SUPREME COURT OF CANADA PROTECTS LESBIAN/GAY BOOKSTORE HARASSED BY CUSTOMS OFFICIALS

On Dec.15, in *Little Sisters Book and Art Emporium v. Canada* (Minister of Justice), http://www.lexum.umontreal.ca/csc-scc/en/rec/html/sisters.en.html, the Supreme Court of Canada held unanimously that the administrative application to Little Sisters, Vancouver's lesbian and gay bookstore, of provisions of the federal Customs Tariff and Customs Act on imports of obscene publications, violated the free expression and equality rights of Little Sisters and its owners under the Canadian Charter of Rights and Freedoms. However, by a vote of 6 to 3, the Court refused to strike down the legislation, except for a provision putting the burden of proving non-obscenity on the importer.

Little Sisters imports 80–90% of its lesbian and gay erotica from the U.S. Between 1984 and 1994 (the year of the trial), Canada Customs detained 261 items destined for Little Sisters, including Marguerite Duras' *The Man Sitting in the Corridor*, Jean Genet's *Querelle*, Dorothy Allison's *Trash*, Jane Rule's *The Young in One Another's Arms*, and Pat Califia's *Macho Sluts*. Books such as *Gay Ideas*, *Tom of Finland*, and *The Men with the Pink Triangle* were detained even though they were available in the Vancouver Public Library. Booksellers catering to a largely heterosexual clientele experienced no such problems, even when importing the same books as Little Sisters. Virtually every shipment to Little Sisters was inspected by Customs for potential obscenity (vs. an average 8% inspection rate for all imported goods), and sex shops specializing in hardcore heterosexual materials were not targeted for blanket surveillance. The detained publications either reached Little Sisters very late, or were seized or returned to the sender, generally without reasons. The delays and prohibitions disrupted book launches, damaged relations with suppliers, had a chilling effect on the appellants' orders, and caused the loss of business to competitors. More generally, they interfered with the access of Vancouver's lesbian and gay community to imported lesbian and gay erotica and literature.

Writing for the majority, Justice Binnie began by observing that "[s]exuality is a source of profound vulnerability," and by acknowledging the seriousness of the trial judge's finding of " 'systemictargeting' of standard bearers for the gay and lesbian community," who "reasonably concluded that they were being treated by Customs officials as sexual outcasts." He then turned to the appellants' challenge to the Customs Tariff and Customs Act, which prohibit the importation of publications deemed obscene under s. 163(8) of the federal Criminal Code ("any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and crime, horror, cruelty [or] violence"). In *R. v. Butler*, [1992] 1 S.C.R. 452, the Court had adopted a new, feminist-inspired, harm-based interpretation of s. 163(8) in order to reconcile the prohibition of obscene publications with the right to freedom of expression in s. 2(b) of the Charter. The *Butler* definition of obscenity effectively legalised hardcore pornography in Canada, as long as it does not involve children, violence or "treatment that is degrading or dehumanizing if the material creates a substantial risk of harm." However, the violence and "degrading or dehumanizing" exceptions have been used against lesbian and gay erotica, especially depictions of sado-masochism or anal intercourse. Within a month of the *Butler* decision, Toronto police seized a magazine containing scenes of lesbian sado-masochism.

The appellants argued that *Butler* "cannot be freely transferred from heterosexual erotica to gay and lesbian erotica," which "plays an important role in providing a positive self-image to gays and lesbians, who may feel isolated and rejected in the heterosexual mainstream," which "in the context of gay and lesbian culture is a core value," and which "plays a different role in a gay and lesbian community than it does in a heterosexual community. [T]he *Butler* approach based on heterosexual norms, is oblivious to this fact. Gays and lesbians are defined by their sexuality and are therefore disproportionately vulnerable to sexual censorship." Justice Binnie rejected the argument, holding that "gay and lesbian culture as such does not constitute a general exemption from the *Butler* test." First, *Butler*'s "national community standard relates to harm not taste, and is restricted, to 'conduct which society formally recognizes as incompatible with its proper functioning.'" It is therefore not unacceptably majoritarian and anti-minority. Second, the application of the "degrading and dehumanizing" exception to depictions of male-male anal intercourse had ignored the "substantial risk of harm" element of the exception. Lesbian and gay erotica presenting such a risk is obscene under *Butler*. "Portrayal of a dominatrix engaged in the non-violent degradation of an ostensibly willing sex slave is no less dehumanizing if the victim happens to be of the same sex, and no less (and no more) harmful in its reassurance to the viewer that the victim finds such conduct both normal and pleasurable. Parliament's concern was with behavioural changes in the *voyeur* that are potentially harmful There is no reason to restrict that concern to the heterosexual community." Third, the *Butler* test is gender neutral and not solely concerned with violence by men against women. The intervener (amicus) Women's Legal Education and Action Fund (largely responsible for the *Butler* test) had sought to make amends by arguing "that sado-masochism performs an emancipatory role in gay and lesbian culture and should therefore be judged by a different standard from that applicable to heterosexual culture," pointing out that "gender discrimination is not an issue in 'same-sex erotica'." Fourth, the *Butler* test applies to written texts, as well as sexually explicit videos, although it will generally be much harder to satisfy in the case of a book.

The appellants also argued that the Customs Act's procedures for challenging a decision to detain an allegedly obscene publication were insufficient to protect their s. 2(b) expression rights. Again, Justice Binnie rejected the argument that the legislation itself, as opposed to its improper implementation, violated the Charter. He interpreted the legislation (as amended since the 1994 trial) as requiring Customs to determine that a publication is obscene within 30 days of importation, and to decide on an internal appeal within 30 days of its submission, after which judicial review could begin. He suggested that "an action against the Crown in respect of an unlawfully detained shipment of material accompanied by a substantial award of costs would likely have a salutary effect in keeping Customs focussed on the deadlines imposed by Parliament." The only aspect of the Customs Act's procedures violating the Charter was the reverse onus provision, which the federal government did not attempt to justify under s. 1, and which Justice Binnie held "is not to be construed and applied so as to place on an importer the onus to establish that goods are not obscene within the meaning of s. 163(8) of the Criminal Code. The burden of proving obscenity rests on the Crown or other person who alleges it."

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In addition to arguing that the customs legislation should be struck down as contrary to their s. 2(b) rights, the appellants argued that "the legislative scheme operates with disproportionate and discriminatory effects on the gay and lesbian community and therefore contravenes s. 15(1) and is to that extent null and void." The trial judge found that "up to 75 per cent of the material from time to time detained and examined for obscenity [by Customs] was directed to homosexual audiences." Justice Binnie concluded that "the appellants suffered differential treatment when compared to importers of heterosexually explicit material, let alone more general bookstores that carried at least some of the same titles as Little Sisters," that this treatment was based on the analogous s. 15(1) ground of sexual orientation, and that it "violated the appellants' legitimate sense of self-worth and human dignity. When Customs officials prohibit and thereby censor lawful gay and lesbian erotica, they are making a statement about gay and lesbian culture, and the statement was reasonably interpreted by the appellants as demeaning gay and lesbian values. The message was that their concerns were less worthy of attention and respect than those of their heterosexual counterparts. [O]ther vulnerable groups may similarly be at risk from overzealous censorship. Little Sisters was targeted because it was considered 'different'. [I]t seems to me fundamentally unacceptable that expression which is free within the country can become stigmatized and harassed by government officials simply because it crosses an international boundary, and is thereby brought within the bailiwick of the Customs department. The appellants' constitutional right to receive perfectly lawful gay and lesbian erotica should not be diminished by the fact their suppliers are, for the most part, located in the United States. Their freedom of expression does not stop at the border."

However, "there is nothing on the face of the Customs legislation, or in its necessary effects, which contemplates or encourages differential treatment based on sexual orientation. The definition of obscenity operates without distinction between homosexual and heterosexual erotica. The differentiation was made here at the administrative level in the implementation of the Customs legislation."

Having concluded that the administrative implementation of the Customs Tariff and Customs Act was a prima facie interference with the appellants' s. 2(b) expression and s. 15(1) equality rights, Justice Binnie then considered whether these interferences were, under s. 1 of the Charter, "reasonable limits prescribed by law [that] can be demonstrably justified in a free and democratic society." In the case of s. 2(b), he said nothing but implied that the interference could not be justified. In the case of s. 15(1), he noted that the administrative discrimination against lesbian and gay material was not "prescribed by law" and therefore could not be justified under s. 1. He also confirmed his earlier view that the interference with s. 2(b) rights resulting from the legislation itself (as opposed to its implementation) could be justified under s. 1. In particular, he rejected the appellants' argument that "the *Butler* standard is so vague as not to be a limitation 'prescribed by law' when applied to gay and lesbian erotica."

By way of remedy, Justice Binnie declared that "[t]he rights of the appellants under s. 2(b) and s. 15(1) of the Charter have been infringed [because] [t]hey have been targeted as importers of obscene materials despite the absence of any evidence to suggest that gay and lesbian erotica is more likely to be obscene than heterosexual erotica, or that the appellants are likely offenders in this regard, " and listed a number of omissions on the part of Customs that contributed to the infringements. However, he declined to issue a detailed order directing Customs to take steps to prevent future infringements because the appellants had not proposed "specific measures (short of declaring the legislation invalid or inoperative) that in the appellants' view would remedy any continuing problems."

Writing for the minority, Justice Iacobucci mainly agreed with Justice Binnie, in particular that "[t]he types of harms that *Butler* concluded might be exacerbated by obscenity are capable of being present in all human relationships, regardless of the sexual orientation of the individuals involved. There is no evidence that the homosexual community is immune from the kinds of problems that s. 163's obscenity provisions are designed to address. On the contrary, the evidence is, sadly, that gay and lesbian relationships suffer from physical, sexual, and mental abuse in much the same way that heterosexual relationships do As a result, I conclude that there is a reasoned apprehension of harm from homosexual obscenity, and that *Butler* should apply to all obscenity, regardless of the sexual orientation of its audience." He also agreed that only the implementation of the legislation, not the legislation itself, constituted sexual orientation discrimination contrary to s. 15(1).

However, he found that the legislation itself did interfere with s. 2(b) expression rights in ways that could not be justified under s. 1, because it lacked " procedural protections that can minimize the dangers posed by prior restraint." In finding that the deleterious effects of the legislation outweigh its benefits, he commented: "That homosexuals are a disadvantaged group in Canadian society cannot be disputed Homosexual literature is an important means of self-discovery and affirmation for gay, lesbian and bisexual individuals. In a society which marginalizes sexual difference, literature has the potential to show individuals that they are not alone and that others share their experience. To ban books carrying these messages can only reinforce the existing perceptions gay, lesbian and bisexual individuals have of their marginalization by society." He would have struck down the prohibition of importation of obscene publications in the Customs Tariff, and offered guidelines for ensuring that any replacement legislation would comply with the Charter. But he urged Parliament to consider not replacing the legislation and "relying on the criminal law to deal with the importation of obscene materials into the country in lieu of a prior restraint regime."

With hindsight, the appellants' challenge to legislation that does not facially discriminate on the basis of sexual orientation was perhaps doomed to fail, as was their attempt to carve out a special "lesbian and gay exception" to the criminal law on obscene publications. The rejection of such an exception shows that arguments of indirect discrimination or disparate impact, resulting from failures to take into account distinctive features of lesbian and gay culture (e.g., a disproportionate interest in sado-masochism?), will often not be taken as seriously as those made by ethnic or religious minorities. However, the appellants did succeed in establishing that Canada's obscenity law cannot be applied in a way that involves direct discrimination against, or disparate treatment of, the lesbian and gay minority. What is striking about the case is the apparent absence of any claim by the appellants for compensatory or punitive damages, which is perhaps the most effective way of deterring administrative officials from enforcing non-discriminatory laws in a discriminatory manner. *Robert Wintemute*

DUTCH GAYS WIN MARRIAGE RIGHTS

On 19 December 2000, the Upper House (Senate) of the Dutch Parliament approved two bills, introduced by the Government on 8 July 1999, to open up both marriage and adoption to same-sex partners. The bills were supported by the liberal and labour parties (VVD, D66, and PvdA) of the governing coalition, with additional support of the left-wing opposition parties. The opposition Christian-Democrat Party, and the small strict Protestant parties voted against the bills. Two members of the governing

liberal party (VVD) also voted against the adoption bill.

The debate centered around questions about the level of recognition Dutch same-sex marriages and adoptions would receive in other countries, and whether adoption by different-sex parents would be preferable. Intriguing questions were raised about the position of royal princ(ess)es marrying someone of the same sex, and about registrars with conscientious objections against same-sex marriages. Both questions received typically Dutch fuzzy answers.

The Lower House of Parliament already approved both bills on 12 September 2000. There the marriage bill obtained a majority of 109 against 33 votes. The adoption bill obtained a similar, but uncounted, majority. Together with the governing and left-wing parties, a few members of the Christian-Democrat Party voted in favor of both bills. The writer's translations and summaries of both bills can be obtained online: http://ruljis.leidenuniv.nl/user/cwaaldij/www/.

It is expected that the Queen (and her State-Secretary for Justice, Mr. Job Cohen, whom the government is appointing as the new Mayor of Amsterdam) will sign both bills before the end of the year. However, it will at least take another three months before the laws will take effect. At present, another bill is being debated in the Lower House of Parliament, proposing minor adjustments to existing legislation that are necessary because of the opening up of marriage and adoption to same-sex couples. This bill is expected to be approved by both houses of parliament in the first months of 2001.

Partnership registration of two men or two women (or between a man and a woman) has been possible in the Netherlands since 1 January 1998. More than 10,000 partnerships have since been registered, 60% of them same-sex partnerships. Registered partnership carries most of the legal consequences of marriage.

As to foreigners marrying in the Netherlands: in each couple that wants to marry in the Netherlands, at least one of the partners should either have Dutch citizenship or have his or her 'domicile' and 'habitual residence' in the Netherlands. This rule has been applicable to different-sex marriages, and will be applicable to same-sex marriages. There is another bill in Parliament, which would make the same rule applicable to partnership registrations (replacing the existing requirement that each registering partner should be either a Dutch citizen or a lawful resident).

In the case of two foreigners who wish to marry in the Netherlands, Dutch private international law does not require that they fulfil the conditions for marriage in the country of their citizenship (which would be impossible if they are of the same sex), provided that at least one of them has indeed 'domicile' and 'habitual residence' in the Netherlands. The latter requirement does not apply when one foreigner wants to marry a Dutch citizen.

It is not quite clear when living in the Netherlands amounts to having one's 'domicile' and 'habitual residence' there. The term 'domicile' seems to require being formally and lawfully registered as a resident of the Netherlands, whereas the requirement of 'habitual residence' seems to exclude people who continue to have their main home in another country while they work or study in the Netherlands for a year or less. A certain continuity of residence is required. Therefore, foreign couples who would want to come to the Netherlands to marry here should first take legal advice.

In Dutch immigration law, the position of married, registered and unmarried cohabiting couples is almost identical. Therefore, it will normally not be necessary to marry, or to register a partnership, in order to obtain a residence permit for one of the partners. Nevertheless, if a foreigner wants to immigrate to the Netherlands to join his or her partner there, it is advisable to first take legal advice. *Kees Waaldijk, Faculty of Law, University of Leiden*

LESBIAN/GAY LEGAL NEWS

Ohio Appeals Court Calls for Reconsideration of Constitutionality of Homosexual Solicitation Statute

A panel of the Court of Appeals of Ohio for the 11th Appellate District has called for state supreme court reconsideration of the question whether a law specifically outlawing same-sex solicitation violates the federal and state constitutional equal protection requirements. *State of Ohio v. Thompson*, 2000 WL 1876610 (Dec. 28). Finding it was precedentially bound by a 20–year old unwritten decision of the state supreme court that had reversed an intermediate appellate ruling on the constitutionality of the law, the court affirmed the trial court's refusal to dismiss a solicitation complaint against Eric R. Thompson.

According to the opinion for the court by Judge Judith A. Christley, Thompson was driving alongside a male jogger, repeatedly importuning him to engage in sex, despite the jogger's indication that he did not want to be bothered. The jogger complained to the police about Thompson's behavior, and he was arrested and charged with a violation of Ohio R.C. 2907.07(B), which provides: "No person shall solicit a person of the same sex to engage in sexual activity with the offender, when the offender knows such solicitation is offensive to the other person, or is reckless in that regard." In an authoritative ruling in 1979, the Ohio Supreme Court held that nobody could be prosecuted under this statute unless the solicitation, "by its very utterance, inflicts injury or is likely to provoke the average person to an immediate breach of the peace." The Court construed it thus in *State v. Phipps*, 58 Ohio St. 2d 271 (1979), in response to a First Amendment and Due Process challenge on vagueness and free speech grounds.

Thompson moved to dismiss the charge on the ground that the statute is facially unconstitutional under the federal and state equal protection clauses. Thompson argued there was no rational basis for punishing same-sex solicitation under circumstances in which opposite-sex solicitation is not outlawed, noting that Ohio has long since repealed its laws against consensual sodomy. The trial court denied the motion, finding that the Ohio Supreme Court had previously rejected such a challenge to the statute, and Thompson appealed.

Most of the court's decision is given over to a detailed review of the history of constitutional challenges to the statute, which is curious indeed. Clearly, a majority of the panel would have held the statute unconstitutional had not the prior precedent stood in the way. In responding to Thompson's argument on appeal, the state argued that the statute does not single out "homosexuals" for adverse treatment, because it forbids anybody, regardless of sexual orientation, from making such a solicitation. Judge Christley was contemptuous towards this argument, noting that it "smacks of *Geduldig v. Aiello* (1974), 417 U.S. 484, 496–497, which ruled that the California disability insurance program denying benefits for pregnancy related disabilities passed constitutional muster on the grounds that '[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.' It is somewhat unnerving to find that the pregnant men are treated the same as the pregnant women rationale is alive and well today."

The problem, unfortunately, is that in a somewhat inscrutable fashion the Ohio Supreme Court had treated its *Phipps* ruling as precluding an equal protection attack on the statute in the subsequent decision of *State of Ohio v. Faulk* (Sept. 13, 1978), Hamilton App. No. C–77486, unreported, 1978 Ohio App. LEXIS 8288, in which an intermediate appellate ruling that had held the statute to violate the equal protection clause was reversed by the Ohio Supreme Court without a written opinion, but with a citation to *Phipps*. In a recent ruling, *State of Ohio v. Lasher* (Jan. 14, 1999), Cuya-

hoga App. No. 73085, unreported, 1999 WL 13971, appeal dismissed on ground that "no substantial constitutional question" was presented, 85 Ohio St. 3d 1476 (1999), a different court of appeals observed that it was bound by the Ohio Supreme Court's reversal in *Faulk* and rejected an equal protection challenge to the statute.

Judge Christley asserted that the 11th Circuit court was no less firmly bound, but would follow the precedent "with considerable reluctance," writing: "The plain language of the statute dictates that any person, regardless of sexual orientation, who solicits someone of the same sex to engage in sexual activity and knows such solicitation is offensive to the other person or is reckless in that regard, may be prosecuted. Certainly, it is clear that protecting the public from offensive conduct, which may invoke a violent response, is a legitimate and objective state interest. As the legislative committee comments recognize: 'The rationale for prohibiting indiscreet solicitation of deviate conduct is that the solicitation in itself can be highly repugnant to the person solicited, and there is a risk that it may provoke a violent response.' What is not clear is why that rationale would only apply to same sex solicitation and not to opposite sex solicitation. It is inherently inconsistent for the Ohio legislature to now criminalize homosexual solicitation after it has chosen to decriminalize homosexual conduct between consenting adults. Further, it is without a doubt that heterosexual solicitation may be equally repugnant, offensive and inciteful to violence as homosexual solicitation. Nevertheless, Faulk rules."

But this may not be the end of it, as Christley also wrote: "We, however, expressly invite the Supreme Court to reconsider its decision in *Faulk*, or more fully explain why R.C. 2907.07(B) does not violate the equal protection guarantees under the United States and Ohio Constitutions."

A footnote acknowledges that *Bowers v. Hardwick*, 478 U.S. 186 (1986), may affect the federal constitutional analysis of these questions, but this was not sufficient for Presiding Judge Donald R. Ford, who added a brief concurring opinion observing that in *Bowers* the Supreme Court "manifested a strong indication that the court would essentially tend to defer to a state's attitude involving sexual conduct proscriptions as they would relate to constitutional rights."

Thompson is represented by Ahstabula County Public Defender Marie Lane. A.S.L.

Federal District Court in Louisiana Finds Same-Sex Harassment Claim Based on Co-Worker Homopobia Actionable Under Title VII

In denying summary judgment to an employer accused of male-on-male sexual harassment, a federal district judge seemed to accept the contention (of civil rights lawyers and gay rights activists and theorists) that all sexual orientation discrimination is sex discrimination. *Price v. Dolphin Services, Inc.*, 2000 WL 1789962 (E.D. La., Dec. 5). In so doing, District Judge Livaudais took a broad view of *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), in which the Supreme Court held for the first time that Title VII, the federal employment discrimination law, can cover same-sex sexual harassment. Price was hired by Dolphin, a marine fabrication company based in Houma, Louisiana, in 1998, as a rigger/clerk (a job that involved both mechanical and secretarial duties). Almost from the start, co-workers and supervisors called him "fairy boy," "cupcake," "faggot," and "Joe's bitch" (a reference to his boss, Joe Grace). On Secretary's Day, in April, 1998, he found a card on his desk with two condoms taped inside. The inscription read: "If you were a real man you could use this." The card was signed by Grace and several of Price's co-workers. He also found a piece of pipe, with a condom rolled over it, on his desk. His mail was tampered with and his dating habits were questioned. After several months, Price reported the incidents to headquarters. Later, claiming the stress of his employment situation made it difficult for him to eat, he experienced a diabetic episode. In December, he filed a complaint with the EEOC; he soon heard from coworkers that his employer was trying to fire him "for personal reasons." After another diabetic episode, Price was laid off. Although two coworkers were also laid off, ostensibly for lack of work, they — unlike Price — were soon rehired. After receiving a Notice of Right to Sue from the EEOC, Price filed his complaint, alleging that he was sexually harassed in violation of Title VII and that he was discharged in retaliation for having complained of the harassment and/or because Dolphin regarded him as having a disability. In deciding the sexual harassment claim, Judge Livaudais relied almost entirely on *Oncale*. In that case, the plaintiff, who worked on an oil rig, quit his job after two supervisors "physically assaulted [him] in a sexual manner" and one supervisor "threatened him with rape." Oncale testified: "I felt that if I didn't leave my job, that I would be raped." The 5th Circuit Court of Appeals held that his discrimination action was barred because Title VII did not cover same-sex harassment. The Supreme Court unanimously reversed, holding (in an opinion by Justice Scalia) that "nothing in Title VII necessarily bars a claim of discrimination … merely because the plaintiff … and the defendant are of the same sex."

Here, Judge Livaudais found Price's situation "factually similar [to Oncale's] … in that both victims are males whom co-workers perceived to be homosexual." Citing *Oncale*, the judge noted that sexual harassment "need not be motivated by sexual desire." Under *Oncale*, a general hostility to women (or men) in the workplace will suffice, and a plaintiff can offer evidence comparing defendant's treatment of men and women in the workplace. The only requirement, again according to the *Oncale* court, is that there be "discrimina[tion] … because of … sex."

Turning to Price's situation, the judge wrote: "The Court finds that the conduct in question could constitute harassment based on sex which would offend Title VII. While any employee might have to endure a modicum of teasing, the barrage of comments and questions of a personal nature about the plaintiff's perceived sexual orientation, uttered both by supervisors and by co-workers within the ear-shot of supervisors without correction, the derogatory names plaintiff was called, and, the most egregious incident, the Secretary's Day card with condoms taped inside, signed by co-workers and supervisors, along with a condom laid across a pipe plug being left on plaintiff's desk, in totality do evince a hostility toward plaintiff in the workplace because of his sexual preference."

The judge thus equated harassment "because of … sexual preference" with "harassment based on sex." In so doing, the court made a leap that seems correct to civil rights lawyers and legal scholars, see, e.g., Andrew Koppelman, Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination, 69 N.Y.U. L. Rev. 197 (1994), but which may prove controversial if and when Price reaches the 5th Circuit. *See, e.g., Spearman v. Ford Motor Company*, 231 F.3d 1080 (7th Cir. 2000) (calling plaintiff a "fag" and comparing him to a drag queen "confirms that some of his co-workers were hostile to his sexual orientation, and not to his sex."); *Simonton v. U.S. Postal Service*, 232 F.3d 33 (2d Cir. 2000) (plaintiff "was harassed because of his sexual orientation. As we have explained, such harassment is not cognizable under Title VII.").

Judge Livaudais also found there were questions of fact precluding summary judgment on Price's retaliation and disability claims. *Fred A. Bernstein*

Iowa Trial Judge Rules Against Vilsack Executive Order

Polk County, Iowa, District Judge Glenn Pille ruled on Dec. 7 in *King v. Vilsack*, No. CE 40318 (not officially published), that an executive order banning sexual orientation discrimination by the executive branch of the Iowa state governmnet, issued by Governor Tom Vilsack after taking office in 1999, violates the separation of powers and usurps the authority of the state legislature. The order, issued September 14, 1999, adds the categories of gender, gender identity, sexual orientation, and marital status

to the categories already covered under state law for the purpose of forbidding discrimination in state government employment and affirmative action policies. Such discrimination was outlawed by statute in Iowa in 1986 for the following categories: race, creed, color, religion, national origin, sex, age, or physical or mental disability.

According to an article in the Dec. 8 issue of the *Des Moines Register*, 23 Republican state legislators, and one current and one retired state employee joined together as plaintiffs in the lawsuit, filed on July 11, 2000, after the governor vetoed a measure passed by the Republican-controlled legislature seeking to overturn the order. According to the newspaper report, an ordinary executive order barring sexual orientation discrimination might not have invoked such ire, but Vilsack took the next step of banning discrimination on the basis of sexual identity and marital status as well, which particularly outraged conservative "pro-family" legislators.

Judge Pille based his ruling on the state constitution's provisions apportioning legislative power solely to the legislative branch. "The question is not whether the (order) is fair or just, but whether legally, under our system of government and the separation of powers clause in our state Constitution, the governor… is exercising powers properly belonging to the Legislature," wrote Pille. Referring to existing state discrimination law, which does not cover sexual orientation, Pille also wrote, "By adding the additional classifications contained in his executive order… this court concludes that he has infringed upon the legislative authority by creating law."

In most states it is well established that a chief executive officer can adopt a nondiscrimination policy unilaterally that is binding only upon state agencies and employees who are the executive's subordinates, as a means of effectuating the state's nondiscrimination obligations under the Equal Protection Clause. Attempts to regulate private conduct by executive order are more tenuous, and normally must be anchored in some statutory authority. (For example, former New York Mayor Ed Koch issued an executive order early in his tenure banning sexual orientation discrimination within the New York City government and by private entities contracting to provide goods and services to the city. In an attack by Catholic Charities of New York, the state's highest court ruled that Koch did not have authority to seek to regulate the employment practices of private entities without any legislative authority. Koch later reissued his order after the New York City Council enacted a gay rights measure in 1986.) Iowa's statutory law does not ban sexual orientation discrimination, and there is a state court ruling, *Sommers v. Iowa Civil Rights Commission*, 337 N.W.2d 470 (Iowa 1983), that specifically holds that the existing ban on sex discrimination does not extend to discrimination against transgendered persons.

The newspaper reported that Vilsack's immediate reaction was to review the decision before deciding whether to appeal. However, the governor also stated, "Given the quality of the people who lead our state agencies, we are confident that no discrimination will take place until such time as the Legislature acts," after indicating he would seek to persuade the legislature to pass a bill adding sexual orientation and gender identity to the state's discrimination laws. A.S.L.

Florida Appeals Court Says Posthumous Challenge of Gay Adoption May Be Possible on Fraud Theory

A unanimous panel of the Florida District Court of Appeal, 4th District, ruled Dec. 27 that Sylvia Rickard, the niece of the late Donald Blackwell, may pursue a claim that she was fraudulently done out of her inheritance under a family trust when Blackwell adopted his gay lover. Palm Beach County Circuit Judge Peter D. Blanc had rejected Rickard's claim as time-barred. *Rickard v. McKesson*, 2000 WL 1873014.

Blackwell, then 88 years old and childless, was the beneficiary under a family trust established by his father. If Blackwell died without an heir, the proceeds of the trust would be paid over to his niece, Sylvia Rickard. In 1994, Blackwell adopted his 72–year-old partner, Gordon McKesson. When Blackwell died, McKesson, as his "son," asserted his right to inherit the trust. In 1999, Rickard brought an action to void the adoption, claiming it was a "fraud on the court" and unlawful because a Florida statute, Sec. 63.042(3), forbids homosexuals from adopting! McKesson moved to dismiss Rickard's complaint, contending first that she had no standing to challenge the adoption, second that no fraud had been comitted on the court, and finally that the anti-gay adoption provision is unconstitutional. As noted above, trial judge Peter Blanc found that the complaint was time-barred, having been filed more than a year after the 1994 adoption, and further found that Rickard's allegations would not support a claim of fraud on the court. (Such a claim would have escaped the time-bar, since a fraud can't be challenged until it is discovered.)

Writing for the court of appeal, Judge Klein first found that Rickard had standing to contest the adoption. McKesson argued that she lacked standing because at the time of the adoption, any interest she had in inheriting the trust was contingent on her outliving her uncle. Klein rejected the argument that Rickard's standing would be precluded by the contingent nature of her claim, citing other Florida cases in which people with contingent claims were not deprived from bringing actions to try to vindicate those contingent rights.

More significantly, Klein disagreed with Blanc's analysis of the fraud on the court issue. "The trial court, in concluding that this did not amount to fraud on the court, focused too narrowly on the alleged violation of the statute, and not enough on the fact that Rickard's right to inherit under the trust gave her standing to question the legitimacy of the adoption. We need not decide whether the mere violation of the statute alone would constitute fraud on the court, because it is the allegation that the adoption was a sham to enable McKesson to inherit trust funds which should have gone to Rickard, which is the essence of this case." The court relied on *Minary v. Citizens Fidelity Bank & Trust Co.*, 419 S.W.2d 340 (Ky. Ct. App. 1967), a Kentucky case in which the only living but childless son of the creator of a trust "adopted" his wife so that she would be his natural heir and thus defeat a trust provision making a church the beneficiary; in that case, the court set aside the adoption as fraudulent.

"We conclude that Rickard's allegations involving the illegitimacy of this adoption are sufficient for her to maintain an independent action to set aside the judgment of adoption based on fraud on the court." This sets up an interesting potential sequel for attorney Michael H. Gora of Hudgson, Russ, Andrews & Goodyear in Boca Raton, who is representing McKesson. Presumably, Gora will have to show on remand that Blackwell adopted McKesson for reasons other than to deprive Rickard of her inheritance, which would mean showing that Blackwell and McKesson had a genuine "father and son" sort of relationship which was not homosexual in nature, in order to avoid the finding of fraud and voiding of the adoption. A.S.L.

Vermont High Court Finds Error in Testimony About Plaintiff's Homosexuality

Reversing a decision by Judge John P. Morrissey (retired) of the Bennington Superior Court, the Vermont Supreme Court unanimous ruled in *Mears v. Colvin*, 2000 WL 1868297 (Dec. 15), that Morrissey erred in allowing the defense to introduce evidence that wrongful death plaintiff Shirley Mears was having a lesbian affair at the time her husband died in a fire in his home.

Charles Mears died from smoke inhalation and carbon monoxide poisoning during a fire in the 3–unit apartment building in Shafsbury where he resided. At the time of his death, Mears and his wife had separated, and she was seeking a divorce. Mrs. Mears and the Mears daughters brought a wrongful death suit, claiming that the owners of the property were negligent in providing smoke alarms and exits in case of fire. A major issue at trial going to the damages was the quality of the relationship be-

tween Mr. Mears and his wife and daughters. Although at first the trial court ruled against the defense's intention to elicit testimony that Mrs. Mears was having a lesbian affair and was divorcing her husband to be with "another woman," ultimately the judge allowed this evidence to come in through the testimony of a neighbor. There was also extensive testimony about the lives of the Mears daughters, who had illegitimate children, drugs problems, and so forth. All of this was introduced by the defense in an attempt to show that the claim for loss of companionship and society from Mr. Mears' death was insignificant. The jury ultimately concluded that Mears was 60% responsible for his death, and the owners of the property only 40% responsible, and thus no damages were awarded to the plaintiffs.

On appeal, Mrs. Mears contended that the testimony about her alleged homosexual affair should have been excluded, and the Supreme Court, in a per curiam opinion, agreed. "The breadth of matters relevant to the issue of damages in a wrongful death action suggests that evidence of an extramarital affair may be admissible to rebut or discredit a claim that the decedent's death deprived the surviving spouse of a faithful, loving companion," wrote the court. "That some aspects of a decedent's family relations may be relevant and admissible in a wrongful death action does not, however, mean that all aspects of family relations are relevant and admissible. There is a line to be drawn when the potentially inflammatory nature of the information exceeds its probative value." The court stated that evidence that Mrs. Mears was having an affair was probative and relevant, but "the additional evidence adduced by defendants concerning the homosexual nature of the extramarital affair was another matter. Such evidence added virtually nothing of probative value to the case. The only effect, if not indeed the purpose, of defense counsel's repeated probing of the witness Boisvert concerning the homosexual aspect of the alleged relationship was to appeal to homophobic prejudices." Thus, the admission of such evidence was an abuse of discretion by the trial judge.

Furthermore, the court also found improper some of the evidence concerning the messed-up sex lives of some of Mears' daughters, on similar grounds.

The court found that the verdict here, with its 60/40 responsibility split, was "close" and possibly improperly influenced by the prejudicial evidence. "In these circumstances, we cannot be certain that the inadmissible evidence played no role in the jury's decision. Accordingly, we cannot conclude that the errors were harmless. The judgment must, therefore, be reversed, and the case remanded for a new trial." So Mrs. Mears will get a second day in court. A.S.L.

U.S. Appeals Court Forfeits "Gay" Swindler's $400

In *United States v. Grant*, 2000 WL 1843896 (Dec. 13), the U.S. Court of Appeals for the 2nd Circuit affirmed a modification of an order of restitution which was part of a conviction of a prisoner for mail fraud.

The prisoner, Robert Grant, had placed advertisements in the personals sections of national gay publications seeking support and, eventually, money, from sympathetic correspondents around the country, alleging that he was seeking a "meaningful relationship," while serving a sentence in a New York state prison. He alleged that he needed to finance litigation against prison authorities because of harassment he endured as a gay man in prison, because he needed from each of his various beaus money for travel expenses to live with them upon release, because his release was being delayed due to lack of funds and for legal expenses relating to a supposed inheritance. Though the decision calls all these representations false, it is unclear whether Grant was gay, or merely representing that he was gay. Grant apparently met with some success, garnering approximately $34,000 from correspondents around the country in the four years prior to his indictment. He apparently managed his ill-gotten gains equally astutely, for by the time he was indicted for mail fraud, he only had about $400 left in his controlled inmate account, having diverted funds to various cohorts on the outside, who then diverted these funds to others whose identities he managed to conceal from authorities. Grant entered a guilty plea to the federal indictment in 1999. Part of the plea agreement involved restitution to some of his victims.

Though he pled guilty, Grant had taken the position that most of his correspondents knew exactly who he was and what their offerings were about. Because of difficulties of establishing identities and locations of victims, a figure of $5,690 was agreed upon as the amount to be returned to four identified victims. This sum was to be paid out over a period of years during confinement and while on supervised release after his discharge from prison.

As this arrangement was being negotiated, the U.S. Attorney apparently overlooked the $400 in his controlled account, which state prison authorities had "frozen" for the duration of the federal criminal proceedings. After the agreement was made, the U.S. Attorney's office came back and sought a modification of the restitution order so that the $400 could be seized immediately, alleging change of economic circumstance. Grant objected, pointing to references on the record well before the agreement was entered into that should have alerted the U.S. Attorney to the existence of the funds in this blocked account. This included discussions before the U.S. Magistrate on the case, in which Grant asked when the funds could be released for his use, and references to the funds in a pre-arraignment report by the U.S. Probation Office. The U.S. Attorney contended that the funds were not disclosed in a pre-sentence interview, while Grant contended the funds were disclosed.

The pre-sentence report stated that Grant was indigent and "virtually penniless," and Grant's attorney signed off on the report as correct. The trial court made no finding of fact on point, but granted the U.S. Attorney's motion. On appeal, Grant contended that the U.S. Attorney's oversight did not constitute a material change of economic circumstance warranting modification of the restitution order. Writing for the 2nd Circuit panel, Judge Roger Miner agreed on that point, but in an astonishing leap of logic, ruled that the fact that Grant's funds, which were frozen by state authorities for the duration of the federal criminal proceeding, were now unfrozen, constituted a material change of economic circumstance warranting modification of the restitution order and seizure of these funds by the U.S. Attorney.

This is a decision of breathtaking intellectual dishonesty. Clearly, the judges found themselves unwilling to release this sum to this swindler, and did not really seem to care what had to be done to keep the funds from him. There is no other conclusion that makes any sense. *Steven Kolodny*

Manhattan Housing Court Extends *Braschi* Rationale to Disability Protections

In a ruling of first impression, a New York County Housing Court judge has extended the rationale of *Braschi v. Stahl Associates Co.*, 74 N.Y. 2d 201 (1989), to a regulation protection tenants or their spouses who suffer from a disability. The opinion by Judge Schneider in *Knafo v. Ching* was published in the *New York Law Journal* on Dec. 6 (p. 28, col.2).

Winston Ching and Chris Den Blaker have lived together as a domestic partners in the apartment on East 11th Street for the past 22 years. They meet all the criteria set forth in *Braschi* for being considered members of each other's family, including intermingling of finances and a committed personal relationship. In 1998, around the time their landlord sought to reclaim the apartment, Mr. Den Blaker was diagnosed with early symptoms of amyotrophic lateral sclerosis (ALS), commonly known as Lou Gehrig's Disease, a nerve disorder that is usually fatal in 3 to 5 years after symptoms first appear. The landlord asserted that she needed the apartment as housing for her daughter, but Ching and Den Blaker contend that she really wants to get rid of rent-regulated tenants preparatory to selling the building. However, their immediate basis for contesting any eviction is

Section 2524.4(a)(2) of the Rent Stabilization Code, which provides that if a tenant or the spouse of a tenant is a senior citizen or disabled, the owner cannot reclaim the apartment without offering equivalent or superior housing accommodations within close proximity. In this action, Ching defends against the eviction by contending that Den Blaker qualifies as a disabled spouse.

Judge Schneider had little trouble concluding that a person experiencing symptoms of ALS is disabled within the meaning of the regulation. Although at the time of trial Den Blaker was still able to carry on many physical life functions, he has been unable to work since mid–1999, and requires assistance in many everyday tasks. More difficult is the application of the term "spouse" to the relationship with Mr. Ching. In *Braschi*, the court of appeals was construing a non-eviction regulation that applies to situations where members of a tenant's family wish to remain in an apartment after the tenant dies or leaves for other reasons. The court had to decide there whether gay partners could be considered members of each other's family, and found that this was not too much of a stretch of the meaning of the word "family," which was undefined in the regulation. Whether the rationale of *Braschi* could extend to the meaning of "spouse" was the question at hand for Judge Schneider.

Judge Schneider focused on case law developments post-*Braschi*, noting particularly that the Appellate Division has adopted a rather expansive interpretation of *Braschi*, which was decided under the Rent Control law, in applying the principle to rent stabilized apartments, especially noting that the Rent Stabilization Code at the time of the Appellate Division ruling had a specific enumeration of family relationships, unlike the Rent Control law, and yet the court found *Braschi* controlling in the Rent Stabilization context. "The regulation at issue in this case is similar to the 1987 succession regulation applied in the two cases cited above," said Schneider, referring to post-*Brascshi* appellate rulings. "Both regulations extend coverage only to specifically enumerated traditional relatives. The regulation at issue here, like the 1987 succession regulation, is remedial in nature. It is intended to mediate the harsh consequences of displacement in cases in which the tenant or the tenant's 'spouse' is elderly or disabled, by providin for relocation in these instances, recognizing that the consequences of displacement are far harsher for an elderly or disabled household head than for others."

"At a time when our city prohibits discrimination in housing, employment and public accommodations on the basis of sexual orientation…, and when our society recognizes nontraditional partnerships for the purposes of health benefit coverage and for myriad other purposes, it would truly be anomalous to deny this couple the remedial protections of the Rent Stabilization code provision clearly designed for individuals in their circumstances simply because they are not legally married," Schneider asserted. Schneider also concluded that under the regulation, it is up to the landlord to make the offer of alternative housing to initiate the process, rejecting the landlord's argument that Ching and Den Blaker had waived their right by not requesting alternative housing.

Thus, Schneider granted Ching's motion for summary judgment on his claim that he and Den Blaker are protected under the regulation and entitled to an offer of alternative housing as a prerequisite for any attempt by the landlord to reclaim the apartment. A.S.L.

Connecticut Superior Court Rejects Sexual Orientation Discrimination Claim by Discharged Heterosexual

In a Nov. 15 opinion, Connecticut Superior Court Judge Melville rejected a claim by a discharged heterosexual employee that his sexual orientation played a role in his discharge by an allegedly homosexual supervisor. *Delgado v. Achieve Global F/K/A Learning International, Inc.*, 2000 WL 1861853. Delgado had asserted claims of discrimination based on race, age and sexual orientation, as well as retaliation for his complaints about discrimination. The company had removed the action to federal court, where the court granted summary judgment on federal claims, and returned the case to state court for action on state claims. Much of the current summary judgment argument revolved around collateral effect to be given to the federal rulings in considering race and age claims asserted under Connecticut law, but the court devoted a separate portion of the opinion to disposing of Delgado's sexual orientation claim.

Delgado alleged that he had been subject to exclusion by a clique of homosexuals in his department, led by the supervisor, Kevin Corcoran, allegedly gay. However, it came out during his deposition that Delgado had little more than rumor and supposition to go on regarding the sexual orientation of the other employees, presuming them to be gay because they were friendly with the gay supervisor. Wrote Judge Melville, "The plaintiff's assertion that Corcoran preferred young homosexual males and that he was one of the only heterosexual males in the department is based solely on conclusory allegations. there is no evidence that the other males in the department were, in fact, homosexual. Nor did the plaintiff present any factual evidence that these males were unqualified for their positions. Further, the mere fact that a supervisor's sexual orientation is different from that of an employee is not a circumstance that would give rise to an inference of discrimination." The court concluded that Delgado had failed to establish a prima facie case, and granted the defendant's summary judgment motion. A.S.L.

Litigation Notes

In *Anderson-Johanningmeier v. Mid-Minnesota Women's Center, Inc.*, 2000 WL 1869555 (Dec. 26)(not officially reported), the Minnesota Court of Appeals sustained the trial court's grant of judgment notwithstanding the verdict against a group of plaintiffs who apparently contended that their lesbian supervisor was creating a hostile environment and discriminating against them based on religion, sexual orientation and marital status. While the opinion by Judge Kalitowski does not specifically state that the supervisor is a lesbian, this could be inferred from the plaintiff's allegations that their boss made comments that were anti-heterosexual, anti-religious, and anti-marriage. They also claimed they were retaliated against for protesting the employer's failure to make a payment to one employee, which they characterized as a violation of the wage and hour statutes, seeking to invoke Minnesota's Whistleblower law. The court of appeals affirmed the trial judge's finding, as a matter of law, that the factual allegations were insufficient to support such claims, and that the state whistleblower statute's operation is limited to situations where employees reveal wrongdoing of public policy dimensions, not purely individual gripes.

The *Los Angeles Times* reported Dec. 13 that an appeals panel of the Orange County, California, Superior Court rejected a motion to dismiss misdemeanor charges against nine men who had been arrested in a "sting operation" at a Santa Ana park known as a gay cruising site. The police claimed they began the operation to identify and arrest gay men who were cruising for sex in the park as a result of complaints by residents of the neighborhood, who alleged that men were having sex in the bathrooms and other areas of the park. All the defendants were arrested after allegedly propositioning undercover officers, and were charged with indecent exposure and other similar charges. They challenged the arrests on the ground of discriminatory enforcement, observing that policy did not set up sting operations to catch heterosexuals, and announced they would seek the next level of appellate review.

Hawaii courts have now reportedly approved three second-parent adoptions for lesbian couples, in which the birth mother and her domestic partner will both be legal parents to the children they are raising, according to a Dec. 4 article in the *Honolulu Advertiser*. A newly-formed organization, called Civil Unions-Civil Rights Movement, held a press conference to announce the most recent adoption approval, by Family Court Judge John C. Bryant, Jr., for

Kaila, the daughter of Carolyn Mori and Lora Day. The organization announced plans to stage a demonstration at the state capital on Martin Luther King, Jr., Day, and a spokesperson commented that although the second-parent adoptions had marked an important step forward, Hawaii courts remain resistant to adoptions by gay parents where the child is not already related to at least one of the adoptive parents.

Lambda Legal Defense Fund announced the victorious settlement of *Frazier v. Palisadian-Post*, a long-running discrimination case brought by a lesbian journalist after her 1993 discharge by the Palisadian-Post, a weekly newspaper in Pacific Palisades. According to a Lambda press statement, Frazier's case was among those that persuaded Governor Davis of the need for legislative revision of the ban on sexual orientation discrimination to be included within the Fair Employment and Housing Code. At the time of her discharge, the only state law protection was in the Labor Code, which provided distinctly inferior protection due a short statute of limitations and inadequate administrative procedures for enforcement. Frazier had been a highly-praised employee, promoted and lauded, until her employer learned that she was a lesbian, resulting in harassment, denial of further promotions, and eventually her discharge. Frazier's trial attorney, Michael Duberchin, received assistance from Lambda's Western Regional Office on the appeal of an initial dismissal of the case by the Los Angeles County Superior Court, which resulted in a unanimous reversal and remand by the court of appeal, leading to the settlement.

Why is it a bad idea for sexual orientation discrimination plaintiffs to proceed pro se? One reason is the complexity of coverage under civil rights law, and the pervasive mythology about the existence of federal remedies for anti-gay discrimination. Humberto Guanipa learned this lesson the hard way, suffering summary judgment against him in his federal discrimination suit, in which he sought to bring sexual orientation discrimination charges under 42 U.S.C. section 1981, a statute whose coverage has been limited by the Supreme Court to claims of discrimination on account of race and ethnicity. Furthermore, U.S. District Judge McKenna (S.D.N.Y.) found that Guanipa's allegations were insufficient to make out a prima facie case for any of the discrimination theories he advanced. *Guanipa v. Bloomingdale's Dept. Stores*, 2000 WL 1772805 (Nov. 30). A.S.L.

Legislative & Political Notes

The Supreme Court's decision making George W. Bush president-elect of the U.S. immediately put in play two important Clinton Administration actions of immediate concern to lesbians and gays, particularly those who are federal employees, hold security clearances, or work for federal contractors injobs requiring such clearances. During his administration, Clinton issued an executive order banning sexual orientation discrimination in civilian executive branch employment, and another executive order reforming and restructuring the security clearance process and, incidently, substantially removing prior practices that disproportionately excluded gays from obtaining timely approval for such clearances. According to the *Washington Times* (Dec. 6), Republican congressional leaders quickly gave Vice-President-Elect Dick Cheney a list of Clinton Executive Orders they expect the new president to rescind. Although the content of the list was not made public, the *Times* commented: "Republicans have long chafed at what they view as Mr. Clinton's excessive use of his executive power to circumvent Congress on a variety of issues, from protecting homosexuals from discrimination to declaring new national monument areas." While an incoming administration cannot quickly revoke regulations promulgated under Administrative Procedure Act auspices, executive orders can be rescinded without any ceremony. (When Dennis Vacco was elected Attorney General of New York in 1994, he immediately rescinded his predecessor's executive order banning anti-gay discrimination in his office, a many openly-gay legal staff members lost their jobs within months of the start of his term.) Now is the time to see whether Log Cabin Republicans can exert the kind of positive influence with the Bush Administration that their New York state and city counterparts have shown with Republican Governor George Pataki (who substantially reaffirmed his predecessor's pro-gay executive order) and Republican Mayor Rudolph Giuliani (ditto).

Nassau County, New York, adopted a law expanding the powers of the County Human Rights Commission to include complaints of discrimination in employment, housing and public accommodations on account of sexual orientation. The measure, which was cosponsored by all ten of the Democrats in the county's legislature, won a unanimous vote of support from the nine-member Republican minority as well. The measure, passed Dec. 11, also added the following new categories of coverage to the law: gender, age, disability, source of income, religion and ethnicity. The existing anti-discrimination law only covered race, creed, color and national origin. *New York Times*, Dec. 19.

Determined to spark a rerun of the infamous Dade County "Save Our Children" referendum of 1977 that led to the repeal of one of the nation's first local gay rights ordinances, a group calling itself Take Back Miami-Dade secured 51,200 signatures on petitions submitted to the county seeking a vote to repeal the new anti-discrimination measure that was enacted in December 1998 by the county commissioners. They needed 34,991 valid signatures to secure a countywide referendum. *South Florida Sun-Sentinel*, Dec. 2. However, their success to this point may be illusory, as a review of a sample of petition signatures conducted by county election officials showed that almost a third of the first 200 were disqualified, as not being valid signatures of registered voters of the county. This result will spark a complete review of all 51,2000 signatures submitted, and if they are rejected at the same rate, the anti-gay group will have failed to put its measure on the ballot. *South Florida Sun-Sentinel*, Dec. 27.

Following up on the vote by the Portland City Council to extend protect against discrimination on the basis of gender identity, the Multnomah County Board of Commissioners unanimously approved an amendment to its bylaws on Dec. 14 prohibiting such discrimination in employment by the county, which will go into effect in late March 2001. At a subsequent meeting, the Commissioners planned to consider a measure that would extend such protection against discrimination to the entire county, both private and public sector. *Portland Oregonian*, Dec. 15.

Seeking to fill a gap left by the partial invalidation of the Violence Against Women Act by the Supreme Court last term in the *Morrison* decision, the New York City Council has approved a bill granting victims of gender-motivated violence a private right of action against their attackers. The City Council passed the bill unanimously. This is the first local measure of its kind in the country, and is being viewed as a model for legislative action elsewhere. The Supreme Court's invalidation of the private right of action under the federal law was premised on its newly-revived concept of state sovereignty and a restrictive view of the Commerce Clause jurisdiction of Congress. *New York Law Journal*, Dec. 15.

In November, Mission Viejo became the second city in Orange County, California, to adopt a domestic partnership benefit plan for its employees, but early in December, noting a change in membership of the city council as a result of November's election, opponents vowed to place the matter back on the agenda and get the benefits rescinded. According to City Manager Dan Joseph, however, the council's rules preclude reconsideration of the matter at this time unless one of its remaining supporters on the council moves to do so, and neither of them has indicated any inclination to reopen the issue. *Los Angeles Times*, Dec. 5. A.S.L.

Law & Society Notes

One of the contested sites for recognition of same-sex couples as been the Duke Chapel, on

the grounds of Duke University in Durham, North Carolina, where gays have been agitating for the right to have their commitment ceremonies performed on the same basis that marriage ceremonies are performed for opposite-sex couples. Duke is a Methodist-affiliated institution, and has declined to allow such ceremonies in its chapel in the past, but early in December the university changed its position, announcing in a Dec. 5 news release from President Nan Keohane and Dean William H. Willimon, who presides in the chapel, that such ceremonies may take place, provided that they are limited to couples with a Duke relationship of some sort as students, staff or alumni of the University. However, don't expect any ceremonies soon, since there is now a one-year waiting list to book the Chapel for such events. In October, the Freeman Center for Jewish Life at Duke announced it would allow same-sex commitment ceremonies in its facilities, and such ceremonies have also taken place at the Sarah P. Duke Gardens on campus, but the chapel has a special symbolism as the heart of the campus. *Raleigh News & Observer*, Dec. 6.

The Cardinal Newman Society for the Preservation of Catholic Higher Education, an intercollegiate group including students, educators and alumni of Catholic institutions, has issued "guidelines" for Catholic institutions that would prohibit hiring any openly gay staff, requiring that a majority of all student-services employees be practicing Catholics, and denying funding to any on-campus groups that depart from Catholic teachings. The guidelines are not binding on anybody, but were drafted by the organization as a response to a Vatican document, Ex corde Ecclesiae, that calls on Catholic universities to strengthen their religious identity. *Dallas Morning News*, Dec. 14.

Minnesota Governor Jesse Ventura announced Dec. 15 that he is looking into ways to extend employee benefits to same-sex partners of state employees without getting specific legislative authorization. The governor said he was planning to negotiate about such benefits with unions representing state employees during 2001, and that his attorney general had advised that in that context legislative authorization would not be required. Ventura's proposal would cover health, dental and life insurance, as well as sick leave. (In 1997, the Minnesota legislature rejected a measure that would have allowed cities and counties to extend such benefits if they wished to do so. The measure was intended to overrule a court decision to the contrary.) Republican House Speaker Steve Sviggum reacted negatively to the announcement, saying that any such action would produce a "very disastrous outcome" for the governor. *Star-Tribune*, Dec. 16 (Minneapolis-St. Paul).

BellSouth Corp. has become the last of the former Baby Bells (companies formed out of the split-up of AT&T) to extend domestic partnership benefits to employees, according to an announcement reported in the *Atlanta Constitution* on Dec. 19. SBC Communications, Verizon Communications, and U.S. West (now owned by Qwest) had all previously adopted such benefits programs. For now, the plan will extend only to those employees not represented by unions, pending negotiations with the Communications Workers of America when contract talks on new collective agreements begin this spring. A spokesperson for the company said that the measure was adopted to assist in recruiting qualified employees in a very competitive business environment.

American West Airlines announced Dec. 7 that it will offer domestic-partner benefits to employees in 2001, including medical and dental insurance and travel privileges for partners in committed relationships. The prerequisite for qualification will be living together for six months, joint household financial responsibility, and documentation of the relationship with such items as mortgages, leases other financial records. Southwest Airlines had already announced that it would adopt a similar benefits program next year, as have most of the U.S.'s major airlines. *Arizona Republic*, Dec. 8. A.S.L.

Boy Scouts Developments

Further developments in reaction to the Supreme Court's Boy Scouts decision:

In Tempe, Arizona, openly-gay Mayor Neil Giuliano's attempt to disqualify the Scouts to receive funding from city employee donations to the United Way campaign has sparked a recall effort against him by conservative city residents, who claim they will easily surpass the 4,000 signatures they need to put such an effort on the ballot. Although Giuliano ultimately backed off from his effort on the United Way issue, he did lead the city council in voting not to make its usual annual donation to the organization. *Tucson Citizen*, Dec. 13.

The Los Angeles Police Commission announced on Dec. 5 that it might drop the Scout-affiliated Explorer police cadet program due to the Scouts' anti-gay membership policies, and called on the national BSA to end its discriminatory policy when the national governing board holds its next meeting in February. In November, the city's police chief and the L.A. county sheriff both met with Boy Scout representatives to discuss the need to change the policy in order to comply with a directive from the L.A. City Council that all agencies review their affiliations with the Scouts. The city attorney's office advised the council that city contracts with the Scouts could be illegal due to a city measure that requires contractors to have a policy of non-discrimination with regard to sexual orientation. *Los Angeles Times*, Dec. 6.

The Boy Scouts filed a lawsuit on Dec. 5 against the Broward County, Florida, School Board in U.S. District Court in Miami, challenging the Board's action in banning the Scouts from meeting on school property because of their discriminatory membership policies. The suit claims that the school board's policy violates the Scouts' first amendment free expression rights and rights of equal access to public facilities. *Orlando Sentinel*, Dec. 6.

Wells Fargo Bank was hailed by gay rights groups in the Portland, Oregon, area, when the *Oregonian* reported on Dec. 11 that the bank was instructing United Way not to use any of its $400,000 annual corporate gift for the Boy Scouts. But Wells Fargo backpedalled, announcing that it would draw a distinction between traditional Scout troop activities and the BSA's Learning for Life program presented in city schools, since the latter was separately run and did not deny participation to any student on the basis of sexual orientation. *Oregonian*, Dec. 12.

The Union Congregational Church in Taunton, Mass., decided to end its two-year relationship with the BSA in January due to the BSA's anti-gay membership policies. Pastor Beverly Duncan said she was taking this action at the request of members of the congregation, both gay and straight, who had told her they didn't feel right about their church being affiliated with a discriminatory organization. "We have a big, red and white banner out front that says, 'All Are Welcome,'" she said. "Jesus never said anything about homosexuality. We're taking this stance because of how we believe in Christianity." *Boston Herald*, Nov. 24.

However, some bodies wish to signal their support for the Supreme Court decision. Two Utah cities, Alpine and Riverton, have passed resolutions endorsing the anti-gay policy, falling into line behind the statement from the Church of Jesus Christ of Latter-Day Saints (the Mormon Church). *Deseret News*, Dec. 22. The church is one of the largest sponsors of Scout troops in the nation, and is vigorously anti-gay in its orientation. A.S.L.

Developments in European and U.K. Law

The European Community legislation prohibiting sexual orientation discrimination in employment (see Dec. 2000 LGLN) was formally adopted on Nov. 27 and published in the Official Journal on Dec. 2. Council Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ, Series L, Issue 303, p. 16, is temporarily available at http://europa.eu.int/eur-lex/en/oj/index-list.html. Publication on Dec. 2, 2000 means that the deadline for national legislation implementing the Directive is Dec. 2, 2003 in the case of religion or belief and sexual orientation,

and Dec. 2, 2006 in the case of disability and age.

On Nov. 30, the 100th anniversary of the death of Oscar Wilde, the United Kingdom finally equalised the age of consent to sexual activity at 16 (17 in Northern Ireland), whether the activity is male-female, female-female or male-male. Equalization, which has generally been a prerequisite for anti-discrimination legislation or registered partnership legislation in Europe, took place 28 years after the Netherlands and 18 years after France. The first equalization bill in 1994 was rejected, but the male-male age was lowered from 21 to 18. After the July 1, 1997 report of the European Commission of Human Rights in *Sutherland v. U.K.*, finding that the U.K.'s unequal ages of consent violated the European Convention on Human Rights, the U.K. Government agreed to amend the legislation in exchange for a suspension of the *Sutherland* case, which had been referred by the Commission to the European Court of Human Rights. The second bill in 1998 received a large majority (on a free vote) in the House of Commons, but was blocked by the House of Lords, where Baroness Young led the opposition. Convention would have prevented her from doing so had the Labour Party included equalization in its 1997 manifesto (they had done so in 1992 but dropped the commitment in 1997 to improve their chances of being elected). The third bill in 1999 had the same result, and the Parliament Acts 1911 and 1949 could not be invoked because the 1998 bill had originated in the House of Lords. The fourth bill in 2000 was sure to succeed, because the 1999 bill had originated in the House of Commons and the Parliament Acts could be invoked to permit the adoption of the bill without the consent of the House of Lords, but only after rejection by the Lords. After adoption by the Commons, Baroness Young delayed consideration of the 2000 bill in the Lords as long as possible. On Nov. 13, she accepted that equalisation was inevitable but made a last ditch attempt to prevent the lowering of the age of consent to anal intercourse ("buggery"), which was already equal at 18 whether male-male or male-female. She was determined to protect 16–year-old girls from having the right to consent to "be buggered" for the first time in history. The Lords adopted her amendments. This constituted a rejection of the Commons' bill, which permitted the Parliament Acts to be invoked and Royal Assent to be given on Nov. 30. The final text of the Sexual Offences (Amendment) Act 2000 can be found at http://www.hmso.gov.uk/acts.htm. Section 3 creates a new, sex- and sexual orientation-neutral offence of "abuse of a position of trust," under which sexual activity between a person over 18 and one who is 16 or 17 is illegal if the older person is a teacher, a worker in a hospital or children's home, etc.

The British Armed Forces' document concluding that lifting the ban on lesbian and gay personnel has caused no problems (see Dec. 2000 LGLN) can be found at the website of the Center for the Study of Sexual Minorities in the Military, University of California at Santa Barbara, http://www.gaymilitary.ucsb.edu.

"Family, Marriage and 'De Facto' Unions," a report of the Pontifical Council for the Family, released on Nov. 21 (see Dec. 2000 LGLN), can be found at http://www.vatican.va/latest_en.htm. *Robert Wintemute*

Other International Notes

The *Dallas Morning News* and the *Houston Chronicle* reported on Dec. 15 that municipal legislators in Mexico City are drafting a bill to recognize "gay unions" and to allow gay couples to adopt children. The city's legislative body is almost evenly split between three political parties: the PRD, a leftist party that is drafting the legislation, which has 19 seats; the PRI, traditionally the dominant party in the country, which has 16 seats; and the PAN, the newly-triumphant conservative party of the country's new president, Vicente Fox,which has 17 seats. Attempting to avoid the emotional baggage of the term "marriage," the drafters have adopted the concept of the civil solidarity pact, similar to that enacted in France. Mexican culture has been very conservative on the issue of homosexuality, and there was a public uproar and vocal opposition from PRI government leaders a few years ago when the International Lesbian and Gay Association attempted to hold its international conference in Mexico City. This legislative proposal, even if it fails to be adopted, marks a historic milestone for Mexico just by its introduction.

On December 15, the Finnish government proposed legalizing same-sex partnerships, but their measure would not authorize adoption of children by such couples, nor would it allow couples to adopt a common surname. Parliamentary approval is expected, placing Finland on a par in terms of recognition of same-sex couples with the other Scandinavian democracies, Sweden, Norway, Denmark and Iceland. (However, Denmark and Iceland do allow some adoptions.) The government proposal is to establish a "separate but equal institution" for same-sexers. The dominant religious body in the country, the Finnish Evangelical Lutheran Church, opposed giving same-sex partners the same rights as married couples, but Archbishop Jukka Paarma told the press in November that "the legal position of homosexual and lesbian couples should be improved." *Associated Press*, Dec. 16.

The British government has adopted new asylum guidelines for dealing with claims of persecution brought by women, including those who face persecution because they are lesbian, according to a Dec. 5 report in *The Guardian*. Catriona Jarvis, an immigration appeals adjudicator who co-authored the new guidelines, said, "We are trying to move away from the idea that a refugee is only a young single male who has been involved in party politics in opposition to the government of his country." Mr. Justice Collins, president of the immigration appeals tribunal, praised the new guidelines.

On Dec. 14, the U.K.'s Judicial Studies Board released three new chapters for the Equal Treatment Bench Book that is issued to judges to guide their actions in the courtroom. Included was some controversial advice about dealing with cases involving gay litigants and witnesses. The guidance suggests that some gays may appear evasive as witnesses because of the prejudice they suffer in daily life, and judges should take this into account in evaluating their testimony. The guidelines also assert that gays and women are the victims of unfairness in judicial proceedings, and that judges should adjust their thinking to ensure fairness. *Daily Mail*, Dec. 15.

Rev. Brent Hawkes of the Metropolitan Community Church in Toronto, Canada, and his legal advisor, Douglas Elliott, president of the recently-formed International Lesbian and Gay Law Association, have caused a stir by contending that the Church can perform valid marriages for same-sex couples using a provision of the Ontario Marriage Act, section 5, which allows a couple (without any express requirements as to gender) to go through a local parish and be granted a marriage license through the publication of marriage bans at three Sunday services preceding the marriage ceremony. They plan to go ahead and try this out, despite a statement from the Ontario provincial government that it will not register any same-sex marriages. Canadian law was recently amended at the federal level to provide a large measure of legal equality for same-sex couples with unmarried opposite-sex couples,who are accorded extensive rights under Canadian law although short of full marriage rights. However, the legislation also included a provision reserving the traditional status of marriage for opposite-sex couples in Canada. Rev. Hawkes says that if the provincial government refuses to register marriages he performs after publication of banns according to law, "We will go to court, and we will win." *New York Times*, Dec. 28; *National Post*, Dec. 5.

The Canadian province of Nova Scotia enacted Bill No. 75 of the 1999–2000 Session of its legislature on Nov. 30, titled "An Act to Comply With Certain Court Decisions and to Modernize and Reform Laws in the Province." Under the Act, provincial policies are modified so that "common-law partners" receive the same legal recognition as "spouses," with common-law partners being defined to include any couple that has cohabited for at least three years,

regardless of gender. The law provides a mechanism for couples registration, and goes into effect gradually, beginning January 1, 2001. A.S.L.

Professional Notes

Paul F. Wotman, a leading gay rights attorney in northern California, died on Christmas day from lymphoma at age 49. Wotman began his career as a gay legal advocate while a law student, when he organized the plaintiffs — fellow law students — in the Gay Law Students v. Pacific Telephone litigation, that culminated in a historic ruling by the California Supreme Court holding that anti-gay discrimination could be found to violate the state's Labor Code at a time when there was no state legislation specifically banning sexual orientation discrimination. Wotman was also a leader in bringing HIV-related discrimination claims, and achieved an unprecedentedly-large $5.3 million damage award in a key gay discrimination ruling against Shell Oil Company in 1991. It was estimated that he had represented more than 2200 clients in discrimination suits over the past 15 years, according to the *San Francisco Chronicle* (Dec. 27). Wotman was a former board member of Bay Area Lawyers for Individual Freedom. Wotman is survived by his partner, Danny Scheie, as well as his parents and two brothers. The family requested donations in his memory to Human Rights Campaign or Lambda Legal Defense & Education Fund.

AIDS & RELATED LEGAL NOTES

California Appeals Court Allows Privacy Claim Against Defendant's Law Firm for Disclosing Plaintiff's HIV Status in Arbitration Proceeding

A man who alleges that a California law office wrongfully disclosed medical records revealing his HIV+ status during a personal injury arbitration, may proceed with his lawsuit against the firm for invasion of privacy. *Jeffrey H. v. Imai, Tadlock & Keeney*, 101 Cal.Retr.2d 916 (Cal. Ct. App., 1st Dist., Dec. 8). The appellate court affirmed the dismissal of the plaintiff's tort claims for intentional and negligent infliction of emotional distress, but ruled that California's "litigation privilege" does not bar the plaintiff's state constitutional claims.

The plaintiff was injured in a motor vehicle accident in 1995, and sued the owner and driver of the vehicle that struck him. The defendants in the personal injury lawsuit were represented by the law firm of Imai, Tadlock & Keeney. During discovery, the law firm issued a subpoena requesting the plaintiff's medical records. Among the records received were several documents marked "CONFIDENTIAL: Do Not Copy Without Specific Authorized Consent" which disclosed the positive results of Jeffrey H.'s HIV test. When the personal injury lawsuit was referred to arbitration, the law firm served notice of its intent to offer into evidence plaintiff's medical records, including some of the confidential documents relating to Jeffrey H.'s HIV status. The plaintiff objected and demanded that the firm return all copies of documents referring to his HIV status. The law firm purported to comply, but ultimately delivered two such documents to the arbitrator. Jeffrey H. sued the law firm for invasion of privacy, intentional and negligent infliction of emotional distress, and violation of section 1980(d) of California's Health & Safety Code, which prohibits institutions that conduct blood tests from disclosing the results of an HIV blood test to third parties. The lower court issued a judgment of dismissal sustaining the law firm's demurrer. (He also sued various other parties, including the hospital, but this ruling goes only to the law firm's motion to dismiss the claims against it.)

On appeal, the court ruled unanimously that the plaintiff's amended complaint states a cause of action for invasion of privacy under California's constitution. Writing on behalf of the three judge panel, Judge Swager rejected the law firm's argument that the plaintiff did not have a reasonable expectation of privacy relating to his medical records since he had commenced a lawsuit for personal injuries, and had placed his physical condition in issue in the case. "[Jeffrey H.'s] first amended complaint provides no basis for inferring that appellant's HIV status relates in any way to the physical or emotional injuries for which he sought recovery in the personal injury action," the court explained, noting that the unauthorized disclosure of HIV+ test results undermines the public interest in encouraging people to be tested for HIV and to be truthful with health care providers when receiving medical treatment, and thus may constitute a "serious invasion of privacy" under California's constitution.

The court also rejected the law firm's argument that the plaintiff's constitutional claims were barred by the state's "litigation privilege," which generally provides an absolute privilege to statements made in any judicial proceeding, including arbitrations. Applying a "balancing of interests" test, the court held that the constitutional right to privacy may sometimes outweigh the policies underlying the privilege, particularly where the disclosure of one's HIV status is not patently related to the claims in the case, and where the disclosure was made without a prior judicial determination.

Lastly, the court concluded that section 1980 of California's Health & Safety Code applies only to "health care providers responsible for receiving and keeping custody of HIV test results in the course of medical diagnosis or treatment," and not to law firms. Therefore, the panel affirmed that portion of the lower court's judgment dismissing the plaintiff's statutory cause of action.

The law firm is represented Murphy, Pearson, Bradley & Feeney. Plaintiff appeared pro se on the appeal. *Ian Chesir-Teran*

Divided Illinois Appellate Panel Rejects Police Officer's "Right to Know" Under State HIV Confidentiality Law

In a 2–1 ruling issued Dec. 22, the Appellate Court of Illinois ruled that a police officer who was exposed to a suspect's blood does not have a right under the state's AIDS Confidentiality Act to know the results of the suspect's HIV test. *Bitner v. Pekin Memorial Hospital*, 2000 WL 1877520 (3rd Dist.). The court also sustained dismissal of an emotional distress claim based on the delay of releasing the suspect's test result to officer Bitner, and derivative loss of consortium claims by Mrs. Bitner.

Christopher Bitner, a Pekin police officer, was exposed to a suspect's blood during an arrest on January 24, 1999. Both he and the suspect were taken to the defendant hospital for HIV testing. Bitner requested that the hospital release the suspect's HIV test result to him, but the hospital refused repeatedly over the next few weeks, but then did release the suspect's negative test result to Bitner a month later. Bitner and his wife sued the hospital, claiming that he had a right to immediate information about the suspect's HIV status, and that the hospital was liable for the emotional distress he and his wife had suffered as a result of the incident.

The Illinois AIDS Confidentiality Law provides that a health care institution may not reveal an HIV test result without the written consent of the person tested, but provides that test results "may" be released to "any law enforcement officer… involved in the line of duty in [an incident] … that may transmit HIV." The statute provides a right of action to any person injured by a violation of its provisions. Bitner claimed that this statutory exception to the written consent requirement amounted, in effect, to a statutory right for a police officer to obtain such information in circumstances such as his. Tazewell County Circuit Judge Robert A. Barnes disagreed, dismissing the case.

On appeal, a majority of the 3rd District Appellate Court voted to affirm, in an opinion by Justice Homer. "It is apparent that the goal of the Act is to protect the confidentiality of HIV test results so that the public will not be de-

terred from engaging in testing," wrote Homer. "The consent requirement and disclosure provision further this goal. Although the Act provides an exception to the disclosure provision for law enforcement officers who may have been infected with the HIV virus [sic] by a suspect, this does not change the nature of the Act. Plaintiffs seek to transform the Act into a mechanism that mandates a breach of confidentiality in certain circumstances. Their interpretation, however, is belied by the statutory language. The operative word of the disclosure provision is 'may.' 410 ILCS 305/9(i) (West 1998). The provision does not require that a law enforcement officer receive a suspect's test result. It only authorizes disclosure of the results. Consequently, plaintiffs' interpretation of the Act is thwarted not only by the professed statutory purpose, but also by its plain language."

Homer also noted that Illinois cases have rejected emotional distress claims for fear of contracting AIDS unless plaintiffs can show an actual exposure to the virus. Since the suspect tested negative, Bitner was never exposed, and his emotional distress claim would also fail, as would all of the derivative claims of his wife.

Dissenting, Justice Holdridge argued that the exception demonstrated that "it is also a purpose of the Act to protect the safety of law enforcement personnel who may come in contact with individuals who have HIV. It simply makes no sense to hold that a test can be required, but the medical professional who knows the result is not required to inform the law enforcement officer of the results of the test." Holdridge argued that the court's ruling "obliterates" the law enforcement exception to the consent requirement. A.S.L.

Tennessee Appeals Court Reaffirms Lengthy Sentence for HIV Exposure

On Dec. 6, the Criminal Court of Appeals of Tennessee held that total incarceration for four years of defendant who pled guilty to criminal exposure to HIV will serve as a deterrent to other HIV+ individuals who fail to inform their sexual partners of their status.*State v. Bennett*, 2000 WL 1782763.

In 1996, Bennett tested positive for HIV. Over a two week period in 1997, Bennett had five unprotected, consensual, sexual encounters with a female victim. Bennett never told his victim that he was HIV+. After one of the encounters, Bennett inadvertently left some of his medication at the victim's home. When asked about the medication, Bennett told his victim it was for the treatment of lung cancer. Bennett's victim later learned from a pharmacist that the medication was for the treatment of HIV. The victim immediately ended the relationship and filed a criminal complaint against Bennett for criminal exposure to HIV. No mention was made in the decision of how or why the victim agreed to have unprotected sexual intercourse with Bennett. Bennett pled guilty to the charges and as part of the plea, it was agreed that Bennett would serve five concurrent sentences with the sentence itself left to the discretion of the trial court.

The trial court sentenced Bennett to four years of total incarceration. The sentence was appealed to the Court of Criminal Appeals which remanded the case to the trial court for consideration of alternative sentencing. The Supreme Court of Tennessee granted permission to appeal from the decision of the Criminal Appeals Court.

While the appeal to the Supreme Court was sub judice, that court decided *State v. Hooper*, No. M1997–00031–SCR–11–CD (Tenn., Sept. 21), which announced new sentencing considerations regarding the need for deterrence as a basis for denying an alternate sentence. Based upon *Hooper*, the Supreme Court remanded Bennett's case to the Court of Criminal Appeals for reconsideration. Upon reconsideration, Judge Hayes, writing for the Court, affirmed the sentence imposed by the trial court.

The trial court had based its sentence of total confinement on the seriousness of the offense and the need for deterrence. At sentencing, testimony was elicited showing that people infected with HIV often deny the disease. In addition, testimony was introduced showing society's general ignorance with respect to HIV transmission. No mention was made of measures the general public could take to protect themselves from HIV infection short of criminalizing its transmission. The Supreme Court decision in *State v.Hooper* held that where deterrence is cited as a basis for a particular sentence, the decision of the trial court will be presumed correct so long as a reasonable person looking at the entire record could conclude that there is a need to deter similar crimes and incarceration of the defendant may serve as such a deterrent.

Given the standard set by the Supreme Court and the evidence submitted to the trial court, the Criminal Court of Appeals reconsidered its prior decision and affirmed the sentence given Bennett. *Todd V. Lamb*

Liability Insurance for HIV-Transmission Molestation Incident Sustained

The Supreme Court of Ohio, reversing existing case law and the rulings of two lower courts based on it, held on Dec. 20 that public policy permits a party to obtain liability insurance coverage for negligence related to sexual molestation when that party has not committed the act of sexual molestation. *Doe v. Shaffer*, 90 Ohio St.3d 388, 738 N.E.2d 1243.

A mentally retarded man was allegedly sexually molested and infected with HIV by employees of a residential care facility operated by a Roman Catholic religious order. The man's surviving parents brought various negligence claims against the Catholic Diocese of Columbus, Ohio, including reckless supervision, violation of statutory duty of care, respondeat superior and agency, breach of fiduciary duty and wrongful death. Prior to a settlement reached between the parents and the Diocese however, appellee Interstate Fire & Casualty Company intervened, seeking declaratory judgment that it had no duty to defend or indemnify the Diocese under three insurance policies then in effect. The Diocese filed a counterclaim for declaratory judgment that Interstate possessed a duty to defend and indemnify it.

The issue thus presented was "whether the public policy precluding liability insurance coverage for acts of sexual molestation also prohibits coverage for a non-molester for related claims alleging negligent supervision, negligent retention, and negligent failure to warn." Writing for the court, Justice Cook noted that the public policy prohibition against liability insurance for intentional torts is "based on the assumption that such conduct would be encouraged if insurance were available to shift the financial cost of the loss from the wrongdoer to his insurer," but reasoned that "the better view is to prohibit insurance only for those intentional torts where the fact of insurance can be related in some substantial way to the commission of wrongful acts of that character." In holding that insurance coverage for a nonmolester's negligence related to molestation is not precluded by policy, the court cited the express societal condemnation of the molester's intentional conduct that animates the public policy, and the immateriality of the molester's intent in determining whether the allegedly negligent party has coverage. Further, "precluding coverage would risk preventing the victim from obtaining a fair and adequate recovery, in contravention of the purpose of modern tort law.70 The court remanded the cause for further proceedings. Justice Lundberg Stratton, concurring with the decision on insurability, dissented from making this change in the law apply to the pending case, arguing that it should be prospective only. *Mark Major*

Judge Gives HIV+ Man Another Chance at Disability Benefits

In *West v. Apfel*, 2000 WL 1847766 (N.D. Ill. Dec. 14), U.S. District Judge Andersen denied both West's and Apfel's Motions for Summary Judgment and remanded the denial of disability insurance benefits case to clarify inconsistencies in the treating psychologist's report and to determine the onset date of West's disability with the assistance of a medical advisor. West is HIV+ and suffers a number of problems, e.g., chronic pancreatitis, depression, anxiety attacks, alcoholism and drug dependency. West

filed his concurrent claims for Social Security Disability Benefits (SSDB) and Supplemental Security Income Benefits on April 6, 1994, with an alleged onset date of September 14, 1991. The Social Security Administration denied his application initially and on reconsideration.

West filed a Request for Hearing on November 23, 1994 and the hearing was convened on September 23, 1997, before an Administrative Law Judge (ALJ). West claimed that the onset date of his disability was June 6, 1996, and his last insured date was December 31, 1996. To qualify for SSDB, a claimant must show that he was disabled on or before the date his insured status expired. At trial, a vocational expert testified that West was capable of one-two step menial labor up until September 19, 1997, when his psychologist, Dr. Luna, wrote a letter to his attorney stating that West suffered an increased number of panic attacks and depressive symptoms. Dr. Luna concluded that West's functioning was at a level of forty-five on the global assessment of functioning (GAF) scale and that his functioning over the past year was at a forty (the lower the number, the less an individual is able to function).

The ALJ found that as of September 19, 1997, there were no jobs in the national economy that West was able to perform. The ALJ based his conclusion upon the opinion records of Dr. Luna. Dr. Luna's report contained a discrepancy that West had had a lower GAF score than the total for the previous year. However, she also reported improvement in his functioning over the previous year. Additionally, on April 18, 1996, a psychiatric consultative evaluator diagnosed West as a person with a drug abuse problem in early remission. On November 19, 1996, West's doctor at Cook County Hospital noted that West complained of anxiety attacks. During the hearing on September 23, 1997, Dr. Abramson, a medical expert, stated that he was not in a position to evaluate the periods of panic attacks or the periods of depression.

In considering this case, the district court determined that an individual claiming disability under the Social Security Act (Act) must demonstrate that he is disabled, or has "an inability to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months."

The Act provides a five-step process to determine whether a claimant is disabled. The five steps in order are: (1) Is the claimant presently employed? (2) Is the claimant's impairment severe? (3) Does the impairment meet or medically equal one of a list of specific impairments enumerated in the regulations? (4) Is the claimant able to perform his former occupation? (5) Is the claimant able to perform any other work? The claimant has the burden of proof through step four. If a claimant satisfies steps one, two and three, he will be declared disabled. However, if he does not, then he must satisfy step four also; at which point the burden shifts to the Commissioner to establish that the claimant is capable of performing work in the national economy.

With the record of medical evidence in consideration, West argued that the ALJ failed to follow the dictates of Social Security Ruling 83–20 (holding that in the case of a disability of non-traumatic origin, an inference must be made as to the onset date of that disability and a legitimate medical basis must exist for that inference). Moreover, a medical advisor must be called when onset must be inferred. West also unsuccessfully argued that the ALJ should have considered one of the three non-examining state agency doctor's opinions determination that West could only perform light work. Then, the court determined that Social Security Rulings were binding on all components of the Social Security Administration. As such, the court correctly remanded the case to the ALJ to clarify Dr. Luna's position and diagnosis and the possibility of determining the correct onset date. *Leo L. Wong*

AIDS Law Litigation Notes

The U.S. Court of Appeals for the 9th Circuit has partially revived a suit by some homeowners against the city of San Francisco, seeking compensation for injuries to their property rights they claimto have suffered when the city constructed an AIDS housing unit in their neighborhood. *Tyler v. Cuomo*, 2000 WL 1838967 (Dec. 15). The trial court had ruled against all defendants, claiming that the plaintiffs did not have standing to challenge the decisions and procedures, even though their homes were eligible for historic landmark designation and a particular federal statute provides safeguards against federally-funded construction that might impair adjacent historic properties. Writing for the court, Judge Tashima found that the district court had correctly ruled out liability by federal agencies and the developer who had constructed the facility, but concluded that the homeowners did have standing to enforce an agreement that had been negotiated earlier in this dispute under which the city was obligated to consult and take into account the homeowners' concerns as the project proceeded. The housing unit is completed and occupied (with a long waiting list), but the case is not moot if the plaintiffs can demonstrate compensable injuries down the line.

In *United States v. Greene*, 2000 WL 1873775 (Dec. 15) (not officially published), the U.S. Court of Appeals for the 9th Circuit upheld Lawrence Greene's conviction for mail and wire fraud for a scheme involving a bogus HIV test offered on-line. According to the evidence summarized by the court, the government showed that Lawrence advertised a confidential HIV test on the internet, took payments by mail and on-line for performance of the test, but actually had performed no test other than visual inspection of blood samples, having claimed that he could detect HIV in blood by examining its color. Lawrence, who represented himself in the federal criminal proceedings, raised a variety of technical flaws in his prosecution, but the per curiam opinion rejects all of them.

A Richmond, Virginia, jury ruled Dec. 15 that a local surgeon was not liable to a man who contracted HIV from a transfusion during surgery performed in March 1999. It turned out that the donor of one of the eleven units transfused into William C. Young during a bypass operation was HIV+ but undetectable because the blood was donated during a "window period" prior to the development of HIV antibodies by the donor. Young charged that his surgeon, Raymond G. Makhoul, did not advise him of the prudence of donating his own blood well in advance of the operation in case a transfusion was necessary. At trial, experts testified that theodds of this kind of transmission taking place were between 1 in 400,000 and 1 in 1 million. The blood agency that supplied the transfusion was dropped from the case on grounds of charitable immunity recognized in Virginia law. Several prominent physicians testified as defense experts, asserting that in light of current screening methods, the risk was not sufficient to justify advising such advance donations, and asserted that even if Dr. Makhoul had told Young the odds, he would not have done anything differently, as this was not elective surgery. *Richmond Times-Dispatch*, Dec. 16.

A neurosurgeon who refused treatment to an HIV+ man will pay $50,000 in damages under a settlement negotiated with the Justice Department to end a suit in federal district court in Tulsa, Oklahoma. Dr. Karl Detwiler, affiliated with Neurological Surgery, Inc., examined John J. McCarthy for back problems in November 1997, but when he learned that McCarthy is HIV+, advised him that he had a policy of not treating people with HIV. McCarthy brought his complaint to the Justice Department, which filed suit on his behalf, asserting a violation of Title III of the Americans With Disabilities Act. *Deseret News*, Dec. 23.

In *Moore v. Cooksey*, 2000 WL 1838274 (Dec. 14), the U.S. Court of Appeals for the 10th Circuit affirmed the trial court's rejection of a federal prison inmate's contention that he suffered unlawful discrimination on account of his HIV status when he was reassigned to a more secure unit after he stabbed another inmate with an "ice pick-type weapon." Moore claimed that the secure unit was not adequately

set up for AIDS treatment, and demanded transfer back to a unit with a significant HIV+ population. The court found his claims nonmeritorious without much discussion of the specifics.

A unanimous panel of the New York Appellate Division, 3rd Dept., affirmed a trial court ruling that a casino/hotel operated by an Indian tribe is immune from suit by a hotel guest who has been taking HIV tests (all negative) ever since sustaining a needlestick injury from a hypodermic needle apparently left by a prior guest in his bed. *Doe v. Oneida Indian Nation of New York*, 2000 WL 1791043, 2000 N.Y. Slip Op. 10797 (Dec. 7). Wrote Justice Mugglin for the court, "It is fundamental that Indian tribes possess sovereign immunity from suit in state and Federal courts," and found without any explanation that "plaintiff's other contentions urging the creation of an exception to the sovereign immunity doctrine" as "unavailing." The hotel had actually offered a settlement in response to Doe's filing of a claim in the Indian Nation Peacemaker Court, but he rejected the offer and filed this ridiculous $20 million action seeking compensation for "mental pain and illness." Sounds like his attorney needs a remedial legal research course. A.S.L.

AIDS Law & Society Notes

On Dec. 19, Ventura county, California, supervisors voted to declare a medical emergency and authorize the establishment of a needle exchange program. The vote came on recommendation of Dr. Robert Levin, medical director of the county Public Health Department, who warned that the transmission of HIV, hepatitis B and hepatitis C was at crisis proportions that could be slowed by setting up such a program. In his testimony, Levin stated: "You may save five or you may save 20 lives a year. One biblical scholar said if you save one life you save all mankind." (Not quite an accurate quote: It goes that a person who saves a life is as if he saved an entire world, but the idea is there.) *Los Angeles Times*, Dec. 20.

The Oregon Department of Human Services announced that beginning July 1, 2001, doctors and labs will be required to report the names of those testing HIV+ to public health authorities. AIDS services groups in the state seem to be split over the new policy, which is supported by Cascade AIDS Project but opposed by the Hispanic Services Round Table. According to a report on the announcement in *The Columbian* (Dec. 22), 34 states now provide for names reporting of HIV+ tests. A.S.L.

International AIDS Policy Notes

Canadian immigration officials announced that HIV and hepatitis B would be added to the list of excludable conditions for immigration to Canada, joining tuberculosis and syphilis. Canada, with a population of somewhat more than 30 million, receives about 250,000 immigrants annually. *Orlando Sentinel*, Dec. 4.

A Benetton advertisement that included aphotograph of a man's buttocks with an HIV+ tattoo did not violate German law, according to a ruling by the nation's highest court on Dec. 12. An advertising "watchdog" group had filed suit against the Italian clothing manufacturer after the advertisement appeared in the German press, complaining that the advertisement violated principles of free competition and was morally offensive. Trial and intermediate courts agreed with the plaintiffs, but the high court reversed, holding that basic free speech rights should not be abridged just because their exercise makes somebody feel uncomfortable. The court also stated that the HIV+ picture could be interpreted as a warning not to segregate people who are sick, rather than a negative comment about such people. *Wall Street Journal Europe*, Dec. 13.

The World Health Organization estimates that there are now more than 36 million people living with HIV infection, worldwide. HIV cases in the former Soviet states are predicted to rise by 60% when the final accounting is made for 2000, based on reports of an estimated 250,000 new cases in Eastern Europe and Central Asia. It was expected that the death toll from AIDS in 2000 would total approximately 3 million worldwide. The worst-hit region remains sub-Saharan Africa,with 72% of new infections nad 80% of deaths. 55% of those infected with HIV in sub-Saharan Africa are women, and the main routes of transmission there are heterosexual sex and contaminated blood supplies. *Wall Street Journal*, Nov. 27. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

MOVEMENT JOB ANNOUNCEMENTS

Dr. M.L. "Hank" Henry, Jr., Fund for Judicial Internships: A $3,500 stipend will be awarded to a qualified law student to support a 10–week summer judicial internship in New York City under the auspices of the Lesbian and Gay Law Association Foundation of Greater New York ("LeGaL Foundation"). The program will be designed to give the intern exposure to a variety of courts or tribunals. The Fund for Judicial Internships was established in memory of Dr. Henry, whose ground breaking work encouraged openly lesbian and gay lawyers to seek and achieve judicial office in New York City. The internship is intended for students with a demonstrated interest in, and commitment to, lesbian and gay rights. The Hank Henry, Jr., Fund values diversity. All interested students are encouraged to apply. Applicants for the 2001 summer internship should provide the following information in a letter to the LeGaL Foundation, 799 Broadway, Suite 340, New York, N.Y. 10003. The letter must be received no later than January 5, 2001. The Selection Committee will communicate its selection by February 5, 2001. A personal interview may be required. The application should include: Law School and anticipated graduation date. Law School grades and class rank (if available), any academic honors earned, extra-curricular and co-curricular activities. Undergraduate and/or other graduate degrees earned, specifying academic institution, major field of study, and extra-curricular and co-curricular activities. Community activities or affiliations or other activities indicating public service. Statement of interest which shall be no longer than 500 words. Names, addresses and telephone numbers of two references who are familiar with the applicant's character and qualifications. Questions concerning the application process or the specifics of the internship program can be directed to the LeGaL Foundation office (212–353–9118).

The Center for Lesbian and Gay Civil Rights in Philadelphia is searching for a new Executive Director. The Center is a non-profit organization started in 1996 providing legal counseling, representation, educational programs, policy analysis and advocacy for lesbian and gay civil rights in Pennsylvania. The E.D. presides over a staff including a supervising attorney, a development coordinator, and administrative coordinator, and a volunteer coordinator, and reports to a board of directors. Job qualifications include at least 5 years of legal experience, with a preference for public interest law and litigation, a working knowledge of gay and lesbian issues, and a law degree. Letters of application and current resumes should be sent by January 15 to: Search Committee, Center for Lesbian and Gay Civil Rights, 1315 Spruce St., Suite 301, Philadelphia, PA 19107, or emailed to: c4crinfo@center4civil rights.org. The Center's website can be accessed at 222.center4civilrights.org.

"The Legal Assistance Foundation of Metropolitan Chicago HIV/AIDS Project is seeking a staff attorney with at least one year of litigation experience. LAFMC is the Legal Services Corporation funded provider for Chicago and suburban Cook County. The HIV/AIDS Project is funded through HOPWA, Title I of the Ryan White CARE Act and private funders. The Pro-

ject represents PWA\HIV in a range of legal problems, including housing, public benefits, family law and discrimination. The Project includes three attorneys, two public benefits paralegals and a housing advocate. The deadline for submitting applications is January 16, 2001. I have attached a complete job announcement. Please forward this announcement to interested parties and feel free to contact me with any questions." Michelle J. Gilbert, Supervisory Attorney, Legal Assistance Foundation of Metropolitan Chicago, HIV/AIDS Project, 111 W. Jackson, Suite 300, Chicago, Illinois 60604, (312) 347–8315, mgilbert@lafchicago.org.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Backer, Larry Cata, *Disciplining Judicial Interpretation of Fundamental Rights: First Amendment Decadence in Southworth and Boy Scouts of America and European Alternatives*, 36 Tulsa L. J. 117 (2000).

Backer, Larry Cata, *Measuring the Penetration of Outsider Scholarship Into the Courts: Indifference, Hostility, Engagement*, 33 U.C. Davis L. Rev. 1173 (Summer 2000).

Beale, Sara Sun, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. Rev. 1227 (Dec. 2000).

Begg, Robert T., *The Lawyer's License to Discriminate Revoked: How a Dentist Put Teeth in New York's Anti-Discrimination Disciplinary Rule*, 64 Alb. L. Rev. 153 (2000).

Belsky, Martin H., *Privacy: The Rehnquist Court's Unmentionable "Right,"*, 36 Tulsa L. J. 43 (Fall 2000).

Brown, Jennifer Gerarda, *Sweeping Reform From Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny*, 85 Minn. L. Rev. 363 (Dec. 2000) (ingenious argument about how judicial rules forbidding sexual orientation bias in the courts may affect constitutional decisions in the gay rights sphere).

Hellman, Deborah, *The Expressive Dimension of Equal Protection*, 85 Minn. L. Rev. 1 (Nov. 2000).

Smith, Charlene, and James Wilets, *Lessons From the Past and Strategies for the Future: Using Domestic, International and Comparative Law to Overturn Sodomy Laws*, 24 Seattle U. L. Rev. 49 (Summer 2000).

Taslitz, Andrew E., *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B. U. L. Rev. 1283 (Dec. 2000).

Vernon, Lana Chiariello, *Book Review: Punishing Hate: Bias Crimes Under American Law*, 47–DEC Fed. Lawyer 61 (Nov/Dec 2000).

Wang, Lu-in, *Recognizing Opportunistic Bias Crimes*, 80 B. U. L. Rev. 1399 (Dec. 2000).

Wood, R. Craig, and Alvin J. Schilling, *The Judicial Dilemma Created by Mandatory Student Activity Fees: The Supreme Court Offers a Resolution in Ruling in Wisconsin v. Southworth*, 147 Ed. L. Rep. 413 (Nov. 23, 2000).

Students Notes and Comments:

Christiansen, Eric C., *Ending the Apartheid of the Closet: Sexual Orientation in the South African Constitutional Process*, 32 N.Y.U. J. Int'l L. & Pol. 997 (Summer 2000).

Doherty, Amy, *Constitutional Methodology and Same-Sex Marriage*, 11 J. Contemp. Legal Issues 110 (2000).

Jablow, Pamela M., *Victims of Abuse and Discrimination: Protecting Battered Homosexuals Under Domestic Violence Legislation*, 28 Hofstra L. Rev. 1095 (Summer 2000).

Osorno, Andy, *Adult Adoption: A Comparison of New York and California Law*, 11 J. Contemp. Legal Issues 617 (2000).

Parrish, Michael J., *Redefining the Refugee: The Universal Declaration of Human Rights as a Basis for Refugee Protection*, 22 Cardozo L. Rev. 223 (Nov. 2000).

Stein, Wendy, *Powell v. State: An Auspicious Decision in a Culture of Affectional/Sexual Orientation Discrimination*, 27 Fla. St. U. L. Rev. 897 (Summer 2000).

Strauss, Kenneth, *Recent Developments in Single Parent Adoptions*, 11 J. Contemp. Legal Issues 597 (2000).

Urban, Mandi Rae, *The History of Adult Adoption in California*, 11 J. Contemp. Legal Issues 612 (2000).

Specially Noted:

Vol. 8, No. 1 of *The Gay & Lesbian Review* (Jan-Feb 2001) (formerly known as the Harvard Gay & Lesbian Review), includes several articles of particular interest to Law Notes readers: Chai Feldblum, *Gay Rights and the Rehnquist Court*; *Why the Boy Scouts Case Went Down* (interview with Evan Wolfson); Deborah Zalesne, *When Your Harasser is Another Man*; Catherine Connolly, *Matthew's Murderers' Defense*; and Mary L. Bonauto, *Referendum Redux for the 2000 Election*. For information about the review, check its website: www.GLReview.com.

The *Washington Post* published a lengthy article on Dec. 28 about the phenomenon of transsexuals being increasingly willing to risk undergoing gender reassignment while continuing to work for the same employer. The article, by Sarah Schafer, asserts that in earlier times transgendered people were more likely to quit their old jobs and move to a new community where people did not know them in their former gender, but as social visibility and acceptability for transgenders have increased, and more communities have outlawed discrimination based on gender identity, more people are willing to "come out" to their employers and enlist them in easing the transition for the workforce. A hopeful, optimistic piece...

AIDS & RELATED LEGAL ISSUES:

Bryce, Kelly D., *Mandatory HIV Testing of Newborns: Is There a Better Way to Achieve the State's Goal of Preventing Transmission of HIV to Newborns and Ensuring Them Treatment?*, 4 Quinnipiac Health L. J. 69 (2000).

Cole, Melissa, *The Mitigation Expectation and the Sutton Court's Closeting of Disabilities*, 43 How. L. J. 499 (Spring 2000).

Student Notes & Comments:

Gillum, Jon L., *Fear of Disease in Another Person: Assessing the Merits of an Emerging Tort Claim*, 79 Tex. L. Rev. 227 (Nov. 2000).

Keenan, Jane M., *A Social Security Claimant's Statement That She is Disabled and Unable to Work Does Not Necessarily Preclude a Subsequent ADA Wrongful Termination Claim: Cleveland v. Policy Management Systems Corporation*, 38 Duq. L. Rev. 685 (Winter 2000).

Stowe, Matthew A., *Interpreting 'Place of Public Accommodation' Under Title III of the ADA: A Technical Determination with Potentially Broad Civil Rights Implications*, 50 Duke L. J. 297 (Oct. 2000).

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.