FLORIDA APPEALS COURT REJECTS SOCIETAL HOMOPHOBIA IN LESBIAN CUSTODY CASE

In an important advance for gay parents in a state that has not been hospitable to their claims, the Florida 2nd District Court of Appeal ruled May 26 that presumed societal homophobia should not have been taken into account by the Pinellas County Circuit Court in making a custody determination as between a lesbian mother and a non-gay father. *Jacoby v. Jacoby*, 2000 WL 678997. The three-judge panel was unanimous on this point, although one member of the court dissented from the decision to reverse the circuit court's ultimate custody determination, arguing that there was "competent, substantial evidence in the record" to support the trial court's best interests finding.

Julie and David Jacoby have two children, born in 1989 and 1992. In November 1996, Julie informed David that she had fallen in love with "a longstanding family friend who is a lesbian," and they agreed to a separation. Julie and the children moved into her new partner's home, and David remained in the "family home." The children visited David on alternate weekends for about a year, and then Julie and David agreed on rotating custody while their divorce case was pending, with the children alternating between the two homes on a weekly basis. Throughout this period, the children continued to attend the same Baptist school in which they were enrolled prior to the separation. Both parents sought primary residential custody: Julie wanted them to live with her and her partner, and David, who became engaged while the divorce was pending, wanted them to live permanently with himself and his new wife, and to attend public school in the county where he would be moving into his new wife's house.

At the divorce trial, the court-appointed psychologist testified that both parties were good parents, but that Julie had an edge on parenting skills, the children had a stronger emotional tie to her, and that she could provide "a fine home environment." The psychologist also concluded, based on David's negative attitude toward homosexuality, that Julie was the parent more likely to encourage contact with the non-custodial parent, and recommended that she be assigned primary residential custody. David's case, at least as characterized by Judge Northcutt in the appeals court's opinion, was based mainly on attacking Julie's sexual orientation. Northcutt found that Circuit Judge George Greer, who assigned residential custody to David, had "succumbed to the father's attacks on the mother's sexual orientation, which were the primary feature of this case."

Northcutt asserted that in order for Julie's sexual orientation to influence the custody decision, it must be shown that her conduct had "a direct effect or impact upon the children." Northcutt asserted that Greer's opinion showed his conclusions on this point to be "conclusory or unsupported by the evidence." Greer had seized upon comments by the expert witness, Dr. Merin, to the effect that "a strong stigma attaches to homosexuality and that while being reared in a homosexual environment does not appear to alter sexual preference, it does affect social interaction and that it is likely that the children's peers or their parents will have negative words or thoughts about this." Apparently, the trial court also presumed that these potential problems would be magnified by the children's attendance at a Baptist-church affiliated school.

Northcutt found Greer's reliance upon social stigma or societal prejudice to be unfounded and inappropriate. Citing *Palmore v. Sidoti*, 466 U.S. 429 (1984), a case which arose, ironically, from a custody dispute within the jurisdiction of the Florida 2nd District Court of Appeal, Northcutt asserted that "the law cannot give effect to private biases," and that: "The circuit court's reliance on perceived biases was an improper basis for a residential custody determination."

Northcutt also characterized as "unsupported" Greer's conclusion that letting the children live with Julie would cause them psychological confusion because of "the effects of religious teaching on the children." Judge Greer had critized Julie's decision to keep the children enrolled in the Baptist school, suggesting that she was "naive or simply blase" about the potential effect of this on the children. Northcutt observed that Greer had been engaging in improper stereotyping of the school, the parents of the children there, and the church, by presuming based on uninformed testimony by the psychological expert and David that the children would encounter prejudice and bias there. Northcutt found that there was no competent evidentiary support for these conclusions.

Ironically, David had testified that he intended to convert to Catholicism after his remarriage, but he testified that he was unfamiliar with Catholic teaching on homosexuality and how that would affect his children's attitudes towards their mother.

"In short," wrote Northcutt, " there was no evidence to show that the children were being harmed or would be harmed by their continued enrollment in the school they had attended during the parties' marriage. Nor does the record disclose that Mrs. Jacoby's deicsion to keep the children in that school was any less informed than Mr. Jacoby's desire to take them out of it."

Northcutt also found that homophobia crept into Greer's other factual determinations. For example, despite the expert testimony that Julie's home was fine, Greer found that upon his remarriage, David could provide a home whose superiority was "obvious." Northcutt asserted that nothing in the record showed that Julie's home was inappropriate for raising children, and that the trial court's only basis, as reflected in the record, for finding David's home obviously better "was based on the father's heterosexual relationship." The court also seems to have been affected by arguments by David's counsel that Julie and her partner had been less than totally circumspect with the children, which Northcutt characterized as "specious innuendo" based on stray comments that David reported having heard from the children and then twisted out of shape.

"In summary, when making this custody determination the circuit court penalized the mother for her sexual orientation without evidence that it harmed the children. Accordingly, we reverse the court's appointment of the father as primary residential parent, and remand with directions to enter a new custody order." However, the court did not order that the trial court award custody to Julie, but rather to redo the custody determination. In making this determination, however, the court of appeal ordered the trial court to reconsider several other factors required by Florida law as to which, according to Northcutt, Greer's findings had not been supported by the evidence and were in some cases "contrary to the disputed evidence."

In particular, Northcutt pointed to Greer's bizarre speculations as to whether Julie was actually gay, and how if her sexuality was undetermined, the stability of the home might

Editor: Prof. Arthur S. Leonard, New York Law School, 57 Worth St., NY, NY 10013, 212–431–2156, fax 431–1804; e-mail: asleonard@aol.com or aleonard@nyls.edu
Contributing Writers: Elaine Chapnik, Esq., New York City; Ian Chesir-Teran, Esq., New York City; Steven Kolodny, Esq., New York City; Mark Major, Esq., New Jersey; K. Jacob Ruppert, Esq., Queens, New York; Daniel R Schaffer, New York City; Robert Wintemute, Esq., King's College, London, England.
Circulation: Daniel R Schaffer, LEGALGNY, 799 Broadway, Rm. 340, NYC 10003. 212–353–9118; e-mail: le-gal@interport.net
LeGaL Homepage: http://www.le-gal.org
Law Notes on Internet: http://www.qrd.org/qrd/www/usa/legal/lgln

$50/yr by subscription
Canadian Rate $55; Other Int'l Rate US$60 **ISSN 8755–9021** **June 2000**

be in doubt because she might break up with her partner. As well, Northcutt said, " We are taken aback... by the court's declaration that the father's deep-seated animosity toward the mother's homosexuality could be softened, and by its clear implication that the mother's inflexibility could not — and we have searched in vain for record evidence to support either view." This going to the factor of which parent would be more likely to encourage the children to maintaining a continuing relationship with the non-custodial parent...

The appeal court also found that the circuit court erred in its determination of Julie's eligibility for attorneys fees and costs, and found that she was entitled to a contribution toward those expenses from David, at least as things stood at the time of the first decision. However, noting that circumstances could change, the court merely reversed the denial of Julie's request for fees and costs, to be reconsidered as part of the case on remand.

In a brief dissenting opinion, Judge Threadgill asserted that the circuit court had "limited its consideration of Mrs. Jacoby's sexual orientation to the effect it would have on the best interests of the children," and that the record supported Greer's conclusions. On that basis, Threadgill would affirm. "Otherwise, I concur in the majority opinion."

Julie is represented by Virginia attorney Jean R. Simons, with amicus support from Lambda Legal Defense Fund attorneys Stephen Scarborough and Beatrice Dohrn through Lambda's Southeast Regional Office in Atlanta. A.S.L.

LESBIAN/GAY LEGAL NEWS

Supreme Court Strikes Down Law Restricting Cable TV Sex Programming: Cable Sex Channels Permitted to Run 24/7.

In yet another blow to the Telecommunications Act of 1996, the Supreme Court affirmed 5 to 4 the ruling of the US District Court for the District of Delaware holding that a law requiring cable operators to restrict sexually explicit programming to late night hours (a.k.a. time channeling) was violative of First Amendment guarantees of free speech. *U.S. v. Playboy Entertainment Group, Inc.*, 2000 WL 646196 (May 22). This decision not only declares top-tier First Amendment protection for cable television programming, but also potentially binds the hands of Congress and other legislatures to regulate new media content.

Although the decision was not altogether surprising, in light of the facts and the Court's past liberal interpretations of free speech, the real surprise came in the unusual lineup of justices: Anthony M. Kennedy wrote the majority opinion, joined by Ruth Bader Ginsburg, John Paul Stevens, David Souter and, in a rare break with fellow conservative mentor Antonin Scalia, Clarence Thomas. Further indicia of the Constitutional Divide were heated dissents by Justices Stephen Breyer (as principal author with Sandra Day O'Connor and Chief Justice William H. Rehnquist joining) and Antonin Scalia.

At issue was the validity of Section 505 of the Telecommunications Act of 1996, which was designed to address the problem of "signal bleed," which occurs when audio and/or video signals from sexually explicit programming inadvertently come through on the TV screens of non-subscribers due to deficiencies in signal-scrambling technology. The Government said that this is a problem in an estimated 39 million homes and that the exposure of those sounds and images to the children in those homes is harmful. Section 505 requires cable television operators who provide such programming either (1) to fully scramble or "otherwise block" those channels or to limit their transmission to the hours between 10 p.m. and 6 a.m. when children are less likely to be watching. Cable operators chose the latter to avoid hefty fines (as well as hefty investment into better fail-safe scrambling technology) should the less-than-perfect scrambling system presently employed create any unintended signal bleed. By doing so, Playboy's speech, it said, was reduced by two-thirds along with a corresponding reduction in revenue.

Playboy challenged Section 505's constitutionality, and a three-judge district court concluded that the content-based restriction on speech violates the First Amendment because the Government could further its interests to protect children from such programming in less restrictive ways than a daytime ban. The court suggested that such an alternative exists in Section 504 of the Act, which requires a cable operator, "upon request by a cable service subscriber...without charge, [to] fully scramble or otherwise fully block" any channel the subscriber does not want. This alternative with "adequate notice" (as defined by the court) to all subscribers by the cable company and by Playboy and its ilk, the court reasoned, would provide as much protection against unwanted programming as would Section 505. The Government disagreed, arguing to the Supreme Court that Section 504, with or without adequate notice, would not be an effective alternative means to achieve its child protective goal, and thus Section 505 should be upheld. The Court, by a 5–4 vote, disagreed.

Justice Kennedy immediately focused the analysis on the efficacy of Section 504, but not without first reiterating the assumptions made by all parties that (1) many adults find the material at issue highly offensive and, when it comes to children, there are legitimate reasons for its regulation; (2) Playboy's programming is indecent and not obscene, thus eligible for First Amendment protection; (3) Section 505 is a content-based regulation thus invoking the strict scrutiny test, and that (4) Section 504 is narrowly tailored to meet the Government's interest to support parents who want sexually explicit channels blocked. With this understood, Kennedy then began to draw a bold line in the sand, stating that the "key difference" between cable television and other broadcast media (to which the courts have applied a lower level of scrutiny, thus permitting more regulatory leeway to Congress) is that cable systems have the capacity to block unwanted channels on a household-to-household basis. "Targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests."

In support of its position that Section 504 would be ineffective for this purpose, the Government cited empirical evidence showing that it had generated few requests for household-to-household blocking; fewer than 0.05% of subscribers over one year requested full blocking. In short, the public greeted Section 504 with, as Kennedy describes, "a collective yawn." Thus, the district court was correct to direct its attention to the import of this tepid response and conclude that Section 504, if publicized, could be capable of serving as an effective, less restrictive means of reaching the Government's goals. Rebutting, the Government interpreted the low response as a need for the Government to step in, since society's independent interests will go unserved if parents fail to request individual blocking devices from their cable companies. That was an unwarranted assumption, Kennedy said, adding, "[E]ven upon the assumption that the Government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction of speech."

Other insurmountable obstacles existed that weakened, the Court felt, the Government's argument that Section 504 is ineffec-

tive: the little hard evidence of how widespread or how serious the signal bleed problem is, the lack of evidence as to how likely any child is to view a discernible explicit image, and no proof of the duration of the bleed or the quality of the pictures or sound. Moreover, there is no legislative fact-finding record behind Section 505, as it was added to the bill by Senate floor amendment, accompanied only by brief statements, and without committee hearings or debate. "The First Amendment requires a more careful assessment and characterization of an evil in order to justify a regulation as sweeping as [Section 505]." In its last gasps, the Government tried to discredit a publicized Section 504 as being cost prohibitive to cable providers and to Playboy. Again, there was no evidence to support this assumption, notwithstanding Playboy's offer to incur any costs related to an effective Section 504. In closing, the Court leaves an impression that an enhanced Section 504 may not be a panacea, remarking that even with adequate notice to parents about their entitlement to institute blocking, some children will be exposed to signal bleed just as there will be children exposed under time channeling.

Temporarily breaking away from Scalia's hip, Justice Thomas authored one of the two brief concurring opinions, wherein he contends that some of the subject programming could be found obscene under *Miller v. California*, 413 U.S. 15 (1973). However, the Government, having declined to defend Section 505 as a regulation of obscenity, cannot now ask the Court to "dilute our stringent First Amendment standards to uphold Section 505 as a proper regulation of protected (rather than unprotected) speech."

Writing the principal dissent, Justice Breyer found no adequate alternative in Section 504, and accuses the majority of "reduc[ing] Congress' protective power to the vanishing point...[which] is not what the First Amendment demands." He also finds the Government's evidence very credible to support that not only is signal bleed a widespread problem, but also that Section 504, even with better notice, would fail to meet the Government's interests. At its heart, the Breyer dissent finds Section 505 constitutional because the Court has routinely held that the Government has a compelling interest in helping parents by preventing minors from accessing sexually explicit materials in the absence of parental supervision. Breyer reasons that Section 504 is not a similarly effective alternative, because 504 and 505 work differently in order to achieve very different legislative objectives. Section 504 gives parents the power to tell cable operators to keep any channel out of their home, but Section 505 does more: unless parents explicitly consent, it inhibits the transmission of adult channels to children who are, for whatever reason, without parental supervision. "In this respect, 505 serves the same interests as the laws that deny children access to adult cabarets or X-rated movies," wrote Breyer. Those laws, like Section 505, burden but do not ban protected speech, yet they still pass constitutional muster. He criticized the majority by reminding them that Section 505 likewise does not ban the protected speech but similarly burdens it. Breyer closed by asserting that Playboy's speech is not that burdened in the age of VCRs and the expected expansion of digital cable service, a technology with superior fail-safe blocking systems.

Scalia, in an unsurprising move, agreed with Breyer in his separate dissent, but cut a shorter path, finding that much of the subject speech is indeed obscene, hence mooting the First Amendment issue. Under his analysis, the Court has held that commercial entities engage in constitutionally unprotected behavior when they engage in "deliberately emphasiz[ing] the sexually provocative aspects of [their nonobscene products], in order to catch the salaciously disposed," (quoting *Ginsburg v. U.S.*, 383 U.S. 463 (1966)). Based upon how Playboy describes its programming and the explicit text and graphics it uses to do so, a finding can be made that it markets sex. "Since the Government is entirely free to block these transmissions, it may certainly take the less drastic step of dictating how, and during what times, they may occur."

Turning next to Justice Thomas' concurring words, Scalia noted in response that a finding of obscenity is not an as-applied challenge but a facial one in which the terms of a statute address obscenity, a role reserved for the Court and not the factfinder. However, Scalia is not Thomas's only critic: Breyer finds exception to Thomas's (and to a degree, Scalia's) notion that even though some of the subject programming can be found obscene, insisting that exclusive reliance on *Miller* which concerns speech between *adults* (emphasis Breyer's) "is to overlook the special need to protect children."

Justice John Paul Stevens devoted his concurring opinion to responding to Scalia. He characterized Scalia's reasoning as "anachronistic," observing that *Ginsburg* was decided before the Court extended First Amendment protection to commercial speech. To prove his point, he illustrated the folly of relying on *Ginsburg*: "advertising a bareheaded dancer as 'topless' might be deceptive, but it would not make her performance obscene." Of course, Scalia responded via footnote, explaining that it's still possible to find obscenity under *Ginsburg*, Stevens' amusing hypothetical notwithstanding.

With targeted blocking now distinguished, it is not too unreasonable to predict the degree of First Amendment protection owed to any medium, known or unknown, based upon its ability to be individually scrambled, blocked or filtered among listeners, whether by the system operator or retail software. However, the Court's opinion does hint and, to a degree, base part of its decision on the digital direction new media technology is taking; a direction that will drastically reduce, if not eliminate, the very problem that brought about this case. *K. Jacob Ruppert*

Maryland Court Finds Lesbian To Be De Facto Parent but Upholds Denial of Her Visitation Rights

In a case of first impression in the state of Maryland, the Court of Special Appeals refused to overturn the trial court's determination that the non-biological lesbian co-parent should be denied visitation rights with the child she reared with her ex-lover, the biological mother, because of the detrimental effects of her visits on the child. *S.F. v. M.D.*, 2000 WL 520686 (Md. Ct. of Spec. Apls., May 2, 2000).

The opinion by Judge Eyler contains a long factual narrative, setting out the full history of the relationship of the parties, how they shared co-parenting responsibilities while living together for the first three years of the child's life, and continuing after they broke up, pursuant to a liberal visitation arrangement agreed to by them. The court noted that S.F., the co-parent, played an integral and significant role in the pre-natal and post-natal care of the child, always acted as a loving and caring parent, and had above average parenting skills. Although the relationship between S.F. and the child was beneficial to the child while they lived together, sometime after the appellant moved out, the child's behavior changed in severe and adverse ways, including inability to sleep, clinginess and engaging in rigid fantasy role-playing. At one point, the ex-lovers got into a fight over a bicycle and M.D. decided to discontinue the visits. The behavior of the child then improved.

S.F. went to court to force visitation. The circuit court ordered a temporary resumption of visitation so that a psychiatrist could evaluate the relationship between S.F. and the child. The behavior problems soon returned, and M.D. again terminated all visitation between S.F. and the child.

S.F. did not argue that she was entitled to custody of the child; only that she was entitled to visitation rights so she could continue her relationship with the child. Both the circuit court and Judge Eyler were sympathetic to S.F.'s argument, and noted that "if visita-

tion is terminated completely, the child will lose a significant positive relationship with someone who has served as a parent for most of the child's life." However, given the undisputed facts of the case, that the symptoms reappeared when visitation resumed and disappeared when visitation terminated, Judge Eyler could find no basis upon which to hold that the circuit court's findings were clearly erroneous.

While the result of the court's opinion is that the non-biological lesbian co-parent is left out in the cold, in fact the case sets a positive precedent for legal recognition of gay and lesbian families. Judge Eyler found that S.F., although unrelated to the child by blood or through adoption, was a de facto parent who had standing to sue for visitation rights under a Maryland statute known as the "grandparents visitation statute" (9–102 and 1–201 of the Family Law Article). In many states, an unrelated same-sex co-parent does not have standing to assert visitation rights, nor will he or she be deemed a de facto parent. In those states, courts would presume that he or she is not entitled to visitation. In order to be granted such rights, he or she would have to show that the biological or adoptive parent is unfit, or some other exceptional circumstance.

Judge Eyler held that S.F. is a de facto parent and therefore "there is no presumption that she is not entitled to visitation." She would not have to show that M.D. was unfit or other exceptional circumstances in order to prevail, only that it was in the best interest of the child that she be permitted to visit with him. Both the Maryland circuit and appeals court clearly treated the lesbian parties the same as they would heterosexual parties.

In an interesting aside, Judge Eyler approvingly quoted the circuit court's suspicion (not supported by any evidence) that the true cause of the child's dysfunctional behavior was M.D.'s hatred of S.F., which, when transmitted to the child, caused him to react in the way he did to S.F.'s visits. Judge Eyler also reiterated the circuit court's lecture to M.D. that she should try to get over her feelings for the sake of the child. The circuit court opined that M.D. destroyed the child's positive relationship with S.F. and caused psychological damage to the child. The bottom line was that the child could not negotiate both relationships at the same time, and the parties had not tried to enable the child to do that. *Elaine Chapnik*

N.Y. Appellate Division Rejects Appeal of Yeshiva Student Housing Claim

When appellate judges want to evade individual responsibility for an opinion, they may collectively hide behind the device of the brief *per curiam* ruling. That appears to be what happened on May 11, when the New York Appellate Division, 1st Department, upheld Yeshiva University's refusal to let students live with their same-sex partners in university housing. *Levin v. Yeshiva University*, 2000 WL 571173. That device won't work here; the names of the offending judges, some of whom were elected to the bench with strong support from the lesbian and gay community, are: Richard T. Andrias, Angela M. Mazzarelli, Eugene L. Nardelli, Peter Tom, and Richard W. Wallach.

The case was brought by two lesbian medical students at Einstein College of Medicine, whose applications to live in married student housing with their same-sex partners were denied by the Yeshiva University administration. Their discrimination complaint had been dismissed on March 29, 1999, by New York County Justice Franklin Weissberg. See *Levin v. Yeshiva University*, 691 N.Y.S.2d 280 (N.Y.Sup.Ct., N.Y.Co.1999) The appeal was argued just a few weeks before the opinion was issued.

Infuriatingly, the appellate judges decided that this was an issue that did not merit any sort of reasoned analysis or explanation. Although New York City forbids housing discrimination on the basis of sexual orientation and New York State forbids such discrimination on the basis of marital status, the court curtly stated that Yeshiva's written policy that lets medical students live with their spouses and children in university housing but forbids unmarried students from living with their life partners in such housing does not violate either law, but provided no explanation, merely citing prior cases, some of which bear little or no relationship to the issue presented to the court, and none of which directly dealt with the question before the court.

Surprisingly, the court neglected to cite or distinguish *Gay Teachers Association v. Board of Education*, 183 A.D.2d 478, 585 N.Y.S.2d 1016 (N.Y.A.D., 1st Dept, 1992) an important ruling to the contrary by another panel of the same court, holding that gay teachers in New York City, relying on the same city and state laws, had stated a legal claim in their struggle to attain domestic partnership health benefits. That case resulted in an 11th-hour settlement by the Dinkins Administration just days before the 1993 mayoral election, under which domestic partnership health benefits were extended to all New York City workers. In his order dismissing the *Yeshiva* case, Justice Weissberg unconvincingly distinguished *Gay Teachers* by reading into it a particular reliance on constitutional arguments that are not available against the private Yeshiva university (the Appellate Division's brief memorandum in *Gay Teachers* does not discuss the legal theories) and by relying on a 2nd Department ruling rejecting a domestic partnership benefits claim in a Long Island school district, which the *Yeshiva* per curiam opinion also cites. Significantly, of course, the N.Y. City Human Rights Ordinance would have no bearing on a domestic partnership claim on Long Island.

The court also rejected the argument that Yeshiva's policy has a "disparate impact on homosexuals," asserting that it has the *same* impact on unmarried heterosexuals, but failing to discuss in any way the plaintiffs' contention that because gay people in New York cannot marry their life partners, they are not similarly situated with non-gay people; the court also failed even to consider the possibility that the policy might be illegal with respect to unmarried non-gay couples as well.

One would have expected much more from a panel of appellate judges sitting in Manhattan in 2000, in a city that has the nation's broadest municipal domestic partnership ordinance and where tenant succession rights for same-sex couples have been established, by mandate of the state's highest court, for more than a decade.

The court also rejected the argument that the policy violates the state's Roommate Law, under which residential tenants are entitled to have a roommate, "since the statute applies to premises occupied by a tenant as his primary residence. A full-time student does not change his primary residence by living temporarily in student housing," said the judges. But, of course, the court paid no attention to the fact that this case concerns graduate students, adults who are unlikely to consider themselves to still be domiciled with their parents and who may be living in university housing year-round.

The Appellate Division's dismissive opinion, provoking not even one dissent, may perhaps set the stage for a more perceptive and empathetic hearing from the Court of Appeals, for which there is a fine precedent. Back in the 1980s, a similarly dismissive, entirely unenlightening per curiam opinion by the Appellate Division in the case of *Braschi v. Stahl Associates Co.*, 531 N.Y.S.2d 562 (N.Y.App.Div., 1st Dept. 1988), a same-sex partner tenant succession case under the rent control law, resulted in a historic, precedent-setting ruling by the Court of Appeals providing the first appellate recognition in the United States that same-sex partners could be considered members of each other's family, 74 N.Y.2d 201 (1989). Perhaps the same principle established in the _Braschi_ case might commend itself to the state's highest court in an appeal from this shameful ruling.

Attorney James D. Esseks represents the plaintiffs in this case. A.S.L.

7th Circuit Rejects Constitutional Claims of Discharged Anti-Gay Crusader

The U.S. Court of Appeals for the 7th Circuit dismissed on summary judgement the due process, equal protection and First Amendment claims of Plaintiff-Appellant Ronnie B. Greer against Chief Debra Amesqua, The City of Madison, and its Fire Department, on May 9. Greer was terminated from the department when he published a disruptive and derogatory "news release" implying a "lesbian conspiracy" headed by Amesqua. *Greer v. Amesqua*, 2000 WL 558642.

Greer, "whose personal mission is to wipe homosexuality from our midst," is pastor of a thirty-member evangelical church. As a Madison firefighter, Greer's "persistent incapacity to conform himself ... to the ... requirements of ordinary civil conduct" earned him an "undisputed record of gross insubordination.70 Highlights under Amesqua's predecessor chief include: chronic tardiness, shouting at superiors, absence without leave, religious speech in the workplace, Greer's Wisconsin Equal Rights Division complaint based on his refusal to submit to Department shaving inspections, and Greer's press announcement that the chief and mayor were misleading the public as to hazardous materials preparedness. On Greer's removal from the hazardous materials team, he sued for employment retaliation in violation of his First Amendment rights; garnering a settlement of $18,500. Madison's Board of Police and Fire Commissioners (PFC) affirmed Greer's appealed three day suspension over misuse of sick pay.

Greer carried a sign protesting Amesqua's appointment as chief at her oath ceremony in 1995. Amesqua is Native American; Greer believes that she is lesbian. Greer protested to the mayor and reporters at the time that Amesqua was unqualified and that the department deliberately and illegally passed over qualified candidates to achieve affirmative action aims. Greer's opinions, that homosexuality is "destructive to the individual and [sic] as well as society" as a pedophilia-like "perversion", a "character issue", that should disqualify homosexuals from "positions of authority", were published in local newspapers. In 1996 Greer distributed to fellow firefighters pamphlets titled "Homosexuality: The Truth" that call homosexuality a "filthy scourge" and blame gay people for disease and child molestation. Amesqua suspended Greer and gave written notice that future breaches of departmental standards could result in his termination. Greer appealed to the PFC, which upheld this suspension, characterizing his pamphleteering as workplace harassment. The PFC also warned Greer that his next breach would result in termination.

In 1996 Wisconsin media aired video of Division Chief Holtz, identified as lesbian in Judge Kanne's opinion, making physical contact with and screaming at a (male) recruit during a live fire training exercise. The firefighters' union requested Holtz's suspension and reprimand. Investigation by an assistant chief under Amesqua found Holtz's conduct "not unreasonable under the totality of the circumstances," mandated Holtz's attendance at a leadership class, and extended her probation for six months. This prompted Greer's "news release" titled "Homosexual Chief rewards [sic] Homosexual Chief for Assault?." Inter alia, Greer's release queries "the relationship between Amesqua and Holtz goes back ... through ... 'Women In Fire' ... seen by most firefighters ... as a predominantly homosexual organization. [Has] favoritism been shown here [between] fellow ... homosexual women ... with clear ... radical agendas [so] that even violence can be ... rewarded?" "Women in Fire" is an erroneous reference to the Madison-based "Women in the Fire Service." Greer's release led to a front page article in a Madison newspaper, titled "Greer says fire chief plays gay games," that observed "Neither Amesqua nor Holtz has said publicly ... whether they're gay or straight."

Amesqua adopted a subordinate chief's investigatory report that found Greer violated specific Department Rules and an Administrative Procedure Memorandum. Amesqua recommended Greer's termination to the PFC. After an eight-day hearing, the commission terminated Greer's employment. Greer declined to appeal in state court, instead launching the present federal case.

The Court of Appeals affirmed the district court's grant of summary judgement for the defendants on all of Greer's claims. The court concluded that Greer's representation by counsel, and opportunities to present defense evidence and confront witnesses against him at the hearing satisfied the requirements of due process. The court found, contrary to Greer's accusations, that three of the PFC commissioners had no evident bias against him. The court disagreed with Greer's argument that Department rules requiring that firefighters "not bring the Department into disrepute," "treat superiors with respect," and "not engage in harassment on the basis of race, sex, religion ... national origin or sexual orientation" were void for vagueness. The court found unsupported Greer's Equal Protection claim because no similarly situated (i.e., grossly insubordinate) firefighters were treated better.

Finally, acknowledging that whether public officials are operating the government ethically and legally is "a quintessential issue of public concern," the court concluded that Greer's firing was not a retaliatory First Amendment violation because he never pursued internal avenues for questioning the Department's investigation, instead making disruptive allegations to the press. *Mark Major*

Michigan Appeals Court Orders New Trial on Liability of Hospital for Death of Gay Patient

In a per curiam opinion issued May 9, the Michigan Court of Appeals ordered a new trial in *Powell v. Michigan Dept. of Community Health*, 2000 WL 621402, setting aside a verdict of over $7 million that had been won by the estate of Gary Tomic, a gay man who died in the defendant's hospital on Dec. 26, 1991.

The lawsuit alleged malpractice by the hospital and its medical staff, specifically focusing on allegations that certain necessary procedures were delayed or were not performed as required by good medical practice. Based largely on the testimony of one witness, Dr. Peter Tiernan, who had been a surgical resident at the hospital during Tomic's treatment, the plaintiff also contended that the hospital was rife with homophobia and that Tomic's inadequate treatment was in part due to his being an openly gay man. Tiernan testified that hospital staff members made contemptuous remarks about gay patients, as well as patients who were members of other minority groups. During the trial, the judge sharply restricted the defendants' ability to impeach Tiernan's testimony by bringing out his animus against the hospital. (It seems that Tiernan was dismissed by the hospital before the conclusion of his residency for a variety of reasons that are sharply disputed.) The jury awarded substantial damages to the Tomic estate, which were somewhat reduced in a remittitur determination by the trial court.

On appeal, the court found that it was error for the trial court to have so sharply restricted the defendants in their attempts to impeach Tiernan's testimony, since it was very likely that his testimony was the key element in persuading the jury, especially as to punitive damages. Wrote the appeals court, "The trial court believed that, because Tiernan's bias against defendant was evident from his demeanor, the jury did not need to know the origin of that bias. We find this reasoning to be flawed. The only evidence presented to the jury concerning Tiernan's animus against defendant was Tiernan's own testimony. Tiernan stated that the hospital was poorly managed and provided substandard care to patients; furthermore, it had dismissed him when he repeatedly complained about these problems. If these allegations were the sole basis for Tiernan's hostility toward defen-

dant, the jury would have had little reason to doubt his testimony regarding Tomic's care and the disappearance of records from patient files. If, however, the jury believed the defendant had dismissed Tiernan for incompetence, it could easily have concluded that Tiernan's testimony, or at least his more inflammatory charges, had been fabricated in an attempt to pay back defendant for derailing his surgical career. We cannot conclude that the trial court's error was harmless. Without Tiernan's testimony, this case was a routine 'battle of the experts,' However, Tiernan made scandalous charges, not corroborated by any other witness, regarding the alleged biases against homosexuals, women, and 'people of color' displayed by defendant's employees; appalling lapses in patient care, including the care given to Tomic; and the deliberate destruction of patient records to cover up wrongdoing. By the trial court's refusal to allow defendant to present evidence concerning the true reason for Tiernan's termination, Tiernan was permitted 'to make himself out impartial and disinterested,' a righteous doctor whose only concerns were for justice and patient care. Indeed, when plaintiff's counsel asked Tiernan why he was testifying, the latter replied, 'Justice and conscience,' and further cited his duties as a physician and as a military officer. Because the outcome may well have been affected by defendant's inability to present evidence concerning a different motivation for Tiernan's testimony, the jury verdict must be reversed and defendant given a new trial."

The court also noted the performance of plaintiff's attorney at trial as being prejudicial, noting the exuberance with which counsel attacked the credibility of all the defendant's witnesses, accusing them of outright lying and destruction of evidence. The court cautioned that a more reserved approach should be followed on the retrial. A.S.L.

N.Y. Court of Appeals Rebuffs Giuliani Administration Once More on Adult Zoning Application

For the second time in five months, the New York State Court of Appeals unanimously rejected the City of New York's interpretation of its adult business zoning resolution in *City of New York v. Dezer Properties, Inc.*, ___WL___, __N.Y.2d.___ (N.Y. May 4). As a result, eating and drinking establishments in New York City will not be subject to stringent regulation and probable closure unless 40 percent of the floor space of the business is devoted to "adult activity." Had the City prevailed, these businesses would have been subject to regulation if *any* portion of the business was devoted to adult activity.

The ordinance in question, Zoning Resolution Section 12–10, was designed to restrict "adult establishments" to certain commercial and industrial areas of town. "Adult Establishments" were defined as those where a "substantial portion" of the floor space — later defined in a city regulation as 40 percent — was devoted to adult features or entertainment. This could include bookstores or eating and drinking establishments. In *City of New York v. Les Hommes*,1999 WL 1215136 (N.Y.Ct.App., Dec. 20, 1999), the Court of Appeals had ruled that a bookstore which had limited sale of "adult material70 to less than 40% of its floor space could not be subjected to analysis of what percentage of revenue was derived from adult materials, because no provision for such analysis was made for such analysis in the zoning resolution or subsequent regulations.

According to news accounts, Dezer Properties owns VIP Club, a topless bar located on West 20th Street in Manhattan. In response to the zoning resolution, topless dancing was restricted to the mezzanine of the club, so this dancing could only be observed from the mezzanine, which occupied only 36 percent of the floor space of the club. The City took a position similar to the one that it urged in *Les Hommes*, arguing that this compliance was a sham, and that any such adult activity qualified the entire establishment as an adult establishment. In this case, both the Supreme Court and the Appellate Division had concluded that, in evaluating compliance with this zoning resolution, the "substantial portion" analysis must be applied to eating and drinking establishments. The Court of Appeals agreed with the lower courts, ruling that the City's interpretation would effectively excise this portion of the zoning ordinance from consideration with regard to eating and drinking establishments. The Court of Appeals had reached a similar conclusion in *Les Hommes*.

Despite its ruling that the substantial portion analysis applied, the Appellate Division disagreed as to its application to the facts of this case. The City, however, had conceded that less than a substantial portion of the club's floor area was devoted to adult activities. Because of this concession, the Court of Appeals ruled that the Appellate Division could not reach this question, and reversed.

This case was before the court on a certified question concerning the interpretation of the zoning resolution. The Appellate Division decision was reversed, and the certified question was not answered, as it was found unnecessary to do so. *Steven Kolodny*

Sex in the Subway: Gay Man Wins Dismissal of Sodomy Charge, But Will Be Prosecuted for Public Lewdness and Public Exposure

In *People v. Stallworth*, NYLJ, 5/1/2000 (N.Y.Crim.Ct., Bx. Cty.), a charge of consensual sodomy was dismissed *sua sponte* on constitutional grounds, even though the act in question was alleged to have taken place in public. Motions to dismiss charges of public lewdness and public exposure, based on claims of selective prosecution, were denied by N.Y.C. Criminal Court Judge Harold Adler.

Derrick Stallworth had been arrested for having sex with another man on a Bronx subway platform. The quoted part of the charging instrument indicated that the defendant was observed "with his penis outside of his pants"and another man "separately apprehended" was observed "to have defendant's penis in his mouth." Stallworth was charged with violations of Penal Law §130.38 (Consensual Sodomy), Penal Law §245.00(a) (Public Lewdness) and Penal Law §245.01 (Exposure of Person).

The court dismissed the charge of consensual sodomy *sua sponte*, pointing out that Penal Law §130.38 had been stricken down 20 years ago by the New York Court of Appeals as unconstitutional in *People v. Onofre* on privacy and equal protection grounds.

Stallworth's motion to dismiss argued that as a gay man, he was the victim of selective prosecution, that a heterosexual couple engaged in similar conduct - oral sex on a subway platform - would not face prosecution. The court took notice of the discrimination which gay men often face, but rejected the argument, stating: "This court is sensitive to, and disheartened by, the fact that homosexuals are frequently discriminated against. This is not the first time that counsel appearing before this court have argued that our law enforcement and criminal justice systems treat homosexual defendants who commit offenses involving public sexual encounters more harshly than their heterosexual counterparts. However, as sympathetic as this court is to this issue, counsel has not provided any factual basis justifying their heartfelt and sincere conclusions of discrimination and disparate treatment. That being the case, the court is constrained to deny the motion to dismiss." *Steven Kolodny*

Gay TV Camera Operator Loses Discrimination Suit Against CBS

Kevin Patterson, formerly employed as a television camera operator by CBS News, has lost round one of his discrimination lawsuit. On May 22, U.S. District Judge Kevin Duffy granted the defendant's motion for summary

judgment, finding that Patterson's pro se claims were either time-barred or substantively lacking under current principles of discrimination law. *Patterson v. CBS, Inc.*, 2000 WL 666337 (S.D.N.Y.).

Patterson worked for CBS from 1978 until he was discharged in August 1993. Beginning in 1991, he was one of two camera operators assigned to the CBS Evening News. He was terminated in 1993 after an incident in which "he abandoned his camera and walked off the set during a live broadcast." Patterson claimed that throughout his employment at CBS he suffered harassment and discrimination because he was gay, and cited incidents dating back to 1985 including name-calling and various homophobic pranks committed by co-workers. He claims that he complained to supervisors about some of the incidents, but was either told to drop his complaint or was ignored. Patterson also alleged harassment by a particular supervisor, the director of the Evening News program, and alleged that he had complained at various times about what he perceived to be discriminatory work assignments.

In 1992, Patterson claimed he confided in the Evening News supervisor about his HIV status, and that the supervisor became more critical of his work after that. However, Patterson never filed a complaint about any of this harassment with CBS's Human Resources Department, as set out in the company's published non-discrimination policies.

Immediately after his discharge, Patterson filed charges with the Equal Employment Opportunity Commission, claiming discrimination based onn disability, sex and sexual orientation. He filed this lawsuit shortly after receiving a right-to-sue letter from the EEOC, which took no other action on his complaint. In the federal court, Patterson alleged violations of the ADA, the new York Human Rights law, the New York City Human Rights Law, and Title VII. He claimed he was subjected to a hostile working environment on the basis of gender and sexual orientation.

One of Patterson's main problems in this case, at least as diagnosed by Judge Duffy, was that he let things slide much too long in following up on the various alleged incidents of discrimination. He never brought CBS management into the picture by complaining to Human Resources. And, perhaps most importantly in relation to his wrongful discharge claim, he gave CBS the perfect defense by having walked off the job during a live broadcast, which must be the equivalent of a capital offense in the television industry. Thus, it was possible for CBS to persuasively articulate a legitimate reason for firing him. Furthermore, the various civil rights statutes that Patterson invoked all have relatively short statutes of limitations, so the court was precluded from considering most of the incidents that Patterson had alleged dating back to the 1980s in deciding whether he had stated a valid hostile working environment claim.

Duffy found that the isolated incidents alleged by Patterson did not add up to the kind of pervasive harassment required to state a claim under current law, and furthermore, under recent Supreme Court decision, the named defendant, CBS, could not be held liable when they had created a non-discrimination policy and an effective procedure to implement it and Patterson had never actually invoked the procedure by complaining to the Human Resources Department. Vicarious liability was approved by the Supreme Court in recent decisions, but only under circumstances where the employer had reason to know of a problem and failed to act. This opinion demonstrates the importance under current law for those who suffer homophobia in the workplace to act expeditiously if they want to preserve a possible legal claim, and to invoke the internal grievance mechanisms of their employers if they want to preserve the ability to sue for damages. A.S.L.

Model Release Saves *HX* Magazine and The Roxy From Privacy and Defamation Claims by Bodybuilder Model

New York Supreme Court Justice Miller (N.Y. Co.) found that a release signed by Kenneth Theissen, a bodybuilder who agreed to have photos taken for a physique magazine layout, extended to the subsequent use of his photograph in HX Magazine, thus defeating his claims of invasion of privacy, defamation, and intentional infliction of emotional distress. *Theissen v. Two Queens, Inc.*, reported in *New York Law Journal* (May 18), p. 29.

Theissen had responded to an advertisement placed by Sean Kahlil, a photographer, who was seeking models to illustrate a planned article in *Fitness Plus* magazine. Theissen submitted to a series of photographs that would be used to demonstrate a particular exercise workout at one session, and then agreed to a second session for "opener shots," described as "nonworkout photos of Theissen demonstrating the aesthetic appeal of his physique." The "opener shots" included carefully posed nudes (but evidently not revealing genitalia). Theissen signed a release authorizing use and publication of the photos by *Fitness Plus*, and the company that published the magazine, Princeton Media Group, Inc.. The release covered, by its terms, the photographs of Theissen taken "for any purpose whatsoever, including promotion or advertising for Princeton Media and including the use of such images on products, and for purposes of trade."

The article using these photos was planned for the January 1999 issue of *Fitness Plus*, but the magazine suspended publication for financial reasons and the issue was never printed. Since the magazine still owed Kahlil payment for the photos and they were out of cash, the assigned Kahlil back the right to Theissen's pictures. Kahlil then turned around and sold the "opener shots" to the company that operates the Roxy nightclub, which used them in an advertisement for its all-male production of Oscar Wilde's play, "The Importance of Being Earnest." The Roxy placed a full-page ad for the play in HX Magazine, a bar handout aimed at the gay male community in New York City, using Theissen's nude photo as an illustration. HX, owned by Two Queens, Inc. (yes, those Queens....), published the picture in reliance on the release Theissen had signed. Subsequently, John Blair Productions, a gay community party promoter, reprinted the photo from HX on various fliers it mailed out to promote gay community events.

Theissen, who evidently does not consider himself to be gay, was quite upset when he found out the uses to which his photograph had been put. He sued Kahlil, HX and Blair, claiming violation of privacy, defamation, and intentional infliction of emotional distress. The first two defendants moved for summary judgment, setting up the release as their defense, and Justice Miller found they had a good case. N.Y. Civil Rights Law, sec. 50, creates a cause of action for invasion of privacy that extends to unauthorized use of a person's photograph for purposes of trade. Since Theissen was not in the Oscar Wilde play, the use of his photograph in an advertisement for the play was solely for purposes of trade, thus theoretically bringing his case within the statute, but Miller concluded that the use of the photograph was authorized under the circumstances because of the breadth of the release that Theissen had signed.

Theissen had tried to overcome the effect of the release by testifying about a phone conversation he had with Kahlil after he became upset upon learning of the use of the photograph by the Roxy and HX, in which Kahlil allegedly apologized to Theissen, and said "I won't ever use anything of yours again without your written permission so you know what it is." Theissen contended this was an admission by Kahlil that he did not have permission to sell the opener shots to Roxy. But Justice Miller wasn't buying this argument: "the statement should be taken in the context of a photographer trying to retain the good will of a model with whom he wants to continue to work. Because this Court holds that the 'opener shots' were covered by the release,

Kahlil's gratuitous promises of future conduct and erroneous interpretation of what was covered in the release are irrelevant."

Having found that the use of the photograph was authorized, Miller found that all of Theissen's torts claims collapsed, and never had to get into the issue of whether the use of somebody's photograph in a gay publication would be considered defamatory of they were not gay, which could have been a rather interesting discussion in light of the somewhat retrogade caselaw on the issue of gay defamation in New York state. Thus, summary judgment was granted in favor of defendants Kahlil, the Roxy, and HX Magazine. However, it was unclear whether Blair "acted pursuant to the release," and to judge by the opinion Blair had not joined in the motion for summary judgment, so the action continues against Blair Productions, and perhaps at some future time Miller will have to grapple with the defamation question (unless Blair is willing to buy off Theissen with an apology and some bucks). A.S.L.

N.Y. Appellate Division Brands Anti-Gay Remarks to be Workplace Misconduct

In *Matter of Claim of Patricia F. Campbell*, 706 N.Y.S.2d 492 (N.Y. App. Div., 3rd Dept., April 13, 2000), the appellate court denied the claimant's appeal of a decision by the Unemployment Insurance Appeal Board, denying unemployment benefits. Claimant Patricia Campbell was employed as a phlebotomist at a hospital. She was discharged after she "became verbally abusive to a male patient and advised the patient, who was homosexual, that he was a sinner and would go to hell. Claimant made similar remarks to the patient's roommate, who also was homosexual, and advised him that his tattoos were signs of the devil." The hospital had a policy banning discrimination on the basis of sexualorientation against patients. The Board found that a failure to comply with the employer's established policies is misconduct, and one discharged for misconduct is barred from the award of unemployment insurance benefits. On her appeal, Campbell claimed that she had not made the remarks to the patient's roommate that were alleged against her, but the court refused to reexamine the credibility determinations made by the Unemployment Insurance Board, and affirmed denial of the benefits. A.S.L.

Federal Court Allows Addition of Sexual Orientation Equal Protection Claim to Discrimination Suit Against Social Services Agency

In a novel ruling that could set up an interesting extension of federal constitutional law to protect lesbian and gay employees from discrimination, U.S. District Judge Leonard Wexler (E.D.N.Y.) adopted in full a report and recommendation by Magistrate Michael Orenstein to allow a discrimination plaintiff to add a federal constitutional count of sexual orientation discrimination to a pending suit against a private social services agency. *Dunayer v. Adults and Children With Learning and Developmental Disabilities, Inc.*, reported in *New York Law Journal*, 5/26/2000, p. 36.

Plaintiff Ronnie Dunayer, a former employee of ACLD, was terminated on Dec. 13, 1996, purportedly for refusing to cooperate in an ongoing internal investigation of charges that she had engaged in inappropriate conduct at a company party. In a lawsuit filed on March 11, 1998 against ACLD and two of its management employees, Dunayer alleged discrimination on the basis of sex and age, asserting that ACLD had a continuing pattern, practice, and policy of discriminating on the basis of sex and age in terms and conditions of employment, and had maintained a sexually hostile environment. Dunayer specifically alleged that during her last year of employment, she "experienced rude, demeaning, threatening and abusive treatment by her supervisor, defendant Saunders." Until December 1999, Dunayer believed that she was terminated on the basis of her sex and age.

Then, on Dec. 14, 1999, during a deposition of defendant Leibowitz, Dunayer learned for the first term of the existence of internal documents recording investigations undertaken by Human Resources employees of ACLD based on complaints against Dunayer. These documents had not been produced or identified by ACLD in response to Dunayer's document production requests, and their existence emerged from testimony in the deposition. When Dunayer reviewed these documents, she discovered that the internal investigations had focused on her sexuality, homosexuality, lifestyle and personal life as they bore on her interaction with co-workers and staff of the agency.

She promptly moved to amend her complaint, adding allegations of sexual orientation discrimination. Dunayer claimed, in her proposed amendment, that the newly-discovered documents showed a campaign against her motivated by defendants' irrational fear and prejudice towards homosexuals in general and plaintiff in particular. At this point, the time had long passed for amendment of the complaint as of right, so Dunayer sought to proceed by motion, and was opposed by the defendants, who argued that adding a sexual orientation claim would be "futile" and would unduly prejudice their case. The motion was sent to Magistrate Orenstein for a report and recommendations.

Orenstein decided that the way to dispose of this motion was to test the proposed amendment by the analysis one would use in considering a motion to dismiss for failure to state claim. Assuming Dunayer's factual allegations were true, would they support a prima facie case under Title VII, the New York State Human Rights Law, or the federal constitution as alleged by Dunayer? (The opinion does not specify the location of the defendant's offices, but they are presumably on Long Island beyond the city limits of New York, and thus not covered by the N.Y.C. Human Rights Law's ban on sexual orientation discrimination.)

Turning first to Dunayer's attempt to add a sexual orientation claim under Title VII and the New York State Human Rights Law, Orenstein concluded that it was reasonably well-established that discrimination on account of sexual orientation is not actionable as sex discrimination. Part of Dunayer's claim is hostile environment sexual harassment; while it is clear that "same-sex" harassment claims are recognized as being within the scope of Title VII if the motivation of the harasser is gender-based, it is also clear that when the motivation of the harasser is the sexual orientation of the victim, the claim is not actionable as sex discrimination. Thus, the motion to add sexual orientation claims under Title VII and the Human Rights Law was denied.

However, Orenstein recommended allowing the amendment to add the constitutional claim. This presented three distinct issues. First, could ACLD be sued on a constitutional claim, since it is not a governmental agency? There would be an equal protection violation only if the defendants' alleged discriminatory action was under color of state law. Wrote Orenstein: "The Supreme Court has established three tests for determining whether a private entity has engaged in sufficient state action to trigger sec. 1983 liability: (1) the 'symbiotic relationship' test which examines whether '[t]he State has so far insinuated itself into a position of interdependence with [the organization] ... that it must be recognized as a joint participant in the challenged activity, ...; (2) the 'state compulsion' test which examines whether the state action 'exercis[e] coercive power or ... provid[e] such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State, ...; and (3) the 'public function' test, which examines whether the entity performed a function that is 'traditionally the exclusive prerogative of the State."

ACLD is a private agency that receives extensive federal, state and local financial assistance to establish and operate residential facilities for persons with disabilities under extensive federal, state and local regulation.

Under Dunayer's direction as Director of Residential Services, the agency had grown to one of the largest apartment programs for persons with disabilities in New York State. "On the present record," wrote Orenstein, "the court is uncertain how closely the ACLD residential care programs are associated with New York State." Although government funding by itself is normally not enough to render an agency's personnel actions "state action," Orenstein found that "the regulatory structure which governs the creation and operation of residential care facilities for adults and children appears extensive and may stamp ACLD's activities with color of state law," quoting a provision of the state Social Services Law that emphasizes the important public interest in providing safe residential housing for such clients. In light of these factors, Orenstein stated that it could not be concluded with certainty whether ACLD would or would not ultimately prove to be a state actor for purposes of constitutional liability. Using a motion to dismiss standard for testing the proposed claim, such indecision counselled against dismissal.

It was far easier to resolve the second question: whether Dunayer's factual allegations would support an equal protection claim on the merits. Orenstein noted that there was precedent supporting the conclusion that severe sexual harassment could support a sex discrimination equal protection claim. Then relying on the Supreme Court's 1996 ruling in *Romer v. Evans*, holding that sexual orientation discrimination could violate the equal protection clause, Orenstein reasoned that a harassment claim premised on sexual orientation could be actionable under the 14th Amendment.

Finally, there was the defendants' argument that allowing this late amendment to the complaint would unduly prejudice their case. Here Orenstein found, in effect, that the defendants lacked the clean hands necessary to make such an argument. Arguably, they had violated their obligations to respond fully to Dunayer's first document request, and thus had deprived her of the ability to discover at an earlier point the documentation that would support a sexual orientation claim. Further, since the new claims arose out of the same factual nucleus as the existing claims, Orenstein did not see how adding another legal theory derived from the same facts would prejudice the defendants, other than to make their case harder to win, and that was not the kind of prejudice the courts had in mind when they established the test for determining whether to allow late amendments of newly-discovered claims.

Consequently, Orenstein recommended that Dunayer be allowed to add a sexual orientation constitutional claim to her existing sex and age discrimination claims, and Wexler, without extended comment, approved the recommendation. If Dunayer ultimately prevails, lesbian and gay employees may have gained significant new protection in workplaces where private agencies provide social services under extensive government regulation pursuant to government funding and contracts. A.S.L.

Legislative Notes

On May 8, Fairfax County, Virginia's Board of Supervisors passed an ordinance that bars county employees from harassing, discriminating against, or making slurs against other county employees or members of the public on the basis of sexual orientation. The 7–3 vote supported a measure that applies to approximately 11,000 county employees. While the legislative majority would have liked to have extended the law to cover private sector employment, local governments do not have authority in Virginia to legislate on private sector labor matters. BNA *Daily Labor Report* No. 95, 5/16/00, A–3. *Washington Post*, May 9.

The Washington State Public Employees Benefits Board voted May 23 to extend health care benefits to same-sex domestic partners of state workers, public school employees and those local government employees whose employers provide benefits through the state system. The director of the state's Health Care Authority, which administers the benefits plans, estimates that approximately 300,000 employees, dependents and retirees are presently receiving benefits, and that approximately one percent of enrolled employees and retirees are likely to sign up for partner coverage. Since no money was allocated for this in the current state budget, the coverage will be entirely on a contributory basis for now, and the initial premiums are expected to come to about $2.43 a month, but this may increase sharply due to expected increases in medical costs forecast for the coming year. The Board also announced that it would extend life insurance coverage to partners beginning in January 2001. Gov. Gary Locke, who had asked the board to move on this proposal, issued a statement praising the Board for its action. BNA Daily Labor Report No. 104, 5/30/2000, A–2.

Gov. Gray Davis of California has vetoed a bill passed by the state legislature that would have extended the right to take leave time from a job to care for an ailing partner to nonmarital domestic partners. Davis expressed concern that the law was too loose in extending eligibility, such that someone could take time off to care for a roommate who was not really a domestic partner.

Litigation Notes: Criminal

On April 28, the Alabama Court of Criminal Appeals upheld the life sentence without parol given to Charles M. Butler, Jr., for his role in the murder and corpse mutilation of Billy Jack Gaither, a mild-mannered closeted gay man, early in 1999. *Butler v. State of Alabama*, 2000 WL 572732 (slip copy). The opinion by Judge Fry contains a complete summary of the factual testimony offered at trial, and systematically rejects Butler's arguments for setting aside the verdict or ordering a new trial. Among other things, Butler claims that he was merely along for the ride and was not the main actor in the murder, trying to shift most of the blame to his accomplice, Steve Mullins. This despite evidence offered at trial that Butler had stated he would be "taking care of Gaither" due to Gaither's having sexually propositioned him in the past. The court found that sufficient evidence had been presented at trial of Butler's own guilt to sustain the sentence he had received. Furthermore, the court found no basis for second-guessing the trial court's refusal to give a manslaughter charge to the jury. Those interested in the details of this case, which received national attention due to the brutal circumstances, are directed to the court's opinion. The version that has appeared on Westlaw is labelled "not yet released for publication," so it is possible that the opinion will undergo change before final publication.

The Texas Court of Appeals in Dallas has upheld the murder verdict and life sentence imposed on Telisa Deann Blackman for the death of her lesbian partner, Lisa Davis. *Blackman v. State of Texas*, 2000 WL 567985 (May 8) (not designated for publication). Blackman claimed she was surprised to find Davis's dead body on the balcony in front of her apartment upon returning from a shopping trip. However, the jury evidently believed the testimony of neighbors who heard any altercation of some kind before Blackman left the apartment to go shopping, and had observed someone apparently in the act of moving a body. On appeal, Blackman contended that the state's evidence merely placed her at the scene at various times without proving she had actually fired the fatal shots. (The murder weapon was never found.) According to the testimony of a friend of Davis's, the women had lived together in a "somewhat stormy" lesbian relationship and that Davis had wanted to end the relationship but was "apprehensive" about doing so, from fear of what Blackman might do. Much of the appellate opinion focuses on issues of jury selection and exclusion.

The Texas Court of Appeals in Austin has affirmed the capital murder conviction of

Daniel Carl Greeley, who was found to have intentionally caused the death of Bruce Becker, a gay man, during the course of a robbery. *Greeley v. State of Texas*, 2000 WL 689769 (May 31, 2000) (not officially published). According to the court's opinion by Chief Justice Marilyn Aboussie, Becker seems to have befriended Greeley, a street person who he came across on Guadalupe Street in Austin, colloquially known locally as "The Drag," beginning in May 1995. Their relationship developed over time as Becker invited Greeley to visit in his house and stay over occasionally. Apparently over the course of time Becker, who was sexually interested in Greeley, became confident enough about the situation to make a pass at Greeley when the two men were sitting together one night on Becker's sofa, eating dinner and watching a videotape Becker had rented. "Greeley stated that Becker began massaging Greeley's neck and suggested the two go up to bed." Various witnesses at trial then gave different accounts of what Greeley told them had happened next, but in all accounts Becker ended up dead after being beaten with a metal bar and stabbed in the neck with a knife. Greeley put Becker's body in a footlocker, straightened out the room, drove to The Drag, and found someone to help him dispose of the body, as well as take various of Becker's possessions and his car. The court rejected all of Greeley's objections to his conviction, including his contention that the trial court erred by failing to instruct the jury on a manslaughter charge or to allow him to prove that he acted with "sudden passion" and thus lacked the requisite mental state to be convicted of capital murder.

A jury's disbelief in a murder defendant's story that he was defending himself from homosexual rape was upheld by the Louisiana Court of Appeal in *State of Louisiana v. Hudson*, 2000 WL 562852, No. 33357–KA (La. App. 2 Cir., May 10). Timothy Ray Hudson, whose victim's charred body was found when a rural police officer noticed a blaze in a field while on patrol, claimed that the victim, Cedric Williams, had attempted to assault him sexually. Although the jury convicted of manslaughter rather than second degree murder as charged, the trial court sentenced Hudson to 40 years hard labor. On appeal, Hudson claimed he was oversentenced for the crime for which he was convicted, and that he was acting in self-defense. The trial record showed that Williams, who was known to be gay, was also morbidly obese and physically sluggish, and very mild-tempered totally at odds with the picture Hudson attempted to paint in his trial testimony. The court found that the jury's conclusions were supported by the trial record, and that the sentence was not excessive, in light of the brutality of the killing and the defendant's subsequent action of transporting the body to a remote area and setting it on fire.

The Arkansas Supreme Court has upheld consecutive sentences totalling 35 years in prison imposed on Terrell Demond Baker for the murder of Jonathan Cooper, for attempted murder of Rodney Brooks, and for theft of property. *Baker v. State of Arkansas*, 2000 WL 573222 (May 11). According to the per curiam opinion's summary of the evidence, Baker and Cooper, an acquaintance, went to visit Brooks, whom Baker had not previously met. Brooks testified that Baker went out of the room at one point to use a cordless telephone, then returned gun blazing and shot up both Cooper (who died from his wounds) and Brooks and fled in Cooper's car, which he subsequently burned. According to Baker, when he returned to the room both men attempted to sexually assault him and he shot them in self-defense. It apparently did come out pretty clearly at trial that Cooper and Brooks were sexually interested in Baker; on the stand, Brooks testified that he thought Baker was "cute." Baker made a variety of objections to rulings by the trial court, all of which were rejected by the court, which affirmed the sentence. In particular, the court upheld the trial court's refusal to put the case on continuance while the defense searched for a corroboration witness for Baker's story, as well as the trial court's decision to rule out evidence that in the past Cooper and Brooks had teamed up to lure men they fancied to Brook's house for the occasional menage a trois. In the latter case, the court opined that such testimony would not be relevant unless Baker could credibly allege that he was aware of this past course of conduct. A.S.L.

Litigation Notes: Civil

A unanimous panel of the U.S. Court of Appeals for the D.C. Circuit has affirmed a decision by the U.S. District Court sustaining the Internal Revenue Service's decision to revoke the tax exemption determination of a church that advocated the defeat of Bill Clinton in the 1992 presidential election due to his stands on "morality" issues, including homosexuality. *Branch Ministries v. Rossotti*, 2000 WL 528329 (May 12). The church, which received formal recognition of its 501(c)(3) status from the IRS in 1983, published full-page advertisements in *USA Today* and the *Washington Times* on October 30, 1992, headlined "Christians Beware," asserting that Clinton's positions on abortion, homosexuality, and distribution of condoms to teenagers in schools violated the Bible. The advertisement stated that it was sponsored by the church and sought "tax deductible" donations to sustain the cost of the advertisement. The ad produced hundreds of donations, and a complaint to the IRS, which attempted to investigate the church's tax exempt status. Tax laws say that 501(c)(3) organizations may not engaged in political activity with their tax exempt funds; most particularly, such organizations are forbidden to advocate for or against particular candidates for public office. The church refused to cooperate with the investigation, and the IRS revoked its prior 501(c)(3) determination. The church took the case to court and has now struck out twice. Under the tax laws, churches are not required to obtain official recognition under 501(c)(3) in order for donations to them to be deductible, but individual taxpayers who are audited may be called upon to prove that the organization is operating in compliance with the strictures of the statute. The court rejected the church's argument that the IRS was violating its free exercise rights by revoking the determination.

The Connecticut Commission on Human Rights and Opportunities ruled unanimously May 11 that the Boy Scouts of America cannot be included in the State Employee Campaign for charitable giving, because the Scouts' anti-gay policies specifically violate Connecticut's public policy of banning discrimination on the basis of sexual orientation by places of public accommodation. Among those arguing the point to the Commission were Gay & Lesbian Advocates & Defenders, The Connecticut Coalition for Lesbian, Gay, Bisexual and Transgender Civil Rights, the Connecticut Civil Liberties Union, and the Connecticut Women's Education and Legal Fund. *GLAD Press Release*, May 15.

The plaintiffs in *Baker v. State of Vermont*, the historic case in which the Vermont Supreme Court ruled in December that the state must afford same-sex couples the same package of legal rights and responsibilities that are offered to opposite-sex couples through marriage, have decided not to pursue the litigation further. The court had left open the possibility that if the plaintiffs were dissatisfied with the legislature's response to its opinion, they could bring any resulting statute back before the court for a determination of whether it satisfies the state constitutional "equal benefits" requirement. The attorneys for the plaintiffs, Susan Murray and Beth Robinson of Langrock, Sperry & Wool, and Mary Bonauto of Gay & Lesbian Advocates & Defenders, announced May 9 that their clients were satisfied with the civil union bill that was enacted this spring and will go into effect July 1. *GLAD Press Release*, May 9.

Massachusetts Superior Court Justice Maria I. Lopez ruled May 1 that the state's Division of Medical Assistance had wrongfully refused to pay for breast reconstruction surgery for a male-to-female transsexual. *Beger*

v. Acting Commissioner, Division of Medical Assistance, 2000 WL 576335 (Mass. Super.) (Not reported in N.E.2d). Ms. Beger, age 49, has lived as a woman for the past 25 years. In 1975, she received breast implants as part of her sex-reassignment procedures. During a medical examination in January 1999, it was determined that the implants had to be removed, one due to calcification and the other due to leakage. Beger's surgeon submitted a prior authorization request to the Division, stating that removal of the implants and reconstruction of the breasts was a medically necessary procedure. The Division authorized payment for the removals but not the reconstruction, claiming that payment for the latter was barred by regulations forbidding the Division from paying for sex-reassignment procedures. Justice Lopez found this refusal to be arbitrary and capricious, determining that a common sense reading of the law would provide that the prohibition would not apply to individuals who have already undergone transition and need a procedure that their doctor finds to be medically necessary in line with their current gender and physical identity. In this light, the decision to deny payment was not supported by substantial evidence, since the Division provided no evidence that this procedure was not medically necessary for Ms. Beger, and regulations provide that reconstructive surgery is, in general, reimbursable when it is medically necessary to correct the physical effects of a defect or traumatic injury. Ms. Beger is represented by Jennifer Levi, a staff attorney at Gay & Lesbian Advocates & Defenders, New England's public interest law firm.

In an unpublished disposition filed on April 24, the U.S. Court of Appeals for the 1st Circuit reaffirmed its view that homophobic workplace harassment is not actionable under Title VII in the absence of proof that the victim was harassed because of his sex. *Silva v. Sifflard*, 2000 WL 525573.

Acting N.Y. Supreme Court Justice Franklin Weissberg ruled in *Sullivan v. David Frankel Realty*, published in the *N.Y. Law Journal* on May 18, that an employment discrimination charge brought by a building worker against the building and management company where he worked was not precluded by a prior arbitration proceeding that had taken place between the union representing the building workers and the same defendants. Plaintiff Sullivan, who had worked as a deskman at a Manhattan apartment building owned and operated by the defendants, claimed in this lawsuit that his termination was due to race, disability, and perceived sexual orientation. Shortly after his discharge, a realty industry arbitrator denied his grievance under the union contract. There was no explicit consideration of any discrimination charges in that proceeding, apart from the claim of disability discrimination based on Sullivan's alleged status as a reformed drug abuser. "However," wrote Weissberg, "with respect to the plaintiff's other claims of discrimination, the issue of whether the defendants' stated reasons for discharging him were, at least in part, a pretext intended to cover the fact that their actions were motivated by the plaintiff's race and perceived sexual preference was never before the arbitrator. Since the plaintiff's sexual preference and race discrimination claims were thus not considered by the arbitrator, he may raise them in this action." Weissberg found controlling a recent First Department decision, *Crespo v. 160 West End Avenue Owners Corp.*, 253 AD2d 28 (1999), holding that the industry-wide collective bargaining agreement does not require the arbitration of job discrimination claims. Weissberg also reject as premature an attempt by the management company to get out of the case based on its argument that only the building itself was the plaintiff's employer. The plaintiff is apparently proceeding on a joint employer theory, in light of the role the management company plays in making personnel decisions for the building.

Orange County, North Carolina, Superior Court Judge Orlando Hudson has rejected a challenge to the domestic partnership health insurance benefits plans adopted by the cities of Chapel Hill and Carrboro, according to a May 9 report posted to the internet. The lawsuit had been filed by Jack Godley, a Carrboro resident, and ten other residents of the two cities, contending that municipal officials had exceeded their authority by adopting the benefits plans. Judge Hudson rejected the contention that state law preempted the localities from taking this action. The Alliance Defense Fund and the North Carolina Foundation for Individual Rights, right-wing litigation groups, financed the litigation.

A New York Family Court judge has taken the logic of the New York Court of Appeals' decision in *Matter of Jacob*, 86 N.Y.2d 651 (1995), one step further, authorizing the joint adoption of a foster child by an unmarried couple. In *Matter of Jacob*, the Court of Appeals had approved adoptions in a situation where a biological parent sought to allow his or her unmarried same or opposite-sex partner to adopt their child without cutting off the biological parent's legal relationship to the child. In *Matter of Carl*, reported in the *New York Law Journal* on May 26, Queens County Family Court Judge John Hunt went the next step and approved a joint adoption by an unmarried opposite-sex couple of a child who had been placed with them in foster care. Hunt could find no reason to treat as a significant the factual distinctions between this case and *Matter of Jacob*.

The *Columbian*, a newspaper in Washington state, reported May 25 that a ruling is expected in June on a lawsuit brought in Clark County Superior Court by the Alliance Defense Fund, a Christian legal foundation, challenging the city of Vancouver's policy of providing health coverage to the unmarried partners of city employees. The policy had been adopted by City Manager Vernon Stoner in May 1998, and covers both opposite-sex and same-sex partners who "have an intimate, committed relationship of mutual caring and are responsible for each other's welfare." The nominal plaintiff is Roni Heinsma, identified as a Vancouver taxpayer. The Alliance Defense Fund has made a speciality of filing this kind of litigation, having instigated similar "taxpayer" suits challenging domestic partnership policies in eleven other cases. According to the *Columbia*, in three of those cases, the policies were struck down, in three they were upheld, and five (including Vancouver) are pending. A hearing on cross-motions for summary judgment ws held May 24.

The *Boston Globe* reported May 26 that Massachusetts Superior Court Judge Allan van Gestel issued a ruling May 25 barring a conversative parents group from distributing a surreptitious tape recording made at a program at which state Department of Education employees were providing explicit information about HIV prevention and homosexuality to high school students. One of the two presenters at the meeting, Julie Netherland, and some students who were in attendance sought assistance from Gay & Lesbian Advocates & Defenders to get the injunction after the parents had gotten some radio air time for excerpts from the tape, and had also been able to persuade some news media to publish parts of the transcript they prepared. Both of the state education department employees who made the controversial presentation at a conference held at Tufts University have lost their jobs. A.S.L.

Law & Society Notes

The U.S. Supreme Court's 5–4 decision striking down the federal civil remedy for gender-motivated violence in *U.S. v. Morrison*, 2000 WL 574361 (May 15), may have repercussions for lesbian and gay rights on several fronts. (The Court held that Congress did not have the power under the Commerce Clause to make a criminal act of purely local conduct that does not, in the Court's view, affect interstate commerce sufficiently to generate a legitimate federal interest.) For one thing, it could undermine the constitutionality of pending hate crimes legislation in Con-

gress. For another, it undercuts a recent 9th Circuit ruling, *Schwenk v. Hartford*, 2000 WL 224349 (Feb. 29), which in the course of finding that a transsexual could sue under the federal Violence Against Women Act opined that Supreme Court precedents have transformed federal sex discrimination law to include protect against discrimination based on gender identity.

A study by researchers at Johns Hopkins Children's Center showed that gender identity is probably formed prior to birth. The researchers tracked the development of 27 genetically male children who had been born with a condition known as cloacal exstrophy, essentially lacking a fully-formed penis. In most such cases, doctors perform sex-reassignment surgery on the infants, castrating them and advising hormone treatment to produce a female body type. This was done in 25 of the cases tracked by the researchers. But they discovered that over the years as they grew up, the children exhibited typically male play behaviors, and fourteen of them declared themselves to be boys. According to Dr. William G. Reiner, "These studies indicate that with time and age, children may well know what their gender is, regardless of any and all information and child-rearing to the contrary. They seem to be quite capable of telling us who they are." The findings were presented on May 12 at the Lawson Wilkins Pediatric Endocrine Society Meeting in Boston. Dr. Reiner called for a thorough review of the practice of sex reassignment in children as a result of this study, a position that has been urged for several years now by the Intersex Society of North America (ISNA), which advocates that except for cases of medical emergency, gender reassignment surgery for children born with anomalous genitalia should be post-poned until the child is old enough to make a well-informed choice of gender identity. *Associated Press Report*, May 13. More information on intersexuality and references to pertinent literature can be found on ISNA's website: <www.isna.org>.

The General Accounting Office, the research arm of Congress, issued a study at the end of April showing that sexual orientation complaints in states that ban sexual orientation discrimination are a tiny part of the overall discrimination law docket. The report was requested by Senate co-sponsors of the pending Employment Non-Discrimination Act, to counter claims by some opponents that passage of the bill would overburden the Equal Employment Opportunity Commission with a flood of new complaints. The report, titled *Sexual Orientation Based Employment Discrimination: States Experience with Statutory Prohibitions Since 1997*, is availabale from the General Accounting Office, 202–512–6000 (publication no. B–284923). A statistical table from the report was publishing in the BNA Daily Labor Report on May 1.

Celebrating their recent courtroom triumph, students at East High School in Salt Lake City have held their first on-campus program discussing lesbian and gay rights issues. The PRISM Club — short for People Respecting Important Social Movements — sponsored a discussion led by Laura Gray, a local attorney who is involved in litigating gay rights cases. The meeting focused on the current debates about same-sex marriage, examing the historical, legal and religious significance of marriage and the current restrictions against same-sex unions. New media were barred from attending the program, but students later described the event to reporters. About 45 students attended. Because of rumors that anti-gay protesters might try to disrupt the event, the school sent a security guard to attend the meeting. *Salt Lake Tribune*, May 25.

The *Pittsburgh Post-Gazette* reported May 29 on a new phenomenon, apparently became somewhat widespread in higher education, at colleges and universities that have not formally adopted domestic-partnership policies: using the offer of such benefits on an individual basis to compete for top-quality faculty. The article recounted the tale of Scott Sandage, who was weighing competing offers of history department appointments from Harvard and Carnegie-Mellon in 1995. Sandage, then finishing up his doctorate at Rutgers, wanted health coverage for his domestic partner. The Harvard offer was more prestigious, but Sandage felt he and his partner would be able to lead a saner existence in Pittsburgh. The chair of the History Department at CMU was able to get approval from the University to offer domestic partnership benefits to Sandage to secure the appointment. Sandage had kept quiet about it until recently, when the issue of domestic partnership benefits became very hot in Pittsburgh as faculty at the University of Pittsburgh sued for such benefits, and the Pennsylvania legislature passed a law barring the courts from requiring state university schools to provide such benefits under local human rights ordinances. Sandage joined with others in lobbying Carnegie-Mellon to adopt a formal benefits plan, which it did during May. Explaining his decision to "come out of the closet" about his benefits deal, Sandage said, "I frankly felt really crummy about having something other employees did not have simply because I had thought to ask for it or because I was in a situation where I could demand it or negotiate it. It wasn't right. It's not the way I was raised." The lawsuit against University of Pittsburgh continues to generate controversy, as the local Human Rights Commission seems reluctant to give up on the case and the University is pushing a local court to order the Commission to drop the case.

In a collective bargaining agreement concluded early in May, the city of Providence, Rhode Island, and the union representing municipal firefighters, agreed to extend family health benefits to same and opposite-sex domestic partners. Mayor Vincent Cianci, Jr., announced that the city was already providing the same benefit to its teachers, and the percentage applying for benefits was less than one percent of that workforce. *Providence Journal*, May 8.

Pope John Paul II chose the occasion of the presentation of New Zealand's new ambassador to the Vatican to launch a new blast against same-sex marriage. Aptly enough, as New Zealand's government is dealing with a proposal to extend various forms of legal recognition to same-sex couples, as to which see below. The Pope proclaimed: "Attempts to define the family as something other than a solemnised lifelong union of man and woman which looks to the birth and nurture of children is bound to prove destructive." *Daily Mail*, May 26. So much for the childless couples of the world... Meantime, the government of Rome, under intense pressure from the Vatican to undercut a Gay Pride event this summer being planned by Rome's gay community organizations, has withdrawn its prior commitment of sponsorship (including financial support) for the Pride events. Italy's Prime Minister, Giuliano Amato, called the scheduling of the Pride events in Rome during the Church's proclaimed Holy Year 2000 to be "inopportune", but admitted that under the country's Constitution, there was no way for the government to ban the event. Mayor Francesco Rutelli, the leftist leader of a leftist city council, said that although the city had decided not to be an official sponsor, it would "be the guarantor of the gays' freedom to demonstrate." *Associated Press*, May 30.

A pioneer of the movement for lesbian and gay legal rights has passed away. Dale Jennings, sometimes referred to as the "Rosa Parks" of the movement, died May 11 in California at age 82. His arrest in a police vice entrapment operation in Los Angeles in 1952 became a cause celebre when the recently-formed Mattachine Society rallied to fund his defense and publicize the case, leading to a jury acquittal and the first real public notice of any sort of organized movement for the repeal of sodomy laws. Jennings continued to be involved in Mattachine and other early gay rights movement organizations, and developed a successful career as an author and screenwriter, according to a press release from the Homosexual Information Center. The popular western movie, *The Cowboys*,

starring John Wayne, was based on one of his books. A.S.L.

Israel High Court Allows Co-Parent Registration

In one of the first rulings by the highest court of any nation to recognize the parental claims of a gay co-parent, a three-judge panel of Israel's High Court of Justice ruled 2–1 in *Berner-Kadish v. Minister of the Interior* (May 29) that the lesbian co-parent of a child conceived in California through artificial insemination was entitled to be registered in Israel as the child's mother. Hadas Tagari, an attorney with the Associate for Civil Rights in Israel, represented the parents in their appeal from the Interior Ministry's refusal of the registration.

American-born Nicole and Israeli-born Ruti met in Israel in 1990 and moved to the United States in 1992. They were united in a service conducted by a Conservative rabbi in California in 1994. In January 1996, Ruti gave birth to a son, Matan, who was conceived through donor insemination. Nicole adopted Matan in a California proceeding, and both women are listed as parents on his birth certificate.

The women then moved to Israel, and sought to register with the Interior Ministry so that Matan would be identified as Nicole's son on her identity card. The Ministry's refusal was premised on its conclusion that such registration would be "manifestly incorrect." Traditionally, the registration process is a formality that invokes no judgment on the part of the Ministry, which merely relies on what the registrant declares in terms of family relationships. However, in this instance, the Ministry maintained that for a child to have two biological mothers was a physical impossibility, and thus to register Nicole as Matan's mother would be wrong.

Two member of the High Court panel, Justice Dalia Dorner and Justice Dorit Beinisch, disagreed with the Ministry's position, on the ground that biology was essentially irrelevant to this registration process. Justice Dorner wrote that international law requires that personal status would be recognized in a unified manner in all countries, and that the refusal of a country to recognize a status attained in another country must be grounded in a public policy determination and narrowly construed to avoid breeching the general goal of uniformity. Thus, in her view, the adoption should be presumed valid in Israel so long as it was not voided in a judicial proceeding. Without expressing a view whether the adoption would be found valid in a judicial proceeding, Dorner observed that making such a determination was beyond the function or competence of the registration clerk or the Interior Ministry.

While acknowledging the correctness of the Ministry's biological contention, Dorner found it to be essentially irrelevant, since the question was not whether Nicole was Matan's biological mother, but whether she is his legal mother. Dorner pointed out, for example, that whenever a woman adopts a child, that child has two mothers: a biological mother and a legal mother. Consequently, it is not "manifestly incorrect" to state that a child could have two mothers. (She noted that in Israel's population registry, both the biological mother and the adoptive mother would be recorded as mothers of the same child.) Dorner also noted that the law establishing the registry provides that the names of a person's parents should be registered, and does not specify "mother" and "father."

Justice Beinish agreed, but was more cautious about the question whether Israeli law should embrace the concept of same-sex coparent adoptions, which is now pending in the lower courts in a case involving a different lesbian couple. She said that the issue would raise complex international law questions that were not properly before the court to decide in this case. While conceding that the position taken by the registration clerk might eventually be embraced by the courts in a proper proceeding, this was not the proper proceeding, and the only question before the court was whether registering Nicole as Matan's mother would be "manifestly incorrect."

Dissenting, Justice Abdel Rahman Baker Zu-bi contended that the registration clerk, confronted by this unusual family make-up, would justify the Ministry in taking the position that the women should seek a declaration from the Family Court first on the validity of the adoption in Israel before being registered. He suggested that the proper place for this matter to be resolved is the Family Court.

The foregoing account is based on an English-language summary of the court's decision, which was issued only in Hebrew, provided by Aeyal Gross, an instructor in the faculty of law at Tel Aviv University, and on press reports in the *Jerusalem Post* (May 30) and brief reports in U.S. and Canadian newspapers (May 30). The decision predictably stirred verbal outrage from the Religious Parties in Israel, and suggestions that the Knesset (Parliament) should take action to "protect" Israeli families. (How denying registration to Nicole as the mother of Matan would "protect" Israeli families was not, of course, specified by these critics.) Professor Gross noted in his summary that the Tel Aviv District Court is currently considering an appeal from a decision o f the Family Court that rejected a co-parent adoption petition. In that case, the Family Court did appoint the coparent to be an "additional custodian" for the child, but was unwilling to recognize full parental rights. Clearly, the ultimate issue on the merits will be back before the High Court before too long. A.S.L.

Canadian Broadcast Standards Organization Criticizes "Dr. Laura" Comments on Homosexuality

In a lengthy written opinion decided in February but brought to media attention in mid-May, the Canadian Broadcast Standards Council issued a ruling finding that Laura Schlessinger, a radio personality who poses as a dispenser of psychological counsel, had violated Canadian broadcast standards by some of her comments about homosexuality most particularly, her suggestion that most homosexual men are pedophiles. The Council also pointed out that by using the title *Dr.* when her advanced degree is in physiology rather than psychology, Schlessinger was misleading her listeners about the "scientific" basis for her opinions. Although the Council found that some of Schlessinger's statements criticized by gay rights advocates were purely opinion and protected under Canadian free speech principles, the Council found that Schlessinger had crossed the ethical line by making certain factual assertions that are without foundation, and by appearing to present as settled scientific views positions on homosexuality that have been rejected over the past twenty years by various learned medical professional associations, most particularly the American Psychiatric Association and its main reference publication, the Diagnostic and Statistical Manual, which have rejected the notion that homosexuality is a mental disease or defect. The full text of the decisions *CFYI-AM re the Dr. Laura Schlessinger Show* and *CJCH-AM re the Dr. Laura Schlessinger Show* are available online at <www.cbsc.ca/english>. The Council is an industry association, not a government agency, but its ruling may lead to Canadian radio stations omitting portions of Dr. Schlessinger's broadcasts dealing with homosexuality. The ruling has also sparked media comment in light of current agitation by the gay rights movement against a new television program hosted by "Dr. Laura." A.S.L.

Developments in U.K., Irish, Canadian and Australian Law

Same-Sex Partners: The Adults with Incapacity (Scotland) Act 2000, <http://www.scotland-legislation.hmso.gov.uk>, was passed by the Scottish Parliament on March 29 and received the Royal Assent on May 9. Section 87(2) provides as follows: "Where - (a) an adult has no spouse or has a spouse but sub-

section (3) applies; and (b) a person of the same sex as the adult - (i) is and has been, for a period of not less than six months, living with the adult in a relationship which has the characteristics, other than that the persons are of the opposite sex, of the relationship between husband and wife; or (ii) if the adult is for the time being an in-patient in a hospital, had so lived with the adult until the adult was admitted; then that person shall be treated as the nearest relative." This would appear to be the first time same-sex partnerships have been expressly recognised in an Act of a legislative body in the United Kingdom.

In England and Wales, an implicit recognition of same-sex partnerships has been quietly slipped into the Community Legal Service (Financial) Regulations 2000, Statutory Instrument 2000 No. 516, http://www.legislation.hmso.gov.uk/stat.htm, made on Feb. 18. Regulation 2(1) defines "partner" as "a person with whom the person concerned lives as a couple, and includes a person with whom the person is not currently living but from whom he is not living separate and apart." "Lives as a couple" replaces the usual formulation, "lives as husband and wife," which has been held by the House of Lords not to include same-sex partners. Under the Regulations, the financial resources of an individual's partner are taken into account in determining whether the individual is eligible for publicly funded legal representation. Guidance published by the Legal Services Commission in April states that the definition "includes partners of the same sex" who "regard themselves as a couple," but not "a brother and sister" or "flatmates who are not living as a couple." The change in wording would be cause for celebration if it heralded a comprehensive extension of the rights and benefits enjoyed by unmarried (if not married) male-female couples to same-sex couples. Unfortunately, the definition is far more likely to signal the U.K. Government's desire to impose the burdens (but not the benefits) of coupledom on same-sex partners in situations where public spending could be reduced, and could be extended to other social security benefits. (Thanks to Lesbian and Gay Employment Rights, London for this information.)

In Canada, the federal Modernization of Benefits and Obligations Act, [2000] L.G.L.N. 39, passed by the House of Commons on April 11 and now pending before the Senate, does not deal with the right to sponsor a same-sex partner for immigration. The informal policy of admitting same-sex partners of Canadian citizens and permanent residents on humanitarian and compassionate grounds, since at least 1994, will be written into the Immigration and Refugee Protection Act, Bill C–31, <http://www.parl.gc.ca/36/main-e.htm> (Parliamentary Business), given First Reading on April 6. Under the captions "Selection of Permanent Residents" and "Family reunification," Section 12(2) of the Act provides that "[a] foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child or other prescribed family member of a Canadian citizen or permanent resident." The definition of common-law partner will be set out in regulations, but is likely to resemble the definition in the Modernization Act, with the possible exception of the duration requirement: "a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year."

Anti-Discrimination Legislation: On April 26, the President of Ireland signed the Equal Status Act, 2000 (No. 8 of 2000), <http://www.irlgov.ie/justice/Publications/EE/equalstatus2.htm>. The Act complements the Employment Equality Act, 1998 by prohibiting discrimination based on sexual orientation (and eight other grounds) in non-workplace areas, such as education, provision of goods, services and accommodation, and disposal of property. Both Acts will be enforced by a single Equality Authority.

In the Australian state of Victoria, the Equal Opportunity (Gender Identity and Sexual Orientation) Bill, <http://www.dms.dpc.vic.gov.au> (Parliamentary Documents, Bills) was introduced in Parliament on April 12. The Bill may be the first at the state, provincial, federal or national level, as opposed to the local, city or county level, to use "gender identity" as the prohibited ground of discrimination intended to cover transgendered persons. Other Australian jurisdictions have used "sexuality," "transsexuality," "sexual orientation" and "transgender grounds" for this purpose. "Gender identity" is defined as: "(a) the identification by a person of one sex as a member of the other sex (whether or not the person is recognised as such) — (i) by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise; or (ii) by living, or seeking to live, as a member of the other sex; or (b) the identification by a person of indeterminate sex as a member of a particular sex (whether or not the person is recognised as such) — (i) by assuming characteristics of that sex, whether by means of medical intervention, style of dressing or otherwise; or (ii) by living, or seeking to live, as a member of that sex." The Bill would also add "sexual orientation" as a prohibited ground to supplement the existing ground of "lawful sexual activity."

Workplace Harassment: On April 7, in *Pearce v. Governing Body of Mayfield Secondary School*, No. EAT/675/99, <http://www.employmentappeals.gov.uk> (Judgments, posted on May 3), the Employment Appeal Tribunal (for England and Wales) dismissed a claim by Shirley Pearce, a lesbian schoolteacher, that her employer's failure to respond adequately to regular homophobic taunts and abuse by both female and male students over a five-year period violated the Sex Discrimination Act 1975. Her counsel, Laura Cox QC, argued that many of the words used were gender-specific (lesbian, dyke, lesbian shit, lezzie, lez), rather than gender-neutral (gay, queer, pervert). Harassment involving gender-specific language, which would not have been applied to a gay male teacher, constituted sex discrimination. The Tribunal accepted the argument of Cherie Booth QC, counsel for the employer, that "[i]f the law were that a case of sexual harassment depended upon whether the language used could apply equally to a man, the law would be absurd," and that "[i]t would be wrong if the use of the word lesbian was presumed to be discriminatory." Applying the Court of Appeal's 1998 judgment in *Smith v. Gardner Merchant*, [1998] L.G.L.N. 136, the Tribunal held that the treatment of a lesbian employee must be compared with that of a gay male employee "to whom similarly gender-specific words are used," "perhaps lesbian to the one or bugger to the other." Because there was evidence that a gay male student had suffered abuse, and no evidence that a hypothetical gay male teacher would have been treated more favourably, the harassment of Pearce was legal sexual orientation discrimination and not illegal sex discrimination. Her claim was rejected as a "vain attempt to turn the apples of sexual orientation discrimination into the pears of sex discrimination."

Section 28: On May 18, the U.K. Government announced a second compromise amendment to the Learning and Skills Bill that would permit the repeal of Section 28 on the "promotion of homosexuality" (for the first, see [2000] L.G.L.N. 60). This second amendment no longer requires that the guidance to be issued on sex education in state schools meet certain general objectives, which included learning about "the nature of marriage and its importance for family life and for the bringing up of children," "the significance of marriage and stable relationships as key building blocks of community and society," "respect[ing] ... others," "understand[ing] difference," and "preventing or removing prejudice." Instead, the guidance need only ensure that pupils "are protected from teaching and materials that are inappropriate having regard to the age and the religious and cultural background of the

pupils concerned." (see <http://www.parliament.the-stationery-office.co.uk/pa/pabills.htm>). However, the application of the guidance has been extended to "material which may be produced by [National Health Service] bodies for use for the purposes of sex education in schools." Section 2A(2) of the Local Government Act 1986 (inserted by Section 28 of the Local Government Act 1988) currently exempts "the doing of anything for the purpose of treating or preventing the spread of disease." *Robert Wintemute*

Other International Notes

The High Court of Zimbabwe has affirmed a conviction and one year jail sentence for the nation's former president, Canaan Banana, on charges of sodomy and abuse of power. Banana was convicted of carrying on "unnatural acts" with men, many of whom were part of his presidential staff. The Court reaffirmed that even if all the sex was consensual, it remained illegal in Zimbabwe. Tourists take note... *Associated Press*, May 30.

Canada's Supreme Court has dismissed an application from the Attorney General of Ontario to reconsider last year's landmark ruling holding the province's failure to include same-sex relationships within the scope of its Family Support Act to be unconstitutional. *National Post*, May 26. The Court will probably be confronting a more direct demand for same-sex marriage soon, as press reports indicate that lawsuits are underway or contemplated in four provinces, British Columbia, Quebec, Ontario, and New Brunswick, by same-sex couples seeking marriage licenses. *Lethbridge Herald*, May 27.

The government of New Zealand proposed adding to a pending Matrimonial Property Bill a provision that would substitute for the terms "husband," "wife," and "marriage," the terms "partner" and "relationship," with the clear direction that genders of partners are irrelevant to the application of the law. The proposal proved controversial, and the government agreed to a "conscience vote" which resulted in directions to draft the bill accordingly. The level of opposition persuaded the goverment to send the measure back to a select committee, rather than try to force it through just now. The ultimate fate of the proposal remains uncertain. *The Dominion*, May 24.

Professional Notes

At long last, Harvard Law School has decided to add a distinguished openly-gay scholar in the field of sexuality law to its tenured faculty. Following up on a successful visit during the last academic year, Harvard has offered a tenured appointment to Janet E. Halley, a member of the faculty at Stanford Law School. Halley is the author of numerous important articles on theoretical issues in sexuality law, as well as a recent book on the military's anti-gay policies. According to a recent report in the *Harvard Crimson*, Halley has accepted the appointment. While several openly-gay scholars have been full-time visitors at Harvard in recent years, Halley is the first to take up a permanent tenured position. A previous visitor and prolific writer in the field, Prof. William Eskridge, has since taken a tenured appointment at Yale.

The AIDS Law Project of Pennsylvania announced the appointment of Ronda B. Goldfien, Esq., to be its new Executive Director. Goldfein succeeds Nan Feyler, Esq., who left the agency to pursue a master's degree in public health. Goldfein had been serving as the agency's senior staff attorney. The AIDS Law Project, founded in 1990, serves approximately 1800 clients a year. A.S.L.

Public Interest Law Job Announcements

The National Employment Law Project, based in New York, is accepting applications for a staff attorney/policy analyst position. An attorney with some background in policy advocacy, with a particular emphasis on workplace issues, is preferred. Salary and benefits are covered by a collective bargaining agreement for the agency's staff. Cover letters, resumes and references should be sent by June 15, 2000, to: Staff Attorney/Policy Analyst Search, National Employment Law Project, 55 John St., 7th Floor, New York ANY 10038.

The HIV Law Project in New York is seeking a family law staff attorney. Substantial family law experience with issues of child abuse and neglect, custody & visitation, child support and paternity determination is preferred. Foreign language skills are a plus. Salary range to the mid–50s depending on experience. Send or fax resume and cover letter, specifying salary requirements, to: Victoria F. Neilson, Esq., the HIV Law Project, 841 Broadway, Suite 608, New York ANY 10003 (fax 212–674–7450).

AIDS & RELATED LEGAL NOTES

Terminated AIDS Workers Fail to Allege ADA Violations

The U.S. Court of Appeals for the 1st Circuit ruled May 26 in *Oliveras-Sifre v. Puerto Rico Dept. of Health*, 2000 WL 669788, that three former contract employees of the defendant's Ombudsman's Office for Persons with HIV/AIDS whose contracts were not renewed had failed to state claims under of discrimination or retaliation under Titles I and V of the Americans With Disabilities Act.

The three individuals, none of whom are HIV+, claim that their contracts were allowed to terminate without renewal because they were vigorous advocates for people with AIDS who were publicly critical of various procedures and policies of the Health Department. Writing for the court, Senior Judge Coffin found that while this might be so, it didn't amount to a prima facie case of disability discrimination or retaliation of the type prohibited by the ADA. The district court had first concluded that the plaintiffs did not qualify as persons with disabilities under the definitional section of the statute, and thus were not directly protected by it.

Then the district court had attempted to analyze the discrimination claims by reference to 42 U.S.C. sec. 12112(b)(4), which prohibits discrimination against a person because of that person's known association with a person with a disability, in an attempt to help out the plaintiffs, who had evidently not thought to include this theory in their complaint. But once again the plaintiffs' claims "fell short," noted Coffin, approving the district court's conclusion that the "association" provision was intended to protect people who were discriminated against because of "unfounded stereotypes and assumptions" arising from their relationships with persons with disabilities, and none of these plaintiffs had alleged anything fitting into that framework.

Coffin found that their allegations came closer to fitting in the relation provision in Title V, 42 U.S.C. sec. 12203(a)-(c), which prohibits discriminating against somebody because that person has opposed an act or practice outlawed by the ADA. The problem here was the failure of the plaintiffs to specify how the positions they were advocating, which allegedly caused the department to decide not to renew their contracts, involved violations of the ADA. From the rather summary allegations quoted in the opinion, it appears that they were concerned with departmental policies on management of medical records, treatment of AIDS corpses, scheduling concerns, and other matters, none of which seem directly implicated in violations of the ADA by the department.

The court was apparently unwilling to turn the ADA into a general whistle-blower protection act for AIDS service workers, and af-

firmed the district court's dismissal of the complaint. A.S.L.

Texas Appeals Court Affirms HIV+ Rapist's Double-Life Sentences; Rejects Ineffective Assistance of Counsel Argument

On May 11, the Texas Court of Appeals at Austin summarily overruled all points of error alleged by an HIV+ convicted rapist in his attempt to appeal his two life sentences on grounds of alleged ineffective assistance of counsel. *Massingill v. State of Texas*, 2000 WL 564168.

In 1998, Joseph Ben Massingill raped two women at knifepoint. After positive ID from the victims as well as positive DNA and fingerprint tests, he was arrested. Further testing established that he was also HIV+, and was also infected with hepatitis C and genital herpes. The victims thus far test negative for HIV, but one now suffers from genital herpes. Massingill, a repeat offender, was indicted on one count of aggravated sexual assault and of aggravated robbery for each victim, as well as for numerous other unrelated pending indictments. Before trial, the prosecutors offered no plea bargain and intended to try each pending indictment separately and request cumulative sentencing. Massingill's lawyer advised Massingill that in his experience in this particular court and under these conditions that it was better for his client to waive a jury trial, plead guilty and beg for mercy in the hope to get concurrent sentencing. Massingill's lawyer found this the better strategy, believing that Massingill would make a better impression in the sentencing report than under cross-examination at trial. Throughout the presentencing interview Massingill admitted his guilt, his three-day crack cocaine binge immediately preceding the attacks, that he had AIDS, had mental and other medical problems and, despite his counsel's insistence, had lied and showed no remorse for the victims but blamed them. Massingill took his lawyer's advice and, as predicted, the other indictments were dismissed and he received concurrent sentencing, but of life sentences. Counsel was hoping for sentencing from 50 to 60 years.

Massingill appealed his sentences, pleading ineffective assistance of counsel, claiming his lawyer did not pursue the mitigating defense of temporary insanity, that he did not conduct an independent investigation for mitigating evidence but relied on the probation department's presentence report, and that counsel did not adequately prepare and guide Massingill during the presentence investigation process.

Writing for the court, Judge Woodfin Jones affirmed the convictions, stating that Massingill did not show that his counsel made such serious errors that he was not functioning effectively as counsel, or that these errors prejudiced his defense to such a degree that he was deprived of a fair trial. At the hearing, Massingill's lawyer stated that he knew of no success of the insanity defense in the Travis County Criminal Court, but did admit success on far less serious charges whereby judges opted for drug-treatment instead of extended incarceration. As for the independent presentence investigation, counsel responded that he has always known the probation department's report to be "a thorough job...[and] pretty straight up." Furthermore, Massingill does not contend that there exists undiscovered mitigating evidence.

Finally, in addressing the claim that counsel failed to adequately prepare and guide Massingill during the presentence investigation process, the court found no evidence to the contrary that defense lawyers do not attend presentencing interviews. More important, Massingill deliberately acted contrary to his lawyer's advice by lying during the interview and showing no remorse or sympathy for his victims. "Appellant's contention....is little more that an attempt to blame counsel for his own unwillingness to follow advice." *K. Jacob Ruppert*

Federal Court Grants Preliminary Injunction to Protect HIV and Sexual Orientation Privacy of Arrestees

In a May 9 order, U.S. District Judge William Pauley (S.D.N.Y.) certified a plaintiff class and issued a preliminary injunction against the N.Y. Commission of Mental Health and the officials responsibility for operation of the Mid-Hudson Forensic Psychiatric Center, preventing the defendants from attaching reports containing medical information to papers that will be filed in court and accessible to the public. *Hirschfeld v. Stone*, 2000 WL 573133. Judge Pauley found that there was a likelihood that the class plaintiffs would prevail on their argument that their constitutional and statutory privacy rights were being violated by the practices of the state defendants of filing papers containing confidential information in court.

When arrestees claim or are believed to present issue of mental fitness to stand trial, they are referred to the Mid-Hudson Forensic Psychiatric Center for evaluation. The Center is required within a set period of time to send a notification to the court concerning whether the arrestee is fit to stand trial. The Center's practice is to attach a Fitness Report to this Notice, which may contain a wide range of information theoretically pertaining to the arrestee's fitness. Although the Center concedes that New York's HIV Confidentiality Law would require it to expunge any HIV-related information from such reports unless, arguably, the arrestee's HIV-status is somehow relevant to the crime for which they were arrested, it was found that many such reports are filed containing confidential HIV-related information. In addition, it appears that statements arrestees made to Center staff concerning their sexuality and sexual orientation have also been found in the reports.

The lead plaintiff is Sidney Hirschfeld, Director of the Mental Hygiene Legal Service, which brought the suit seeking to represent an unenumerated class of arrestees referred to Mid-Hudson for evaluation and concerned about the violation of their privacy rights. Judge Pauley found that the requisites for class certification had been met, and that it would be appropriate pending a final determination on the merits to issue preliminary relief, barring the filing of such reports. (Pauley found that the law only appears to require the filing of a notice containing the Center's conclusions as to whether an arrestee is fit to stand trial, and does not directly require the filing of a substantive report on the individual arrestee's mental and physical condition.)

In providing a preliminary analysis of the privacy claims in support of the injunction, Pauley cited cases establishing both the high degree of protection afforded to HIV-related information under New York law, and supporting the proposition that information about an individual's sexuality, related voluntarily by the individual to health care professionals, also enjoys constitutional protection. "Courts recognize a privacy interest in sexual orientation and preference," wrote Pauley, citing half a dozen cases going back to *Eisenstadt v. Baird*, 405 U.S. 438 (1972), one of the seminal cases on individual sexual privacy under the 14th Amendment.

"Public disclosure of highly personal and confidential information, the likes of which are at issue in this case, result in a harm that is both substantial and irreversible," said Pauley. "The harm caused by the disclosure of the confidential information in the Fitness Reports is imminent and not merely speculative. Indeed, it has been disclosed in each individual plaintiff's case. Accordingly, plaintiffs have met the irreparable injury requirement..." The court found that the state did not have a valid 11th Amendment immunity defense to this suit, and rejected soundly the defendant's arguments that the release of this information was specifically authorized or required by state law. A.S.L.

Federal Court Rejects Treatment and Privacy Claims by N.Y. Inmate With AIDS

Chief Judge Larimer of the U.S. District Court for the Western District of N.Y. has rejected

claims by a Spanish-speaking inmate with AIDS that his constitutional rights not to be subjected to cruel and unusual punishment or deprivation of privacy were violated by the staff at the New York State prison in Orleans. *Leon v. Johnson*, 2000 WL 674698 (May 22).

Leon, who claimed in his complaint that he spoke and read no English, was transferred to Orleans from Attica on March 8, 1996. Leon had been receiving medication for his diagnosed AIDS condition at Attica. He alleged that upon arrival at Orleans, he was given a medical orientation handbook written in English that he could not read, and nobody advised him that he should go to the infirmary to obtain his AIDS medications. He claimed that he had to enlist another prisoner, who was multilingual, to explain the situation to him and assist him in getting his meds, thus necessitating revealing his HIV status to another prisoner, and that as a result of the failure of the staff at Attica to provide him with a Spanish-language orientation manual or to have anyone on the medical staff who spoke Spanish, his medical treatment was delayed for two weeks. Leon, who represented himself, filed suit under 42 U.S.C. sec. 1983.

Judge Larimer dissected Leon's allegations, and the clarifications that emerged from court proceedings, ultimately demolishing Leon's case and granting summary judgment to the defendents. First, it appeared that Leon had received hundreds of hours of bilingual language training at Attica prior to his transfer, and could manage well enough in English to communicate on a rudimentary level with the prison staff. Larimer found it peculiar that Leon, who had been receiving medication at Attica that had to be picked up at the infirmary, did not at least assume that the same would be true at Orleans and make an appointment to go to the infirmary.

Larimer found several technical and jurisdictional grounds for rejecting Leon's claims. A deliberate indifference claim requires, at the outset, the allegation that the prisoner has suffered a physical injury under the Prison Litigation Reform Act, 42 U.S.C. sec. 1997e(e), which went into effect in 1996 prior to the events of this case. Larimer was unwilling to grant that a two-week interruption of AIDS medication would result in a physical injury, and noted that the only injury Leon alleged in his complaint was interruption of his medicaitons without explaining how this had actually injured him physically. (Evidently, Larimer is unwilling to do what the 9th Circuit recently did in *South v. Gomez*, 2000 WL 222611 (Feb. 25) (unpublished disposition), taking judicial notice that an interruption of AIDS medication for even a few days may contribute to the development of drug resistance, making subsequent medication less effective and seriously endangering the inmate's long-term prognosis.) But even if the injury requirement could be met, Larimer observed that Orleans prison officials did not deliberately deprive Leon of medication; at worst, they were negligent in not making sure that he understood the routine at Orleans by inquiring into whether he could read and undertstand the English-language handbook. And Larimer noted that since Leon now conceded that he was fluent enough in English to get along on a day-to-day basis, there would not necessarily be reason for the prison officials to have suspected he had any problem in reading the orientation manual without him speaking up about it.

Larimer was similarly dismissive of the privacy claim. While noting that in 1999 a 2nd Circuit panel had apparently accepted a similar privacy claim from an inmate, Larimer noted that the claim was based on a pre–1996 case not governed by the Prison Litigation Reform Act and thus not requiring a finding of physical injury. Larimer found that the only injury Leon was alleging in connection with his privacy claim was emotional distress and damage to reputation, neither of which are actionable under the Act. Furthermore, Larimer found that in 1996, when the alleged events occurred, the prison officials could not be held to have anticipatorily known about the 2nd Circuit's 1999 ruling, and thus would enjoy qualified immunity for any damage claims.

Thus another pro se plaintiff falls to the intricacies of the procedural maze Congress has prescribed to avoid imposing liability on prison officials for their treatment of inmates who are, medically speaking, totally at their mercy. The opinion does not relate the reason for Leon's incarceration. A.S.L.

Court Finds Physician Has Duty to Select Appropriate Container for Transport of HIV-Infected Tissue

A New York judge has ruled that doctors and other health care professionals owe a legal duty to hospital lab technicians to ensure that syringe needles and specimens are properly packaged. *Doe v. Smith*, 2000 WL 557362 (N.Y. Supreme Ct., N.Y. Co., March 31). Justice Yvonne Gonzalez concluded that a doctor may have breached this duty when he allowed one of his nurses to transport a pus sample to a hospital lab using a capped needle and syringe rather than a sterile test tube.

Plaintiff Jane Doe, a full-time lab technician trainee at an unnamed New York hospital, contracted HIV and tuberculosis in September of 1988 after being stuck by a syringe needle that contained a pus sample from one of Dr. John Smith's patients. Doe was attempting to recap the needle with a rubber stopper when she was accidentally stuck. Doe alleged in her lawsuit against the doctor and the hospital that Smith was negligent because needles and syringes, even if capped, are "inappropriate" and "unsafe" containers in which to transport specimens.

Smith moved for summary judgment, arguing that he could not owe a legal duty to a hospital employee whom he had never known or met. Justice Gonzalez disagreed, explaining that it is "neither unprecedented nor burdensome [under] standards of common morality, logic and social policy" for health care professionals to owe a duty to minimize the risk of needle sticks to "medical personnel who will subsequently come into contact with those medical by-products."

The court also rejected Smith's argument that he could not be held liable as a matter of law for the actions of one of the nurses. Doe offered expert testimony from a general surgeon, who testified that while it is appropriate for a doctor to rely on surgical nursing staff to choose specimen containers and fill out pathology forms, it is ultimately the doctor's responsibility to supervise the nurses and ensure that their functions are performed correctly. Plaintiff's expert also opined that in 1988, it was proper medical procedure to transport specimens in sterile test tubes rather than capped needles and syringes. The court ruled that this evidence created a question of fact as to whether Smith breached the duty that he owed to Doe, which could only be resolved by a jury at trial. The court therefore denied Simth's motion in its entirety.

The plaintiff was represented by Stephen Harrison. McAloon & Friedman, P.C. represented the defendant. *Ian Chesir-Teran*

California Court Rejects Privacy Claim Against Newspaper That Reported Cop's HIV Testing

In an unofficially published ruling that only recently came to light, California Superior Court Judge Richard Silver (Monterey Courty) granted the defendant's motion for summary judgement in an invasion of privacy suit against a newspaper which had published articles regarding a deputy sheriff being attacked and subsequently tested for HIV. (The test results were negative). *Tiano v. Monterey County Herald*, 1999 WL 1454872, 27 Media L. Rep. (BNA) 1637 (March 4, 1999).

Tiano, a deputy sheriff, sued the *Herald* after it published articles stating that she had been assaulted by a prisoner in 1997 and that she may have been exposed to HIV infection. The article noted that HIV tests were negative. Tiano did not question the facts reported, but claimed that the use of her name relating to the HIV testing violated her privacy.

The *Herald* based its dismissal motion on C.C.P. 425.16, which states that actions relating 5to free speech "shall be subject to a special motion to strike" barring a determination that the plaintiff would prevail in the case. Tiano asserted that she had a probability of prevailing.

Judge Silver found that "all of the information complained of by Tiano had been disclosed in public documents or in public court hearings prior to their publication by the Herald." One of the documents was a probation report, in which it was noted that Tiano told a probation officer about the HIV testing. Probation reports are public information for 60 days after sentencing. Tiano's medical records were also admitted as evidence in the criminal case. Tiano never sought to keep this information confidential. Citing *Shulman v. Group W. Productions, Inc.*, 18 Cal. 4th 200 (1998), a recent state supreme court ruling, Silver found that Tiano failed to show that the article was not "of legitimate public concern," and thus protected from tort liability by the First Amendment. *DanielR Schaffer*

AIDS Civil Litigation Notes

The U.S. Court of Appeals for the 9th Circuit has ruled in *Echazabal v. Chevron USA, Inc.*, 2000 WL 669137 (May 23), that an employer may not defend a disability discrimination charge by arguing that the plaintiff's disability poses a danger of heightened risk of injury to the plaintiff in the workplace. The only heightened danger defense that may be considered, according to the court, is danger to others, thus insisting upon a strict reading of the statute and following the import of EEOC interpretations of statutory intent.

In *Doe v. Miles, Inc.*, 2000 WL 667383 (Mo. Ct. App., E.D., Div. 4, May 23), the appellate court, ruling per curiam, set aside a $1.4 million general verdict in a hemophilia AIDS case. The plaintiff, a widow, alleges her husband was infected with HIV between August 1983 and May 1984 while using the defendant's Factor VIII concentrate product. The case went to trial on claims of breach of warranty and negligence. Much of the appellate opinion focuses on the question whether the trial court properly charged the jury on the warranty claim and should, in fact, have directed a verdict against the plaintiff. The plaintiff was pursuing a theory of implied fitness for a particular purpose, which the appellate court held would have required evidence that the Factor VIII in question had been specifically formulated for the plaintiff's husband, as to which there was, of course, no evidence, because it wasn't. The appellate court also reviews the detailed historical evidence and rejects the proposition that Factor VIII manufacturers could be found negligent for their dealing with AIDS during the relevant time period. However, recognizing that its opinion is on an important matter of first impression in Missouri, the court certified the case to the Supreme Court.

The Texas Court of Appeals in Fort Worth ruled April 27 that a state hospital patient who was allegedly assaulted by an HIV-positive patient could not state a claim against the state under the Torts Claims Act, because she could not show that negligence by the state in leaving a particular door unlooked was the proximate cause of her injury, the volitional acts of the assailant being an intervening force. However, the court held that a claim could be made under the Texas patient's bill of rights, under which health care providers are required to provide a safe environment for patients, and that as to such claims the state legislature had intended to waive sovereign immunity. Thus, trial court's decision dismissing the case on sovereign immunity grounds was reversed in part. *Texas Dept. of Mental Health and Mental Retardation v. Lee*, 2000 WL 502521.

In *Gruca v. Alpha Therapeutic Corp.*, 2000 WL 631377 (U.S.Dist.Ct., N.D.Ill., May 12)(slip copy), District Judge Gottschall rejected a summary judgment motion by the defendant on the claim by Peggy Gruca, the widow of a hemophiliac who died from AIDS during the 1980s, attempting to dispose of the last remaining claim in a long-running case, Gruca's claim for emotional distress damages arising from her own exposure to HIV due to the infection of her husband. This case has already been through rounds of dismissals, summary judgments and appeals on a variety of claims, and the subject of Judge Gottschall's opinion was whether the most recent remand by the 7th Circuit left things in a state where summary judgment would be appropriate applying a "law of the case" analysis. The reasoning of the opinion is complex and intricate as it works through the extended history of the litigation indeed, much to extensive and intricate to rehearse here but the end result was a determination by the court that Ms. Gruca should be allowed to continue pursuing her emotional distress claim. (Alpha was not originally the only defendant; three other pharmaceutical companies that manufacturing blood clotting medications used by hemophiliacs were co-defendants, but Gruca has either settled with or lost trials against everybody else on every other claim asserted.) A.S.L.

AIDS Law & Society Notes

The Clinton Administration has decided that the impact of AIDS in the third world, particularly in Africa, is so significant that it constitutes a threat to the national security of the United States. According to a Reuters report on May 1, the U.S. National Security Council concluded that it could undermine national economies, threaten military establishments and governments, and cause other regional problems that could embroil the U.S. The NSC announced that the Administration will be stepping up efforts to help combat AIDS overseas in line with this finding. The first tangible effort was a Presidential Executive Order issued on May 10, titled "Access to HIV/AIDS Pharmaceuticals and Medical Technologies," essentially abandoning and foreswearing efforts by the U.S. government to enforce the intellectual property rights of U.S. companies in AIDS treatments as against sub-Saharan African countries that are attempting to manufacture pharmaceuticals at low cost to combat the epidemic there. Announcement of the executive order was quickly followed by announcements by five major international pharmaceutical companies that they will begin negotiations with the United Nations AIDS authorities to provide drugs at substantially discounted prices for use in third world countries that are battling AIDS epidemics. Public awareness of the scale of the AIDS threat internationally seems to have finally reached the state of consciousness necessary to spark major policy changes, albeit probably at least a decade too late to be optimally effective. *Wall Street Journal*, May 11. A.S.L.

European Court of Human Rights Permits Sweden to Deport HIV-Positive Zambian Woman

On Feb. 15, in *S.C.C. v. Sweden* (Application No. 46553/99), <http://www.echr.coe.int/hudoc> (admissibility decision), the European Court of Human Rights held that the deportation of an HIV+ Zambian woman would not violate Articles 2 (right to life), 3 (prohibition of inhuman or degrading treatment) or 8 (respect for family life) of the European Convention on Human Rights. The applicant lived in Sweden from 1990 until early 1994 with her husband, who worked at the Zambian Embassy. She returned to Zambia with him, where he died. She returned to Sweden in Nov. 1994 and had lived there illegally ever since. Her HIV infection was being treated with anti-retroviral drugs. Her deportation had been stayed, at the request of the Court, pending its decision on her application. The Court agreed with a Swedish tribunal that "an overall evaluation of the HIV infected alien's state of health should be made rather than letting the HIV diagnosis in itself be decisive." The Court then noted "that according to [a] report from the Swedish Embassy AIDS treatment is available in Zambia, [however at considerable costs]. It also notes

that the applicant's children as well as other family members live in Zambia. ... [T]he Court finds that the applicant's situation is not such that her deportation would amount to treatment proscribed by Article 3 [or Article 2]." The Court also held that the interference with her family life (with her male, HIV+ partner, who had the right to reside in Sweden) caused by her deportation would be justifiable under Article 8(2), because "the alleged relationship with F.R. commenced at a time when the applicant was illegally residing in Sweden. Consequently, she could not reasonably have expected to be able to continue the cohabitation in Sweden." The Court's decision places a clear limit on the right of a person with advanced AIDS not to be deported to a place where they would not receive adequate medical treatment, which the Court first established in *D. v. U.K.*, [1997] L.G.L.N. 155. The right would seem not to apply to any HIV+ person who is in good health, whether as a result of antiretroviral therapy or not, and whether they have already had AIDS-defining illnesses or not. Although the Court understandably wants to avoid creating a right of asylum for HIV+ persons from countries where antiretroviral therapy is not available or unaffordable, the Court's decisions in this area create a bizarre incentive for HIV+ persons to refuse therapy and become ill enough to trigger a right not to be deported! *Robert Wintemute*

Namibian Labor Court Finds Exclusion of HIV+ Applicant From Military to be Unlawful

In a decision delivered on May 10, the Labour Court of Namibia ruled in *N v. Minister ofDefence*, Case No. LC 24/98, that the refusal to accept the enlistment of somebody solely because he is HIV+ is unlawful. The court found to be specifically applicable to the military the provisions of the Labour Act 1992, and guidelines issued pursuant to the Act. The guidelines state, regarding Job Access: "There should be neither direct nor indirect pre-employment tests for HIV. Employees should be given the normal medical tests of current fitness for work and these tests should not include testing for HIV." The guidelines also provide that HIV-infected employees should be allowed to work under normal conditions so long as they are fit to do so. In this case, the applicant had received a positive recommendation of fitness to serve from a medical officer in a signed report. The court noted that in fact there are a large number of persons who are HIV+ presently serving in the Namibia Defense Forces, so excluding an HIV+ applicant could not be justified on the ground of keeping the military workplace AIDS-free. The court concluded that the Labour Act was violated by the applicant's exclusion. The court ordered that the applicant be allowed to re-apply for enlistment, and that he should be enlisted if his CD4 count is not below 200 and his viral load isnot above 100,000. While the military could require HIV testing, said the court, it could not base enlistment decisions solely on HIV status, but would also have to conduct CD4 and viral load tests to determine whether somebody was fit for training and service. A.S.L..

PUBLICATIONS NOTED

LESBIAN & GAY & RELATED LEGAL ISSUES:

Aylwin, A. Scott, et al., *Sexual Offense Severity and Victim Gender Preference: A Comparison of Adolescent and Adult Sex Offenders*, 23 Int'l J. L. & Psychiatry 113 (March/April 2000).

Dreger, Alice D. (ed.), *Intersex in the Age of Ethics* (Univ. Publishing Group, 227 p., 1999).

Dugdale, D.F., *Same-Sex Relationships: the Law Commission's Views*, New Zealand L.J. (Feb. 2000), at 3.

Elias, James (ed.), *Porn 101: Eroticism, Pornography, and the First Amendment* (Prometheus Books, 616 p., 1999).

Ertman, Martha M., *Oscar Wilde: Paradoxical Poster Child for Both Identity and Post-Identity*, 25 L. & Soc. Inq. 153 (Winter 2000).

Hunt, Gerald (ed.), *Laboring for Rights: Unions and Sexual Diversity Across Nations* (Temple Univ. Press, 302 p., 1999).

Hunter, Nan D., *Expressive Identity: Recuperating Dissent for Equality*, 35 Harv. Civ. Rts.- Civ. Lib. L. Rev. 1 (Winter 2000).

Krauss, Daniel A., and Bruce D. Sales, *The Problem of "Helpfulness" in Applying* Daubert *to Expert Testimony: Child Custody Determinations in Family Law as an Exemplar*, 5 Psychology, Pub. Pol. & L. 78 (March 1999).

Law, Sylvia A., *Commercial Sex: Beyond Decriminalization*, 73 S. Cal. L. Rev. 523 (March 2000).

Leslie, Christopher R., *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws, 35 Harv. Civ. Rts. - Civ. Lib. L. Rev. (Winter 2000)*.

Mastro, Randy M., *Justice Handler's Concurrence in* Dale v. Boy Scouts of America*: A Morality Tale*, 30 Seton Hall L. Rev. 741 (2000) (Part of Tribute to Justice Alan B. Handler on his retirement from the New Jersey Supreme Court).

Moore, Jennifer, *From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents*, 31 Columbia Hum. Rts. L. Rev. 81 (Fall 1999).

Nice, Julie A., *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 1999 U. Ill. L. Rev. 1209 (Includes analysis of where *Romer v. Evans* fits in Supreme Court equal protection jurisprudence).

Richards, David A.J., *Identity and the Case for Gay Rights: Gender, Race, Religion As Analogies* (Univ. of Chicago Press, 234 p., 1999).

Rosga, AnnJanette, *Bias Before the Law: The Rearticulation of Hate Crimes in* Wisconsin v. Mitchell, 25 N.Y.U. Rev. L. & Soc. Change 29 (1999).

Schwartz, Martin A., *New York City Zones Out Free Expression*, 43 N.Y.L.S. L. Rev. 301 (1999).

Shapiro, Julie, *De Facto Parents and the Unfulfilled Promise of the New ALI Principles*, 35 Willamette L. Rev. 769 (Fall 1999).

Sherman, Jeffrey G., *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. Ill. L. Rev. 1273.

Strasser, Mark, *The Privileges of National Citizenship: On* Saenz*, Same-Sex Couples, and the Right to Travel*, 52 Rutgers L. Rev. 553 (Winter 2000).

Student Notes & Comments:

Bratspies, Joshua S., *Beyond a Reasonable Doubt: Limiting the Ability of States to Define Elements of an Offense in the Context of Hate Crime Legislation*, 30 Seton Hall L. Rev. 893 (2000).

Brunelli, Heather C., *The Double Bind: Unequal Treatment for Homosexuals Within the American Legal Framework*, 20 Bos. Col. 3rd World L. J. 201 (Winter 2000).

Campbell, Brandon, *Cohabitation Agreements in Massachusetts:* Wilcox v. Trautz *Changes the Rules but Not the Results*, 34 N. Eng. L. Rev. 485 (Winter 2000).

Casenote, Dale v. Boy Scouts of America*, 160 N.J. 562 (1999)*, 10 Seton Hall Const. L. J. 577 (Spring 2000).

Casenote, Fitzpatrick v. Sterling Housing Association Ltd.*: Membership of the family and homosexual relationships*, Conveyancer & Property Lawyer (UK), March-April 2000, 153–160.

Doolittle, Kirsten Lea, *Don't Ask, You May Not Want To Know: Custody Preferences of Children of Gay and Lesbian Parents*, 73 S. Cal. L. Rev. 677 (March 2000).

Langemak, Heather J., *The "Best Interest of the Child": Is a Categorical Ban on Homosexual Adoption an Appropriate Means to This End?*, 83 Marquette L. Rev. 825 (Summer 2000).

Lellos, Stella, *Litigation Strategies: The Rights of Homosexuals to Adopt Children*, 16 Touro L. Rev. 161 (Fall 1999).

Note, National Endowment for the Arts v. Finley*: Sinking Deeper Into the Abyss of the Supreme Court's Unintelligible Modern Unconstitutional Conditions Doctrine*, 59 Md. L. Rev. 225 (2000).

Note, National Endowment for the Arts v. Finley*: Striking a Balance Between Art and the State or Sealing the Fate of Viewpoint Neutrality?*, 9 Temple Pol. & Civ. Rts. L. Rev. 135 (Fall 1999).

Note, Southworth v. Grebe*: The Conservative Utilization of "Negative" First Amendment Rights to Attack Diversity of Thought at Public Universities*, 65 Brooklyn L. Rev. 529 (1999).

Ray, Elizabeth Megen, *"I May Not Know Art, But I Know What I'll Pay For": The Government's Role in Arts Funding Following* National Endowment for the Arts v. Finley, 2 U. Pa. J. Const. L. 497 (March 2000).

Recent Cases, *Same-Sex Marriage Vermont Supreme Court Holds State Must Extend Same-Sex Couples the Same Benefits as Married Opposite-Sex Couples.* Baker v. State, *744 A.2d 864 (Vt. 1999)*, 113 Harv. L. Rev. 1882 (May 2000) (without stating a review on the merits, this commentary criticizes the Vermont Supreme Court's innovation in state equal protection doctrine).

Ryan, Kelly Kathleen, *The Cost of Free Speech: First Amendment Limitations of Student Activity Funds* Southworth v. Grebe, 83 Marquette L. Rev. 707 (Spring 2000)

Smith, Miriam, *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking, 1971–1995* (Univ. of Toronto Press, 211 p., 1999).

Smith, Rhona K. M., Lustig-Prean & Beckett v. United Kingdom; Smith & Grady v. United Kingdom*: European Court of Human Rights decision regarding ban on homosexuals in British armed forces*, 94 Am. J. Int'l L. 382 (April 2000).

Urbansky, Rachel, *Seducing the Target: Sexual Intercourse as Outrageous Government Conduct*, 50 Case West. Res. L. Rev. 729 (Spring 2000).

Warren, Stephen P., *Of Merit Badges and Sexual Orientation: The New Jersey Supreme Court Balances the Law Against Discrimination and the Freedom of Association in* Dale v. Boy Scouts of America, 30 Seton Hall L. Rev. 951 (2000).

Zielinski, Debbie, *Domestic Partnership Benefits: Why Not Offer Them to Same-Sex Partners and Unmarried Opposite Sex Partners?*, 13 J. L. & Health 281 (1998–99).

Specially Noted:

A book (in Italian) about domestic partnership developments within the European community has been published. Emanuele Calo, *Le Convivenze Registrate in Europa: verso un secondo regime patrimoniale della famiglia* (Milano: Dott. A. Giuffre Editore, 2000). The author discusses developments in the law of Belgium, Denmark, France, Germany, the Netherlands, Spain and other countries, as well as European Community law. The publisher's website is: <http://www.giuffre.it>. • • • Daniel Borrillo, an openly-gay law professor at the University of Paris, has published (in English) an overview of the gay rights situation in Europe, as a contribution to the volume *Peace, Justice and Freedom: Human Rights Challenges for the New Millennium* (Univ. of Alberta Press). Borrillo's chapter is titled "Sexual Orientation and Human Rights in Europe".

AIDS & RELATED LEGAL ISSUES:

Anderson, Cheryl L., *"Deserving Disabilities": Why the Definition of Disability Under the Americans With Disabilities Act Should Be Revised to Eliminate the Substantial Limitation Requirement*, 65 Mo. L. Rev. 83 (Winter 2000).

Blanck, Peter David, and Heidi M. Berven, *Evidence of Disability After* Daubert, 5 Psychology, Pub. Pol. & L. 16 (March 1999).

LeDoux, Josette M., *Interspousal Liability and the Wrongful Transmission of HIV-AIDS: An Argument for Broadening Legal Avenues for the Injured Spouse and Further Expanding Children's Rights to Sue Their Parents*, 34 N. Eng. L. Rev. 392 (Winter 2000).

Meadows, Perry, M.D., and Richard A. Bales, *Using Mitigating Measures to Determine Disability Under the Americans With Disabilities Act*, 45 S. Dak. L. Rev. 33 (1999).

Strang, John, Joan Heuston, Christopher Whiteley, Loraine Bacchus, Tony Maden, Michael Gossop, and John Green, *Is Prison Tattooing a Risk Behaviour for HIV and Other Viruses? Results From a National Survey of Prisoners in England and Wales*, 10 Crim. Behavious & Mental Health 60 (2000).

Student Notes & Comments:

Comment, *When You Should Have Known: Rethinking Constructive Knowledge in Tort Liability for Sexual Transmission of HIV*, 52 Maine L. Rev. 261 (2000).

Cooper, Heather J., *Employment Law Defining "Handicap" Under HRCA When Determining If An Individual Is "Handicapped" The Factfinder Should Evaluate The Individual As He Exists With The Benefit Of His Medication. Chmielewski v. Xermac, Inc., 580 N.W.2d 817 (Mich. 1998)*, 76 U. Detroit Mercy L. Rev. 1183 (Summer 1999).

Note, Bragdon v. Abbott*: The Supreme Court Redefines "Disability" Under the Americans With Disabilities Act*, 9 Temple Pol. & Civ. Rts. L. Rev. 109 (Fall 1999).

Note, *The Lesser of Two Evils: New York's New HIV/AIDS Partner Notification Law and Why the Right of Privacy Must Yield to Public Health*, 73 St. John's L. Rev. 1191 (Fall 1999).

Rabineau, Brian T., *Those With Disabilities Take Heed: Eighth Circuit Suggests That ADA May Not Protect Those Who Fail to Control a Controllable Disability*, 65 Mo. L. Rev. 319 (Winter 2000).

Wong, Amanda J., *Distinguishing Speculative and Substantial Risk in the Presymptomatic Job Applicant: Interpreting the Interpretation of the Americans With Disabilities Act Direct Threat Defense*, 47 UCLA L. Rev. 1135 (April 2000).

Specially Noted:

Vol. 21, No. 1 (2000) of the *Berkeley Journal of Employment and Labor Law* features a symposium on current controversies surrounding the Americans With Disabilities Act, including a series of articles debating the economics of applying discrimination law in the disability area.

EDITOR'S NOTE:

All points of view expressed in *Lesbian/Gay Law Notes* are those of identified writers, and are not official positions of the Lesbian & Gay Law Association of Greater New York or the LeGaL Foundation, Inc. All comments in *Publications Noted* are attributable to the Editor. Correspondence pertinent to issues covered in *Lesbian/Gay Law Notes* is welcome and will be published subject to editing. Please address correspondence to the Editor or send via e-mail.