NEW YORK'S HIGHEST COURT EMBRACES DISPARATE IMPACT ANALYSIS IN UNIVERSITY GAY PARTNER HOUSING DISPUTE

In a unanimous decision that could significantly expand the effectiveness of state and local laws barring discrimination on the basis of sexual orientation, the New York Court of Appeals ruled on July 2 in *Levin v. Yeshiva University*, 2001 WL 735762, that lower courts erred in dismissing a claim that Yeshiva violated New York City's anti-discrimination ordinance when it refused to allow to lesbian medical students to live in University housing with their same-sex partners. One member of the court, Chief Judge Judith Kaye, would have gone even farther than her colleagues and also sustained a cause of action for marital status discrimination in violation of both state and city human rights laws.

The case arose in 1998 when Sara Levin and Maggie Jones, both first-year medical students at Yeshiva's Einstein College of Medicine, applied for student housing, requesting that their partners be allowed to live with them. Einstein, which is located in the Bronx, provides subsidized housing for medical students, their legal spouses and their minor children. Strictly applying their eligibility rules, college officials denied the applications, and offered to assign Levin and Jones to share apartments with other "single" students. After spending some time living apart from their partners, both women decided to abandon University housing and rent apartments in which they could live with their partners. However, due to the housing situation in the neighborhoods surrounding Einstein, both women found it necessary to rent elsewhere, incurring higher rents and commuting expenses.

The students went to the ACLU Lesbian and Gay Rights Project complaining of this discrimination. James Esseks, then in private practice, took on the case under the aegis of the ACLU as a cooperating attorney, and argued the ultimate appeal before the Court of Appeals. (The ACLU recently announced that Esseks will join the Project Staff as Litigation Director.) Their suit was filed in New York Supreme Court, New York County (where the University is headquartered), but was dismissed on motion by Justice Franklin Weissberg, who was affirmed by the Appellate Division, First Department.

Both Weissberg and the Appellate Division found that the state's "Roommate Law," Real Property Law section 235–f, does not apply to transient student housing, that Yeshiva was not engaging in marital status discrimination in violation of state and local law (noting the narrow interpretation of marital status discrimination in New York precedents, which had previously upheld lease provisions excluding unrelated partners and employer anti-nepotism policies), and that the school's policy did not have a disparate impact on same-sex partners in violation of the city human rights law. The lower courts conducted their disparate impact analysis by concluding that unmarried same-sex partners are not similarly-situated to marital partners, and thus the only appropriate comparison for determining disparate impact is between same-sex and opposite-sex unmarried partners, who are similarly excluded from Yeshiva's housing. Viewed that way, the policy appeared to the courts to have no disparate impact based on sexual orientation. When the plaintiffs pointed out that the state forbids same-sex couples from marrying, the courts' response was that the plaintiffs' argument was with the state legislature, not the court or the university.

Six of the seven members of the Court of Appeals agreed with the lower courts that the Roommate Law does not apply to this case and that the marital status discrimination provisions are not violated by Yeshiva's policy. Writing for the court, Judge Carmen Ciparick found the matter "settled" by the court's prior rulings in *Matter of Pizza Hut v. N.Y. S. Human Rights Bd.*, 51 N.Y.2d 506, and *Hudson View Properties v. Weiss*, 59 N.Y.2d 733. "As we held in *Matter of Pizza Hut*, and then again in *Hudson View*, for purposes of applying the statutory proscription, a distinction must be made between the complainant's marital status as such, and the existence of the complainant's disqualifying relationship — or absence thereof — with another person. Just as the lease provision in *Hudson View* did not turn on the marital status of the tenant, but instead validly limited occupancy to only those in a legal, family relationship with the tenant, AECOM's housing policy is restricted to those in legally recognized, family relationships with a student, not the student's marital status."

Chief Judge Kaye dissented from this portion of the ruling, finding that the court's 1989 decision in *Braschi v. Stahl Associates Co.*, 74 N.Y.2d 201, recognizing same-sex partners as family members under the rent control regulations, provided a basis for distinguishing *Hudson View*. She argued, "AECOM permits married students to live in student housing with their partners; only unmarried students are denied this benefit. When plaintiffs applied for housing for their partners, the sole question asked by AECOM was whether they were married. Since plaintiffs could not present marriage certificates, they were denied access to the housing benefits they sought. For present purposes, these allegations state a claim of discrimination based on marital status… At the very least, it is a question of fact whether plaintiffs' life partners qualify as members of their 'immediate families.' If they do, the State and City Human Rights Laws prohibit AECOM from denying them housing merely because they are unmarried. Since discovery and factfinding on this issue are necessary, the lower courts improvidently granted AECOM's motion to dismiss." But she did not persuade any other members of the court, possibly because their disposition to rule for the plaintiffs could be expressed through the narrower mechanism of the city sexual orientation discrimination law.

Judge Ciparick decisively rejected the disparate impact analysis that the lower courts had used to dispose of the case. She pointedly observed that the city council had amended the human rights law in 1991 (at about the same time as Congress was amending Title VII along similar lines) to expressly add a provision on disparate impact claims. Under N.Y.C. Admin. Code sec. 8–107[17][a][1]-[2], she wrote, "a claim is established where a plaintiff demonstrates that a defendant's policy or practice 'results in a disparate impact to the detriment of any group protected' under the City Human Rights Law." Ciparick noted that "how impact is measured is obviously a critical determination."

She turned to the progenitor of federal disparate impact theory under Title VII, *Griggs v. Duke Power Co.*, 401 U.S. 424, as her exemplar. In that case, the court held that diploma and education requirements instituted by the employer as of the effective date of Title VII, which had the effect of disproportionately disqualifying black applicants and employees from attaining various positions, would be considered unlawfully discriminatory unless the employer could prove that they were necessary for the conduct of its business (i.e., imposed requirements that were necessary for the performance of the jobs in question). In *Griggs*, the court asked whether the particular policy disqualified people of color at a significantly higher rate than other applicants or employees for the jobs in question. "Here," Judge Ciparick noted, "the Appellate Division held that, as a matter of law, AECOM's housing policy did not have a dis-

Editor: Prof. Arthur S. Leonard, New York Law School, 57 Worth St., NY, NY 10013, 212–431–2156, fax 431–1804; e-mail: asleonard@aol.com or aleonard@nyls.edu

Contributing Writers: Fred A. Bernstein, Esq., New York City; Elaine Chapnik, Esq., New York City; Ian Chesir-Teran, Esq., New York City; Alan J. Jacobs, Esq., New York City; Steven Kolodny, Esq., New York City; Todd V. Lamb, Esq., New York City; Mark Major, Esq., New Jersey; Sharon McGowan, Esq., New Orleans, LA; Tara Scavo, Student, New York Law School '03; Daniel R Schaffer, New York City; Travis J. Tu, Student, New York University Law School '03; Robert Wintemute, Esq., King's College, London, England.

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

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

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

$55/yr by subscription

Canadian Rate $60; Other Int'l Rate US$70 ISSN 8755–9021 Summer 2001

parate impact on plaintiffs on the basis of sexual orientation. It reached that conclusion by also ruling as a matter of law that married students had to be excluded from consideration for purposes of comparison between the benefitted and excluded classes. We conclude that the court erred in dismissing the complaint on that basis."

"The exclusion of married students from the necessary comparison group conflicts with controlling disparate impact methodology and analysis. Self-evidently, married students make up a significant portion of the very class of persons made eligible by AECOM's policy for the substantial economic and social benefits of cohabiting with non-students in university-owned housing. In no presently authoritative precedent, either Federal or from our Court, has a plaintiff in a disparate impact discrimination case been precluded from pointing to the composition of the class of persons rendered eligible for benefits under the challenged policy at issue. Excluding a large portion of the class benefitted by this policy from the disparate impact comparison group would render the disparate impact analysis articulated in *Griggs* meaningless. To illustrate, the result in *Griggs* would have been entirely different had the plaintiffs been prevented from analyzing the racial composition of those actually offered employment under the company's hiring policy requiring successful test completion and/or a high school diploma. As a result, just as in the Appellate Division's ruling here, the only comparison would have been between those African-American and white persons without high school diplomas or passing test scores. And, since 100% of both classes were not the recipients of favorable treatment, no disparate impact would have been established, thereby frustrating Congressional policy as applied to that case."

Ciparick rejected Yeshiva's reliance on *Hudson View* in this connection, finding that the earlier case, while dispositive of the marital status claim, was essentially irrelevant to the sexual orientation discrimination claim: "It does not… determine the question of whether the same policy would constitute prohibited disparate treatment or disparate impact based upon sexual orientation or, indeed, discrimination against any other statutorily protected class. Thus, if AECOM had limited cohabitational university housing to married students of a particular race and their non-student spouses, such a policy would arguably be 'lawful' with respect to marital status discrimination under *Hudson View*, since it would be based upon the relationships and characteristics of the particular partners, not upon their marital status as such. No one would serious contend, however, that such apolicy would not constitute illegal discrimination based upon race. Likewise here, the legality of AECOM's policy with respect to a martial status discrimination claim cannot insulate it from a sexual orientation discrimination claim."

Ciparick was too polite to say it, but she clearly found Yeshiva's alternative defense argument totally ludicrous. In effect, Yeshiva argued that the policy could not be attacked using disparate impact theory because it was not *facially neutral*. Ciparick rejected this notion, observing that if the court "were to accept defendants' proposition that AECOM's housing policy lacks facial neutrality 'vis a vis sexual orientation,' then AECOM would be compelled to acknowledge this its policy was facially discriminatory and, thus, in direct violation of the City's Human Rights Law on the basis of disparate treatment, without the necessity of establishing disparate impact."

Ciparick also noted Yeshiva's reliance on one of the U.S. Supreme Court's most famously-overruled opinions, *General Electric Co. v. Gilbert*, 429 U.S. 125, in which that Court rejected the plaintiffs' argument that a benefits policy that excludes coverage for pregnancy has a disparate impact on the basis of sex because there are both pregnant and non-pregnant women who participate in the benefits plan. Congress immediately overruled *Gilbert* by passing the Pregnancy Discrimination Act. In so doing, Congress specifically rejected, in the legislative history of the PDA, the Supreme Court's reasoning in *Gilbert*. Ciparick found the same reasoning unavailing here. "Just as in *Gilbert*, the attempt here is to extract married medical students — the very group benefitted by AECOM's housing policy — from consideration in any disparate impact analysis thereby obscuring any realistic examination of the discriminatory effects of that policy."

Of course, since the case went of the Court of Appeals from a motion to dismiss, there is no trial record in the case, which was argued assuming the truth of the factual allegations in the complaint. The case now gets remanded to the trial level, where one presumes settlement negotiations will ensue and Yeshiva, unless it has an undying yen for prolonged litigation, will probably settle by changing its rules to reflect those of such neighboring institutions as Columbia and N.Y.U., which have welcomed same-sex partners in university housing for years.

Of more significance than this individual case, however, is the theoretical implication embodied in the opinion for future litigation. Having rejected a standard formulation that many appellate courts have used to dispose of gay-partner equity claims, the Court of Appeals has opened the door to demands for a wide variety of benefits for same-sex partners, cabined only by the unfortunate cloud of omnipresent ERISA preemption when the subject matter is an ERISA-defined "employee benefit or pension plan" maintained by a private sector employer. But for the thousands of same-sex partners living in New York City, the decision in *Levin* provide a green light to demand that employers recognize such partners for purposes of all non-ERISA benefits, and to make similar demands on all businesses that provide benefits to consumers.

The tenor of such claims is foreshadowed in the concurring opinion by Judge George Bundy Smith. Smith was not convinced by Ciparick's use of *Griggs* as the basis for her analysis, preferring to rest directly on the legislative purpose of the city council's amendment adding the disparate impact theory to the local human rights ordinance. "[T]here is another interpretation of Section 8–107(17) that supports plaintiffs' position," he wrote. "It is that the legislation is designed to secure for unmarried, committed couples the same benefits as those enjoyed by married persons. Thus, under the legislation, same-sex couples who are in committed relationships would be able to secure housing and other benefits on the same basis as married couples. The language of sec. 8–107 supports this interpretation." Significantly, Judge Smith cites in support of this point *Baker v. State of Vermont*, 744 A.2d 864, the case in which the Vermont Supreme Court ruled that same-sex couples are entitled to all the rights and benefits afforded by the state to married couples under the state constitution's equal benefits provision. Smith's implication is clear: by enacting sec. 8–107(17), New York City sought similarly to empower its same-sex couple residents. A.S.L.

LESBIAN/GAY LEGAL NEWS

San Francisco Contractor Benefits Ordinance Survives 9th Circuit Challenge

San Francisco has won another round in the battle to defend its Ordinance 12B, which requires all parties who wish to do business with the city to provide domestic partner benefits that are equivalent to those offered to the spouses of their heterosexual employees. *S.D. Myers, Inc. v. City and County of San Francisco*, 2001 WL 664233 (June 14). The U.S. Court of Appeals for the 9th Circuit sustained the provision against charges that it violated the Dormant Commerce Clause, 14th Amendment Due Process, and the California Constitution, and refused to entertain the claim that the Ordinance was preempted by ERISA. The Court of Appeals did, however, remand the case so that the trial court could consider whether the city's policy had been preempted by the state's recently-enacted Domestic Partnership Law.

In 1997, San Francisco codified its long-standing policy not to do business with entities that discriminate on the basis of sexual orientation by passing Ordinance 12B. Pursuant to this statute, contractors with the city must provide the same bereavement leave, family medical leave,

health benefits, membership discounts, moving expenses, pension and retirement benefits, travel benefits and any other benefits associated with working at the company to domestic partners of their employees as are provided to spouses. The Ordinance's non-discrimination requirement covers not only the contractor's operations within the city, but also any operations on land outside of San Francisco if the property is owned or controlled by the city and the contractor's presence at that location is connected to a contract or property contract with the city, as well as any other location in the United States where the contract is being performed. The city may fine any contracting company that violates the ordinance $50 per day for each employee affected by the discrimination, and may also terminate the contract for breach of these terms. Furthermore, under the Ordinance, the offending company may be deemed an "irresponsible bidder" and be barred from contracting with the city for up to two years.

S.D. Myers, Inc., an Ohio-based corporation, bid on a servicing contract for city-owned electrical transformers located in Tuolomne County, California. Although Myers was the lowest bidder, it was denied the contract because it refused to certify its willingness to comply with the Ordinance. Myers insisted that compliance was "contrary to the religious and moral principles adhered to by the corporation," and sued to have the Ordinance declared invalid.

On cross-motions for summary judgment, U.S. District Judge Claudia Wilken upheld the Ordinance, with the exception of the provision requiring a contractor to abide by the city's nondiscrimination policy at "any of the contractor's operations elsewhere within the United States." Judge Wilken rejected Myers' arguments that the Ordinance was invalid under the Commerce Clause, Due Process Clause, and the California Constitution. She further ruled that Myers did not have standing to argue ERISA preemption, because Myers' express refusal to provide non-ERISA benefits to the domestic partners of its gay employees would render Myers ineligible for a city contract even in the face of a favorable ruling on the ERISA question, rendering any decision on that issue advisory. Myers appealed.

Judge Wallace, writing for the appellate panel, first addressed Myers' Commerce Clause argument. The Court assumed without deciding that the city was attempting to regulate, rather than merely participate in the market, meaning that the Ordinance had to be tested under a more exacting standard. Even using this more demanding analysis, he rejected Myers' argument that the ordinance was facially invalid. As a preliminary matter, the panel dismissed Myers' suggestion that the court adopt a less stringent test than the *Salerno* standard, which holds that a statute must be upheld against a facial attack if there is any set of circumstances under which the enactment could pass constitutional muster. Although Myers maintained that the Ordinance impermissibly regulated interstate commerce in a direct manner by requiring out-of-state contractors to provide equal benefits to all employees, regardless of where the employees were located, the court pointed out that nothing in the language of the Ordinance explicitly or implicitly targeted out-of-state entities or entities engaged in interstate commerce. Furthermore, reading the Ordinance narrowly, the court determined that a business would only be subject to its requirements when conducting its normal operations in San Francisco proper or when working on a specific city contract, either within or outside the city limits. Even though the court had assumed that the city was acting as a market regulator, rather than as a market participant, the court found it significant that the Ordinance's requirements only came into play through contract, rather than legislative fiat. Finally, the panel refused to invalidate the Ordinance based on Myers' speculation that other municipalities might enact conflicting legislation, which would make it impossible for an entity to comply with the regulations of San Francisco and the other jurisdiction. Judge Wallace emphasized that, in previous cases where legislation had been invalidated on this basis, there either were conflicting statutes already in place or there was legislation pending, making the threat of conflicting legislative regimes imminent rather than merely speculative.

Myers argued in the alternative that Ordinance 12B should be struck down as applied in this case because the burden it imposed upon interstate commerce would be clearly excessive in relation to the benefits that would accrue to the city. While acknowledging that the defendant would not be required to calculate a specific dollar estimate representing the effect of the Ordinance, the court insisted that it needed some "specific details" as to how the Ordinance supposedly burdened interstate commerce before striking down the provision on this basis. The court also rejected Myers' contention that any benefits of the policy were illusory simply because the Ordinance contained a "sole source" exemption, which allowed the policy's requirements to be lifted if the only entity able to provide the necessary goods or services, such as a broker selling unique pieces of art, refused to do business with the city otherwise. The court noted that the exemption was a "rational response" to the problems that might arise for the city as a result of the Ordinance, and admonished that the city "need not strike at all evils at the same time." Therefore, Myers' claim that the Ordinance was invalid facially and as applied as a result of the Dormant Commerce Clause were rejected in their entirety.

The court next addressed Myers' contention that its due process rights had been violated because the city was essentially "impos[ing] economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." The court, on the other hand, determined that even though noncompliance had adverse economic consequences, Myers' characterization of the Ordinance as imposing economic sanction was inappropriate. Judge Wallace rejected Myers' analogy to the punitive damages provision struck down by the Supreme Court in *BMW v. Gore*, 517 U.S. 559 (1996), noting that, whereas punitive damages are imposed on unwilling defendants, the breach of contract provisions of the Ordinance would only apply to those parties who had voluntarily consented to be bound to those terms. Even assuming that the Ordinance's requirements resulted in the imposition of economic penalties, the panel ruled that because the Ordinance has been construed as operating only in the city, on city-owned property or as to employees working on city contracts, the Ordinance was adequately supported by the "[c]ity's interest in protecting its own consumers and its own economy."

Turning to issues of state law, the court first remanded the question of whether California's newly enacted Domestic Partner Registration Law conflicted with, and thereby preempted, San Francisco's Ordinance. The Domestic Partner Registration law, codified in Division 2.5 of the California Family Code, delineates certain rights and responsibilities that accrue to same-sex domestic partners who register with the state. Section 299.6 provides that it shall preempt any local domestic partnership provision. However, the Domestic Partner Registration statute specifically preserves the right of localities to pass laws, ordinances or policies that offer broader protection to domestic partners. As these new Family Code provisions had not yet been signed into law at the time the district court ruled on Myers' claims, the Court of Appeals refused to consider Myers' arguments on this question, preferring instead to give the district court the first opportunity to analyze the relationship of the new law to San Francisco's Ordinance.

The court rejected Myers' second challenge under state law on the merits, determining that San Francisco had not legislated beyond its constitutional authority when it passed the Ordinance. The court first observed that California jurisprudence limits the regulatory power of a municipal government to its own municipal limits, or to property owned by the municipality. The city's proprietary powers, however, included the ability to enter into commercial transactions and relationships. In assessing this ground for attack, the panel relied upon a 1981 California Court of Appeals decision sustaining the earlier version of the Ordinance, which required contractors not to discriminate, inter alia, on the ground of sexual orientation in their employment practices. As in that case, the Ninth Circuit panel found that the present Ordinance was a permissible exercise of the city's contracting power. Regardless of whether the Ordinance was characterized as an anti-discrimination statute or as a legislative affirmation of homosexual relationships, the panel determined that the city had properly exercised

its regulatory authority in conjunction with its proprietary powers within permissible limits. The court observed that Myers' dissatisfaction was with the city's mode of contracting (i.e., its refusal to contract with parties who did not meet particular requirements) rather than the subject matter of any particular municipal contract. However, Myers' objections on this basis were without merit because "under current California law, the [c]ity's chosen mode of contracting is a municipal affair over which the [c]ity may exercise its authority without violating the California constitution."

Finally, the court affirmed the district court's decision to dismiss Myers' ERISA challenge for lack of standing. Myers' stipulation that it would provide neither ERISA nor non-ERISA benefits to the domestic partners of its employees meant that any ruling on the question of ERISA preemption would be merely an advisory opinion because, even if the Ordinance had only required Myers' to provide non-ERISA benefits to its employees, avoiding a preemption question entirely, Myers had already made clear that it would not comply with that requirement either, rendering Myers ineligible for any contract with the city.

Although the Ordinance must still go through another round of challenges on the issue of whether the state-wide Domestic Partnership Registration Law has preempted the ability of San Francisco to enact such progressive legislation, and might, in other litigation, still be subject to challenge on ERISA-preemption grounds, the opinion of the Ninth Circuit marks a resounding victory for the supporters of Ordinance 12B. Participating in this case as amicus in support of San Francisco were Matt Coles of the ACLU's Lesbian and Gay Rights Project, Robert Kim of the California ACLU, and Jennifer Pizer from Lambda Legal Defense and Education Fund. *Sharon McGowan*

Arkansas Supreme Court Upholds Exclusion of Lesbian Domestic Partner From Joint Residence as Condition of Custody

In a unanimous June 21 decision in *Taylor v. Taylor*, 2001 WL 723145, the Arkansas Supreme Court affirmed an order by Saline County Chancellor Robert W. Garrett premising the continued custody of her children by Linda Taylor on excluding Taylor's domestic partner, Christina Richards, from residing in the family home.

Linda and Chris Taylor divorced in 1998, the chancery court awarding joint custody of their two daughters, the younger of whom suffers a developmental disability that may be autism. In 1999, Chris petitioned the court for sole custody, charging that Linda was "cohabitating" with a lesbian partner. The chancellor granted a temporary order requiring Christina to move out of the house and not be present as an overnight guest when the children were there. But Linda, whose job required occasional night-shift work, asked Christina to stay over with the children on nights when Linda had to work. When Chris found out about this, he asked the court to hold Linda in contempt.

At the custody hearing, Linda sought to introduce evidence from a variety of experts, including two on the parenting issues of dealing with developmentally disabled children, and one on parenting by same-sex partners. The chancellor refused to allow these experts to testify, hearing testimony only from a court-appointed psychologist, who recommended barring Christina from living in the house. Chancellor Garrett also refused Linda's request to delay the hearing until the younger daughter's disability could be evaluated and properly diagnosed.

Garrett ruled that Linda was better suited to primary custody than Chris, but that her custody should be premised on the continued exclusion of Christina from living in the house, relying on earlier Arkansas appellate precedents that required single mothers to exclude their male lovers from staying overnight. Garrett did bow to the practical problem of Linda's nightshift work by ruling that Christina could help out on those occasions, but insisted that she could not maintain her residence in the house that she and Linda had jointly purchased.

Linda appealed the ruling, raising for the first time on appeal a constitutional argument: that treating Linda and Christina's settled relationship the same as a heterosexual mother with a series of male lovers was as Equal Protection violation. Writing for the unanimous Supreme Court, Justice Tom Glaze asserted that since Linda had not raised this issue before the Chancellor, it was waived on appeal.

Glaze also saw no reason not to apply prior Arkansas precedents in support of Garrett's order. "Arkansas's appellate courts have steadfastly upheld chancery court orders that prohibit parents from allowing romantic partners to stay or reside in the home when the children are present," he wrote, citing to *Campbell v. Campbell*, 985 S.W.2d 724 (Ark. 1999). "The *Campbell* court stated that the purpose of the overnight-guest order is to promote a stable environment for the children and is not imposed merely to monitor a parent's sexual conduct. Linda does not seek to overturn these decision, but tries to distinguish them from the facts here. For example, Linda asserts no evidence has been presented that she has engaged in promiscuous or illicit behavior with Christina Richards in the presence of the children. Linda's argument, however, misses the point. As emphasized by our court's earlier decisions, the trial court's use of the non-cohabitation restriction is a material factor to consider when determining custody issues. Such a restriction or prohibition aids in structuring the home place so as to reduce the possibilities (or opportunities) where children may be present and subjected to a single parent's sexual encounters, whether they be heterosexual or homosexual."

Of course, it was Glaze who was missing the point. If the court's standard for child custody is the best interest of the child, a situation involving a stable, cohabiting lesbian couple is entirely distinguishable from a situation involving a single heterosexual parent who allows an "overnight guest" of the opposite sex to stay over from time to time. And the recent census figures on non-marital cohabitation make clear that the court's continued indulgence of its established precedent is out of step with current social arrangements.

Perhaps even more disturbing is the court's "don't bother us with the facts" response to Linda's arguments about the expert witnesses. Linda contended that Chancellor Garrett erred by refusing to allow the various experts to testify, or to postpone the hearing until the younger daughter's disability could be properly evaluated. Linda sought to show the court that the children would be benefited by the presence of a second full-time live-in parent, and especially that the younger child's need for a continuing, stable adult presence would be assisted if the person who stayed overnight during Linda's night-shift work was a co-parent-in-residence rather than a sporadic visitor. The Supreme Court was having none of this, however, single-mindedly insisting that since the precedents allow the chancellor to exclude any non-marital adult partner from the residence, evidence on this point is essentially irrelevant.

The Supreme Court affirmed the chancellor's order, pointedly noting that if Linda failed to comply with the requirement that Christina not live in the house, custody of the children would revert to Chris.

The unspoken factor looming over this case, of course, is the pending challenge to Arkansas's sodomy law. Although never mentioned by Glaze in his opinion for the court, the existence of the state's same-sex sodomy law certainly bolsters the court's implicit characterization of Linda and Christina's relationship as "promiscuous" or "illicit." On March 23, Pulaski County Circuit Judge David Bogard ruled in *Picado v. Jegley*, CV 99–7048, a test case brought by Lambda Legal Defense Fund, that the sodomy statute violates the Arkansas constitution on privacy and equal protection grounds. This decision is now on appeal by the state. Reading tea-leaves in these matters is always precarious, but the outcome in *Taylor v. Taylor* does not appear to bode well for success in the sodomy law appeal. A.S.L.

New Jersey Appellate Division Finds Civil Rights Law Covers Discrimination Against Transsexuals

A unanimous 3–judge panel of the New Jersey Appellate Division has ruled that a person who encounters employment discrimination because she is transgendered may have two alternative theories for suit under the state's Law Against Discrimination, NJSA 10:5–1 through 49 (LAD):

sex discrimination or disability discrimination. Reversing the Superior Court's dismissal of two complaints filed by Carla Enriquez, the court ordered that her sex discrimination claim be allowed to proceed, that she have the opportunity to present appropriate evidence in support of her disability discrimination claim (if she wants to pursue it), and that she also be able to proceed with certain common law claims against her former employers. *Enriquez v. West Jersey Health Systems*, 2001 WL 741271 (July 3, 2001).

Born Carlos Enriquez, the plaintiff is a licensed New Jersey physician who conducted a private medical practice as a pediatrician from 1974 to 1995, at which time he was hired by West Jersey Health Systems to be the medical director of the West Jersey Center for Behavior, Learning and Attention. Enriquez had a written employment agreement that was terminable by either party on 90 days notice. Enriquez, who was married to Monica, had long experienced uneasiness about her gender, and finally began the first visible steps of transformation in September 1996, beginning to assume a feminine appearance and growing breasts through hormone treatments. She also began wearing her hair in a pony tail and wearing more feminine attire. Monica, who Enriquez claimed in court papers is a lesbian, was happy to be married to Enriquez as she made the transformation from Carlos to Carla. But her employers were not so happy; on February 13, 1997, John Cossa, West Jersey's Vice President who was also the head of West Jersey Phyisicians' Associates, a new entity that was planning to take over control of the Center that fall, confronted Enriquez about her appearance and asked if she would be willing to back to her prior appearance if required to do so by her employer. Cossa specifically told Enriquez to "stop all this and go back to your previous appearance!"

In June 1997, Dr. William Stayton, an expert in gender dysphoria treatment, formally diagnosed Enriquez as having gender dysphoria according to the criteria set out in DSM-IV, the official compilation of mental disorders published by the American Psychiatric Association. On July 22, 1997, Enriquez received a letter announcing that her employment would be terminated in 90 days, and that Physician's Associates would be assuming control of the Center at that time. Enriquez was advised that she would be contacted by Cossa to discuss a contract with the new entity running the Center. She tried repeatedly to contact Cossa over the next two months without success, but finally met with him on September 29. According to Enriquez, Cossa stated at that time that "no one's going to sign this contract unless you stop this business that you're doing." Enriquez and Cossa met again on October 13, at which time Enriquez gave Cossa a draft of a letter she had prepared, explaining her gender dysphoria to her patients and employer. At that time, she had not sent the letter to anyone. Cossa asked her not to say anything about this and let him work things out. But on October 22, Cossa handed Enriquez a termination letter, stating that Physicians' Associates had made arrangements with other doctors and would not need Enriquez's services, and further that Enriquez was not to send her letter to patients, but the Center would inform patients about arrangements to continue their care. Enriquez was also instructed not to return to her office.

Enriquez alleges that subsequently the Center contacted patients and told them she had disappeared and was probably no longer practicing medicine. Actually, she continued to practice, and retained about half of the patients she had been seeing at the Center. In February 1998, she legally changed her name to Carla, and had her sex reassignment surgical procedure performed in July 1998. In December 1998, she filed her first lawsuit against the Center and Physicians' Associates, alleging discrimination on the basis of gender, sexual orientation and disability, as well as breach of contract and trade libel. She subsequently filed a second complaint, alleging intentional interference with contractual relations, conspiracy, wrongful refusal to continue a business, and unjust enrichment. Ultimately, the trial court dismissed all of her claims, finding that gender dysphoria is not covered as a disability under New Jersey law, and that a discrimination claimed by a transsexual is neither sex nor sexual orientation discrimination within the meaning of the law. The trial court's decision on this point was in accord with a majority of the state courts that have dealt with the issue.

Writing for the Appellate Division panel, Judge Steven Lefelt found that the New Jersey Law Against Discrimination differs in relevant ways from other state and federal discrimination laws, making Enriquez's sex and disability discrimination claims both potentially actionable. However, the sexual orientation discrimination claim was not actionable; Enriquez never alleged that she was perceived by her employer as being gay or lesbian, or that she was discriminated against due to her erotic orientation towards women.

Enriquez had alleged discrimination on account of her "gender." The court noted that the statute does not use the term "gender," rather forbidding discrimination on the basis of "sex," so the interpretive question posed was whether the ban on sex discrimination should be broadly construed to comprehend discrimination against somebody because their gender did not accord with their anatomical sex at birth and they were taking steps to bring these elements into accord. Federal courts have historically refused to recognize such discrimination under Title VII, but Judge Lefelt noted that since *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), embraced the idea that Title VII applies to cases of gender stereotyping, some federal courts had begun taking a more expansive view, most particularly in *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) and *Rosa v. Park West Bank & Trust Co.*, 213 F.3d 213 (1st Cir. 2000), in which claims of gender discrimination, broadly defined to include transgender or cross-dressing individuals, were found to state claims under the sex-based provisions of the Violence Against Women Act and the Equal Credit Opportunity Act.

The court noted that most state courts construing sex discrimination laws had also been hostile to discrimination claims by transsexuals, but found those ruling unpersuasive compared to the New York trial court ruling in *Maffei v. Kolaeton Industries, Inc.*, 626 N.Y.S.2d 391 (Sup.Ct., N.Y. Co. 1995), which found a transsexual discrimination claim actionable where a state law prohibited sex discrimination and a city ordinance prohibited discrimination based on gender and sexual orientation.

Lefelt wrote, "A person who is discriminated against because he changes his gender from male to female is being discriminated against because he or she is a member of a very small minority whose condition remains incomprehensible to most individuals. The view of sex discrimination reflected in these decisions [i.e., the earlier, negative decision] is too constricted." After noting the *Maffei* decision, and the recent decision in *Goins v. West Group*, 619 N.W.2d 424 (Minn.App. 2000), interpreting the Minnesota Human Rights Law to forbid discrimination against a transsexual, Lefelt stated, "We conclude that the reasoning reflected in *Goins*, *Maffei*, as well as *Price Waterhouse*, *Schwenk*, and *Rosa* is more closely connected to our own state's historic policy of liberally construing the LAD… There is also some New Jersey support for the position that precluding discrimination on the basis of sex also precludes gender discrimination," noting *Zalewski v. Overlook Hospital*, 300 N.J. Super. 202 (Law Div. 1996), which adopted the view that gender stereotyping violates the LAD in a case where a male employee was being harassed by other males because they perceived him to be a virgin!

The court concluded "that 'sex' embraces an 'individual's gender,' and is broader than anatomical sex," stating agreement with an old opinion by former New Jersey Supreme Court Justice Handler when he was serving on the Appellate Division, *M.T. v. J.T.*, 140 N.J. Super. 77 (App. Div.), cert. den., 71 N.J. 345 (1976). Wrote Lefelt, "The word 'sex' as used in the LAD should be interpreted to include gender, protecting from discrimination on the basis of sex or gender. It is incomprehensible to us that our Legislature would ban discrimination against heterosexual men and women; against homosexual men and women; against bisexual men and women; against men and women who are perceived, presumed or identified by others as not conforming to the stereotypical notions of how mena nd women behave, but would condone discrimination against men or women who seek to change their anatomical sex because they suffer from a gender identity disorder. We conclude that sex discrimination under the LAD includes gender discrimination so as to protect plaintiff from gender stereotyping and dis-

crimination for transforming herself from a man to a woman."

On the second theory, the court found that the New Jersey approach to defining disabilities for purposes of discrimination law is much broader than the approach taken by the federal goverment or most other states. New Jersey defines disabilities broadly to include diagnosable mental conditions, even if they do not directly prevent or affect the performance of major life activities. "As remedial social legislation, the LAD is deserving of a liberal construction, especially with regards to handicaps," wrote Lefelt. Noting that other state courts are split over the question whether transsexualism should be considered a disability under discrimination law, Lefelt commented, "Our problem with the out-of-state cases concluding that gender dysphoria is not a disability is that our statute is very broad and does not require that a disability restrict any major life activities to any degree… Our courts have held that the LAD recognizes as disabilities such conditions as alcoholism, obesity, and substance abuse. The LAD has thus been broadly and liberally construed to include what otherwise might be termed emotional or mental disorders, in order to eradicate the evil of discrimination in New Jersey."

Having concluded that gender dysphoria could be covered by the statute, the court was concerned that the proof Enriquez offered in opposition to the defendants' motions was "not clear regarding the quality and quantity of impairment plaintiff may have suffered from this disorder. While the LAD does not require proof that some major life activity was impaired, plaintiff must suffer a disability… Solely from the circumstances of plaintiff's course of treatment, we can infer sufficient impairment of plaintiff's emotional and mental well being to constitute a disability under the LAD. Plaintiff's proofs were adequate to at least raise a factual issue for summary judgment purposes establishing that her condition was a disability under the LAD… To constitute a handicap, however, the disability must also result 'from anatomical, psychological, physiological or neurological conditions which… is demonstrable … psychologically, by accepted clinical … diagnostic techniques. NJSA 10:5–5(q). The record is complete silent on this issue." Thus, on remand, it will be necessary, if Enriquez wishes to pursue the disability theory in addition to the sex discrimination theory, for her to put in more evidence. "Because the case must be remanded for trial on plaintiff's gender discrimination claim, we leave plaintiff to her proofs on whether she had gender dysphoria and whether her condition was diagnosed in a fashion sufficient to qualify as a handicap under the LAD."

Finally, the court turned to the common law claims. It agreed with the trial court that there was no breach of contract claim here, because Enriquez's written contract allowed for termination on 90 days notice for any or no reason, and the defendants had provided such notice. Enriquez had argued that she relied on the good faith of the defendants to negotiate with her over a new contract with the entity that was taking over the Center, but the court found that this does not amount to an actionable claim under New Jersey contract law, and that other aspects of the breach of contract claim were also unavailing for various reasons. However, the court agreed that her claim for trade libel should be reinstated, based on affidavits Enriquez had submitted from the parents of two patients stating that the defendants had lied to them about the status of Enriquez's medical license and practice following her termination. This states a prima facie case, although the court noted that Enriquez will have to show actual damages arising from this in order to recover on the claim. The court also opined that Enriquez should have a chance to add unjust enrichment and interference with economic advantage counts to her claim on remand, noting that the trial court had initially dismissed these claims based on a misperception of the validity of Enriquez's other claims.

Concluding with a ringing affirmation of the purpose of the LAD, Lefelt wrote, "The Legislature's goal is that only 'legitimate distinctions between citizens' be made. NJSA 10:5–3. Distinctions must be made on the basis of merit, rather than skin color, age, sex or gender, or any other measure that obscures a person's individual humanity and worth. This case represents another step toward achieving what has thus far been an elusive goal." A.S.L.

Mass. Supreme Court Approves "Reasonable Lesbian" Standard in Hostile Environment Harassment Case

Massachusetts' highest court, the Supreme Judicial Court, transferred a case driectly from the trial court on its own motion so that it could rule on disputed same-sex hostile environment sexual harassment jury instructions. The instruction in contention asked each juror to evaluate the claim as though he or she were an "objectively reasonable woman of lesbian orientation." The appeals court found this standard to be non-prejudicial in a case involving a lesbian supervisor allegedly harassing a lesbian employee, and in which the women may have engaged in consensual sexual activities. *Muzzy v. Cahillane Motors, Inc.*, 434 Mass. 409, 2001 WL 716940 (June 27).

Plaintiff Susan Muzzy started working in the sales, finance, and insurance department of Cahillane Motors, Northampton, MA, in August 1995. The manager of that department in the family-owned business was Deborah Cahillane. Both women were lesbians. Ms. Cahillane contended that she and Ms. Muzzy "had a brief romance outside of the workplace," that any sexual contact or language was by mutual consent, and that Ms. Muzzy never complained about it. Ms. Muzzy, on the other hand, called the activities "verbal and physical conduct of a sexual nature … which included inappropriate physical touching, degrading sexual conversation and comments, and unwelcome invitations and advances imbued with sexual overtones." The conduct took place both during and after work, according to Murray. In September 1996, Ms. Muzzy left her job because of the alleged harassment.

Cahillane Motors won summary judgment on a wrongful termination claim brought by Ms. Muzzy. Only the issue of sexual harassment was left for the jury to decide. The jury found that the defendant did *not* engage in sexual harassment. The plaintiff appealed, alleging that the "reasonable lesbian" jury instruction was prejudicial to her case.

The fact that both women are lesbians was never disputed. Justice Robert J. Cordy's opinion noted that the trial judge had ascertained during voir dire that each individual juror felt that he or she could be fair to lesbians.

Massachusetts statutes on sexual harassment do not refer to gender, only to "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." Mass. Gen. Laws ch. 151B, §§ 1(18). Massachusetts case law holds that "this definition encompasses a claim for sexual harassment brought by an individual claiming harassment by a member of the same gender." See *Melnychenko v. 84 Lumber Co.*, 676 N.E.2d 45, 48 (Mass. 1997).

Federal law also supports the illegality of same-sex sexual harassment: "In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target.…Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a *reasonable person in the plaintiff's position would find severely hostile or abusive. Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82 (1998) (emphasis added).

The Massachusetts court first used the language "reasonable person in plaintiff's position" in its decision in *Gnerre v. Massachusetts Comm'n Against Discrimination*, 402 Mass. 502, 507, 524 N.E.2d 84, 88 (1988).

The Massachusetts high court clearly stated that same-sex sexual harassment is unlawful in the state of Massachusetts. The question for the court was whether it is proper for the trial judge to "endow" the plaintiff in its jury charge with attributes such as sex, race, religion, or sexual orientation, which may trigger a juror's prejudices. The court looked at cases from various jurisdictions holding that a "reasonable woman" instruction was acceptable, that a "reasonable homosexual man" instruction passed muster, and that a "reasonable black person" instruction was satisfactory in a racial harassment case. On the other hand, some courts have rejected "reasonable Jew" and "reasonable African- American" in-

structions, as well as the "reasonable woman" instruction.

The Massachusetts court sided with the cases allowing attributes to be part of the jury instruction so long as: (1) "further refinements" to the "reasonable person" standard "must not reduce it to a *subjective* standard" (the court here emphasizing that the instruction's language was "an *objectively reasonable* woman of lesbian orientation") (emphasis added); (2) "the judge's instruction should not include any characteristics of the plaintiff that were not relevant to the claim"; and (3) "the judge should give serious consideration to a plaintiff's objection to an instruction that references particulars of the plaintiff's race, gender, sex, ethnicity, or sexual orientation."

Number 3, above, was the point of contention in this appeal. Before the judge had instructed the jurors, Ms. Muzzy's attorney had agreed with Cahillane Motors' attorney that the language "objectively reasonable woman of lesbian orientation" was appropriate. On that basis, the trial judge included the language in the jury instruction. However, once the instruction was delivered to the jury, but before the jury started deliberations, the plaintiff decided to object to the instruction based on individual jury members' apparent reactions to it. Ms. Muzzy's attorney was watching the jury as the instruction was given, and felt that it confused them. She then requested that the instruction be withdrawn and replaced with a "reasonable person" standard. The trial court, noting previous agreement to the instruction, let the instruction stand. Using the "reasonable lesbian" standard, the jury found in favor of the defendant that no actionable harassment had occurred.

In Massachusetts, a jury instruction objection may be made if a party "objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Mass. Rules Civ. Proc., 365 Mass. 816 (1974). Ms. Muzzy's appellate brief cites prejudice and confusion as reasons why the instruction was invalid and the verdict should be thrown out. Justice Cordy disagreed, noting that only the confusion rationale was raised when the plaintiff originally objected to the instruction. Justice Cordy did not find the instruction at all confusing. In addition, "[h]aving agreed to the instruction at [the] charge conference, having failed to object to it at two subsequent opportunities the next day, having waited until the arguments (which were premised on that agreed-on instruction) concluded, and having based her objection solely on counsel's general sense from viewing the jurors' faces that there might be confusion, we deem the plaintiff''s present objections (that the contextualized instruction was both erroneous and prejudicial) as having been waived."

The justice further held that the plaintiff's allegations that the "instruction was 'highly charged,'" that it "improperly 'shifted the focus onto the plaintiff's status as a lesbian,'" and that it "introduced the plaintiff's sexuality to and thereby 'tainted the jury,'" were meritless. "The record before us makes clear that this case was all about the alleged sexual interaction of two lesbian women. The jury heard … about sexually explicit conversations between [the parties] regarding lesbian kissing, lesbian dating, and lesbian sex toys. In these circumstances, we are not persuaded that the reference to a 'lesbian woman' in the judge's instruction gave rise to any prejudice, bias, or unfairness." Slip op. at 5.

No dissenting opinion was filed, so it appears that the decision was unanimous.

The court notes that a joint amicus brief was filed by the Gay & Lesbian Advocates & Defenders and the Women's Bar Association of Massachusetts, but does not describe the position taken by these organizations. *Alan J. Jacobs*

N.J. Appellate Division Finds False Imputation of Lesbianism Defamatory

A New Jersey appeals court ruled July 2 that a retired television personality may sue the radio talkshow host who called her a "lesbian cowgirl" on the air. *Gray v. Press Communications*, No. A–4797–99T5 (N.J. App. Div., July 2, 2001).

The court was apparently the first in New Jersey to find that a false accusation of homosexuality may give rise to a claim of defamation. Writing for the panel, Judge Steinberg stopped short of declaring such a charge to be defamation *per se*, preferring instead to put the question to a jury.

"Although society has come a long way in recognizing a person's right to freely exercise his or her sexual preferences, the fact remains that a number of citizens still look upon homosexuality with disfavor," said the court. "[A]t the very least, a false accusation of homosexuality is reasonably susceptible to a defamat[ory] meaning."

While co-hosting his afternoon radio talk-show in 1998, Jeff Diminski prompted listeners to call in and discuss their favorite childhood TV shows. A woman called to report hers was the Sally Starr show, a Philadelphia program begun in 1950 which ran for 22 years. Referring to the show's host, Diminski responded, "That was the lesbian cowgirl I think." News of the on-air slight quickly got to Starr (whose full name is Sally Starr Gray), who called the show's producer seeking a retraction. Soon after, Diminski told his listening audience, "It has been very informative today … We learned Sally Starr is not a lesbian."

Diminski testified that he had heard from a number of sources, including his neighbors, friends and fellow comedians, that Starr was a lesbian. While Starr had on a number of occasions made celebrity appearances at gay pride events, the court thought Diminski could have acted with reckless disregard of the truth in relying on sources of such "dubious veracity." Careful not to abridge the first amendment rights of "responsible" members of the media, the court stated repeatedly that the threshold for proving a claim of defamation is set high. This is especially true in the case of public personas such as Starr, in whom the media has a bona fide interest.

On remand, Diminski is likely to argue that his statements were comedic and satirical rather than defamatory. The appeals court found it unnecessary to reach this issue. New Jersey is now in line with the majority of states that have concluded that a false accusation of homosexuality is actionable. *T.J. Tu*

[Editor's Note: See the *Rivkin* defamation case from Australia reported below, in which the court held that a false imputation of homosexuality is no longer presumed defamatory in New South Wales, even though a minority of the population may still think less of somebody whom they believe to be gay. New South Wales is probably the most gay-friendly jurisdiction in Australia, and New Jersey is probably among the most gay-friendly jurisdictions in the U.S., to judge by state court and legislative yardsticks, so the New Jersey decision is somewhat surprising. A.S.L.]

Utah Supreme Court Upholds Charges That Family Kidnaped Lesbian Daughter

The Supreme Court of Utah has ruled that a Jordanian-American man and his three sons, who brutalized their daughter/sister for a day-and-a-half because she is a lesbian, and almost succeeded in flying her under duress to Jordan, must face charges for aggravated kidnaping. *State of Utah v. Hawatmeh*, 2001 WL 699863 (June 22) The court's ruling reversed the finding of Salt Lake District Judge William W. Barrett, who held that the evidence warranted charges for assault (a misdemeanor) and aggravated assault (a third-degree felony), but not aggravated kidnaping (a first-degree felony).

Muna Hawatmeh, a 23–year old woman, was born in Jordan and came to the United States in 1995. She lived with her family in Utah until December of 1998, when she began living with her girlfriend, Leticia Rivera. During the ensuing months, Muna's family tried to convince her to "stop being a lesbian" and come home. One brother left a message on her answering machine saying "lesbians must die."

In October 13, 1999, Muna went back to her family's house, where she intended only to spend the night. When she arrived, family members locked the door, closed the windows and turned-up the volume of the television. Her brothers began to beat her while her mother and father watched. All the while, family members called her a "bitch" and "whore" and told her that they intended to kill her. One brother held up a knife, indicating it was the weapon he intended to use to kill Muna and "make her ugly." Ultimately, Muna's father joined in the beatings. During the ordeal, Muna kissed her father's feet, begged for her life and pleaded that he take her back to Jordan, "where she would be a different person."

The following morning, the defendants dictated a letter in which Muna told Leticia that she was no

longer a lesbian, and drove towards the airport. On the way, the family spotted Leticia, stopped the car and had a confrontation with her. One brother told Leticia, "if you want to live, get the f*** out of here, you whore." Leticia went to the local police station and filed a missing person report. The police called the Hawatmeh family on their cellular phone and directed them to bring Muna to the station to make sure that she was all right. Muna's brothers told her that they would kill her if she told the truth about what had happened. Muna initially lied about her bruises and injuries when questioned by the police, but ultimately told the authorities what her family had done to her.

The first degree felony charge of aggravated kidnaping requires a showing that the defendant "intentionally or knowingly, without any authority of law and against the will of the victim, by any means and in any manner, seizes, confines, detains, or transports the victim,"and that at least one statutory aggravating factor is present. Here, the state argued that three aggravating factors were present: a threat using a dangerous weapon; flight after commission of a felony; intent to terrorize the victim. The Supreme Court, viewing the evidence in the light most favorable to the prosecution for purposes of this pre-trial phase of the case, concluded unanimously that evidence presented by the State was sufficient to bind the defendants on the aggravated kidnaping charge.

The defendants were represented by Earl Xiaz, Lynn C. Dondaldson, Edward K. Brass and Walter F. Budgen. Attorney General Mark L. Shurtleff and Assistant Attorneys General Frederic Voros and Rodwicke Ybarra argued the case on behalf of the State of Utah. *Ian Chesir-Teran*

Idaho Supreme Court Holds Newspaper May Be Sued for Printing Document from 40–Year Old Gay Scandal

The Idaho Supreme Court ruled June 22 that a newspaper may be sued for publishing a reproduction of a 40 year-old court document suggesting that a man had a homosexual affair with his cousin. *Uranga v. Federated Publications, Inc.*, 2001 WL 693891. In a unanimous ruling, the court revived Frank Uranga's claim that the *Idaho Statesman* invaded his privacy by publishing his name in a 1995 story recounting a sweeping police investigation that took place in Boise in 1955. That investigation, dubbed the "Boys of Boise" scandal, involved the interrogation of nearly 1,500 people and culminated in the arrest of 16 men on charges of illegal homosexual activity.

In a sworn statement, one of the arrested men told police that the son of a Boise City Councilman had been involved in a gay affair with his own cousin, Frank Uranga. The Councilman's son soon after committed suicide, and Uranga was never charged. But the statement remained filed away in state court for four decades until a reported uncovered the document and used it to illustrate the newspaper's retrospective feature about the scandal. Uranga sued, claiming that the newspaper not only invaded his privacy but also intentionally caused him emotional distress. The *Statesman*, relying on two U.S. Supreme Court cases shielding newspapers from liability for truthfully reporting the names of rape victims, argued that it had an absolute constitutional right to publish information contained in the public record.

Overturning two lower court decisions, the Idaho Supreme Court sided with Uranga, refusing to "cloak the press in an absolute privilege to publish a statement regarding Uranga's sexuality found in a forty-year-old court file" The court thought that Uranga could reasonably have believed that the information would remain private, especially if, as Uranga maintains, the information were untrue.

Barring a petition for rehearing or to the U.S. Supreme Court, Uranga will now be able to have his case heard by a jury. The court also gave new direction to Idaho's lower courts, instructing that a plaintiff in invasion of privacy cases must show that the disclosed information was of no legitimate public concern. This element of the tort, while common in other states, had never before been explicit in Idaho law. *T.J. Tu*

Illinois Appellate Court Bows to Mom's Objection to Gay Uncle in Reversing Visitation Order for Grandparents

In an application of the U.S. Supreme Court's recent decision in *Troxel v. Granville*, 530 U.S. 57 (2000), that at least partially effectuates a parent's desire to shield her child from contact with a gay person, the Appellate Court of Illinois, 3rd District, reversed an order by the Kankakee County Circuit Court, finding that the order giving paternal grandparents a right of monthly unsupervised visitation with their 3–year-old grandson violated the constitutional rights of their widowed daughter-in-law, who objected to the infant's possible exposure to his gay uncle and the uncle's partner. *Langman v. Langman*, 2001 WL 770199 (July 6, 2001).

Amy and Rhett Langman were married and had two children, T.L. born September 1995 and P.L. born June 1998. Rhett died in an auto accident a few months after P.L. was born. Amy, seeking a fresh start, moved with the children to Missouri. When Rhett was alive, he frequently brought T.L. to visit with his parents, Brent and Rita Langman. Rhett's gay brother, also named Brent, and his boyfriend, would sometimes also be visiting. During these visits at the Langman farm, young T.L. would sometimes shower together with his grandfather Brent. After Rhett's death, relations between the senior Langman's and Amy became strained, at least partly because Amy did not like young T.L. showering with his grandfather or being exposed to his gay uncle. She insisted that visitation should only take place under her supervision at her home. The grandparents, pointing out that they had established a close relationships with young T.L. through the frequent overnight visits when Rhett was alive, sued for a visitation order.

The trial judge found that it was in the best interests of T.L. to nurture the continuing relationships with his paternal grandparents, and found Amy's concerns to be overblown, stating: "She objected to her young son, then little more than a toddler, showering with his grandfather in a large open shower on the farm. She also apparently objects to the children being with their uncle who is a homosexual. No evidence was produced that the uncle ever placed either child in any danger, merely that he was a homosexual and had a partner. As to the showers with grandfather, no evidence was presented that these acts frightened, upset or endangered the child."

On appeal, Amy argued that she had a constitutional right as a fit parent to decide with whom her young son will associate, and she met a receptive appellate panel. Writing for the panel, Justice Slater found that the *Troxel* decision made clear that parents have a fundamental constitutional right to make decisions about the care, custody, and control their children. There was no allegation in this case by the grandparents that Amy was unfit; indeed, Rita, the grandmother, testified, according to Justice Slater, "that Amy was a good mother, and the trial court described all of the parties as responsible, moral and caring people. As our supreme court has recently noted [in a recent post-*Troxel* case], this issue is pivotal because a court must presume that a fit parent acts in the best interests of her children."

In this case, found the appellate court, "even if the [trial] court disagreed with Amy on these issues, it is Amy's fundamental right as a parent to determine with whom her children may bathe and also with whom they may associate. The trial court did not give any special weight to Amy's determination, and specifically noted that its task was to balance the right of the parent and the grandparents in this case. For these reasons, we hold that the facts in this case do not warrant the state's interference with a parent's decision regarding who may have visitation with her children." The court found that Illinois's grandparent visitation act, to the extent it might be found to support the trial court's visitation order, "as applied to this case, is an unconstitutional infringement on Amy's fundamental liberty interest in raising her children." Since the court was treating this as an "as-applied" challenge to the law, it refrained from ruling on whether the law was facially unconstitutional.

The court also rejected the relevance of pre-*Troxel* Illinois rulings favoring grandparent visitation, finding that they set a standard that conflicts with the constitutional holding in *Troxel* and thus may no longer be cited as precedent. A.S.L.

Minnesota Sodomy Decision Given Statewide Effect Through Class Certification

In an order announced on July 2, Hennepin County (Minnesota) District Court Judge Delila F. Pierce granted a motion by the plaintiffs in *Doe v. Ventura* to certify this pending challenge to the Minnesota sodomy law as a statewide class action on behalf of all adults who engage in consensual, non-commercial sodomy in private. Thus, the court's May 15 ruling in *Doe v. Ventura*, 2001 WL 543734, that the sodomy law applied violates the state constitution will be effective throughout the state, not just in Hennepin County.

The state had opposed the motion, arguing that the case was inappropriate for class certification, mainly because the plaintiffs could not show that the factors supporting standing for the named plaintiffs were typical of the class as a whole, and also because the plaintiffs had failed to serve every prosecutor in the state with the complaint. In a memorandum accompanying her class certification order, Judge Pierce rejected these arguments, agreeing with the plaintiffs that only the representative plaintiffs need to have personal standing, that the central legal issue in the case — the unconstitutionality of the sodomy law as applied to consenting adults in private — was an issue of common interest to all the class members, and that the challenge to the state law was properly filed only against the state and its law enforcement officials, as all prosecutions under the law are brought in the name of the state.

Reacting to the order, a spokesperson for Attorney General Michael Hatch stated that officials were discussing the order with Governor Ventura's staff and considering their options. Ventura had stated agreement with the substance of Judge Pierce's ruling on constitutionality when it was announced in May. In the absence of a state appeal and a subsequent appellate ruling, counsel for the plaintiffs were concerned that the decision might provide no relief for Minnesotans apart from the individual plaintiffs or, perhaps, the residents of Hennepin County. They believe that the statewide class certification now makes the court's declaratory judgment binding statewide.

An opponent of sodomy reform, Greg Wersal, an attorney who had accused the Attorney General of failing to present an adequate defense to the statute, urged that the state appeal, and Jordan Lorence, an attorney who has worked on behalf of the anti-gay Minnesota Family Council, expressed doubts about whether the declaratory judgment as certified would bind prosecutors outside Hennepin County. But Timothy Branson, one of the attorneys for plaintiffs, whose suit was supported by the Minnesota Civil Liberties Union, asserted that if the state does not appeal Judge Pierce's orders, "the sodomy statute for private consensual acts is dead letter for all time." *Minneapolis-St. Paul Star-Tribune*, July 3. A.S.L.

Alabama Appeals Court Changes Child Custody From Physically Abusive Straight Father to Domestically-Partnered Lesbian Mother Living in California

The Court of Civil Appeals of Alabama overturned the trial court's determination that the father should continue to retain physical custody of his three children, finding that it was in the best interests of the children that they reside with their lesbian mother and her domestic partner. *D.H. v. H.H.*, 2001 WL 586966 (June 1, 2001).

The opinion by Judge Yates sets forth the history of the custody arrangement between the parents. Originally the divorce judgment, entered in California, awarded the parties joint legal custody and the mother physical custody. Subsequently, the parties voluntarily agreed that the children would move in with the father, who lived in Alabama. The custody decree was modified to that effect. After two years, the children informed the mother that the father's disciplinary measures bordered on abuse (such as slapping them in the face and whipping them with belts and hangers). In addition, she learned that he was interfering with their telephone and written communication with her and referred to her variously as a "dyke" and "fudgepacker." As a result, she sought an order restoring the children to her physical custody.

The trial court refused to grant her request. Instead, it ordered the children to remain with the father, provided that he stop interfering with their communications, attend parenting classes, provide therapy for the children, lock up the guns, etc. In ordering the children to remain with the father, the trial court found no domestic abuse had occurred, but that the father's disciplinary measures were excessive. The court seemed bothered that the had mother voluntarily surrendered physical custody to the father. Noting that it neither condoned the father's behavior nor the mother's "lifestyle," the trial court held that the mother failed to show that the situation met the standards for a custody change set forth in *Ex Parte McLendon*, 455 So.2d 863 (Ala. 1983), and so was constrained to keep the custody arrangement as it was. *McLendon* held that a non-custodial parent seeking to modify a custody order must make a strong showing that the circumstances have changed so that a change in custody is required. The petitioner must also show that a change will materially promote the child's best interest, and more than offset the harm caused by uprooting the child.

Judge Yates noted that, as in all child custody modification proceedings, the trial court's judgment may not be reversed unless the appeals court concludes that "the findings are plainly and palpably wrong." Despite the high bar to overturning the trial court's order, the appeals court did just that. The court found that the father's verbal, emotional and physical abuse can be considered family violence constituting a change of circumstances that meets the *McLendon* test (citing the Alabama Family Violence Abuse Act (30–3–131, Ala. Code 1975), and so it awarded custody to the mother.

Other factors that the court considered were: (i) the children wanted to live with their mother and (ii) she would provide a better home for the children than the father. In what seemed a Solomonic test, the mother was asked by the appeals court whether she would be willing to terminate her relationship with her domestic partner in order to regain custody. She responded that, although it would be difficult for her to do so, she would do it if she had to, because her children's well-being and safety were of uppermost importance to her. Happily for the mother, the court's order was not made conditional upon termination of the domestic partnership. Indeed, the court found that "no evidence indicated that the mother's homosexual relationship, which is accepted under California law through the "Domestic Partnership Act," would have a detrimental effect on the well-being of the children."

This case sets a positive precedent for legal recognition of gay and lesbian families, not something one would expect to come out of an Alabama appeals court. *Elaine Chapnik*

Ohio Appeals Court Rejects Necessity Defense Raised by Homophobe Who Tore Down Rainbow Flag

The Ohio Court of Appeals affirmed the conviction of a man who climbed the flagpole of the Ohio Statehouse and cut down the rainbow flag that was flying in conjunction with the celebration of gay pride. *City of Columbus v. Spingola*, 2001 WL 682287 (June 19). The court rejected Spingola's argument that the city had no authority to regulate wrongdoing that occurred on state property, and found that the trial court properly refused to offer the jury an instruction on the necessity defense as a justification for Spingola's actions.

On June 27, 1999, Gay Pride Day in Columbus, Ohio, Charles Spingola and a collection of anti-gay protestors were assembled on the Ohio statehouse lawn, talking about the evils of homosexuality. According to witnesses, Spingola had been encouraged by those in his group to tear down the rainbow flag, which the state had allowed the Stonewall Columbus organization to fly during Pride. As Spingola removed the flag, he proclaimed that "no damn faggot flag is going to fly over" the statehouse grounds. Spingola was indicted of ethnic intimidation, which consists of criminal damaging motivated by the victim's sexual orientation. However, he was ultimately convicted only of criminal damaging, a lesser included offense.

At his trial, Spingola testified that he had lived a troubled life, but had undergone a religious transformation when he was twenty-three. For the past twenty years, Spingola had been preaching against the sin of homosexuality, and insisted that, according to his beliefs, homosexual sinners must

be confronted. He testified that when he heard on the news that the rainbow flag was going to be flown over the statehouse during Pride, he went to the celebration with the intention of removing the flag. Spingola admitted that he assumed that the flag had been flown with permission, and that he did not pursue any other avenues to remove the flag prior to cutting it down, such as speaking with officials at the statehouse.

On appeal, Spingola argued that the city had no jurisdiction to prosecute him for crimes that occurred on the statehouse grounds. The Court of Appeals, in an opinion written by Judge Kennedy, dismissed this argument, finding that the municipal ethnic intimidation statute under which Spignola was prosecuted was consistent with the Home Rule Amendment to the Ohio Constitution, because it neither prohibited what the state law allowed, nor did it allow what state law prohibited. The court also refused to impute a conflict between the state and municipal statutes, simply because the Columbus ordinance forbids conduct targeted at a victim because of his sexual orientation, whereas the state provision does not include sexual orientation. The court also rejected Spingola's argument that because a municipality cannot tax state property or annex state property to a city, it must therefore also be prohibited from prosecuting crimes that occur on state property. Judge Kennedy easily distinguished these taxation and annexation cases from those involving the uniquely local domain of criminal and sanitary regulation.

The court also found that the trial judge properly refused to instruct the jury on the necessity defense offered by Spingola. First, the court noted that Spingola's proposed instruction was not an accurate statement of the law in Ohio with regard to this defense. Relying on Missouri cases, Spingola suggested that the elements of the defense were that (1) the act charged must have been done to prevent a significant harm, (2) there must have been no adequate alternative, and (3) the harm caused must not have been disproportionate to the harm avoided. However, in Ohio, the Court of Appeals explained, the defense of necessity only applies if (1) the harm was committed under the pressure of physical or natural force, rather than human force, (2) the harm sought to be avoided is greater than, or at least equal to, the harm sought to be prevented, (3) the defendant reasonably believes that his act is necessary and is designed to avoid the greater harm, (4) the defendant is without fault in bringing about the situation, and (5) the harm threatened must be imminent.

Even assuming that Spingola had requested an instruction incorporating the proper elements of a necessity defense in Ohio, the court found that the trial court was under no obligation to offer the instruction because Spingola could not prove that at least two elements of the defense applied in his case. First, the court found that Spingola had provided no evidence that his damage to the flag was committed under the pressure of physical or natural force. The court rejected Spingola's invitation to eliminate the requirement of "physical or natural force," but also noted that even if the court were to recognize force emanating from a human source, the "harm" caused by the human source must, at a minimum, be unlawful. In this case, the pride organizers had received permission to fly the rainbow flag, so even under Spingola's inaccurate instruction, the defense of necessity would not apply. Second, the court ruled that Spingola could not demonstrate that he had no other alternative but to cut down the flag. His decision to scale the statehouse flagpole prior to airing his grievance through other lawful avenues stripped him of his right to seek a necessity defense. *Sharon McGowan*

Minnesota Appeals Court Upholds Suspension of Gay Teacher Caught in Restroom Surveillance

In an unpublished opinion, the Minnesota Court of Appeals upheld the decision of the Minnesota Board of Teaching to suspend for two years the teaching license of a gay man who exposed his erect penis to an undercover police office in a public hotel restroom. *Shaw v. Minnesota Board of Teaching*, 2001 WL 605096 (June 5) (unreported disposition). Although the administrative law judge who originally heard the case found that Shaw's conduct was not "immoral," and therefore did not warrant disciplinary action, the court of appeals affirmed the Board's decision to reject the ALJ's recommendations and impose sanctions.

On November 24, 1998, while attending an education conference at the Hyatt Hotel in downtown Minneapolis, David Shaw went to the restroom. He soon noticed that the men in the stalls on either side of him were tapping their feet, which, as Shaw explained, is a sign that gay men use to meet each other. Shaw explained that first he tapped his foot back, and then looked under the partitions, making eye contact with both men. After the man on the stall to his left "wiggled his finger at him" underneath the stall and whispered "show it, show it, show it," Shaw knelt on the floor and exposed his erect penis underneath the partition so that the man could see it. After he got up, Shaw asked the man what he thought, and he responded that "it's nice."

Unbeknownst to Shaw, the man in the stall to his left was Martin Werner, an off-duty police officer who had been hired by Hyatt Hotel to work undercover in the men's bathroom, after the establishment had received complaints of inappropriate sexual behavior. According to Werner, Shaw tapped his foot first, and only then did Werner respond to Shaw's indication of his desire to engage in sexual activity. When the men exited the stalls, Werner identified himself to Shaw and issued Shaw a citation for indecent exposure, a misdemeanor offense.

Shaw entered into an agreement with the government to suspend prosecution, and after complying with the terms of the agreement, the charge was eventually dismissed. But, in Spring 2000, the Minnesota Board of Teaching's disciplinary committee recommended that Shaw's teaching license be suspended because he had engaged in "immoral conduct," which is a statutory ground for discipline. After a preliminary hearing, an administrative law judge (ALJ) determined that Shaw's conduct was not immoral and no disciplinary action was recommended. However, after holding its own disciplinary hearing on November 16, 2000, the board rejected the ALJ's recommendation, and ruled that Shaw's conduct was immoral. The board voted to suspend Shaw's teaching license for two years.

Shaw appealed on three grounds. First, Shaw insisted that there was not substantial evidence to support the board's conclusion that he had engaged in immoral conduct. Second, he argued that the board acted arbitrarily by rejecting the ALJ's findings because there was no indication that the board members had fully reviewed the record. Finally, Shaw maintained that, because only four of the eight board members eligible to participate in the decision had voted in favor of suspension, the action was not supported by a majority vote as required by statute.

Preliminarily, the court grappled with the proper statutory interpretation of the phrase "immoral conduct." Judge Robert Schumacher noted that neither of the two statutes at issue offered a specific definition, but the court found guidance from language in a Missouri Court of Appeals opinion pertaining to similar facts, *Howard v. Missouri State Bd. of Educ.*, 913 S.W.2d 887, 891 (Mo. Ct. App. 1995) (unpublished), to devise a working definition: "not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially not in conformity with the accepted standards of proper sexual behavior; unchaste; lewd; licentious; obscene."

At Shaw's hearing, the ALJ had applied the "ordinary" meaning of the term, which he defined as "corrupt, indecent, depraved or dissolute, or was conduct which offense the morals of the community in which it occurred." Under this definition, the ALJ had found that Shaw's conduct did not qualify as "immoral." On review, the court accepted the ALJ's definition, but did not end its inquiry there.

The court examined whether the board's finding that Shaw's actions were, in fact, immoral was supported by substantial evidence. The ALJ had found Shaw's version of the events on November 24 — namely that Werner had initiated the encounter — to be more credible, and Shaw complained that the board erred when it reached the opposite conclusion. However, Judge Schumacher found this credibility call irrelevant to the question of the propriety of the board's ultimate decision, because its determination had relied primarily on the undisputed facts of the case rather than on issues of credibility. In particular, the board emphasized that Shaw had been at the

Hyatt attending an educational conference, that he had intentionally exposed his penis to another man in a restroom accessible to the general public on a school day, and that it was typical for the Hyatt to have groups of students at the facility for school-related events.

In his appeal, Shaw posed a broader question, asking "why it would be harmful for a male child to witness a man with an erection in the men's bathroom … [as when] a child enters a public restroom, it is certainly possible that he could view a man's penis either erect or flaccid." The court rejected Shaw's analogy to the inadvertent viewing of the penis of a man standing next to him at a urinal, summarily dismissing the comparison, and noting that when Shaw knelt on the floor and exposed his erect penis for the purpose of meeting the man in the next stall, he "was not performing a function one normally witnesses in a public restroom."

Arguing that his actions are a common way for gay men to identify themselves to each other, Shaw maintained that his actions should not be classified as immoral. The court classified this argument as "misplaced," asserting that Shaw had other options than exposing his erect penis in a public restroom as a method for meeting other gay men. "Without passing judgment on Shaw's lifestyle," Shumacher wrote, "we conclude his act of exposing his penis in a public restroom, whether he is homosexual or heterosexual, does not comport with society's acceptable mores."

In support of his position that his conduct should not be classified as "immoral," Shaw pointed out that the board had previously overruled the denial of a teaching license application to a man who had been convicted of disorderly conduct for having sex with another man in a public restroom in *In re Denial of the Application for Teaching Licensure of C.M.* The court distinguished the cases by noting that in *C.M.*, the individual had engaged in the conduct two years prior to applying to become a teacher and would not have been aware of the ethical obligations that would be concomitant with the job. In this case, by contrast, Shaw was already licensed as a teacher when the incident occurred, and therefore he was aware of the ethical standards to which he was required to adhere.

The court found Shaw's case to be more comparable to *In re Suspension of Teaching License of Ebnet*, where the board decided to suspend a teacher after he exposed his penis to an undercover police officer under a stall in a public restroom in a Minneapolis department store on a weekday afternoon. In both cases, the board found that the teacher had used poor judgment by engaging in such conduct in a public place "that was easily accessible to children." Examining Shaw's other contentions, the court refused to read into the statutes at issue any requirement that, prior to suspending his license, the board must demonstrate a nexus between the allegedly immoral conduct and a teacher's fitness to teach.

The court also ruled that there was nothing in the record to support Shaw's second allegation, that the board had reached its conclusions without reading the record from the preliminary ALJ hearing.

Finally, with regard to Shaw's third assignment of error, the court determined that the board's procedures had satisfied the statute's requirement that a suspension decision be supported by a majority vote. In this case, ten of the eleven members of the board had been present at the meeting. Two of these ten members were disqualified from voting because they had been the members initially recommending that the board take action against Shaw. With eight members remaining, four voted in favor of suspension, three voted against taking disciplinary action and one member abstained. Citing an Opinion of the Attorney General, the court explained that "[a]bstentions may be considered to be acquiescence in the vote of the majority and are counted, therefore, with the votes of the majority." Under this interpretation, the vote was 5 to 3 in favor of suspending Shaw's license. Therefore, Shaw's procedural objection was rejected as well. *Sharon McGowan*

Kentucky Appeals Court Finds County Rights Ordinance Effective Within Louisville

Chalk one up for the good guys. In a June 8 decision that will result in more protections for gay and lesbian and transgendered residents of Louisville, Kentucky, the Court of Appeals of Kentucky found that a Jefferson County ordinance which prohibits discrimination in employment, public accommodations, and housing on the basis of sexual orientation and gender identity is enforceable within the City of Louisville. *Rogers v. Fiscal Court of Jefferson County* 2001 WL 6293439.

On February 1, 1999, a City of Louisville ordinance which prohibits discrimination in employment on the basis of sexual orientation and gender identity went into effect. On October 12, 1999, an ordinance went into effect in the Jefferson County that prohibits discrimination in employment, public accommodations and housing on the basis of sexual orientation and gender identity. The city is within the county. A dispute arose between the city and the county over whether the broader county ordinance was enforceable within the city. On November 19, 1999 the city commenced a declaratory judgment action seeking a declaration that the county's ordinance was not enforceable within the city. The trial court ruled in the city's favor, finding that the county ordinance was only enforceable within the unincorporated portions of the county and not within the city.

On appeal, Judge Buckingham, writing for the Court of Appeals, reversed. The court held that under KRS 67.083(7), where a county and a city within the county have adopted ordinances based upon the same subject matter, the county ordinance will be enforced county-wide unless the city ordinance is more stringent than the one passed by the county. The court found that the county ordinance is clearly more stringent than that passed by the city. Accordingly, the court reversed and remanded the case for entry of a judgment declaring the county ordinance to be enforceable throughout all of Jefferson County, including the City of Louisville and other incorporated areas. *Todd V. Lamb*

Michigan Appeals Court Upholds Dismissal of Public Sex Prosecution

In *People of Michigan v. Bono*, 2001 WL 732067 (June 12), a unanimous panel of the Michigan Court of Appeals concluded that the trial court had correctly dismissed charges of "gross indecency between males" that were brought against two men apprehended in what may have been a mutual jerk-off session in a department store restroom.

According to the complaints, on Nov. 19, 1999, a store detective noticed that adjacent stalls were occupied in the restroom. He washed his hands, walked out of the restroom and waited in the front center lobby of the store for 8 to 10 minutes to see who would come out. When nobody came out, he called his supervisor and they together went back into the restroom. The detective kneeled down and lowered his head to within an inch or two of the floor so he could see under the stall doors. He observed that Bono, the occupant of the "handicapped" stall, "was down on his knees, facing the adjacent stall, with his pants and underwear around his ankles." Lake, the occupant of the other stall was sitting on the toilet, "moving his arm up and down near the bottom of the handicapped stall" where Bono was kneeling. The detective didn't see either man touching the other, and did not see either man's penis.

The trial judge granted motions to quash the charges, finding there was no evidence that either man had touched the genitals of the other, and that they had a reasonable expectation of privacy when occupying the toilet stalls. Ruling on the state's appeal in a per curiam memorandum, the Court of Appeals summarized the state's burden as follows: "Assuming, without deciding, that *consensual* masturbation among *consenting adults in private* is not an act of gross indecency, the prosecution must establish in this case that, for purposes of the statute, defendants committed an act of gross indecency 'in public.'" (emphasis in original). The court noted that "the prosecutor has never suggested that consensual sexual acts among adults in private are acts of gross indecency that are prohibited under the statute."

In this case, the court noted, the defendants were occupying adjacent stalls with the door closed, and it was "undisputed that the store detective did not observe any activity below the door or partition, and no evidence has been presented that would support a finding that the unsuspecting public could have been exposed to or viewed the

act from the common area of the restroom." In short, if gay men in a public restroom are carrying on their sex play in such a way that an unsuspecting member of the public won't see them without going out of his way to do so, the Court of Appeals is not going to consider this a violation of the gross indecency statute, as it concluded "as a matter of law" that based on these facts the "conduct did not occur in a 'public place' within the meaning" of the statute. A.S.L.

New York Trial Court Rules on Lesbian Couple's Property Dispute

A Justice Richard Braun, N.Y. Supreme Court (N.Y.Co.) ruled that a constructive trust may be used to help resolve a property dispute between members of a lesbian couple who are no longer living together. *Minieri v. Knittel*, 2001 WL 740794 (June 1), also reported in 27 Fam. L. Rep. (BNA) 1386.

Joanne Minieri and Marta Knittel met in September 1996 and began living together in Minieri's apartment the next month. Although they never registered with the city as domestic partners, they continued to live together until September 1999, when their relationship ended and Knittel moved out. According to Minieri's complaint, after the two women began living together, Minieri, who had the much larger income of the two, opened a joint checking account and a joint money market account at Republic National Bank, to which Minieri made most of the contributions.

The following summer, Minieri bought a condo in Manhattan with her own funds and placed title in the names of both herself and Knittel as "joint tenants with right of survivorship," which means that if anything happened to Minieri, Knittel would automatically own the apartment. The following spring, the women opened a joint investment account at Solomon Smith Barney, using Minieri's funds. In the fall of 1998, Minieri bought a house in East Hampton, again with her own funds, and again putting the title in both women's names with survivorship rights.

In February 1999, Minieri transferred about $400,000 in funds from her existing Prudential Securities account into a joint investment account. In March 1999, Minieri bought a new Ford Explorer automobile, again with joint title.

After the relationship ended, Minieri moved quickly to try to cut off Knittel's right as joint owner to claim the real estate if anything happened to Minieri. She executed a new deed to the Manhattan condo, purporting to end the joint title, and filed it with the New York County Clerk. She did the same thing for the East Hampton house, filing the new deed with the Suffolk County Clerk. And, she filed a lawsuit, seeking to set up a constructive trust for all the joint assets, under which the court would make a fair division of the property between the two women by determining their appropriate ownership interests. In essence, Minieri argued that all these joint ownerships and accounts were set up with an understanding that they really belonged to her, so letting Knittel have half of all this property would unjustly enrich her at Minieri's expense.

Knittel responded with a counterclaim seeking an equal division of interest in the real estate, an accounting and equal distribution of all the joint assets, and various kinds of damages. In effect, Knittel was arguing for half of everything, while Minieri was claiming the court should reallocate things to reflect the differing amounts that the two women put into their joint assets.

Both Minieri and Knittel moved for summary judgment on their respective claims.

Justice Braun observed: "This dispute typifies the legal difficulties in relation to property which lesbian and gay couples face. Because New York State does not afford them a legal right to marry, they must use contractual, statutory, common law, and equitable vehicles to protect their interests in property. Here, the failure of Plaintiff and Defendant to have executed any documents specifying any changes that would occur in their respective rights to the properties at issue in the event of a dissolution of the relationship… (admittedly anti-romantic, akin to a prenuptial agreement) leaves them in the position of needing to have a Court determine their rights at law and in equity."

Braun rejected Knittel's argument that a constructive trust was not appropriate here. Referring to *Sharp v. Kosmalski*, 40 N.Y.2d 119 (1976), Braun found that New York courts look at four factors to determine whether such an action is appropriate: (1) a confidential or fiduciary relationship between the parties, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment. He noted that these factors are not necessarily determinative in all cases. In essence, the issue is whether all of these joint ownership relationships and accounts were set up based on an understanding between the women about who really owned what. On their face, all the joint arrangements appear to give each woman a half-interest, so the issue is whether the court should look behind that and make some other division based on prior understandings and unequal contributions.

Knittel argued against Minieri's contentions that things were set up this way solely to ensure that if something happened to Minieri, Knittel would be protected against claims by Minieri's family members. Knittel argued, to the contrary, that the women had an understanding that Knittel "would not work, but would devote part of her time to caring for their properties, including maintaining and repairing the real properties, and trading on the securities accounts." Knittel also claimed that some of the money in the joint accounts came from her, and argued that letting her keep half of everything was not necessarily unjust. (Although the court does not mention the total value of this property, it undoubtedly runs to seven figures.)

Knittel challenged Minieri's action of unilaterally filing new ownership deeds on the real estate, but Justice Braun pointed out that the New York Real Property Law sec. 240–c(1)(b) and (2) allow a joint tenant to take such an action. This cuts off Knittel's right to inherit full ownership in the case of Minieri's death, but leaves her with a formal claim to half-ownership of the property as a tenant in common. The court will still have to determine, as part of further proceedings, whether she is entitled to any or all of that half-interest.

Ultimately, Justice Braun found that neither woman was entitled to judgment as a matter of law. Rather, there were lots of factual issues to be sorted out. Minieri may succeed in getting a constructive trust imposed on the property, but so far she has only satisfied the first legal factor of showing that there was a confidential relationship between herself and Knittel. She still has to persuade the court about the nature of the understanding between the women that led to the establishment of all these joint titles and accounts.

Braun ruled that the case should go to trial, so that each woman has an opportunity to prove her claims regarding the property. In effect, the court agreed that, under certain circumstances, a constructive trust can be imposed as a sort of substitute for the statutory procedures that would be available to deal with the division of assets upon the divorce of a married couple.

Minieri's lawyer is Elaine McKnight, of Wallman, Gasman & McKnight. Knittel's lawyer is Lance Grossman. A.S.L.

N.Y. Trial Court Rejects Due Process Challenge to New Hate Crimes Law

Justice Jeffrey M. Atlas of N.Y. Supreme Court, New York County, rejected a constitutional challenge to the N.Y. Hate Crimes Act of 2000 (P.L. secs. 485.00–485.10) in *People of New York v. Diaz*, 2001 WL 766273 (June 15).

Defendant Theodore Diaz claimed that he was angered after listening to a radio talk show with included discussion about gay men molesting children, so he went out to assault a gay man. He came across the victim in this case, who was returning to his apartment in the early morning hours of Oct. 22, 2000, after spending time with friends at a neighborhood gay bar. Diaz confronted and attacked the victim without warning, striking him in the face, knocking him to the ground, and repeatedly cursing him, calling him "faggot" and "degenerate" and asking him "how could you walk around like that?" The victim called out for help and the defendant walked away but was stopped by a police officer and identified by the victim. Diaz allegedly told the police that he had decided to take out his anger on a gay man after hearing the radio broadcast. The grand jury indicted Diaz for Assault in the 3rd Degree as a felony pursuant to P.L. sec. 120.00(1) and the

Hate Crime Law, P.L. sec. 485.05(1)(a) and 485.10.(2).

Diaz sought dismissal of the indictment, claiming that the Hate Crimes Law is unduly vague and gives excessive discretion to prosecutors. Justice Atlas rejected these contentions, stating: "In my view the language of that act is clear and can be reasonably understood by all citizens to prohibit certain kinds of attacks made against others who have been selected by the offender because of a perception as to the victim's special vulnerability, appearance, or background." After reviewing the legislative findings and history that led to enactment of the law, Justice Atlas said, "Given the history of such offenses and given what is now our universal understanding that such despicable behavior takes place almost daily in our society, it is impossible to imagine that any person in our community would not understand the plain meaning of this law and the ultimate penalties now consequent to putting hateful words and thoughts into action. The law clearly delineates specific conduct easily avoided by the innocent-minded." Atlas noted that the law has long used intent to determine whether sentences should be enhanced for particular kinds of crimes.

Atlas rejected the argument that the law sought to penalize thought or speech, finding that "this legislation increases the punishment not for thought alone, but for behavior impelled by such thought. Consideration of motive in that context has been held to be appropriate. Moreover, to the extent that the defense is concerned that this legislation impermissibly regulates motive, that is thought and speech, laws very much like this one have been upheld as not violating the constitution because such statutes do not prohibit discriminatory beliefs, rather they prohibit discriminatory acts."

The court also rejected the argument that the statute lends itself to arbitrary and discriminatory enforcement, noting that the penalty enhancement law only comes into play when a defendant is accused of committing a criminal act specified in the hate crimes law, such that the decision whether to arrest is not based on whether the hate crime law applies to the case. "Beyond that," wrote Atlas, "enforcement by the prosecutor, the Grand Jury and the trial court really turns on the sufficiency and clarity of proof establishing that the accused purposefully chose the victim, in whole or part, because of the accused's perception that the selected victim was, as in this case, of a certain sexual orientation." Atlas concluded that regardless of what concerns one might have about the future of this law as applied, "it seems certain that this statute, as it is applied in these and many other circumstances, is not unconstitutionally vague," citing to New Jersey and U.S. Supreme Court precedents upholding similar penalty enhancement bias crime provisions. A.S.L.

Media-Shy Sodomous Fornicators Foiled in Challenge to Utah Law

A group of purportedly straight, unmarried Utah residents filed an action in the U.S. District Court in Salt Lake City, challenging the constitutionality of the state's laws against fornication and sodomy, and presumably alleging that they feared prosecution under the laws because they were engaging in said acts. The District Court dismissed the action on summary judgment, finding that plaintiffs lacked standing and that their claims were unripe, presumably because the police in Utah are not beating the bushes for heterosexual fornicators and sodomists. But to add insult to the injury, the U.S. Court of Appeals for the 10th Circuit dismissed their appeal of the summary judgment on the basis that the district court never had proper jurisdiction because the plaintiffs filed suit using pseudonyms without requesting permission from the court to do so. *W.N.J. and J.A.S. and J.O.H.N. and D.M.W. v. Yocom*, 2001 WL 776668 (July10).

Wrote Circuit Judge Seymour, the Federal Rules of Civil Procedure, Rule 10(a), requires that the title of an action filed in federal court include "the names of all the parties," and Rule 17(a) requires that "every action shall be prosecuted in the name of the real party in interest." The rules do not expressly allow plaintiffs to file anonymous lawsuits. However, as evidenced by the numerous significant cases beginning with "Doe" or "Roe," upon application a federal court may make an exception if there are "significant privacy interests" at stake, where the case involves "matters of a highly sensitive and personal nature." Seymour cited a 10th Circuit case from 1982, *Coe v. U.S. District Court*, 676 F.2d 411, which listed the kinds of cases for which pseudonyms might be allowed, including challenges to laws involving birth control, abortion, and homosexuality. However, plaintiffs may not presume that they will be allowed to file anonymous complaints, but "must first petition the district court for permission to do so. If a court grants permission, it is often with the requirement that the real names of the plaintiffs be disclosed to the defense and the court but kept under seal thereafter. Where no permission is granted, 'the federal courts lack jurisdiction over the unnamed parties, as a case has not been commenced with respect to them.'"

In this case, the court of appeals asked the plaintiffs to file sealed affidavits giving their true names to the court, which they did, and they also secured a purportedly retroactive order from the original magistrate judge granting leave to proceed using pseudonyms, but the court of appeals finally concluded this was unavailing. Since the plaintiffs had commenced the suit anonymously, the district court never had jurisdiction over the case and so the action was properly dismissed. The court of appeals expressed no view as to whether this was the kind of suit that could proceed anonymously were the proper application to be made. A.S.L.

D.C. Human Rights Commission Orders Reinstatement of Gay Adult Scout Members

A very lengthy opinion issued by the District of Columbia Human Rights Commission on June 20 finds that the Boy Scouts of America violated the D.C. Human Rights Law by ordering two gay men to sever their ties with the organization. *Pool and Geller v. Boy Scouts of America*, Nos. 93–030–(PA) & 93–031–(PA). The Commission found that the organization is a place of public accommodation under the city's human rights law, and that as the complainants are not gay activists comparable to James Dale, the U.S. Supreme Court's 1st Amendment analysis in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), does not apply to this case.

Michael Geller, who spent a happy childhood in Scouting and attained the rank of Eagle Scout in 1979, was elected to the Order of the Arrow, the National Brotherhood of Scout Honor Campers, in 1977, and was continually registered as an adult leader of Troop 37 in the Baden-Powell Council from 1980 through 1992. He became aware of his gay orientation in 1983. In 1992, Geller read an article in the *Washington Post* quoting a Scouting executive as stating that gay men did not make good role models for youth and the Scouts rejected them as adult members. This was the first Geller had heard of such a policy, and he wrote Carroll to express his disagreement, in the course of the letter making clear that he is gay. Upon receiving the letter, Carroll had Geller removed from the Boy Scouts of America database of adult members, and had the Northeast Regional Director write to Geller telling him to sever his ties with the organization. Geller attempted to fight his expulsion internally, but eventually filed his complaint with the D.C. Commission. He is an employee of the World Bank.

Roland Pool had similarly participated in Scouting as a boy and ascended to the Eagle Scout rank, ultimately being elected to the Order of the Arrow and achieving high honors. He was an Assistant Scoutmaster for two years, and was actively involved with the Philmont Ranch, a major backpacking destination for Scout outings. Although he became aware of his homosexuality as a teenager, he never spoke about it with others in Scouting. He left active participation in 1985 when he went to graduate school, but retained an interest in Scouting and attended the 1989 National Jamboree. In 1992, he read the same article as Geller and, after discussing it with a friend, contacted the ACLU. He became a "tester," contacting the Scouts about becoming an Assistant Scoutmaster. When he attended a meeting, he was told that with his credentials he should strive for a higher rank of Unit Commissioner, and he went to training sessions. When he submitted his application in July 1992 to become a Unit Commis-

sioner, he mentioned that he was gay, and received a letter two weeks later denying his application.

The Commission's opinion goes into great detail about the history of the Scouts' policy on homosexuality, the degree to which it was known or not known among adult members, and the details of its interpretation. The Commission found that the policy was not well-publicized within the organization, and that the policy is ambiguous about the circumstances for exclusion. It also found, consistent with the New Jersey Supreme Court's decision in *Dale*, that the organization does not have a consistent public position on the issue, and that the religious grounds for objection to homosexuality are not uniformly held among religious organizations that sponsor Scout troops.

As to its legal findings, the Commission rejected the BSA's argument that Geller, as a nonresident of DC, is outside the Commission's jurisdiction, or that both men lacked standing because they were really "testers" rather than genuine applicants for adult positions. The Commission found the BSA to be a public accommodation, noting analogies to cases in other jurisdictions.

Turning to the central issue in the case, the Commission rejected the BSA's arguments that it is now immune to discrimination suits by gays as a result of the *Dale* decision, finding that *Dale* and *Hurley* (the Boston St. Patrick's Day Parade case invoked by the Supreme Court in *Dale*) are distinguishable from the Geller and Pool cases. Although conceding, as the Court found in *Dale*, that the BSA is an "expressive association," the Commission found "that admitting Complainants as adult leaders would not significantly affect the Boy Scouts' ability to advocate its public or private viewpoints. Unlike the record in *Dale*, the present case has significant evidence to indicate that BSA's exclusionary policy may not be the Boy Scouts' viewpoint. Granted the Scout Oath and Law does not mention sexuality or sexual orientation. The terms 'morally straight' and 'clean' are not self-defining. The record in both *Dale* and in this case indicate that different people would have different meanings to those terms…" The Commission found that most of the record evidence about publicity of the anti-gay policy postdated the filing of litigation contesting the exclusion of particular gay individuals, and could not be deemed evidence of an essential, longstanding policy of the organization.

Most significantly, however, the Commission relied on drawing a distinction between Geller, Pool, and James Dale, finding no evidence in the record that either Gller or Pool had ever been open gay rights advocates, or had ever stated anything publicly about homosexuality while in the course of their prior Boy Scouts activities. The Commission specifically rejected the charge that the men became gay activities when they filed their discrimination complaints. Instead, it found "that Mr. Pool like Mr. Geller are individuals who would not send messages about homosexuality or its lifestyle."

Finally, addressing an issue that the Supreme Court never grappled with in *Dale* but just assumed away, the Commission found that D.C. "has a compelling interest, over First Amendment rights, in eliminating discrimination in public accommodations," and took solace from the recent ruling by an Illinois appellate court in *Chicago Area Council of Boy Scouts v. City of Chicago Commission on Human Rights*, 2001 WL 474049 (May 21), similarly holding that *Dale* did not preclude a discrimination claim, albeit in that case limited to positions with the Scouts that did not involve direct youth contact. "In the Illinois case, the court found that the complainant was not an advocate like Mr. Dale and nor was he seeking a position where he would be in a position to send a message. As in the present case, Mr. Geller and Mr. Pool are non-messengers. They merely have the status of being gay. Their inclusion within the BSA will not infringe on any message the BSA has about instilling values into youth." The Commission also found that extensive expert testimony about gay men as "role models" pretty well cancelled out the negative with the positive to leave this a relatively neutral factor, finding that there was "insufficient evidence in the record that indicates that gay adult scout leaders would be an inappropriate role model. Any such argument is found to be pretext for discrimination."

The Commission found that each of the Complainants was entitled to $50,000 in damages, to payment of their attorneys fees by the Scouts, and to an order of reinstatement. Anybody taking bets on whether the courts will enforce this award when the BSA appeals it?

The Complainants are represented by D.C. attorneys David Gische, Merril Hirsh and Julie Glass of the firm of Ross, Dixon and Bell. Copies of the Commission's opinion were quickly posted to the law firm's website: rdblaw.com.

The most immediate reaction to the decision came from U.S. Rep. John Hostettler (R.-Ind.), who introduced a bill in the House of Representatives on June 28 that would prohibit the Commission from spending any of its appropriated funds to implement the ruling. *Washington Blade*, July 6. A.S.L.

Boy Scouts Updates

At a national meeting of Boy Scouts leaders held in Boston the last week in May, leaders of the Boy Scout councils in New York City, Los Angeles, Chicago, West Los Angeles, Orange County (California), San Francisco, Philadelphia, Minneapolis and Boston approved a resolution calling on the national organization to allow local sponsoring groups to decide their own membership policies, rather than dictating from the national office that gay men may not be Scout members or leaders. The resolution requested adoption of a national policy "that membership and leadership positions are open to persons regardless of their sexual orientation," so long as the individual complies with the organization's conduct standards, and that "a Scout treat all people with respect, regardless of their sexual orientation." Under the policy proposed by the resolution, however, the Scouts would accept local rules established by sponsoring organizations. Thus, a church-sponsored Scouting unit could exclude gay leaders if the church's theology required such an exclusion. A national spokesperson for Scouting, Gregg Shields, stated that the resolution would be considered in an appropriate committee, but pointed out that the Councils joining in the resolution "represent a minority of councils" out of the 320 councils around the country, and predicted that the national organization would continue to adhere to its discriminatory policy. *Boston Globe*, June 8.

The Boy Scouts' Illowa Council in Illinois, has decided to reject a grant of $23,000 from the Knox County United Way, because the United Way recently adopted an anti-discrimination policy that includes sexual orientation, ancestry and creed. The Scouts maintain that they must be able to kick out gays and atheists in order to maintain the moral tone of the organization. The district executive for one of the chapters of the Council expressed concern that "the United Way will end up hurting itself" by eschewing homophobia and religious bigotry. *Peoria Journal Star*, June 15.

The American Medical Association, at its annual meeting, approved in a voice vote a resolution calling on youth organizations "to reconsider exclusionary policies based on sexual orientation." A Scouts official claimed that proponents of the resolution were misrepresenting the Boy Scouts' position, asserting that Scouts are taught to tolerate people with views different from their own. Evidently, toleration doesn't extend to association… *Arizona Republic*, June 20.

Apparently eager to provoke a confrontation, the Iowa City School Board voted in May that groups adhering to the district's anti-discrimination guidelines could have free use of facilities for meetings, but groups who fail to follow the guidelines will have to pay a fee. Guess who fails to follow the guidelines? The Hawkeye Area Council of the Boy Scouts has sent a letter to the school superintendent, arguing that the policy is unconstitutional, and if other groups get free meeting space, the Scouts must get free meeting space as well. The Scouts' attorney is threatening the school district officials with individual liability for monetary damages if the BSA has to go to court to get its free access restored. *Des Moines Register*, June 23.

The Chicago chapter of the United Way announced May 31 that it will continue funding the Chicago Area Council of the Boy Scouts of America, but funds will be targeted only for the Learning for Life Program, a school-based program that does not bar gay students and teachers from participating. This chapter has given more than

$400,000 annually to the local Scouts council. A local gay civil rights group characterized the decision as "disingenuous," on the ground that the money will still be supporting the Council, which also administers Scout programs that exclude gay participants. *Chicago Tribune*, June 1.

Leonard Lanzi, a west coast Boy Scouts executive staff leader who was given the boot after he revealed that he was gay (during a local legislative hearing when he was testifying in favor of the Boy Scouts!), has settled his lawsuit against the BSA. Terms of the settlement are confidential. Lanzi is now working as interim executive director of the Community Kitchen in Santa Barbara, CA, and is considering a run for public office. *Los Angeles Times*, June 16.

Have it your way? The United Way of Central Iowa announced that it would continue funding the Mid-Iowa Council of the Boy Scouts of America, which had purportedly agreed to adopt a policy prohibiting discrimination on the basis of sexual orientation. However, Ely Brewer, the top executive of the Council, said that, "If we would so choose, we would have the right to refuse their membership." A United Way spokesman, confronted with this and other statements by Brewer, said that United Way does not "micromanage" its non-discrimination agreements with recipient organizations, but would have to discuss allegations of discrimination if they should arise. *Des Moines Register*, June 7. After the June 7 newspaper report appeared, the president of United Way of Central Iowa, Martha Willits, announced that they would ask the Mid-Iowa Council of Boy Scouts to clarify how they interpret their policy, proclaiming that groups that don't abide by the United Way's nondiscrimination requirements would be ineligible to receive funding. *Des Moines Register*, June 8.

In Massachusetts, the Hampshire County United Way announced early in June that it would refuse to provide further financial support to the Great Trails Council of the Boy Scouts, because council officials refused to sign a non-discrimination statement that includes sexual orientation. *Boston Globe*, June 8.

The Mohegan Council of the Boy Scouts of America in Central Massachusetts adopted a non-discrimination policy that includes sexual orientation, in order to comply with requirements of the Untied Way of Central Massachusetts for continued funding. The United Way then voted a grant of $137,958 to Mohegan Council for the next fiscal year, which begins July 1, 2002. The president of the Mohegan Council claims that this policy was approved by the Boy Scouts national organization. However, a reporter from the *Worcester Telegram & Gazette* was on the case, and phoned the national Boy Scouts organization, where a legal counsel named David Park told him that the Scouts continue to insist that no openly gay people may serve as adult leaders. When Park was asked about the contradiction between this and the non-discrimination policy adopted by Mohegan Council, he reportedly stated: "Apparently, United Way and the council have agreed on some statement of policy that allows them to coexist. I think that's a fine thing," and insisted that all 315 of the BSA's councils is in compliance with the national organization's policy against gay participation. *Worcester Telegram & Gazette*, June 8. Someone's playing games here.

800 clergy and lay leaders in the United Methodist Church West Michigan Conference voted on a resolution early in June calling on church leaders to open a dialogue with Boy Scouts leaders to advocate that gay people be allowed to participate in Scouting. The United Methodist Church is the largest organizational sponsor of Boy Scout troops in the U.S. The Church also has a policy statement affirming the civil rights of gay and lesbian people. However, despite this Church policy, the proposal was narrowly defeated. Nonetheless, the resolution's defeat does not stop local church leaders from initiating a dialogue on their own. *Grand Rapids Press*, June 9.

Anti-gay conservatives in Congress, eager to play the "gay card" in a popular cause, have saddled President Bush's education bill with a requirement that schools receiving federal financial assistance treat the Boy Scouts of America the same as any other organization in terms of access to school buildings. Jesse Helms was lead sponsor of the amendment in the Senate, which passed on a largely party-line vote of 51–49; the House version of the amendment passed on a voice vote. Senate Democrats then achieved passage of another amendment, which they hope will emerge as a substitute in the conference committee, that prohibits discrimination against any youth group on the basis of its viewpoint about sexual orientation. *N.Y. Times*, June 15.

Civil Litigation Notes

The 9th Circuit has voted for en banc reconsideration of *Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206 (March 29, 2001), in which a three-judge panel voted 2–1 against a hostile environment sexual harassment claim brought by an openly-gay employee. A majority of the panel concluded that Mr. Rene was harassed because he is gay, not because of his sex; dissenting Judge Dorothy Nelson contended that when harassment crosses the line to physical and sexual assault, the matter should be considered actionable sexual harassment under Title VII. The decision to grant en banc review was announced July 2. *Daily Labor Report* No. 130 (BNA), July 9.

Film actor Tom Cruise is still busy trying to stamp out rumors about his sexual activities. Having filed a defamation suit May 2 in Los Angeles County Superior Court against gay porn performer Chad Slater, who had allegedly told a French magazine that Cruise had approached him for sex, the actor filed a second suit on June 4, this time against Michael Davis, the publisher of *Bold*, a Los Angeles-based magazine. Cruise alleges that Davis sent a dozen news organizations a copy of an "anonymous" letter asserting that a videotape exists depicting Cruise having sex with a man. The letter purportedly came into Davis's possession after he offered a $500,000 reward to anyone who could produce a photo or video proving that Cruise was gay — purportedly to help Cruise put an end to the rumors about his sexual orientation. As to the first suit, Slater denies having made the statement, and the magazine is printing a retraction. We won't make further comment, since we don't want to be sued by Cruise (although it would certainly juice our circulation). *New York Daily News*, June 5.

The Texas Supreme Court ruled on June 21 that neither a concerned citizen nor a member of the Houston city council had standing to raise legal objections to Mayor Lee P. Brown's executive order barring discrimination on the basis of sexual orientation within the executive branch of the city government. *Brown v. Todd*, 2001 WL 690373. In 1984, the city council passed an ordinance prohibiting such discrimination, but Richard Hotze and other citizens organized to pass a referendum repealing the ordinance. There things stood until Brown was elected major and, shortly after taking office, issued his executive order. Hotze and city council member Rob Todd filed suit, seeking to have the order invalidated. Hotze premised standing on the argument that he was personally injured because the mayor had improperly sought to invalidate the results of the referendum he had organized; Todd claimed standing as a city councilmember whose legislative prerogatives were trampled by the order. The court found that neither individual had standing, since Hotze's injury was no different from any other member of the general public, and since Todd has suffered no personal injury as a result of the mayor's order. The court expressed no view on the merits of the mayor's authority to issue the order in light of the prior referendum.

Here's a curious one: Christopher McKelvey signed up to become a Roman Catholic priest in 1985 and was sent off to begin his seminary training. After earning bachelors and masters degrees at various seminaries and doing some internships, he voluntarily took a leave from the program. When he didn't return from leave, his original sponsoring Diocese dropped him, and his subsequent attempt to sign up with another Diocese was rebuffed. Then he got a letter demanding $69,000 to cover the cost of his education (which would have been picked up by the Church had he become a priest). So he turned around and sued the Church in New Jersey state courts for breach of contract, claiming that he had been unable to complete the program because he was deluged with homosexual propositions from fellow priests and, when he reported them to his superiors, no action was taken. Sort of a "hostile environment" claim, but couched as a breach of the contract he had with the Church. The trial court wasn't buying it, and neither was the Appellate Division, which

rejected his appeal of the dismissal of his case. *McKelvey v. Pierce*, 2001 WL 747872 (July 5). Both courts grounded the dismissal on lack of jurisdiction to inquire into the policies of religious seminaries. But the Appellate Division displayed no hesitation about detailing McKelvey's charges about rampant homosexuality in the priesthood in its opinion…

In a case that took a long time to surface after the opinion was issued, the Michigan Court of Appeals affirmed a trial court's decision to award physical custody of her two youngest children to a mother who has engaged in same-sex relationships. *Boot v. Boot*, 2001 WL 766115 (Jan. 30). At the time of divorce, the parents had joint custody, with mother having physical custody. Four years later, father petitioned for a change of custody, which was granted for one of the older children but not for the two younger ones. The father appealed, asserting the mother's unsettled personal life, subsequent unsuccessful marriage and a lesbian affair. The court of appeals found that the trial court considered all relevant factors, and noted with apparent approval that the morality factor favored the father, but nonetheless affirmed the trial court's conclusion that taking all factors together the custody of the two youngest children should not be changed.

Are the Washington state courts ready to accept non-traditional definitions of family? The opinion by the Washington Court of Appeals, Division 2, in *Matthews v. Penn-America Insurance Co.*, 25 P.3d 451 (June 15), suggests not. 24–year-old Blake Matthews was living with his mother and her domestic partner, Ray Edinger, at the time of his serious auto accident. Ray's insurer denied coverage, asserting that Blake was not a member of Ray's "family" as specified in the insurance policy. The policy used the term "family" but did not define it explicitly. A majority of the 3–judge panel found that the traditional definition of family, based on blood or legal ties, should be used, thus leaving Blake uninsured. The dissent argued that the way to construe this undefined term is by reference to what Ray thought he was purchasing when he bought this policy, and that in light of modern definitions and family evolution, Ray could reasonably have believed he was purchasing coverage for his household, consisting of himself, his domestic partner, and her son who lived with them.

A man bites dog story: Professor Steven Albrechtsen of University of Wisconsin-Whitewater filed suit under Title VII, claiming he had suffered retaliation for complaining about sex discrimination, and claiming that as a heterosexual he suffered discrimination at the hands of the lesbians who were running his department. He also claimed that two straight women in the department were denied tenure because they were friendly with him. He asserted that the lesbians gave him a low merit pay raise and refused to allow him to teach some summer classes that he had taught in the past. University officials denied discrimination or retaliation, but the jury ruled for Albrechtsen on his retaliation charge, awarding him $250,000 for emotional distress, $43,840 for lost income, and $150,000 for legal fees. *Capital Times*, *Wisconsin State Journal*, June 28.

The California First District Court of Appeal has essentially affirmed a San Francisco Superior Court ruling that federal law preempts a challenge of the military's "don't ask, don't tell" policy as applied in the California National Guard, at least so far determining whether an openly-gay person can continue serving in those Guard positions that require acceptability in the federal program. However, the court also agreed with the lower court that for those California National Guard positions where federal recognition or approval is not required, it would violate the California constitution and statutes for the California National Guard to apply the "don't ask, don't tell" policy. *Holmes v. California National Guard*, 2001 WL 729204 (June 29). The court remanded for clarification of the scope of the superior court's ruling, finding that it was worded ambiguously enough that it might overlap into preempted territory. But the court agreed with the lower court that Holmes' limited victory in this case was insufficient to justify the substantial attorney fee award he was seeking of more than $400,000. As a practical matter, the severely limited number of non-federal-related positions that the ruling could affect was seen as accomplishing too little to denominate Holmes as a prevailing party.

A published ruling on some objections to how a deposition was being conducted provides a fascinating window into an ongoing lawsuit in the Connecticut Superior Court involving allegations of sexual orientation discrimination. *Kavy v. New Britain Bd. of Educ.*, 2001 WL 688622 (May 21). Beth Kavy, a lesbian special education teacher in New Britain, alleged that she had been in a relationship with another female teacher, Lynne Kowalczyk, but the relationships was disrupted when Kowalczyk began a relationship with a school nurse, Marcia Garcia. Kavy alleged that she had been assaulted by Garcia, and when she complained to school authorities, both she and Kowalczyk were transferred to other positions. Kavy claims her transfer was in fact a demotion, and was motivated by the sexual orientation of all the women involved in this incident. A fascinating case! At Kowalczyk's deposition, where she was not represented by counsel, Kavy's counsel instructed her not to answer certain questions posed by the school board's attorney, on the ground that they related to a proceeding Kowalczyk had filed against the school board regarding her own transfer, rather than to Kavy's case. Judge Shapiro of the Superior Court held that the subject matter of the questions was also relevant to Kavy's case, and so Kowalczyk should answer them.

In *Ellenbogen v. Projection Video Services, Inc.*, 2001 WL 736774 (June 29), U.S. District Court Judge Buchwald (S.D.N.Y.), granted summary judgment to the employer on hostile environment sexual harassment and sex discrimination charges brought by a lesbian former employee of the A/V subcontractor at the N.Y. Hilton, and dismissed supplementary sexual orientation discrimination charges under New York City's human rights ordinance. Ellenbogen claimed that she was denied promotion, harrassed and ultimately discharged due to her sex and sexual orientation. The court found that although she had made out a prima facie case on the promotion charge, it was successfully rebutted by the employer, that the employer had responded promptly and effectively to Ellenbogen's complaints about various workplace misconduct by other employees, and that Ellenbogen had failed to substantiate her claim that the circumstances of her discharge (for refusal to submit to a hair test for marijuana use after a package of marijuana was found in her backpack) were a "set-up" to get rid of her. Having found against Ellenbogen on all her sex discrimination charges under Title VII, the court exercised its discretion to avoid ruling on the sexual orientation claims, which arose only under supplementary jurisdiction. A.S.L.

Criminal Litigation Notes

A 3–member panel of the Virginia Supreme Court issued a ruling June 1 denying review of *DePriest v. Commonwealth of Virginia, 537 S.E.2d 1, 73 Va. App. 754 (Va. Ct. App., Salem, 2000), in which the intermediate appellate court rejected a constitutional challenge to Virginia's sodomy law. The ten defendants, all arrested by vice officers for soliciting gay sex in public, sought to persuade the court that the privacy rights of all Virginians, gay and straight, were violated by the underlying sodomy law, but the lower courts have ruled that because the solicitations were made in public the privacy argument is unavailable to the defendants. Meanwhile, legislative attempts to get rid of the sodomy law have been notably unsuccessful. During the 2000 session of the legislature, the House of Delegates narrowly approved a measure to reclassify consensual sodomy from a felony to a misdemeanor, but a similar measure was buried in a Senate committee. Washington Blade*, June 8; *Roanoke Times & World News*, June 6.

Rejecting a gay-panic style defense, a Montgomery County, Maryland, jury convicted Robert Paul Lucas of second-degree murder, robbery and burglary in the death of Monsignor Thomas Wells in Germantown last year. Lucas's defense sought to portray Wells as a homosexual aggressor in support of its contention that Lucas's conduct would merit at most a manslaughter conviction, but the jury never "gave any credence to that story at all," according to Juror Joe Berry. The June 5 conviction subjects Lucas to a prison sentence of up to 70 years; sentencing is set for Aug. 13. Circuit Judge Paul McGuckian will sentence Lucas on Aug. 13. *Washington Times*, June 6; *Washington Blade*, June 8.

When the bloody body of 16–year-old Fred Martinez Jr. was found outside the city limits of Cortez, Colorado, there were immediate suspicions of a hate crime, since young Martinez was a gender-bender, possibly gay or transsexual, according to friends and family members of the young Navaho. Soon after the body was found, policy arrested 18–year-old Sean Murphy, and some witnesses now say that Murphy had bragged to friends in the days after Martinez's death that he had "beat up a fag," according to affidavits filed in Montezuma County court. Ironically, Murphy's mother told reporters that her son was not homophobic or racist, and that she is a lesbian and has dated Indian women. Police who were watching Murphy's house when he was a suspect said they saw someone, later identified as a friend who was with Murphy on the day Martinez was killed, leave with a bag and drop it in a dumpster. Clothing, including blood-stained tennis shoes, was found in the bag. According to press accounts, Murphy grew up in a troubled home,with a stepbrother who died in 1996 when he was shot by a police sniper in a dorm room at the University of Northern Colorado, where he had gone to confront his ex-girlfriend after killing three of his roommate in Bayfield. (Is this beginning to sound like a daytime TV soap?) Police are still holding back from stating conclusively that Martinez was the victim of a hate crime. *Rocky Mountain News*, July 12.

The Texas Court of Appeals in Houston (14th District) affirmed a murder conviction where the killer asserted that he shot the victim in self defense after the victim "made a homosexual advance at him." The court noted that the victim's family and friends all testified at trial that the victim was not "homosexual." What do they know? *Williams v. State of Texas*, 2001 WL 726441 (June 28) (not reported in S.W.3d).

On June 21, Van Nuys (California) Superior Court Judge Paul Gutman ruled that Gov. Gray Davis had unlawfully denied parole to Robert Rosenkrantz, a gay man who has been in prison since 1985, shortly after his high school graduation, for the murder of another teenager who had "outed" him to his family and then taunted him when Rosenkrantz begged him to retract the outing so his father would take him back into the family home. The case has had a tortured history since then, with Rosenkrantz being fully accepted as a gay man by his family and having convinced the parole board and several judges that he should now be released as presenting no danger to society. But Davis refuses to parole convicted murderers, and now Judge Gutman has ruled that the state has produced no evidence that Rosenkrantz presents a continuing threat to society. However, Gutman's ruling is stayed pending the state's appeal. *Los Angeles Times*, June 22.

Ronald Crumpley, who murdered two gay men and wounded others in a shooting incident in front of a gay bar in Greenwich Village in 1980, was found not responsible by reason of insanity. See *Matter of Crumpley v. Wack*, 212 App. Div. 2d 299 (N.Y.A.D., 1st Dept. 1994), leave denied, 86 N.Y.2d 808 (1995). Several times in recent years Crumpley has petitioned to be removed from his confinement in a secure Psychiatric Center, always unsuccessfully. On June 19, Acting Supreme Court Justice Jose A. Padilla, Jr. (N.Y. County), found in *Matter of Crumpley v. Garyali*, No. 68121/83, that Crumpley is still mentally ill and still suffering from a dangerous mental disorder requiring continuing confinement in a secured facility. Crumpley was found to have suffered from a delusion that gay men were out to sexually assault him, which led him to attack gay men on a variety of occasions leading up to the fatal shootings at the Ramrod. Justice Padilla noted that Crumpley had refused to take certain prescribed medications, and had been involved in incidents with staff and fellow patients over the past twenty years that required a special anger-management program. In particular, the court noted expert testimony that Crumpley had failed to develop "sufficient insight into an underlying cause of the psychosis which precipitated his killings of two individuals who he believed were gay." Although Crumpley asserts that he no longer believes that gays are agents of the devil, he still believes that gays were "probably trying to pick him up," and continued to liken gay men to "stalkers" for their street-cruising activities.

In *Roe v. Attorney General*, 2001 WL 721409 (June 28), the Massachusetts Supreme Judicial Court rejected a lower court's conclusion that the state's sex offender registry law provided insufficient due process for convicted sex offenders to get an individualized hearing before having their names and other identifying information listed in a registry accessible to the public. The court concluded that due process would not be offended if sex offenders are required to transmit their names and addresses to the registry board before individualized hearings are held, and that the registry could also pass this information on to law enforcement officials. The current law authorizes individualized hearings after these initial registration requirements are met, and the court found that sufficient as a matter of state constitutional law. (No federal constitutional claim was raised.)

Yet another judge will take a look at Robert Rosenkrantz's attempt to win parole from his 1985 murder conviction. Rosenkrantz, then 18, murdered Steven Redman, a 17–year-old fellow student from Calabasas High School who had "outed" Rosenkrantz to his then homophobic family. Rosenkrantz has been imprisoned ever since, becoming a model prisoner, completing college-level credits, and winning the support of his family. Los Angeles County Superior Court Judge Kathryne Stoltz had ordered his release, overruling a decision by the parole board, which then issued a recommendation for parole to the governor. But Gov. Davis took the position that Rosenkrantz should do more time, and denied parole. At various times, Davis has stated that he will never grant parole to a convicted murdered, so Rosenkrantz went back to court, arguing that his rights to an unbiased consideration of his parole application were violated by Davis's alleged blanket policy of no parole for murderers. The case was finally reassigned to Van Nuys Superior Court Judge Paul Gutman, who promised he will try to resolve the case as quickly as possible. *Los Angeles Times*, June 8.

The *New York Daily News* reported June 7 that U.S. District Judge David Trager agreed to a request by federal prosecutors to bar defense attorneys in a pending organized crime trial from questioning a "turncoat" witness about a murder alleged to have been committed because the victim was gay. Defense attorneys had hoped to show that the murder in question was not motivated by any organized crime concern, and was done strictly out of homophobia. The prosecutor argued that the issue is "so potentially inflammatory to a jury that they would reject all of the government's case because of the anger about that particular incident." Trager agreed with the prosecutors.

A difference of opinion has emerged among New York trial courts as to whether a federal conviction for purchase or possession of child pornography suffices to require the defendant to register under New York's Sex Offender Registration Act. In February, Justice Richter (Sup. Ct., N.Y. Co.) ruled in *Matter of David Nadel*, 2001 NY Misc. LEXIS 103, that because the federal statute criminalized some conduct that was not covered by the state statute, a conviction under the federal statute would not suffice to impose such a requirement; the main differences between the statutes is that the federal statute requires an interstate commerce nexus as a basis for federal jurisdiction while the jurisdictional basis of the NY statute is that the alleged conduct occurred within New York State, and that the federal statute treats as child pornography material depicting persons under 18 years old, while the N.Y. statute defines child pornography as depicting persons under 16 years old. In *Matter of Bernard Millan*, reported in the NY Law Journal on June 11, Justice Stone (Sup. Ct., N.Y. Co.), expressly disagreed with the reasoning of *Nadel* and found that a man convicted under the federal statute for ordering pornography advertised as depicting children of various ranges from 14 down is required to register, since the conduct for which he was charged and convicted was clearly covered by the state law. A.S.L.

Legislative Notes

Opponents of same-sex marriage, calling themselves the Alliance for Marriage, announced at a Washington press conference on July 12 that they would seek the introduction in Congress of an amendment to the U.S. Constitution stating the following: "Marriage in the United States shall consist only of a union of a man and a woman." The amendment would also prohibit any federal

or state constitution or law from requiring "that marital status or the legal incidents thereof be conferred upon unmarried couples or groups." Enactment of an amendment requires passage by at least a 2/3 vote in each house of Congress and ratification by 3/4 of the states (38 states). Proponents of the Federal Marriage Amendment stated their concern that the enactment of civil unions in Vermont was a first step towards undermining the traditional definition of marriage. Well, they're correct about that… *Los Angeles Times*, July 13.

The U.S. House Judiciary Committee approved H.R. 7, a bill intended to allow religious organizations to compete for federal grant money, after adding an amendment intended to respond to the criticism that religious organizations may be using federal money in ways that discriminate, but the amendment will be no help to lesbians or gay men who suffer discrimination from religious employers. The amendment, offered by North Carolina Democratic Rep. Mel Watt, provides that religious employers are bound by the requirements of federal anti-discrimination law in performing under their federal grants. Federal law does not presently ban sexual orientation discrimination. In three days of political turmoil in mid-July, the *Washington Post* published a report about an internal Salvation Army memorandum revealing that a deal had been struck with the White House to include a specific exemption from compliance with state and local sexual orientation discrimination laws for religious organizations that receive federal money under the faith-based program, in regulations that would be promulgated after the bill was enacted. The resulting protest from some members of Congress led to a quick disavowal from the White House; a spokesman insisted that the subject had only been discussed at rather low levels, and later the same day announced that such a regulation would not be approved by the White House. The next day, however, it was learned that Karl Rove, the president's top political advisor and liaison to religious groups, had involved himself in the issue by calling the general counsel of the Office of Management and Budget to inquire about the status of the Salvation Army's proposed regulation. Red faces all around, and a renewed demonstration about the internally conflicted Bush Administration when it comes to gay issues. *New York Times*, *Wall Street Journal*, *Washington Post*, July 11;*Newsday*, July 13.

The Employment Non-Discrimination Act (ENDA), which would create a federal ban on intentional employment discrimination on the basis of sexual orientation by federal and state government agencies and private employers in businesses affecting interstate commerce, will be reintroduced in the 107th Congress during the summer with some minor changes, slightly expanding the exemption for religious organizations and adding language necessary to overcome the sovereign immunity issues created by recent Supreme Court decisions under the ADA and the ADEA. With Sen. James Jeffords' exit from the Republican Party, a search is on for a Republican senator to be a principal co-sponsor of the bill. Among the candidates being discussed are Gordon Smith (Oregon), Lincoln Chafee (Rhode Island) and Arlen Specter (Pennsylvania), all of whom have expressed support for ENDA in the past. Political observers hope that ENDA will pass the Senate this year, but doubt it will advance in the Republican-controlled House. In any event, it seems unlikely that President George W. Bush would sign the measure even if it passed. *Washington Blade*, June 22.

On June 13, Acting Governor Mazie Hirono signed the new Hawaii Hate Crimes Law, which provides for enhanced sentences for persons convicted of felonies in which a victim is selected because of their race, religion, disability, ethnicity, national origin or sexual orientation. *Honolulu Star-Bulletin*, June 13.

Nebraska Governor Mike Johanns vetoed a bill that would have protected residents from discrimination in real estate dealings on the basis of sexual orientation. The provision was part of a major bill to revise and update the state's real estate law, which had been endorsed by the Nebraska Real Estate Commission and the Nebraska Board of Realtors. The bill's sponsor originally put it forward without any anti-discrimination language, but a floor amendment added the anti-discrimination provision, after which the sponsor actually threatened to pull his own bill off the floor. The governor stated that he would not support a bill that classifies people based on their "sexual choices." The legislature (which is unicameral in Nebraska) fell four votes short of overriding the veto. *Omaha World-Herald*, June 1.

The Common Council of the city of Milwaukee voted 9–8 on May 30 to reject a proposed union contract with city workers that would have included a domestic partnership benefits plan for same-sex partners of municipal employees. At least one Alderman contended that the conservative majority that voted no had in effect voted to raise taxes, since the contract dispute will be submitted to arbitration and may result in a more expensive contract for the city. This was the first time in 40 years that the Council had rejected a contract negotiated by city administrators with the municipal union. *Milwaukee Journal Sentinel*, May 31.

The Montgomery County, Virginia, Council voted to ratify a labor agreement that extends health and retirement benefits to unmarried opposite-sex partners of police department employees. The step was taken at the request of the union because the council had previously voted to extend benefits to same-sex partners, and the union argued that equity demanded equal treatment for unmarried opposite-sex partners. *Washington Post*, June 27.

Attempts to repeal the sodomy law as applied to private, consenting adults continue in Louisiana. A routine measure to make technical adjustments to the sex offender registration law was amended in the Senate to add a repeal of the crime against nature provision, but the original House sponsor of the measure was unwilling to accept the Senate amendments, and the measure was thrown back into a conference committee. *New Orleans Times Picayune*, June 15.

A sign of the times… The Tucson, Arizona, city council voted unanimously on July 2 to cut off a $1.5 million donation to the local United Way unless United Way changes its non-discrimination policy to include transgendered individuals. Local activists expressed anger that the charity bans sexual orientation discrimination but has proved unwilling to ban transgender discrimination as well. If the United Way does not make the appropriate change by the council's August 6 meeting, it will forfeit the funding for the 2002 fiscal year, which began July 1. *Arizona Republic*, July 4.

The Fairfax County, Virginia, school board voted 9–3 on May 24 to update the Student Responsibilities and Rights Handbook to make it clear that the school's policy against harassment includes harassment based on sexual orientation. The previous edition of the book referred vaguely to "matters pertaining to sexuality" but the new edition will specifically mention sexual orientation. *Washington Blade*, June 1.

On May 31, a bare majority of the California State Assembly voted in favor of a bill that would add "actual or perceived gender" to the list of characteristics covered under the Fair Employment and Housing Act, an anti-discrimination measure. The 41–31 vote sent the bill to the state Senate. Assemblywoman Jackie Goldberg, an openly-lesbian member from Los Angeles, is the author of the bill. The measure is intended to extend protection of the law to transgendered individuals. *San Diego Union-Tribune*, June 1. On July 3, the Senate Judiciary Committee approved the measure by a 4–2 vote. The measure was expected to pass the Senate, but Gov. Davis had not yet stated whether he would sign the measure if it passed. *San Francisco Chronicle*, July 4.

On June 6, the California State Assembly voted 43–29 in favor of a bill introduced by openly-lesbian Assemblywoman Carole Migden of San Francisco, that would increase the rights and privileges available to registered domestic partners under the registration law that was passed two years ago. The bill would allow same-sex partners to file wrongful-death suits, permits partners to make medical decisions for each other, and establish entitlement to intestate succession. Republican opponents argued that passage would defy the voters who supported Proposition 22, which prohibits the state from recognizing same-sex marriages. *Los Angeles Times*, June 7.

On April 25, the Huntington Woods, Michigan, City Commission voted 5–0 to pass an ordinance that bans discrimination on the basis of age, sex, disability and sexual orientation. Residents opposed to the measure have gathered sufficient signatures on a petition to suspend it from going into effect and requiring that it be submitted to the vot-

ers in November unless the Commission votes to rescind it. *Detroit News*, June 3.

On June 1, Maine Gov. Angus King signed into law ch. 347, a bill approved by both houses of the state legislature during May by substantial majorities, which will require health insurers doing business in the state to offer domestic partnership coverage under the same terms and conditions as coverage is offered for spouses. The measure specifically requires HMO's to offer domestic partnership coverage on the same basis as family-spousal coverage. *BNA Daily Labor Report* No. 111, June 8, p. A–11.

The state budget belatedly passed in Minnesota did not include a threatened amendment that would have blocked the state from offering health insurance coverage to same-sex partners of state employees. *St. Paul Pioneer Press*, *Minneapolis-St. Paul Star Tribune*, June 28.

A referendum for repeal of Maryland's recently-enacted law banning sexual orientation discrimination is brewing. Proponents of repeal have been circulating petitions and claim to have already exceeded the minimum number of required signatures to get on the ballot, if the signatures are verified by the State Board of Elections. 46,128 signatures of registered voters are required. The law is slated to take effect on October 1. *Washington Post*, June 30. On July 5, the *Washington Post* reported that repeal advocates, operating under the name TakeBackMaryland.org, claimed to have gathered more than 55,000 signatures. If more than the required number prove valid, the law will not go into effect on October 1, but will be on hold pending the outcome of the vote, which would be held in November 2002 at the general election. Meanwhile, the state board of education, following up on passage of the new law, has proposed to add sexual orientation to the list of prohibited forms of discrimination in the state's public schools. *Baltimore Sun*, June 20.

The Des Moines, Iowa, City Council voted 5–2 to add "sexual orientation" to the city's ordinance banning discrimination in employment, housing or public accommodations. Under the rules of the Council, the matter must be put to a vote two more times before it can go into effect, allow time for public debate and consideration. A similar proposal failed several times during the 1990's, most recently in 1998. One of the two opponents of the measure, Councilman George Flagg, explained his opposition prior to the meeting, stating that "sodomy is a dirty, disgusting and filthy habit." The second vote was to be held June 18. *Des Moines Register*, June 5. A.S.L.

Law & Society Notes

During the last six years of his presidency, William J. Clinton issued annual Gay Pride month proclamations and many federal agencies officially sponsored Gay Pride ceremonies for their employees. President George W. Bush, however, decided not to issue such a proclamation, and a White House spokesman told the Associated Press: "The President believes every person should be treated with dignity and respect, but he does not believe in politicizing people's sexual orientation. That's a personal matter." However, the White House has sent a memo to administration officials stating that it "will continue to observe, in some form or manner… programs that are traditionally recognized through the Affirmative Action Program. Those programs recognize minorities and women that have been traditionally under-represented in the work force." The Administration's decision to stand aloof from Gay Pride activities has resulted in most federal departments abandoning their official sponsorship of Gay Pride programs for employees, although gay employee groups are continuing to hold the programs on their own in many agencies, usually without attendance or participation from top officials (who would preside at the ceremonies during the Clinton Administration). *Washington Post*, June 13. This all seems consistent with the "Y'all go back into the closet and we'll tolerate you" approach of the Bush Administration to gay rights issues.

How things have changed in the federal service! In the 1950s, President Eisenhower issued an executive order banning employment of "homosexuals" and other "sex perverts" by the federal government. But in June 2001 the U.S. Department of Agriculture advertised for a "gay and lesbian program specialist" to work on improving conditions for lesbian and gay employees of the agency. This may be the first time that a federal agency has advertised to hire somebody to specialize in gay workplace issues. *New York Times*, June 20.

Gallup Polls released over the years have shown a trend towards more public acceptance of gay people in the U.S. A new national poll, reported early in June, showed that, perhaps for the first time, a majority of the general public agrees with the statement that a "homosexual lifestyle" can be acceptable, but just barely - 52%. The poll also shows that 72% of the public support the ability of gays to serve in the military. Also, a majority, 54%, believes that consensual gay sex should be legal. However, a slight majority stated opposition to the concept of civil unions for same sex couples, with only 44% stating support for such laws. *National Journal*, June 9.

Dr. David Satcher, appointed Surgeon General by President Bill Clinton for a 4–year term that ends in 2002, made waves late in June by releasing a Public Health Service Report that criticizes the sole emphasis on sexual abstinence in federally-funded sex education programs, arguing that adolescents need to be taught about barrier contraction as part of the struggle against HIV infection. Further, Satcher's report stated that there is no evidence that sexual orientation can be changed through medical or psychological intervention and called on respect for diverse sexuality, suggesting that insults or isolation of gay youth can lead to depression or suicide. The national press went crazy. President Bush kept his distance. Social conservative fulminated. See *Chicago Tribune*, June 30 (Associated Press report); *New York Times*, June 29.

The world press marveled in early July over the possibility that lesbian couples may be able to have kids without the involvement of male sperm donors. Dr. Orly Lacham-Kaplan of Monash University in Melbourne, Australia, announced an experiment with mice in which eggs were fertilized using cells from other parts of the body, not sperm. The tests are at an early stage, and might not work in humans, but scientists responded affirmatively to press questions on whether this could mean that lesbians could get pregnant by having their eggs fertilized with cells from their female partners. So far, the experiments have only been in vitro, but they are close to the next step of attempting to implant embryos conceived in this manner in the wombs of mice to see if they can be brought to term. Another one of the scientists observed that the technique that was used to clone Dolly the sheep could theoretically be used to combine DNA from two fathers in an embryo that would then be gestated by a female surrogate. A brave new world in which gay and lesbian couples could be biological parents. And then where will the opponents of same-sex marriage be? *Daily Mail*, July 11.

In a feature article about Vermont civil unions published on July 11, *USA Today* reported that some corporations have recognized Vermont civil unions as qualifying employees for inclusion in spousal benefit programs.

During 2000, the U.S. Defense Department discharged 1,212 members from the uniformed services on grounds of homosexuality, compared to 1,034 discharged in 1999. A Pentagon spokesperson stated that gay-related discharges constituted fewer than one percent of all discharges. According to the DoD, 106 of the cases involved actual sexual conduct; 1,106 discharges were based solely on a service member stating that they are gay in violation of the "don't ask, don't tell" policy. The administration of the policy seems to differ sharply depending on location and which service is involved. The number of discharges from the Army doubled from 1999 to 2000, while the number from the Air Force were halved over the same time period. *New York Times News Service*, June 2.

Beginning in June, the U.S. Census Bureau began releasing data on a state-by-state basis drawn from the responses to the 2000 census question about unmarried same-sex cohabitants. The first two states to receive such data, Vermont and Delaware, both reported a sharp increase in unmarried same-sex partner households from 1990 to 2000, 400% in Vermont and 700% in Delaware. It is unclear whether the huge increase is an artifact of more willingness of same-sex couples to respond honestly to the census questionnaire, or of a better-worded question more apt to draw appro-

priate responses, or whether the numbers reflect real, substantial actual growth in the number of same-sex couples living together. By the end of the summer, all 50 states will have received this data. Despite the large percentage increases, same-sex couple households made up less than one percent of all households in either of the two states. *Detroit News*, June 13. ••• Subsequent reports from other states have confirmed the data from Vermont and Delaware, as the number of same-sex couple households appears to have skyrocketed just about everywhere. In Colorado, for example, the number of reported same-sex couple households increased 400% (while the number of households headed by unmarried couples regardless of gender had doubled) over the figures from 1990. *Rocky Mountain News*, July 3. The figures for New York showed that Manhattan was the county with the largest number of same-sex households, about 10,000, making up 1.4% of all households in the county. The Census Bureau reported that 26,000 households in the city were headed by same-sex couples, up 179% from the 1990 Census count. *Newsday*, June 27. ••• The Census Bureau put a damper on some of the euphoria about the increase in numbers, by putting out a statement on June 29 that part of the reason for the increase was that Census workers in 1990 had "adjusted" data received about same-sex couples who stated that they were "married" by treating them as opposite-sex couples! *USA Today*, July 11. ••• The *Seattle Times* reported July 11 that with a density of one out of every 21 couples living in the city, Seattle had one of the highest densities of same-sex couples living together in the U.S. As of the time of this article, only Washington, D.C., had a higher density. The Census Bureau was still in the process of releasing local figures when this report was issued, however. A.S.L.

The June issue of the *American Journal of Public Health* is devoted to lesbian, gay, bisexual and transgender health issues. It includes the results of a survey of high school students, showing that the level of anti-gay harassment and violence is lower in schools that include gay-sensitive HIV-related information and material on sexual orientation in the health curriculum. The survey, which was carried out in Massachusetts high schools, was conducted by researchers from George Washington University and the Center for Applied Behavioral and Evaluation Research in Washington, and the Massachusetts Department of Education. Among the specific findings: Gay students were twice as likely as heterosexual students in the survey to report having had sexual intercourse in the three months preceding the survey, 68.5 percent to 47.8 percent. Self-identified gay students were four times as likely as self-identified straight students to have attempted suicide, 36.1 percent to 9.4 percent. Similarly four times as many gay students reported being the target of threats or recipient of injuries, and four times as many gay students skipped school because they felt "unsafe" there. In schools with gay-sensitive HIV information programs, the proportion of gay students contemplating suicide dropped sharply, as did the proportion of who skipped classes. Even the rate at which gay students engaged in sexual intercourse was lower at such schools. *Detroit News*, June 1.

The governing board of the Presbyterian Church USA voted 317–208 in favor of a resolution lifting the ban on ordination of openly lesbian and gay church members as ministers and other clergy of the church. The June 15 vote by the delegates to the national meeting must now be submitted for ratification to the 173 regional governing bodies over the next year before it can take effect. *Washington Post*, June 16.

The University of Colorado's governing board voted May 30 to add "sexual orientation" to the institution's non-discrimination policy, and to consider at its next quarterly meeting, in August, whether to extend health-care benefits to same-sex partners of University employees. *Denver Post*, May 31.

Skirting controversy, Iowa Governor Tom Vilsack ordered the state education department to withdraw a proposed revision to state accreditation standards for public schools that would have required schools to offer diverse programming and an inclusive environment that offers information about alternative lifestyles. *Chicago Tribune*, June 1.

The National Education Association was planning to consider a resolution at its national convention calling for schools to do a better job in support of gay, lesbian, bisexual and transgender students and staff, drawing hundreds of protesters outside the convention hall. The leadership then decided, responding to a suggestion from the gay and lesbian caucus, to withdraw the resolution and instead to appoint a special Task Force to study the issue and report back later. Sounds like chickening out to us.... *Associated Press*, July 5.

The Minneapolis Police Department issued a new code of conduct. In a section headed "Impartial Policing," it provides that no person should be singled out or treated differently as a consequence of race, ethnicity, national origin, gender, sexual orientation or religion. *Minneapolis-St. Paul Star Tribune*, June 28.

In conservative Salt Lake City, Utah, where local politics is dominated by the strongly anti-gay Mormon Church, Mayor Rocky Anderson made history by accepting an invitation from the lesbian and gay community to serve as Grand Marshal of the Utah Pride Day 2001 Parade, which took place on June 10. Said Mayor Anderson at a public forum the day prior to the event, "I think it's entirely appropriate and I was honored to be asked." He expressed that hope that his involvement in the event would send a message that "everybody is welcome in this community and everybody is entitled to respect, dignity and fair treatment regardless of their differences." *Deseret News*, June 10.

Officials at Catholic University of America in Washington, D.C., canceled plans to rent space to an organization that planned to hold a conference on "curing" homosexuality. The officials stated that the nature of the conference had been misrepresented to them when the original arrangements were made, and they did not learn until just weeks before the event the true nature of what was contemplated. After the conference organizers were rebuffed by CU, they turned to Trinity College, a Catholic school for women in northeast Washington, where the conference was held. Trinity officials ultimately also stated regret, announcing that they had been misled as well about the nature of the conference and only figured out what was going on after the event began. Among the speakers at the event was Reverend Paul Scalia, son of Supreme Court Justice Antonin Scalia, speaking on a panel titled "How a priest or minister can participate in an ex-gay's recovery process." *Washington Post*, June 10.

Human Rights Campaign, the gay lobbying and political action group, has called for a boycott of Exxon Mobil Corp., in response to that corporation's refusal to reinstate non-discrimination and partner benefits policies that had been adopted by Mobil prior to the merger with Exxon. Many other employers in the energy industry now ban anti-gay discrimination and provide benefits for domestic partners, but Exxon Mobil has rebuffed efforts to reinstate the benefits. A shareholder proposal on this question was recently rejected by Exxon Mobil shareholders, but a large enough bloc voted in favor of the resolution that the matter can be brought up at the next annual meeting again. Responding to the boycott call, a spokesperson for the company maintained that Exxon Mobil does have a written policy against sexual orientation discrimination, but that it is just not included in the company's published policy statements. On the issue of partner benefits, the company claims that it provides benefits for relationships that are legally recognized in Canada, the Netherlands, and Vermont, and that it has continued to provide benefits to Mobil employees who had registered for them prior to the merger. *San Francisco Chronicle*, June 13.

The Intersex Rights Movement, formed just a few short years ago, is making enormous strides, attracting substantial law review and medical journal articles advocating for the rights of intersexuals to determine for themselves whether to submit to surgical genital modification, and now winning a vote by the national convention of the National Organization for Women (NOW) in support of the right of intersex children's right "to choose and be properly and fully informed regarding cosmetic medical procedures involving their bodies or genitals." Beginning in the 1950s, the "standard" procedure of American medicine was for doctors to recommend immediate surgery when discovering genital abnormalities at birth, pressuring the parents into making the decision for their child on the basis of incomplete (virtually

no) information about the physical and psychological problems this might cause for the children down the line. For detailed information about the issue of intersexuality, consult the website of the Intersex Society of North America, www.isna.org.

For the third time since the Texas Court of Appeals ruled in *Littleton v. Prange*, 9 S.W. 3d 223 (Tex. App., San Antonio, 1999), rev. denied, March 2, 2000 (Tex. Sup. Ct.), cert. denied, 121 S. Ct. 174 (2000), that a transgendered person permanently remains a member of their birth sex regardless of gender identity or surgical procedures, a lesbian couple has obtained a marriage license from the Bexar County Clerk on the grounds that one member of the couple is, according to *Littleton*, a man. Dawn Heilpap and JoEllen Comment from Fort Wayne, Indiana, both in their 40s, obtained their license on Monday, June 11, planning to hold their wedding ceremony on June 14 in San Antonio before heading back home. Since Heilpap was born a man, their wedding will be legal in Texas, although nobody knows what the Indiana courts would think of it. Each of the women was previously married to a person of the opposite sex/gender, and between them they have four children and five grandchildren. *San Antonio Express-News*, June 12.

Organized crime leaders stand up for traditional values: The *New York Daily News* reported on June 15 that when members of the De Cavalcante crime family in New Jersey learned that their acting boss, John D'Amato, a married man, was carrying on gay dalliances on the side, they had him assassinated. According to an FBI informant, Anthony Capo, he had learned from a "girlfriend" of D'Amato that D'Amato frequented gay clubs and also picked up male prostitutes in Manhattan's meatpacking district. When he reported this to his immediate mob supervisor, a special meeting of DeCavalcante leaders convened and determined that D'Amato had to be killed. Capo was the triggerman, but he says he does not know what happened to the body after he turned it in at a mob safe house. The police have not yet recovered the body since D'Amato's disappearance in 1992. We are everywhere?

New South Wales (Australia) Court Holds False Imputation of Homosexuality Not *Per Se* Defamatory

As a matter of law, "it is no longer open to contend that the shared social and moral standards which the ordinary reasonable member of the community is imbued include that of holding homosexual men (or men who engage in homosexual sex) in lesser regard on account of that fact alone," held Justice Virginia Bell of the Supreme Court of New South Wales (Australia), Common Law Division. *Rivkin v. Amalgamated Television Services Pty. Ltd.*, 2001 NSWSC 432 (as revised May 28, 2001) (quoting submission of defendant's attorney). Therefore, a jury is not allowed to decide on the defamatory character of mere imputations that a person may be homosexual.

The defendant broadcasts over New South Wales' television Channel 7. A program entitled *Witness*, broadcast sometime before March 26, 1998, concerned the suspicious drowning death of a fashion model, Caroline Byrne. Ms. Byrne's fianc, was Gordon Wood, who was also the driver and personal assistant of plaintiff Rene Rivkin. Mr. Rivkin is a public figure, described by a NSW newspaper as "the celebrity stockbroker."

A witness contended that Ms. Byrne had placed her fianc,, Mr. Wood, under surveillance after catching him having sex with the plaintiff, Mr. Rivkin. This provided a motive to suspect Mr. Wood of murdering Ms. Byrne. Mr. Wood denied having killed Ms. Byrne, and denied that he had been caught having sex with Mr. Rivkin. The program presented witnesses who said that they had seen a green Bentley, consistent with Mr. Rivkin's vehicle, near the site of the drowning at about the time that it was thought to have occurred.

Based on this broadcast, Mr. Rivkin sued Channel 7 for the following allegedly defamatory "imputations": "(a) That he was criminally liable for murder, (b) That he behaved in such a way as to warrant suspicion that he was liable for murder, (c) That he had engaged in homosexual intercourse with Mr. Wood, (d) That the police had reason to suspect that he had sex with Mr. Wood."

Regarding charges (a) and (b), the judge held that a jury should decide whether they are defamatory. The broadcast seemed "capable of conveying the imputation pleaded by the plaintiff." Quoting a 1964 U.K. case, *Lewis v. Daily Telegraph*, [1964] AC 234: "[W]hat is the meaning of the words conveyed to the ordinary man — you cannot make a rule about that. They can convey a meaning of suspicion short of guilt; but loose talk about suspicion can very easily convey the impression that it is a suspicion that is well founded." Because the imputations in (a) and (b) "were capable of being conveyed" by the broadcast, Justice Bell ruled that they should be heard by the jury.

The defendant challenged the latter two charges involving homosexuality because "in order to be defamatory an imputation must tend to lower the plaintiff in the estimate of 'right thinking members of society generally.' To publish an assertion which would disparage an individual in the eyes of a section of the community was not sufficient unless the views of that group happened to correspond with those of right thinking members of the society generally." The defense contended that, up until recently, saying that someone had gay sex would have lowered him in the eyes of the community, *but that is no longer true*. Channel 7 cited at least six Australian statutes that had tended to afford equal rights to homosexuals under Australian law. Those statutes were seen as reflections of the will of society generally — that it is no longer deleterious to one's standing in the community to be thought a homosexual.

Although the plaintiff asserted that this list of statutes "does not speak to the question of whether ordinary right thinking members of the community might not entertain an adverse reaction to a man who had homosexual intercourse," Justice Bell agreed with a 1981–82 court decision (*Readers Digest Servs. Pty. Ltd. v. Lamb*, 150 CLR 500) that "[t]he defamatory nature of an imputation is ascertained by reference to general community standards, not by reference to sectional attitudes." Justice Bell implies that she sees anti-gay attitudes as "sectional" rather than "general," and therefore they cannot be the basis for a charge of defamation *per se*. She further agrees with a holding from a 1999 Scottish case, *Quilty v. Windsor*, [1999] SLT 346: "[M]erely to refer to a person as being homosexual would not now generally at least be regarded — if it ever was — as defamatory per se."

Therefore, imputations (c) and (d) may not be presented to the jury. However, other imputations arising from the same segments of the television show may be presented to the jury. The judge, therefore, allowed the jury to hear the following, which became (c), (d), and (e): "(c) That Rivkin engaged in homosexual intercourse with Wood, a man who was an employee of his, much younger than him, who viewed him as a father figure, upon whom he lavished gifts and who was engaged to be married; (d) That the police had reason to suspect the imputations contained in (c); and (e) That Rivkin procured a male employee to have sexual intercourse with him by lavishing presents on him, which was an abuse of his wealth and power."

These three imputations would tend to lower Mr. Rivkin's reputation if the general community believed them; therefore, Justice Bell allowed them to go to the jury.

We believe that burdens for proving defamation of a public figure by the press in a newsworthy context are much lighter in Australia than in America. Whereas in America, a "celebrity stockbroker" may have resort only to friendly press coverage and public relations to counter the allegedly defamatory charges above, a court in Australia will entertain a suit for defamation for a wider range of statements or imputations. This makes it all the more significant that statements impugning one's assumed heterosexuality are removed from the realm of *per se* defamation. *Alan J. Jacobs*

[Editor's Note: In another recent decision, *Marsden v. Amalgamated Television Services PTY Ltd.*, No. 20223 of 1995; No. 20592 of 1996 (June 27), Justice David Levine of the Supreme Court of New South Wales found that Channel 7 had defamed John Marsden, a former Law Society president, by stating that he had sex with underage boys. The judge found that not only had Channel 7 described events that had not occurred, but that it had done so with actual malice. The judgment followed an extraordinary hearing beginning in 1999 during which Channel 7 presented

as witnesses eleven young men, mostly "former" male prostitutes. According to one press account, the hearing ran 229 days and comprised "salacious and often bizarre evidence about the life of the high-profile and openly homosexual Mr. Marsden, a former member of the Police Board and president of the NSW Council for Civil Liberties." Damages of $525,000 (Australian) were awarded, and the court was to proceed to consider legal expenses, Marsden claiming that he spent $6 million to prosecute the case. The opinion is available on the court's website, and is extremely lengthy. A precis of the story appeared June 27 in the *Sydney Morning Herald* and the June 28 issue of *The Age*. As in the *Rivkin* case, it is important to note that the imputation of homosexuality as such is not considered defamatory, but it is considered defamatory to state that somebody broke the law, as by having sex with minors. A.S.L.]

Legislative Updates from Australia

In Melbourne, Australia, the Parliament of the State of Victoria has passed a broad-ranging domestic partner law. The Statute Law Amendment (Relationships) Act 2001 was introduced by Victoria's relatively new Labor government and, after a lot of stalling, eventually supported in the State's upper house by the Liberal Party, the major opposition party. The model used is to replace references to 'de facto partner' in some 44 statutes with the term 'domestic partner' which is defined to include same-sex couples. The State's Attorney-General says the Act will end discrimination in areas like property law, superannuation, hospital visiting rights, stamp duty, victims of crime and mental health. Victoria now joins another State, New South Wales, and the neighbouring country of New Zealand in achieving wide-ranging DP law reform. The new Victorian law will be available on http://www.austlii.edu.au/au/legis/vic.

In the State of Western Australia, the new Labor government has established a community-dominated committee to recommend legislative reforms and has guaranteed a slot in its 2001 legislative timetable to the law reform package recommended. High on that agenda will be a lower homosexual age of consent than the present 21 years, but DP reform is also expected. *David Buchanan, Esq.*, Sydney, Australia.

Registered Partnership Is Not Marriage, Says European Court of Justice

On May 31, the European Court of Justice (E.C.J.) in Luxembourg delivered its Judgment in Joined Cases C–122/99 P and C–125/99 P, *D. & Sweden v. Council*, http://europa.eu.int/jurisp/cgi-bin/form.pl?lang=en (type C–122/99 after "Case number"). The case concerned the refusal by the Council (the main E.C. legislative institution) to treat the Swedish same-sex registered partnership of a Council employee as equivalent to a marriage in relation to an employment benefit. D.'s annullment action in the the Court of First Instance (C.F.I.) was dismissed on Jan. 28, 1999, [March 1999] LGLN. Both D. and the Swedish government appealed to the E.C.J., and the Danish and Dutch governments intervened on the side of D. Advocate General (A.G.) Jean Mischo urged the E.C.J. to dismiss the appeals of D. and Sweden in his Opinion of Feb. 22, 2001, [March 2001] LGLN.

The E.C.J. agreed with the C.F.I. and the A.G., and gave five main reasons for dismissing the appeals. First, the provision of the Staff Regulations providing for the payment of a household allowance to a "married official" (of a European Community institution) could not be interpreted as covering an official who had contracted a registered partnership. The E.C.J. noted that: (a) unregistered same-sex cohabitation (as in *Grant v. South-West Trains*, 1998) was "not necessarily equivalent to a registered partnership under a statutory arrangement" with legal effects "akin to those of marriage" (meaning that *Grant* was not dispositive); (b) "according to the definition generally accepted by the Member States, the term 'marriage' means a union between two persons of the opposite sex"; and (c) "since 1989 an increasing number of Member States have introduced, alongside marriage, statutory arrangements granting legal recognition to various forms of union between partners of the same sex or of the opposite sex," which arrangements "are regarded in the Member States concerned as being distinct from marriage." The E.C.J. thus concluded: "The Community judicature cannot interpret the Staff Regulations in such a way that legal situations distinct from marriage are treated in the same way as marriage," given the above-mentioned circumstances and the fact that, "in a limited number of [the 15] Member States, a registered partnership is assimilated, although incompletely, to marriage." (Only Denmark, the Netherlands and Sweden currently have full, almost-identical-to-marriage registered partnership laws; Iceland and Norway are not Member States.) The E.C.J. left the issue of recognition to the E.C. legislature, stressing that a 1998 request by the Swedish government that the Staff Regulations be amended to expressly provide for the equivalence of marriage and registered partnership had been rejected by the Council and referred to the Commission (executive branch) for study.

Second, this interpretation of the Staff Regulations did not involve any sex discrimination with regard to pay, contrary to Article 141 [ex 119] of the E.C. Treaty, because a woman with a female partner would have been treated in the same way (the same faulty reasoning as in *Grant*). Third, this interpretation did not involve any sexual orientation discrimination (potentially prohibited for E.C. institutions and Member States implementing or derogating from E.C. law through the unwritten and open-ended "general principle of equal treatment" in E.C. law), because "it is not the sex of the partner which determines whether the household allowance is granted, but the legal nature of the ties between the official and the partner." Fourth, this interpretation did not violate the general principle of equal treatment as "nature of legal ties" (or implicitly marital status) discrimination, because the principle "can only apply to persons in comparable situations … The existing situation in the Member States … as regards recognition of partnerships between persons of the same sex or of the opposite sex reflects a great diversity of laws and the absence of any general assimilation of marriage and other forms of statutory union … In those circumstances, the situation of an official who has registered a partnership … cannot be held comparable … to that of a married official." (Because comparison was not permitted, the Council did not have to provide any justification for the difference in treatment.) Fifth, this interpretation is not "capable of constituting interference in private and family life within the meaning of Article 8 of the European Convention." (Here, the E.C.J. seems to have focused on D.'s argument that the Council's notifying Belgian authorities that he was "single" was an interference with his Article 8 rights, rather on than the effect of the denial of the household allowance on his private and family life, or on whether he had a "family life," or on whether there was discrimination in relation to private or family life contrary to Articles 8 and 14 of the Convention. Nor, unlike in *Grant*, did the E.C.J. cite any decisions of the European Court or Commission of Human Rights.)

The E.C.J. declared inadmissible (as not raised at the start of the case) a sixth argument made by D. on appeal, that the marriage-only interpretation constitutes nationality discrimination or an obstacle to the free movement of workers violating the E.C. Treaty, i.e., Danish, Dutch and Swedish workers who had registered their partnerships would be deterred from moving to other Member States to work (including to Brussels to work for an E.C. institution) if their registered partnerships were not treated as equivalent to marriages. Just as *Grant* was overruled by the combination of a 1997 treaty amendment (adding Article 13 of the E.C. Treaty) and legislation prohibiting sexual orientation discrimination with regard to pay and other aspects of employment (Council Directive 2000/78/EC, [Dec. 2000, Jan. 2001] LGLN), a solution to the problem of non-recognition of registered partnerships by E.C. institutions and in other Member States will probably require new legislation. However, if the E.C. legislature does not act, and the number of Member States with registered partnership laws grows, in a few years another claimant could ask the E.C.J. to reconsider the arguments made by D. (including the free movement argument). *Robert Wintemute*

Scotland's Highest Court Rejects Gay Litigant's Sex Discrimination Argument

On 1 June, in *Clark v. MacDonald*, http://www.scotcourts.gov.uk/opinions/XA172_00.html, the Court of Session (Inner House, Extra Division), Scotland's highest appellate court refused (by a vote of 2 to 1) to interpret the Sex Discrimination Act 1975 (SDA) as prohibiting the dismissal of a gay man from the Royal Air Force. The Court of Session therefore reversed the decision of the Scottish Employment Appeal Tribunal (EAT), [2001] 1 All ER 620, [Nov. 2000] LGLN, which had accepted the sex discrimination argument (by a vote of 2 to 1) in September 2000. MacDonald is entitled to compensation under the Sept. 27, 1999 judgments of the European Court of Human Rights in *Smith & Grady v. United Kingdom* and *Lustig-Prean & Beckett v. UK*, [Oct. 1999] LGLN. Whatever McDonald's reasons for pursuing his case might be, it can be argued that damages under the SDA are generally more generous (because of the requirements of European Community sex discrimination law) than under the "just satisfaction" (Article 41) case law of the European Court of Human Rights. The Ministry of Defence has vigorously resisted his claim, because: (i) there are over 100 other pending SDA claims by dismissed lesbian, gay and bisexual military personnel; (ii) a decision in favor of MacDonald would apply to private sector employers (Articles 8 and 14 of the European Convention on Human Rights, as incorporated into UK law on Oct. 2, 2000 by the Human Rights Act 1998, do not, and European Community Council Directive 2000/78/EC, [Dec. 2000, Jan. 2001] LGLN, does not require the UK to prohibit sexual orientation discrimination in private sector employment until Dec. 2, 2003) and to private sector providers of education, housing, goods and services (the EC Directive is limited to employment); and (iii) the SDA and EC law have a huge body of case law on indirect discrimination (disparate impact). The UK Government is concerned that indirect sex discrimination arguments would be used to challenge employment and other benefits tied to marital status.

Lord Kirkwood and Lord Caplan voted to allow the appeal of the Ministry of Defence, while Lord Prosser voted to dismiss it. Lord Kirkwood began his Opinion by deciding that "the word 'sex', particularly in sections 1 and 2 [of the SDA], refers to gender and does not include sexual orientation," and that "the meaning of the word … is plain and unambiguous." He disagreed with the finding of the EAT that the word "sex" was ambiguous, and pointed out (correctly) that the European Court of Human Rights had not "expressly included sexual orientation in the definition of the word 'sex'" in its Dec. 21, 1999 judgment in *Salgueiro da Silva Mouta v. Portugal*, [Jan. 2000] LGLN. "Ambiguity" was the relevant standard for justifying a UK court's referring to the European Convention on Human Rights to interpret a UK statute before Oct. 2, 2000. Since Oct. 2, 2000, there is an obligation under s. 3(1) of the Human Rights Act 1998 (HRA) to interpret all UK statutes "in a way which is compatible with Convention rights …[s]o far as it is *possible* to do so" (emphasis added), even if a possible interpretation is contrary to what the UK Parliament intended when it passed the statute (its intention to comply with Convention rights, as expressed in the HRA, being given priority).

Lork Kirkwood concluded that s. 3(1) made no difference. First, "if the word 'sex' in section 1(1) of the [SDA] is read as meaning only gender, and does not include sexual orientation, such an interpretation is not incompatible with any Convention right. The Convention does not contain any free-standing right not to be discriminated against." (This is true, but Article 8, the right to respect for private life, on its own, as interpreted in *Smith* and *Lustig-Prean*, or taken with the prohibition of discrimination in Article 14, as interpreted in *Salgueiro*, generally prohibits sexual orientation discrimination in public sector employment. If it was possible to interpret or apply "sex" in a way that would avoid a violation of Articles 8 and 14, the Court of Session had an obligation under s. 3(1) to do so.) Second, he did not "consider that it would be possible to construe … section [1 of the SDA] as relating not only to male and female, but also to the sub-categories of heterosexual and homosexual." (He noted a major extra-legal reason for a UK court to decline to apply the SDA in cases of sexual orientation discrimination, i.e., the UK's EC law obligation to expressly prohibit sexual orientation discrimination in employment by Dec. 2, 2003, which will make the issue go away, at least with regard to employment, but will not be retroactive. He incorrectly stated that the EC Directive does not apply to the armed forces. This is only true for age and disability discrimination.)

Lord Kirkwood then turned to MacDonald's alternative (and in this writer's view, better and correct) argument that the Ministry of Defence had discriminated against him on the ground of his sex in the sense of "gender." Lord Kirkwood adopted the traditional analysis. Because MacDonald was "a person who is sexually attracted to a member of the same sex," "the appropriate comparator in this case is a homosexual woman, namely, a woman who is sexually attracted to members of her own sex," who would also have been dismissed. He rejected the argument of MacDonald's counsel, citing Robert Wintemute, [1997] 60 Modern Law Review 634, that "the proper comparator was a woman in the armed forces who was attracted to men, namely, a heterosexual woman."

Lord Caplan agreed with Lord Kirkwood that "sex" in the SDA means "gender," and that a "female homosexual" was the appropriate comparator. "Any resultant inequality between [MacDonald] and [a] heterosexual woman [in relation to sexual activity with men] arises from the former's involvement in a prohibited sexual activity and not from differences in gender." As for using s. 3(1) of the HRA to interpret "sex" as including "sexual orientation," s. 3(1) "does not mean that omitted provisions should be added where no ambiguity exists and the scope of the [statute] is clearly not intended to deal with what is omitted."

In dissent, Lord Prosser was one of the rare judges to appreciate the strength of the sex discrimination argument. Indeed, his Opinion is one of the most extensive judicial discussions of the argument to date. He began by agreeing that "sex" in the SDA means "gender," and that s. 3(1) of the HRA makes no difference. He saw "no possibility of reading the [SDA] as being concerned not only with the simple categories of male and female, but with a further subdivision into the subcategories of homosexual and heterosexual."

However, accepting that "sex" means "gender" and does not include "sexual orientation," he disagreed with the majority as to the appropriate comparator. He was "satisfied that the reasoning of Mr. Wintemute [60 Modern Law Review at 347–8] and of Beldam LJ [in *Smith v. Gardner Merchant*, [1998] 3 All ER 852 (Court of Appeal, England and Wales), [Sept. 1998] LGLN] is to be preferred to that of Ward L.J. and Sir Christopher Slade in *Smith*", and gave an illustration. "If a male officer X wished or had a partner Y, and indeed if a female officer Z wished or had that same partner Y, the Royal Air Force would require to know the gender of Y before it could say whether that was an acceptable partner for X or an acceptable partner for Z. However one describes the policy, they would in fact discriminate between X and Z on the basis of the male gender of X and the female gender of Z, and in each case on the basis of whether Y's gender related to X's or Z's by being the same or the opposite." It followed that: "Mr. MacDonald is attracted by males. He should be compared with a woman who is attracted by males." Without citing *Loving v. Virginia*, he made the miscegenation analogy. "[I]n the context of racial discrimination, a veto on mixed marriage can scarcely be justified by saying that black and white are treated alike because each is permitted to marry a person of the same, or their own, colour. There is discrimination on the ground of colour in such a situation despite the 'equal' treatment of persons of either colour. And that would not be altered by recourse to linguistic obfuscation, by inventing concepts of homoethnicity or heteroethnicity."

What is perhaps most gratifying about the Opinion of Lord Prosser is that he saw how sexual orientation discrimination, analyzed differently, is a form of sex discrimination. "[T]he idea [of the SDA] seems to me to be that a woman should be allowed to go precisely where a man goes, and to do what a man does, and not to be fobbed off by being told that, mutatis mutandis, she has some equivalent for what is permitted to him. As I read the provisions with which we are concerned, and in particular the word 'same' in section 5(3), the

position is really very simple. If a person of one gender wants to do something which persons of the other gender are allowed to do, the fact of their own gender is not to be seen as a ground for being treated less favourably, and being denied a specific choice which would be open to a person of the other gender. And if the conduct in question involves someone else, then again that person's gender, whether the same or the opposite, should not lead to a difference in treatment." He thought that the "heterosexual woman comparator" was the only possible interpretation of the SDA in this case, and stressed that his "conclusion does not … depend in any way upon the [European] Convention or the [HRA]." Even if, as the majority argued, the SDA could be read as permitting a "homosexual woman comparator," he said that he "would feel obliged by the Convention and the [HRA] to reject that alternative interpretation," noting that *Smith v. Gardner Merchant* was decided before the HRA was passed.

MacDonald shows how hard it is to convince judges of the correctness of the sex discrimination argument. But Lord Prosser's unequivocal and forcefully argued acceptance of the argument suggests that progress is slowly being made. The Court of Session (Inner House) has granted Roderick MacDonald leave to appeal to the highest court of the UK, the House of Lords (Law Lords sitting as Appellate Committees of, in most cases, five judges), http://www.parliament.the-stationery-office.co.uk/pa/ld/ldjudinf.htm. *Robert Wintemute*

Other International Notes

The International Gay & Lesbian Human Rights Commission's participation as a non-governmental organization at the UN AIDS Conference in June became a subject of considerable controversy. Although IGLHRC was originally listed as a participant at a roundtable discussion on HIV/AIDS and human rights non-governmental organizations, the UN's invitation for IGLHRC to participate was withdrawn on June 22 at the instance of nine countries generally identified as Islamic in culture, who objected to the inclusion of a gay rights organization. IGLHRC then got organized and obtained the support of some of the world's most gay-friendly governments (Canada, Norway, and Sweden) to make a motion to include IGLHRC in the discussion. Ultimately the motion passed after several procedural votes, with the support of 62 nations for IGLHRC's inclusion (including the U.S.), while 30 nations abstained, 97 nations were marked absent (including all 9 of the objecting nations), and no nations voted against IGLHRC. *Washington Blade*, June 29.

As the Netherlands go, so goes Belgium? The Associated Press reported on June 24 that the Belgian government has approved legislation to authorize same-sex marriages and submitted it to the Parliament. In an official statement released by Prime Minister Guy Verhofstadt's Cabinet on June 22, the government stated: "Mentalities have evolved, there is no longer any reason not to open marriage to people of the same sex." However, the government decided not to allow same-sex married couples jointly to adopt children. The adoption exclusion, which has appeared with some frequency as various European nations have extended recognition to same-sex couples, appears to respond both to the emotional resistance of traditionalists and to fears that the impact of allowing such adoptions might have on inter-country adoptions and recognition of adoptive status when families travel.

New Zealand Member of Parliament Tim Barnett plans to propose a Civil Union Bill next year that would allow gay and straight de facto partners the same rights as married couples upon registration of their partnerships. Barnett has been privately approaching leaders of all parties in search of cross-party support so that the proposal would survive any change in government. Speaking to *The Dominion*, a Wellington, New Zealand newspaper, which reported on this issue on June 9, Barnett said that he and gay marriage proponents were "trying to walk a cautious path," and that if the Parliament did not take action on this issue, it might be faced with a same-sex marriage lawsuit when the Human Rights Act, which forbids sexual orientation, goes into effect as binding on the government next year.

The Dutch, always at the cutting edge of political correctness, will now take renewed steps to make sure that immigrants understand the nation's acceptance of gay people. Netherlands Secretary of State for Education Karin Adelmund told the Parliament on July 2 that the Dutch school inspectorate will supervise policies on homosexuality in the public schools, including requiring study materials to ensure that "newcomers and imams" are informed about the now-prevailing customs in Dutch society. *De Volkskrant*, July 3.

London Mayor Ken Livingstone announced that the London Partnerships Registry will open in September at the Greater London Authority's headquarters. Although Livingstone has no authority to endow registered partners (who may be same-sex or opposite-sex couples) with any particular legal rights, he stated his hope that businesses and others will give credence to family claims from those who have registered. *Daily Mail*, June 29.

Various Canadian provincial governments continue to respond to the nation's Supreme Court's rulings on the equality requirements of the Charter by amending their laws to extend various forms of recognition to same-sex couples. On June 27, the Manitoba legislature unanimously approved a bill proposed by the government that extends alimony, pension, and death benefits to gay couples. The measure, which amends ten provincial laws, requires royal assent before it can become effective. Members of opposition parties criticized the government for introducing such a limited bill, pointing out that some other provinces have gone much farther, approaching the Vermont civil union virtual equality standard, with one liberal member stating: "For a party which has claimed to be on the side of social justice, the NDP has done a disservice to social justice in Manitoba." The government appointed a special panel to review outstanding issues and recommend additional legislation. *Winnipeg Free Press*, June 28.

The Associated Press reported on July 9 that a provincial Supreme Court judge in Nova Scotia, Canada, Justice Deborah Gass, had ruled that same-sex couples have the right to adopt children jointly. The case was started by a lesbian couple who are already raising children together, but who claim they are subject to unconstitutional discrimination because the province won't recognize them as parents for adoption purposes. The legal upshot of the ruling is that children of unmarried common-law couples, either same-sex or opposite-sex, will be able to register their relationships with their parents, inherit under the Intestate Succession Act and receive maintenance from both parents. Wrote Justice Gass, according to the AP report: "The evolution of the concept of family and the importance of family to children… support the contention that this exclusion is unjustified."

On June 21, the Romanian government adopted an "emergency ordinance," bypassing the parliament, which ended criminal penalties for "homosexual acts." The action was taken, despite vehement opposition by Romania's Orthodox Church, which had been able to block the measure in the parliament, due to the government's great eagerness to be admitted as a member of the European Union. Elimination of laws against consensual gay sex are now a prerequisite for admission, as Union tribunals have found that such laws violate privacy rights guaranteed by the basic documents underlying the Union. *Chicago Tribune*, June 24; *Financial Times*, June 23. Too bad we don't have something like that in the U.S. yet.

The Estonian Parliament voted 51–1 on June 6 in support of penal code reform that equalizes the age of consent as between gay and straight sex. Under prior law, the age of consent for gay sex was 16, but will now be equalized with the age of consent for straight sex at 14. *Washington Blade*, June 22.

The contest for Mayor of Berlin took a surprising turn when the Social Democratic candidate, Klaus Wowereit, "outed" himself at a party meeting a week prior to the voting. Wowereit, whose election was widely-forecast, thus became the first openly-gay senior level politician in Germany, where only a handful of legislators are openly gay. *The Independent - London*, June 12. Wowereit was subsequently appointed as the interim mayor pending an election to take place later this year, the incumbent's political coalition having fallen apart. *Los Angeles Times*, June 17.

The *Washington Post* reported on July 1 that many Namibian gays are disturbed by repeated public statements by President Sam Nujoma calling for outlawing "homosexuality," deporting foreign gays, and arresting gay Namibians. The feeling of threat has been exacerbated by reports of state security officers roaming the capital city, "tearing earrings off men they think may be gay." • • • Taken together with reports about anti-gay actions by the government in Uganda, the Namibian news moved members of the U.S. House of Representatives to put together an "International Human Rights Equality Resolution, introduced as H. Res. 173 on June 26. Rep. Tom Lantos, a California Democrat, was the prime mover behind the action, which had 20 co-sponsors. The resolution condemns countries that violate the human rights of sexual minorities. Its likelihood of passage in the Republican-controlled House seems slim, since it sounds like a condemnation of the G.O.P.'s 1992 national platform, but perhaps the new openness of some within the G.O.P. to seeking gay votes will dictate a different result. *New Vision*, July 5.

The provincial legislature in Nova Scotia, Canada, voted June 1 for legislation that will allow same-sex couples to register with the province and be recognized for a variety of benefits, including tax benefits. *Globe and Mail*, June 2. On June 4, Kimberley Vance and Samantha Meehan became the first same-sex couple to register in Halifax, followed by Brian Mombourquette and Ross Boutilier. The legislation, enacted with only minor dissent, was described by the *National Post* on June 5 as giving same-sex couples "spousal support, protection under the Matrimonial Property Act and the right to see a partner's medical records and make decisions in a medical emergency." (The news report did not mention whether Ross Boutilier is any relation to Clive Boutilier, who as a young Canadian living in the New York metropolitan area was booted out of the U.S. in the 1960's by the Immigration Service under the anti-gay exclusion then found in U.S. law, resulting in a famous Supreme Court decision bearing his name.)

To encourage police departments to maintain better relations with the gay community, the Australian Federal Police now have a training course for officers who are to be designated as "contact officers" between the force and the community. According to the *Canberra Times*, June 26, topics in the 3–day course include "anti-discrimination, domestic violence, hate crimes, stereotypes, prejudices and harassment." 18 officers attended the most recent offering of the course.

The Age (July 9) reported on a new poll published by the Australian Social Monitor, finding that public approval of homosexuality in Australia has increased substantially over the past 15 years. In the mid–1980s, 64 percent of respondents stated that homosexual behavior is "always wrong." The new poll elicited that response from 48% of the respondents. In addition, 28% said that homosexual behavior is "not wrong at all."

The Scottish Parliament is considering a committee proposal to enact the Protection from Abuse (Scotland) Bill, which would give increased authority to police to protect victims of domestic abuse. The bill specifically includes coverage of same-sex partners. *Evening News -Scotland*, June 5. A.S.L.

Professional Notes

For the first time, the Great Hall of the Association of the Bar of the City of New York was the scene of a symposium on transgender law, co-sponsored by four committees of the Association (Lesbian and Gay Rights, Women and the Law, Civil Rights, Sex and Law), the Lesbian & Gay Law Association of Greater New York, the Metropolitan Gender Network, the New York City Gay and Lesbian Anti-Violence Project, and the Committee on Lesbians and Gays in the Law of the New York County Lawyers' Association. The moderator was Prof. Kendall Thomas of Columbia University Law School; panelists were Prof. Paisley Currah of Brooklyn College (author of a forthcoming book on gender identity issues), Jennifer Levi of Gay & Lesbian Advocates & Defenders (Boston), Shannon Minter of the National Center for Lesbian Rights (San Francisco), Thomas Shanahan (a New York attorney active in transgender rights litigation), and Pauline Park of the New York Association for Gender Rights Advocacy (NYAGRA). The June 6 event drew approximately 100 participants. Moderator Thomas noted the irony that every one of the numerous portraits on the walls of the Hall appears to picture a dead (or nearly-so) white male. (They are all past presidents of the Association of the Bar.) Your editor noticed the same phenomenon in the large reception room at the New York County Lawyers Association when attending the first-ever Gay Pride Reception in honor of openly-lesbian and gay judges held on June 5, at which New York City Criminal Court Judge Michael R. Sonberg, president of the International Association of Lesbian and Gay Judges, delivered a talk about the history of openly lesbian and gay judges in New York City.

The Committees on Lesbian and Gay Rights, Sex and Law, and Civil Rights of the Association of the Bar of the City of New York have issued a new report titled "Marriage Rights for Same-Sex Couples in New York" (May 2001), which the Association of the Bar has posted on its website, www.abcny.org. The report updates a prior report of the Association issued in 1997, taking account of intervening developments, and particularly noting the Vermont Civil Union Law, which the committees suggest could be a model for a partial measure on the road to full marriage rights.

The Texas Bar Board voted on June 14 to amend the state bar's non-discrimination policy to add the phrase "sexual orientation." The bar's Section on Sexual Orientation and Gender Identification Issues had recommended that the policy also cover "gender identification" in order to include protection for transgendered persons, but the bar committee working on the issue rejected the proposal. Transgender advocates led by Phyllis Frye attended the Texas Bar convention intending to lobby the delegates to add "gender identification." However, at the session where the issue was discussed, after the "sexual orientation" provision was passed, the chair of the Texas Bar Board, Richard Miller, stated without any dissent from the participants that "sexual orientation" would be interpreted to cover discrimination on the basis of gender identification as well. This is a highly truncated version of the detailed account of these proceedings that was posted by Phyllis Frye to subscribers of the transgender law email list that she maintains. To get the full account, email her at PRFrye@aol.com.

Lambda Legal Defense & Education Fund has announced the appointment of Adam Aronson as a staff attorney in the New York headquarters office. A graduate of Yale Law School, Mr. Aronson clerked for 2nd Circuit Judge Jon O. Newman, was associated with two large firms in New York, and most recently has been Assistant Solicitor General in the Division of Appeals and Opinions in the New York State Law Department, where he supervised the work of assistant attorneys general and helped draft formal Attorney General opinions. While at the Law Department, Mr. Aronson worked on a U.S. Supreme Court amicus brief on behalf of ten state attorneys general in support of James Dale's challenge to the exclusionary policies of the Boy Scouts of America under New Jersey's civil rights law. Mr. Aronson's appointment brings the number of Lambda's full-time legal staff to fifteen attorneys in four offices, New York city, Los Angeles, Chicago and Atlanta. Lambda plans to open an office in Dallas during 2002. A.S.L.

AIDS & RELATED LEGAL NOTES

Frequently Absent PWA Held Not "Qualified" for ADA Protection

In a 7–4 decision, the U.S. Court of Appeals for the 7th Circuit ruled en banc that a man living with HIV/AIDS who was terminated from his job for excessive absenteeism failed to state a claim under the ADA for employment discrimination. *EEOC v. Yellow Freight System, Inc.*, 2001 WL 641800 (June 12).

Michael Nicosia began working for Yellow Freight as an "on-call" dockworker in 1990, and was promoted to a full-time dockworker position the following year. Over the next several years, Nicosia's attendance record was poor. In 1991, he called-in sick 37 days out 113 days he was scheduled to work. In 1994, out of 227 scheduled work days, he took 47 sick days, left work early three times and had three unexcused absences. These absences did not include his time off for paid vacations, jury duty, five annual paid sick days, and worker's compensation absences.

In December 1995, Nicosia tested HIV positive. When he was diagnosed with Kaposi's sarcoma in January 1996, Nicosia wrote to his supervisor to advise about his medical condition. When Nicosia called in sick every working day in January, February and March of 1996, Yellow Freight initiated its progressive disciplinary system by having a coaching session with Nicosia (step one), a letter of information (step two), and a written warning (step three). Nicosia advised the company that his absences were related to his medical condition. The company responded by sending to him an ADA accommodation review form, which requested that Nicosia list his condition, identify his health care providers and describe the accommodation, if any, he was requesting. Instead of filling out the form, Nicosia wrote to the company advising that he was "requesting no particular considerations at this time other than the resources necessary to perform my job and reasonable accommodations necessary to monitor and maintain my health status." Nicosia also stated that he wanted "sick days, if needed, without being penalized."

After Nicosia was absent for 10 out of the next 19 days, the company suspended him for a day in August 1996 (step four). Nicosia sent a letter to the company in response to the suspension stating that he would report to work every day. In October 1996, Nicosia filed charges with the EEOC, alleging that Yellow Freight disciplined him because of his disability and denied him reasonable accommodation. Yellow Freight formally fired Nicosia in December of 1996 for excessive absenteeism.

The EEOC filed a complaint in the U.S. District Court for the Northern District of Illinois against Yellow Freight, alleging that the company terminated Nicosia because he was a person living with AIDS, and in retaliation for Nicosia filing an administrative complaint with the EEOC. In August 1999, the trial court granted summary judgment in favor of Yellow Freight, concluding that Nicosia was not a "qualified individual" under the ADA, that regular attendance at the job site was an "essential function" of his job, that Nicosia's request for unlimited sick days was unreasonable as a matter of law, and that there was no causal connection between Nicosia's termination and his having filed a complaint with the EEOC. Nicosia appealed.

Writing on behalf of the majority, Circuit Judge Coffey noted from the outset of the analysis section of his opinion that "in most instances, the ADA does not protect persons who have erratic, unexplained absences, even when those absences are a result of a disability. The fact is that in most cases, attendance at the job site is a basic requirement of most jobs." The majority noted that although Yellow Freight did not utilize its progressive disciplinary system with Nicosia until after he divulged his HIV status, the company issued at least six warnings to him from 1991–1993 as a result of his excessive absenteeism. According to the majority, "Yellow Freight bent over backwards to accommodate Nicosia in spite of his long history of poor work attendance." In light of his poor attendance record, the court concluded as a matter of law that Nicosia was not a "qualified individual" under the ADA.

The majority similarly cited to prior decisions in which it had concluded that a request for unlimited sick days, as had been requested by Nicosia, was unreasonable as a matter of law: "We refuse to force employers to the negotiating table in the face of demands of this nature, and hold that Yellow Freight fulfilled its burden under the law, especially in light of the fact that Nicosia had fashioned a poor attendance record for himself before he was diagnosed with AIDS," Judge Coffey explained.

The majority affirmed the dismissal of Nicosia's retaliation charge on technical grounds, finding that the affidavit Nicosia submitted in opposition to Yellow Freight's motion for summary judgment was filed late, and contradicted certain deposition testimony. The majority concluded that the district court was not required to give any weight to Nicosia's affidavit.

Writing on behalf of the four-judge dissent, Circuit Judge Diane P. Wood noted that although Yellow Freight may have had a five-step disciplinary process, it did not have objective standards for enforcing that process: "[Yellow Freight] had no objective written attendance policy that indicated what number or constellation of absences would lead to a particular type of discipline… it was entirely within [the company's] discretion to determine when a particular employee's absences became 'excessive' and how rapidly to proceed through the disciplinary process."

According to the dissent, since the disciplinary process lacked this level of detail and could be applied on an ad-hoc basis, no inference could be drawn in the company's favor that the process was used, particularly where the evidence demonstrated that the policy was applied with vigor only after Nicosia informed Yellow Freight that he was living with AIDS.

The dissent also considered the fact that Nicosia had presented evidence in opposition to Yellow Freight's summary judgment motion, which if credited by a jury, would establish that regular attendance was not an essential element of Nicosia's job as a dockworker. This evidence was sufficient to present a question of fact for the jury, since as Judge Wood noted, "the majority does not rely upon a single case for the proposition that attendance is always, invariably, as a matter of law, an essential job function."

Finally, the dissent faulted Yellow Freight for not taking any further steps to find an appropriate solution, in light of Nicosia's response to the company's ADA accommodation review form: "The interactive process envisioned by our cases and the EEOC requires the employer to try harder than that. It is not allowed to make one move and then call it quits." The dissent suggested as an example that the company could have allowed Nicosia to resume working as an "on-call" dockworker, which would have given Nicosia a more flexible schedule

The majority's opinion is expected to make it much more difficult for an ADA plaintiff to establish a prima facie case of employment discrimination, where the employee was terminated at least in part due to poor attendance. The case also emphasizes the importance of early legal counsel, since responses to an ADA accommodation form by a employee who is uncertain of her or his rights under the ADA can have a catastrophic impact on subsequent discrimination lawsuits. *Ian Chesir-Teran*

The *Bragdon/Sutton* Legacy?: District Court Dismisses HIV Discrimination Claim

While the Supreme Court's 1998 decision in *Bragdon v. Abbott*, 524 U.S. 624, was a major victory for the rights of HIV+ people due to the Court's conclusion that HIV infection is an "impairment" within the meaning of the Americans With Disabilities Act, the Court's treatment of the remainder of the analysis in determining whether a particular plaintiff is protected by the ADA left big question marks about whether subsequent plaintiffs who were, unlike Sidney Abbott, not women of childbearing capacity, would fare in meeting the requirement to show that their impairment substantially limited a major life activity. The answer given by Chief U.S. District Judge Hector Laffitte of Puerto Rico is not promising in

this regard. On June 28, Judge Laffitte dismissed the complaint in *Carrillo v. AMR Eagle, Inc.*, 2001 WL 754463, finding that the HIV+ male plaintiff had failed to establish that he had a disability under the ADA, because he had not presented an expert witness to prove. Among other things, that HIV can be transmitted from men to women during sexual intercourse! (I'm not making this up, folks.)

Carrillo was a probationary flight attendant for AMR-owned Executive Airlines. He sent a letter to his employer, stating that he was HIV+ and wished "to discuss this matter under strict confidentiality." The next day he was discharged. The airline claimed he was let go due to his poor attendance record and a passenger complaint about him, saying nothing about his HIV-status.

After Carrillo presented his case-in-chief before the federal district court, the defendant moved to dismiss for failure to state a claim, arguing that Carrillo is not protected by the ADA because he does not have a disability. Judge Laffitte, applying the ridiculous analytical method dreamed up by the Supreme Court, agreed. While conceding that under *Bragdon* Carrillo has an "impairment," Laffitte found that Carrillo failed to present proof that the impairment substantially limited Carrillo's asserted major life activity of reproduction.

Wrote Laffitte: "He failed to introduce into evidence any medical evidence from which a reasonable jury could find that HIV substantially limits a man's ability to reproduce: there is no study, medical testimony, or statistical evidence in the record of a significant risk of infection of female partners by men with HIV; there is no evidence of whether an infected man's sperm may carry and transmit the virus to his child at conception; there is no evidence in the record of any treatment available to lower the risk of infection. Plaintiff contends that because his impairment removed his incentive to reproduce, it substantially limits his major life activity of reproduction. The Court is unpersuaded. Cruz Carrillo's testimony, without more, is not enough to shoulder his burden of showing a substantial limitation. He is not an expert in the medical field of immunology or reproduction, and as previously discussed, no objective evidence has been presented to support his position."

Does this judge isolate himself entirely from the news media, and have no conception whatever of the worldwide HIV epidemic fueled by heterosexual transmission of the virus? The above quotation also shows the malign influence of the Supreme Court's decision in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), the case holding that whether an impairment substantially limits a major life activity must be determined in each case taking into account the impact of medication and assistive devices. The clear implication of Laffitte's comment is that evidence that medical treatment of pregnant women substantially lowers the risk that their children will contract HIV would undercut the claim of any HIV+ man that his infection substantially impairs his major life activity of reproduction. (Imagine what Judge Laffitte would say if there was evidence that the plaintiff was a gay HIV+ man. At least one federal circuit, the ever-retrograde 4th, has held that an HIV+ gay man who didn't plan to have children could not claim reproduction as a major life activity for purposes of the ADA.)

This opinion clearly illustrates that the ADA as presently enacted is insufficient to provide adequate protection against discrimination for HIV+ men.

But there is more. Judge Laffitte found alternative grounds for dismissing the case. First, he found that Carrillo's allegations that the employer failed to make a reasonable accommodation to his disability were groundless because Carrillo never specifically requested an accommodation. The court dismissed Carrillo's letter, asking to talk about his situation with the employer, as not having specifically invoked the accommodation requirement, even though it is clear that Carrillo was seeking some discussion. Apparently, this court has decided that "magic words" are required to invoke the accommodation requirement.

And this is a court that will not try to help a discrimination plaintiff by connecting the dots, either. The airline claimed Carrillo had a poor attendance record, but was it conceivable that Carrillo's letter asking to discuss the situation might have been seeking a discussion of how his HIV-status was affecting his health and his job attendance? For the court, it was sufficient that the employer had asserted (without proof, since this motion was decided before the employer had to put on its defense case) that Carrillo had an attendance problem and had attracted a passenger complaint, which suddenly became grounds for discharge the after he notified the employer he was HIV+.

By dismissing at the end of the plaintiff's evidence, the court terminated Carrillo's ability to dispute whatever case the airline was planning to put on in justification of the discharge. The opinion is, unfortunately, rather typical of the hostility toward ADA plaintiffs exhibited by many federal judges. Judge Laffitte was appointed to the federal bench by Ronald Reagan in 1983 as part of the first wave of ultra-rightwing judicial appointees in his administration.

Carrillo represented himself pro se, with assistance from Nora Vargas-Acosta and Victor M. Bermudez-Perez.

As we opined after the Supreme Court issued its *Sutton* opinion, the ADA badly needs a congressional fix if it is to continue as a viable source of protection for workplace rights of HIV+ people. A.S.L.

Federal Court Rejects HIV Confidentiality and Hostile Environment Claims Under ADA

A medical imaging lab employee told his supervisor that he was HIV+, and asked the supervisor to keep the information confidential; the supervisor then told his superior, who in turn told her superior. But the employee cannot claim a breach of the confidentiality provision of the ADA, because he had not undergone the HIV test at the employer's request, according to Chief Judge Buchmeyer of the U.S. District Court for the Northern District of Texas in Dallas. *Ballard v. Healthsouth Corp.*, 2001 WL 585974 (N.D. Tex. May 25). Nor can the employee establish that several incidents in which he alleges he was mistreated by his supervisors during the nine-month period following the disclosure created a hostile work environment in violation of the ADA.

Randy Ballard performed CT scans, MRIs, and X-rays at a clinic in South Arlington, Texas. In two 1995 performance evaluations he was described as a generally good employee with some punctuality and attendance problems. An August 1996 evaluation criticized Ballard for sometimes being argumentative and confrontational with his coworkers. In February 1997, he went to his doctor for treatment of pinkeye and for an HIV test. The HIV test came back positive. Ballard took several vacation days to recover from this blow.

After he returned to work, he voluntarily disclosed the HIV test result to his manager, Grady Hobbs, and asked Hobbs to keep the information confidential. Ballard also told Hobbs that he had been stuck with a needle during an incident with a seizing patient several months earlier. Later that day, Hobbs told Ballard that he planned to tell his own supervisor, Erin Masters, about Ballard's HIV status. Hobbs then met with Masters at a restaurant and told her of Ballard's test result. Masters subsequently told her own supervisor, regional manager Bill Lane.

Ballard claims that after these disclosures, a number of things changed at work. Specifically, Ballard alleges that: 1) in April and May 1997 he received oral and written warnings about his performance; 2) an August 1997 performance evaluation accused him of losing his temper at work and being rude to patients; 3) he was made to work overtime when a full-time coworker quit and was replaced by a part-timer; and 4) he was counseled for objecting to his supervisor's attempt to get him to perform an exam that he was not trained to perform. Eventually, Ballard resigned; Lane asked him to withdraw the resignation, and he did so. In December 1997, he was written up for an alleged timecard falsification. He then resigned and sued, claiming his employer had (1) violated the confidentiality provisions of the ADA and (2) discriminated against him by creating a hostile work environment.

Jerry Buchmeyer made short work of both claims. As to confidentiality, according to the court the ADA requires that medical information

be kept confidential if obtained: 1) when an employer requires a new employee to undergo a medical exam; 2) when an employer requires an employee to undergo a medical exam that is "job-related and consistent with business necessity"; or 3) when an employer conducts "voluntary medical examinations … which are part of an employee health program available to employees." Of these three, the only one that arguably applied, according to Buchmeyer, was the second — business necessity. Ballard pointed to the needle stick and a policy requiring the reporting of workplace accidents, and the OSHA requirement that employees report any incident that may expose them to blood-borne diseases, as combining to create a "standing job-related inquiry" into his HIV status. Thus, he argued, his disclosure to his employer should be treated as consistent with the business necessity provision.

Judge Buchmeyer rejected this claim, in language that should give pause to anyone deciding whether to undergoing a medical exam privately or at an employee's direction. According to the court, "Ballard is correct that had he told the Defendant of the needle-stick incident at any time after it happened" and had the defendant offered him a medical exam, "Defendant would have had to treat the results of [this exam] as a confidential medical record." However, since Ballard did not inform the employer of the needle stick until after he had tested positive for HIV, confidentiality was not required by the ADA..

Ballard claims that his treatment by his employer after he disclosed his HIV status amounted a hostile work environment. In the Fifth Circuit, the creation of a hostile work environment in response to an employee's disability violates the ADA. *Flowers v. Southern Regional Physician Services*, 247 F.3d 229, 232 (5th Cir. 2001). According to *Flowers*, in deciding whether a working environment is hostile as a matter of law, the finder of fact must consider "the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance."

In making this determination, Judge Buchmeyer compared Ballard's treatment to Flowers's. In that case, after Flowers told her supervisors that she was HIV+, the company's regional president called her a "bitch" and refused to shake her hand. Flowers was made to undergo four drug tests in a one-week period, although she had never previously tested positive on such a test. She was written up repeatedly, starting one month after her disclosure, each time in a manner that the court likened to an "ambush." She was twice placed on probation and was ultimately fired.

Not surprisingly, Buchmeyer found that Ballard's complaints that his workload was increased; that he was asked to perform a test he hadn't been trained for; that his employers' oral and written evaluations of his work took a turn for the worse, did "not rise to the level set by the court in *Flowers*." Moreover, according to the court, the nice things that Ballard's employer did for him after the disclosure (notably, Lane asked Ballard to stay, warmly enough to persuade him to do so) undermine any claim of a hostile work environment. Ironically, though, the judge then contradicted himself by suggesting that whatever bad things happened to Ballard happened not because of discrimination, but because his employer simply didn't like him. This suggests that the line between disliking an HIV+ employee, and disliking an employee because he is HIV+, can be a fine one. *Fred Bernstein*

Iowa Supreme Court Rejects "As Applied" Constitutional Vagueness Challenge to HIV Criminal Transmission Law

In a ruling announced July 5, the Iowa Supreme Court unanimously rejected Justin Keene's constitutional challenge to the application of an Iowa law criminalizing HIV transmission. *State of Iowa v. Keene*, 2001 WL 747614. Keene alleged that the law was insufficiently specific in describing the circumstances to which it would apply, and that he received ineffective assistance of counsel in that his lawyer permitted him to plead guilty when there was an insufficient factual predicate for his guilt under the statute.

According to the record of proffered evidence before the trial judge at the time of the guilty plea, Justin Keene knew that he was HIV+ when he met C.J.H., who suffers from an unspecified mental illness. They had a "brief romance" that included one episode of consensual, unprotected sexual intercourse. Keene claims he did not ejaculate or, if he did so, only on C.J.H.'s stomach; she could not recall whether he had ejaculated. A week after this incident, Keene and C.J.H. went together to Hillcrest Family Service in Dubuque so that she could take a pregnancy test. During this visit, C.J.H. told a nurse that she wanted to have a baby with Keene. Keene then asked the nurse about "what having AIDS meant to having a child." The nurse later stated that C.J.H. appeared surprised when Keene questioned the nurse about HIV's effect on babies. Evidently, the Service contacted the police. Investigating Dubuque officer Tom Parker stated that Keene admitted to Parker that he had engaged in consensual, unprotected intercourse with C.J.H., as well as the other elements of this story, including that he was infected with HIV and did not notify C.J.H. of this prior to their sexual encounter. There was plenty of corroborating evidence in the file from other potential witnesses, including Keene's doctor, Keene's mother, and a co-worker of C.J.H. at McDonald's, who stated that she had warned C.J.H. about rumors concerning Keene's HIV status. (The opinion by Justice Cady does not, however, indicate whether this warning came before or after the sexual encounter.) Keene had stated to Parker that he did not intend to transmit HIV to C.J.H., and there is no indication in the opinion that C.J.H. had become HIV+.

After Keene pleaded guilty to the charges, he was sentenced to 25 years in prison, but the sentence was suspended and he was placed on probation. He appealed, arguing that the statute was unduly vague and his counsel erred by having him plead guilty to a charge that lacked a factual basis, since he believed that by not ejaculating in her vagina, he had avoided placing C.J.H. at risk for HIV infection.

The statute, Iowa Code sec. 709C.1 is violated if a person "engages in intimate contact with another person" while knowing he is HIV+, and "intimate contact" is defined as "the intentional exposure of the body of one person to a bodily fluid of another person in a manner that could result in the transmission of [HIV]." Actual transmission is not required for a violation to occur. If the exposed person knowingly consented (i.e, was informed of the other person's HIV status), the defendant would have an affirmative defense to the charge.

Keene argued that this language is unclear and fails fairly to warn of prohibited conduct. The court, using the American Heritage Dictionary definition of "could," found that the burden of the state was to show that transmission of HIV was "possible" under the circumstances described in the charge. Wrote Justice Cady, "Over the past decade, our nation's understanding of possible methods of transmitting the HIV has increased dramatically. It is a well-known fact that an infected individual may possibly transmit the HIV through unprotected sexual intercourse with his or her partner. We take judicial notice of the fact that the HIV may be transmitted through contact with an infected individual's blood, semen or vaginal fluid, and that sexual intercourse is one of the most common methods of passing the virus… Thus, any reasonably intelligent person is aware it is possible to transmit HIV during sexual intercourse, especially when it is unprotected."

Consequently, the court found that based on the record Keene "was aware of the risk of transmission of the HIV when he engaged in unprotected sexual intercourse with C.J.H." Furthermore, wrote Cady, "any claim by Keene that he did not ejaculate on October 9 or that if he did ejaculate, he ejaculated outside of C.J.H's body, is irrelevant," since the statute merely requires that "the body of one person be exposed to the bodily fluid of another."

The opinion by the court is notably free of any discussion about the infectivity of "pre-cum" or the degree of risk of transmission when somebody withdraws before ejaculating, and to that extent mirrors the rather non-specific language of the statute itself. Ironically, at least in the view of this writer, the more one knows about the subtleties of HIV transmission risk, the more vague the statute actually appears in terms of defining criminal conduct, perhaps due to legislative ignorance or, more likely, legislative skittishness about enact-

ing detailed language concerning sexual practices.

Having rejected Keene's as-applied challenge, the court also rejected his ineffective assistance of counsel charge, finding that the facts on the record supported the charge and there was no fault by the attorney in permitting Keene to plead guilty. A.S.L.

PWA's Failure to Request Accommodation Condemns Her ADA Complaint

Chief Magistrate Walters of the U.S. District Court for the Central Division of the Southern District of Iowa ruled in *Burke v. Iowa Methodist Medical Center*, 2001 WL 739595 (Feb. 22) that a registered nurse who suffered from AIDS had the burden to request a reasonable accommodation, and thus her termination by the Medical Center did not violate the ADA.

Debra Bruke, a registered nurse, was working in the Center's neurosurgery unit in patient care when she was transferred in May 1993 to a non-patient care position. At the time she had "full-blown AIDS" (i.e., symptomatic HIV infection). She does not object to that transfer. From June 1993 to May 1995 she worked part-time doing surgical assessments over the phone, and then she worked part-time in human resources doing clerical work. In March 1996, Burke went on disability leave when a "major depressive disorder associated with her HIV status" prevented her from working. She received workers compensation benefits, and applied for and received long-term disability and security benefits, beginning in the fall of 1996. In October 1999, she submitted a statement of continuing disability to retain her eligibility for the social security benefits, but the disability insurance carrier had notified her in September 1998 that her disability benefits would be discontinued because it interpreted recent medical notes as indicating that her condition allowed her to work. Burke's doctors sent new notes to the disability insurer attesting to her continued disability.

At this point, her disability leave exceeded what was normally authorized by the Medical Center, and apparently spurred by the discontinuance of her disability benefits, the Center decided to offer her a new position in its Outreach Education program, similar to some of the work she had been performing on a part-time basis prior to her disability leave. The Center sent her a letter describing the position, stating it would be held for her for 30 days, inviting her to call designated Center staff if she wanted to discuss "the employment opportunity available to you, your insurance coverage or any other matters." The letter concluded that if no arrangement could be worked out, her employment would terminate at the end of the thirty days. Burke never called the Center, but her workers compensation attorney wrote the Center a short letter, stating: "I do not believe my client can perform the full-time position described by you." (The position was a 32–hour per week position that would have involved standing several hours each day.) At the end of the thirty days, the Center notified Burke of her termination. She then filed suit under the ADA and the Iowa Civil Rights law, contending she had been discriminatorily discharged and the Center had failed to accommodate her by offering part-time employment that she could perform. Burke contended that she could have performed a job requiring about 20 hours per week.

In moving for summary judgment, the Center argued that Burke did not qualify for protection under the ADA in light of the various communications stating that she was fully disabled, and that it had fulfilled its obligations by offering her the outreach position. Burke argued that she was able to perform part-time work, which the Center should have offered her as an accommodation.

Magistrate Walter found that for purposes of deciding the motion, "Viewing the record favorably to Burke as the Court must, it appears that despite her limitations Ms. Burke had been doing some community outreach work on a volunteer basis similar to what she would have performed as Outreach Education Instructor… Burke's disability affected her stamina and attentiveness, not her ability to perform work of the type she had been doing on a volunteer basis… Assuming the truth of, or Ms. Burke's good faith belief in, her statements that she was totally disabled for social security and insurance disability purposes, the jury might conclude that she was nonetheless capable of performing the essential functions of some type of low-stress, part-time work similar to that she had performed before." Thus, Burke could qualify as an individual with a disability, and her discharge would be discriminatory in violation of the ADA *if* the Center failed to make reasonable accommodations to her disability.

Here is where her case fell apart, however, in Magistrate Walters' analysis. The Center characterized its letter to Burke as an effort to begin the interactive process of finding a reasonable accommodation. Burke characterized it as a "take it or leave it" offer, and thus insufficient to satisfy the Center's obligation. Burke found the Center's argument more persuasive. Quoting from relevant case law, Walters found that "unless the necessary accommodations are open, obvious and apparent to the employer, the initial burden rests primarily upon the employee to specifically identify the disability and the resulting limitations, and to suggest the reasonable accommodation." In this case, the Center knew very well that Burke had AIDS, and offered her a reduced hours position (32 hours instead of 40) doing something she had done recently on a volunteer basis. Burke's response was to reject it and not to request something else. "The only response to its letter concerning the Outreach Education Instructor was that she could not perform the job and remained totally disabled. With this information in hand, [the Center] had no reason to believe part-time employment was a reasonable accommodation. Accordingly, reasonable jurors could not find that [the Center] failed to participate in the interactive process or, it follows, that it unlawfully discriminated by not making a reasonable accommodation." Thus, the court granted summary judgment to the defendant. A.S.L.

Court Finds Insurer Owes No Duty to Reveal HIV+ Test Result to Rejected Applicant

In *Eaton v. Continental General Insurance Company*, 2001 WL 630266 (N.D. Ohio April 26), the U.S. District Court granted summary judgment to an insurance company against an insurance applicant who sued because he was not advised of a positive result of an HIV test which he had been required to take as part of an application for disability insurance. The application had been denied for reasons unrelated to the test.

David Eaton had applied for disability insurance with a local insurance agent in May 1997. Although the agent represented another company, agents for that company were authorized to solicit applications for Continental. A local paramedic firm provided the blood work, and their paramedic promised that Eaton would be notified if he tested positive. Eaton signed a Notice and Consent for Testing which advised that the results of the test would be provided to the insurance company and that if the results were positive the insurer may contact the applicant about the result. Eaton also completed a form requesting to be advised of the test results. The local firm forwarded the blood to an independent lab for analysis.

Before results of the test were obtained, Continental discovered that Eaton already had disability insurance through his employer. Because Continental's underwriting guidelines preclude writing disability insurance where the applicant already had such coverage, Eaton's application was denied and his file was closed. Continental did not follow its normal practice and advise Eaton of his test results because his file was closed.

Eaton learned of his HIV positive status a year later, apparently after testing by his own physician. Continental then provided confirmation of the positive result from his earlier test upon receiving a request by Eaton's attorney. Eaton sued Continental, the local insurance company, the lab and the paramedic firm, alleging breach of a statutory duty to inform under Ohio law, breach of contract, and intentional or negligent infliction of emotional distress.

District Judge Carr granted summary judgment to all defendants on all counts. The court ruled that the statute in question, Ohio Revised Code sec 3901.46 (B)(1), was a consent statute. The consent of the applicant was required to perform the HIV test, and the applicant had to be notified of procedures for notification of results. Confidentiality of results had to be assured, and general interpretation of results had to be provided. The court ruled, however, that the statute did not spe-

cifically require that test results be provided, nor did Continental have a common law duty to advise of positive test results, because there is no doctor-patient relationship between an insurance company and an applicant giving rise to such duty.

The court found no contractual duty between Continental and Eaton because nobody of any authority to bind Continental had agreed to provide him with this information. Any promises made by the paramedic to provide results exceeded the scope of the paramedic or the paramedic company to bind Continental, and the test was found to be incidental to the application to purchase insurance ("There is no evidence that plaintiff made an offer to apply for insurance in exchange for a promise to fairly process his application or to inform him of his HIV status.") Eaton's request to be advised of HIV test results did not bind Continental to provide the results, the court found.

The claim for intentional or negligent infliction of emotional distress was denied because the court ruled that Eaton's emotional distress was caused by his fear of a "non-existent peril," and because Continental's conduct was not "extreme or outrageous." Although the latter is clear, the former is not. The court seems to be saying that the peril Eaton alleges is that he was fearful that he might have infected others, but that he has no knowledge that he did so. "No harm, no foul" is what the court seems to be saying, incredibly. As it is with Continental, so it is with the co-defendants. They could not bind Continental, and as independent subcontractors, nothing that Continental did could bind them, either. One surmises that in the court's view the whole thing was illusory, except for the damages which Eaton suffered (delay in possible treatment for at least a year), which the court simply refused to see. *Steve Kolodny*

Drug Advertiser Sanctioned in HIV+ Plaintiff's Defamation Action

The New York Appellate Division, 2nd Department, affirmed sanction of the Merck Pharmaceutical Company, and its advertising agency, for the intentional destruction of evidence sought by a defamation plaintiff. *Doe v. Merck & Co., Inc.*, 2001 WL 584388 (May 21).

Defendants used plaintiff Jane Doe's photograph in an educational brochure titled "HIV: Getting the Facts," and in a promotional brochure titled "Sharing Stories." The biography in "Sharing Stories" implies that Doe has herpes.

Doe alleges that she did not consent to the commercial use of her photograph, and was defamed by the herpes inference. The court denied defendants' attempt to subpoena samples of Doe's blood that were stored for unrelated reasons one year prior to the creation of "Sharing Stories," holding that defendants failed to justify disclosure by establishing through scientific evidence that the samples would show that Doe had herpes at the time "Sharing Stories" was created. The court also sanctioned defendants for spoliation of evidence, in that Merck destroyed "approval sheets" sought by Doe. The sanction takes the form of precluding defendants from showing that the "Sharing Stories" brochure is educational, a key point since a photo used for educational purposes can't constitute a commercial use.. *Mark Major*

State and Private Healthcare Mishandles Infant's Welfare, HIV+ Mother Sues

An HIV+ mother brought an eleven-count suit in the U.S. District Court for the District of New Jersey against New Jersey's Division of Youth and Family Services (DYFS), and a private hospital, for their treatment of herself and her newborn. *Doe v. Division of Youth and Family Services*, 2001 WL 708444 (June 25).

In 1998, Jane Doe, participating in a prenatal treatment program at Capital Health System, Inc. (CHS), consented to random urine testing for drugs and HIV. Doe alleges that CHS failed to record the subsequent withdrawal of her consent. Notwithstanding her refusals, CHS tested Doe's blood, discovering she was HIV+. Doe was prescribed AZT during her pregnancy, which she stopped taking due to side effects. When Doe went to the hospital with labor pains, her doctor openly discussed her HIV status in front of her family, who had not previously been informed. Doe refused AZT and intravenous medication, and alleges that the hospital staff denied her repeated requests for oral pain medication.

After delivery, Doe refused permission to administer the recommended AZT protocol to Baby Doe. CHS reported the refusal to DYFS and placed the baby in protective custody. DYFS obtained temporary medical guardianship for CHS, who gave the baby AZT. CHS disclosed to Doe that the baby tested positive both for HIV and opiates, which were apparently incorrect results as all test results since have been negative. When the baby was returned, Doe was instructed to administer AZT. Then, on notice from Doe that she had stopped administering AZT because it made the child ill, DYFS obtained temporary custody based on allegations of abuse and neglect. After further testing, DYFS discontinued the baby's AZT. Doe refuted the DYFS accusation that she was "drug involved" during pregnancy, and regained custody.

Doe charges that DYFS's conduct and policies violated her substantive due process rights to privacy and familial relations, violated the Rehabilitation Act, the Americans with Disabilities Act, the New Jersey Law Against Discrimination, and the New Jersey Constitution. Doe also asserts common law causes of action against DYFS for failure to investigate and negligence.

The court preserved Jane Doe's "novel" Rehabilitation Act claim that she was denied the right to make decisions with respect to Baby Doe's medical treatment, and that DYFS filed a false affidavit with the state court indicating that she was drug-involved during her pregnancy, based solely on her HIV status. Citing the ADA proscription on denial of an opportunity for the disabled to participate in services on an equal basis with non disabled individuals, the court found a cause of action under ADA Title III in Doe's allegations that CHS disclosed her HIV status to DYFS, her family, and the police, and that CHS refused her requests for HIV re-testing and oral pain medication during delivery. Doe also retains triable NJLAD and New Jersey AIDS Assistance Act claims against CHS for the disclosure of her HIV status without consent; an NJLAD claim against DYFS was rejected because DYFS is not a place of public accommodation.

However, the court found that Jane and Baby Doe lacked standing to seek to prospectively enjoin DYFS's alleged "policy of seizing newborns based solely on a mother's HIV status and refusal to administer AZT to the baby," because they had neither alleged continuing harm to themselves nor filed a class action. The court held that the Eleventh Amendment doctrine of state sovereign immunity precluded Doe's claim that DYFS violated her substantive due process rights to privacy and familial relations, and found that, in Title II of the ADA, Congress failed to abrogate the States' immunity from suits in federal court because Congress did not identify a pattern of discrimination against HIV+ pregnant women or other disabled individuals at the hands of state child welfare agencies. The opinion distinguishes the Rehabilitation Act from the ADA because the former applies to entities which, like DYFS, receive federal funds.

The court also held that Doe's claim for DYFS's failure to perform a confirmatory test after Baby Doe initially tested positive for opiates, and DYFS's failure to investigate the efficacy of the prescribed AZT protocol prior to mandating the treatment, did not make out a cause of action under New Jersey law. Finally, the court declined Doe's "invitation to predict that the New Jersey Supreme Court would adopt a cause of action for tortious interference with parental rights."

Cynthia Dennis of the Rutgers University School of Law-Newark Women and AIDS Clinic represented the plaintiffs. Deputy Attorney General Stephanie Brand represented the state-defendants, individual defendants were represented by private counsel. *Mark Major*

Mass. Appeals Court Rules on Evidentiary Issues Related to AIDS

In an unpublished opinion addressing an evidentiary issue involving AIDS in a criminal prosecution, the Appeals Court of Massachusetts affirmed the lower court's decision denying the defendant's motion for a new trial. Defendant Edward T. Martin, convicted of rape, argued on appeal that his counsel failed to request a limiting instruction

regarding the victim's testimony that the defendant had AIDS. The defendant also argued that his counsel failed to request a voir dire to determine juror's potential prejudice regarding AIDS. *Commonwealth v. Martin*, 2001 WL 586682 (May 31).

Martin was convicted of rape, breaking and entering and assault with a dangerous weapon. At trial, the judge erred by ordering excessive security measures because he was unsure whether the evidence items were "safe" for viewing by the jury. For example, the judge failed to provide the jury with all of the trial exhibits and commented that he would provide the jury with gloves so that they could examine the evidence. Although the appellate court agreed that the judge's security measures were excessive, the court concluded that the defendant did not suffer prejudice from it, nor did it constitute reversible error.

The court said reasonable minds could have differed on what was the best way to handle such "volatile" evidence. The defense counsel might have concluded that the limiting instruction would only have made things worse, by giving the jury a 'children, don't put beans up your nose' instruction. Therefore, the failure to include a limiting instruction could have been part of their defense strategy.

The court held that Martin failed to demonstrate that the missing instruction deprived him of a grounds for defense. Furthermore, there was no abuse of discretion in the judge's denial of the defendant's motion for a new trial. *Tara Scavo*

Peculiar Iowa Limitations Rules Bar Parents' Claims re HIV-Infected Son

Noting that the result reluctantly reached would not have occurred under the law in some other states, U.S. District Judge Longstaff (S.D.Iowa) ruled March 19 in *Doe v. Baxter Healthcare Corp.*, 2001 WL 740112, that the parents of an HIV+ boy were timed-barred in their claims for damages for medical expenses and loss of consortium against manufacturers of blood clotting medication whose use caused their son's HIV-infection.

John Doe, Jr., was born in 1978 and diagnosed with hemophilia in 1979, whence he began using the defendants' products. His HIV infection was discovered in 1987. At that time, his parents were active in organizations providing services for hemophiliacs, and were aware about the unfolding information concerning HIV infection and AIDS as it related to hemophiliacs. From 1987 to 1993, Doe was part of a clinical study during which his T-cell counts were monitored. The first medical expenses his parents incurred in connection with his HIV-status came in November 1993, as a result of medical examinations and procedures leading to a diagnosis of T-cell non-Hodgkins lymphoma, a condition that some medical authorities have found connected with HIV-infection. In October 1995, Doe and his parents filed suit against the manufacturers of blood clotting medication, alleging that negligence in the preparation of these medications resulted in Doe's infection and his parents' subsequent expenses and loss of consortium injury. The defendants moved to dismiss the parents' claim as time-barred.

Judge Longstaff found that under Iowa law, the parents' claim was entirely derivative from their son's claim, since their damages would be denominated as "consequential damages" from the tort allegedly committed against their son. The son's claim is not time-barred, because he is still a minor and has until age 21 before the statute begins to run on his own personal injury claims. However, the court found, the statute of limitations (which is two years for this kind of claim in Iowa) began to run for the parents in 1987, when their son's HIV+ status was discovered. The court rejected the parents' argument that they had no claim until they first accrued medical expenses in 1993, finding that under Iowa law, once they learned of their son's infection, they were on notice of potential injuries to themselves and could have filed suit against the blood clotting manufacturers at that time.

Judge Longstaff pointedly noted two jurisdictions in which the rule would be otherwise, Idaho, citing *Doe v. Cutter Biological*, 844 F. Supp. 602 (D. Idaho 1994), and New York, citing N.Y. Civ. Prac. L. & R. sec. 214–3, by which the N.Y. legislature passed a law reviving time-barred personal injury actions involving allegations that tainted blood products had transmitted HIV. "The purpose of statutes of limitations is 'to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared,'" wrote Longstaff, quoting a prior federal district court decision from Iowa. "Statutes of limitations protect the Court and all parties from having to involve themselves in 'stale claims.' In this instance, the Court doubts that these laudatory goals are promoted. Even defendants do not appear to argue that evidence or testimony relating to the parents' Rule 8 claims has eroded through the passage of time. However, the Court must adhere to Iowa law even though it may unfairly bar meritorious claims. The parents' Rule 8 claims in this case accrued when they discovered their son was HIV positive in July 1987, and were not tolled." A.S.L.

Magistrate Rules on Claims by HIV+ Detainee Denied Meds for Four Months

A U.S. Magistrate granted summary judgement for the Dallas County Sheriff in Daniel M. DiSalvo's *pro se* action charging that he was denied access to medicine for his HIV condition while he was held for four months. *DiSalvo v. Bowles*, 2001 WL 705782 (N.D.Tex., June 18). DiSalvo sued Sheriff Bowles individually and in his official capacity.

DiSalvo was arrested on December 25, 1999. While being booked, DiSalvo said that he told the medical staff that he is HIV+ and maintained a strict medical regimen. During four months of incarceration, his repeated requests for medication were denied. Finally, in April 2000, DiSalvo received medication. He was released in March 2001.

DiSalvo claimed that the absence of medication "caused his T-cell count to drop and his viral load to increase from an undetectable level to a dangerously high level" and that he had "become resistant to medication that was previously effective in controlling his condition." His health being "irreparably damaged and his life expectancy shortened," DiSalvo sued for $10 million under the ADA. The court construed his complaint against the Sheriff as being a 42 USC sec. 1983 action, even though this was not specified in the complaint.

Magistrate Boyle could not "determine from the record or the parties' briefings" whether DiSalvo was denied medical care while incarcerated after conviction or as a pretrial detainee. Boyle found that "where denial of medical care claims are involved, the Fifth Circuit has held that the states owe the same duty to pretrial detainees under the Due Process Clause as they owe convicted prisoners under the Eighth Amendment." In either case, Boyle wrote, to impose liability on Sheriff Bowles, it must be shown that he had "subjective knowledge of a substantial risk of serious harm." Further, Boyle found that Bowles could not be held liable in the sec. 1983 action for the actions of subordinates. DiSalvo had also sued two unnamed workers in the medical department of the jail.

Boyles rejected DiSalvo's claim that his "complaints were addressed to the Sheriff personally, but no response was received from the Sheriff personally." DiSalvo, Boyle wrote, did not "complain of any particular policy, nor does he complain of the lack of a policy. Rather, he complains that jail employees failed to follow existing policy." Even though Bowles did not seek summary judgement on the ADA claim, the court dismissed that claim as well, finding that DiSalvo did not claim discrimination based on disability. Lastly, the court ordered DiSalvo to name the unnamed employees by August 3, 2001 "so they may be properly served," or have the case dismissed. *Daniel R Schaffer*

Massachusetts Appeals Court Adopts Actual Exposure Rule in AIDS-Phobia Case

Coming a bit late to the game, the Massachusetts Appellate Division ruled June 19 in *Cole v. D.J. Quirk, Inc.*, 2001 WL 705730 (Dist. Ct. Dept.), that an AIDS-phobia plaintiff must allege actual exposure to HIV if he is to mount a successful claim for emotional distress damages without having actually contracted HIV.

The case arose out of the sale of a used car by the defendant dealership. As part of the purchase negotiations, the dealer agreed to have the interior

of the used car cleaned before delivery to the Coles. The next day, after picking up the car, Mr. Cole noticed the interior was still dirty and began to clean the car himself. He reached into the back pocket of the driver's seat to recover debris and suffered a puncture wound, which he then ascertain had been caused by a long pair of sharp surgical tweezers. He later ascertained that the previous owner of the car was a doctor, and he found prescription slips in the car containing words such as "viral," "ELISA" and "antibodies." Frightened that he might contract hepatitis B or HIV, Cole had himself tested, and went for repeated testing. He abstained from having unprotected sex with his wife over the next year, and suffered various symptoms of emotional distress. Mr. and Mrs. Cole sued the car dealership for negligent infliction of emotional distress, sometimes referred to as AIDS-phobia.

The court noted that Massachusetts had not yet taken a position in the growing split of state court authority over whether somebody in Mr. Cole's position could survive a motion to dismiss by arguing that a reasonable person in his circumstances would fear the possibility of HIV infection and genuinely suffer symptoms of emotional distress (the minority position among state courts), or whether he could only litigate the claim if he could show that the surgical tweezers had been used on an infected person and presented him with actual exposure to a transmissible agent (the majority view).

The court decided that Massachusetts should line up with the majority on this, relying primarily on *Payton v. Abbott Labs*, 386 Mass. 540 (1982), in which the state's Supreme Judicial Court had ruled that claims for negligent infliction of emotional distress may not be brought unless the plaintiff can demonstrate that he has suffered actual physical harm. The SJC premised this rule on the need to discourage frivolous suits. The court felt reassured in picking the majority rule by the more recent SJC decision in *Urman v. South Boston Savings Bank*, 424 Mass. 165 (1997), where an emotional distress claim due to an alleged environmental exposure failed due to lack of any direct exposure by the plaintiffs to the alleged hazard.

Thus, the appellate court found that the trial court had properly directed a verdict for the defendant. "To prove their claim for HIV/AIDS-phobia, the Coles were required to prove both a scientifically accepted method of transmission of the virus and that the source of the allegedly transmitted blood or fluid was in fact HIV-positive. They did not meet this burden at trial." Indeed, although Mr. Cole retained possession of the tweezers, he never introduced any evidence that they had been tested for the presence of HIV. A.S.L.

AIDS Law Litigation Notes

Litigation over transfusion AIDS has helped to permanently shift the standard to which blood banks are held in screening blood, to judge by the New Jersey Appellate Division's July 2 decision in *Estate of Elkerson v. North Jersey Blood Center*, 2001 WL 735769. Ernestine Elkerson died of cirrhosis of the liver, allegedly brought on by a hepatitis B infection she claimed to have incurred from a blood transfusion in 1983. The Blood Center argued that it should be judged based on prevailing practices in 1983 in the blood banking community, as at that time donated blood was not routinely screened for hepatitis B, even though a screening test was available and feasible to use. The trial court was taken in by this argument, but the defense verdict was reversed, the Appellate Division finding that HIV-transfusion litigation in New Jersey had established a new standard: a reasonable blood bank standard, adopted in *Snyder v. American Ass'n of Blood Banks, 144 N.J. 269 (1996), under which the question is whether a reasonable blood bank, having all the facts then available, would have used such a test, in light of the costs and efficacy of the test as compared to the harms that would befall those transfused with unscreened blood. An expert witness who was very visible during HIV litigation, Dr. Donald Francis, was also a witness in this case, and testified that the blood banks should have been screening for hepatitis B in 1983 as a surrogate marker for HIV infection.*

An HIV+ man from Belize whose case just keeps popping up in the U.S. courts in New York claims he has to be in the U.S. because there is inadequate treatment for HIV in Belize, but the courts just don't want to hear him. In *U.S. v. Crown*, 2001 WL 682289 (June 18)(unpublished disposition), the U.S. Court of Appeals for the 2nd Circuit, upholding Errol Crown's conviction for illegally re-entering the U.S. after having been deported due to a prior narcotics conviction, found that the district court properly refused to listen to Crown's "necessity defense." According to the unattributed panel opinion, the necessity defense was properly ruled out because "there were lawful alternatives available to him other than entering the United States illegally." Of course, the court refrains from stating what those "lawful alternatives" are.

Housing Works continues its winning ways in litigation against New York City. On June 20, N.Y. Supreme Court Justice Emily Jane Goodman found the city in violation of an order she had issued in 1999 concerning the city's failure to provide appropriate emergency housing to homeless people with HIV. Responding to complaints from 17 individuals that they had been denied appropriate housing on 35 separate occasions, Justice Goodman ordered the city to pay the plaintiffs $250 each for every night they were denied housing. *LGNY*, July 5. A.S.L.

Bush Administration Throws Support Behind Ineffective AIDS Prevention Measures

Rejecting the advice of public health experts, U.S. Secretary of Health and Human Services Tommy Thompson announced that the administration's response to news of rising rates of HIV infection in various population groups will be met by additional funding for "abstinence only" sex education programs. Any school that accepts funding under such a program is prohibited from advising students on how to prevent HIV transmission other than by abstaining from all sexual activity outside marriage. In addition, determined to continue fueling the raging epidemic of HIV-transmission through shared IV works, the administration plans to stick with the discredited Clinton Administration policy of forbidding federal funding for any health program that supplies drug users with clean hypodermic needles in exchange for used needles. This all comes on top of Bush's action in reviving a Reagan-era policy banning federal financial assistance to any program that counsels about abortion rights, thus denying federal funding to many programs on the front lines of AIDS prevention work around the world. *USA Today*, June 6. A.S.L.

AIDS Law & Society Notes

In response to a complaint filed with the Texas Department of Health, the Eckerd drugstore chain has installed a new software program in pharmacy computers in all its Texas stores to ensure that its receipts no longer print "HIV/STD" in boldface on receipts for AIDS-related medication. An HIV+ man from Beaumont, Texas, complained to the state after receiving such a receipt when he picked up his medications. *Houston Chronicle*, June 5.

New AIDS treatments have permeated the prison system, resulting in a sharp drop in AIDS-related deaths among inmates in the U.S. (from 1,010 deaths in state prisons in 1995 down to 242 in 1999), but the number of prisoners testing HIV+ had increased, to 25,800 in 1999. *Atlanta Constitution*, July 9. A.S.L.

International AIDS Law & Society Notes

The United Nations General Assembly held its first special session devoted entirely to a particular disease - AIDS, at the end of June. There was much controversy about the content of an official statement to be adopted by the conference, with representatives from some nations arguing strongly against including anything that might be seen as tolerating or approving homosexuality, while others pushed for recognition of the severe burden AIDS had imposed on the gay community, and the impressive leadership role the gay community had played in combating the epidemic on numerous fronts. Ultimately, a compromise document emerged that managed to be filled with gen-

eralities, few specific commitments, and avoidance of hard policy issues. But at least the world's press devoted much attention to AIDS for the better part of a week, stimulating quite a bit of discussion and distributing substantial information. Excerpts from the text of the final resolution were published in several newspapers. See, e.g., *Boston Globe*, June 28: UN Adopts Resolution for Global AIDS Fight; Nations, Corporations Pledge $644M for Fund. The Associated Press reported on June 27 that U.S. congressional leaders had agreed to add more than $1.3 billion to the global campaign, on top of the $200 already announced by President Bush for the special fund being put together by U.N. Secretary-General Annan.

The *New York Times* reported June 22 that the International Labor Organization has adopted a code of conduct for businesses, governments and workers dealing with AIDS in the workplace. For copies of the code, contact ILOAIDS@ilo.org.

The United Nations has designated Stephen Lewis, a Canadian diplomat, to be a special envoy for AIDS in Africa. Lewis will be assigned to represent the world organization in assisting African nations in combating AIDS, and in helping to organize a unified effort across national boundaries. *New York Times News Service*, June 2. The *Wall Street Journal* reported June 7 that Microsoft chairman Bill Gates had donated an extra $2 billion to his philanthropic foundation, giving rise to speculation that the Gates Foundation will either make a major donation towards the global fund that U.N. Secretary-General Kofi Annan has proposed to help coordinate a world effort to stem HIV transmission, or will fund other AIDS-related projects coordinated with the U.N. effort. The foundation has already committed $300 million to HIV vaccine research programs. The first private business to donate to the U.N. fund was Winterthur Insurance, a Swiss company owned by the Credit Suisse Group, which announced a $1 million donation plus provision of technical services. *Wall Street Journal*, June 8.

The Lambda Rights Committee in Austria reports via the internet a peculiar policy confusion between the Austrian Health Ministry and Justice Ministry. The Health Ministry's guidelines for prevention of HIV-transmission recommends use of condoms for anal sex but not for oral sex, so long as one party does not ejaculate in the mouth of the other party. But the Justice Ministry takes the position that oral sex without the use of a condom involving an HIV+ person is a criminal offense, or at least this is the logical consequence of the Justice Ministry's recent approval of prison terms for some HIV+ men who engaged in oral sex without using condoms. The courts have been relying on Art. 178 of the Austrian Criminal Code, which covers intentionally endangering another person with a transmittable disease.

Desperate times call for desperate measures. The *Atlanta Constitution* reported July 12 that Catholic bishops in Africa, who will be meeting on July 24, will consider a proposal by the AIDS office of the Southern African Catholic Bishops' Conference to relax the church's blanket opposition to the use of condoms as a means of containing the epidemic of sexually-transmitted HIV.

The Public Health Minister in Thailand, Sudarat Keyuraphan, announced July 11 that condom-dispensing machines will be installed in public toilets, especially in shopping malls, in an attempt to get barrier contraception into the hands of sexually-active at-risk young people. A campaign for 100% condom use by sex workers appears to be succeeding, but officials note that other young people are experiencing a surge in new HIV infections. Prime Minister Thaksin Shinawatra, who opened the country's 8th National AIDS Conference, also on July 11, stated that the government's emphasis must be on the next generation, not the next election. *Bangkok Post*, July 12.

A study of sexual practices of gay men in Australia by the National Center in HIV Social Research at the University of New South Wales found that a large proportion of gay men in Australia do not use condoms, but that in many cases the lack of condom use accompanies negotiated "safe sex." The study, conduct by post, of 1832 gay men, found that 46 percent had unprotected sex with a regular partner in the previous six months; a 1996 survey found that only 25% of respondents had engaged in such conduct. In addition, 26% had unprotected sex with a casual partner, up from 16% in the prior survey. The researchers concluded that there was a growing trend towards "negotiated safe sex" in regular relations, showing that the gay community had moved beyond "crisis mode" in dealing with AIDS. *Sydney Morning Herald*, June 7.

Canada's Citizenship and Immigration Minister, Elinor Caplan, announced to the nation's House of Commons on June 12 that the federal government will require HIV testing of all immigrants and refugees, but that those testing positive will not be automatically excluded from entering Canada. Decisions will be made on a case-by-case basis, with spouses, partners, dependent children and refugees being admitted, while economic migrants will be assessed individually and a judgment will be made whether they would impose excessive costs on Canada's health care system. Canadian immigration practice already involves testing for a variety of medical and mental conditions, some of which provide bases for exclusion. Current policy authorizes discretionary testing based on judgments of the entrance examiners, but the new policy would make it routine and mandatory. The Health Minister, Allan Rock, rejecting charges from Canadian AIDS groups that the new policy is discriminatory, pointed out that this would bring Canada into line with many other Western countries, including the U.S., whose exclusionary policy is more stringent. *Winnipeg Free Press*, June 13.

The president of Kenya has come up with a two-prong strategy for attacking the HIV epidemic in his country. President Daniel arap Moi called for death by hanging for anybody found to have knowingly passed HIV to somebody else, and has called on everybody in his country to abstain from sex for two years in order to bring sexual transmission of HIV to a halt. Although the government had discussed importing hundreds of millions of condoms for free distribution, said President Moi: "As a president, I am shy that I am spending millions of shillings importing those things." Although the Kenyan Federation of Women Lawyers promptly stated support for the proposal of the death penalty, the news account did not report their reaction to the president's call for total sexual abstinence. *The Guardian*, July 13.

The *Irish Times* reported on July 6 that a settlement had been reached in a lawsuit that has been pending for ten years between Irish hemophiliacs and five major pharmaceutical companies whose products caused HIV infection. Each of the 59 plaintiffs will be paid compensation averaging 60,000 pounds Irish. In addition, the Minister for Health and Children, Mr. Martin, has proposed a new formula for state compensation of infected hemophiliacs; talks have been on and off over this issue, and one sticking point at present is whether the 59 successful plaintiffs will have any state compensation reduced due to their private recovery. In a separate story, the newspaper reported recent data that the number of Irish hemophiliacs infected with HIV, hepatitis C or both viruses as a result exposure through blood transfusions or clotting medication was 252. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

ANNOUNCEMENTS

The National Lesbian and Gay Law Association and the Dallas Gay and Lesbian Bar Association have announced Lavender Law X, a national legal conference to be held in Dallas Oct. 25–27, 2001. The conference will be at the Le Meridien Hotel in downtown Dallas, and a mid-June mailing sought applicants to speak on conference programs. Those interested in speaking should contact Judy M. Spalding, 214–346–0050, judyspalding@worldnett.att.net. For registration information, check the NLGLA's website: www.nlgla.org.

The Lesbian & Gay Law Association of Greater New York, OUTlaw of NYU Law School, and the LGBT Advisory Committee to Manhattan Borough President C. Virginia Fields are co-sponsoring an LGBT Employment Law Forum, to be held Thursday, September 13, at NYU Law

School, Washington Square, Manhattan. More details will be in our September issue.

Amy Falkner, a professor at the S.I. Newhouse School of Public Communications at Syracuse University has teamed with a gay public relations company, OpusComm, and a gay entertainment services company, Gsociety, to create an internet survey of gay consumers in order to generate information that may be useful to businesses seeking to market their goods and services to the gay community. Individuals interested in participating by filling out a coded-anonymous on-line questionnaire should go the website www.glcensus.org. The survey will be operational from mid-July to mid-August, and the results will be tabulated and announced online in September. *Syracuse Post-Standard*, July 10.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Altman, Andrew, *The Democratic Legitimacy of Bias Crime Laws: Public Reason and the Political Process*, 20 L. & Philosophy 141 (March 2001).

Bernstein, David E., *Antidiscrimination Laws and the First Amendment*, 66 Miss. L. Rev. 83 (Winter 2001).

Blake, Michael, *Geeks and Monsters: Bias Crimes and Social Identity*, 20 L. & Philosophy 121 (March 2001).

Bowe, Martin, *The 2001 Elections and the Gay Rights Merry-Go-Round*, 7 City Law No. 3 (May/June 2001) (newsletter published by NY Law School Center for NY City Law) (commentary on passage of gay rights legislation during mayoral election years).

Brennen, David A., *Tax Expenditures, Social Justice, and Civil Rights: Expanding the Scope of Civil Rights Laws to Apply to Tax-Exempt Charities*, 2001 Brigham Young U. L. Rev. 167.

Brink, David O., *Millian Principles, Freedom of Express, and Hate Speech*, 7 Legal Theory 119 (June 2001).

Brower, Todd, *Of Courts and Closets: A Doctrinal and Empirical Analysis of Lesbian and Gay Identity in the Courts*, 38 San Diego L. Rev. 565 (May-June 2001).

Burbach, Mary, and Mary Ann Lamanna, *The Moral Mother: Motherhood Discourse in Biological Father and Third Party Cases*, 2 J. L. & Family Studies 153 (2000).

Card, Claudia, *Is Penalty Enhancement a Sound Idea?*, 20 L. & Philosophy 195 (March 2001).

Carpenter, Dale, *The Limits of* Gaylaw, 17 Constitutional Commentary 603 (Winter 2000)(review essay on Eskridge's *Gaylaw*).

Chamallas, Martha, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. Cal. L. Rev. 747 (March 2001).

Chambers, Henry L., Jr., *Discrimination, Plain and Simple*, 36 Tulsa L. J. 557 (Spring 2001) (speculates on the impact of recent Supreme Court decision adopting a simplistic, literalistic approach to interpreting federal civil rights statutes).

Collier, Charles W., *Hate Speech and the Mind-Body Problem: A Critique of Postmodern Censorship Theory*, 7 Legal Theory 203 (June 2001).

Coolidge, David Orgon, and William C. Duncan, *Reaffirming Marriage: A Presidential Priority*, 24 Harv. J. L. & Pub. Pol. 623 (Spring 2001) (urging the federal government to prop up the institution of traditional heterosexual marriage as a counterweight to the dangerous trend toward recognition of same-sex marriage which seems to be sweeping the country, at least in the minds of these anti-gay folk; see specially noted section below concerning Duncan's further production).

Cruz, David B., *"Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. Cal. L. Rev. 925 (May 2001).

Culhane, John G., *A Tale of Two Concurrences: Same-Sex Marriage and Products Liability*, 7 Wm. & Mary J. Women & L. 447 (Winter 2001) (compares concurring opinions by Vermont Supreme Court Justice Johnson in *Baker v. State* and California Supreme Court Justice Roger Traynor in an important case presaging the ultimate adoption by that court of strict liability for defective products; judges both to be transformative works of legal scholarship).

Davis, Martha F., Nan D. Hunter and Vicki Schultz, *Panel VI: Fighting Gender and Sexual Orientation Discrimination*, 9 J. L. & Policy 387 (2001) (part of symposium on *Constitutional Lawyering in the 21st Century*).

Doty, David S., *Finding a Third Way: The Use of Public Engagement and ADR to Bring School Communities Together for the Safety of Gay Students*, 12 Hastings Women's L. J. 39 (Winter 2001).

Duncan, William C., *"A Lawyer Class": Views on Marriage and "Sexual Orientation" in the Legal Profession*, 15 BYU J. Pub. L. 137 (2001).

Elrod, Linda D., and Robert G. Spector, *A Review of the Year in Family Law: Redefining Families, Reforming Custody Jurisdiction, and Refining Support Issues*, 34 Fam L. Q. 607 (Winter 2001).

Eskridge, William N., Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions: The 2000 Edward C. Sobota Lecture*, 64 Albany L. Rev. 853 (2001).

Eskridge, William N., Jr., *The Rrelationship Between Obligations and Rights of Citizens*, 69 Fordham L. Rev. 1721 (April 2001).

Ettelbrick, Paula L., *Domestic Partnership, Civil Unions, or Marriage: One Size Does Not Fit All*, 64 Albany L. Rev. 905 (2001) (speech).

Finnis, John, *Virtue and the Constitution of the United States*, 69 Fordham L. Rev. 1595 (April 2001) (judicial recognition of equality rights for gays under the constitution is not virtuous).

Fox, Lawrence J., *All's O.K. Between Consenting Adults: Enlightened Rule on Privacy, Obscene Rule on Ethics*, 29 Hofstra L. Rev. 701 (Spring 2001).

Frye, Phillis Randolph, and Alyson Dodi Meiselman, *Same-Sex Marriages Have Existed Legally in the United States for a Long Time Now*, 64 Albany L. Rev. 1031 (2001).

Gordon, Daniel, *Brennan's State Constitutional Era Twenty-Five Years Later — The History, the Present, and the State Constitution*, 73 Temple L. Rev. 1031 (Fall 2000) (examines *Baker v. State of Vermont*, the same-sex marriage case, as an example of state constitutional rights development along the lines envisioned in 1977 by Justice William J. Brennan, Jr.).

Gregory, David L., *The Supreme Court's Labor and Employment Law Jurisprudence, 1999–2001*, 36 Tulsa L. J. 515 (Spring 2001) (includes commentary on *Boy Scouts of America v. Dale*).

Heinze, Eric, *Sexual Orientation and International Law: A Study in the Manufacture of Cross-Cultural "Sensitivity"*, 22 Mich. J. Int'l L. 283 (Winter 2001).

Horne, Christine, *The Contribution of Norms to Social Welfare: Grounds for Hope or Pessimism?*, 7 Legal Theory 159 (June 2001) (part of symposium on hate speech).

Hurd, Heidi M., *Why Liberals Should Hate "Hate Crime Legislation"*, 20 L. & Philosophy 215 (March 2001).

Jacobson, Daniel, *Speech and Action: Replies to Hornsby and Langton*, 7 Legal Theory 179 (June 2001) (part of symposium on hate speech).

Kahan, Dan M., *Two Liberal Fallacies in the Hate Crimes Debate*, 20 L. & Philosophy 175 (March 2001).

Klein, Hilary B., and Robin A. Forshaw, *Proving Intent Under New York's Hate Crimes Law*, NYLJ, 6/4/01, p.1, col.1.

Knauer, Nancy J., *Homosexuality as Contagion: From* The Well of Loneliness *to the Boy Scouts*, 29 Hofstra L. Rev. 401 (Winter 2000).

Kurlantzick, Lewis, *John Rocker and Employee Discipline for Speech*, 16 The Labor Lawyer 439 (Winter/Spring 2001).

Leslie, Christopher R., *Standing in the Way of Equality: How States Use Standing Doctrine to Insulate Sodomy Laws from Constitutional Attack*, 2001 Wis. L. Rev. 29.

Marcosson, Samuel A., *Constructive Immutability*, 3 U. Pa. J. of Constitutional L. 646 (April 2001).

McCarthy, Gregory A., *Reforming Chapter 14 of Arizona's Criminal Code: Bringing Consistency, Clarity, Contemporaneity, and Constitutionality to Sexual Offenses in Arizona*, 33 Ariz. St. L. J. 229 (Spring 2001) (advocates wholesale revision of sexual offenses, including doing away with offenses involving consensual adult sex; legislature repealed sodomy law after this article was written).

Perry, Michael J., *Christians, the Bible, and Same-Sex Unions: An Argument for Political*

Self-Restraint, 36 Wake Forest L. Rev. 449 (2001).

Reardon, Roy L., and Mary Elizabeth McGarry, *On Gay Rights and University Housing Policies*, NYLJ, 7/12/01, p. 3 (NY Court of Appeals Roundup Column).

Robson, Ruthann, *Our Children: Kids of Queer Parents and Kids Who Are Queer: Looking at Sexual Minority Rights from a Different Perspective*, 64 Albany L. Rev. 915 (2001).

Rubenfeld, Jed, *The First Amendment's Purpose*, 53 Stanford L. Rev. 767 (April 2001) (Ingenious critique of First Amendment analysis, explaining why *Boy Scouts of America v. Dale* was incorrectly decided. Rubenfeld argues that the correct inquiry by the Court is not whether the Boy Scouts had an expressive purpose, but whether the purpose of the New Jersey Civil Rights Law was targeted at the suppression of speech.)

Saguy, Abigail C., *Employment Discrimination or Sexual Violence? Defining Sexual Harassment in American and French Law*, 34 L. & Society Rev. 1091 (2000).

Samar, Vincent J., *Gay-Rights as a Particular Instantiation of Human Rights*, 64 Albany L. Rev. 983 (2001).

Stacey, Judith, and Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 Amer. Sociological Rev. 159 (April 2001). (This is the study whose publication received some media attention, playing up the authors' conclusion — after reviewing numerous studies that have been done on children being raised by gay parents — that indeed parental sexual orientation does have an impact on children. The full study is a nuanced exploration of ways in which such children differ from children raised by comparable heterosexual parents. The major difference seems to be that children raised by gay parents have much less rigid conceptions of gender roles, which is unsurprising when one considers that their parents are likely to have and exhibit less conventional ideas about gender roles than many heterosexual parents. The authors conclude that nothing they have found would justify taking parental sexual orientation into account when government actors make decisions about the welfare of children.)

Strasser, Mark, *Same-Sex Marriage Referenda and the Constitution: On* Hunter, Romer, *and Electoral Process Guarantees*, 64 Albany L. Rev. 949 (2001).

Strossen, Nadine, *Incitement to Hatred: Should There be a Limit?*, 25 S. Ill. U. L. J. 243 (Winter 2001).

Thomas, Tracy A., *Congress' Section 5 Power and Remedial Rights*, 34 U.C. Davis L. Rev. 673 (Spring 2001) (crucial topic of legislative authority to make ENDA binding on state government employers).

Wharton, Meghan A., *Pornography and the International Internet: Internet Content Regulation in Australia and the United States*, 23 Hastings Comm/Ent L. J. 121 (2001).

Witte, John, Jr., *The Goods and Goals of Marriage*, 76 Notre Dame L. Rev. 1019 (April 2001)(This article, written as part of a tribute to conservative Catholic federal appeals judge John T. Noonan, Jr., of course does not deign to mention the issue of same-sex marriage, but the piece could provide useful ammunition for those litigating same-sex marriage cases, by bringing together and demonstrating the numerous ways in which being married is said to improve the lives of those who can do so).

Students Notes and Comments:

Anderson, Wade T., *Criminalizing "Virtual" Child Pornography Under the Child Pornography Prevention Act: Is it Really What it "Appears to Be?", 35 U. Richmond L. Rev. 393 (May 2001).*

Ayotte, C.P. Dominic, Toxel v. Granville*: Parental Power to Determine Associational Interests of Children*, 52 Baylor L. Rev. 997 (Fall 2000).

Carpenter, Jacob M., Dale v. Boy Scouts of America*: Whether the Application of New Jersey's Public Accommodations Law, Forcing the Boy Scouts to Include an Avowed Homosexual, Violates the Scouts' First Amendment Freedom of Expressive Association*, 52 Mercer L. Rev. 745 (Winter 2001).

Chorba, Christopher, *The Danger of Federalizing Hate Crimes: Congressional Misconceptions and the Unintended Consequences of the Hate Crimes Prevention Act*, 87 Va. L. Rev. 319 (April 2001).

Crabtree, Mark A., *Sexual Harassment Laws: A Consideration of the Imposition on Oregon Free Speech Interests*, 79 Ore. L. Rev. 721 (Fall 2000).

Eskandari, Layli, *Is Loitering a Fundamental Rights? City of Chicago v. Morales*, 17 N.Y.L.S. J. Hum. Rts. 371 (2000).

Ford, Kshka-Kamari, *"First, Do No Harm" — The Fiction of Legal Parental Consent to Genital-Normalizing Surgery on Intersexed Infants*, 19 Yale L. & Policy Rev. 469 (2001).

Hasenstab, Dan, *Is Hate a Form of Commerce? The Questionable Constitutionality of Federal "Hate Crime" Legislation*, 45 St. Louis U. L. J. 973 (Summer 2001).

Immigration Law — Asylum — Ninth Circuit Holds That Persecuted Homosexual Mexican Man with a Female Sexual Identity Qualifies for Asylum Under Particular Social Group Standard. — Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000)*, 114 Harv. L. Rev. 2569 (June 2001).

Kim, Haeryon, *In Defense of Single-Parent Families* (Book Note), 2 J. L. & Family Studies 229 (2000).

Narris, Adam, *Are You My De Facto Mommy? Third-Party Visitation Rights: A Case Comment on* Youmans v. Ramos, 35 N. Eng. L. Rev. 685 (Spring 2001).

Patterson, Nicholas J., *The Repercussions in the European Union of the Netherlands' Same-Sex Marriage Law*, 2 Chicago J. Int'l L. 301 (Spring 2001).

Royer, Christina M., *Paradise Lost? State Employees' Rights in the Wake of "New Federalism"*, 34 Akron L. Rev. 637 (2001).

Theroux, Christine, *Assessing the Constitutionality of Mandatory Student Activity Fee Systems: All Students Benefit*, 33 Conn. L. Rev. 691 (Winter 2001).

Symposia:

Symposium, *"Family" and the Political Landscape for Lesbian, Gay, Bisexual and Transgender People (LGBT)*, 64 Albany L. Rev. No. 3 (2001) (individual articles noted above, except for Foreward, Welcoming Remarks by Dean Thomas H. Sponsler, and Opening Remarks by Nancy Ota).

Special Issue: Hate Crime Legislation, 20 L. & Philosophy No. 2 (March 2001) (individual articles noted above, except for introduction by Christopher Heath Wellman).

Symposium, *The Constitution and the Good Society*, 69 Fordham L. Rev. No. 5 (April 2001)(virtually all the articles in this very lengthy symposium issue — more than 600 pages — have some sort of relevance to lesbian/gay legal issues, but we have noted above only two articles that deal directly with such issues).

Symposium on Sexual Harassment in Schools, 12 Hastings Women's L. J. No. 1 (Winter 2001) (the one article specifically on gay students is noted above, but the entire issue would be relevant for anybody concerned with the issues raised by harassment of sexual minority students).

Specially Noted:

An anti-gay legal scholar's obsession with gay power in the legal profession has led to an unusual publication, *"A Lawyer Class": Views on Marriage and "Sexual Orientation" in the Legal Profession*, 15 BYU J. Pub. Pol. 137 (2001), by William C. Duncan. In 45 pages, Prof. Duncan has traced out in minute detail the history of lesbians and gay men in the legal profession, legal education, and in the judiciary. He has brought together surveys of law school faculty and curricula, references to "sexual orientation" in professional ethics codes, resolutions by legal associations concerning same-sex marriage and sexual orientation discrimination, amicus brief filings in major cases such as *Romer* and *Dale*, and mentions in the press of openly-gay judges, all to the make the point, at obsessive length, that lesbians and gay men and their sympathizers have hijacked the organized legal profession into becoming a tool to undermine traditional American families and values. This piece of work's genesis seems to have been Justice Scalia's observation in his *Romer v. Evans* dissent that support for gay rights seems to have taken over the "elite bar."

Journalists Joyce Murdoch and Deb Price have published *Courting Justice: Gay Men and Lesbians v. the Supreme Court* (Basic Books, June 1, 2001), a detailed history of the treatment of les-

bian and gay issues in the Supreme Court of the United States. Murdoch and Price are a lesbian couple with extraordinary journalistic credentials: Murdoch is managing editor for politics of *The National Journal*, and previously was a staff reporter on *The Washington Post*, before which she reported on Congress for local newspapers in Georgia through her own news service organization. Deb Price is a former *Washington Post* reporter who has been writing a nationally syndicated column on lesbian and gay issues for many years for the *Detroit News*. The book provides an in-depth journalistic look at how the Supreme Court has handled (and/or mishandled) lesbian gay issues over the past half century, and is full of new details and insights emerging from the hundreds of interviews the authors conducted with lawyers, former Supreme Court clerks, parties in major cases, and legal scholars who follow the Court's work closely. This is a must-read for anyone interested in gay legal issues. • • • An op-ed article by Murdoch and Price summarizing the conclusions from their research appeared in the July 9 issue of the *National Law Journal* under the title, "A sorry history of anti-gay bias."

ABC-CLIO, Inc. has published *Homosexuality and the Law: A Dictionary*, by Chuck Stewart (ISBN 1–57607–267–3). This book appears to be aimed at the general reader and non-law students. An introductory section gives a quick history of the legal treatment of gay people. The main body of the work consists of alphabetical entries, some based on topics, some on particular cases or incidents. The focus is almost exclusively on U.S. law and experience. The choice of references and examples is idiosyncratic at times, and some errors slip in, but a lay reader seeking an appreciation of lesbian and gay issues will find a fairly good introduction in this work. The text occasionally makes the mistake common among nonlawyers of citing a state law ruling as if it created a national precedent. Appendices include listings of state laws that are somewhat incomplete and outdated, partly, perhaps, because the pace of new enactments these days makes almost anything published in hardcover outdated by the time it is released. For example, the appendix listings for New York are unaware of the 2000 passage of sodomy law repeal and hate crimes coverage; similarly, the entry for New York City mentions the domestic partnership registry, but fails to reference the DP Ordinance passed in 1998. Elsewhere, the book lists as current the Maryland sodomy law, which was successfully challenged in ACLU litigation and effectively removed from the books a few years ago. The author is not a lawyer or legal scholar, which may help explain why the book is so refreshingly readable.

On June 10, the *New York Times* published a lengthy article by Reed Abelson titled "Courts Offer Little Shelter to Men in Same-Sex Harassment Cases," detailing the failure of Title VII to provide adequate protection against workplace harassment to men who are victimized because others perceive them as being gay. Another lengthy *Times* article, "Study Shows Differences in Children Raised by Gays,"by Erica Goode, was distributed on-line by the New York Times News Service on July 9. The article discusses the study by Stacey and Biblarz that we mentioned in the May *Law Notes*, finding that children raised by gay parents are different in various ways from children raised by straight parents. The spin of the article is that the differences are just that — differences — and not necessarily negatives.

AIDS & RELATED LEGAL ISSUES:

Cooper, Elizabeth, *Social Risk and the Transformation of Public Health Law: Lessons From the Plague Years*, 86 Iowa L. Rev. 869 (March 2001).

Limas, Vicki J., *Of One-Legged Marathoners and Legally Blind Pilots: Disabling the ADA ON a Case-by-Case Basis*, 35 Tulsa L. J. 505 (Spring/Summer 2000).

Saito, Natsu Taylor, *From Slavery and Seminoles to AIDS in South Africa: An Essay on Race and Property in International Law*, 45 Villanova L. Rev. 1135 (2000).

White, Rebecca Hanner, *Deference and Disability Discrimination*, 99 Mich. L. Rev. 532 (Dec. 2000).

Student Notes & Comments:

Arnsdorfer, Elizabeth, *Absent Abstinence Accountability*, 27 Hastings Const. L. Q. 585 (Summer 2000) (argues Congress should not be wasting federal money on abstinence educational training in schools, which do not effectively and responsibly address the current crisis in adolescent reproductive health).

Flores, Stephanie C., *Reading the ADA with 20/20 Vision: Anti-Discrimination Protections for Individuals with Corrective Disabilities After* Sutton v. United Air Lines, Inc., 22 Whittier L. Rev. 909 (Spring 2001).

Frankel, Michael, *Do Doctors Have a Constitutional Right to Violate Their Patients' Privacy?: Ohio's Physician Disclosure Tort and the First Amendment*, 46 Villanova L. Rev. 141 (2001).

Hanson, Laurel R., *Informed Consent and the Scope of a Physician's Duty of Disclosure*, 77 N. Dak. L. Rev. 71 (2001).

McDonnell, Julie, Sutton v. United Air Lines*: Unfairly Narrowing the Scope of the Americans With Disabilities Act*, 39 Brandies L. J. - U. of Louisville 471 (2000–2001).

Santee, Alexander, *More Than Just Bad Blood: Reasonably Assessing Fear of AIDS Claims*, 46 Villanova L. Rev. 207 (2001).

Specially Noted:

Vol. 6, No. 2 of the journal *Psychology, Public Policy and Law* (June 2000), published by the American Psychological Association, is devoted entirely to the issue of assisted suicide. Since people with AIDS have been leading parties in lawsuits brought to vindicate the right of a terminal patient to have the assistance of a willing doctor in terminating his or her life, it seems appropriate to bring this issue to the attention of those concerned with AIDS law.

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.