TEXAS APPEALS COURT, RULING EN BANC, REVIVES SAME-SEX SODOMY LAW

By a 7–2 vote announced on March 15, the Texas 14th Court of Appeals in Harris County upheld the constitutionality of Section 21.06 of the Texas Penal Code, which makes it a misdemeanor for couples of the same sex to engage in oral or anal sexual activity, even when acting consensually in private. This ruling in *Lawrence v. State of Texas*, 2001 WL 265994, replaces the contrary holding last year by a 3–judge panel, previously reported on-line as *Lawrence v. State of Texas*, 2000 WL 729417 (June 8, 2000), but not officially published. The two judges in the majority on the 3–judge panel dissented, in an opinion by Justice John S. Anderson. Justice J. Harvey Hudson wrote the opinion for the en banc court, and there were two concurring opinions.

The case arose out of a rare prosecution of a same-sex couple for private consensual activity. Police officers went to the defendants' apartment in response to a report by a third party of a "weapons disturbance" and upon gaining admission discovered the defendants *in flagrante*. The Harris County prosecutor decided to pursue the case, and the men decided to challenge the constitutionality of the statute after pleading *nolo contendere* to the charges against them. They were fined as provided by the misdemeanor statute, and pursued their appeal through the criminal appellate system, asserting violations of federal and state constitutional rights of equal protection and privacy. The equal protection claim arises both under Texas's general equal protection clause and under the state's equal rights amendment, which expressly bans discrimination on the basis of sex.

The 3–judge panel found the privacy claim precluded by *Bowers v. Hardwick*, 478 U.S. 186 (1986), and a subsequent Texas decision, *Henry v. City of Sherman*, 928 S.W.2d 464 (Tex. 1996), which had rejected the argument that the state constitutional privacy right extended to consensual acts of adultery. But the 3–judge panel did find an equal protection violation, arguing that the Texas sodomy law makes particular conduct criminal depending upon the sex of the participants, and that the state had shown no justification for making this distinction based on sex.

Justice Hudson's opinion dwells on the history of the federal equal protection clause, apparently to emphasize the contention that the "central purpose" of that provision was to ban states from intentionally discriminating on the basis of race, and not (quoting an 1884 opinion) "to interfere with the power of the state… to prescribe regulations to promote the health, peace, morals, education, and good order of the people." Hudson asserted that the Texas state constitutional equivalent provision, Art. I, sec. 3, has the same purpose and has been interpreted along the same lines. However, Hudson conceded that the state Equal Rights Amendment, Art. I, sec. 3a, has no federal equivalent, and thus must of necessity extend protection further than Art. I, sec. 3.

Hudson first addressed the defendants' argument that the sodomy law unconstitutionally discriminates on the basis of sexual orientation. The court seized upon a distinction between sexual orientation and sexual conduct, and concluded that the law does not discriminate on the basis of sexual orientation because heterosexual men are forbidden from having sex with heterosexual men, and similarly for women. In short, the court found that sexual orientation is irrelevant to the operation of the sodomy law, and that an equal protection claim could only succeed upon a showing that the law was adopted out of discriminatory animus towards homosexuals. However, because sexual orientation has not been denominated a "suspect class", wrote Hudson, "the prohibition of homosexual sodomy is permissible if it is rationally related to a legitimate state interest." And Hudson found such a policy in the state's argument that it banned same-sex sodomy in defense of public morals. Here Hudson relied on *Hardwick*'s acceptance of such an argument in sustaining the Georgia sodomy law in 1986, and sought to distinguish the Supreme Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996) (Colorado Amendment 2 Equal Protection case), by in effect recasting that case more in terms of the Colorado Supreme Court's holding that Amendment 2 violated a fundamental right of political participation.

"Here, appellants do not suggest that Section 21.06 unconstitutionally encumbers their right to seek legislative protection from discriminatory practices," he wrote. "Hence, *Romer* provides no support for appellants' position. *Romer*, for example, does not disavow the Court's previous holding in *Bowers*; it does not elevate homosexuals to a suspect class; it does not suggest that statutes prohibiting homosexual conduct violate the Equal Protection Clause; and it does not challenge the concept that the preservation and protection of morality is a legitimate state interest." Hudson also asserted the court's power to "review the moral justification for a legislative act is extremely limited,"and said that the people had given the legislature "the exclusive right to determine issues of public morality." The court also accepted the state's argument that the legislature had the authority to determine that certain sexual acts were more seriously violative of public morality when committed by same sex couples than when committed by opposite sex couples.

Turning next to the sex discrimination argument that the 3–judge panel had accepted, Hudson insisted that the statute embodied no actionable sex discrimination at all. The defendants had argued, and the panel had agreed, that under the Supreme Court's rationale in *Loving v. Virginia* 388 U.S. 1 (1967), striking down a miscegenation law on the basis of its racial classification for the offense, the state could not justify making particular conduct criminal depending upon the sex of the participants. This argument did not impress Hudson: "But while the purpose of Virginia's miscegenation statute was to segregate the races and perpetuate the notion that blacks are inferior to whites, no such sinister motive can be ascribed to the criminalization of homosexual conduct," he wrote. "In other words, we find nothing in the history of Section 21.06 to suggest it was intended to promote any hostility between the sexes, preserve any unequal treatment as between men and women, or perpetuate any societal or cultural bias with regard to gender. Thus, we find appellants' reliance on *Loving* unpersuasive." In other words, the use of sex in defining an offense is not, in the court's view, an actionable instance of sex discrimination unless such use is intended to preserve or enforce inequality between the sexes, and the court could not see how the same-sex sodomy prohibition evinced such an intention.

Finally, the court rejected the defendants' privacy arguments, citing a variety of historical, religious and legal sources to document the point that homosexual conduct is not something that has traditionally been valued and protected by society. "Nevertheless, appellants contend that Texas should join several of our sister states who have legalized homosexual conduct. Certainly, the modern national trend

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has been to decriminalize many forms of consensual sexual conduct even when such behavior is widely perceived to be destructive and immoral, e.g., seduction, fornication, adultery, bestiality, etc. Our concern, however, cannot be with cultural trends and political movements because these can have no place in our decision without usurping the role of the Legislature," Hudson insisted. "While the Legislature is not infallible in its moral and ethical judgments, it alone is constitutionally empowered to decide which evils it will restrain when enacting laws for the public good."

Justice Wanda McKee Fowler wrote a short concurring opinion, mainly to rebut points raised by the dissent. Justice Leslie Brock Yates wrote a short concurrence as well, concentrating on rejecting charges that have been raised that the en banc court was reversing the 3–judge panel due to political pressure from the local Republican party leaders. Yates solemnly asserted that the en banc majority, made up entirely of Republicans, was not influenced by politics in its decision-making.

Justice Anderson's dissent is the longest of the four opinions filed by members of the court. Anderson vehemently disagreed with the majority's conclusion that the statute does not discriminate on the basis of sex, reiterating at length the arguments he had made in his opinion for the majority of the 3–judge panel, reported in the Summer 2000 issue of *Law Notes* in detail. He also pointed out that the majority's analysis failed to engage with the heightened scrutiny requirement for sex discrimination claims enacted by the people of Texas when they passed the Equal Rights Amendment back in the 1970s.

Where the majority found *Romer v. Evans* essentially irrelevant to this challenge to the sodomy law, Anderson found it a key and dispositive precedent in the defendants' favor: "The statute at issue here, much like Amendment 2, draws a classification for the purpose of disadvantaging the group burdened by the law. In fact, Justice Scalia, in his dissent to *Romer* readily agreed that, 'there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.' I agree with Justice Scalia that the statute at issue here, by proscribing 'deviate sexual intercourse' only when engaged in with members of one's own sex, does discriminate against homosexuals. However, following *Romer*, I view the justifications proffered by the State, enforcement of traditional norms of morality and family values, as nothing more than politically-charged, thinly-veiled, animus-driven cliches." Anderson found, at the end, that "stripped of its asserted justifications, the classification drawn in 21.06 is arbitrary and irrational, and fails the rational basis test."

The defendants, John Lawrence and Tyron Garner, are represented by Ruth Harlow, legal director of Lambda Legal Defense and Education Fund, who argued the appeal, and local counsel Mitchell Katine of the Houston law firm Williams, Binberg & Anderson. Harlow indicated to the press that Lambda will attempt to appeal this decision to the highest criminal court in Texas, the Court of Criminal Appeals and ultimately, if need be, to the U.S. Supreme Court. Many commentators have suggested that in an appropriate case the U.S. Supreme Court might be willing to use an equal protection argument to invalidate a same-sex only-sodomy law, building hopes primarily on the possibility that Justice Anthony Kennedy, author of the Court's *Romer* opinion, might be willing to vote alongside the members of the Court's more moderate wing, Justices Stevens (who dissented in *Hardwick v. Bowers*), Souter, Ginsberg and Breyer, all members of the *Romer* majority. This would certainly be poetic justice were it to occur, since Justice Kennedy occupies the seat previously held by Justice Lewis F. Powell, Jr., who cast the deciding vote in support of Georgia's sodomy law in *Hardwick* but then repented of his vote publicly after retiring from the Court, and was appointed after the Senate rejected President Reagan's nomination of Robert Bork, an outspoken opponent of gay rights. A.S.L.

LESBIAN/GAY LEGAL NEWS

Arkansas Trial Judge Finds Same-Sex Sodomy Law Unconstitutional

Ruling on cross-motions for summary judgment based on affidavits and oral argument, Pulaski County, Arkansas, Circuit Judge David Bogard ruled on March 23 in *Picado v. Jegley*, CV 99–7048, that Arkansas Code Ann. Sec. 5–14–122, the state's same-sex sodomy statute, violates the Arkansas constitution on privacy and equal protection grounds. Bogard disclaimed any ruling on federal constitutional claims.

Until 1975, Arkansas's criminal code contained a prohibition on all acts of "sodomy," but in that year the state reformed its sex crimes laws to cut down the restriction so that it covers only anal or oral sex between persons of the same sex or between persons and animals. In this case, the plaintiffs were challenging the sodomy law only with respect to its application to same-sex couples engaging in consensual sexual activity in private. From the time the suit was filed on behalf of seven gay and lesbian Arkansans in the chancery court in January 1998, the state has been attempting to get the case thrown out on procedural or jurisdictional grounds to avoid a ruling on the merits. In a prior appeal to the state supreme court, the state won a ruling that the chancery court did not have jurisdiction of an action to declare a criminal statute unconstitutional, but the supreme court ruled, *Bryant v. Picado*, 996 S.W.2d 17 (Ark. 1999), that the circuit court would have jurisdiction, and allowed the case to be refiled in the circuit court. In that same ruling, the supreme court had rejected the state's argument that the plaintiffs, none of whom have ever been prosecuted or directly threatened with prosecution under the law, lacked standing, finding that the state had not disclaimed any intention of enforcing the law.

The state had renewed the standing argument before Judge Bogard, this time under the guise of justiciability, but the court accepted the plaintiffs' argument that they feared prosecution, and concluded: "Each Plaintiff has a distinct interest in the constitutionality of the Sodomy Statute, not shared by the general public, such that they are entitled to maintain a declaratory judgment action to determine the constitutionality of the Sodomy Statute."

Judge Bogard then turned to the two substantive constitutional grounds: privacy and equal protection.

Art. 2, Sec. 2 of the Arkansas Constitution provides: "All men are created equally free and independent, and have certain inherent and inalienable rights, amongst which are those of enjoying… and of pursuing their own happiness." Bogard found that this provision provides a solid basis for distinguishing this case from *Bowers v. Hardwick*, 478 U.S. 176 (1986), in which the U.S. Supreme Court rejected a federal privacy challenge to Georgia's sodomy law. In addition to this general clause, he found other provisions recognizing that the government is instituted "only for the collective benefit" and providing specific protection in Arkansas for "the particular privacy necessary in one's home." "Sexual intimacy falls at the very center of that zone of privacy," he declared, rejecting the state's argument that the failure of the constitution to mention privacy directly should be held to dispose of the issue as it had in *Hardwick*.

Bogard pointed to the Kentucky Supreme Court's 1992 decision in *Commonwealth v. Wasson*, 842 S.W.2d 487, in which almost identical language in the Kentucky constitution was construed to invalidate a sodomy law on privacy grounds. "The Court agrees with the Plaintiff," wrote Bogard, "the Declaration of Rights in Article 2 of the Arkansas Constitution indicates a strong commitment by the citizens of this State to individual liberty and freedom from governmental interference in their personal lives." Bogard found that it was "consistent" with the state constitution "to hold that an adult's right to engage in consensual and non-

commercial sexual activities in the privacy of that adult's home is a matter of intimate personal concern which is at the heart of right to privacy in Arkansas, and this right should not be diminished or afforded less constitutional protection when the adults engaging in that private activity are of the same gender." He decisively rejected the state's argument that the police power to forbid conduct found immoral by the majority of the people could trump this right. "There is little doubt that the State's attempt to rescue homosexuals from an unpopular lifestyle does not provide for a compelling reason or even a valid reason for infringement of the fundamental right of adults to engage in private, noncommercial, consensual sex," he wrote, citing *Palmore v. Sidoti*, 466 U.S. 429 (1984), in which the Supreme Court condemned government enforcement of majoritarian prejudices.

As to the argument from morality, Bogard asserted that "homosexuality is not only a question of morals. History teaches us homosexuals have been present on earth throughout the recorded existence of man. Experts have testified that homosexuality is not a choice and there is no 'cure' for it. In *Wisconsin v. Yoder*, 406 U.S. 205, 224 (1972), the United States Supreme Court stated, 'a way of life that is odd or even erratic, but interferes with no rights or interests of others, is not to be condemned because it is different.'"

Turning to equal protection, Bogard noted the state's argument that the statute could be sustained on a rational basis test because sexual orientation is not a suspect classification, but he found this argument essentially irrelevant. Arkansas's constitution includes an Equal Rights Amendment, under which the state's high court has previously ruled that gender classifications are subject to strict scrutiny. Bogard found that by limiting their prohibition to same-sex sodomy, the legislature had created a sex classification, and thus strict scrutiny applied. He noted that during the argument, the state had conceded that if strict scrutiny did apply in this case, the state would lose, because it would be unable to make a compelling argument to allow opposite-sex couples do what was forbidden for same-sex couples.

Judge Bogard concluded that because the statute offended the state constitution, there was no need to rule on any federal constitutional claim.

The plaintiffs are represented by Lambda Legal Defense & Education Fund in collaboration with local counsel. Lambda's Legal Director, Ruth Harlow, argued the case before Judge Bogard, achieving a nice victory on the heels of the loss in Texas just days earlier. The state is expected to appeal. A.S.L.

U.S. Supreme Court Finds State Law Sexual Orientation Discrimination Claim Subject to Arbitration Agreement

On March 21, a closely divided U.S. Supreme Court held that an employee's sexual orientation discrimination claim, originally commenced in state court under California's Fair Employment and Housing Code, must go to arbitration. *Circuit City Stores, Inc. v. Adams*, 2001 WL 273205. At issue before the Supreme Court was whether the Federal Arbitration Act (FAA) creates federal jurisdiction for the enforcement of the binding arbitration clause in the employment contract between Saint Clair Adams and Circuit City Stores.

In 1995, Adams applied for a job as a sales associate at a Circuit City store in Santa Rosa, California. The job application Adams signed specifically stated that any dispute relating to his employment with Circuit City would be submitted to binding arbitration. Adams was hired and two years later filed a sexual orientation discrimination suit against Circuit City pursuant to California's Fair Employment and Housing Code in state court. Circuit City responded by commencing an action in the U.S. District Court, seeking to stay Adams' state court action and to compel arbitration of Adams' discrimination claims. The district court found that the employment contract was subject to the FAA and entered an order staying the state court action and requiring Adams' dispute with Circuit City be submitted to arbitration. The Ninth Circuit reversed, relying on an exception to the FAA for contracts of employment for workers involved in interstate commerce.

The Ninth Circuit's decision was contrary to rulings made by each of the other Circuit Courts. The Supreme Court reversed, by 5–4 vote, in an opinion by Justice Anthony Kennedy finding that the exception to FAA jurisdiction was limited to contracts of employment for workers actually engaged in moving goods in commerce. Here, Adams was merely a sales associate for Circuit City. Although Circuit City itself may be involved in interstate commerce, Adams was not engaged in the transportation of goods for Circuit City and therefore his claims are subject to the FAA. (The dissenters argued that this interpretation of the statutory exception to FAA jurisdiction improperly ignores the historical context in which the statute was enacted, which clearly shows that Congress did not intend the FAA, enacted in the 1920's, to apply to any contracts of employment that were otherwise subject to federal regulatory jurisdiction.) As a result of the Supreme Court's decision, Adams' sexual orientation discrimination claims, which arise under state law, will be resolved in arbitration and not by the California state courts. *Todd V. Lamb*

Mississippi Court Affirms Custody Award to Father over Lesbian Mother

The Court of Appeals of Mississippi refused to overturn the chancery court's determination that the biological mother, the Appellant, was not entitled to custody of her daughter, in part because she is a lesbian. *S.B. v. L.W.*, 2001 WL 244350 (Miss. App., March 13, 2001).

Appellant and her ex-boyfriend, the biological father, were living together when Appellant became pregnant. Before giving birth, she moved out and went to live with another woman in a lesbian relationship. Appellee acknowledged paternity, paid some child support, had equal visitation time and shared co-parenting responsibilities for the first four or five years of the daughter's life, although nothing was formalized in court. When the child entered school, the parties agreed that she would spend every other weekend with her father. When the mother announced her intention to move a significant distance away to Gulfport to start a business, the father petitioned for full custody of his daughter.

The chancery court found that both parties played a significant role in the girl's care and had equal emotional ties to her. But the chancellor awarded the father full custody, finding in his favor factors such as stable home and employment and moral fitness. He had a steady job, a five bedroom home in a county with excellent schools, and a wife and stepchildren with whom his daughter had close relationships. The mother, in contrast, had a part time job and an uncertain future, since she was planning to start a business and had not yet found a place to live in Gulfport. Furthermore, she did not know where her daughter would attend school. Another factor the chancellor considered was that she had previously relinquished custody of a son to her ex-husband, because she felt that she was not fit to be a parent a parent at that time. Although the mother explained that now she has matured and has become fit, the chancellor nevertheless found that she had a severe emotional problem.

Given the rationality of the mother's actions, one cannot help but think that the real reason he thought she had a severe emotional problem was the mother's sexual orientation. While he acknowledged that his custody decision could not be based solely on her being a lesbian, he made no inquiry into whether that was detrimental to the child, and it was another factor in the chancellor's decision.

Judge Chandler, writing for the appeals court, analyzed whether, in awarding custody to the father, the chancellor gave undue consideration to the mother's impending move and her "bisexual" or "homosexual" lifestyle (the court appears to use these terms interchangeably), without finding that the child had been adversely affected thereby. He cited case law stat-

ing that it is a valid exercise of a chancellor's discretion to consider that a child has more friends and relatives in a particular location. With regard to her lifestyle, Judge Chandler attempted to rebut the dissent by Judge Thomas, which noted that the sexual relationships of an unmarried custodial parent, absent a finding that the relationship caused harm to the child, cannot be used to determine custody, citing *Forsythe v. Akers*, 768 So. 2d 943 (Miss. 2000). In contrast, Judge Chandler cited a Mississippi Supreme Court case, *White v. Thompson*, 569 So. 2d 1181 (Miss. 1999), which awarded custody to the child's grandparents over the lesbian mother. The mother argued that her lesbianism was not shown to have had a detrimental affect on her children. The *White* court held that, although the predominant issue on the chancellor's mind was the lesbian relationship, it was not the only evidence adduced to show that the mother was unfit. Judge Chandler further noted that the dissent cited a long list of cases from other jurisdictions that "it apparently believes reflects the more thoughtful view of the irrelevance of homosexual relations when determining custody of a child." Dismissing this enlightened view, Judge Chandler, noting that there is no case law in Mississippi that states that the homosexuality of a parent must be ignored, ruled that it was proper for the chancellor to base the custody award on the morality of the mother's lifestyle, so long as it was not the only basis for his decision.

There was also a long separate concurring opinion that catalogued the homophobic laws of various states that deny gay people the right to adopt children. Although the instant case did not involve adoption, the point of the concurring opinion apparently was to show that in many states, public policy dictates that homosexuality per se will render a person unfit to raise a child.

The dissent sharply criticized the court for allowing the chancellor to take the mother's sexual orientation into account without any showing that it had an adverse impact on the child. Furthermore, the dissented contended that the court had failed to apply the normal presumptions in support of maternal custody when the putative father has not officially declared his paternity within the time provided under the statute of limitations. *Elaine Chapnik*

Boy Scouts Win Preliminary Injunction Against Exclusion From Broward County Schools

A federal district judge in Miami ruled March 21 that the fifth-largest public school district in the nation, in Broward County, had violated the constitution by banning the Boy Scouts of America (BSA) from meeting in school buildings because of the Scouts' anti-gay policies. *Boy Scouts of America v. Till*, Case No. 00–7776–Civ-Middlebrooks-Bandstra (U.S.Dist.Ct., S.D. Fla.). District Judge Donald M. Middlebrooks found that although the District was within its rights in canceling a five-year agreement that gave the Scouts free use of school buildings and established an annual "School Night for Scouting" at which the school assisted the BSA in recruiting new members, it could not consistent with the 1st Amendment exclude the BSA from using the limited public forum of school property on the same basis as other private groups.

For many years, Broward County's Board of Education has had a policy involving use of school buildings that requires all such users to comply with the Board's non-discrimination policy, which includes sexual orientation in addition to the other usual categories such as race, sex, and religion. The County had never moved to expel any organization from the schools, even though some might technically be found in violation of the policy. However, after the Supreme Court's ruling in *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000), which was followed by a forceful restatement of the exclusionary policy by Scout national executives, the Board felt it could not overlook the conflict. In 1998, the Board had entered into an agreement with the BSA giving the BSA free access to school facilities and transportation, and establishing an annual recruitment drive for new Scout members in which the schools heavily collaborated. The written agreement between the District and the BSA includes the non-discrimination provision, and makes clear that the BSA is required to comply with it. As of last summer, the South Florida Council of the BSA was carrying on activities at 57 elementary schools and 4 middle schools in Broward County, involving 1,985 scouts and 625 adult volunteers.

On September 18 last year, the Diversity Committee for the School District discussed the BSA's use of the schools and recommended that the Superintendent and Board take action to bar the BSA. On September 20, Superintendent Frank Till wrote to the South Florida Council Executive, reminding him of the non-discrimination policy in the agreement and asking whether BSA would comply. The executive responded that South Florida Council's policies were dictated by the national office, and that the BSA did not interpret the agreement to require it to change its membership policies. The executive also said the Scouts would sue if the District attempted to bar them from the schools. Nonetheless, the School Board voted on November 14 to exercise its right to cancel the agreement on 30 days notice, and to inform the BSA that they would not be welcome in the schools after that date. The BSA filed suit in federal court, and the parties agreed to extend the termination date of the agreement to March 30, 2001, so that both parties had time to brief the case and prepare arguments for the court.

Judge Middlebrooks found that by allowing a wide array of groups to use public school buildings, the Board of Education had created a "limited public forum" in which 1st Amendment principles come into play. The School District argued that it has a compelling interest to exclude organizations that maintain overtly discriminatory membership policies, and that the BSA, by entering into an agreement with a non-discrimination provision including sexual orientation, had waived its constitutional right (as upheld by the Supreme Court) to exclude gays from membership, at least in troops that meet in Broward schools. At the hearing held on March 13, the BSA conceded that the District had a right to cancel the agreement, since by its terms it could be canceled at will by either party on 30 days notice. But the BSA argued that the District could not take the further step of a total ban, and would have to allow the Scouts to meet on the same basis as it allowed other groups — some of them discriminatory on the basis of sex or race — to meet.

Judge Middlebrooks found that the Scouts had the better of this argument, especially in light of the District's practice of allowing other organizations to meet in the schools despite their lack of compliance with the non-discrimination policy. He found that the District was free to disassociate itself from the Scouts policy by canceling the agreement, by refusing to participate in recruitment activities, and by criticizing the policy publically. "However, in expressing its own message and setting its example for students to follow, the School Board cannot punish another group for its own message," he wrote. "The government must refrain from regulating speech when the specific motivating ideology or opinion or perspective of the speaker is the rationale for the restrictions."

The court found to be controlling a precedent of the old 5th Circuit, *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board*, 578 F.2d 1122 (5th Cir. 1978). (Decisions of the old 5th Circuit prior to the subdivision which now places Florida in the 11th Circuit remain precedents for both the 5th and 11th Circuits.) In that case, the school board sought to exclude the Ku Klux Klan from meeting at the school, while allowing other groups to meet, arguing that the schools should not be used by an organization that was opposed to racial equality and desegregation. The court held that since the school had created a public forum in which it allowed private organizations to meet, it could not exclude the Ku Klux Klan, no matter how objectionable that organization's policies were to the school officials. Middlebrooks quoted the old decision as follows: "The benefits of the First Amendment are often hard to see, its gifts frequently unwelcome to the majority of the time, but the interest that thinks to make head against it must be a compelling one indeed." The court there found that given the clear ex-

pressions of distaste for the Klan's policies by the School Board, no member of the public would be misled into thinking that the Board was endorsing the Klan by allowing it to meet in school buildings on the same basis as other groups.

Middlebrooks rejected the School Board's attempt to distinguish the Klan case, in which the 5th Circuit noted that the Klan sought only occasional use of the building on an ad hoc basis while in this case the Scouts were scheduling regular weekly or monthly meetings in a large number of district buildings. "I find no support for the proposition that the number of participants or the frequency of use changes public forum analysis," he wrote.

Secondly, the Board argued that this case was distinguishable because the Scouts draw their members and volunteers from the schools in which they are meeting, giving the District a compelling interest in stopping discrimination, and arguing that the School Board needed to protect its own students and teachers (who might be adult Scout volunteers) from discrimination. "This concern is understandable," wrote Middlebrooks. "The emotional hurt that such an event could cause may be a reason for parents and young men to disassociate themselves from participation in Scouting. It may also be a reason for the Boy Scouts to reconsider their policy. But the hurt of exclusion is part of the price paid for the freedom to associate. I do not see how this hurt differs from that of the African-American student whose school gymnasium is used for a Klan rally, the Holocaust survivor forced to contemplate the National Socialist Party parading through the streets of Skokie, Illinois wearing swastikas, the gays or lesbians who are refused a place in the St. Patrick's Day parade, or James Dale's pain after being excluded from scouting after 12 years of active and honored participation. Freedom of speech and association has its costs, and tolerance of the intolerant is one of them."

Middlebrooks also observed that banning the Scouts from the schools "does nothing to stop the possible exclusion of students or teachers from scouting" because the Scouts would just meet elsewhere. "If its purpose is to stop discrimination, the method chosen by the Board is ineffective. Under the law, when government seeks to regulate speech based upon its content, the regulation must achieve the stated governmental purpose, it must be narrowly tailored, and it must be the least restrictive alternative available. For the reasons outlined earlier, I do not believe excluding the Boy Scouts from Broward school facilities based on their anti-gay viewpoint can pass constitutional muster under this standard."

Although the Scouts may appear to have won a victory with this preliminary injunction, which orders the District not to prevent the BSA "from using Broward County public school facilities and buses during the off school hours by reason of the Boy Scouts' membership policy," the District has announced that it interprets the order to uphold its cancellation of the agreement, meaning that if the Scouts want to use school facilities, they will have to pay rent the same as other organizations. And a news report shortly after the opinion indicated that the practical effect of this litigation has been to sharply reduce the presence of the Scouts. In the wake of the controversy last fall, several troops have folded, some have already relocated to churches rather than wait to be evicted (according to a *Sun-Sentinel* article published March 13, more than half of Broward's troops and had moved out of school buildings or disbanded in the wake of the controversy), and others may lack the financial resources to rent the premises, since their operating budgets had been premised on the free use of school facilities. (However, it seems likely that in at least some cases business sponsors may come forward with donations to underwrite school space rentals for some troops.) *South Florida Sun-Sentinel*, March 22. So, although the immediate effect of the opinion is to cut down a strategy of pressuring the Scouts to change their policy by getting them banned from public schools, the net effect of the opinion is to recognize that the public schools have at least a right, if not a duty, to refrain from active collaboration with the Scouts, and that the Scouts have no entitlement to "special rights" such as free access and preferred access to public school students. A.S.L.

Other Boy Scouts Developments

The *Los Angeles Daily News* reported March 19 that the City Council in SAnta Clarita is considering adopting a resolution praising the Boy Scouts of America for its work in the city. The newspaper reported that several other communities, including Palmdale and Lancaster, have adopted similar resolutions, in response to a campaign by the Scouts to drum up support after being kicked out of public facilities in some other places, including Los Angeles, because of their policy mandating discrimination on the basis of religion and sexual orientation.

The United Way of Dane County, Wisconsin, has decided not to cut off funding for the local Four Lakes Council of the Boy Scouts of America, even though it has determined that the Council is not currently in compliance with non-discrimination requirements, because the Local Council has undertaken several steps to attempt to satisfy the United Way's requirements, including setting up a committee to explore the council's position regarding the national membership policy, adopting a broad statement of tolerance (that includes a sort of don't ask, don't tell policy on sexual orientation), developing Learning for Life and Explorer Post programs that would not be limited in membership on the basis of gender, sexual orientation, or religious beliefs, and by expressing willingness to be responsive to Untied Way requests for program and outcome information. The amount at stake this year is about $136,000, of which about $60,000 is donor-directed. *Capital Times*, March 27.

The Santa Barbara, California, County Board voted late in February to end a lease granting Boy Scout Troop 33 the exclusive right to use the top floor of a carriage house in the center of Montecito as a meeting place. The 25–year lease had been signed just eight months ago, but the Board was galvanized by arguments that a discriminatory private organization should not be given special access to public property. *Los Angeles Times*, March 5. On March 21, after a continuing debate, the Board voted 3–2 to adopt a resolution specifically condemning the Boy Scouts of America's anti-gay policy. This appeared to be directly in reaction to the BSA's discharge of Leonard Lanzi, former executive director of the Los Padres Council of Boy Scouts and a highly-respected community figure, who came out as openly-gay while testifying before the Board in opposition to the proposal to terminate the carriage house lease. *San Diego Union-Tribune*, March 22.

On March 13, the executive committee of the Palm Beach Community Chest/United Way (Florida) voted 29–11 to add sexual orientation to its non-discrimination policy, and the chair indicated that the organization will end its $62,000 contribution to the Boy Scouts after next year unless the ban on gay members and leaders is lifted. *Palm Beach Post*, March 14.

On March 19, the Seattle School Board's Policy and Legislative Committee voted to recommend that the Board end the Boy Scouts' privilege of using schools rent-free, or for using School District internal mail systems to send announcements about Scouting activities to students' families. *Seattle Times*, March 20.

On March 8, the Arizona House of Representatives voted down a bill that was intended to overturn the city of Tucson's new policy prohibiting city money from going to exclusionary groups, including the Boy Scouts. HB 2403 would have prohibited cities and schools from denying funds to non-profit organizations because of their "tenets." Opponents of the bill successfully argued that state interference with local decision-making could have unintended consequences, like putting the Boy Scouts on the same level as "those wacko groups we talk about," according to one representative. *Tucson Citizen*, March 9.

The Cornerstone United Methodist Church in Oak Park, Illinois, had applied for a charter to sponsor a Cub Scout pack, but was turned down by the BSA because the application indicated the church's intention to run an "open and inclusive program." *Chicago Tribune*, March 8.

The United Way of Sonoma-Mendocino-Lake (California) has voted to adopt a new policy prohibiting distribution of charitable funds to any organization that discriminates on the basis of race, ethnicity, gender, disability or sexual orientation. Local Scout leaders are preparing for the loss of funds when they applications come up. *Santa Rosa Press Democrat*, March 8.

Congregation Beth Shalom, a Kansas City synagogue that has been the longtime sponsor of Boy Scout Troop 61, has decided it cannot live with the BSA's discriminatory policies, and has sent a statement to the BSA national organization calling for an end to the exclusionary policy. It is possible that the congregation will withdraw its sponsorship from the troop. *Kansas City Star*, March 22.

The United Way of Greater Winona, Wisconsin, indicated that it won't fund any groups that refuse to sign a pledge that they will not discriminate on the basis, inter alia, of sexual orientation. At present, United Way funding accounts for about half of the administrative budget for 22 troops and 1,100 Boy Scouts in Winona County, participating in the Gamehaven Council based in Rochester and the Gateway Area Council based in La Crosse. *Milwaukee Journal Sentinel*, March 24. A.S.L.

Mass. Judge Says State Handicap Law Protects Transgenders

In the continuing saga of *Pat Doe v. Yunits*, the transgender 8th grade student at Brockton South Junior High School (Massachusetts), a second Massachusetts Superior Court Judge has issued a ruling, finding that the state's ban on handicap discrimination protects transgendered individuals.

In *Doe v. Yunits*, Superior Ct. Civ. Action No. 00–1060–A (Mass. Super. Ct., Plymouth, Oct 11, 2000), Superior Court Judge Linda E. Giles ruled that a transgendered 15–year-old boy (identified in court papers as "Pat Doe") must be allowed to attend junior high school classes when presenting herself for class in herself identified gender. This ruling granted temporary relief. In a new ruling issued on February 26, 2001, Superior Court Judge Ralph D. Gants ruled on a variety of pending motions in the case.

First, Judge Gants granted the motion to dismiss as defendants the members of the Brockton School Committee, finding that they had not participated in the decisions to bar Doe from attending school in feminine attire. Doe had alleged that they were responsible for the formulation of the school's Dress Policy, which was relief upon by junior high school administrators in their dealings with Doe. Gants ruled that if discovery revealed that individual school committee members had actually participated in any of the decisionmaking involving applying the policy to Doe, she could later amend her complaint to add them as defendants.

Next, Gants turned to the motion by school administrators to dismiss claims lodged against them in their individual capacities. Gants found that at this stage in the litigation, there was not enough of a factual record to determine whether these defendants were protected by qualified immunity because they were engaged in a discretionary decision-making function regarding Doe, or whether they were performing a ministerial act in enforcing a clear existing policy, so that dismissal would be premature.

Count I of the complaint, alleging a violation of Doe's freedom of speech, was dismissed with the agreement of Doe's attorney. Current authorities hold that high school students enjoy some First Amendment protection in terms of personal expression at school, but it is unclear whether the First Amendment similarly extends to junior high school students, and evidently Doe's attorney decided that there were sufficient other theories for this case to merit avoiding pressing forward on this unprecedented claim. The court similarly dismissed Count II, which was brought under a state law protecting the right of students as to "personal dress and appearance," because this was a "local option" provision, and the City of Brockton has never formally voted to adopt this provision.

Count V of the complaint presented the most interesting issue: whether the Massachusetts Declaration of Rights, Art. CXIV, which bans discrimination by the state against qualified handicapped individuals, would apply to a transgender junior high school student. The defendants noted that the federal Rehabilitation Act expresslys exempt transgenders from coverage as handicapped individuals, and argued that the court should adopt a similar construction for the state law. The court was unwilling to do so, however, noting that prior to the 1992 effective date of an amendment excluding transgenders from coverage under the federal rehabilitation act, two federal courts had refused to dismiss employment discrimination claims brought by transgendered people under the Rehabilitation Act. While the Congressional response to these decisions removed coverage for transgenders under federal law, the court found that this development was not binding on construction of the state law. "The Supreme Judicial Court had made it clear that this Commonwealth has a proud and independent tradition in protecting the civil rights of its citizens, and will not follow in lock-step federal civil rights law," wrote Gants, finding that Massachusetts has chosen to "protect all persons who meet the definition of 'qualified handicapped individuals' from discrimination in state programs, regardless of the specific nature of their handicap."

Asserting that "there is wisdom to such an approach," Gants commented: "It recognizes that, as our knowledge of genetics, biology, psychiatry, and neurology develops, individuals who were not previously believed to be physically or mentally impaired may indeed turn out to be so, and may warrant protection from handicap discrimination. It also recognizes that this may mean that persons who were previously thought to be eccentric or iconoclastic (or worse) and who were vilified by many people in our society may turn out to have physical or mental impairments that grant them protection from discrimination. Stated differently, the traits that made them misunderstood and despised may make them persons enjoying special protection under our law." And, Gants found, using the "generic definition" of a "qualified handicapped individual," "this Court cannot categorically say that Doe falls outside that definition." As a result, the defendants' motion to dismiss the handicap discrimination claim failed.

Next Gants took up the defendants' motion to dismiss Count VI, based on a state law that provides that school authorities may not permanently exclude a pupil for alleged misconduct without a hearing. The school authorities insisted they had not permanently excluded Doe, but merely required that Doe dress as a boy if she wanted to attend school. The court found that this was a "constructive exclusion," analogous to constructive discharge in the employment context, and thus their conditioning her attendance on dressing in a way that would be psychologically harmful to her did invoke the statute. Indeed, Gants commented that even though on a motion to dismiss all that was necessary to defeat the motion would be allegations by Doe that requiring her to attend school dressed as a boy would be psychologically harmful, in this case a look at the record showed that Doe had already submitted probative evidence on point, in the expert testimony of Prof. Gerald Mallon of Hunter College School of Social Work, who submitted an affidavit squarely stating that he had observed children who were "significantly harmed by clinicians, caregivers, and other adults in childrens' lives who insist on 'correcting' gender variant children by attempting to make them more gender conforming." Thus, the court denied the motion to dismiss this count.

Finally, Gants granted Doe's motion to amend the complaint to add the City of Brockton as a defendant, finding applicable a statute providing for municipal liability if a pupil is improperly excluded from attending the public schools.

Commenting on the court's rulings, Staff Attorney Jennifer Levi from Gay and Lesbian Advocates & Defenders, representing Doe, said that the court's opinion was, to her knowledge, "the first in the Commonwealth recognizing that a transgender student may be covered by disability discrimination protections." A.S.L.

Court Rejects Constitutional Challenges to Louisville, Jefferson County, Kentucky Rights Ordinances

Ruling on March 21, U.S. District Judge Charles R. Simpson, III (W.D. Ky.) rejected constitutional challenges to gay rights ordinances adopted by the city of Louisville and the surrounding Jefferson County, Kentucky during 1999. *Hyman v. City of Louisville*, 2001 WL 289890.

In February 1999, the city of Louisville amended its city code to add a provision banning employment discrimination on the basis of sexual orientation or gender identity. Later that year, the county legislature followed suit on a broader scale, forbidding discrimination on the basis of sexual orientation or gender identity in employment, housing, and public accommodations. There is some dispute about whether the county legislation is applicable within the Louisville city limits, which is being sorted out in separate litigation. Judge Simpson noted that Judge Stephen Ryan of the Jefferson Circuit Court had ruled that the county ordinance only applies to unincorporated portions of the county.

J. Barrett Hyman, a medical doctor who is very opposed to the ordinances, brought an action in federal district court to have them declared unconstitutional. Hyman, backed up by a conservative "public interest" litigation group that specializes in filing such lawsuits nationwide, made a variety of interesting and innovative arguments, none of which found favor with Judge Simpson. Citing Biblical prohibitions on homosexuality, Hyman asserted that because of his religious beliefs he would have to violate both ordinances in making employment decisions in his medical practice. He claimed that he had already asked applicants for an open position in his office about their sexual orientations, in order to avoid hiring gays, and that his attempt to place a help-wanted ad in a local newspaper had been rejected due to the content of the advertisement, presumably due to the newspaper's desire to comply with local non-discrimination laws.

Judge Simpson found that because Hyman is an openly proclaimed violator of the ordinances, and because local authorities have not disclaimed any intention of enforcing the ordinances, he has standing to seek a declaratory judgment and the dispute is ripe for judicial consideration.

Hyman's first argument is a religious free exercise claim, asserting that "the ordinances impermissibly distinguish between individuals who, based on their religious beliefs, seek to make employment decisions on the basis of sexual orientation or gender identity and religious institutions with the same intentions. By including a broad exemption from compliance for religious institutions, Hyman argues, the legislators had discriminated against him; his pastor can refuse to hire homosexuals, but he cannot. The court analyzed this claim under the Supreme Court's ruling in *Employment Division v. Smith*, 494 U.S. 872 (1990), which upholds against First Amendment free exercise challenge state laws that are neutral with respect to religion but have an incidental effect on religious practice. Hyman claimed that the enactment of a religious exemption solely for religious institutions and not for religious individuals rendered the law non-neutral on its face and thus subject to constitutional attack. The court disagreed, finding that the legislators did not have a purpose of restricting any practices because of religion, but rather were walking that fine line between free exercise and establishment where religious organizations may be exempted from complying with particular laws in order to avoid excessive government entanglement with religion. This provided a rational basis, in the court's view, for enacting an exemption for religious organizations but not for individuals.

Furthermore, the court found in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of America*, 515 U.S. 557 (1995), a case generally accounted as a gay rights defeat for upholding the exclusion of a gay Irish group from Boston's St. Patrick's Day Parade, some dicta supporting the proposition that laws prohibiting sexual orientation discrimination are "well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination." The court also found that the Kentucky constitution's protection for religious free exercise was coextensive with the federal 1st Amendment, and thus provided no independent basis for any religious challenge to the ordinance by Hyman.

Next, based on his experience with the rejection of his newspaper ad, Hyman claimed the ordinances violated his free speech rights. Here he ran into a solid Supreme Court precedent, *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), holding that a provision of Title VII forbidding sex discrimination in job advertising was constitutional. In that case, the court found that help-wanted advertising was commercial speech, which would have to give way to the strong government interest in stopping hiring discrimination. Hyman also alleged that the ordinances were overbroad, claiming that they would penalize all public criticism of the ordinances and homosexuals. The court disagreed, finding nothing in the ordinances that would lend themselves to that interpretation, merely because they forbade anybody from "inciting" violations. The court found that the incitement requirement has to do with language seeking to spark an imminent violation, and nothing Hyman alleged fell into that category.

The court also rejected Hyman's freedom of association argument, pointing out that these claims had been set to rest in *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), in which the Supreme Court upheld against freedom of association attack the application of a municipal sex discrimination law to the membership policies of a civic association. In that case, the Court effectively ruled that associational freedom claims on behalf of commercial actors would be trumped by government policies forbidding discrimination.

The court also rejected due process and equal protection claims, finding that the use of the terms "sexual orientation" and "gender identity" did not raise vagueness concerns and once again rejecting the argument that that affording an exemption to a religious organization would be a basis for invalidating the ordinance.

The court also rejected a preemption argument, finding that the state of Kentucky's enactment of a civil rights law was not intended to preempt counties and cities from adopting broader civil rights laws. Finally, the court rejected some technical arguments based on the Kentucky constitution having to do with division of powers and who may vote on local legislation.

Given his outspoken opposition to the ordinances and the financial resources of the right-wing organization behind his lawsuit, it seems likely that Hyman will appeal this ruling. A.S.L.

Courts Uphold Causes of Action Against School Districts by Homophobically-Harassed High Schoolers

In what seems to be a emerging trend, students are no longer content just surviving high school, but are now seeking to use the courts to redress their unfortunate situations. In *Henkle v. Gregory*, 2001 WL 213005 (D. Nev., Feb. 28), a gay high school student, Derek R. Henkle, sued school officials in their individual and official capacities and the Washoe County School District on a number of counts for violating his civil rights under 42 U.S.C. sec. 1983 and 20 U.S.C.A. sec. 1681 (Title IX). Magistrate Judge McQuaid ruled that Plaintiff's sec. 1983 claims were subsumed by his Title IX claims, that the defendants were not entitled to qualified immunity as a matter of law, and that punitive damages were available under his Title IX claims. Derek's Title IX claims were the only ones to survive Defendants' Summary Judgment Motion.

Derek began his freshman year at Galena High School in 1994 after skipping the eighth grade. In Fall 1995, Derek appeared on the local access channel's program "Set Free" where he participated in a discussion about gay high school students and their experiences. From this point on, Derek alleges that during school

hours and on school property, he endured constant harassment, assaults, intimidation, and discrimination by other students because he was gay and male. Also, after being notified of the continuous harassment, school officials failed to take any action. At the end of the Fall 1995 semester, Derek asked to leave Galena because he feared further harassment and assaults. Derek was transferred to Washoe High School, an alternative high school. Defendant Anastasio, the principal of Galena, allegedly conditioned Derek's transfer on him keeping his sexuality private.

During Derek's stint at Galena, he wore buttons on his backpack with gay slogans, but removed them upon his transfer. Defendant Floyd, the principal at Washoe High School, told Derek to "stop acting like a fag." At Washoe, Derek was subject to the same harassment, and again, no school official acted to end the torment. Derek was subsequently transferred to Wooster High School, and once again, prior to the transfer, was told to keep his sexual orientation quiet. Derek's time at Wooster was no better, and school officials again took no steps to protect him. After he was attacked, Defendants Floyd and Anastasio agreed that Derek should be transferred back to Washoe. However, Floyd later decided not to accept him at Washoe, despite having room for him. Instead, Defendants placed Derek in an adult education program at Truckee Meadows Community College, thus making him ineligible for a high school diploma because he was no longer enrolled in a public high school.

The court found that the central issue in this case, however, was whether a sec. 1983 action could be based upon an alleged Title IX violation. After examining decisions in other circuits, the magistrate judge determined that the remedial devices provided in Title IX were sufficiently comprehensive to demonstrate congressional intent to preclude the remedy of suits under sec. 1983, thereby providing the basis upon which it dismissed four of Derek's claims. As for his First Amendment claims, the court found that he had made allegations sufficient to prove that the speech at issue was constitutionally protected and that the speech was a substantial or motivating factor in the adverse action. The court also denied Defendants' assertions of qualified immunity because their conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known.

Regarding Derek's claims for punitive damages, the court followed *Reese v. Jefferson District No. 14J*, 203 F.3d 736 (9th Cir. 2000), in which the 9th Circuit set four requirements for the imposition of school district liability under Title IX for student-on-student sexual harassment: (1) the school district "must exercise substantial control over both the harasser and the context in which the known harassment occurs"; (2) the plaintiff must suffer "sexual harassment … that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school"; (3) the school district must have "actual knowledge of the harassment"; and (4) the school district's "deliberate indifference subjects its students to harassment." The court determined that a punitive damage instruction could be warranted for a Title IX violation.

In a somewhat parallel case, U.S. District Judge Diclericojr granted and denied in part, defendants' Motions for Summary Judgment in *Snelling v. Fall Mountain Regional School District*, 2001 WL 276975 (D.N.H. March 21, 2001). Plaintiffs, Joel and Derek Snelling, brought suit against the school district and school officials and personnel alleging claims under Title IX, 42 U.S.C.A. sec. 1983 and state law.

Derek Snelling entered Fall Mountain Regional High School as a freshman in September of 1994. He was small for his age, but played basketball. Although he had never been harassed before attending high school, Derek recounts that harassment began after an incident in November 1994. After practice on November 16, Derek was the only person who took a shower. The next day at school, one of the other team members walked up to Derek and said, "How are you Stiffy? I saw you in the showers last night with another guy and you had a 'stiffy.'" From then on, Derek said that he was called Stiffy by the other team members, among other derogatory and anti-Semitic names. Derek continued to suffer homophobic remarks and other derision of his manhood. Derek also felt that the coaches did not treat him fairly, as they often chose other team members over him and refused to discipline the other players for their inappropriate conduct.

Joel Snelling entered high school in the fall of 1995. By this time, verbal abuse of Derek had spread to the other students from the basketball players. The coaches continued to ignore the abuse and intentional physical abuse of Derek by the other players. Joel reports that he did not experience much harassment until his sophomore year when students began calling him "Little Stiffy." Derek complained to the principal, Alan Chmiel, about the abuse. In response, Chmiel explained to Derek that peers could be mean in high school, which is part of growing up. Chmiel said that Stiffy was just his nickname, which he should accept and move on.

Derek and Joel brought weight vests to wear during practice to enhance their jumping ability in games. At practice, Coach Weltz referred to the vests as "bras" and would tell them to take their bras off. Weltz said that Derek could take his bra off faster than Joel could. The coaches continued to ignore the verbal and physical harassment of Derek and Joel by the other players. In December 1996 Derek aired his concerns about his treatment to Assistant Principal Dimick who told him to fill out a sexual harassment complaint. Derek believed that this action would only worsen the situation, but when asked about the incidents, Coach Weltz denied such actions. Mr. and Mrs. Snelling met with the superintendent of the school district, Leo Corriveau, in March 1997. After the meeting, the district's lawyer sent the Snellings a letter in which he set out the action that would be taken. However, the abuse and harassment continued until graduation, during which, when Derek received his diploma, the entire class screamed "Stiffy." In one incident, Joel suffered physical injuries when a student bounced a ball off his head, in apparent retaliation for Joel's complaints against the basketball coach.

Judge Diclericojr dismissed plaintiffs' Title IX claims against the individual defendants because Title IX claims were cognizable only against the federal funding recipient, the school district.

To be actionable under Title IX, harassment must be so severe, pervasive, and objectively offensive that it undermines and detracts from victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities. Moreover, the Office of Civil Rights (OCR) Title IX Guidelines identify the following factors to consider in assessing the severity of student harassment: the degree of the effect on the victim's educational experience; the type, frequency, and duration of the conduct; the identity and relationship between the harasser and the victim; the number of individuals involved (a group is worse than an individual); the ages and sexes of the harassers and victims (harassment of younger students by older ones more intimidating); the size of the school, location of the incidents, and context in which they occurred; other incidents at the same school; and incidents of gender-based, but non-sexual harassment. Title IX liability could arise when a funding recipient remains indifferent to severe gender-based mistreatment played out on a widespread level among students. The court found that the extent of the school officials' deliberate indifference to plaintiffs' treatment was an issue of material fact, despite the defendants' claims that their response was reasonable given "simple acts of teasing and name-calling among school children."

The plaintiffs' section 1983 claims contended that the harassment violated their Fourteenth Amendment rights to substantive due process and equal protection. Regarding substantive due process, the court found that this provision does not apply to the state's failure to provide protection against the actions of private parties, except in limited circumstances when the state created a special relationship with the

plaintiff as in the custodial setting of a prison or a mental hospital and when the state created or markedly increased the risk of danger to the plaintiff. To be actionable under an increased-risk-of-danger theory, the state actors must have engaged in affirmative conduct that created or markedly increased the plaintiff's risk of harm and the state actor's conduct had to be conscience-shocking or outrageous. The court held that the defendants' behavior did not rise to this level.

The court also found that plaintiffs' equal protection claims were insufficiently pleaded to survive a motion for summary judgment.

In this current social climate where high school students are no longer sitting idly and just suffering through the injustices of adolescence as a growing pain, it is interesting to see such cases arise and to have them taken seriously. The most interesting nonlegal question in this case is where the line is crossed from simple acts of teasing to harassment based upon gender and sexual orientation. The bar, it seems, is being lowered. *Leo L. Wong*

Federal Court Grants Habeas Corpus to Slaughterer of Gay Man

A Louisiana Federal District Court granted a writ of habeas corpus sought by Charles Faulkner, who was convicted of killing Steven Radoste. Faulker claimed that evidence of Radoste's homosexuality, rubber gloves and pornography, was improperly suppressed at trial. *Faulkner v. Cain*, 2001 WL 218922 (E.D.La.. February, 7, 2001).

Faulkner was convicted in 1983 and sentenced to life in prison for the killing of Radoste in 1982. Faulkner and Frederick Kirkpatrick were hitchhiking from Mississippi to New Orleans when Radoste gave them a ride and let them stay at at his home that night. Faulkner claimed that Kirkpatrick killed Radoste in "rage and anger" after he made an "unwanted homosexual advance" toward him. According to Faulkner, Kirkpatrick had taken a shower at Radoste's home and came into the living room wearing a towel. Radoste, also wearing a towel, had a conversation with him which Faulkner did not hear. Radoste then left the room and returned with a gun, telling Kirkpatrick, "You're going to do this one way or another." Kirkpatrick hit Radoste on the head with an object, stabbed him twice and shot him in the head. Faulkner then helped Kirkpatrick load Radoste's belongings into his truck, returned to Mississippi and burned the truck. Faulkner said he helped Kirkpatrick "because he was frightened."

The prosecution argued that Faulkner and Kirkpatrick sought to rob and kill Radoste. The prosecution claimed that if Faulkner did not kill Radoste personally he "took an active part in the offense and attempted cover up." The prosecution argued that if "an unwanted sexual advance" was made, Kirkpatrick could have fled after the initial blow to Radoste and sought help. There were also an instance when Faulkner was alone and could have fled from Kirkpatrick. In attempting to show that Radoste was heterosexual, a detective, William McCormick, testified that there was no "homosexual pornography" at Radoste's house. McCormick said that there was "a stack of magazines featuring naked women." The prosecutor criticized references to Radoste's sexual orientation "as baseless and unjustified attacks." Two officers who were at the scene before McCormick wrote in their reports that there was "a drawer full of rubber gloves, which apparently can be associated with homosexual activity." Faulkner was not told of the report. Kirkpatrick, tried separately, was sentenced to death. In his habeas corpus petition, the first officers on the scene "recalled being shown homosexual pornography, and a drawer full of rubber gloves."

The State's denial of Kirkpatrick's petition was vacated and he subsequently plead guilty in exchange for a life sentence and withdrawing his petition. Federal District Judge Fallon found that the evidence of the rubber gloves and homosexual pornography were favorable to Faulkner and that "the reasonable probability [was] that the outcome would have been different had the evidence not been suppressed..." *Daniel R Schaffer*

5th Circuit Rules Employer Need Not Accommodate Anti-Gay Employee in Counseling Position

Reversing the district court's refusal to direct a verdict against an employer, the U.S. Court of Appeals for the 5th Circuit set aside a verdict awarding more than $300,000 in damages against an employer that had discharged a counselor who refused to counsel gay employees due to her religious beliefs. *Bruff v. North Mississippi Health Services, Inc.*, 2001 WL 246354 (March 28). The magistrate judge who had been assigned responsibility for the trial had allowed a religious discrimination under Title VII to go the jury, which made a multi-million dollar damage award, that was then reduced to the statutory cap by the judge.

Sandra Bruff graduated from the Reformed Theological Seminary in Jackson, Mississippi, with a master's degree in marriage and family counseling, and was hired as a counselor by the defendant, a health care institution that provided employee assistance programs to employees of various businesses in the region. Bruff was one of three individuals employed as EAP counselors, a job requiring travel to the various businesses in Tupelo and Oxford, Mississippi, where the employer had contracts with local businesses to provide such counselling on personal matters for their employees. The difficulty arose in 1996 when Bruff was assigned to counsel a woman identified in court records as "Jane Doe," a self-identified lesbian who asked Bruff for advice on improving her relationship with her lesbian partner. Bruff declined to counsel Doe on that subject, telling her that homosexual behavior conflicted with Bruff's religious beliefs. Doe complained to her employer, which in turn complained to Bruff's employer. After investigating, the employer determined that Bruff was not suitable to perform this job due to her insistence that she would not counsel gay people on their relationships and, upon further questioning, that she would not counsel heterosexuals about their relationships either, if they were not married to their partners. The employer offered to accommodate her by transferring her to a different position that would not present this problem, but she was not cooperative with efforts to transfer her, applying only for one posted position that went to a better qualified applicant. Ultimately she was discharged.

She alleged a violation of Title VII's ban on discrimination on the basis of religious belief or practice, and a common-law wrongful discharge claim premised on the Mississippi sodomy law (i.e., that it would violate public policy to discharge her for refusing to counsel people about engaging in violations of the state's criminal code).

Circuit Judge Politz found that the district court should have directed a verdict in favor of the defendant employer. Examining uncontroverted facts on the record, it appeared to the court as a matter of law that although Bruff made out a prima facie case under Title VII, the employer had attempted to accommodate her religious requirements to the extent compatible with its legitimate business needs. Politz commented that nothing in Title VII requires an employer to accommodate an employee's "inflexible position" that she will not perform certain tasks that are part of her job function, and that attempting in advance to screen out employees who might present problems for Bruff and have one of the other two EAP counselors deal with them was not feasible and would impose more than de minimis expense on the employer.

The court affirmed the district court's dismissal of the state common law wrongful discharge claim. "Nothing in the record suggests that she, or any other counselor, was ever asked to counsel anyone on the performance of sexual acts," wrote Politz, "nor that she ever raised any such concern with anyone. We find that argument specious, and we agree with the trial court that this is strictly a Title VII religious discrimination case." The court of appeals ordered that the judgment on the Title VII claim be reversed, and rendered judgment dismissing Bruff's claims with prejudice. A.S.L.

IRS Rules on Tax Status of Domestic Partnership Benefits

The Internal Revenue Service recently ruled that health coverage provided to a non-spouse domestic partner of an employee participant in a multi-employer voluntary employees beneficiary association (VEBA) is not considered gross income to the employee or wages for employment tax purposes, if the domestic partner is a legal "dependent" of the employee. The IRS letter ruling, which was issued on November 17, 2000, was published in the February 26, 2001 edition of Tax Notes Today. (2001 TNT 38–39)

Section 501(c)(9) of the Code describes a VEBA as an association that provides for the payment of life, sick, accident, or other benefits to its members or their dependents or designated beneficiaries. The VEBA that requested this letter ruling from the IRS was a fund created pursuant to a collective bargaining agreement between a union and various employers. The fund's health coverage program provides for payments to health care providers for the cost of medical, hospital, and dental care for participants and their dependents, as well as to eligible domestic partners. Domestic partner coverage entitles the eligible domestic partner of a plan participant and the domestic partner's dependent children to the same health coverage that is available to all other plan participants and the spouses and dependent children of plan participants.

The IRS explained in its letter ruling that under section 152(a)(9) of the Internal Revenue Code, a dependent is defined as one who receives more than half of his or her support from the taxpayer for the year, and who has the same home as the taxpayer as his or her principal abode, and is a member of the taxpayer's household during the entire taxable year of the taxpayer. Under the IRC, the individual cannot be considered a member of the taxpayer's household if the relationship between the individual and the taxpayer is in violation of local law. The union VEBA at issue in this case presumes that a domestic partner is not a dependent of the plan participant unless either the participant provides her or his prior year's Form 1040 reflecting that the domestic partner has been claimed as a dependent, or the participant executes a written certification that the domestic partner qualifies as the participant's dependent in accordance with the rules of the IRS. In its letter ruling, the IRS accepted this certification process.

While the ruling is useful in those instances where a same-sex domestic partner can demonstrate that she or he is indeed a dependant of a plan participant, it has no impact on same-sex couples where the domestic partner has gainful employment of her or his own, or lives at a different address even for only part of the year. In such cases, according to the IRS, the domestic partner is not a legal "dependant" of the VEBA plan participant, and the value of the domestic partner's health coverage is income and wages to the employee participant. The letter ruling cites the Defense of Marriage Act on this point. The utility of the IRS letter ruling is therefore limited, and serves only to affirm that in the context of federal tax law, same-sex partners are subject to lawful discrimination.

The letter also provides that so long as benefits to domestic partners and their dependents comprise a de minimis portion of the plan's expenditures, the tax-favored treatment of the plan will not be endangered.

The letter ruling was written by Particia M. McDermott, IRS Associate Chief Counsel (Tax Exempt and Government Entities) and Branch Chief of the Office of Division Counsel. *Ian Chesir-Teran*

Ohio Appeals Court Rules on Same-Sex Harassment Claim

The Ohio 10th District Court of Appeals ruled that Rachel Brentlinger had stated a valid hostile environment same sex harassment claim based on conduct by her former supervisor, Kathleen Towslee, but that her retaliatory discharge claim was clearly without merit. *Brentlinger v. Highlights for Children*, 2001 WL 290071 (March 27).

Brentlinger was hired as a customer service supervisor, reporting to Towslee, on March 3, 1997. She claims that several times over the next few months, Towslee subjected her to unwanted touching, including pinching her behind and swatting her with a roll of paper. Brentlinger protested these actions to Towslee, and in November 1997 complained to the Human Resources manager, who offered to speak with Towslee. Brentlinger asked that he not tell Towslee who had complained about her. The HR manager made some vague inquiries, apparently failing to communicate to Towslee that her conduct had been the subject of serious complaints. Later in December, Brentlinger met with Towslee's immediate superior to complain again; this individual said something would be done after the holidays, but when Brentlinger heard nothing back by early February, she again approached supervisors and said she felt uncomfortable working with Towslee. The employer hired an outside consulting firm in March, but Brentlinger failed to return the consultant's phone call. Meanwhile, she hired an attorney who wrote to the CEO of the employer. Upon receiving this letter, the employer involved its own counsel, undertook a full investigation, and dismissed Towslee for misconduct.

Subsequently Brentlinger received a wage increase and seemed to get along well with her new supervisor, but problems allegedly developed between her and other employees in the department. In August she asked the HR manager if the company would reimburse the cost of the attorney she had hired to deal with the harassment issue. He passed along her request but advised that he thought she would not be reimbursed. About a month later, after the company finished investigating various complaints against Brentlinger by coworkers, she was placed on probation and was discharged while on a forced week off. Brentlinger's suit alleged sexual harassment (hostile environment) based on the Towslee incidents and retaliatory discharge for protected activity.

The trial court granted summary judgment on these claims to the company, finding that it had promptly taken steps to deal with the Towslee matter and thus bore no liability for harassment, and that the company had successfully articulated legitimate reasons for discharging Brentlinger. The court of appeals, in an opinion by Judge McCormac, agreed with the later ruling but not with the former. The court found that Brentlinger's allegations created a jury question as to whether the company had responded adequately, noting that Brentlinger first complained in November 1997 but that the company didn't undertake a serious investigation until after receiving the lawyer's letter in March 1998, and that Brentlinger's factual allegations about her treatment by Towslee were sufficient for a prima facie case of hostile environment same-sex harassment. However, the court found that the complaints against Brentlinger by co-workers provided a legitimate basis for discharge, and that there was no evidence the company discharged her for requesting reimbursement for her attorney costs. Since she had been given a raise after Towslee's discharge, the court also found no evidence that Brentlinger's discharge had anything to do with her complaints about Towslee. A.S.L.

Tennessee Supreme Court Approve Workers Comp Panel Ruling in Favor of Gay Man Who Suffered Work-Related Injury

In *Coleman v. Lumbermens Mutual Casualty Co.*, 2001 WL 285209 (March 15), a gay man who suffered a workplace injury obtained vindication of his claim to continued benefits for psychological impairment flowing from the injury.

David Coleman, a semi-literate gay man with a third-grade education, suffered the loss through death of both his long-time companion, Bruce Jaco, and Bruce's mother, with whom David was also close, early in 1994, as a result of which he received psychotherapy to cope with depression. Later in 1994, he was employed by Heilig-Meyers Furniture Company as a salesman. While at work on July 7, 1995, he received a severe injury to his shoulder when a hide-a-bed sofa fell on his right shoul-

der in the warehouse. He received emergency medical treatment and pain relievers and was placed on six-months disability leave. While on leave, he began drinking and developed severe depression due to the pain and his inability to work. His doctor released him to work early in 1996 and the disability payments stopped. However, his attempts to resume work were unsuccessful, as continuing pain in his shoulder impeded his ability to perform normal work tasks, and he lost his job and benefits. He sank into further depression, moving in with Bruce Jaco's niece, who testified that he had been a workaholic. She also testified that he had never abused drugs or alcohol prior to his work-related accident. His depression got so bad that he was institutionalized for a while, but the institution discharged him because there was no money to pay for continued treatment while his workers compensation claim was being litigated.

In earlier proceedings, the workers compensation administrators were very stingy in their findings, and apparently had attributed his psychological problems mainly to his being gay and having lost his lover. However, in this new appeal from a prior ruling that had determined his physical disability at 25% and his emotional disability at 25%, Supreme Court's Special Workers Compensation Appeal Board found that the administrators had misinterpreted a prior remand from the court of appeals and mistakenly seemed to believe that they could not find a greater percentage of psychological disability than the percentage of physical disability. The panel recommended, and the Supreme Court ordered, that the matter be remanded for a new determination of psychological disability. In the meanwhile, reacting to undisputed record testimony that Coleman was desperately in need of psychotherapy to prevent his depression from sliding into suicide, the Court ordered that the employer pay temporary permanent disability benefits retroactive to the date when benefits previously ceased in January 1996, so Mr. Coleman will be able to get the treatment he needs for now as the case continues. A.S.L.

Drug-Using Gay Dad Loses Custody of Children

In *Matter of Fouty*, 2001 WL 227672 (Ohio App. 5 Dist. March 7), the Ohio Court of Appeals affirmed a juvenile court order granting permanent custody of three minor children to the Guernsey County Children's Services Board (GCCSB), and granting permanent termination of the natural father's parental rights. The three boys are ages 8«, 7 and 5«.. The father was divorced and had custody of the children.

The petition alleged that the three minor children were abused and neglected children, and after substantial findings of fact, the trial court agreed. The record reveals that the father is a gay man who has a history of drug abuse. At trial, the father's step-sister outlined a long history of severe physical abuse of the children, dating back to when the eldest son was 2 months old, testified that the children had been exposed to the father's drug use and to homosexual pornography, and that the eldest son had walked in on the father and the father's boyfriend engaged in sexual activity on one occasion. The step-sister knew all this because she lived with the family.

At trial, the father admitted that in Spring 1999, he left the children for a week in the care of a "friend" who had molested the father when he was a teenager and who he knew had molested his own younger brother when the brother was a minor. When pressed by the court as to why he would do that, he said that he did not think that the friend would bother his children, because the friend "was good to the children" and the children "enjoyed seeing him." The father said he assumed that the friend would not molest his children because he had been a teenager when the friend molested him, and he assumed that the friend "liked teenagers rather than children."

Despite the father's assertions to the contrary, from the court's opinion by Judge Hoffman it appears there was an adequate factual basis for termination of parental rights and for the affirmance of the trial court decision. While the facts were painful, it is clear that the decision was not difficult. *Steven Kolodny*

Appeals Court Orders Admission of Defendant's Evidence of Community Standards in Obscenity Trial

The Appellate Court of Illinois, 5th District, upheld as harmless error the evidentiary bar on a petition supporting the rental of adult videos, but reversed a ruling that barred introduction of a defense survey about community acceptance in *People of the City of Belleville v. Family Video Movie Club, Inc.*, 2001 WL 233635 (Jan. 31). The result was to vacate a jury verdict imposing a $2,000 fine, $1000 for each video seized by the police as violative of the local obscenity ordinance.

At trial Family Video Movie Club, Inc. (Family) proffered two items of evidence to show that two videos it rented, "The Ultimate Pool Party No. II" and "Where the Boys Aren't, No. 7," were not patently offensive according to community standards. Both items were denied admission. The first item was 100 customer signatures on petitions drafted by Family, 97 in support of Family's right to rent adult videos and three opposed. Noting that "the trend today is to admit public polls and surveys, despite their hearsay character, because the technical adequacy of a survey is a matter running to the question of the weight to be given such evidence, not its admissibility," the appellate court stated that while it would have permitted the defense to admit the signatures, the trial court's refusal to do so was harmless because they were virtually worthless as an indicator of a community standard. The second item proffered was the results of an investigation, conducted by a law clerk for the defense, into the availability of sexually explicit videos in nine Illinois cities. The appellate court, noting that the availability of comparable videos may indicate that the challenged videos "enjoy a 'reasonable degree of community acceptance,'" held that by refusing to allow Family to present evidence of the survey, the trial court denied Family's right to introduce the best evidence offered on the issue of a community standard.

The trial jury, unpersuaded by the testimony of certified sex therapist Judith Seifer, Ph.D., levied the maximum fine of $2,000 against Family for violating Belleville's obscene literature ordinance. Seifer had testified as an expert for the defense that differences in people's comfort levels with sexually explicit material are more dependent on age and educational level than on geographic location within the U.S., and that "a majority of adult videos of the x-rated genre are now rented by women." Seifer opined that the first video had educational value because it depicted group and oral sex, the second video would help educate women curious about same-sex encounters and lesbian relationships and had scientific value for women considering the results of breast implants, that couples in sex therapy who might want to experiment sexually should do so vicariously by watching video before risking a potentially traumatic experience, and the average individual would be unlikely to find either video patently offensive.

The appellate court remanded the case for retrial, holding that exclusion of the survey results required the jurors to apply personal standards rather than a community standard to determine obscenity, which was prejudicial to Family's defense. *Mark Major*

Lesbian Police Officer Adequately Pled Continuing Violation in Case Against NYPD

U.S. District Judge Sweet found that Myra Salgado, formerly a New York City Police Officer, had alleged facts sufficient to support a continuing violation theory, and thus rejected the argument by the Police Department defendants that most of her discrimination and harassment claims were time-barred. However, Judge Sweet did reject Salgado's civil rights conspiracy claim against various other officers in the department. *Salgado v. City of New York*, 2001 WL 290051 (S.D.N.Y. March 26).

Salgado joined the NYPD in January 1983. In 1988, she was assigned to the Missing Persons Squad, a subdivision of Special Investiga-

tions, and she was promoted in 1989 to Third Grade Detective. In the fall of 1993, she was assigned to share an office with Nicolas Negron, the second in command of the Squad. In April 1994, Negron discovered that Salgado was gay, and began subjecting her to harassment and discriminatory assignment practices, according to Salgado's complaint. The information about her sexual orientation spread to other officers in the unit, and harassment accelerated. She made numerous complaints, none of which resulted in any effective action by her superiors, and ultimately she resigned from the police department in January 1998. Her lawsuit, combining claims under 42 U.S.C. sec. 1983 and 1985 and the NY City Human Rights Law, alleges constructive discharge, discrimination, harassment, and a conspiracy among named police officers to deprive her of her constitutional rights.

In this motion, the City sought dismissal of all claims based on actions that occurred more than three years prior to the filing of her complaint in May 2000 on grounds of the statute of limitations, and dismissal of the conspiracy claims against the individual officers. Judge Sweet accepted the City's argument that the officers, as employees within the entity of the Police Department, could not be charged with conspiracy under the "intracorporate conspiracy" doctrine, which holds that officers, agents and employees of a single corporate entity, such as the Police Department, each acting within the scope of her employment, are legally incapable of conspiring together.

However, the court found that Salgado's allegations qualified for treatment as a continuing violation; so long as some of the alleged harassment and discrimination occurred within the statute of limitations, earlier conduct of a similar kind could also be examined. Judge Sweet noted that while technically one could argue that Salgado's time to bring legal action should have begun running as soon as she began experiencing harassment, she did complain to superiors and attempt to put internal mechanisms for dealing with the problem into motion. Wrote Sweet, quoting from *Johnson v. Nyack Hospital*, 891 F. Supp. 155 (S.D.N.Y. 1995), aff'd on other grounds, 86 F.2d 8 (wnd Cir. 1996), "'the question [of] when a plaintiff in a discrimination case 'has had enough' so as to warrant the commencement of litigation may be subtle an difficult… [and] many employees who seek to hold on to their jobs in the face of a hostile environment face hard choices.' Certainly Salgado did. It cannot be said as a matter of law, based on the pleadings, that Salgado's duty to sue was triggered before May 15, 1997 — and certainly not as far back as April 1996 — as she attempted to negotiate the treacherous terrain of her work environment. Thus, she has made a sufficient showing of compelling circumstances to warrant application of the continuing violation doctrine." A.S.L.

Denial of Gay HIV+ Asylee's Petition Shows Importance of Legal Counseling for Aliens

Here's a heartbreaker... Carlo Pondoc Hernaez, a gay HIV+ Philipino, seems to have lost the complicated chess game that aliens play with the Immigration Service seeking to remain in the U.S., at least partly because he waited too long in the procedure to assert a claim for asylum based on the situation for HIV+ gay men in the Philippines. *Hernaez v. Immigration and Naturalization Service*, 2001 WL 289974 (9th Cir. March 27).

The procedural twists and turns of his case or too complicated to recite here in full detail. Briefly put, Hernaez arrived in Hawaii on a six-month visitor visa in September 1987. Just before the visa was to expire, he married a female U.S. Citizen, but it appears this was a wedding contracted in order to get a green card, and the marriage failed thereafter, Hernaez's wife subsequently notifying the INS that the marriage was fraudulent and that she was withdrawing her petition to get Hernaez a green card. In August 1989, the INS informed Hernaez that he had a month to voluntarily leave the country. But Hernaez stayed on, and a few years later aplied for an alien registration receipt card, thus bringing himself to the attention to the INS. He made the further mistake of showing up personally at an INS office in March 1992, at which time he was arrested as an "alien not lawfully entitled to be or remain in the United States," and he became the subject of deportation proceedings. Things were complicated by Hernaez having contracted HIV and developed a drug problem. He argued that he had kicked the drugs, and that he should be allowed to remain in the U.S. on a hardship basis due to his HIV infection and lack of appropriate treatment in the Philippines. This got him nowhere, and rather late in the proceedings he sought to raise an asylum claim, asserting that as an HIV+ gay man he would be subject to oppression in the Philippines. However, he submitted no new evidence specifically going to the question of whether there was systematic discrimination on the basis of sexual orientation and HIV status in the Philippines, and the 9th Circuit panel approved the Board of Immigration Appeals' decision denying his motion to reopen his proceeding in order to make the asylum claim.

The court's opinion includes a holding that it was not without jurisdiction to review certain aspects of Hernaez's appeal on the merits, as argued by the INS, but ultimately the court upheld all of the INS's substantive rulings that were subject to review. A.S.L.

Federal Sex Offender Escapes State Registration Under N.Y. Law

Pointing to a possible loophole in the state's sex offender registry scheme, a New York Supreme Court justice ruled March 8 that a man convicted of a federal sex offense may not be forced to register with state authorities. *In re David Nadel*, 3/8/2001 NYLJ 20, (col. 3).

In 1998, David Nadel, a New York resident, pled guilty in federal court to violating a federal statute outlawing transmission of child pornography over the Internet. New York law requires that residents convicted of sex offenses in other jurisdictions must register with the state if New York has an analogous criminal statute. Citing two state statutes barring the distribution of child porn, the New York Board of Examiners of Sex Offenders ordered Nadel to register with state police in August of last year. The extent of Nadel's registration obligation was to be based on a court's assessment of his risk to the community.

But prior to his hearing before the Supreme Court in New York County, Nadel argued that the federal and state laws were not sufficiently similar to trigger the state's registration requirement. The federal law bars the sending of sexually explicit pictures depicting individuals under age eighteen, while New York law only outlaws such images of children under sixteen. The Board countered that the distinction Nadel sought to draw was irrelevant because he transmitted pictures of children younger than twelve. Moreover, the Board argued that the court lacked authority to review its decision that Nadel should register.

Justice Rosalyn Richter thought the suggestion that the court lacked the authority to review the Board's determination "simply [made] no sense." She found it inconceivable that the legislature would require the court to decide how long and to what extent an offender must register without giving the court power to determine whether registration was required at all. The court went on to hold that Nadel was not required to register in New York, because the state laws lacked all of the "essential elements70 of the federal crime to which Nadel plead guilty. Justice Richter found the particular facts of Nadel's case irrelevant to its consideration, and instead looked strictly at the language of the two statutes. Because of the different age requirements, the court pointed out that "it is possible to violate the federal statute … without violating either of the analogous New York statutes." The statutes were therefore dissimilar enough to relieve Nadel of his obligation to register.

Despite the Board's protest that this decision would run counter to the spirit of New York's Sex Offender Registration Act, Justice Richter held that it was up to the legislature to cure any

gap in its statutory scheme. Justice Richter is a long-time member of LeGal. *T.J. Tu*

Anti-Tavern Zoning on Gay Bar Rumor Did Not Violate Due Process of Law

A panel of the U.S. Court of Appeals for the 7th Circuit ruled March 28 that town of Williamsport, Indiana, did not violate the due process rights of some business partners who had obtained a liquor license with the intention of opening a restaurant in the town, whose attempt was foiled by a local zoning change after rumors spread that the establishment would be either a topless bar or a gay bar. *L C & S v. Warren County Area Plan Commission*, 2001 WL 294312.

The plaintiffs stoutly and consistently denied, including during the hearing on their usage permit, that the establishment would be anything other than a normal restaurant that happened to serve liquor, but they were denied the license. The rumors about their establishment had caused the town council to amend its zoning ordinance to make "taverns" a "special exception" to uses permitted in the town's commercial district, requiring a special permit. The amendment to the zoning ordinance grandfathered the only existing bar in Williamsport. The plaintiffs argued that their due process rights were violated by the passage of the amendment, contending that under the circumstances it was in effect an adjudication against them without any opportunity for hearing or argument to dispel the rumors.

Writing for the panel, Judge Richard Posner mentioned that the rumors on which the amendment was based were "not even plausible, since topless (or at least fully topless) bars are illegal in Indiana and small county towns are unlikely venues for openly homosexual enclaves." Nonetheless, the court determined that due process requirements do not apply to legislative acts, only to judicial ones, and that the town's zoning decision was a legislative act, even if it was inspired by one particular proposed usage. Posner cited the Sherman Antitrust Act, which he said was intended in large measure to curb John D. Rockefeller's Standard Oil Trust, as an example of valid legislation that was aimed primarily at an individual. He also noted that it is very common for local governments to treat establishments that serve liquor differently from other commercial establishments under their zoning laws. Posner also pointed out that rather than running to federal court making constitutional arguments, the plaintiffs could have appealed the zoning board's decision to the Indiana state courts.

Posner also said that the plaintiffs' alternative claim, that the undefined term "tavern" in the zoning amendment was unconstitutionally vague, "borders on the frivolous." A.S.L.

Civil Litigation Notes

Sharon Smith of San Francisco, the surviving partner of Diane Whipple, who was mauled to death by a pit bull kept by her neighbors, is trying to make new law by persuading the California legislature to approve A.B. 25, a bill introduced by Assemblymember Carol Migden, which will allow unmarried same-sex and opposite-sex partners to bring wrongful death actions, as well as permit them to make medical decisions for each other and to inherit through intestate succession. Smith testified at a legislative hearing on March 13, after which the Assembly Judiciary Committee passed the bill by an overwhelming vote. Earlier that week, Smith filed a wrongful death action in San Francisco Superior Court against Marjorie Knoller and Robert Noel, her neighbors, and prosecutors are considering whether to charge Noel and Knoller with criminal responsibility in the matter. Although Smith was advised that California precedents make it unlikely that her personal injury claim will succeed, it is always possible that the courts might be persuaded to expand existing precedents to recognize unmarried partners, perhaps as a reaction to the state's recent passage of a law setting up a registration system for same-sex partnerships. *Los Angeles Times*, *San Francisco Chronicle*, March 14.

Amanda Lepore and Sophia LaMar, transgender specialty dancers, have filed a discrimination complaint against Twilo, the trendy dance club in Manhattan's Chelsea neighborhood, seeking $100,000 for being discharged due to their gender. Lepore and LaMar have been go-go dancing as women at the club, but they were discharged by the club manager, who said that the club decided they only wanted to use "real girls" or "biological girls" as dancers at the club. Their attorney, LeGaL member Tom Shanahan, told the *New York Post*(March 22): "They're world-class entertainers, an they had never been reprimanded by the club in any way. This was just a case of out-and-out discrimination."

More allies heard from: The *New York Law Journal* reported March 28 that the Association of the Bar of the City of New York and the NAACP Legal Defense & Education have filed amicus briefs in the pending appeal of *Levin v. Yeshiva University*, which will be heard by the New York Court of Appeals on April 24. Already on file were amicus briefs from NY Attorney General Eliot Spitzer, New York City Public Advocate Mark Green, and Lambda Legal Defense & Education Fund. *Levin* will be the first case argued before the highest court of a state contending that a school is in violation of statutory bans on sexual orientation discrimination by refusing to allow students who have same-sex partners to live with their partners in university housing on the same basis that married students are allowed to live with their spouses in university housing.

The ACLU announced March 16 that it had settled a lawsuit against the Anaheim, California, Union High School District over censorship of gay and lesbian books in the school library. The settlement will involve the school returning to the library collection books from the series "Lives of Notable Gays and Lesbians" that had been the source of contention. As part of the settlement, district officials promise not to remove books merely because parents or teachers object to any books having gay subject matter, and agreed to advise librarians to include books on controversial subjects, including gender and sexual orientation, in their collections. *Los Angeles Times*, March 17.

According to a March 22 report in the *Milwaukee Journal Sentinel*, Tommy Schroeder, a former schoolteacher in the Hamilton School District in Waukesha County, suffered dismissal of a lawsuit he brought against the district in 1999 claiming damages for the district's failure to deal with severe harassment against him — including a death threat by a student — after word got around that he was gay. Schroeder alleged that he reported all the acts of abuse and harassment from students and parents to district officials, but they did nothing to help him. U.S. Magistrate William Callahan, Jr., dismissed the complaint, finding that although Schroeder had been harassed by students and parents, the school district bore no responsibility and had not discriminated against him.

The New Hampshire Commission for Human Rights announced that it had found probable cause to believe allegations by Tricia Thompson that she was denied dental services by Dr. Jay Roper of Franklin, N.H., because she is a lesbian. Thompson's complaint indicated she had been a patient of Roper for several years, but when he discovered she was gay after asking her why she listed a woman's name as her "spouse" on the patient information card, he terminated treatment. Gay and Lesbian Advocates and Defenders are representing Thompson on her discrimination complaint. *Boston Herald*, March 7. A.S.L.

Criminal Litigation Notes

The *Washington Post* reported March 23 that U.S. Park Police have decided to get tough on gay people using the parkland around George Washington Memorial Parkway for cruising and sex activities, and are finding local judges receptive to their campaign. Nearly 300 people have been charged in recent weeks with indecent exposure and indecent acts, and judges in U.S. District Court in Alexandria have begun handing out jail sentences for what had previously been seen as low-level offenses meriting merely fines or probation. The news report indicated that 293 people had been arrested since

February 2000, and quoted U.S. Magistrate Theresa C. Buchanan, who said, "I have been wrestling with these cases in my own mind as to what to do. By this conduct, the park is no longer available to others, to tourists." Defense attorneys argued that the continuing high level of arrests showed that using undercover officers was not working, and that the police should send uniformed officers into the area to deter the commission of unlawful conduct, rather than randomly arresting folks. The newspaper account specifically noted that the area has been promoted as a cruising site on internet sites devoted to gay cruising.

Newsday (N.Y.) reported March 22 that an 18–year-old high school student, James Ford III of Dix Hills, N.Y., has been arrested on charges that he violated the new Hate Crimes Law provisions covering sexual orientation by sending an anti-gay instant-message on-line to another student. Police officers would not reveal the content of the message, but said that America On-Line had been "very cooperative" in helping police track down the Dec. 8 message, which reportedly threatened the recipient because of his sexual orientation. On March 28, *Newsday* reported further that Michael Ashley, age 42, of Huntington Station, has been indicted on hate crime charges in connection with a sexual attack on his gay roommate at a Central Islip halfway house last November.

The Ohio Court of Appeals, 9th District, affirmed the conviction of Kenneth Ditzler on a multitude of charges arising from a camping expedition on which Ditzler chaperoned a group of young teenagers in Findley State Park, Lorain County, Ohio. *State of Ohio v. Ditzler*, 2001 WL 298233 (March 28). Ditzler alleged on appeal that his conviction had been secured through prosecutorial misconduct. According to Judge Batchelder's summary of the evidence, it appears that Ditzler took the boys into the park, allowed them to consume significant quantities of alcohol and view pornographic magazines, and then waited until they fell asleep to initiate oral on one of the boys with whom he shared a tent. The next day the boy told his brother and they went to the police, leading to the investigation and trial. Among other things, Ditzler alleged he did not receive a fair trial because of the prosecution's frequent reference to him during the trial as a "homosexual." Rejecting this argument, Batchelder wrote: "The crimes herein were committed by a male upon a male. The evidence present would, by definition, implicate a homosexual orientation on Mr. Ditzler's part. Further, upon review of the record herein, we cannot find that the prosecutor made excessive references to the evidence that tended to show a homosexual bent to Mr. Ditzler's actions. Just as evidence of the rape of a female by a male would tend to show a heterosexual interest on the part of the perpetrator, evidence of one male raping another shows a homosexual interest on the part of the perpetrator. Further, Mr. Ditzler testified that he had a biological son, implying that he has engaged in heterosexual intercourse, and hence, is a heterosexual who would not be interested in having a sexual relationship with another male. In rebuttal, the prosecutor inquired, and Mr. Ditzler admitted, that he was not the biological father of his son. Hence, we cannot conclude that the prosecutor committed misconduct in regard to referencing Mr. Ditzler's sexual orientation."

In *Sommi v. Ayer*, 2001 WL 282403 (Mass. Appeals Ct., March 23), the court ruled that where mutual restraining orders are sought, the court must make written findings to assist law enforcement authorities in determining whether such orders have been violated. In this case, a Samuel Ayer had been living with a gay couples, Richard Sommi and Samuel Keller. After an argument on December 26, 1998, Ayer left the home of Sommi and Keller sought an ex parte restraining order against both men in Orleans District Court, which was issued, based on Ayer's allegations of physical and emotional abuse, on December 26. On December 29, Sommi and Keller went to Plymouth District Court and obtained a similar restraining order against Mr. Ayer. On January 7, 1999, the Orleans court extended the order against Sommi and Keller for one year. On January 8, all parties appeared together in the Plymouth court for a hearing at which the judge declared that there had been "abuse amongst all of the parties here, and there will be mutual restraining orders." However, the judge put no findings on the record, and Ayer appealed. Writing for the court, Judge Porada found that the Massachusetts statutes require a judge in this kind of situation to adopt written findings to support an order that runs against opposite parties. Gay & Lesbian Advocates & Defenders filed an amicus brief in the case to inform the court about some of the issues of abuse within same-sex couples.

Reaffirming a position it had taken in previous cases, the Court of Appeals of Georgia ruled in *Alvarado v. State*, 2001 WL 294158 (March 28) that there was no error in admitting evidence that the defendant, charged with sexual molestation of a boy, had videos in his home depicting sex between men. Even though the videos did not illustrate pedophilia, the court held the evidence relevant as showing the defendant's "lustful disposition toward the sexual activity with which he is charged or his bent of mind to engage in that activity," citing *Simpson v. State*, 523 S.E.2d 320 (1999). As Alvarado was charged with performing oral sex on a boy, exposing himself to the boy and fondling the boy's penis, the videos which depicted men engaging in similar conduct with men were deemed relevant as corroborating Alvarado's sexual interests. Here, the court cited *Walsh v. State*, 512 S.E.2d 408 (1999), for the proposition that although the materials in issue did not "specifically depict sexual activity involving children, all the materials concern sexual activity between males." Thus, the court buys into the canard that homosexuality and pedophilia have a necessary relationship, which would be denied by most experts in the field of human sexual behavior.

The Kansas Court of Appeals has upheld the conviction for disorderly conduct of Jonathan B. Phelps, a member of the notorious anti-gay Phelps clan of Topeka, Kansas. The court's succinct statement of the facts: "Teresa Roles was a passenger in a car driven by her sister. Roles observed Phelps and his family crossing a Topeka street, carrying signs. Roles rolled down her window and told defendant that 'hate was not a family value.' Defendant then approached the car and screamed, 'Dyke,' in what Roles described as the loudest voice she had ever heard. Roles got out of the car while defendant walked away from her across a driveway. She said, 'E-xcuse me?' and defendant screamed at her, calling her a whore, a lesbian, a sodomite, and a dyke repeatedly for a couple of minutes until Roles got back into the car. Phelps agreed that he yelled at Roles in a 'rapid fire' manner and may have used some of the words she described. He further testified that the driver got out of the car and walked to Roles, and the driver appeared to be addressing Phelps' wife. Although he probably told the driver that she was blocking traffic, he testified that his yelling and gesturing were directed at Roles." Phelps was convicted twice, with the first conviction being vacated for technical reasons. On this appeal, he raised problems with the jury charge and leveled a facial attack at the disorderly conduct statute, but these were unavailing. The court did find that the trial court miscalculated the amount of money Phelps should have to pay to cover Roles' expenses of testifying at the trial, and remanded for that purpose. *State of Kansas v. Phelps*, 2001 WL 227423 (Kan. Ct. App., March 9). A.S.L.

Legislative Notes

Co-sponsored by a bare majority of Senators, a new federal Hate Crimes Bill that would add "sexual orientation" to other categories already covered by federal legislation was introduced on March 27 by Senator Edward M. Kennedy. A counterpart bill was simultaneously introduced in the House. Last year, a version of the bill passed in both Houses but was ultimately blocked from enactment by the House Republican leadership through negative action in a conference committee, consistent with the official position of the Republican Party that sexual orientation should not be the basis for civil rights protection under federal law. *Houston Chronicle*, March 28.

A bill that would have forbidden the Arkansas Dept. of Human Services from "placing any child with any adoptive or foster parent who is homosexual" was narrowly defeated in the Arkansas House Committee on Aging, Children and Youth, Legislative and Military Affairs by a vote of 10–9 on Feb. 28. *Washington Blade*, March 9.

A gay rights bill survived a crucial vote in the Maryland Senate Judicial Proceedings Committee on March 20, when it passed 6–5. Governor Parris Glendening has been advocating for a sexual orientation discrimination bill for three years, and a substantial portion of the state is already covered by non-discrimination policies enacted by Montgomery, Prince George's and Howard counties and the city of Baltimore, but this key Senate committee had proven the stumbling block in past efforts, when the committee leadership actually refused to bring the bill to a vote even though it had passed the other chamber in 1999. Observers contend that there is majority support for the bill in both houses of the legislature. *Washington Post*, March 21. This contention was confirmed for the Senate on March 27, when it voted 32–14 in favor of the bill following the collapse of a filibuster attempt by die-hard Republican opponents. (One such, Richard Colburn of Dorchester, said, "I want to commend the governor for making Annapolis the San Francisco of the East Coast.") The *Post*'s report of the vote on March 28 indicated that this made ultimate passage all but assured, since the full House and its Judiciary Committee had approved versions of the bill in prior sessions of the legislature.

The Illinois House of Representatives voted 96–10 on March 20 in favor of a bill that would allow prosecutors to charge leaders of hate groups with criminal liability if their followers attack somebody because of race, religion or sexual orientation. The sponsor of the bill, Rep. Jeff Schoenberg of Evanston, described it as an "opportunity to shut down those white supremacist or hate groups that have ruined lives in Illinois,"but some opponents objected that the law might be misused to attack legitimate religious leaders for articulating their beliefs about, for example, homosexuality. *Chicago Sun-Times*, March 21. The House followed this up with a March 27 vote narrowly approving a measure to add sexual orientation to the state's civil rights law, banning discrimination in employment, housing, public accommodations and credit transactions. This was the first time such a measure had passed the House since 1993, and nobody was quoted as being optimistic about passing it in the Senate. Governor George Ryan, a Republican, is a supporter of the bill. *Chicago Tribune*, March 28.

In an order issued on March 26, the Illinois Supreme Court amended that state ethical codes for judges and lawyers to add sexual orientation, age, disability or socioeconomic status to the forbidden grounds for discrimination. The chief counsel for the Attorney Registration and Disciplinary Commission, James J. Grogan, told the *Chicago Law Bulletin*, March 26, that these amendments to Supreme Court Rule 63 and Rule 8.4 of the Illinois Rules of Professional Conduct was merely "conforming…rules to practice," as the disciplinary authorities had already considered these grounds to be covered under more general anti-bias rules. Although the court disclaimed that any particular incident had triggered the action, it did follow closely on the issuance of a complaint by the Judicial Inquiry Board in February against Circuit Judge Susan J. McDunn for her handling of adoption petitions filed by lesbian mothers.

The Wisconsin State Administration Secretary, George Lightbourn, has signed a proposed administrative rule change under which charities that get donations from state workers who authorize them to be deduced from paychecks will be required to have policies prohibiting discrimination based on sexual orientation. The rule has drawn fire from some Republicans in the legislature, who claim it is aimed at reducing donations to United Ways that dispense funds to the Boy Scouts of America. If is subject to a comment period and a public hearing before being republished as a final rule. An existing rule already requires that charitable recipients have policies banning other forms of discrimination covered by state civil rights laws; this rule would reflect state law, which bans sexual orientation discrimination, by adding it to the list. *Milwaukee Journal-Sentinel*,*Capital Times*, March 27. Governor Scott McCallum's spokesperson told the press on March 27, in response to the above press report, that he does not like the proposed rule and is trying to figure out a way to deal with it consistent with state civil rights law. *Wisconsin State Journal*, March 28.

In Maine, the State Employee Health Commission negotiated a new one-year contract with the unions representing state workers that will include health insurance coverage for unmarried same-sex and opposite-sex partners of state employees, effective in July. *Portland Press Herald*, March 9. The agreement was subject to legislative review, and inspired a 35–minute debate in the state House of Representatives on March 15, which culminated in an 85–56 vote, largely along party lines, to allow the agreement to go into effect. However, to go into effect, the plan must be funded as part of the next state budget, giving opponents another shot at trying to block it. *Portland Press Herald*, March 16.

By a narrow 14–12 vote, the Arizona State Senate approved S.B. 1225, a bill introduced by Senator Elaine Richardson that would ban discrimination on the basis of sexual orientation by all public state agencies that have 15 of more employees. Although originally introduced as a broad antidiscrimination law applicable to both the private and public sectors, the measure was watered down by amendments to make it politically feasible. However, an amendment also added "gender identity," thus extending the measure beyond a more traditional gay rights bill. The bill requires a second approval from the Senate before being sent to the House. *Arizona Republic*, March 20.

California Assemblyman Paul Koretz, who represents West Hollywood, introduced a bill in the state legislature patterned on Vermont's Civil Union Statute, which would provide all the rights that state law can confer on married couples (except the right to call themselves married) on same-sex couples. Passage seems unlikely in light of the overwhelming vote a year ago by California's to approve Proposition 22, the so-called Protection of Marriage Act, which bans the state from recognizing same-sex marriages. Despite representing the nation's gayest city in the state legislature, Koretz is a married self-avowed heterosexual. *Los Angeles Times*, March 2.

Ever hopeful, North Carolina state Senator Ellie Kinnaird has introduced a bill seeking to reform the sex crimes laws of that state to decriminalize private, non-commercial consensual sex, including same-sex activity, under the title of "Sexual Privacy Act." The bill would leave on the books prohibition of public sex, prostitution and non-consensual sex, as well as sex involving children. *Greensboro News & Record*, March 9.

A bill introduced in Washington State's legislature to "fix" the state's third-party visitation law in light of last year's decision finding it unconstitutional in *Troxel v. Granville*, 120 S.Ct. 2054 (June 5, 2000), came to grief in the House Judiciary Committee when Republican committee co-chair, Mike Carrell, became concerned that the revised language might create an opening for same-sex couples to seek legal recognition as family members. The Democratic co-chair of the committee in the evenly divided House said, "It's an absurdity. He just lost it. He's just focused on something here that's not the point at all." *The Columbian*, March 7. A.S.L.

Law & Society Notes

The Massachusetts Dept. of Public Health released a study showing that four times as many people die from suicide than from homicide in that state, and that the rate of suicide attempts is particularly high among gay high school students. In 1998, the year studied, there were 503 suicides and 123 homicides in Massachusetts. The study, referring to a 1997 survey of high school students in the state, found that about ten percent of high school students at-

tempted suicide, but if the group was narrowed down to those who identified themselves as gay on the survey, 40 percent had attempted suicide. A DPH analyst opined that gay youth are not more mentally unstable or suicide-prone, as such, but are "susceptible to victimization by their peers." *Boston Globe*, Feb. 28.

The Tribune Company, publisher of the Chicago Tribune and many other newspapers around the country, has adopted a domestic partnership benefits plan, according to an internet posting by the National Lesbian and Gay Journalists Association. The plan will cover both same-sex and opposite-sex partners. The company has also adopted a non-discrimination policy that includes sexual orientation. • • • The *Houston Chronicle* reported on March 2 that Southern Methodist University, which is owned and operated by the United Methodist Church, will being offering medical benefits and reduced tuition benefits to same-sex partners of employees starting sometime in 2002.

The final tally is in, and it appears that a resolution intended to bar Presbyterian ministers from conducting same-sex commitment ceremonies has been defeated. Of the 173 regional presbyteries, 63 have voted in favor of the resolution and 87 opposed as of March 15. Since a majority of all presbyteries would be needed to pass the resolution, the negative vote by 87 defeats it. *Washington Post*, March 15.

The Servicemembers Legal Defense Network issued its annual report, indicating that anti-gay behavior remains a significant problem, but that reported incidents of homophobic harassment have declined, apparently in response to efforts by the Pentagon to improve training programs for officers and enlisted staff. The big question now is whether the Bush Administration will make any changes from the way the policy was administered under Bill Clinton. *New York Times*, March 15. A.S.L.

Israeli Supreme Court Strikes Down Order Barring Lesbian Mother from Exposing Her Children to Her Partner

On March 19, the Israeli Supreme Court ruled in *Anonymous v. High Rabbinical Court in Jerusalem, No. 293/00, that the Rabbinical Court acted outside its jurisdiction when it ordered that a divorced woman could not be with her lesbian lover in the presence of her children. The Rabbinical Court had issued this order at the ex-husband's request. The Supreme Court held that the matter did not fall into the jurisdiction of the Rabbinical Court, which had jurisdiction over the divorce itself, but not, wrote Justice Yitzchak Zamir, to issue this injunction.*

The case originated from an order issued by the rabbinical court prohibiting the petitioner no. 1 to have her daughters meet the petitioner no. 2. The petitioner (no.1) was married for 13 years. The marriage ended in divorce. She has three girls from this marriage, ages 17, 13 and 10. The divorce agreement was enforced by the Haifa Rabbinical Court in 1996. (In Israel all matters of marriage and divorce are decided according to one's religion, and all Jews are subjected to mandatory jurisdiction of the rabbinical courts in matters of marriage and divorce. There are complex issues concerning the jurisdiction on other marriage/divorce related issues such as custody, and on those issues sometimes the jurisdiction will lie with the secular Family Court). The divorce agreement, within the clause dealing with property, discusses the future of the house in which the couple lived, and also states that "the wife commits to not bringing a strange man into that house unless she married him according to the [religious] law." (Article 6d).

After the divorce, petitioner no. 1 started conducting an intimate relationship with petitioner no. 2, and, in the words of the Supreme Court, "they define themselves, in this petition, as lesbian women, who are a couple." In 1998, the divorced husband approached the Rabbinical Court, asking to reduce the alimony. A month later, he submitted two motions, one of them for the rabbinical court to issue an order prohibiting the petitioner 1 (the divorced wife) from bringing petitioner 2 into her house or from having petitioner 2 meet the children in any form or place. The rabbinical court asked the divorced husband to explain how it could have jurisdiction to hear the request for alimony reduction, as the couple's divorce was already final. However, regarding the request concerning the lesbian relationship, it held: "Since the mother is conducting a love affair with her [female] neighbor, her companion, in her home in the children's presence, this behavior is immoral and is severely detrimental to the children's education and souls...... we are issuing an order prohibiting the mother to have her children meet her lover Mrs..... [petitioner 2]."

The petitioner 1 appealed to the High Rabbinical Court, which upheld the lower rabbinical court and added that it is justified, because having the children meet their mother's lover will be detrimental to the education of the children "and this is clear to any one with a mind, and needs no explanation." The rabbinical court added that the court had the authority to issue the order based on the clause in the divorce agreement that included the woman's obligation not to bring in a strange man she is not married to into the house. The court said that the purpose of the clause is clearly to protect the children's souls from seeing their mother live with a man she is not married to according to Jewish law, and thus the same clearly applies if the children will meet the mother's lover.

The Israel High Court of Justice can review the Rabbinical Court's decision for exceeding jurisdiction or for illegality. Petitioners argued that the court acted ultra vires, as the couple was already divorced and thus it was not a matter of marriage and divorce, nor was it linked to the divorce case. Also, they argued, it was outside the rabbinical court's jurisdiction as it was a matter of the children's education, and these kind of matters do not normally fall within rabbinical court's jurisdiction.

The Supreme Court's hearing focused on the issue of jurisdiction. The Attorney General appeared before the Court at the Court's request, and expressed his position that the rabbinical court acted ultra vires. The Supreme Court agreed and held that if the main suit (for alimony) brought before the Rabbinical Court was not within its jurisdiction, then the request concerning the children also was not within the jurisdiction. As to the High Rabbinical Court's reliance, in appeal, on the clause in the divorce agreement in which the wife committed not to bring a strange man into the house that she was not married to: the Supreme Court held that this clause did not give the rabbinical court jurisdiction over the case. This conclusion was reached based on the following: (a) the fact that the clause was in the part of the contract that dealt with the property, and not with custody, (b) the fact that the clause referred to the home and could not be the basis for a broad injunction preventing the divorced woman from being with her lover in front of the children, (c) the clause referred to "this house," i.e. the house in which they lived during the marriage, which was by now sold, and (d) the clause mentioned a "strange man," and thus does not apply to the petitioner no. 2.

Justice Zamir added that the Rabbinical Court's decision pertained to the rights of a third person (petitioner 2) who was not a party to the proceedings. For these reasons the Supreme Court accepted the petition and held that the decisions of the Rabbinical Courts (both first instance and appeal) were given ultra vires, and are void. The Court found it unnecessary to consider the petitioners' additional arguments pertaining to the substance of the decision.

The Court concluded by saying: "To decide this petition it is enough [to conclude] that the High Rabbinical Court was wrong when it considered that article 6d of the divorce agreement gave the [Rabbinical] Court the jurisdiction to give the injunction. This mistake undermines the basis of the Rabbinical Court's judgement." The decision, written by Justice Zamir, was given unanimously., with the concurrence of Justices Theodore Or and Ayala Procaccia. The petitioners were represented by Ayelet Golan-Tavori, on behalf of the Association for Civil Rights in Israel.

The Supreme Court decided this case solely on the jurisdiction issue. It did not address the reasoning of the Rabbinical Courts and did not

judge the merits of their decisions. By doing so, the Supreme Court rejected the opportunity to make a statement against the "moral" position taken by the rabbinical court, and against the rabbinical court's attempt to enforce its homophobic "values" on the petitioners. Given the delicate relationship between the Supreme Court and the Rabbinical Court, and the hostility from the religious parties in Israel towards the Supreme Court, which they consider to be acting against religious institutions, it should come as no surprise that at this stage the Supreme Court decided to tailor its decision as narrowly as possible. Still, it is unfortunate that the Rabbinical Court's homophobic statements were left with no commentary upon them from the Supreme Court. *Aeyal M. Gross*, Tel-Aviv University, Faculty of Law. A report about this decision appears in the *Jerusalem Post* of March 20.

Other International Notes

All hail the Queen of the Netherlands! The royal assent has now been given to the Netherlands law of 21 December 2000 on opening marriage and adoption to same-sex couples. The decree will be published in Staatsblad 2001, number 145, coming out on March 29, and at midnight on March 31 same-sex couples can beginning getting married in the Netherlands. Amsterdam Mayor Job Cohen has already agreed to officiate at a same-sex marriage ceremony for four couples that night in the Council Chamber of the City Hall to mark the historic occasion, according to an email news release we received from our occasional Dutch contributor, Kees Waaldijk of the University of Leyden.

Euan Sutherland has agreed to a settlement of his lawsuit against the British government before the European Court of Human Rights in Strasbourg. Sutherland, now 23, filed his suit 6 years ago, claiming that Britain violated his human rights by setting the age of consent for gay sex at 18 while maintaining an age of consent for heterosexual sex at 16. The case is essentially moot, since the government put through a law reform in December equalizing the age of consent. It is widely conceded that Sutherland's lawsuit forced the government's hand, as it had been advised that the case would be lost if it went to court. As part of the settlement, the government agreed to pay Mr. Sutherland's litigation costs. *The Scotsman*, March 28.

Alarmed at reports about the rate of HIV infection in his country, Namibia's President, Sam Nujoma, has announced that the police will attempt to round up all the homosexuals in the country and either deport or imprison them. In a speech at the University of Namibia delivered recently, President Nujoma ascribed homosexuality to "foreign" influences corrupting the nation's youth, and proclaimed: "The Republic of Namibia does not allow homosexuality, lesbianism here. Police are ordered to arrest you, and deport you and imprison you." Phil ya Nangoloh, executive director of the National Society for Human Rights in Namibia, said that members of the local gay community had been alarmed by the president's statements, even though the police have not yet taken any steps to implement them. Ian Swartz, co-ordinator of the gay lobbying group Rainbow Project, said that his office was swamped with calls for information about emigration. *Daily Telegraph*, March 22; *New York Times News Service*, March 21. • • • The president's staements came several weeks after the Supreme Court of Namibia ruled on March 5 that the domestic relationship between a German woman working in Namibia and a Namibian woman could not be taken into account in determining whether the German woman could be issued a permanent residence permit. The court set aside a 1999 High Court judgment by Acting Judge Harold Levy which had ruled that the same-sex relationship should be accorded the same weight as a heterosexual relationship. While the court agreed that Liz Frank was entitled to reconsideration of her application, it found that Namibia has not accepted homosexuality and homosexual relationships as being subject to treatment equal to heterosexual relationships. *The Namibian*, March 6.

Paris, France, has become the first major world city to elect an openly-gay mayor. On March 18, Bertrand Delanoe, described in one press report as "an unassuming, openly gay Socialist,"was elected with the support of both the Socialist and Green parties. The event was celebrated more for Delanoe's politics than his sexual orientation, which seems to have been a non-issue in the campaign. The *Chicago Tribune* (March 19) reported: "The new mayor is a keen supporter of gay issues and prides himself for strict honesty."

Britain's Court of Appeal heard argument on March 27 on behalf of Shirley Pearce, a lesbian former school teacher who was effectively forced to retire as a result of harassment by students after her sexual orientation became known at the Mayfield School in Portsmouth where she had taught for 20 years. An employment tribunal and an appeal tribunal had both ruled that she was not the victim of sex discrimination because a gay male teacher would undoubtedly have been subjected to the same sort of harassment. Her attorney, Laura Cox, QC, argues that she was a woman who was sexually harassed and should thus be protected under the law; in addition, she alleges violation of several articles of the Human Rights convention of the European community. But the school's attorney, Cherie Booth, QC (wife of Prime Minister Tony Blair and a frequent advocate for gay rights causes), argues that the industrial tribunal correctly concluded that the Human Rights Act at the time in question did not cover sexual orientation discrimination. *Daily Telegraph*, March 28; *The Independent*, March 26.

The *Orlando Sentinel* reported March 16 that legislators in Portugal voted March 15 to grant legal rights and tax benefits to same-sex couples who have lived together for at least 2 years, extending the same rights now recognized for common-law marriages among opposite-sex couples. The news report likened this to the partnership status that have previously been recognized in France, the Netherlands, and Sweden.

In England, *The Guardian*(March 15) reported that back in April 1999, the Home Secretary for the Blair Government, Jack Straw, had appointed a "working group" to study the legal status of transsexuals in England and to make policy recommendations. The group issued a report last July setting forth three possible options for the government: leave things as they are, with no legal recognition of gender change; issue birth certificates showing new name and possibly new gende; grant full legal recognition of new gender. A spokesperson for the Home Office told *The Guardian*, "Whilst the government is sympathetic to the issues raised, the implications of change would be far-reaching. There is no opportunity in the present parliamentary session to change the law." In other words, with a possible election pending, the Blair Government has decided this is too hot an issue to bring forward for consideration. The newspaper reported that all but four countries in Europe now grant full recognition of gender-reassignment.

On March 20, Israel Knesset Member Yael Dayan (Labor) hosted an event in the Knesset (Parliament) building to commemorate the 25th Anniversary of the formation of Israel's first gay rights group. Other parliamentary allies of gay rights attended, but Dayan was the only representative of the new governing coalition, as the others came from left-wing or peace parties who are no longer in the government. Dayan has been holding annual celebrations on the anniversary date. *Jerusalem Post*, March 20 & 21.

The Chinese Psychiatric Association, finally catching up a quarter-century later with psychiatric opinion in the west, is issuing news guidelines that drop existing references to homosexual orientation as a pathological condition. *Los Angeles Times*, March 6.

Stig Korjus, a substitute teacher, has been suspended and required to take sensitivity training by action of a disciplinary panel of the Ontario College of Teachers (Canada), for attempting to foster homophobia among parents, students and his professional colleagues. Specifically, Korjus noted that Richard Villeneuve was depicted in the *Globe and Mail* in June 1999 marching semi-clad in a gay pride parade in Toronto. When he learned that Villeneuve

would be teaching at the school to which he was assigned, Korjus brought the photo to the attention of staff, students and parents to alert them to Villeneuve's sexual orientation. After the picture appeared, Villeneuve, who is no longer teaching at the school, suffered harassment, including another teacher inviting students to come to the front of the classroom and make fun of Villeneuve. Villeneuve himself thought the penalty was "ridiculous" because he believed that sensitivity training "won't change his mind on anything." *Globe and Mail*, March 29.

The Minister of Justice in the German province of Bavaria has started a lawsuit challenging the new law setting up registered partnerships for same-sex couples, which is slated to go into effect in August. Local government officials in Thuringia and Saxony have also stated opposition to the law, and may join the suit, according to an internet posting.

The Norwegian government proposed March 9 that gay clergy have equal access to state church positions. The state church is funded by the government, and its employees are technically civil servants, subject to national laws against employment discrimination. *Orlando Sentinel*, March 10. A.S.L.

Professional Notes

Is this historic, or what? On March 6, 2001, the *New York Law Journal* front page featured pictures of two lesbian judges, both long-time members of LeGaL, who had issued opinions meriting front page treatment. Justice Rosalyn Richter's picture accompanied a story about her decision limiting the scope of the New York sex offender registration law, which is discussed in more detail above. Justice Joan Lobis's picture accompanied a story about her decision requiring a divorcing judge to stop wasting his marital assets on expenditures for his girlfriend while the divorce was pending.

Evan Wolfson has announced that he is resigning from the staff of Lambda Legal Defense & Education Fund, where he is director of the Marriage Project and a senior staff attorney. Wolfson has been on the Lambda staff for a decade, during which he emerged as a leading spokesperson for the right to marriage for same-sex couples, having participated in litigating the Hawaii marriage case. Wolfson also won high national visibility as the advocate for James Dale, the openly-gay former Boy Scout, as Wolfson argued Dale's case before the New Jersey and United States Supreme Courts, winning a unanimous ruling from the former and suffering a 5–4 defeat before the latter. Wolfson announced that he has received a foundation grant to spend some time working independently on these issues. Lambda announced that its staff attorney, David Buckel, will be designated the new director of the Marriage Project.

Openly-gay Massachusetts State Representative Jarrett Barrios will receive the Kevin Larkin Memorial Award for Public Service at the annual dinner of the Massachusetts Lesbian and Gay Bar Association on April 20 ini Boston. Barrios was the first openly-gay man to be elected to the Massachusetts legislature. (Elaine Noble, elected in the early 1970s, was the first openly lesbian or gay person to be elected to any state legislative body in the U.S.) At the same dinner, Robert L. Quinan, Jr., an Assistant Attorney General for the Commonwealth of Massachusetts, will receive the MBA Community Service Award.

At its 15th Annual Dinner on March 22, the Lesbian and Gay Law Association of Greater New York presented Public Service Awards to New York State Senator Tom Duane and Anthony Romero, Community Service Awards to Erica Bell and Ruth Harlow, and a special award on the 20th anniversary of *Lesbian/Gay Law Notes* to Arthur Leonard.

We note with sadness the death of Hugh R. Jones, retired judge of the New York Court of Appeals, who wrote the opinion for the court in the historic decision of *People v. Onofre*, 51 N.Y.2d 476 (1980), cert. denied, 451 U.S. 987 (1981), holding that the state's deviate sexual intercourse statute could not be applied to private, consensual adult sex. Jones, who was 86 at his death, was noted as a progressive member of the court, and had been engaged in law practice since retiring from the court in 1984. *New York Times*, March 6. A.S.L.

AIDS & RELATED LEGAL NOTES

3rd Circuit Strikes Rules Limiting Foster Placements in Homes with HIV+ Children

Child services agencies may not automatically prevent foster families with HIV+ children from taking uninfected children into their homes, according to the U.S. Court of Appeals for the 3rd Circuit, ruling in *Doe v. County of Centre, PA*, 2001 WL 214005 (March 5). Agencies must make an individualized assessment of the risks posed to a child before denying placement in a foster home where a member of the foster family is HIV+. The court also found that the prospective foster parents' claim of race-based discrimination was ripe for adjudication, reversing the lower court, but affirmed the lower court's determination of qualified immunity for the county officials and its rejection of any claim for punitive damages against the county.

John Doe, a 51–year-old African American man, and Mary Doe, a 52–year-old white woman, are married and live together with Mary's two adopted sons, Adam, age 11, and Steven, age 12. Over the years, Mary has taken in numerous foster children with special needs, and from 1972 to 1989, she cared for eight foster children and eventually adopted seven of them, the last two of which were Adam and Steven. Mary had adopted children with histories of physical and sexual abuse, as well as children who were blind, developmentally retarded and had cerebral palsy. Adam came to Mary with HIV and AIDS, which he had contracted from his birth mother, whose husband. John Doe had been employed as a program worker in a residential group home for persons with mental retardation and has no children of his own, but after his marriage to Mary, accepted her adopted children, including Adam, into his home.

In January 1998, the Does applied to become foster parents with the Office of Children and Youth Services of Centre County (CYS). During the preliminary home study, the Does disclosed to a CYS employee that their son Adam had HIV and AIDS. Prior to the Does' application, CYS officials had never knowingly placed a child in a foster home where someone had HIV, and therefore had no policy to address what limitations, if any, applied to such a home. Although the American Public Health Association had challenged the County's claim that there were no policies to which it could turn for guidance, the Court agreed that, while there were policies addressing the placement of HIV+ children in foster homes, no policy spoke to the distinct question of placing uninfected children in a home where an HIV+ individual was present.

Because Adam's condition was of tremendous concern in this case, Judge Fuentes's decision for the court explained in some detail the specific nature of Adam's illness. In 1996, when Adam was six years old, he had severe eating and digestive problems, and he weighed only 37 pounds. At that time, however, Adam began aggressive drug therapy, which succeeded in suppressing his HIV viral load to undetectable levels. Adam still suffers from eating and digestion problems, which necessitates his use of a feeding tube, and also has symptoms of autism and permanent learning disabilities, which impair his ability to speak and express himself. Adam relies on his parents for all major life functions, including eating, cleaning and personal hygiene. But as a result of his medical regimen, Adam as in "good overall health and suffers from no greater risk of opportunistic infection than a child without HIV," according to the opinion. Adam attends school in a class

with other children with special needs. School officials keep Adam's HIV-status confidential and do not require disclosure of that status to parents of uninfected students. Judge Fuentes emphasized that "Adam has not transmitted to his brother, Steven, nor to any children with whom he attends school."

In its attempt to formulate a policy to deal with Adam's case, CYS officials investigated its records and determined that 5% of foster children were perpetrators of sexual abuse against other children in the home. Under the CYS's classification scheme, a perpetrator is a child who has assaulted another child sexually, but the court pointed out that "assault" included activities such as fondling and disrobing others. Because a number of foster children would not be identified as sexual perpetrators until after foster placement, CYS Director Terry Watson decided that it would be the agency's policy to place children in a foster home where a foster family member had a "serious infectious disease" only when the child also had the same infectious disease. As a result of this new policy, the foster home specialist for the Does' application, Lisa Rice, informed the Does that Adam's HIV "might present a problem" for foster approval. However, at that time, the Does were also apparently told that the HIV issue was "irrelevant" because CYS did not have any African American foster children to place with the Does at that time, and that the CYS used race as a factor in placing children because it tried to replicate a foster child's original home environment. Rice suggested that racial "continuity" minimized disruption and change in the child's life, and eliminated the possibility of racial animosity between the interracial foster parents and white biological or custodial parents.

The Does sued in federal court, charging Centre County with disability discrimination in violation of the Americans with Disabilities Act ("ADA") and the Rehabilitation Act, racial discrimination in violation of Title VI, racial and disability discrimination in violation of the equal protection clause and 42 U.S.C. sec.1983. Their complaint sought injunctive relief — invalidation of the County's infectious disease policy, and their approval as foster parents along with compensatory and punitive damages. The district court denied the motion for preliminary injunction, and proceeded to transform the County's motion to dismiss into a motion for summary judgment, despite Plaintiffs' contentions that they were entitled to some discovery prior to having their claims adjudicated on the merits.

In February 2000, the district court granted summary judgment to the County on all claims, finding that Adam's HIV-status posed a significant risk to foster children who might sexually assault Adam, and that therefore, the direct threat exception to the ADA and the Rehabilitation Act applied, justifying discriminatory treatment pursuant to the infectious disease policy. The district court also held that the individual CYS employees were entitled to qualified immunity, because any right the Does had was not clearly established, and that the County government entities were immune from punitive damages. Finally, the district court determined that the Does' claims of race-based discrimination were not ripe.

Judge Fuentes first examined the Supreme Court's jurisprudence regarding what qualifies as a "significant risk" so as to permit deviation from the non-discrimination principles announced in the ADA and the Rehabilitation Act. In *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), the Supreme Court directed courts to make factual findings concerning the following four factors to determine the existence of a significant risk: (1) the nature of the risk (how the disease is transmitted); (2) the duration of the risk (how long is the carrier infectious). (3) the severity of the risk (what is the potential harm to third parties); and (4) the probabilities that the disease will be transmitted and cause varying degrees of harm. In both *Arline* and *Bragdon v. Abbott*, 524 U.S. 624 (1998), the Supreme Court insisted that these findings must be based on "medical or other objective evidence," with special deference given to the views of public health authorities. By relying on such objective sources of information, courts can give effect to Congress' intent that there be an individualized determination as to the significance of the risk underlying the direct threat exception.

Because "[t]he probability of HIV transmission from Adam to others is a crucial issue in this case," the court of appeals dedicated a significant portion of its opinion to a discussion of how HIV is transmitted, relying in large part on the Supreme Court's discussion in *Bragdon*. The court noted that the chance of transmission through casual contact is virtually nonexistent, and that "normal sibling fighting and roughhousing present negligible risk of transmission." One of the experts who testified in the district court reported that out of the 21,000 AIDS cases in Pennsylvania, there were no reported cases of virus transmission due to familial contact or fighting, and intense physical contact, as might happen playing football, only leads to transmission in one of every 85 million contacts.

However, the district court was particularly concerned with the possibility of nonconsensual male-to-male activity in a foster home, and therefore the 3rd Circuit focused its attention on the fourth prong of the "significant risk" test. The County had argued that "even though the probability of HIV transmission is negligible, a generalized policy is justified where a disability, such as HIV, is deadly and has no cure, because the loss of even one life is too great a cost in pursuit of the ADA's honorable goals."

Judge Fuentes wrote that the reasoning employed by the County and the district court was "contrary to Congress' intent that analysis of the ADA's direct threat exception should involve an individualized inquiry into the significance of the threat posed." As an example of how the district court's logic was flawed, Fuentes noted that children of "tender age" are extremely unlikely to commit forcible sexual intercourse leading to the transmission of HIV. Furthermore, the court pointed out that the specifics of Adam's case highlighted another flaw in the CYS's blanket policy namely, the fact that a child who suffered from other physical disabilities would be "simply incapable of committing a sexual or physical assault."

County officials had argued that a policy permitting the placement of an HIV-negative child in a foster home with an HIV+ child would be unfair because the child and his or her guardians lack choice in the foster placement process. The panel rejected the County's suggestion that informed consent would be required prior to such placement, noting that no provision of the ADA incorporates the concept of informed consent as part of the legislative scheme. The County also argued that even in the absence of a blanket policy, the Does' application would be denied because Adam's illness could cause family instability if Adam needed to be hospitalized. The court rejected this argument, along with the County's conjecture that a foster child would suffer psychological damage if he needed to be moved from his original placement with the Does. The court found that both of these arguments merely reflected generalized assumptions and thereby violated the ADA's mandate of individualized determination. For these reasons, the court reversed the district court's grant of summary judgment and remanded the case.

In the remainder of the opinion, Judge Fuentes wrote that the Does' allegations of race-based discrimination were ripe for adjudication, and directed the lower court to consider these claims. However, the panel affirmed the district court's ruling on qualified immunity, not only because the issues raised in this case were "novel," but also because the County had an independent duty to safeguard the well-being of the children under its care. Therefore, any violation was not already "clearly established" under law prior to this ruling. Finally, the court determined that neither Title II of the ADA nor Section 504 of the Rehabilitation Act expressed an intent by congress to override municipal immunity to punitive damages.

Matthew Gutt and Carl Roberts, from Ballard Spahr Andrews & Ingersoll LLP, and Scott Buris, from the ACLU of Pennsylvania, represented the Does on appeal. Lambda Legal Defense & Education Fund's Catherine Hanssens

and Colleen Sullivan led an impressive coalition of organizations who participated as amici curiae, a roster which included the American Public Health Association, AIDS Alliance for Children, Youth and Families, AIDS Law Project of Pennsylvania, National Alliance of State and Territorial AIDS Director, and the National Center for Youth Law. *Sharon McGowan*

Malpractice Claim Time-Barred But Wrongful Death Action Timely in N.J. Transfusion AIDS Litigation

A medical malpractice action (which evolved into a survival action) "accrued when plaintiff tested positive for HIV and knew that his infection was caused by another's negligence," held the Appellate Division of the New Jersey Supreme Court. The court asserted that the near certainty that HIV infection will lead to AIDS means that the statute of limitations must start running upon discovery of the wrongfully transmitted HIV, and not upon the diagnosis of AIDS. *Troum v. Newark Beth Israel Med. Ctr.*, 2001 WL 223292 (N.J. Super. App. Div. March 5, 2001). However, the wrongful death action brought by the decedent's executor was not time-barred, so a jury verdict was sustained on appeal.

Following 1984 heart surgery, medical practitioners in Newark's Beth Israel coronary care unit treated Arthur Troum with cryoprecipitate, "an extract of clotting factors from pooled blood." In April 1987, that batch of cryoprecipitate was discovered to have been HIV-infected. Troum was so informed, and tested positive for HIV the same month. In 1989, Troum and his wife realized that someone was at fault for Troum's condition, and filed suit on March 30, 1990, well within New Jersey's two-year statute of limitations. Under the statute, a cause of action accrues when the injured party is aware both of the injury and of the fault of another in causing that injury. However, Troum felt too weak to pursue this action, and voluntarily dismissed it on September 30, 1990.

Under the medical standards of the time, Troum was not considered to have contracted "full-blown AIDS" until August 1992, when he was diagnosed with AIDS-related dementia. (He previously had contracted several symptoms that today would be considered components of "full-blown AIDS.") Troum died in June 1993; Mrs. Troum filed a survival action (based on the medical malpractice action) and wrongful death action on September 8, 1994.

The issue: Did the underlying negligence action accrue in 1989 when Troum, afflicted with HIV, realized that someone had caused the ailment, or in August 1992, when he was diagnosed with AIDS?

The Appellate Division does "not view the HIV infection and the AIDS virus as distinct illnesses, each representing a separate cause of action and triggering a new statute of limitations." The court looked to "other jurisdictions [which] have held that the statute of limitations for the wrongful transmission of AIDS begins to run when the plaintiff knows that he has been infected with the HIV virus and is aware, or should reasonably be aware, that his injury is attributable to the fault or neglect of another… [A] plaintiff must ordinarily institute suit within two years of learning that he is HIV positive as a result of another's fault, or forgo his claim because of expiration of the statute of limitations."

The court extensively discussed the evolution of the medical knowledge that HIV causes AIDS, as well as the subjective knowledge of Troum (a medical doctor) and his wife. In the opinion of the court, HIV always leads to AIDS, and the Troums knew it. Despite the court's holding that the medical malpractice/survival claim was untimely filed, the court upheld a jury verdict in a wrongful death action against the resident doctor who had ordered administration of cryoprecipitate, finding that the wrongful death action did not require that at the time of his death the decedent would have been able to file a timely action. *Alan J. Jacobs*

NY Appellate Division Declares Harmless Error for Asking Defendant About His "Life-Threatening Disease" but Remits on Other Grounds.

The prosecution in an attempted murder case was permitted to ask the defendant if he had "a life-threatening disease" to support a theory that the defendant "had nothing to lose" by killing the victim, ruled the N.Y. Appellate Division, 3rd Dept., in *People v. Felix-Torres*, 2001 WL 200032 (March 1). Although the court found harmless error, it remitted due to the prosecution's violations of N.Y. rules requiring advance disclosure to defendant of various kinds of evidence the prosecution intends to use at trial.

Norberto J. Felix-Torres was convicted in New York's Montgomery County Criminal Court of, *inter alia*, second degree murder. He requested all *Rosario* material (required to be disclosed to him under N.Y. rules) and, in response, the prosecution provided certain materials and advised County Court that it had fully complied and that it intended to cross-examine Torres on his HIV+ status. In a *Sandoval* hearing, the county court ruled that no reference to HIV or AIDS would be permitted on cross-examination to inquire as to whether the defendant has a life-threatening disease. If Torres said "yes," then the prosecution would not be allowed to go any further. If he answered "no," and the prosecutor had a good faith basis for doing so, the prosecution would be permitted to ask if he is HIV+. At trial, Torres replied "yes," and at closing the prosecution suggested that since Torres knew he had a life-threatening disease at the time of the assault, he "had nothing to lose" by killing his victim. Torres was convicted and filed an appeal challenging the court's decision to allow the question about a life-threatening disease, and also argued that the prosecution failed to timely turn over significant *Rosario* material.

As to the *Sandoval* issue, Justice Rose found that the prosecution presented no evidence that Torres was despondent, hostile or vengeful as a result of his disease, or had reason to believe that he would not live long enough to be punished for his actions. Although the court found error, it held that this did not rise to the level of tainting the verdict in light of witness testimony of Torres' prior statements to kill the victim.

However, the court was persuaded that the prosecution failed to hand over significant *Rosario* material discovered after trial via a FOIL request, including an incident report and other statements. Since Torres was not afforded an opportunity to demonstrate prejudice arising from this nondisclosure, the court remitted the case back to the county court for Torres to do so, as well as to discern whether vacatur of the conviction and a new trial are warranted. *K. Jacob Ruppert*

AIDS Litigation Notes

On Feb. 26, the U.S. Supreme Court refused to review the 5th Circuit's decision holding that Title III of the ADA does not preclude an insurance company from selling coverage that caps AIDS-related claims at lower levels than other claims. *McNeil v. Time Insurance Co.*, No. 00–848 (cert. denied, 2/26/01), ruling below: 205 F.3d 179 (5th Cir. 2000).

The Ohio Court of Appeals, 12th District, rejected an appeal by Joey Eldridge, a state prison inmate, of his conviction in the Warren County Court of Common Pleas for harassment of a prison official. Eldridge spat in the face of Lt. Steven Lyons, chairman of the Lebanon Correctional Institution's Rules Infraction Board, during a proceeding at which Eldridge had been charged with a rules infraction. On appeal, Eldridge claimed he had ineffective legal counsel because his lawyer did not object when Lyons testified that he had undergone testing for hepatitis and HIV as a result of Eldridge spitting at him. The court found that this testimony was relevant to the question whether Lyons felt harassed by being spat upon by Eldridge, and that counsel's failure to object to this line of questioning could have been strategic. In any event, this ground for appeal was held invalid. *State of Ohio v. Eldridge*, 2001 WL 290305 (March 26) (not officially reported).

Randall Louis Ferguson, convicted of exposing a woman to HIV, was sentenced to 70 months in prison by Washington Circuit Judge Edwin Poyfair, who was critical of the state supreme court for having thrown out the

120–month sentence previously imposed. During Ferguson's trial, authorities accused him of spreading HIV to dozens of people through six years of needle-sharing and unprotected sex activities, but ultimately under existing laws were able to convict him only of a single count of second-degree assault. The Supreme Court threw out the longer sentence as going beyond the sentencing guidelines for an offense at that level. The state has since amended its criminal laws to allow stiffer charges against persons who intentionally transmit or expose others to HIV. *The Columbian*, March 21. A.S.L.

International AIDS Notes

Two countries with the largest numbers of HIV-infected residents recently released discouraging new figures. In South Africa, a government study now shows that about 4.7 million South Africans are HIV+, or about one in nine persons in the population. This increases the official count by over 500,000 over previously released figures. Among women attending public postnatal clinics, almost one quarter were found to be infected. *Associated Press*, March 21. In India, the government announced that it believes there are 3.86 million infected residents, an increase of about 160,000 over a year ago. *Orlando Sentinel*, March 21.

The Tokyo, Japan, District Court ruled that Takeshi Abe, who served as head of a government panel on AIDS in 1983 and 1984, was not liable in negligence to the mother of a hemophiliac who died in 1991 from AIDS after being infected by tainted blood products. The substance of the allegation against Abe was that by opposing the importing of heat-treated blood products at a time when Japanese blood banks were not subjecting donated blood to such processing, he had negligently caused the death of the plaintiff's decedent. The decedent's mother had filed criminal charges, and the prosecutor was seeking a 3 year prison sentence. Judge Toshio Nagai found that Abe understood the dangers of using unheated blood products, but couldn't have known at that time that so many hemophiliacs would be infected with HIV. Heat treatment wasn't approved in Japan until two years after it came into use in the U.S. *Asian Wall Street Journal*, March 29.

In Timmins, Canada, Justice N. M. Karam ruled that Pierre Angnatuk-Mercier, an HIV+ man accused of assault for having unprotected sex with a woman several times without revealing his HIV status, should not be convicted. Karan decided it would be "unsafe to convict" Angnatuk-Mercier due to inconsistencies in the testimony of the complainant. *National Post*, March 21.

The *Birmingham Post* reported March 3 that the Imperial College of Science was fined 20,000 pounds by Judge Charles Byers of London's Blackfriars Crown Court for carrying on work involving the manufacture of HIV for research purposes in an "unsealable" hospital laboratory. The court was told that in the event of spillage, the virus could have escaped and infected somebody. Byars found that actually the risk to the public was not high, but nonetheless it was "unacceptable."

The Blair Government in the U.K. promised that it would amend the Disability Discrimination Act to strengthen protection and extend coverage, making clear that people diagnosed with cancer and HIV infection are protected from unjustified discrimination. Margaret Hodge, the Employment Minister, said the proposed changes would give people with disabilities "comprehensive and enforceable civil rights." The amendment would not extend coverage to small businesses until 2004, however. *The Guardian*, March 6.

The Court of Appeal in Kenya ruled March 19 that an HIV+ woman is entitled to continue living in the same house in Nairobi until their divorce case is finally decided. The husband filed for divorce after learning his wife was HIV+, and removed her from the house to the servant's quarters with the approval of the High Court (the trial court). The woman obtained a temporary order from the Court of Appeal allowing her to stay in the house, which was made permanent on March 19. The husband's divorce was filed on cruelty grounds, claiming he was endangered by his wife's HIV status. *The Nation* (Kenya), March 20.A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

CONFERENCE ANNOUNCEMENT

The Georgetown Journal of Gender and the Law is co-sponsoring a conference with the Gender-LAW Institute in Washington on May 18–20, devoted to panels and workshops on gender and law, with an emphasis on transgender issues. For information, check out the GenderPAC website, www.gpac.org/ncg.

MOVEMENT JOB ANNOUNCEMENTS

The Human Rights Campaign (www.hrc.org), the nation's largest LGBT political and civil rights organization with 400,000 members and a staff of 100, seeks a Staff Counsel to join its busy Legal Department. Counsel will join two other attorneys, a paralegal and law fellows, in advising all HRC federal and state legislative, regulatory, judicial, educational and corporate client areas. Primary duties will include providing legal research, analysis and tracking services to State and Federal legislative advocacy and web-based FamilyNet programs; collaborating with HRC lobbyists, field staff and coalition allies on policy initiatives; handling judicial advocacy and corporate legal matters; and managing law fellows program. Applicants must have outstanding legal research, writing and interpersonal skills, a strong academic record, political savvy, and the ability to work in a fast-paced legal department. Experience in legislative lawyering strongly preferred, but outstanding entry-level candidates will also be considered. Initial appointment will be for one year with potential for extension. Competitive salary and benefits package. Applicants should submit cover letter, resume, law school transcript, two references, and brief writing sample ASAP to: Anthony E. Varona, General Counsel & Legal Director, HRC, 919 18th Street, NW, Washington, DC 20006. Applications from women, people of color and other underrepresented minorities are strongly encouraged.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Romano, Patricia, Davis v. Monroe County Board of Education:*Title IX Recipients' "Head in the Sand" Approach to Peer Sexual Harassment May Incur Liability*, 30 J. L. & Educ. 63 (Jan. 2001).

Silverman, Lewis A., *Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of a Child of the Union*, 102 W. Va. L. Rev. 411 (Winter 1999).

Strasser, Mark, *Unity, Sovereignty, and the Interstate Recognition of Marriage*, 102 W. Va. L. Rev. 393 (Winter 1999).

Titshaw, Scott C., *U.S. Immigration Law: Denying the Value of Gay and Lesbian Families*, 28 Hum. Rts. No. 1, 25–26 (Winter 2001).

Students Notes and Comments:

Psonak, Raymond A., *"Don't Ask, Don't Tell, Don't Discharge," At Least in Europe: A Comparison of the Policies on Homosexuals in the Military in the United States and Europe After* Grady v. United Kingdom, 33 Conn. L. Rev. 337 (Fall 2000).

Recent Developments, *"How Solemn is the Duty of the Mighty Chief": Mediating the Conflict of rights in* Boy Scouts of America v. Dale, *120 S. Ct. 2446 (2000)*, 24 Harv. J. L. & Pub. Pol. 319 (Fall 2000).

Scott, Andrea R., *State Public Accommodation Laws, the Freedom of Expressive Association, and the Inadequacy of the Balancing Test*

Utilized in Boy Scouts of America v. Dale, *120 S. Ct. 2446 (2000)*, 24 Hamline L. Rev. 131 (Fall 2000).

Vaughan, Adrienne J., *The Civil Rights Remedy of the Violence Against Women Act as Litigated in* United States v. Morrison*: The Supreme Court's Sacrificial Lamb to Reinforce* United States v. Lopez, 24 Hamline L. Rev. 163 (Fall 2000).

Specially Noted:

Symposium, *Unbending Gender: Why Family and Work Conflict and What to Do About It*, 49 Amer. U. L. Rev. No. 4 (April 2000). ••• *Guidelines for Psychotherapy With Lesbian, Gay, and Bisexual Clients*, by Division 44/Committee on Lesbian, Gay, and Bisexual Concerns Joint Task Force on Guidelines for Psychotherapy with Lesbian, Gay, and Bisexual Clients, American Psychological Association, 55 American Psychologist 1440 (Dec. 2000).

AIDS & RELATED LEGAL ISSUES:

Mameli, Peter, *Splitting the Difference: Partnering with Non-Governmental Organizations to Manage HIV/AIDS Epidemics in Australia and Thailand*, 2 Human Rts. Rev. 93 (Jan-Mar 2001).

Student Notes & Comments:

Mann, Michael T., *Defining a "Disability" Under the Americans With Disabilities Act — Corrective Measures as a Factor:* Sutton v. United Air Lines, Inc., 69 U. Cin. L. Rev. 385 (Fall 2000).

Romero, Kristin Kay, *Defining Discrimination in* Doe v. Mutual of Omaha Insurance Co.*: Determining if a Health Insurance Policy's AIDS Benefit Cap Violates the ADA*, 9 Geo. Mason L. Rev. 179 (Fall 2000).

Summer Author Competition, *Civil Rights — Reproduction Deemed a Major Life Activity Under the Americans With Disabilities Act of 1990* Bragdon v. Abbott, *524 U.S. 624 (1998)*, 32 Suffolk U. L. Rev. 833 (1999).

EDITOR'S NOTE:

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