MASS. HIGH COURT RULES FOR SAME-SEX MARRIAGE; N.J. SUPERIOR COURT RULES AGAINST

In a landmark decision, the Massachusetts Supreme Judicial Court ruled, interpreting its state constitution, that same-sex couples cannot be denied equal access to the civil institution of marriage. *Goodridge v. Department of Public Health*, 2003 WL 22701313 (Nov. 18, 2003). Although the court stayed its decision for 180 days "to permit the Legislature to take such action as it may deem appropriate in light of this opinion," the language of the decision suggests that anything less than civil marriage would likely not pass constitutional muster.

Less than two weeks earlier, a New Jersey trial court had rejected the claims of same-sex couples seeking marriage licenses in that state. Interestingly, one of the rationales put forth by the court for denying their claims was that New Jersey should not be forced to be the "trailblazer" state. In light of the developments in Massachusetts, LGBT advocates eagerly await the opportunity to present their case to the New Jersey Supreme Court. Although events will continue to develop on the ground, it appears as though the glass ceiling relegating same-sex relationships to second-class status has finally been shattered.

Chief Justice Margaret Marshall wrote for the four justices in the majority in *Goodridge*. The first paragraph of her opinion provides an eloquent synopsis of the analysis that followed, and is worth quoting in full: "Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. In return it imposes weighty legal, financial, and social obligations. The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may not."

After this ringing opening pronouncement, the court then analyzed the various claims and defenses presented by the parties. As a preliminary matter, the court rejected the plaintiffs' argument that the marriage statute could be interpreted to permit "qualified same-sex couples" to marry. [Accepting that argument could have avoided the constitutional question, but would have left open to the legislature the option of amending the statute, returning the litigation to square one. Editor]. Looking at the language of the marriage licensing statute, other laws pertaining to marriage, and general legislative intent, the court acknowledged that the legislature clearly did not intent to permit same-sex couples to marry when it enacted the state's venerable marriage laws. With that issue out of the way, the court then turned to the more important question i.e., whether the exclusion of same-sex couples from marriage "constitute[d] a legitimate exercise of the State's authority to regulate conduct" or whether it violated the guarantees of the Massachusetts Constitution.

The court approached this question by first "considering the nature of civil marriage itself." It noted that civil marriage is a "social institution of the highest importance," and "anchors an ordered society by encouraging stable relationships over transient ones." In a rhetorical move possibly designed to emphasize the important distinction between marriage and civil unions, the court noted that "tangible *as well as intangible* benefits flow from marriage." The court listed the traditional panoply of rights and benefits enjoyed not only by the married couples themselves, such as inheritance rights, presumptions of legitimacy for children, evidentiary privileges, but also by the children of married couples, including the "family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children." Quoting language from the Vermont Supreme Court's decision in *Baker v. State of Vermont*, 744 A.2d 864 (Vt. 1999) , the court declared, "Without the right to marry or more properly, the right to choose to marry one is excluded from the full range of human experience and denied full protection of the laws for one's 'avowed commitment to an intimate and lasting human relationship.'"

The court quickly disposed of the argument that history counseled against allowing same-sex couples to marry. Invoking *Loving v. Virginia*, 388 U.S. 1 (1967) and a California case from 1948, *Perez v. Sharp*,32 Cal.2d 711 (1948), the court replied to this line of argument by insisting that "history must yield to a more fully developed understanding of the invidious quality of the discrimination."

With regard to the level of scrutiny appropriate for this case, the court applied rational basis review after determining that the Commonwealth's marriage scheme could not survive even this most deferential level of scrutiny. By doing so, the court avoided, in a footnote, the question of whether sexual orientation warranted heightened scrutiny. As to the question of fundamental rights, the court reiterated the importance of the right to marry throughout its opinion. By explicitly adopting rational basis review, however, the court evaded the fundamental rights inquiry as well.

The court examined the three rationales put forth by the state, and ultimately found each of them lacking. First, the Commonwealth insisted that its discriminatory marriage policy promoted a "favorable setting for procreation." The court noted, however, that the Commonwealth's marriage statute neither requires couples to attest to their ability or intention to bear children, nor establishes fertility as a prerequisite for obtaining a marriage license. Furthermore, the state's facilitation of adoption and assisted reproduction by prospective parents, regardless of marital status or sexual orientation, demonstrates that procreation and marriage are not inextricably intertwined.

The court disparaged the "marriage is procreation" argument, insisting that it simply "singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage." The court compared this tactic to the one driving Colorado's Amendment 2, which tried to exclude a whole class of people from the political process based on the single trait of sexual orientation. Furthermore, the court continued, such a "narrow view" of marriage is unwarranted in light of the "integrated way in which courts have examined the complex and overlapping realms of personal autonomy, marriage, family life, and child rearing."

The Commonwealth's second stated rationale i.e., limiting marriage to different-sex couples ensures that children are raised in the "op-

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timal setting" suffered from equally fatal flaws. The court noted that Massachusetts had repudiated the common-law tradition that calibrated children's legal status according to the circumstances of their birth and cited cases about second-parent adoption and grandparent visitation to highlight the fact that there are numerous non-traditional family structures that received protection from the courts.

The court refuted the suggestion that allowing same-sex couples to marry would somehow discourage heterosexual couples from raising children within a marital context. In fact, the court insisted, restricting same-sex couples from marriage does nothing to enhance the security of children of heterosexual couples, while, at the same time, jeopardizing the stability of children of same-sex couples. Due to the complete lack of connection between these two actions, the court belittled this justification as wholly irrational. For similar reasons, the court also rejected the argument that, due to the other protections and benefits available to same-sex couples, excluding them from the institution of marriage was nothing more than a minor inconvenience.

Finally, the court assessed the Commonwealth's third rationale, which had two prongs: (1) the state could legitimately assume that same-sex couples are more financially independent than different-sex couples, and therefore less in need of the benefits of marriage; and (2) the state is entitled to conserve scarce financial resources. The court disputed this rationale on two grounds: first, in many gay relationships, just as in many heterosexual ones, one party (not to mention the couple's children) is financially dependent on the other; second, different-sex couples receive these benefits regardless of their financial situation. For these reasons, Massachusetts' exclusionary marriage policy bore "no rational relationship to the goal of economy."

The court then alluded to "additional rationales" for prohibiting same-sex marriage, most of which were presented by amici rather than the Commonwealth. While not engaging all of them, the court simply noted that same-sex couples were seeking to participate in, not destroy, the institution of marriage. Marriage by same-sex couples would not threaten current restrictions on polygamy, consanguineous marriages, or "any other gate-keeping provisions of the marriage licensing law." The court also rejected the notion that the legislature was entitled to control and define the boundaries of a social institution as important as marriage, noting that the Massachusetts Constitution established a floor below which the legislature could not fall. The suggestion that the courts should simply leave this question to the legislature amounted to nothing more than a call for the courts to abdicate their constitutional responsibility.

Faced with amici's argument that allowing same-sex couples to marry in Massachusetts would lead to interstate conflict, the court responded by invoking the wonders of the federal system, which allows each state to determine for itself how it will respond to events in Massachusetts. Furthermore, the court insisted, concerns about comity were insufficient to deny Massachusetts residents "the full measure of protection available under the Massachusetts Constitution." Similarly, in the court's view, amici's claims that Massachusetts' public policy reflected a community consensus that homosexuality is immoral was contradicted by the numerous anti-iscrimination statutes in Massachusetts preventing discrimination on the basis of sexual orientation.

Noting that the state had been given ample opportunity to justify its discriminatory marriage scheme, the court ultimately concluded that "[t]he marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason," and therefore violated the Massachusetts Constitution. With regard to the question of remedy, the court observed that the plaintiffs had come to court seeking declaratory relief, not marriage licenses. Accordingly, the court provided such a declaration: "We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violations the Massachusetts Constitution." In a move that has sparked much consternation and speculation, the court then stayed its decision for 180 days to give the legislature the opportunity to conform the laws of the Commonwealth to the court's ruling. Therefore, it remains to be seen whether any additional steps will be necessary for the plaintiffs, and others, to obtain, at long last, their marriage licenses.

In a concurring opinion, Justice Greaney insisted that traditional equal protection analysis would have been sufficient to achieve the same result. Article I of the Massachusetts Declaration of Rights provides that "All people are born free and equal," and their "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." Applying this provision, Justice Greaney concluded that the marriage restriction was a gender-based classification that could not withstand constitutional scrutiny. By adopting a sex-discrimination analysis, Justice Greaney acknowledged that "[this] case requires that we confront ingrained assumptions with respect to historically accepted roles of men and women within the institution of marriage." Ultimately, however, he called upon all citizens of Massachusetts, even those who disagreed with the notion of "same-sex marriage," to move beyond their anger, and even past mere tolerance, to a more "liberating" understanding of the issues at stake by recognizing that this decision was about securing justice for "members of our community, our neighbors, our coworkers, our friends.". In the concluding sentences of his inspiring concurrence, Greaney reminded his readers: "We share a common humanity and participate together in the social contract that is the foundation of our Commonwealth. Simple principles of decency dictate that we extend to the plaintiffs, and to their new status, full acceptance, tolerance and respect. We should do so because it is the right thing to do."

One potential pitfall buried within Justice Greaney's opinion appears at footnote 4, where he suggests that certain provisions of the Massachusetts marriage law will prevent couples who are not Massachusetts residents from coming to the state to get married, thus cabining the effect of the court's decision to that state. Section 11 of Chapter 207 of the Massachusetts General Laws provides, "No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void." Section 12 of that same chapter requires the licensing officer to "satisfy himself, by requiring affidavits or otherwise, that such person is not prohibited from intermarrying by the laws of the jurisdiction where he or she resides." Although these footnotes do not appear in the majority opinion, they point out a potential legal obstacle for same-sex couples wishing to come to Massachusetts to marry (whenever the time comes) especially those who live in states that have adopted mini-DOMAs.

Each of the three dissenting justices Justices Spina, Sosman and Cordy wrote separate opinions. The dissents each took issue with the majority's "heightened rational basis" review, and insisted that a law preventing both men and women from marrying same-sex partners presented no equal protection problem. The dissents also insisted that there was no "fundamental right to same-sex marriage," and claimed that the court had usurped the role of the legislature by radically revising a long-held understanding of what marriage "is." Justice Cordy presented perhaps the most novel justification for the state's actions, by suggesting that it was entirely rational for the state to wait until more solid social science had developed about the health and stability of same-sex families before allowing them to marry: "Given the critical importance of civil marriage as an organizing and stabilizing institution of society, it is eminently rational for the Legislature to postpone making fundamental changes to it until such time as there is unanimous scientific evidence, or popular consensus, or both, that such changes can safely be made." Each of the dissents made a point of acknowledging the exis-

tence of numerous same-sex couples and did not attempt to suggest that their relationships were immoral or otherwise unworthy of recognition or support. Ultimately, however, the dissenting justices insisted that the Commonwealth had adequately sufficiently justified its marriage policy to survive rational basis review.

A few weeks earlier, New Jersey Superior Court Judge Linda R. Feinberg rejected the claims of several same-sex couples who sought to obtain marriage licenses, in *Lewis v. Harris*, Civ. Action MER-L–15–03 (Nov. 5, 2003). Just as in *Goodridge*, Judge Feinberg began her analysis by rejecting the argument that the New Jersey marriage statute could be construed in a gender-neutral way. From that point on, however, the opinion resembled the *Goodridge* dissents far more than the majority opinion. Like many prior unfavorable marriage decisions, Feinberg first reviewed the case law regarding the "fundamental right to marriage" *Skinner*, *Griswold*, *Loving* and *Zablocki* — and found all of those cases distinguishable because, she insisted, in none of them had the petitioners sought to redefine the meaning of marriage, which has traditionally been the union of a man and a woman. As the institution has traditionally been limited to different-sex couples, the court ruled that any right to marry a same-sex partner was not essential to our system of "ordered liberty" and therefore could not be deemed a fundamental right. Furthermore, the court continued, the framers of the New Jersey Constitution clearly never intended to permit same-sex couples to marry when they drafted the privacy provision of the state constitution (article 1, paragraph 1). The court also observed that thirty-three states had passed mini-DOMAs (defense of marriage acts), and that no legal challenge brought by a same-sex couple had ever met with success. The court acknowledged the favorable decisions in Alaska, Hawaii and Vermont, but noted that in all of these states, the ultimate outcomes produced something short of "marriage." This is because, in the court's view, same-sex couples do not seek merely to join the institution, but rather wish to effect a radical transformation of the institution of marriage.

Although noting that New Jersey equal protection jurisprudence has departed from the three-tiered structure used in federal analysis, and as a result offers greater protection in some cases, the court found that there was no reason to believe that the state constitution would countenance the relief sought by plaintiffs. The court insisted that sexual orientation did not call for heightened scrutiny, and therefore no "close look" at the state's purported justifications was required. In this case, the state could adequately justify its law by citing a desire to foster and facilitate traditional notions of family, and to keep its laws consistent with those of other states.

Whereas the *Goodridge* court believed that *Loving v. Virginia* provided compelling authority for opening the institution of marriage to same-sex couples, Judge Feinberg found *Loving* inapposite because it involved race-based discrimination, meaning that the discrimination claim in that case rested on a more "significant legal foundation" than the claim before her, which involved sexual orientation. Likewise, the court noted that there was no proof that the marriage statute had been enacted with the intent to harm same-sex couples, and reiterated that both men and women were equally burdened by the requirement that in order to obtain a marriage license, the individuals comprising the couple be of different sexes.

Finally, the court actually used the fact that same-sex couples have had significant success in obtaining legal protection for their relationships in New Jersey against them. The court delineated the numerous rights already enjoyed by same-sex couples in New Jersey, including parental rights for unmarried gay people; second parent adoption; psychological parent status (resulting in visitation rights); permission to change one's surname to match one's partner; protections for same-sex couples under domestic violence laws; anti-discrimination protection in housing, public accommodations, and employment; health care proxies; joint tenancy; enforceable lifetime support agreements and agreements regarding the distribution of property. While acknowledging the numerous other areas of the law where same-sex couples were at a disadvantage relative to married couples, the court suggested that, in light of all of the protections same-sex couples did have, gay couples really did not suffer a great deal as a result of their exclusion from marriage. Comparing the marriage ban to a New Jersey provision that prevents the spouses of judges from working in casinos in order to prevent any appearance of impropriety, the court insisted that the marriage ban has a "at most, a minimal effect on the ability of these couples to maintain their relationships."

Finally, Judge Feinberg (speaking perhaps as much for herself as for the state of New Jersey) resisted the notion that, simply because New Jersey has been a "trailblazer" on many important social issues, the New Jersey courts should once again take the lead on the controversial question of "same-sex marriage." Nevertheless, she called upon the legislature to "examine and consider the expanded rights afforded to same-sex couples in other jurisdictions," and cited the civil union system in Vermont, the domestic partner registry in California, and the reciprocal beneficiaries program in Hawaii. In closing, she noted that a civil union and domestic partner legislation had already been introduced in the New Jersey legislature. Lambda Legal Defense, which had brought the New Jersey test case, announced that an appeal will follow, and noted that success in this sort of test case litigation must be achieved at the appellate level in any event, so the trial court's summary judgment ruling was just a step to get past on the way to the appellate courts.

Even with the favorable decision in *Goodridge*, many questions remain unanswered regarding when same-sex couples will finally be able to exercise the constitutional rights vindicated by the Massachusetts Supreme Judicial Court.

[Mass. Governor Mitt Romney and Attorney General Tom Reilly immediately announced their view that the opinion left room for a civil union statute to preempt the grant of full marriage rights, but numerous commentators disagreed, most notably a former attorney general of the Commonwealth in a sharply-worded oped article in the *Boston Globe*. Romney also announced his support for a state constitutional amendment to define marriage as a union of one man and one woman, but the process would require passage by two successive legislatures and a referendum, which could be held no sooner than 2006. Polling by the *Boston Globe* showed that most Massachusetts legislators, including the Democratic leaders of the two houses, were not overwhelmingly enthusiastic about amending the state constitution for the purpose of discriminating against a politically active group of constituents. Public opinion polls showed the public roughly divided on the issue of marriage, but with a clear majority opposed to amending the state constitution so as to overrule the court's opinion. ••• All of the Democratic presidential candidates disclaimed any support for same-sex marriage, but most stated opposition to a constitutional amendment and a few came out solidly for federal recognition of domestic partnership. Senator Joseph Biden (D-Del.), not a presidential candidate, said that same-sex marriage is "inevitable" and that gay Americans deserve the same rights as everybody else. (See *Washington Times*, Nov. 24.) In New Jersey, the *New Jersey Law Journal* speculated on Nov. 13 that Feinberg's decision could give some impetus to a pending legislative proposal of a state domestic partnership law. — Editor]

Regardless of how events in the Bay State unfold, Law Notes salutes GLAD attorney Mary Bonauto, lead attorney who argued the case brilliantly in the state supreme court, and GLAD Executive Director Gary Buseck and and all of those who played a role in achieving this monumental victory, the first appellate ruling in the United States to hold in a final ruling on the merits that same-sex couples are entitled to marry. *Sharon McGowan*

LESBIAN/GAY LEGAL NEWS

North Dakota Supreme Court Overrules Homophobic Custody Precedent

Overruling its own 1981 decision, on November 13 the Supreme Court of North Dakota held that a custodial parent's homosexual household is not grounds for modifying custody within two years of a prior custody order in the absence of evidence that such environment actually or potentially endangers the children's physical or emotional health or impairs their emotional development. *Damron v. Damron* , 2003 WL 22674337.

In September 2001, Valerie and Shawn Damron were divorced under a stipulated decree pursuant to which they agreed to joint custody of their two minor children, with Valerie receiving primary physical custody of the children subject to reasonable visitation by Shawn. One year later, Shawn moved for a change of custody because Valerie had begun living with another woman in a homosexual relationship after the divorce.

After an evidentiary hearing, the trial court found that there is no question that Valerie is a fit parent. However, because of the mores of today's society, because Valerie is engaged in a homosexual relationship in the home in which she resides with the children, and because of the lack of legal recognition of the status of a homosexual relationship, the trial court held that the best interest of the children would be better serve by placing residential custody of the children with Shawn.

On appeal, Valerie argued the trial court's modification of custody was not supported by the evidence and was induced by an erroneous view of the law. She also argued that modification of custody based upon her sexual orientation violates the federal and state constitution. Shawn argued that the Supreme Court of North Dakota's prior decision in *Jacobson v. Jacobson*, 314 N.W.2d 78 (1981), effectively created a presumption of harm to children living in a lesbian household and eliminated any requirement for evidence of actual or potential harm to the children to support an application for a change of custody.

Reversing the trial court in an opinion by Justice Neumann, the Supreme Court reviewed similar custody cases from Alaska, Florida, Illinois, Indiana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, and Washington, which generally held that in the absence of evidence of actual or potential harm to the children, a parent's homosexual relationship, by itself, is not determinative of custody. The court specifically stated that to the extent that *Jacobson* can be read to create a presumption of harm to children living in a lesbian household, it is overruled. Moreover, reviewing the factual findings from the hearing before the trial court, Justice Neumann specifically pointed out that the trial court found Valerie was a fit parent and that Shawn presented no evidence that the children's present environment may endanger their physical or emotional health or impair their emotional development. In fact, the evidence submitted at the hearing showed that the children were doing well in Valerie's custody.

There being no evidence to support the trial court's modification of custody, the Supreme Court found that modification to be clearly erroneous, reversed the decision from the trial court, and reaffirmed custody of the children with Valerie. The court did not reach the issue of whether the modification of custody based solely upon Valerie's sexual orientation violates the federal and state constitutions. Although both parties sought attorneys' fees for these proceedings, the court declined to award fees to either party. *Todd V. Lamb*

New Hampshire Supreme Court Holds Wife's Gay Affair Not Adulterous

In a truly astonishing decision, the New Hampshire Supreme Court has ruled that the involvement of a wife in a "homosexual" relationship does not constitute "adultery" warranting the grant of a "fault-based" divorce under the New Hampshire divorce statutes, because "adultery" requires heterosexual coitus, and nothing else will suffice. *Blanchflower v Blanchflower*, 2003 WL 22515086 (Nov. 7).

The petitioner/husband, David Blanchflower, filed for dissolution of marriage from his wife, Sian, and then moved to amend his petition to claim that divorce should be granted because his wife was engaged in a "continuing adulterous relationship" with another woman. He named the woman, Robin Mayer, as co-respondent. Mayer moved to dismiss the petition for divorce, arguing that a lesbian relationship between two women does not constitute "adultery" within the meaning of the New Hampshire statute. The trial court disagreed and denied the motion to dismiss. Mayer sought and was granted leave to file an interlocutory appeal by the New Hampshire Supreme Court, which then reversed the trial court decision.

Over a spirited dissent, the majority, in an opinion by Justice Nadeau, ruled that "adultery" (not previously defined by the statute) required coitus, and, more particularly, the penetration of the penis into the vagina or acts from which "spurious issue may arise … which clearly can only take place between persons of the opposite gender." The court brushed aside arguments that the outcome resulted in unequal treatment of homosexuals and heterosexuals, contrary to the stated public policy of the state of New Hampshire, because "(h)omosexuals and heterosexuals engaging in the same acts are treated the same because our interpretation of the term 'adultery' excludes all non-coital sex acts, whether between persons of the same or opposite gender. The only distinction is that persons of the same gender cannot, by definition, engage in the one act that constitutes adultery under the statute." (It is startling to see how this logic, previously used to deny gay people protections under law, has boomeranged.)

In reaching its conclusion, the majority asserted its prerogative to act as the final arbiter as to the intent of the legislature, but then chose to interpret the statute in light of cases dating back to the 1840's and a dictionary definition dating back to 1961. The court ruled that it must interpret a statute in light of what it meant to its framers, and mere re-passage of the law by subsequent legislatures cannot be taken to alter its meaning. The court's reliance on a 42–year-old dictionary definition is completely inexplicable. The majority opinion is fearful that including non-coital acts in the definition of adultery would usurp the legislature by creating new grounds for divorce, thus destabilizing understanding of well-settled law and introducing a new element of gamesmanship in divorce litigation. The majority's opinion is a triumph of original intent over common sense, even as it appears extremely respectful of "homosexual" relationships. (The word "lesbian" does not appear in the majority opinion at all.).

The dissent, written jointly by Justice Brock and Broderick, mocks the logic of the majority opinion, with its reliance on dictionary definitions. "To strictly adhere to the primary definition of adultery in the 1961 edition of Webster's Third New International Dictionary and a corollary definition of sexual intercourse, which on its face does not require coitus, is to avert one's eyes from the sexual realities of our world," they wrote. In doing so, the dissent argues that the majority opinion makes a mockery of the purpose of fault-based divorce, which is to provide some measure of redress to an innocent spouse for the offending conduct of a guilty spouse. For the dissenters, the extramarital relationship itself is the injury, regardless of the specific acts performed by the promiscuous spouse or the sex of the paramour. The dissent argues that some may find a "homosexual betrayal" even more devastating.

The dissent is particularly puzzled by the reasoning of the majority because the act of coitus so insisted upon by the majority is almost never proved by direct evidence, but only by circumstantial evidence. The dissent argues that the majority opinion creates a new burden on an innocent spouse to prove adultery by the

guilty spouse, dependent on a showing of one particular act and no other. This, the dissenters argue, is absurd: "It is hard to comprehend how the legislature could have intended to exonerate a sexually unfaithful or even promiscuous spouse who engaged in all manner of sexual intimacy, with members of the opposite sex, except sexual intercourse, from a charge of adultery. Sexual infidelity should not be so narrowly proscribed.… Under our fault-based divorce law, a relationship is adulterous because it occurs outside of marriage and involves intimate sexual activity, not because it involves only one particular sexual act.…" It would be hard to see how differences in opinion could be more stark. *Steve Kolodny*

Federal Appeals Courts Split Over Gay Chinese Asylum Petitions

Reflecting a fundamental disagreement about the evidentiary weight to be given airport interviews of newly-arrived asylum applicants by Immigration officials, federal appeals courts on opposite coasts have split over the Board of Immigration Appeals' refusals to grant asylum to two gay men from China. On November 13, the 3rd Circuit Court of Appeals in Philadelphia rejected Zhen Xiung Lin's asylum petition, while on November 18, the 9th Circuit Court of Appeals in San Francisco reversed the Immigration Appeals Board ruling in the case of Quan Fa Chen. *Lin v. Ashcroft*, 2003 WL 22697283 (3rd Cir.) (Unpublished disposition); *Chen v. Ashcroft*, 2003 WL 22718174 (9th Cir.) (Unpublished disposition). Although both opinions are unpublished and cannot be cited as precedent, they send a conflicting message to the appeals board.

The 3rd Circuit opinion, by Chief Circuit Judge Anthony J. Scirica, found that an Immigration Judge had correctly concluded that Lin's claims of being persecuted because he is gay lacked credibility, partly because of conflicting details in the stories he gave under oath at various times, and significantly because when Lin first arrived at a U.S. airport without a valid visa and was questioned by immigration officials, he said nothing about fleeing anti-gay persecution. "As a basis for the credibility determination," wrote Scirica, "the judge commented on the degree to which Lin's story was 'embellished' during repeated retelling. The judge observed that in sworn statements in an interview at the airport, Lin made no mention of homosexuality or of past torture, arrests, or detentions." Only later, after having a chance to consult an attorney, did Lin divulge his story of persecution in China during the course of a subsequent interview, and a more detailed account as part of his formal written petition for asylum. The immigration judge had also "found Lin's demeanor unconvincing due to his 'hesitation' and 'feigned inability to respond to questions.'" The judge's decision denying asylum was affirmed by the appeals board without a written opinion. The court of appeals found that the decision was supported by substantial evidence in the record, also taking into account a State Department document claiming that attitudes toward homosexuality have moderated in China and that the government no longer instructs local officials to prosecute homosexuals, and rejecting the argument that Lin's shyness and fear of persecution could excuse the inconsistencies in his testimony.

By contrast, the 9th Circuit opinion discounts the discrepancies between airport interviews and later statements. Chen also had an airport interview upon arrival, at which he said nothing about homosexuality, and it was only during subsequent testimony after he had a chance to consult with a lawyer that Chen revealed that he was fleeing anti-gay oppression. There are clear differences between the two cases. During the airport interview, Lin had answered "no" when asked if he had been subjected to persecution in China, while Chen answered yes. Inexplicably, the immigration officer who questioned Chen did not follow up by asking for a description of the persecution, perhaps because Chen's response when asked why he left China was "My family raise pigs and do not make much money." This sounds a bit like Lin's response to that question, that he left China because he was one of four children. Neither Chen nor Lin said anything about homosexuality in the initial interview.

The 9th Circuit's opinion was an unsigned memorandum from a three-judge panel. The court wrote, "even if we agreed with the Immigration Judge that there was a variance between Chen's initial interview and his subsequent testimony, answers given at an initial, perfunctory interview with immigration officials shortly after arrival are not sufficiently reliable to constitute substantial evidence supporting an adverse credibility determination. Here, numerous factors call into question the reliability of Chen's initial interview: linguistic difficulties with the Mandarin translation; the fact that the statement itself provided no information as to how the interview was prepared, and the absence of a recorded opportunity for an explanation as to the basis for one's fears; the stressful circumstance of entry into a new country; and the recognition that 'an arriving alien who has suffered abuse during interrogation sessions by government officials in his home country may be reluctant to reveal such information during the first meeting with government officials in this country."

The 9th Circuit panel's comments go to the heart of the issue. Newly-arrived asylum applicants, who may lack knowledge about what they can or cannot reveal without incurring retaliation or punishment, who have suffered anti-gay discrimination in their home countries, are likely to be very hesitant to identify themselves as gay to U.S. immigration officials who encounter them as soon as they get off the plane, lacking an entry visa and sometimes having no documentation ready at hand for their persecution claims. It is not surprising that their initial stories are tempered by fears of what they may encounter.

Lin was represented by Thomas V. Massucci of New York, Chen by Jisheng Li of Honolulu. A.S.L.

3rd Circuit Affirms $1 Million-Plus Damages for Homophobic Retaliation Against Firefighter

Finding no abuses of discretion by the trial judge, the U.S. Court of Appeals, 3rd Circuit, let stand a damages award totaling $1,237,500 to Robert Bianchi, a former Philadelphia firefighter who claimed that the fire department's response to homophobic harassment against him was to retaliate against him when he complained and to effectively force him to quit his job. *Bianchi v. City of Philadelphia*, 2003 WL 22490388 (Nov. 4, 2003). Although the trial judge, Anita Brody (E.D.Pa.) did not send Bianchi's First Amendment and sexual harassment claims to the jury, she did allow retaliation and due process claims to go to trial, and rejected the city's motion to overturn the verdict or cut down the damages, which included $500,000 compensatory, $225,000 backpay, and $512,500 frontpay.

Bianchi was a 14–year veteran of the department when he was promoted to Lieutenant in 1994. In 1996 he was given supervision of Ladder Company No. 2, where some of his subordinates quickly perceived him as gay and began a campaign of harassment against him, but doing the sorts of juvenile things one would expect: "placement of used condoms and homosexual paraphernalia in his desk drawer, gear, and mail." Bianchi's protests to his superiors brought chastisement to his platoon, but no involvement of department higher-ups, and things worsened later in 1997. This time Bianchi filed a formal complaint leading to an investigation. The department's response to all this was to punish Bianchi rather than his persecutors, by removing his command and giving him a desk job in the safety office. After further complaints by Bianchi about this reassignment, he was forced out on medical leave and required to undergo psychiatric evaluation. After a returned to work, he received a feces-smeared threatening letter full of anti-gay vitriol warning him of violence. After further, and contradictory, involvement of department psychiatrists in his campaign, he was given a resign-or-be-fired ultimatum.

Bianchi is a single man who lives with his unmarried twin brother. The opinion for the court by Circuit Judge Dolores Sloviter says nothing about his sexual orientation.

On appeal, the City argued that its case had been unfairly prejudiced by the admission of evidence about the sexual harassment in graphic detail (especially the threatening note), which it contended was irrelevant to the two claims that went to trial. The 3rd Circuit disagreed, with Judge Sloviter pointing out that this evidence was relevant to helping the jury evaluate Bianchi's theory of the case: that embarrassment by the department about what its investigation uncovered led it to attempt to bury the issue by transferring Bianchi rather than taking action against his platoon. Sloviter also rejected the City's argument that damages were excessive, pointing out that there was a basis for calculation of the backpay and frontpay awards, and that it was clear from the evidence that any relationship between Bianchi and the department had been so soured by this experience that an award of frontpay was appropriate. A.S.L.

Federal Court Refuses to Dismiss Challenge to Nebraska Anti-Gay Amendment

U.S. District Judge Joseph Bataillon (D. Nebraska) rejected a motion to dismiss a challenge to part of an anti-gay state constitutional amendment that was enacted by Nebraska voters in a November 2000 referendum. *Citizens for Equal Protection, Inc. v. Bruning*, 2003 WL 22571708. Rejecting all of the state's arguments as to why the court should not hear the case, Bataillon found that the plaintiffs had standing, the matter was ripe for litigation, and that they had alleged plausible legal arguments under both Equal Protection and Bill of Attainder theories. The court's discussion of the Bill of Attainder theory is particularly illuminating and suggests that Bataillon will be very open to ruling in favor of the plaintiffs on the merits.

Acting in the current wave of same-sex marriage hysteria, one Guyla Mills organized a petition drive in Nebraska known as Initiative 416, which provided: "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska." The measure passed and became a new Section 29 of Article I of the Nebraska Constitution. (Article I, ironically, is generally known as the Nebraska Bill of Rights. This would appear to be the only section that consists of a negative right.)

Two Nebraska organizations comprised largely of lesbians, gay men and bisexuals, Citizens for Equal Protection, a gay rights lobbying group, and Nebraska Advocates for Justice and Equality, Inc., which had been specifically formed to combat Initiative 416, joined with the Nebraska chapter of the ACLU to file a constitutional challenge, after Attorney General Jon Bruning opined that a domestic partnership bill that had been introduced by state Senator Nancy Thompson would be unconstitutional under Section 29. (The bill was intended to allow one same-sex partner to make decisions about funeral arrangements and organ donation if their partner died.)

The plaintiffs argued that the second sentence of Section 29, as written and as interpreted by the Attorney General, had the effect of depriving gay Nebraskans of access to the normal legislative process, and in so doing imposed a punishment on them.

The state argued that the case should be dismissed because nobody in Nebraska had yet suffered any harm by virtue of the new constitutional provision. Pointing out that same-sex partners in Nebraska had not achieved any legal recognition prior to the vote on this measure, the state argued that they had not suffered a legally recognizable harm. Furthermore, the state argued that no harm would be suffered unless some governmental policy recognizing same-sex unions was declared unconstitutional under the challenged provision.

Judge Bataillon found that the plaintiffs adequately alleged a constitutionally recognizable harm. Pointing to their experience with Senator Thompson, he wrote: "It is obvious that Section 29 acts as a barrier to the ability of the plaintiffs to obtain support for the introduction and passage of legislation. I conclude that Section 29 acts as a barrier to plaintiffs' participation in the political process, and thus as a result plaintiffs have established injury for purposes of the standing requirement." The judge also rejected the state's argument that the dispute was not yet ripe for litigation, pointing out that Section 29 had already tripped up the plaintiffs in their attempt to get a bill considered in the legislature.

Perhaps more interesting, and rather novel, is the bill of attainder argument. A bill of attainder is a law enacted to punish a specific individual or ascertainable group. Under our system of government, the legislature can pass general criminal or regulatory laws, but is prohibited from passing laws intended to inflict punishment on specific groups or individuals, since it is the role of the courts, not the legislature, to decide whether particular individuals have violated the law and merit punishment. In this case, the plaintiffs argued that the enactment of Section 29 singled out same-sex partners as an ascertainable group and imposed on them the punishment of exclusion from the normal political process in seeking legal recognition and public benefits.

Judge Bataillon found that the plaintiffs had come up with a plausible claim, finding that Section 29 identified "an easily ascertainable group" and, more significantly, that the disadvantage it imposes can be considered a "punishment" under past interpretations of the Bill of Attainder provision, which had addressed the issue of deprivation of political rights in this context. "Clearly, plaintiffs have made an initial case that the law in question operates as a legislative bar for their specified groups. Accordingly, I find that the challenged legislation falls within the historical meaning of the term punishment."

Even more significantly, Bataillon quoted the Supreme Court's opinion in *Romer v. Evans*, 517 U.S. 620 (1996), the case that invalidated Colorado Amendment 2, to support his conclusion that a law limiting legislative access will "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." Thus, Bataillon concluded that the plaintiffs had adequately alleged the impermissible legislative motive of imposing punishment that is a prerequisite to a bill of attainder claim.

"Section 29 does not just withhold a benefit; it actually prohibits same-sex relationship couples from working to obtain government benefits," Bataillon asserted. "If the purpose, as offered by the defendants, of Section 29 is merely to maintain the common law definition of marriage, there would be no need to prohibit all forms of government protection or to preclude domestic partnerships and civil unions. I conclude that the plaintiffs have met the legal requirements for stating a claim of bill of attainder."

Although this was just a ruling on the state's motion to dismiss on standing and ripeness grounds, and not a decision on the merits of the plaintiffs' claim, Judge Bataillon's analysis of the issues suggests that plaintiffs have a winner on their hands and that the challenged part of Section 29 is likely to fall. A.S.L.

Federal Magistrate Allows Transgender Prison Treatment Lawsuit to Proceed

Federal Magistrate Judge James R. Muirhead (D. N.H.) ruled on November 20 that Lisa Barrett, a transsexual state prisoner who has been denied any treatment for her condition, may proceed with a federal lawsuit against prison officials, claiming a violation of her constitutional rights. *Barrett v. Coplan*, 2003 WL 22767757. The ruling in favor of Barrett, who is representing herself *pro se*, demonstrates the importance of the growing body of published court decisions in empowering transgendered prisoners to assert their interests in the courts.

According to Muirhead's opinion, Barrett, who was born male, "is psychologically and emotionally female," and prior to incarceration "had lived as a female since the age of seventeen, and had cross-dressed at a much earlier age pursuant to her long-held belief that she is, in fact, female." In her complaint, Barrett alleged that she had been receiving female hormones by prescription from a physician, and that the medical department at Belknap County House of Corrections had continued to provide

that medication to her. The hormone treatment had resulted "in some physiological changes, including minor breast development."

However, when Barrett was transferred to the state prison, the examining physician on her intake procedure discontinued her medication. Barrett claims to have been told that her medication was stopped pursuant to a prison policy against medical treatment for transsexual prisoners. Although Barrett advised the prison staff repeatedly that she was suffering from gender identity disorder and required treatment, her requests were repeatedly rebuffed.

Although the opinion does not give the precise date of her incarceration, it appears that Barrett has been in the New Hampshire prison system since the mid–1990s, and has been living in general population since 1997. During this time, although she is housed in a male prison, she has attempted "to the extent possible to modify her appearance and behavior in order to live as a woman." She has also attempted suicide and threatened to "mutilate her own male genitalia." Despite this, the prison has refused to provide an individualized assessment of her condition by a gender identity specialist or to provide any psychological or medical treatment.

The breakthrough for Barrett seems to have been obtaining a copy of the U.S. District Court opinion in *Kosilek v. Maloney*, 221 F. Supp. 2d 156 (D. Mass. 2002). Seeing that her situation was very similar to that of Ms. Kosilek, Barrett drafted her own federal court complaint and filed it with the U.S. District Court in New Hampshire. Such complaints are routinely referred to magistrate judges for screening.

After noting the resemblance of this case to *Kosilek*, Muirhead found that Barrett's complaint clearly stated a valid claim for violation of the 8th Amendment's ban on cruel and unusual punishment. The Supreme Court has interpreted this to mean that prison authorities may not deliberately disregard and fail to provide treatment for serious medical conditions of inmates. *Kosilek* and other cases decided in different federal districts over the past several years have established that gender identity disorder is a serious medical condition, and that any inmate who credibly claims to be suffering from this condition is entitled to an individualized medical assessment and appropriate treatment. Although federal courts will not order state prison systems to provide gender reassignment surgery, at the least they will require psychological treatment and hormone therapy in appropriate cases. Several decisions have made clear, as Judge Muirhead noted, that official policies of providing no treatment cannot withstand judicial review, and that prison officials who maintain such policies may have personal liability to prisoners under the 8th Amendment in suits brought under 42 USC 1983 for violation of civil rights.

Muirhead also found, however, that the prison officials may only be sued in their individual capacities, not in their official capacities, since under the 11th Amendment's sovereign immunity clause, individuals may not sue the state in federal court unless the state has agreed to waive its immunity. Muirhead found no such waiver by the state of New Hampshire.

Muirhead authorized the federal marshal to serve copies of the complaint prison officials named as defendants, who were instructed to make some response within twenty days of receiving the complaints. Given the failure rate of self-represented prisoners in getting into the federal courthouse door, Barrett's accomplishment at surmounting this first barrier is quite impressive. A.S.L.

Maine High Court: No Duty to Notify Anonymous Sperm Donor of Guardianship Proceeding

Must the parental "rights" of an anonymous sperm donor be considered when a same-sex couple petitions for co-guardianship of the child of one member of the couple, who is also the biological mother? The Supreme Judicial Court of Maine has unanimously held that the futility of trying to notify an anonymous sperm donor makes notification unnecessary under the Maine Probate Code. The court further saw no obstacle to awarding co-guardianship of a child to the partner of the biological mother; the extent of the guardianship is subject to any restrictions that the court deems in the best interest of the child. *Guardianship of I.H.*, 2003 WL 22493481, 2003 ME 130 (Me. Nov. 4, 2003).

A Maine county probate court certified two questions to the Maine Supreme Judicial Court: (1) What notice, if any, must be given to an anonymous sperm donor who donated sperm under a California law guaranteeing anonymity? (2) May the Probate Court appoint a co-guardian with a natural or legal parent? The court chose to answer the first question even though the lower court had not arrived at a final appealable judgment, and provided affirmative dicta in response to the second question, while refusing to provide a holding because the question had been improperly argued, and was posed to the high court prematurely.

Maine law states that notice of a hearing for the appointment of a guardian of a minor must be provided in the manner prescribed by the court to "any living parent of the minor." Regulations allow for service of notice by publication.

The petitioners argued that notice is not required because an anonymous sperm donor is not even a "parent." The sperm was obtained in California, and a California statute demands that such semen donor not be treated as the "natural father" of the child of a woman other than the donor's wife. The Maine court ruled, however, that Maine's statutes do not exclude an anonymous sperm donor as a parent, although laws governing intestate succession might be construed that way. The laws of intestate succession, however, do not apply in this case, and may be flexible enough to include an anonymous sperm donor as an estate's beneficiary.

Instead of deciding that the father is not a parent, the court determined that it was wildly improbable that any sort of notice would be sufficient actually to notify the father that a guardianship proceeding was pending. "Requiring such notice would subject petitioners to procedures and expense for no realistic purpose," wrote Justice Calkins for the court. In addition, Calkins cited commentary and cases persuasively asserting that the intent of anonymous sperm donors is to remain anonymous. At least one court has held that an anonymous sperm donor is not subject to notification, *In re E.S.*, 324 Ill. App. 3d 661, 756 N.E. 2d 422, 429, 258 Ill. Dec. 440 (4th Dist. 2001), citing an Illinois parentage statute modeled after the Uniform Parentage Act. Notification, therefore, is not required under Maine law.

The court refused to answer the question regarding appointment of a co-guardian along with the child's natural parent. First, the question argued by the litigants was not the same as the question posed by the lower court. (The question argued was whether the mother may retain all of her parental rights even if her partner and herself are named co-guardians.) Second, the probate court made no findings as to what type of guardianship it might grant. For example, the court may grant limited guardianship; in such case, the mother would lose none of her parental rights and duties, as is the case when a limited guardianship is granted to a relative so that the child may attend a school nearer to the relative. Until the probate court makes findings on the best interests of the child, the high court cannot rule on any question regarding the remaining rights of the mother. However, as to the question posed, the court apparently leaves the question whether such a guardianship is permissible to the discretion of the probate court.

The petitioners were represented by Patricia A. Peard of Portland, Judith M. Berry of Gorham, and Mary Bonauto of Gay & Lesbian Advocates & Defenders, Boston. *Alan J. Jacobs*

D¡j… Vu: Pre-Operative Transgender Plaintiff Wins Limited Name Change in N.Y.

"The law does not distinguish between masculine and feminine names, which are a matter of social tradition [T]here is no reason — and no legal basis — for the courts to appoint themselves the guardians of orthodoxy in such matters." So stated New York Civil Court Judge Debra Samuels, in an opinion granting legal change of name to a plaintiff pursuing gender

reassignment. *Matter of Guido*, 2003 WL 2241153, 2003 N.Y. Slip Op. 23821, NYLJ, Dec. 1, p. 18 (Oct. 24). Judge Samuels' ruling untangled a "catch–22," created by her prior decision, that conditioned grant of plaintiff Cynthia Frank's name change upon proof of completion of gender reassignment surgery and divorce from Frank's wife.

Frank was born anatomically male and given the name Frank Guido. In 2002 Frank, 50, applied pro se to change her first name to facilitate gender reassignment, and her last name to alleviate employment discrimination. Frank submitted a notarized consent to the change from her wife. An unsworn supporting letter from a physician and a social worker at the Michael Callen-Audre Lorde Community Health Center explained that Frank's female psychological gender predominates over her physical gender, that Frank was taking female hormones and pursuing gender reassignment treatment to resolve Gender Identity Disorder, and that gender reassignment required living and working full-time as a woman. Samuels' initial denial of the requested change confronted Frank with a paradox faced by previous transgender plaintiffs: doctors condition gender reassignment surgery on the "real-life test" whereby candidates live in all aspects of life in the gender they are to become, while judges condition name changes on reassignment surgery. (E.g., "Pennsylvania Supreme Court Holds Sex-Change Operation Need Not Precede Legal Name Change,70 Lesbian/Gay Law Notes, Sept. 1998.) Samuels' denial was premised on a concern that change from a "male" to "female" name would lead to public confusion, and that a female not remain married to a person of the same gender.

Frank had originally handled her name-change application pro se. Now assisted by counsel, Frank's Memorandum of Law on reapplication reminded the judge that any same-sex marriage concerns are outside the scope of a name change inquiry, because a name change does not amount to a legal change of gender, the latter being outside the court's jurisdiction in any case. New York, New Jersey, and Pennsylvania courts' inquiry in such matters is limited to ensuring that no fraudulent purpose or interference with another's rights would be advanced by the name change. Satisfied as to Frank's purpose, Judge Samuels ultimately granted an order that "may never be [used to] evidence court acknowledgment of [a gender change]." Pre-operative transgender plaintiff Veronica Rivera achieved the same relief on this issue in N.Y. Civil Court in Bronx County in 1995. ("N.Y. Court Grants Limited Name Change for Pre-Operative Transsexual," Lesbian/Gay Law Notes, April 1995.) The counsel who effectively assisted Cynthia Frank on her reapplication was not named in the opinion, but was identified in the New York Law Journal's Dec. 1 report about the case as Dean Spade, himself a transgendered person affiliated with the Sylvia Rivera Law Project of the Urban Justice Center. (Sylvia Rivera was a noted transgender activist who was present at the Stonewall Riots in 1969). *Mark Major*

Hearing Officer Sustains Discharge of Anti-Lesbian High School Teacher

N.Y. State Education Department Hearing Officer Dr. Joel M. Douglas upheld the discharge of Terence Brunson, a tenured N.Y.C. social-studies teacher at Morris High School, for his anti-lesbian speech and actions at the school. *Department of Education of City District of the City of New York and Terence Brunson*, SED File No. 4536 (Oct. 18, 2003). The Brunson case came to public attention on November 17, when the *New York Post* published a sensational story detailing the charges against Brunson, and pointing out that he had a record of sexual harassment complaints against him long before the anti-lesbian incidents that got him fired.

Hearing Officer Douglas heard from about fifty witnesses during thirty-two days of testimony stretching from October 2002 through June 2003. Cutting through the volumes of conflicting testimony, Douglas concluded that Brunson was not a credible witness in his own defense, and that testimony, mainly by students, as well as Brunson's own admissions, indicated that many of the charges against him were true, sufficient to justify his termination. The case was complicated by Brunson's status as a leader in the teacher's union. A major part of his defense was to claim that there was a conspiracy between students, other teachers and administrators to get him fired because he was a somewhat abrasive "chapter chair" for the union members at Morris High School, but Douglas found that this seemed irrelevant to the nature of the charges against him.

Although Douglas's written opinion falls short of providing a coherent chronological narrative, it appears that Brunson's anti-lesbian activities were set off by a lesbian student in one of his classes wearing a rainbow flag pin to class. This led Brunson to question the student, and to make inflammatory statements in front of other students. According to Douglas's findings, Brunson had told students that gay people would not go to heaven, because "God made Adam and Eve, not Alecia and Eve." He told a classroom full of high school students that all gay students in the class should raise their hands and publicly identify themselves, and he demanded, in writing, the "immediate" transfer of three lesbian students from one of his social studies classes because they had "views upon which I disagreed with." (It sounds like Brunson could also have been discharged for illiteracy.) Brunson also told another lesbian student, who he had questioned about her gender, that he would find a guy to turn her straight.

Commenting on Brunson's reference to Alecia and Eve, Douglas wrote: "While respondent is certainly entitled to his own belief about the hereafter life of homosexuals, its vocalization in a classroom, or any other educational setting, is unwarranted. If this was a class in religious studies, then perhaps linkage to curriculum and free expression may have been attempted. To make this statement to teen-age students who openly profess to a homosexual life style is irresponsible and precipitous and rises to the level of actionable misconduct."

The N.Y.C. Department of Education "subscribes to a policy of tolerance and acceptance of multifariousness for all students," wrote Douglas. "For a social studies teacher of Mr. Brunson's seniority and training to make such statements regarding gay students goes against the very precepts of tolerance and diversity."

Douglas also noted that Brunson had a past record of disciplinary problems based on allegations that he had sexually harassed female students and staff dating back to the early 1990s, but approved this discharge primarily based on the anti-lesbian incidents, which occurred during the 2001–2 school year. Brunson was suspended from classroom teaching after the charges were made, but the hearing process stretched things out so it was years before he could actually be discharged.

Schools Chancellor Joel Klein, when asked to comment about the case, cited it as an example of how long it takes to discharge a tenured teacher, even when credible allegations of outrageous conduct are made.

LeGaL Member Robin Merrill, an attorney in the City Department of Education's legal department, represented the Department in the discharge hearing. A.S.L.

Litigation Against Solomon Amendment Proceeds, But Without Interim Relief

A New Jersey federal court has handed a procedural (and partial substantive) victory to those challenging the Solomon Amendment, which strips educational institutions of federal funding if they do not allow on-campus military recruiting. *Forum for Academic and Institutional Rights, Inc. v. Rumsfeld*, 2003 WL 22708576 (Nov. 5). The court ruled that individual law schools, professors, students, student organizations, and even an umbrella organization of law schools whose members are "kept secret," all have legal standing to challenge the constitutionality of the amendment. The court also, in dicta, suggested that the Defense Department may be interpreting the amendment too broadly. But, unfortunately, the decision is unlikely to lead to a decision striking down the Solomon Amendment entirely, since District Court Judge Lifland, in denying the plaintiffs'

request for a preliminary injunction, concluded in his exhaustive 89–page decision that the Solomon Amendment probably passes constitutional muster, both facially and as applied. Since the government did not move to dismiss the complaint, but instead merely opposed the plaintiffs' application for a preliminary injunction, the plaintiffs' claims are still viable for the time being. Given the court's analysis, however, it is unclear what, if anything, would enable the plaintiffs to defeat a future motion by the government.

The Solomon Amendment was first enacted in 1994 in response to the growing number of law schools and colleges that have refused to allow the military to recruit on campus because of the military's discriminatory policies against lesbians and gay men. The statute, in its present amended form, has particularly far-reaching effects on institutions of higher learning for two reasons. First, it deprives non-compliant schools of funding not only from the Department of Defense, but also from the Departments of Labor, Health and Human Services and Education, and all related agencies. Second, an entire university may be denied funding even if only a "sub-element" of the school (such as the university's law school) does not comply with the statute. Department of Defense regulations exempt from the amendment schools that bar all employers from on-campus recruiting, and schools that are able to demonstrate that "the degree of access by military recruiters is at least equal in quality and scope to that afforded to other employers." The statute also exempts schools that have a long-standing, religious-based policy of pacifism.

Judge Lifland noted in his decision that according to the complaint and affidavits filed with the court, some law schools have tried to comply with the Solomon Amendment while still enforcing their own anti-discrimination policies. These efforts have included permitting the military to recruit on campus but refusing to schedule student interviews; allowing the military to use university but not law school facilities; refusing the military's access to school-sponsored job fairs only; keeping military recruiting literature separate from its career services office. Yet according to the plaintiffs, beginning in 2001 the Department of Defense began in earnest to crack down on these policies and others like them.

The Department of Defense challenged the standing of the plaintiffs to commence a lawsuit attack the constitutionality of the Solomon Amendment, arguing that any threat of injury from enforcement of the amendment would be to individual law schools and universities themselves, rather than faculty members and students, or student organizations and umbrella organizations. Judge Lifland disagreed, finding as to each group of plaintiffs that a sufficiently concrete injury had been alleged. For example, the court explained that the Forum for Academic and Institutional Rights (FAIR), an association of law schools, has pleaded some of its members have abandoned their non-discrimination policies specifically because of threatened enforcement of the Solomon Act. Judge Lifland concluded that even though these schools have not suffered actual loss of federal funds, "FAIR members have alleged a concrete injury fairly traceable to the Solomon Amendment that is likely to be redressed were enforcement of the statute enjoined," and that the organization as a whole therefore has standing to proceed. The court was not swayed by the government's argument that FAIR should be denied standing because its membership is kept secret ("to allay members' fears of retaliatory efforts on behalf of the government and private actors," according to FAIR), especially since the plaintiffs' second amended complaint specifically identified two member law schools: Golden Gate University School of Law and the Faculty of Whittier Law School.

The government argued separately that any alleged injury to the plaintiff law professors and law students amounts only to "stigmatic or dignity injury, without personal harm," which is insufficient to confer standing on them. The law professors and students responded by explaining they commenced suit because "the Government is interfering with a learning environment that law schools constructed for their benefit." The law professors and law professor association SALT (Society of American Law Teachers) also claimed that as a result of the Solomon Amendment, they are unable to benefit from "the enriched pedagogical environment created by non-discrimination policies." These claims were sufficient for Judge Lifland, who considered them "sufficiently concrete and particularized" to allow the plaintiffs to press forward with their claims.

On the merits, the plaintiffs did not fare nearly as well. They alleged in the complaint that the Solomon Amendment is unconstitutional because it conditions federal funding on the requirement that one surrender First Amendment rights; constitutes viewpoint discrimination because it punishes schools that object to the military's anti-lesbian and gay policies; and is impermissibly vague because there are no clear-cut guidelines as to what specifically constitutes a violation of the statute. On the basis of these constitutional challenges, the plaintiffs sought a preliminary injunction barring enforcement of the amendment pending the court's final adjudication of their claims. The court denied the plaintiffs' application. Although Judge Lifland acknowledged that many of the interests plaintiffs claimed were inhibited as a result of the Solomon Amendment were worthy of some level of constitutional protection, he concluded that in the balance, as to each specific challenge raised, the plaintiffs could not demonstrate a "reasonable likelihood" of success on the merits. "At the intersection between the Spending Clause [which allows the federal government to impose conditions on the receipt of public funds] and the First Amendment, the mere presence of a constitutionally protected interest does not render the Solomon Amendment unconstitutional," Judge Lifland explained.

Perhaps ironically, in support of their First Amendment claims, the plaintiffs relied on two United States Supreme Court decisions in which the high court had ruled against lesbian and gay litigants: *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (ruling that the Boy Scouts had a First Amendment right to prohibit a gay man from serving as an assistant scoutmaster, notwithstanding New Jersey law prohibiting sexual orientation discrimination in public accommodations) and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (ruling on First Amendment grounds that lesbian and gay group could lawfully be excluded from St. Patrick's Day parade). Based on *Dale*, the plaintiffs argued that they could not constitutionally be compelled to allow the military an organization that enforced anti-gay policies antithetical to the schools' anti-discrimination policies to use their campuses. Judge Lifland held that even though law schools qualify as "expressive associations" entitled to First Amendment protection, "the forced inclusion on their campuses of an unwanted periodic visitor" does not "significantly affect the law schools' ability to express their particular message or viewpoint." Distinguishing Dale, the court ruled: "Here, the Solomon Amendment does not compel the law schools to accept the military recruiters as members of their organizations, not to mention bestow upon them any semblance of authority The law schools are free to proclaim their message of diversity and tolerance as they see fit, to counteract and indeed overwhelm the message of discrimination which they feel is inherent in the visits of the military recruiters As the presence of military recruiters does not significantly affect the law schools' ability to espouse or advocate their own viewpoints, Plaintiffs' claim of expressive association fails the framework established in Dale."

Judge Lifland denied the plaintiffs' viewpoint discrimination claims for similar reasons. According to the court, since schools retain the right to voice objections to the military's anti-gay policies, and can take action to disassociate themselves from military recruiters, the schools have demonstrated only an indirect effect on speech, something that, "without more, cannot sustain a claim for invidious viewpoint discrimination." The court determined that the plaintiffs' reliance on *Hurley*, and their argument that the Solomon Amendment compels schools to endorse the military's recruiting

message, was equally misplaced. Judge Lifland explained that unlike in Hurley, the military is not seeking access to campuses for the express purpose of spreading the message that the military's anti-lesbian and gay policy is morally correct or justifiable. He noted: "That some see the military only for its discriminatory policy does not support the conclusion that the military is similar to GLIB in its expressive purpose Unlike a parade, a recruiting function does not proclaim an overall message which could be destroyed by the presence of an individual recruiter In short, if there is any expressive component to recruiting, it is entirely ancillary to its dominant economic purpose."

In connection with the plaintiffs' void-for-vagueness claim, the court found that economic regulations are measured by less exacting standards than criminal or regulatory statutes, and that the Solomon Amendment therefore did not trigger a heightened vagueness standard. Judge Lifland concluded that the amendment survived review under the less scrupulous standard, since "the operative terms of the Solomon Amendment are not complex or difficult to understand such that one of ordinary intelligence must 'necessarily guess ' at their meaning."

In the only substantive victory for the plaintiffs, the court ruled that the Department of Defense could not interpret the Solomon Amendment and issue regulations so as to require "absolute parity" between a law school's treatment of the military and other employers. Judge Lifland elaborated by noting "while it is conceivable (in presently unknown circumstances) that a substantial disparity between treatment of the military and other employers could rise to the level of 'in effect preventing' military recruitment efforts [the standard set by the Solomon Amendment], the Court simply fails to see how the statute requires absolute parity when all that is requires is that a school not 'prohibit' or 'in effect prevent' military recruiting efforts." [Lifland also seemed to suggest that the Defense Department's decision to abandon the sub-element interpretation was not necessarily applicable to funds from other federal agencies, an interpretation that could significantly lessen the impact of the Solomon Amendment in some situations, where a university's main sources of federal funding come from the Education or Agriculture Departments rather than the Defense Department. (Of course, the Bush Administration could respond by having those other agencies issue regulations following the Defense Department's lead.) Editor.]

At this juncture, the plaintiffs' options seem quite limited. Are there other constitutional bases to challenge the Solomon Amendment? Are there more egregious facts that, when coupled with the legal theories already advanced by the plaintiffs, paint a more compelling picture that would enable Judge Lifland to find a constitutional violation? If not, this is an issue that would appear to require legislative action to be redressed. From a practical perspective legislative repeal of the Solomon Amendment seems particularly unlikely, not only because we are approaching an election year in which the questions relating to the Solomon Amendment would undoubtedly be trumped by questions relating to same-sex marriage, but also because universities and law schools will almost certainly be unwilling to continue putting themselves on the line, even for the sake of preserving their anti-discrimination policies, where precious federal funding at risk. *Ian Chesir-Teran*

Civil Litigation Notes

Federal — Michigan — U.S. District Judge Gerald E. Rosen of Michigan expressed outrage from the bench at a hearing in a lawsuit filed by the Thomas More Center on behalf of high school student Elizabeth Hansen, who was denied the opportunity to state the anti-gay position in a Diversity Day assembly at Ann Arbor Pioneer High School. The judge characterized a refusal to allow anti-gay voices to be heard as part of the program was "Un-American" and compared the District's reasoning that the purpose of the event was to promote tolerance, not to debate whether people should have civil rights to Nazi Germany and other totalitarian regimes. "Isn't this what led to book-burning in Nazi Germany?" asked Rosen. The school actually cancelled the diversity event after the lawsuit was filed, so the More Center seems to have achieved its litigation goal — to discourage the promotion of toleration of gay people. *Detroit News*, *Detroit Free Press*, Nov. 25. We wonder whether the judge would take the same view if a white supremacist was denied the right to participate in a school assembly that was held to discuss issues of multiculturalism?

Federal — Texas — Some things just never change. On Nov. 10, U.S. District Judge Cummings ruled in *Caudillo v. Lubbock Independent School District*, 2003 WL 22670934 (N.D.Tex.), that public school officials enjoyed qualified immunity from a lawsuit brought by some recent graduates of Lubbock High School whose requests to post notices about meetings of a local gay-straight alliance were rebuffed by the school officials. The plaintiffs cited a string of district court decisions from around the country upholding the rights of high school students to form gay-straight alliances, but Judge Cummings concluded that the lack of any appellate precedent directly on point means that the questions of access under the Equal Access Act and the constitution were not clearly established sufficiently to overcome qualified immunity. "Under the circumstances of this case, this Court cannot say that the unlawfulness of Defendant Clemmons' particular actions should have been apparent to him in light of clearly established law at the time of the actions," wrote Cummings. "Clemmons may have had fair warning that generalized limits on a student's free speech might violate the First Amendment; the law was less clear whether, in the context of secondary school students, limits on the speech of a group of minors whose goals included discussing safe sex and providing a website with direct links to materials that clearly discussed explicit sexual acts, might violate the First Amendment. Defendant's Brief cites to Supreme Court precedence which allows limitations on speech of a sexual nature or speech that might be considered inappropriate for secondary school students." Cummings also contended that the principal's actions were objectively reasonable under the circumstances. Cumming found that the principal could rely on exceptions to access spelled out in the EAA, which he could reasonably believe would apply to this situation, such as an exception to protect the "well being of the student." Why are we not surprised by this ruling?

Arizona — The Arizona Supreme Court rejected an attempt by some state legislators to invalidate by direct petition the governor's executive order that bans sexual orientation discrimination in the state civil service. The court rejected the petition by six legislators without issuing any written opinion. The six had argued that the governor exceeded her executive authority in forbidding a form of discrimination that is not proscribed legislatively. Gov. Janet Napolitano (Dem.) issued the executive order in June. The court's refusal to accept this direct challenge is not a ruling on the merits, so the legislators could, if so inclined, file an action at the trial court level. *Arizona Daily Star*, Oct. 30, 2003.

California — On Nov. 20, National Center for Lesbian Rights and the ACLU of Southern California announced the successful settlement of *Massey v. Banning Unified School District*, noting that all parties had reached agreement on a settlement under which the district will put a new non-discrimination policy in place, train teachers and staff on anti-discrimination obligations, and will pay Massey $45,000 as damages to settle her sexual orientation discrimination claims. *San Diego Union-Tribune*, Nov. 22.

Colorado — The Associated Press reported on Nov. 15 that Colorado District Judge John Coughlin has issued an order that Dr. Cheryl Clark, who is to share joint custody of her 8–year-old adoptive daughter with her former same-sex partner, Elsey McLeod, should not allow her child's religious upbringing to be tainted by homophobia. *McLeod v. Clark*. The women's relationship ended when Clark converted to Christianity and decided to renounce her lesbian orientation. Clark is appealing the order, which AP quotes as stating that she must ensure "there is nothing in the religious up-

bringing or teaching that the minor child is exposed to that can be considered homophobic." A law firm specializing in Christian causes, *Liberty Counsel*, represents Clark on appeal, claiming that the court order violates her First Amendment rights. The judge apparently imposed the order to ensure that Clark does not turn her daughter against McLeod.

Kentucky — Rejecting an argument by Patricia Tibbs that Warren Circuit Court Judge Margarent Ryan Huddleston had erred in taking account of Tibbs lesbian orientation in making a child custody decision, the Court of Appeals of Kentucky ruled in *Tibbs v. Tibbs*, 2003 WL 22748834 (Nov. 21), that in fact the court had found that Mike Tibbs failed to introduce factual proof that Patricia was engaged in a lesbian relationship and had disclaimed any reliance on such allegations in making its decision, and thus this was not a valid ground for appeal.

Massachusetts — The Appeals Court of Massachusetts affirmed the refusal of the Superior Court to assert jurisdiction over a discrimination claim brought by a gay Canadian man against his Canadian employer. *Shaw v. First Marathon, Inc.*, 2003 WL 22833653 (Nov. 26, 2003) (unpublished disposition). Gerald Shaw, who was discharged from his employment, first asserted a claim of sexual orientation discrimination before the Quebec Labour Tribunal, which found that his sexual orientation was irrelevant to his discharge. Claiming that his discharge eventuated from a "whispering campaign" against him that originated in the employer's Boston, Massachusetts, office, Shaw filed a sex discrimination suit in the Massachusetts court, claiming that the Mass. courts had jurisdiction under the state's long-arm statute since the employer's office in Boston solicited business in the state. The Superior Court ruled that it lacked jurisdiction over the defendants and dismissed the case. The affirmance on appeal was decided on the alternative ground of claim preclusion. The appeals court found that Shaw was just trying to relitigate the same legal claim under a slightly different name, and should be precluded from doing so by the adverse determination on the merits in the Quebec tribunal. By deciding on this ground, the court was able to avoid analyzing the trickier question of long-arm jurisdiction in this case.

Massachusetts — In *Cuddi v. Gallery Gift Shoppes*, 2003 WL 22700536 (Mass. Super. Ct., Oct. 2003), Paul Cuddi claims that he was constructively discharged as a result of anti-gay harassment by co-workers and executives of his employer. Cuddi first filed a discrimination charge with the Massachusetts Commission Against Discrimination, then withdrew that charge and filed an enlarged complaint, against named individuals as well as the company, in the Superior Court. In addition to his discrimination claim, Cuddi asserted violations of the state's civil rights act (which provides a cause of action for coercion in violation of civil rights) and various torts claims. Various defendants moved to dismiss various claims on different grounds. When the dust settled from rulings on the motions, the heart of Cuddi's claim of sexual orientation discrimination against the company remained intact, but some of the other claims had fallen by the wayside due to such issues as Workers Compensation preemption of claims against the company and failure to satisfy administrative exhaustion requirements with respect to individual named defendants. Significantly, however, Justice Lauriat ruled that the filing of an employment discrimination does not preclude asserting civil rights and torts claims arising from the same set of facts.

New Mexico — The state's court of appeals refused to hear an appeal from a trial court decision that upheld the San Miguel County Commission's approval of a permit to construct a gay-friendly subdivision in Pecos County. The proposed development would be actively marketed toward a gay adult clientele, but would not pose a sexual orientation test on applicants to the "Birds of a Feather Resort Community." The developer dropped a "no children" requirement when advised that it could raise Fair Housing Act questions. A local community group that has been opposing the development claims that it would violate the Federal Fair Housing Act but, oops (!!), like all federal nondiscrimination laws, the Act does not mention sexual orientation as a forbidden ground for discrimination. The protesting community group previously struck out in its argument that the subdivision should not be approved because of an insufficient water supply. *Albuquerque Journal*, Dec. 2.

New York — Is "Queer Awareness" as the name for a public advocacy group so inherently offensive that it should not be approved for incorporation under New York's Not-for-Profit Corporation Law, section 301? Christopher Barton Benecke, a gay paralegal, sought to form such an organization, but his application to the New York Department of State's Corporations division for approval of the name was denied. The statute provides that a corporate name "shall not contain any word or phrase … which, separately, or in context, shall be indecent or obscene or shall ridicule or degrade any person, group, belief, business or agency of government or indicate or imply any unlawful activity." The director of the Corporations division, Daniel E. Shapiro, takes the position that "queer" is a word "that still connotes hostility and is used by many people in a pejorative manner," as he informed Mr. Benecke in a letter quoted in a news story in the *New York Law Journal* on November 10. Mr. Benecke and his pro bono counsel (and employer), Keith Halperin, argue that this content-based censorship of corporate names violates the First Amendment, and they planned to file an administrative review proceeding (referred to in New York practice as an Article 78 Proceeding) to seek judicial review of the issue, unless, of course, the Department of State, embarrassed by the publicity generated by their actions, decides to back down.

New York — A lesbian woman who encountered homophobia in a New York City police station when she reported to receive a "desk appearance ticket" for a criminal trespass charged filed against her by her former lover failed to state a constitutional or statutory claim against the City, ruled U.S. District Judge Gleeson in *Smith v. City of New York*, 2003 WL 22697991 (S.D.N.Y., Sept. 23, 2003). In order to have a claim against the City for violation of her civil rights, Denise Smith would have to show that the homophobia to which she was exposed was a matter of City practice and policy, and not just the bigoted expression of two police department desk officers. Smith offered no evidence of any such policy. The City's motion to dismiss was granted, but the action continues against Detective Melvin Carter, author of the disgusting remarks, and other unnamed police officers who were present at the time.

New York — On Nov. 6, the N.Y. Appellate Division, 1st Department, upheld the dismissal of a negligence claim that had been brought against the N.Y.C. Gay & Lesbian Anti-Violence Project, Inc., and some of its employees, by two gay men who claimed that they had been injured by the negligence of AVP employees, who had counseled an AVP client to contact the police about his claims that the two men had assaulted him. *Galatowitsch v. New York City Gay and Lesbian Anti-Violence Project*, 766 N.Y.S.2d 206. In dismissing the case on July 10, 2002, in a bench ruling that was filed with the N.Y. County Clerk on September 16, 2002, N.Y. County Supreme Court Justice Alice Schlesinger, after noting that New York did not recognize an action for "negligent prosecution", engaged in some analysis of the negligence claim, finding that the essential element of duty was missing; i.e., that in her view the Anti-Violence Project does not have a duty of care towards the alleged assailants of its clients, such that AVP would have to investigate their clients' claims to determine their validity before counseling their clients to contact the police. As a matter of policy, Schlesinger opined, imposing such a duty would undermine the function of AVP as an advocate for victims of anti-gay violence. She expressed some reluctance in reaching this conclusion in light of the serious injury suffered by the plaintiffs, one of whom had attempted suicide and incurred serious physical injuries upon being informed that criminal charges might be brought against him. In affirming, the Appellate Division did not get into these issues, merely noting in a terse *per curiam* that "their remedy, if any against defen-

dant, was a malicious prosecution suit," and that such a suit would have been time-barred on the date when this lawsuit was filed (and would, as Justice Schlesinger observed, have required proof of various elements that would have been quite difficult in light of the facts alleged, such as proving malicious intent on the part of AVP).

Pennsylvania — The Allentown, Pennsylvania, *Morning Call* reported on Nov. 12 that the first charge of gender discrimination has been filed under a city ordinance enacted last year prohibiting discrimination on the basis of sexual orientation or gender identity. Dr. Gwen Greenberg, formerly Dr. Gary Greenberg, alleges that she was removed as director of the podiatric surgical residency program at St. Luke's Hospital in Allentown after she informed the hospital administration in May that effective July 1 she would be talking, dressing and living as a woman, in line with her gender dysphoria treatment. According to Greenberg's complaint, the hospital's VP of Medical Affairs told her that the hospital's administration feared public reaction and that it would make it more difficult to recruit podiatrists into the training program if a transgendered person was the director. Either these people can't read simple English, or they still quaintly reside in a world where adverse personnel decisions are made without consulting competent labor counsel. In any event, Greenberg is awaiting her right-to-sue letter from the city's Human Relations Officer, which is a prerequisite to initiating an action in the Common Pleas Court. Her attorneys are Elaine Lippmann of Hangley Aronchick Segal & Pudlin (Philadelphia) and Cynthia Schneider of the Center for Lesbian and Gay Civil Rights (Philadelphia).

Criminal Litigation Notes

California — The 4th District Court of Appeal upheld three consecutive 25 year to life sentences for Kent Gordon, convicted of participating in a shooting spree with overtones of homophobia. *People v. Gordon*, 2003 WL 22476210 (Nov. 3, 2003). In finding that the sentence was not excessive, the court noted testimony that somebody in the car from which the gunfire came yelled "faggot" before shooting, so "the motive underlying the assaults appears to have been dislike of homosexuals," wrote Judge McDonald. "Therefore, Gordon's assault offenses, in the abstract and as committed, present a substantial degree of danger to society."

Indiana — In *Wessling v. State*, 2003 WL 22746965 (Nov. 21, 2003), the Indiana Court of Appeals affirmed Alfredo Wessling's conviction for manslaughter in the death of Lance Bunner, his domestic partner, but reversed the sentence due to errors by the trial judge in accounting for aggravating and mitigating factors. Wessling seems to have killed Bunner in a drunken stupor. The trial judge counted Wessling's incapacity as both a mitigating and aggravating factor, to the supefaction of everybody else involved in the case!

Michigan — In an unpublished per curiam opinion, the Michigan Court of Appeals affirmed the conviction of Diane Engleman, a lesbian, for assaulting a corrections officer while incarcerated in a state penitentiary. *People v. Engleman*, 2003 WL 22681558 (Nov. 13, 2003). On appeal, Engleman argued that her case was prejudiced by the prosecutor bringing up her sexual orientation and making reference to her "lover," another prisoner. The court pointed out that the prosecutor raised this issue in order to supply a motive for the attack on Officer Crystal Wheeler, arguing that Engleman may have attacked Wheeler in order to get transferred to another facility where her "lover" was going to be transferred. In addition, since her "lover" would be testifying, the prosecutor was entitled to introduce the evidence on the subject of witness bias. The court noted as well that the trial judge and prosecutor had cautioned the jury against anti-gay bias in its deliberations.

New York — The *New York Daily News* reported on Nov. 22 that a Manhattan jury had acquitted Benjamin Zola, a cardiologist, of charges of sexually abusing a lesbian patient by kissing her bare chest while she was on his examination table. The main evidence against Dr. Zola had been a taped telephone conversation in which Zola admitted to the complainant that he had "inappropriate" sexual contact with her, while insisting that she was dressed at the time. The jury may have been swayed by evidence that the complainant is litigious, having filed six lawsuits in ten years. The complainant protested that it was unfair that the trial court allowed testimony about her prior lawsuits, but refused to admit evidence that Zola pled guilty in 1997 to having sexually harassed a nurse.

Pennsylvania — The novel "don't blame me, I'm gay" defense appears to have worked in the Montgomery County Court trial of Gary Lee Glazer, a karate instructor, on charges that he sexually molested two teenage girls in his class. A jury found Glazer not guilty of counts of aggravated indecent assault, indecent assault, and attempted aggravated indecent assault, but deadlocked on two counts of corruption of a minor and one count of indecent assault. Glazer's business partner, Kim Keller, testified that Glazer is gay. *Philadelphia Inquirer*, Dec. 4.

Tennessee — The Court of Criminal Appeals of Tennessee rejected Randall Wilmoth's appeal of his conviction of attempted second-degree murder. *State v. Wilmoth*, 2003 WL 23663235 (Nov. 6, 2003). On March 23, 2001, Wilmoth, apparently trying to reenact an old Hitchcock epic, went into the bathroom where his roommate was taking a shower and started slashing away. The victim, Quinn Mansfield, with whom Wilmoth had "engaged in a homosexual relationship" in the past, managed to escape with severe stab wounds. (A police officer who came in response to a 911 call "found the victim standing outside, holding in part of his intestines." He also suffered slash wounds on neck and in his throat. From the narrative in the opinion for the court by Judge James C. Witt, Jr., it appears that Wilmoth was upset that Mansfield was thinking of resuming a previously-abandoned job at a gay bar whose owner Wilmoth did not like. In any event, Wilmoth complained on appeal that his defense attorney had not mounted an effective defense and virtually conceded his guilt, but the court said he missed his chance on this by failing to complain in a post-trial motion. The court also rejected Wilmoth's contention that the verdict was not supported by the evidence, which consisted almost entirely of the testimony of the victim. The appeals court observed that the jury could have found the victim to be a credible witness, and actually bore physical scars from the encounter that were exhibited to the jury. As such, the court found that the trial record could support a finding of attempted second-degree murder, even though the defendant claims he did not intend to kill the victim.

Legislative Notes

Illinois — A collateral "victim" of the Massachusetts marriage decision may be the Illinois gay rights bill. According to a report in the *Chicago Tribune* on Nov. 20, chief sponsor Rep. Larry McKeon believed that the Massachusetts court ruling resulted in legislators being "inundated with phone calls and mail and false information at times that goes against our cause." Things had looked good for the bill when the governor called for its enactment after Democrats took control of the state legislature, but Democratic leaders pulled it from the agenda when they determined that it lacked sufficient support to assure passage in this session.

Cleveland Heights, Ohio — On Nov. 4, residents of Cleveland Heights voted 7,600 to 6,290 to approve a proposal to create a domestic partnership registry in their city. The ballot question was promoted by local activists. According to a Nov. 6 report in the *Cleveland Plain Dealer*, Cleveland Heights is the first city in the nation to create such a registry through a citizen-driven ballot drive. Although San Francisco's domestic partnership registry was also enacted through a referendum, that question was placed on the ballot by the city's Board of Supervisors.

Kentucky — The battle to save domestic-partnership benefits for the public employees of Urban County suffered a setback when the County Council voted 11–3 to override Mayor Teresa Isaac's veto of a council bill requiring

termination of a domestic partnership benefits policy that had been adopted by the mayor without the participation of the legislature. *Lexington Herald-Leader*, Nov. 21.

Wisconsin — The state legislature passed a mini-DOMA for the state, restricting the definition of marriage to one man and one woman, but Governor Jim Doyle vetoed the measure on November 7, calling it "mean-spirited" and "redundant and unnecessary" because the state's marriage law already clearly prohibited same-sex marriages. Said Doyle, "This bill is just another example of the Legislature focusing its time and energy on divisive, mean-spirited bills that do nothing to grow Wisconsin's economy, make health care more affordable and accessible, or improve our public schools." The bill had passed by margins large enough to suggest that the veto might be overridden, but in the event it was sustained. *Associated Press*, Nov. 7.

Law & Society Notes

Olympics — The International Olympic Committee has decided to allow athletes who have undergone sex-reassignment surgery to compete in the Olympics in their chosen gender, provided a sufficient period of time has passed since their surgery. IOC Medical Director Patrick Schamasch told the Association Press on Nov. 13 that "The IOC will respect human rights." Full details of the policy had not yet been announced at press time. This change in policy was undoubtedly responsive to recent developments in Europe, where the Court of Human Rights has ruled in favor of transgender recognition claims in recent years.

Military — The Navy may not officially allow openly gay Naval Academy graduates to serve in uniform, but once they've retired from the service, may the Navy allow them to form a gay alumni association? This question is posed by Jeff Petrie, a 1989 graduate and Operation Desert Shield veteran, who has filed an application with the Naval Academy seeking official recognition for a gay alumni chapter, called USNA Out. *Baltimore Sun*, Nov. 12.

German Holocaust Memorial — A committee of the German parliament has decided that there should be an official memorial in Berlin to gay victims of the Nazis, according to a report in the Nov. 14 issue of the London *Independent*. According to the news report, the German Nazi government had convicted some 50,000 gay people as criminals, and it was estimated that between 10,000 and 15,000 gay men were deported to concentration camps. A bill to fund the project has passed the lower house of the Parliament.

Religious College Sees the Light — St. Mary's College has added sexual orientation to its non-discrimination policy. The vice president and faculty dean, Patrick White, stated: "We regard this not as a huge change in the employment policy, but rather articulation what we have long held." *South Bend Tribune*, Nov. 25.

Political Incorrectness Run Amuck? — In Lafayette, Louisiana, the principal of Ernest Gaullet Elementary School freaked out when seven-year-old Marcus McLaurin was overheard telling a classmate that his mom and her partner are lesbians, and then explaining what that means. Marcus was sentenced to detention, during which he was compelled to fill a blackboard with repetitions of the sentence "I will never use the word 'gay' in school again." What, not even to mean "cheerful"? A teacher told Marcus that 'gay' is a 'bad word' and sent him to the principal's office. The ACLU is on the case, however, and has demanded an apology for the boy and his moms. *Los Angeles Times*, Dec. 2.

Anti-Marriage: The Usual Suspects — The U.S. Conference of Catholic Bishops decided to surprise the world by issuing a document on Nov. 12 condemning same-sex unions and reaffirming the church's doctrine that homosexuality is sinful and unnatural. The document was approved during an annual meeting held in Washington, D.C. The vote was 234–3; the schismatics who voted against it will undoubtedly be excommunicated as soon as it is convenient to do so, unless they used a secret ballot, in which case the celibate bishops are probably consumed with curiosity about who among their number supports same-sex marriage. One observer, a religion professor from Emory University, told a reporter for the *Atlanta Journal-Constitution* (Nov. 13) that there was "nothing new" in this document, which is "an attempt to simplify the Vatican's teaching. It looks as if the bishops are worried that there's uncertainty in the minds of American Catholics." Matthew Gallagher, executive director of Dignity USA, said, "They have taken on the mantle of President Bush and the Republican Party in their hatred of gays and lesbians." (To be fully ecumenical about this, the bishops' position is consistent with that of Orthodox Judaism, conservative Protestant denominations, and virtually every Muslim cleric who cares to speak publicly about the subject. What makes this newsworthy is that the bishops actually thought it was necessary for them to come out with a new statement, when it is hard to know how anybody could mistake their position.)

Nature or Nurture? — Suddenly newspapers were full of stories in the later part of the year suggesting new evidence linking sexual orientation with genetic or biological causes. A summary of the recent stories appeared in the *Boston Globe* on Dec. 2 under the title "The Biological Basis of Homosexuality" by Judy Foreman.

Revisionist History — Was the prosecution of Oscar Wilde really a cover-up to help conceal the homosexuality of a major English government figure? So suggests Neil McKenna, working on a new biography of Oscar Wilde. McKenna has uncovered evidence that the British government agreed to prosecute Wilde when the Marquess of Queensberry, who had original accused Wilde of "posing as a somdomite [sic]" when he discovered that Wilde was having an affair with his son, Lord Alfred Douglas, threatened to reveal that England's Prime Minister, Archibald Philip Primrose, fifth Earl of Rosebery, was himself a closeted gay man who had been sexually involved with the Marquess's other son, the then-deceased Viscount Drumlanrig! This is a bio we can't wait to read....

A Virginia First: As we noted earlier when he won the Democratic nomination, Adam P. Ebbin, an openly-gay man, became the first such person to win elective legislative office in Virginia, running unopposed for the 49th House District seat. Ebbin had emerged from the competition to replace a retiring incumbent Democrat in a district so heavily Democratic that the Republicans didn't bother to field a candidate against him. *Washington Times*, Nov. 5.

Travails of Harvey Milk High: Police confirmed reports that first appeared in the anti-gay *New York Post* that four male students from New York City's Harvey Milk High School had posed as female prostitutes, hung out in a street prostitution venue in the West Village, and shaken down prospective customers by pretending to be undercover police officers. The four faced charges of robbery and impersonation of a police officer. *Newsday*, Nov. 7.

International Notes

European Union — Dec. 1 was the deadline for members of the Union to have laws in place forbidding workplace discrimination based on sexual orientation, and the British and Irish press were full of terrified warnings that employers would suddenly be confronted with floods of litigation from disgruntled gays. On the other hand, some British trades unions were critical of the limited effect of the law that was put in place in England and Northern Ireland, complaining that it did not provide adequate parity for gay workers with their non-gay colleagues in terms of benefits rights, and provided too big a loophole in exemptions for religious employers. Litigation to follow, says the Trades Union Congress, whose chief, Brendan Barber, told the press: "These rights are a massive leap towards fairness for lesbian, gay and bisexual employees but we want them to go all the way. It's a shame to have to go to court to achieve this but we have worked hard for these new rights and we want them to be solid.". The TUC claims that the new law leaves Britain out of compliance with its European Union obligations. *Belfast News Letter*; *Daily Mail*; *Finan-*

cial Times, all Dec. 1. ••• On Nov. 8, *Die Presse* in Vienna reported that the Austrian council of ministers had passed new anti-discrimination legislation incorporating a ban on sexual orientation discrimination to comply with the Union guidelines.

Australia — A reader from Australia sent us word of a jury verdict rendered Nov. 7 in the New South Wales Supreme Court (the general trial court) in a defamation case. It seems the *Sydney Morning Herald* had published a picture of a shirtless man tied to the top of a piano in Hyde Park. The caption mentioned a prominent local lawyer and said we was "practising his piano-top bondage display as part of this year's street performance at the Gay and Lesbian Mardi Gras." The lawyer protested that the picture was not of him and that he had been defamed. The newspaper published an apology, but the lawyer wanted damages and sued. The jury found that the caption could be interpreted by readers to say that the lawyer was a gay man and an exhibitionist, but the jury found neither imputation to be defamatory, i.e., injurious to reputation. It will be interesting to see how this kind of issue plays out in the U.S. in the post-*Lawrence* era. In her concurring opinion in that Texas sodomy case, Justice Sandra Day O'Connor pointed out that Texas courts treated an imputation of homosexuality as defamatory, by reference to criminality under the sodomy law. There are recent opinions in New York that continue to uphold defamation claims for false imputations of homosexuality, even though the N.Y. sodomy law was declared unconstitutional in 1980, on grounds that it is still socially disadvantageous to be thought to be gay.

Barbados — Prime Minister Owen Arthur denied reports that his government would propose the decriminalization of homosexual conduct and prostitution. Public speculation about these issues had followed on public comments by Attorney General Mia Mottley that these issues would need to be addressed as the island confronted AIDS issues. Arthur commented that eventually the country would have to grapple with questions about sexuality, which would require significant study because of the social ramifications. *Caribnews*, Nov. 25.

Brazil — Reuters reported on Nov. 28 that Judge Ana Carolina Morozowski had ruled that a gay Englishman, David Ian Harrad, can stay in Brazil even though his visa has expired, because he is in a long-term relationship with Antonio Martins does Reis. The two men have been living together as partners in Brazil since 1992.

Brazil — Elcio Berti, the mayor of Bocaiuva do Sul in the southern Brazilian state of Parana, issued a decree barring "homosexuals" from moving into the town, according to reports published on Dec. 4 in the *National Post* and *The Guardian*. Gay rights activists reacted by calling Berti a "neo-Nazi." Berti's proclamation suggested that gays do "not bring any kind of benefits" for the town. Clearly, he has not been reading recent research in the U.S. showing that the most economically successful urban areas are those that are perceived as "gay friendly."

Great Britain — The Labour government of Tony Blair has proposed a civil partnership bill that would allow same-sex partners to register with the government and acquire a package of rights and responsibilities that falls short of full marriage but includes tangible benefits including some income-related benefits, pensions, parenting, immigration, and testimonial privilege. Some details of the proposal were read by Queen Elizabeth II in her speech opening the parliamentary session. (The speech is customarily written for the Queen by the ruling political party in the House of Commons. She does not initiate legislative initiatives, and nobody really knows what she things about this proposal. If she refused to read the speech presented to her by the P.M., there would be a bloodless revolution and the end of the monarchy in its current form, so…) As a government bill, this is considered likely to pass in the Commons, but its fate in the House of Lords is uncertain. The Lords can delay a measure considerably, but cannot totally block it in the long run if the Commons is insistent on the matter. Thus, the measure has a good chance of becoming law, although the declining popularity of the Blair government over its alliance with the U.S. in the war in Iraq, if it results in a change of parliamentary control, could endanger its passage if the Lords try to block it on the first round. *Daily Telegraph*, *London Independent*, Nov. 27.

Greece — The National Broadcasting Council, a government media watchdog agency, has fined a television station 100,000 Euros for broadcasting a soap opera in prime time that included two men kissing each other. The president of the Council, Yiannis Laskarides, condemned the kissing scene as "idiosyncratic and outside of the bounds of normal human relationships." Clearly not a reader of Plato is Yiannis Laskarides. Under Greek law, "adult programming" is not supposed to be broadcast during prime evening hours. An editor of a gay magazine in Greece, Paul Sofianos, characterized the Council as a bunch of reactionaries whose stance is "unacceptable censorship" in a European Union country. London *Independent*, Nov. 13.

Israel — The Israeli newspaper *Yediot Aharonot* has reported that a family court in Nazareth ruled against a claim by a surviving gay life partner to inherit from his intestate deceased. The court ruled Oct. 15 in the case of *Doe v. Administrator General* that the legal principal allowing unmarried opposite-sex long-term partners to inherit did not apply to same-sex couples. An appeal is being pursued in the case, in light of significant gains that have been made in the appellate process in Israel in obtaining legal recognition for same-sex partners. (Our thanks to Dan Yakir of the Association for Civil Rights in Israel for providing some of the detail missing from the English-language report we saw about this case on the internet. ACRI has been prominently involved in gay rights litigation in Israel.)

Russia — The *Moscow Times* reported on Nov. 28 that homosexuality is no longer a basis for exclusion from military service in Russia, and quoted General-Major Valery Kulikov, "a member of the Defense Ministry's Health Commission," as having stated: "There is no such diagnosis as 'homosexual' This is not a medical question. A homosexual will be evaluated on his general suitability for armed service. If he is psychologically and physically healthy, he is suitable and will serve in the armed forces." According to Kulikov, this policy has been in effect since July 1, but Kulikov also said he would not advise gay service members to "publicize their sexual orientation," since they would probably be beaten up by their comrades-in-arms if they did so.

Scotland — A Scottish Appeal Court panel ruled on July 22 that "shameless indecency" is not a crime in Scotland. The term was used in a 19th century treatise and then taken up by some courts as a sort-of catch-all criminal offense, but the court found that it was unduly vague in letting judges send people to prison for conduct that the judge might find personally offensive but was nowhere specified in the law. *Procurator Fiscal, Dunoon v. Dominick*, #XJ147/30. *Gay Scotland* #147 — Nov. 2003.

AIDS & RELATED LEGAL NOTES

California Supreme Court Resolves Procedural Issues Under HIV Testing Statute

In two decisions issued simultaneously on December 1, the California Supreme Court addressed issues raised in the application of state laws directing trial judges to order criminal defendants to submit to HIV testing under certain circumstances. *People v. Stowell*, 2003 WL 22834961; *People v. Butler*, 2003 WL 22834798. *Stowell* concerned Penal Code section 288, which requires a court that has determined that there is probable cause to believe that HIV might have been transmitted to order HIV testing of defendants convicted of lewd

and lascivious acts with minors. *Butler* concerned Penal Code section 1202.1, which has similar application to convictions of certain sex offenses against minors.

Timothy Stowell was charged with lewd and lascivious acts with a minor and sexual penetration of a minor with a foreign object. Stowell and his girlfriend and Tracie H. and her 4–year-old daughter, Taylor, were sharing a motel suite. About 2:30 a.m., Tracie was awakened by Tayler's "rustling" in the bed and told her to settled down. "Tracie then heard a male voice say 'tight little pussy' and Taylor say 'Don't Tim. Quit it.' She asked, 'Taylor, what is he doing to you?' Taylor responded, 'He's got his finger in my pee-pee.' Tracie immediately took Taylor from the bed and left the motel." In an interview with police, Stowell admitted inserting his finger into Taylor's vagina. He was found guilty on both counts. The trial judge sentenced Stowell to six years in prison and ordered him to submit to HIV testing. The statute requires the judge to have made a probable cause determination regarding potential HIV exposure as a prerequisite to ordering HIV testing. Although the relevant statute says "the court shall note its finding on the court docket and minute order if one is prepared," the judge made no such notation. Stowell's trial attorney made no objection to the testing order, but on appeal Stowell argued it was invalid due to the lack of a written probable cause finding.

The court of appeal rejected the appeal, stating that failure to object at the time of sentencing effectively waived the right to raise the issue on appeal. The California Supreme Court agreed that the right to appeal the testing order on this point had been waived, differing with the court of appeal only in its analytical approach. According to the opinion by Justice Brown, since an HIV-testing order is not a form of "punishment" but rather a health matter, it is inappropriate to use the mode of analysis for evaluating waivers of objections to sentencing to determine the outcome of this case. Instead, the court used a "general forfeiture rationale," under which a defendant will be deemed to have forfeited the right to appeal based on trial errors that could have been easily corrected had objection been raised promptly to the trial judge. Justice Brown paid no attention to the possibility that the trial judge had made no probable cause determination at all, since none is reflected in the written record. After all, it seems very unlikely that anybody could argue with scientific credibility that HIV would be transmitted through the insertion of a finger in a vagina. A concurring opinion by Justice Baxter agreed with the result but would have affirmed based on the court of appeal's analysis of this as a sentencing issue.

Willie Butler was convicted of fondling 13–year-old Cynthia B.'s vagina through her clothing while visiting in the house of John Shoyer, a friend of Cynthia's mother. Cynthia happened to be present in the house watching television, when Butler asked her to come with him to the bathroom, purportedly under the guise of wanting to tell her a secret.. He persisted when she asked him to stop, and began touching her clothed breasts. Butler asked Cynthia if he could "suck on her titties" but she said no. "He then stated that he would not force her and left the bathroom." After Butler left, Cynthia told Shoyer what had happened and they called the police. Although Butler denied physical contact, the prosecutor and jury found Cynthia a credible witness. Butler was convicted of lewd and lascivious acts and sentenced to eight years. The trial court ordered HIV testing, but made no express finding of probable cause that HIV could have been transmitted by the conduct to which Cynthia testified, and no written record of such a finding. Although Butler did not object at the time of sentencing, he appealed on the ground that there was no evidence in the record to support a probable cause finding.

The court of appeal struck the AIDS testing order and remanded for further hearing if the prosecutor sought to introduce evidence to support a probable cause finding. The Supreme Court affirmed, distinguishing this case from *Stowell* in that here there was nothing in the record from which a probable cause finding could have been made. Wrote Justice Brown, "The Attorney General argues the failure to object to these omissions precludes appellate review. For the reasons discussed in *Stowell*, we agree that to the extent the Court of Appeal vacated the testing order because the trial court failed 'to make the required finding,' it erred in considering defendant's claim that the order was unlawful. The Court of Appeal premised its ruling on an additional ground, hwoever: 'the lack of any evidence on the record to support such a finding...' This determination implicates more than a recitation of the trial court's probable cause finding or a notation of the finding in the docket or minutes. It raises a fundamental question of sufficiency of the evidence to sustain the order."

Thus, the court approved vacating the HIV testing order, and remanding to afford the prosecutor an opportunity to provide evidence, if any, that the conduct proved at trial would support a probable cause finding — a daunting task, considering that Cynthia was clothed throughout the episode and experience no insertion of anything, unlike Taylor in the *Stowell* case. A.S.L.

California Court of Appeal Adopts Lower Standard in AIDS-Related Assault Cases

In *Roman v. Superior Court*, 2003 WL 22504505 (Cal. Ct. App., 2nd Dist., Nov. 5, 2003), the defendant was charged with abuse of a 25 year-old autistic male, called "John Doe" in the court's opinion. The Los Angeles County Superior Court denied a motion to exclude information regarding Doe's condition, and denied the defendant's motion to set aside the charges, holding that there was sufficient evidence that the defendant's conduct could produce great bodily harm, and also that the defendant knew the victim was a dependent adult.

Judge Epstein's opinion reveals the following facts: Doe is autistic, has hydrocephalus, is "mentally retarded," and has had three open-brain surgeries (the outcome of the surgeries, or their significance to the court in reaching its decision, is never indicated). The defendant, Christopher Roman, approached Doe on the street and "pulled him into his car." Roman brought Doe to a condominium where he "told him to watch wrestling on television." The court says that Roman then "removed or pulled down" Doe's pants and sodomized him.

The court suggests (without deciding), that had Roman used a condom, the endangerment would not have been "knowing," but found that Doe's testimony about the use of a condom was "ambiguous." Although Doe initially testified that there had been a condom, and nodded to affirm this, on cross-examination, he said that he could not recall whether a condom had been used. The court also acknowledged that Doe had testified to seeing Roman throw a condom in a toilet, apparently at different location, although the court does not elaborate. Despite, or rather, because of, these inconsistencies, the Court of Appeal ruled that the evidence supported a "legitimate inference" that semen had come in contact with Doe's skin.

In order to reach this decision, the court had to overturn a 1998 case that had characterized the standard in such cases as "a 'rational' basis for 'assuming the possibility' that petitioner's act was 'likely to produce great bodily injury.'" Writing for the majority, Judge Epstein held that the appropriate standard of review is much lower: "a strong suspicion that the defendant committed the crime charged." Epstein noted that actual harm or injury was not required, and "although the risk of transmission of the HIV virus [sic] may increase with each incident, the risk of infection is present at each exposure, including the first."

In light of its new-found "strong suspicion" standard, the Court of Appeal reasoned that the likelihood of HIV transmission from a single act of unprotected sex was sufficient to raise a strong suspicion that the victim had been subjected to great bodily harm or death. The defendant argued that the AIDS statutes, upon which the court relied, were no longer a meaningful basis for rule-making. Later scientific studies, he argued, have either discredited or cast doubt on the concerns that led to the enactment of those laws. To prove this, the defendant introduced reports from the Centers for Disease

Control, as well as an issue of the Department of Health and Human Services' Morbidity and Mortality Weekly Report. Epstein refused to consider this evidence because it had not been presented to the magistrate or to the trial court, and instead chose to rely on a decision written nearly fourteen years ago. In that case, the Court of Appeal had rejected constitutional challenges to required AIDS testing because "AIDS is a fatal disease" and "conflicting medical research" about its transmission compels state interest in protecting public safety officers from the "anxiety and risk." Epstein made no attempt to explain the applicability of a statute expressly intended to protect safety officers at a time when very little was known about AIDS with the facts of the present case, relying again on the lower threshold of the "strong suspicion" standard.

The defendant also argued that there was insufficient evidence to establish that he knew that Doe was a dependent adult. The court relied on the same standard, i.e., "strong suspicion," in holding that the magistrate had heard sufficient evidence to reject this claim as well. Epstein points out that the lower court had been able to observe Doe's demeanor, although there is no indication, other than the ruling itself, as to the *nature* of that demeanor or any basis for analysis. The sole evidence as to both Doe's condition and its apparent nature was the testimony of his mother. However, because of the "relatively low burden of proof" required at this stage, it was enough. The case was returned to the Superior Court for trial to take place in 2004. *Joe Griffin*

Federal District Court Rejects Privacy Act Disclosure Claim Social Security Administration

U.S. District Judge Hornby (D. Maine) rejected a Privacy Act Claim for unauthorized disclosure of HIV status, that had been asserted against a Social Security worker who mentioned the client/patient's HIV status in the presence of an unrelated person. *Stokes v. Commissioner, Social Security Administration*, 2003 WL 22767611 (Nov. 21, 2003). Finding that the worker's conduct "may have represented a lack of judgement on her part," Hornby concluded that it did not violate the Privacy Act.

Regina Brooks, a claims representative for the Portland, Maine, Social Security Office, visited Alan Stokes in the hospital, where he was receiving treatment for HIV infection and cancer. Brooks was there specifically to interview Stokes to obtain information needed to process his claims application. Stokes' domestic partner, Dianne Hamilton, was present in the hospital room when Brooks arrived. Brooks testified that she specifically requested whether Stokes wanted to have the interview with Hamilton present, and only proceeded with his consent. Hamilton was already aware of Stokes' HIV status. During the interview, an acquaintance of stokes who did not know that he was HIV+, Andrea Robinson, came as a visitor. Brooks testified that she asked if Stokes wanted to continue the interview, and he said yes. At the end of the interview, on her way out of the hospital room, Brooks mentioned that if Stokes' HIV status progress to AIDS, he would need to contact the Social Security Office. Stokes had never said anything specifically to Brooks about keeping his HIV status confidential. After Brooks left the room, Robinson also left, and subsequently began telling other people that Stokes was HIV+. Robinson has not spoken to Stokes since that day, but has chatted about Stokes' HIV status in an internet chatroom. After learning about these breaches of confidentiality, Stokes "was angry, hurt and distraught and received supportive counseling at the AIDS Lodging House."

The Privacy Act forbids unauthorized disclosure of HIV-related information that a person obtains from a patient's records or in the course of rendering services to the patient. Stokes did not specifically authorize Brooks to disclose information about his HIV-status. "The Privacy Act does not prevent an agency employee from discussing the contents of a protected record with the person to whom the record pertains," wrote Hornby. "Brooks and Stokes were engaged in a discussion about matter relevant to his obtaining benefits, including his medical condition. When, at the end of the interview, Brooks made the statement about Stokes' HIV status, she directed the statement to Stokes, not to the two other people in the room."

Perhaps more importantly, Hornby found that Stokes had specifically approved continuing the interview in Robinson's presence. Although there was some dispute in the testimony as to when Robinson arrived (before or after Brooks), there was no doubt that, as Judge Hornby wrote, "He affirmatively authorized Robinson's presence during this discussion." Hornby granted judgment after trial to the defendant. A.S.L.

AIDS Litigation Notes

Federal — Illinois — Finding that a critic of the AIDS Research Alliance, an agency that was participating in studies of new medications, had failed to frame his complaint with sufficient specificity to state a claim under the federal False Claims Act, U.S. District Judge Hibbler (N.D. Ill.) granted a motion to dismiss Sanford M. Gross's complaint. *Gross v. AIDS Research Alliance*, 2003 WL 22508153 (Nov. 3, 2003). Gross had claimed in general terms about mismanagement of the study by various participants and failure to the Alliance adequately to fulfill its supervisory role in the project. Hibbler commented, "It is well settled that the FCA is a fraud prevention statute, not a means to ensure regulatory compliance, and … mere negligence will not support a FCA claim." Thus, it was not enough for Gross to allege mismanagement; in order to state a claim under the Act, he would have to point to evidence that the defendants made deliberate misrepresentations in order to secure federal funds for their projects.

Federal — New Jersey — In *Carmon v. Barnhart*, 2003 WL 22769043 (Nov. 24, 2003), the U.S. Court of Appeals, 3rd Circuit, reversed a decision by the district court and ordered the Social Security Administration to re-evaluate its decision to deny disability benefits to Antonio Carmon. An administrative judge had denied benefits, even though Carmon's physicians had very negative things to say about his physical condition, ability to work, and longterm prognosis, because the judge found that Carmon was not suffering from any specific condition on the "list" of presumptively disabling conditions. (HIV infection by itself is not on the list.) Circuit Judge Michael Chertoff wrote: "We are troubled by the ALJ's summary determination. We have repeatedly stated that we are unable to conduct our substantial evidence review if the ALJ fails to identify the evidence he or she rejects and the reason for its rejection. Our precedent requires much more than a mere conclusory statement that the claimant's conditions are not found in the listings. The reason is not merely a desire to make the ALJ jump through additional 'hoops.' Substantial evidence review is all but impossible without an adequate indication of what the ALJ considered, what he or she rejected, and why." The court also found that the ALJ had come to conflicting conclusions, on the one hand determining that Carmon was unable to regularly perform functions of his prior work, but on the other that he was capable of returning to his job. "We cannot square the responsibilities of Carmon's past relevant work with the ALJ's determination of his residual capacity."

Arkansas — The Court of Appeals of Arkansas upheld a second-degree battery conviction and resulting 15 year prison sentence in the case of Kevin Jeremy Linn, who while an inmate at the Pulaski County Jail bit a deputy sheriff in the struggle that ensued when Linn tried to grab the deputy's keys while was being returned to his cell after his scheduled break. *Linn v. State of Arkansas*, 2003 WL 22853847 (Dec. 3, 2003). As part of the evidence on the question whether Linn had caused sufficient injury to the deputy to sustain a second-degree battery conviction, the court took note that the deputy was advised to get testing for HIV on a regular basis for a sufficient period of time to rule out transmission. There is no indication in the opinion by Judge Andree Layton Roaf that either Linn or the deputy is HIV+.

California — San Francisco's Human Rights Commission has opened an investigation into Cirque du Soleil, which is charged by Lambda

Legal Defense Fund with discriminating against Matthew Cusick, a gymnast who had been offered a job by the defendant which was withdrawn when they learned he was HIV+. At risk, in addition to the usual penalties for discrimination in an employment case, is Cirque's ability to continue performing on property leased from the Port of San Francisco, as city contractors are barred from discriminating on the basis of sexual orientation on pain of forfeiting their right to contract with the city. *San Francisco Chronicle*, Nov. 22.

Connecticut — In continuing litigation over a 1985 transfusion AIDS case, Conn. Superior Ct. Judge Carl J. Schuman ruled on Oct. 30 in *Sherwood Armour v. Danbury Hospital*, 2003 WL 22705960 (not officially reported), that a the defendant hospital did not have a duty in April 1985 to inform a surgery patient about the prospective risks of using donated blood at a time when an HIV screening test was not yet available to the hospital. The court said that imposing such a duty on the hospital would interfere with the doctor-patient relationship, as these topics were better discussed between a doctor and her patient directly. However, summary judgment motion was not an absolute win for the defendant hospital, as the case continues on other grounds.

Pennsylvania — A 3–judge Superior Court panel found that prosecution of Maurice Walker for making terroristic threats was appropriate under a state statute. While being taken to jail after being apprehended for a parole violation, Walker, who knew one of the arresting officers, was being led by Parole Officer Eric Webb, to whom he was cuffed at the risk. According to Judge Klein's decision, "While waiting for the gate to open, Webb felt Walker scratching his right hand with his fingernails. While digging his fingernails into Webb, Walker said, 'I have open cuts on my hands. Life is short. I am taking you with me.' Webb knew that Walker was HIV-positive. Walker then pointed at Webb and said, 'You better watch your back.'" This led Webb to seek HIV testing for the next six months, always testing negative. The court found that this evidence sufficiently supported the finding of a terrorist threat against Walker.

International AIDS Notes

World AIDS Day — Dec. 1 has now become established as World AIDS Day, an occasion for taking-stock on the progress (or lack of same) in combating the epidemic and of remembering those we've lost. One manifestation of World AIDS Day is that major newspapers around the world publish articles discussing the progress or lack of same in their countries, and in some countries governments have used World AIDS Day as an occasion to announce new initiatives. The *New York Times* reported that the Chinese government signaled a new openness to dealing with AIDS as an urgent policy matter, televising a visit by Prime Minister Wen Jaibao to AIDS patients in a hospital, characterized as "the first such public appearance by a top government leader." For the first time, the government is broadcasting public service announcements, encouraging condom use to prevent the spread of HIV, and making AIDS medications more widely available. The *Jerusalem Post* reported on Dec. 1 that the World Health Organization estimates about forty million individuals are now living with HIV infection or AIDS, and that of those, 3,124 are Israelis. New cases of HIV infection are reported daily, and 550 Israelis have died in the epidemic to date. Reporting on annual data released by the U.S. Centers for Disease Control and Prevention late in November, the American press noted that the number of gay men diagnosed with HIV in the U.S. was 17% higher in calendar 2002 than in calendar 1999. The *Independent* (Nov. 25) reported that an estimated 49,500 people were living with HIV in Britain, an increase of 20% from 2001 to 2002.

Great Britain — Mohammed Dica was convicted of knowingly infecting two women with HIV in the first case of "biological grievous bodily harm" recorded in England. He was sentenced to eight years in prison by Judge Nicholas Philpot. Addressing the prisoner at sentencing, Judge Philpot stated: "There is no evidence of your remorse. There is no mitigation for these offences except the threadbare point that you did not perjure yourself in your own defence." The evidence showed that Dica lied to his victims in order to lure them into having unprotected sex with him. *Evening Standard*, Nov. 3.

New Zealand — It is so refreshing to read about HIV prevention efforts in countries where public health policy appears not to be dictated by religious sensibilities. In New Zealand, for example, the *Christchurch Press* (Dec. 2) reports that local billboards "are sporting nude men as part of a campaign to stem the South Island's upsurge in HIV infections." Well, that's one way to get people's attention. "The provocative poster and billboard campaign, which features a nude male model with 'back to basics' condom messages, was launched by the New Zealand AIDS Foundation in Christchurch and Dunedin yesterday — World AIDS Day." and, listen to this: "A harder hitting, more explicit HIV/AIDS campaign will be published in gay venues." (In the U.S., the Bush Administration will not fund any sexually-explicit HIV prevention materials targeted at " gay venues." Indeed, researchers applying for federal grants to pursue HIV prevention research are told to leave anything about gay men or homosexuality out of their proposals for fear of dooming them, since right-wing religious reactionaries now vet all the grant proposals for their version of political correctness. (See *Pittsburgh Post-Gazette*, Nov. 2.) Meanwhile, of course, the Roman Catholic Church has undertaken a campaign to convince the teenagers of the world that HIV is too small to be blocked by condoms… Thus is public policy made in the "educated" west.) A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

WRITING COMPETITION ANNOUNCEMENT:

The Williams Project at UCLA Law School has announced the Dukeminier Awards writing competition on lesbian, gay, bisexual and transgender legal issues. The competition is open to students enrolled in an accredited law school during the 2003–2004 academic year, and is open for papers written during this academic year that are neither published nor scheduled for publication. The first place prize is $1,000 and publication in *The Dukeminier Awards: Best Sexual Orientation Law Review Articles of 2003*. Full details about the format of submissions can be found on the Project's website: www.law.ucla.edu/williamsproject. The deadline for submissions is January 10, 2004. The Awards memorialize Prof. Jesse Dukeminier of UCLA, who passed away in April after a long and distinguished career in which he was recognized as a leading scholar in the fields of real property and trusts and estates law. Prof. Dukeminier was a speaker on several programs sponsored by the Section on Gay and Lesbian Legal Issues of the Association of American Law Schools during the early years of the section in the 1980s.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Anderson, Michelle J., *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 Hastings L. J. 1465 (2002–3).

Bacon, Richard G., *Rum, Romanism and* Romer*: Equal Protection and the Blaine Amendment in State Constitutions*, 6 Delaware L. Rev. 1 (2003) (Blaine Amendments are state constitutional provisions forbidding the use of taxpayer funds for religious schools. The author contends that the US Supreme Court's equal protection reasoning in *Romer* may lead to invalidation of such provisions.)

Becker, Susan, *Constitutional Classifications and the "Gay Gene"*, 16 J. L. & Health 27 (2001–2).

Hutchens, Neal, *The Legal Effect of College and University Policies Prohibiting Romantic Relationships Between Students and Professors*, 32 J. L. & Educ. 445 (Oct. 2003).

Lunny, Allyson M., *Provocation and 'Homosexual' Advance: Masculinized Subjects As Threat, Masculinized Subjects Under Threat*, 12 Social & Leg. Studies 311 (Sept. 2003).

Post, Robert C., *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 Harv. L. Rev. 4 (Nov. 2003) (Forward to annual Supreme Court issue of Harvard Law Review; views the 2002 Term through the lens of Lawrence v. Texas and other surprise "liberal" decisions on affirmative action and federalism).

Preiser, Peter, *Rediscovering a Coherent Rationale for Substantive Due Process*, 87 Marquette L. Rev. 1 (Fall 2003).

Spaht, Katherin Shaw, *The Last One Hundred Years: The Incredible Retreat of Law from the Regulation of Marriage*, 63 La. L. Rev. 243 (Winter 2003).

Spindelman, Marc, *Discriminating Pleasures*, ch. 14 in *Directions in Sexual Harassment Law*, edited by Catharine A. MacKinnon and Reva B. Siegel (Yale Univ. Press, 2003) (applies Queer Theory approach to analysis of doctrinal developments in sexual harassment law).

Stein, Nan, *Bullying or Sexual Harassment? The Missing Discourse of Rights in an Era of Zero Tolerance*, 45 Arizona L. Rev. 783 (2003).

Strasser, Mark, *An Analysis of the Federal Constitutional Right to Same-Sex Marriage*, 19 Constitutional Commentary 761 (Winter 2002).

Valdes, Francisco, *Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education*, 10 Asian L. J. 65 (May 2003).

Student Articles:

Rudolf, Beate, *European Court of Human Rights: Legal Status of Postoperative Transsexuals*, 1 Int'l J. Of Const. L. 716 (2003).

Clark, Matthew, *Stating a Title VII Claim for Sexual Orientation Discrimination in the Workplace: The Legal Theories Available After* Rene v. MGM Grand Hotel, 51 UCLA L. Rev. 313 (Oct. 2003).

Supreme Court, 2002 Term: Leading Cases Constitutional Law Intimate Personal Relationship, 117 Harv. L. Rev. 297 (Nov. 2003) (student article about *Lawrence v. Texas*).

Specially Noted:

Vol. 11, No. 3 of the William and Mary Bill of Rights Journal (April 2003) includes a symposium on "The Relationship Rights of Children." This is an emerging doctrine in the area of child custody and visitation that has surfaced in some cases involving gay parents, who are asserting that their children have a right to a continued relationship with them in the child's best interest. ••• Inexplicably, a previously unpublished trial court decision from 1998, declaring the Maryland sodomy law to be unconstitutional, has been added to the Westlaw database. *Williams v. Glendening* can now be found at 1998 Westlaw 965992 (Md. Cir.Ct. 1998). Perhaps Westlaw editors have decided that in light of *Lawrence v. Texas* it would be good to make available previously unpublished state sodomy law decisions that might be frequently cited by law journal article authors in the next few years who are writing about this subject.

AIDS & RELATED LEGAL ISSUES:

Burris, Scott, Steffanie A. Strathdee, and Jon S. Vernick, *Lethal Injections: The Law, Science, and Politics of Syringe Access for Injection Drug Users*, 37 U. S.F. L. Rev. 813 (Summer 2003).

Hoffman, Sharona, *Corrective Justice and Title I of the ADA*, 52 Amer. Univ. L. Rev. 1213 (2003).

Malloy, Sister Elizabeth Wilborn, *The Interaction of the ADA, the FMLA, and Workers' Compensation: Why Can't We Be Friends?*, 41 Brandeis L.J. — U. Of Louisville 821 (2003).

Miller, Commissioner Paul Steven, *Reclaiming the Vision: The ADA and Definition of Disability*, 41 Brandeis L.J. — U. Of Louisville 769 (2003).

Spectar, J.M., *The Olde Order Crumbleth: HIV-Pestilence As a Security Issue & NEW Thinking About Core Concepts in International Affairs*, 13 Indiana Int'l & Comp. L. Rev. 481 (2003).

Student Articles:

Goldfarb, Tobey E., *Abstinence Breeds Contempt: Why the U.S. Policy on Foreign Assistance for Family Planning is Cause for Concern*, 33 Calif. Western Int'l L.J. 345 (Spring 2003).

Green, Kelly, *Physician Assisted Suicide and Euthanasia: Safeguarding Against the "Slippery Slope": The Netherlands v. the United States*, 13 Indiana Int'l & Comp. L. Rev. 639 (2003).

Mullin, Thomas F., *AIDS, Anthrax, and Compulsory Licensing: Has the United States Learned Anything? A Comment on Recent Decisions on the International Intellectual Property Rights of Pharmaceutical Patents*, 9 ILSA J. Of Int'l & Comp. L. 185 (Fall 2002) (Nova Southeastern University Law Center).

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. ••• The January 2004 issue of *Law Notes* will be slightly delayed due to the Editor's planned trip to Israel for the last ten days of December. It will be published during the week beginning January 11.