EUROPEAN COURT OF HUMAN RIGHTS UPHOLDS TRANSSEXUALS' RIGHTS TO AMENDED BIRTH CERTIFICATES AND DIFFERENT-SEX MARRIAGES

On July 11, in *Christine Goodwin v. United Kingdom* (Application No. 28957/95) and *I. v. United Kingdom* (Application No. 25680/94), a Grand Chamber of 17 judges of the European Court of Human Rights held unanimously that the United Kingdom's refusal to permit post-operative transsexuals to have their birth certificates amended to reflect their reassigned sex, and to contract different-sex marriages in their reassigned sex, violated Articles 8 (right to respect for private life) and 12 (right to marry) of the European Convention on Human Rights. The two judgments (Goodwin and I. are identical except for the facts) represent a huge victory for the European transsexual rights movement after a struggle of more than three decades against the U.K.'s intransigence, and will apply to 44 European Convention countries with a combined population of over 800,000,000. British transsexual applicants had previously lost before the Court on these issues in *Mark Rees v. U.K.* (1986) (12–3 on Article 8, 15–0 on Article 12), *Caroline Cossey v. U.K.* (1990) (10–8 on Article 8, 14–4 on Article 12), and *Kristina Sheffield & Rachel Horsham v. U.K.* (1998) (11–9 on Article 8, 18–2 on Article 12). (The court's opinion is available on its website.)

The Court framed the issue under Article 8 of the Convention as whether the lack of legal recognition given to the applicant's gender reassignment breached the U.K.'s "positive obligation" to ensure respect for her private life. Having found no such breach three times, most recently in 1998, the Court observed both that it would not depart from its precedents "without good reason" and that it would "look at the situation within and outside the [U.K.] to assess 'in the light of present-day conditions' what is now the appropriate interpretation and application of the Convention," which it has described as a "living instrument."

The Court then departed from its determination in 1998 that the position in the U.K. (transsexuals are issued new passports and driver's licenses but cannot have their birth certificates amended) did not give rise to "detriment of sufficient seriousness" as to override the U.K.'s "margin of appreciation." Instead, the Court found that "[t]he stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety." Morever, "[w]here a State has authorised the treatment and surgery alleviating the condition of a transsexual, financed or assisted in financing the operations[,] and indeed permits the artificial insemination of a woman living with a female-to-male transsexual , it appears illogical to refuse to recognise the legal implications of the result to which the treatment leads."

The Court rejected all of the U.K.'s arguments for maintaining the current system. First, "the ongoing scientific and medical debate as to the exact causes of the condition is of diminished relevance." It is sufficient that gender identity disorder is an internationally recognised medical condition, and that, "given the numerous and painful [surgical] interventions involved and the level of commitment and conviction required to achieve a change in social gender role," there is nothing "arbitrary or capricious" about a transsexual person's decision to undergo gender reassignment. "It is not apparent to the Court that the chromosomal element, amongst all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals ."

Second, the Court departed from its finding in 1998 that there was insufficient European consensus on the appropriate legal response to gender reassignment. "The Court attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed [there is still no European consensus as to the details], than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals [the European and international trend is to grant legal recognition, even if the details may vary]."

Third, the historical nature of the U.K.'s birth register system was no longer decisive, given the existing exceptions in relation to legitimization or adoption of children, the small number of transsexuals, the absence of concrete evidence of likely prejudice to third parties, and the U.K.'s own proposals to reform the system.

The Court found a violation of Article 8, concluding that the U.K. (which had been chastised by the Court in 1998 for failing to keep this area under review but still had no plans to change the law four years later) "can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right [consequences in relation to access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance].… In the twenty-first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable."

The Court also found a violation of Article 12 ("Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."), departing from its statement in 1998 that "the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex" and that "Article 12 is mainly concerned to protect marriage as the basis of the family." Instead, the Court observed that, "[r]eviewing the situation in 2002, Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as per se removing their right to enjoy the first limb of this provision." Similarly, "[t]he Court is not persuaded that at the date of this case it can still be assumed that these terms ['men' and 'women' in Article 12] must refer to a determination of gender by purely biological criteria . There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women [from the right to marry] ."

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

Contributing Writers: Fred A. Bernstein, Esq., New York City; Ian Chesir-Teran, Esq., New York City; Alan J. Jacobs, Esq., New York City; Steven Kolodny, Esq., New York City; Todd V. Lamb, Esq., New York City; Mark Major, Esq., New Jersey; Sharon McGowan, Esq., Cambridge, MA; Tara Scavo, Student, New York Law School '03; Daniel R Schaffer, New York City; Audrey Weinberger, New York Law School '05; Robert Wintemute, Esq., King's College, London, England.

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

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

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

$55/yr by subscription

Canadian Rate $60; Other Int'l Rate US$70 ISSN 8755–9021 September 2002

Even though there was less European consensus with regard to marriage than amendment of birth certificates (the evidence suggested that only 54% of European Convention countries clearly permit transsexuals to marry in their reassigned sex), the U.K.'s margin of appreciation cannot extend to "an effective bar on any exercise of the right to marry." (This was the case because "it is artificial to assert that post-operative [heterosexual] transsexuals have not been deprived of the right to marry as they remain able to marry a person of their former opposite [but current same] sex.") "While it is for the [U.K.] to determine inter alia the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future marriages (including, for example, the information to be furnished to intended spouses), the Court finds no justification for barring the transsexual from enjoying the right to marry under any circumstances."

It is now up to the U.K. government to bring forward legislation that will provide for amendments to birth certificates and for different-sex marriages. Significant issues will still have to be resolved, such as the degree of physical change required before legal recognition of gender reassigment is granted, and the effect of gender reassignment on an existing different-sex marriage (which will become a same-sex marriage if it remains valid). The U.K. will probably have up to five years to do so, before the Committee of Ministers of the Council of Europe (which supervises execution of the Court's judgments) grows impatient and begins contemplating the ultimate, theoretical sanction of expulsion from the Council of Europe (an unlikely scenario as the U.K. has always complied fairly promptly in the past). Although a same-sex marriage case under Article 12 would still be premature (given that only one of 44 European Convention countries has opened up civil marriage to same-sex couples), the Court's new interpretation of Article 12 will prove extremely helpful when such a case is brought in the future. *Robert Wintemute*

LESBIAN/GAY LEGAL NEWS

Ontario Court Rules for Same-Sex Plaintiffs in Marriage Case, But Stalls on Remedy

On July 12, in *Halpern v. Canada (Attorney General)*, No. 684/00, and *Metropolitan Community Church of Toronto v. Canada (Attorney General)*, No. 39/2001, http://www.sgmlaw.com/userfiles/filesevent/file_1413620_halpern.pdf, a three-judge panel of the Ontario Superior Court of Justice (Divisional Court) held unanimously, after a trial held on Nov. 5–9, 2001, that the exclusion of same-sex couples from civil marriage is unjustifiable sexual orientation discrimination, contrary to the Canadian Charter of Rights and Freedoms. However, the Court did not require the immediate issuance of marriage licenses to same-sex couples (or the registration of marriages of same-sex couples celebrated by the M.C.C.T.), and instead (by 2 votes to 1) gave the federal Parliament two years to remedy the violation.

The Court had to decide six main issues: (1) Is there a legal exclusion of same-sex couples from civil marriage? (2) If so, is its source the federal Constitution, a federal statute, or a common-law rule? (3) If its source is a statute or a common-law rule, does the exclusion constitute "discrimination" violating the equality rights provision of the Charter, Section 15(1)? (4) If so, can the discrimination be justified under Section 1 of the Charter? (5) If not, should the applicants be entitled to marriage licenses immediately (in the case of 8 couples), or to the immediate registration of their M.C.C.T. marriages (in the case of 2 couples)? (6) If not, because the federal government should be given time to remedy the violation, what should happen if the federal government fails to act within the prescribed period?

Justice Harry LaForme's opinion on issues (1) to (4) had the support of the other two judges. On issues (1) and (2), he held that there is a legal exclusion, but that it is not found in the word "Marriage" in Section 91(26) of the Constitution Act, 1967 (which is generally interpreted as giving the federal Parliament jurisdiction over capacity to marry), nor in any federal statute, but in the common-law rule that marriage is "the lawful union of one man and one woman to the exclusion of all others." On issue (3), he found that "lesbians and gays are treated differently than heterosexuals [on the grounds of sex and sexual orientation] when they are denied the right to enter into the societal institution of marriage… [M]arriage is much more than a word to most of Canadian society [it] is: ' the institution that accords to a union the profound social stamp of approval and acceptance of the union as being of the highest social value.'" Providing all the benefits of marriage to same-sex couples through other legislative measures, such as a "registered domestic partnership" or "civil union" law, would amount to "separate but equal" treatment. The differential treatment (exclusion from marriage) constitutes "discrimination" because it "offends the human dignity of gays, lesbians and bisexuals."

On issue (4), Justice LaForme began by rejecting the federal government's argument that the objective of the common-law rule is "procreation," in view of the fact that one spouse's refusing to engage in vaginal intercourse, being infertile or impotent, or insisting on using contraceptives, does not render a marriage voidable. As no other objective had been established, and the objective of "preserv[ing] the exclusive privileged status of heterosexual conjugal relationships in society" would be discriminatory, the first branch of the Section 1 justification test had not been satisfied. Even if "procreation" were the objective, there was no "rational connection" between it and the rule. There was no evidence that "granting same-sex couples the freedom to marry would either diminish the number of children conceived by heterosexual couples, or reduce the quality of care with which heterosexual couples raise their children." For achieving this alleged purpose, the rule is "overinclusive in that it allows non-procreative heterosexuals to marry" and "underinclusive in that it disallows same-sex parents and intended parents the right to marry." It did not "minimally impair" the Section 15(1) right, and its "deleterious effects" outweighed its benefits. The rule "deni[es] [lesbians and gays] the autonomy to choose whether they wish to marry[,] conveys the ominous message that they are unworthy of marriage[,] [and] [f]or those same-sex couples who do wish to marry, represents a rejection of their personal aspirations and the denial of their dreams."

On issues (5) and (6), Justice LaForme parted company with Associate Chief Justice Heather Forster Smith and Regional Senior Justice Robert Blair. He would have reformulated the common-law rule, to make it comply with the Charter, as "the lawful union of two persons to the exclusion of all others," and would have ordered the issuance of the marriage licenses and the registration of the two M.C.C.T. marriages. Issues such as filiation links and international recognition "are simply not impacted by the capacity to marry alone and are all issues very capable of being acted upon by Parliament To make capacity to marry dependent on such expressed concerns is to my mind tantamount to having the tail wag the dog. The common law rule of marriage is not itself a complex law The choice is to amend it to include gays and lesbians or to not amend it at all."

On issue (5), Regional Senior Justice Blair wrote for a majority of two, supported by Associate Chief Justice Smith. Instead of reformulating the common-law rule, they held that the rule should be declared constitutionally invalid, with the operation of the declaration of invalidity suspended for 24 months. The federal Parliament is in a better position than a court to reformulate the rule, which requires a response to "a myriad of consequential issues relating to such things as inheritance and property rights, filiation, artificial birth technologies, adoption, and other marriage-status driven matters," as well as to the hostility of religious groups. The responses of the federal Parliament and provincial Legislatures to *M. v. H.* (Supreme Court of Canada, 1999) have not eliminated all distinctions between the treatment

of married or unmarried different-sex couples and unmarried same-sex couples. Justice LaForme's "two persons" reformulation is not the only option. Other options could include: (i) a "registered domestic partnership" or "civil union" law as in Scandinavia, Vermont, Nova Scotia and Quebec, (ii) the abolition of civil marriage, or (iii) the opening up of civil marriage to same-sex couples subject to the exceptions made in the Netherlands, in relation to presumptions of parenthood and international adoptions.

On issue (6), Regional Senior Justice Blair effectively wrote for a majority of two, in that Justice LaForme would support his view. Blair R.S.J. ordered that, if the federal Parliament fails to act within 24 months, Justice LaForme's reformulation of the common-law rule will take effect and the applicants will be entitled to marriage licenses, or registration of their marriages. Associate Chief Justice Smith would have left it open as to what would happen if the federal Parliament failed to act.

So what now? An opinion poll released on July 25 found that 48% of Canadians agree with the Court's judgment (65% of those aged 25 to 34) and 43% disagree (60% of those aged 65 or more). Premier Ernie Eves of Ontario accepted the judgment, while Premier Ralph Klein of Alberta vowed to use the "override" provision of the Charter (Section 33) to make it inapplicable in Alberta. (He cannot do so. Because the federal Parliament has jurisdiction, there will be same-sex marriage in every province or territory of Canada simultaneously or in none at all, and no province or territory can "opt out.") On July 29, the federal government announced that it was seeking leave to appeal the Court's decision to the Ontario Court of Appeal. Pursuing a two-track strategy, the federal government decided on August 7 to prepare an outline of four or five realistic options, and then turn the question of compliance with the Court's judgment over to a committee of the House of Commons, which will listen to people's views across Canada. This committee is likely to hear from dozens of individuals and groups saying how upset they will be if same-sex couples are permitted to marry. Given that only Justice LaForme ruled out a "registered domestic partnership" law as "separate but equal" treatment, it is not clear yet that the federal government will be willing to open up civil marriage. Although the Ontario Court of Appeal, and ultimately the Supreme Court of Canada, will probably agree that there is a Section 15(1) violation that cannot be justified under Section 1, it remains to be seen whether they will give the federal Parliament more or less leeway with regard to the remedy than the majority of the Divisional Court.
Robert Wintemute

Pennsylvania Supreme Court Opens Door to Second Parent Adoptions

Finding that decisions by the lower appellate courts of Pennsylvania refusing to approve second-parent adoptions produced "absurd" results, the Pennsylvania Supreme Court unanimously ruled on August 20 that the courts have discretion under the state's adoption law to allow same-sex partners to adopt their partners' children. *In re: Adoption of R.B.F. and R.C.F.; In re: Adoption of C.C.G. and Z.C.G.*, No. 59 WAP 2001; No. 60 WAP 2001.

The ruling, in an opinion by Chief Justice Stephen A. Zappala, concerned appeals by two same-sex couples, one male and one female, who were identified in the opinion only by their initials. In the case of the male couple, J.C.G. and J.J.G., J.J.G. adopted two children and then filed a petition to have J.C.G. become the adoptive parent of the two children. Pennsylvania law requires that when an adoption petition is filed, the legal parent submit a form giving permission for the adoption and agreeing to relinquish his or her parental rights in favor of the adoptive parent. The only statutory exception to the relinquishment requirement is where the adopting parent is the "spouse" of the prospective adoptive parent. Pennsylvania also has a statutory provision limiting the right to marry to opposite-sex couples, so a same-sex partner may not be considered a "spouse" under Pennsylvania law.

In this case, J.J.G. filed the permission form, but deliberately did not indicate his agreement to relinquish his parental rights. The Erie County Common Pleas Court then denied the adoption, on the ground that J.J.G.'s failure to relinquish his parental rights was a fatal omission under the adoption law, and this ruling was sustained on appeal to the Superior Court, 762 A.2d 724 (Pa. Super. 2000).

In the case of the female couple, B.A.F. and C.H.F., the women decided to have children through donor insemination. C.H.F. had twin boys, and a bit more than a year after the twins were born, C.H.F. and B.A.F. filed a petitition to have B.A.F. adopt the boys. As in the case of the male couple, C.H.F. filed a consent form that did not relinquish her parental rights, and the Lancaster County Common Pleas Court denied the petition on that basis, subsequently sustained by the Superior Court, 762 A.2d 739 (Pa. Super. 2000). The cases were consolidated for argument on appeal to the Supreme Court.

Unlike the Erie County and Lancaster County Common Pleas Courts, trial courts in some other counties have approved second-parent adoptions, finding that the law leaves enough room for the court to exercise discretion. Since there was no opposition to the petitions in those cases, they did not get to an appellate level, and so there was no appellate precedent on the issue prior to the appeals in these two cases.

In his opinion for the Supreme Court, Justice Zappala found that the courts that were exercising discretion to allow such adoptions had embraced a more realistic interpretation of the state's adoption law. He observed that a prior Pennsylvania Supreme Court case upon which the Superior Court was relying in its rulings, *In re Adoption of E.M.A.*, 409 A.2d 10 (Pa. 1979), had been superceded as a precedent by a 1982 legislative amendment of the adoption statute, which appeared to give the trial courts more discretion in cases involving possible second-parent adoptions. (In *E.M.A.*, the Supreme Court had refused to allow an adoption by an unmarried single mother's boyfriend, finding that the only situation in which an adoption can take place without relinquishment of parental rights is in the case of a stepparent, or "spouse," of the child's legal parent.)

Under the 1982 amendment, a trial court can approve an adoption that does not meet every single statutory requirement by finding that there is "cause shown" to excuse the failure to meet a statutory requirement. In these cases, the petitioners will have to argue that the trial courts should exercise their discretion to waive the relinquishment requirement in light of the realities of the situation: that the children are residing in households headed by same-sex couples and that it would be in the best interest of the children to be legally related to both of their parents.

Anticipating the objection that this ruling could open the door too widely to petitions for adoption by strangers, Zappala commented, "The exercise of such discretion does not open the door to unlimited adoptions by legally unrelated adults. Such decisions will always be confined by a finding of cause and a determination of the best interests of the child in each individual case. Moreover, like other trial court decision, findings of cause will be reviewed on appeal for abuse of discretion." Zappala argued that "a contrary interpretation of the 'cause shown' language would command an absurd result as the Adoption Act does not expressly preclude same-sex partners from adopting. For example, the denial of Appellants' adoption petitions is premised solely upon the lack of unqualified consent by the existing legal parent. There is no language in the Adoption Act precluding two unmarried same-sex partners (or unmarried heterosexual partners) from adopting a child who had no legal parents. It is therefore absurd to prohibit their adoptions merely because their children were either the biological or adopted children of one of the partners prior to the filing of the adoption petition."

Under the peculiar reading of the statute that had been embraced by the Superior Court, these same-sex partners could only have adopted their kids by first having the legal parent relinquish their parental rights, and then have the couple jointly apply to adopt, presumably in the same proceeding. Acknowledging this possibility, Zappala commented, "In view of the fact that there

appears to be no statutory bar to such approach, our interpretation avoids such a convoluted procedure that would serve no valid purpose."

In both of these cases, however, because the trial courts had dismissed the petitions without examining the best interests of the children, the Supreme Court could not simply grant the adoption petitions. So both cases were sent back to their respective trial courts to give the petitioners the opportunity to show that the courts should exercise their discretion to grant the adoptions in the best interest of the children. A.S.L.

Co-Parents Can Seek Shared Child Custody in Ohio

The Ohio Supreme Court ruled on August 28 in *In re Bonfield*, 96 Ohio St. 3d 218, 2002 WL 1877090, that it is possible under Ohio law for same-sex partners to have joint legal custody of the children they are raising, but that a relatively new statute empowering courts to approve "shared parenting plans" between parents could not apply to a same-sex couple. Partially reversing lower court decisions, the Supreme Court found that there was nothing in the state laws governing child custody that would bar same-sex partners from seeking a share custody solution to their situation.

Teri Bonfield and Shelly Zachritz have lived together as domestic partners since 1987. Teri adopted two children early in the 1990s, and then had three children through anonymous donor insemination later in that decade. Shelly has joined fully in parenting the children throughout the relationship. At this time, second-parent adoption is not available under Ohio law, so she cannot petition to adopt the children. Concerned about Shelly's lack of any legal status regarding the children, Teri and Shelly jointly filed a petition with the Hamilton County Common Pleas Court, Juvenile Division, seeking a formal declaration of Shelly's parental status from the court to "confirm their commitment that they will both continue to raise the children regardless of what happens to their relationship." They explained that they also were concerned to secure Shelly's relationship in case Teri were to die since, as a "legal stranger" to the kids, she would have no legal rights and her relationship to them (and theirs to her, of course) would be endangered by the death of their legal mother. They sought to invoke a 1990 Ohio statute that authorizes courts to approve a plan for shared parenting that would recognize Shelly as a parent of the children.

Puzzled about how to handle this unusual request, the Common Pleas Court assigned the matter to a magistrate for hearing, study and a recommendation. The magistrate concluded that the court lacked jurisdiction to rule on the petition, because Shelly is not a parent within the meaning of Ohio R.C. 3109.04, which gives courts authority to allocate rights and responsibilities between parents. The court decided to follow the magistrate's recommendation, but also suggested that Teri and Shelly try an alternative route of seeking shared legal custody. There is no indication that Teri and Shelly followed the recommendation. Instead, they decided to appeal the ruling on jurisdiction.

The court of appeals affirmed the trial court's ruling, finding that the juvenile court has exclusive jurisdiction to decide custody issues for children who are not wards of the court, but that such jurisdiction must be exercised in accordance with section 3109.04, which only applies to shared custody between legal parents. Since Shelly is not a legal parent, the statute does not apply to her. The Ohio Supreme Court exercised its discretion to permit a further appeal.

Chief Justice Moyer's opinion for the court agrees with the lower courts in their interpretation of the shared parenting statute. "The legal concept of 'shared parenting' is relatively new in Ohio law," Moyer wrote, "and refers to an agreement between parents regarding the care of their children that was previously termed 'joint custody.'" However, Moyer pointed out, the shared parenting concept did not displace all references to custody in Ohio family law.

Teri and Shelly had argued that the court should use the doctrine of *in loco parentis*, which is used elsewhere in Ohio laws to recognize parental responsibilities of non-parents, in order to consider Shelly a parent in this context, or to adopt an approach that has been used by the courts in New Jersey and Wisconsin in finding that a lesbian co-parent has a right to seek custody of children she was parenting with a former partner, but the court found it inappropriate to do so, because parent is a term that has come to have a specific legal meaning in Ohio, which they found to be binding on the court.

The court also rejected the argument that Shelly has some sort of a constitutional right to establish a legal relationship with the children, reasoning that existing constitutional principles would protect Teri's decision to "co-parent her children with Shelly" against state interference, but would not necessarily give Shelly a right to have a court establish legal ties between her and the children.

But, the court found, in apparent agreement with the lower courts, that Teri and Shelly could still seek to share legal custody. Like the court of appeals, wrote Chief Justice Moyer, "we 'do not intend to discredit [the petitioners'] goal of providing a stable environment for the children's growth.' We note that although appellants urged the trial court to find that 'both Petitioners have equal standing to parent the minor children,' their brief filed in this court contains repeated references to 'custody,' and concludes with a plea for the court to recognize that they are 'equal custodial parents.'" Moyer concluded that 69the juvenile court has jurisdiction to determine whether a petition for shared custody is appropriate."

Moyer asserted that it is "well settled under Ohio law that a juvenile court may adjudicate custodial claims brought by the persons considered non-parents at law." It seems that when a court is confronted with a custody decision because a child is found to have been abused, neglected or dependent, the court's jurisdiction may be limited by section 3109.04, the provision that excluded Shelly because of her lack of parental status. But Moyer found that children whose custody status is before the court for other reasons do not invoke that particular statutory section.

Also, Moyer pointed out that the Ohio precedents that might appear adverse involved cases where a parent and a non-parent were disputing custody. But in this case there is no dispute, as the women are jointly petitioning, and Teri is asking the court to recognize Shelly as a custodial parent. "The parents' agreement to grant custody to a third party is enforceable subject only to a judicial determination that the custodian is a proper person to assume the care, training, and education of the child," Moyer concluded.

Thus, the case is sent back to the juvenile court in Hamilton County, with the charge to determine whether it is in the best interests of the children for Shelly to be designated as a custodial parent alongside Teri. From the court's summary of the nature of their relationship with the children, there are clear signals that the court expects that determination to be positive.

The ruling drew a dissenting opinion from Justice Cook, joined by one other member of the court, who argued that the juvenile court had correctly navigated its way through the complexities of Ohio's custody statutes and correctly concluded that it did not have jurisdiction in this case. Thus, the dissenters agreed with the majority that Shelly is not a parent and cannot be made part of a shared parenting plan under sec. 3109.04, but disagreed that the option remained open for an award of custody to Shelly while Teri also retains custodial rights.

Sallee Fry Waterman of Cincinnati represents the petitioning mothers. The case drew significant interest, attracting amicus briefs from members of the legislature and from the anti-gay American Family Association and related groups, as well as briefs in support of the mothers' petition by Lambda Legal Defense, the National Center for Lesbian Rights, the Ohio Human Rights Bar Association, and various child welfare and public health groups. A.S.L.

Washington Appeals Court Allows Public Employee Sexual Orientation Discrimination Claim Under 14th Amendment

In a decision that may be without similar appellate precedent anywhere in the United States, the Court of Appeals of the state of Washington ruled on July 18 that a discharged lesbian public employee can invoke the Equal Protection Clause of the U.S. Constitution's 14th Amendment to

ground her discrimination claim against a public hospital and the medical director of the department in which she was employed. *Miguel v. Guess*, 2002 WL 1578749. Reversing the trial court's dismissal of the constitutional claim, the court nonetheless ruled that a companion state law claim asserting a discharge in violation of public policy must be dismissed.

Mary Jo Davis was hired by Pullman Memorial Hospital in July 1993 to work as a sonographer in its radiology deparment, the director of which was Dr. Charles Guess, an independent contractor radiologist. According to Davis's complaint, Dr. Guess was immediately prejudiced against her due to her sexual orientation, referred to her as a "fucking faggot, a fucking dyke, and a queer." Dr. Guess was also heard to say, "I don't think that fucking faggot should be doing vaginal exams and I'm not working with her." He was heard to say this to the Hospital Administrator, Scott Adams, and to have elicited from Adams a sympathetic response, along the lines of "We need to do something about it and we will.'" Davis complained to Nan Miguel, the radiology department manager, who championed her cause with the hospital administration and, allegedly, suffered the elimination of her job as a result. (Miguel is co-plaintiff in the case, asserting unlawful retaliation.) Ultimately things came to a head with Dr. Guess, as Davis continued to complain about her mistreatment and began to solicit support for her position from other staff members. To help document her case, she made the mistake of copying some patient records for her lawyer, and upon this "rules violation" being discovered, she was at first suspended and then discharged by the hospital, on the grounds that she had breached patient confidentiality and become a "disruptive" employee. Although Dr. Guess was told at various times to back off and watch his language, the hospital never took any steps against him for his overt homophobia and discrimination.

Davis asserted a federal equal protection claim and a state claim of discharge in violation of public policy. She also asserted a violation of due process and a breach of her employment contract, premised on procedural terms in the employee handbook. Washington State does not have any law prohibition sexual orientation discrimination, so the trial court readily dismissed her public policy claim. The trial court also concluded that sexual orientation discrimination, at least as of the time of her 1994 discharge, was not actionable under the Equal Protection Clause. But the court held that contested facts left open the possibility that she could prevail on her contract and due process claims, so refused to dismiss those. Davis decided she preferred to appeal the dismissal of the Equal Protection and public policy claims, so withdrew the other claims and filed her appeal.

Writing for the court, Judge Kurtz found that the key questions on the 14th Amendment claim were whether state action was involved, and whether sexual orientation discrimination is actionable (and would have been considered so in 1994, in light of potential qualified immunity claims by the defendants). The state actor issue, as against Dr. Guess as an individual defendant, was complicated by his independent contractor status. Nonetheless, Kurtz found it possible to resolve the state action factor against dismissal of the complaint, noting the hospital's apparent ratification of Dr. Guess's overtly homophobic conduct towards Davis, and the factual support for an argument that the true reason she lost her job was adverse response to her sexual orientation rather than the copying form the patient files. At this stage, of course, all allegations of Davis's complaint are considered true for purposes of ruling on the motion. The court also noted Dr. Guess's powerful role in the radiology department, as reflected by the support he elicited from hospital administration, and by the administration's interim solution to the problem of Guess's refusal to work with Davis: cutting Davis's hours and mandating that she be scheduled to work at times when Guess was not working. In other words, the hospital was taking steps to accommodate his homophobia rather than to provide equal protection to its employee.

Turning to the substance of the constitutional claim, Kurtz found that the trial court erred in its characterization of Equal Protection law at the relevant time and today. citing and quoting from *Romer v. Evans*, 517 U.S. 620 (1996), and adverting to *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) and *State v. Ward*, 869 P.2d 1062 (Wash. 1994), the court finds that all discriminatory state action is subject to a rationality test. In this case, since the hospital and Guess are, at this stage, denying that they discriminated against Davis based on her sexual orientation, there is nothing in the record to support a rationale for discriminating against her on that basis, and thus dismissal is inappropriate. The court noted the 7th Circuit's decision in *Nabozny v. Pdlesny*, 92 F.3d 446 (1996), and the trial court decision in *Quinn v. Nassau County Police Department*, 53 F.Supp. 2d 347 (E.D.N.Y. 1999), to demonstrate that sexual orientation discrimination claims are actionable under the 14th Amendment.

"Based on the above authority," wrote Kurtz, "we hold that a state actor violates a homosexual employee's right of equal proteciton when it treats that person differently than it treats heterosexual employees, based solely upon the employee's sexual orientation. The alleged violation of the right of equal protection is actionable under [42 U.S.C. sec.] 1983." The court also adopted the standard analysis used under Title VII for evaluating whether a discrimination plaintiff has made out a prima facie case sufficient to withstand dismissal, including having introduced evidence of "pretext" to counter the defendant's proffered legitimate explanation for a discharge, and found that Davis's complaint alleged sufficient facts to meet these requirements.

Finally, it appears that the time has finally arrived when qualified immunity claims will no longer be readily entertained in sexual orientation discrimination cases, as helpful caselaw has aged sufficiently so that public actors can be held to have been on sufficient notice since at least the early 1990s that sexual orientation discrimination, as such, violates constitutional requirements. Judge Kurtz found the *Nabozny* decision persuasive on this point, quoting an extended passage about how it is well established that "the Constitution prohibits intentional invidious discrimination between otherwise similarly situated persons based on one's membership in a definable minority," and that there "can be little doubt that homosexuals are an identifiable minority subjected to discrimination in our society."

However, the public policy claim appeared doomed to failure in the absence of a Washington statute banning sexual orientation discrimination. While the court agreed that recent legislative developments in Washington showed a trend towards more recognition and protection for gay rights in the state, "the trend is insufficient to establish a clear mandate of public policy," and found it bound by state supreme court precedent to "proceed cautiously" in this area.

The case was remanded to the trial court for a resolution on the merits of Davis's equal protection claim, with a reminder that the trial court may, in its discretion, award attorney fees to a prevailing party in a sec. 1983 case. Ms. Miguel's discrimination claim was not involved in this interlocutory appeal. The ACLU took a role in the case on behalf of Ms. Davis, and proclaimed the court's decision historic in being possibly the first state appellate decision to recognize constitutional equal protection rights for employees of state agencies. A.S.L.

Connecticut Appellate Court Declines Jurisdiction Over Dissolution of Vermont Civil Union

Glen Rosengarten seeks to protect the inheritance rights of his three children by dissolving his Vermont civil union with Peter Downes in his home state, Connecticut. *Hartford Courant*, Aug. 9. Conn. Gen. Stat. 46b–1(17), controls jurisdiction over "matters within the jurisdiction of the Superior Court concerning children or family relations as may be determined by the judges of said court." Nevertheless, on July 30, the Appellate Court of Connecticut affirmed the Superior Court's *sua sponte* judgment that it lacks subject matter jurisdiction over Rosengarten's claims, thereby joining Georgia (Lesbian/Gay Law Notes, Feb. 2002) in denying extraterritorial effect to Vermont civil unions. *Rosengarten v. Downes*, 2002 WL 1644548.

The Superior Court cited the federal Defense of Marriage Act's purported exemption of "relationship[s] between persons of the same sex ... treated as a marriage" from constitutional "full faith and credit" requirements, and relied on a statutory

statement that Connecticut "public policy ... is now limited to a marriage between a man and a woman" in finding Rosengarten's claims outside the scope of 46b–1(17) jurisdiction. The court also focused on the fact that civil unions are not listed among the "family matters" defined in the Connecticut Practice Book, although the definition states that the list is not exhaustive or exclusive.

The appellate opinion by Judge Flynn, writing for a panel of three, notes that Rosengarten "does not claim that the civil union may be dissolved as a marriage." "Implicit in the plaintiff's argument ... is that we must recognize the validity of the Vermont civil union as a matter concerning family relations. If Connecticut does not recognize the validity of such a union, then there is no *res* to address and dissolve."

Superior Court judges had not enacted any rule of practice defining foreign civil unions as a family matter, which is not to say that individual judges could not have made that determination. Per Black's *Law Dictionary*, "The meaning of word family necessarily depends on ... purpose intended to be accomplished by its use, and facts and circumstances of each case." The opinion quotes the Vermont Statute that a civil union is not a marriage, and that the parties to a civil union must be "excluded from the marriage laws." Also, subdivisions 1 through 16 of 46(b)–1 refer specifically to dissolution and annulment of marriage, as well as the creation and removal of such non-spousal roles as guardian and conservator. The legislative history of catch-all subivision 17 shows only that it was enacted to merge matters previously divided between two older courts under the authority of the new Superior Court. The appellate court reads "family" to mean "husband and wife," exclusive of "some relationship, blood or otherwise," "household," or economic interdependence.

Rosengarten argued that Connecticut's statutes prohibiting discrimination on the basis of sexual orientation evidenced a public policy in favor of recognizing the right of homosexuals to enter into and dissolve marriage-like relationships, but the court countered with statutory language that the anti-discrimination statute cannot be construed to authorize same-sex marriage. The opinion references ecclesiastical courts, custom and tradition, and the failure of the legislature to enact same-sex marriage or civil union bills to further establish that Connecticut public policy limits marriage to heterosexual couples. Unlike the "treated as a marriage" language in federal DOMA, Connecticut law limits marriage to heterosexual couples, but was silent on solemnized same-sex relationships. This decision erases the distinction, as it equates civil union with marriage, proves that same-sex marriage is against Connecticut's present public policy, and then concludes that it lacks jurisdiction to hear a civil union case.

Rosengarten's lawyer, Gary I. Cohen, included a prayer for "any other" legal or equitable relief. The court declined to treat the civil union as an (unenforceable) contract or quasi-contract because Rosengarten did not plead an agreement to share assets or earnings, nor was a distinct claim made on appeal for jurisdiction.

As to extraterritorial "full faith and credit" for the Vermont statutes, the court invoked its authority to appraise the governmental interests of each jurisdiction, and attach "paramount importance to [the] legitimate interests" of the people of Connecticut.

Rosengarten will appeal to the Connecticut Supreme Court. *Hartford Courant*, Aug. 9. As noted in the June 2002 Lesbian/Gay Law Notes, Governor Rowland is expected to sign a bill calling for a study by the judiciary committee of the state Senate of gay marriages and civil unions. The debate about the eventual results of the study could modify or overcome the legislative policy found by the Rosengarten court. *Mark Major*

5th Circuit Revives Same-Sex Harassment Claim; Sets Criteria for Identifying Gay Supervisors

Reversing the dismissal of a same-sex harassment claim, the United States Court of Appeals for the Fifth Circuit found that genuine issues of material fact existed as to whether a male employee was harassed based upon sex by virtue of his male supervisor's apparent homosexuality and whether the supervisor subjected the employee to a hostile work environment. *La Day v. Catalyst Technology, Inc.*, 2002 WL 1878750 (Aug. 15, 2002).

Patrick La Day was hired as a reactor technician for Catalyst Technology, Inc. in 1996. In 1998, La Day was working for Catalyst in Montgomery, Alabama, under the supervision of Willie Craft. Based upon three incidents involving Craft, La Day brought suit against Catalyst under Title VII alleging same-sex sexual harassment.

The first incident happened while La Day was sitting in his car with his girlfriend outside the work place. Craft observed the two in the car and saw "passion marks" on La Day's neck. According to La Day, Craft approached the car and stated, "I see you got a girl. You know I am jealous."

In the second incident, La Day alleges that Craft approached him from behind while La Day was bending down. Craft fondled La Day's buttocks in a way that was similar to "foreplay with a woman." La Day immediately turned around and told Craft not to touch him and that he did not play like that. Later that day, La Day reported the incident to a supervisor. After the report was made, Craft allegedly spit chewing tobacco on La Day's hard hat and shirt and stated "this is what I think of you."

As a result, La Day filed a complaint against Catalyst through the Equal Employment Opportunity Commission. Upon receipt of the complaint, Catalyst began an investigation and learned that two other former employees had filed similar complaints against Craft. Eventually, La Day filed suit against Catalyst in state court. The company removed the case to the U.S. District Court for the Middle District of Louisiana. The suit asserted same-harassment claims under state and federal law, retaliation claims, and a vicarious liability claim, all against Catalyst for the acts of Craft.

Catalyst moved for summary judgment on all of La Day's claims. Judge James J. Brady granted summary judgment in its entirety to Catalyst and dismissed the case. La Day appealed.

Judge Jerry E. Smith, writing for a three-judge panel of the Fifth Circuit Court of Appeals, reversed Judge Brady with respect to the same-sex harassment claims. In reversing Brady, Smith applied the test for same-sex harassment outlined in *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998). According to *Oncale*, one way to show same-sex harassment is through evidence that the harasser made "explicit or implicit proposals of sexual activity" and "provide credible evidence that the harasser was homosexual." An issue of first impression before the Fifth Circuit was what kind of evidence constitutes "credible evidence that the harasser was homosexual."

Relying on the Seventh Circuit decision in *Shepherd v. Slater Steels Corp.*, 168 F.3 998 (7th Cir. 1999), and the Ninth Circuit decision in *Rene v. MGM Grand Hotel, Inc .*, 243 F.3d 1206 (9th Cir. 2001), Smith determined that there are two types of credible evidence that are likely to show the harasser may be homosexual. First, there should be evidence suggesting that the harasser intended to have some kind of sexual contact with plaintiff rather than merely to humiliate him for reasons unrelated to sexual interest. Second, evidence showing that the alleged harasser made same-sex sexual advances to others, especially to other employees.

Here, Smith found evidence of sexual advances to both La Day and to other employees made by Craft. The court also found sufficient evidence that Craft's conduct was both objectively and subjectively offensive in that a reasonable person would find the conduct hostile or abusive and that La Day in fact perceived it to be so. Accordingly, the Court found genuine issues of fact on the same-sex harassment claims, reversed the District Court's decision on summary judgment and remanded the matter for trial. The Court of Appeals affirmed the dismissal of La Day's retaliation and vicarious liability claims. *Todd V. Lamb*

Pennsylvania Appellate Court Strikes Down Philadelphia Partner Legislation

The Commonwealth Court of Pennsylvania, an intermediate appellate court, reversed two orders of the Philadelphia County Court of Common Pleas on Aug. 29, ruling that 1998 amendments to the Philadelphia Code defining same-sex "life partnership" status and extending certain rights to life

partners were beyond the legislative competency of the city and preempted by state law. *Devlin v. City of Philadelphia*, 2002 WL 1946133.

The amendments were part of a group of ordinances signed into law on May 19, 1998, by then-Mayor Edward Rendell after passage by the city council. The amendments adopted a definition of "life partnership," provided that "life partners" be included within the concept of "marital status" such that discrimination on this basis would be forbidden in the city of Philadelphia, included "life partners" within the property transfer tax exemption accorded to married partners, and established insurance and pension entitlements for "life partners" of city employees on the same basis as legal spouses. Passage of these measures was attended by considerable controversy, and the current mayor of Philadelphia, then a council member, was an opponent of the measure.

Upon enactment, a gropu of objecting citizens filed suit in the Court of Common Pleas, claiming that the city council acted without authority in purporting to create a new "marital status" for same-sex partners, inasmuch as the state has exclusive jurisdiction to create and define marriage. This argument had not impressed Common Pleas Judge Matthew D. Carrafiello, who granted summary judgment to the city on October 5, 2000. The plaintiffs' appeal was decided by a seven-member bench of the Commonwealth Court, which was unanimous in reversing, with only the slightest dissension from Presiding Judge James Gardner Colins, who wrote a brief concurring opinion.

Senior Judge Joseph T. Doyle (who had not yet taken senior status when the case was argued in June, 2001), wrote for the court. After reviewing Pennsylvania law on home rule legislative power and its limitations, Judge Doyle wrote that "the salient question, then, is whether the City overstepped the bounds of its authority and legislated not merely as to its municipal functions but in a field of substantive statutory law of statewide significance and concern, and preempted by the state, when it amended the Fair Practices ordinance to include the new cateogry of 'Life Partner' as a marital status." The court found that the City had overstepped its power "when it defined and created for legal purposes a new relationship between same-sex persons that it categorized as being part and parcel of the marital state." The court found that the state legislature, by its most recent enactments in the field of domestic relations, "tacitly but thoroughly demonstrated its intent to preempt this field of legislation, which concerns the health, safety and general welfare of the State's inhabitants."

Doyle found it obvious that the city "attempted to circumvent the Marriage Law when it specifically categorized the Life Partnership relationship between a same-sex couple as a type of marital status," and found "utterly facile" the city's argument that these amendments to the code did not "legislate with respect to relationships at all." To back up the court's view, Doyle recited numerous ways in which the life partnership status paralleled marital status. The problem, apparently, is that not content to pass a simple domestic partner registration scheme limited to the usual minimal rights found elsewhere, such as hospital and jail visitation and limited access to employee benefits for public employee partners, the Philadelphia council had passed a more far-reaching scheme, embracing tax consequences, a general non-discrimination requirement, and full pension and insurance rights, coupled to a nomenclature calculated to tempt fate by specifically describing a life partnership as a "marital status" for purposes of city law.

Judge Colins' concurrence makes clear the nature of this strategic error, by asserting that Philadelphia could certainly adopt a policy of providing employee benefits to partners of city employees, provided no distinction was made between homosexual and heterosexual partners. Although Colins' concurrence was not joined by any other members of the court, it may point the way to a partial solution, at least to protect the access to benefits for the relatively small number of city employees and their partners who had enrolled over the past four years. (In its opinion, the court cites the Georgia litigation over Atlanta's domestic partnership ordinance. In *City of Atlanta v. McKinney*, 454 S.E.2d 517 (Ga. 1995), the state supreme court struck down the city's partnership ordinance on grounds of state preemption, while hinting at how a more narrowly focused ordinance might survive judicial review. The city then enacted the narrower ordinance, which was sustained on appeal.)

The Center for Lesbian and Gay Civil Rights in Philadelphia had joined with numerous other organizations in filing an amicus brief, after the Common Pleas court rejected an attempt to let gay partners who have been receiving benefits intervene in the case as parties. Now the question arises whether those individuals would have standing to appeal this ruling, especially if the city, governed by a former legislative opponent of the measure, decides not to appeal the ruling. The decision, which built in various ambiguities, leaves plenty of room for debate about how Philadelphia could, if it wanted to, craft a narrower measure to provide equity to partnered public employees. A.S.L.

9th Circuit Finds Potential Constitutional Flaw in Prison Policy Against Expressions of Same-Sex Affection During Visits

A unanimous three-judge panel of the U.S. Court of Appeals, 9th Circuit ruled Aug. 12 that the same-sex partner of an Arizona state prison inmate can maintain a lawsuit challenging the constitutionality of a prison policy that prohibits same-sex hugging or kissing during prison visits. *Whitmire v. State of Arizona*, 2002 WL 1832015. The ruling reversed a decision by U.S. District Judge Roger G. Strand (D. Ariz.), who had dismissed the case.

William Lyster is an Arizona state prisoner who is openly-gay. Karl Whitmire is his same-sex partner. When Lyster informed the prison staff that his same-sex partner would be coming to visit, he was instructed that he was not permitted to hug or kiss Whitmire during visits, in accordance with a state prison regulation providing that "same-sex kissing, embracing (with the exception of relatives or immediate family) or petting" is prohibited during visits. After Lyster briefly hugged Whitmire during a visit, a guard told him that "if that happens again it will be a long time before you see him again."

Whitmire and Lyster filed suit to protest this policy as a discriminatory violation of their rights of freedom of speech and association. When the case was automatically slotted to the prisoner pro se litigation docket, where it might be ignored for some time, Lyster agreed to drop out of the lawsuit, leaving Whitmire as the sole plaintiff and earning the case an upgrade to the district court's regular civil docket. But that didn't help with the district judge, who accepted the argument by the Arizona Department of Corrections that the regulation served the legitimate purpose of avoiding "marking" homosexual prisoners, who might suffer harassment or worse from other prisoners if their sexuality became known.

This argument struck Circuit Judge A. Wallace Tashima as just a bit strange in the context of Whitmire's case. After all, Lyster is openly gay, so letting him hug his partner during visitation is not going to change what other inmates know about him. But that's not the end of the matter, because the issue, in terms of constitutional law, is not whether the regulation makes sense in this case but rather whether it makes sense often enough to be justified as a general rule. Tashima's opinion casts doubt on this as well. Treating the issue, contrary to the complaint, as arising under the 14th Amendment's Equal Protection Clause, Tashima found that it potentially failed the test of rationality (and thus there was no need to question whether a more stringent form of judicial review should be used in a sexual orientation discrimination claim).

"Common sense indicates that an inmate who intends to hide his homosexual sexual orientation from other inmates would not openly display affection with his homosexual partner during a prison visit,70 wrote Tashima. "Rather, prisoners who are willing to display affection toward their same-sex partner during a prison visit likely are already open about their sexual orientation. Whitmire's and Lyster's situation is illustrative. Lyster openly told other prisoners that he was gay. In situations like this, Arizona's policy prohibiting same-sex displays of affection during visitation does nothing to prevent the marking of homosexual prisoners."

However, Tashima conceded that a final decision on the merits of the case would have to be

made by the district court after giving the prison officials an opportunity to demonstrate that there is a rational justification for the policy. Concurring Judge John Sedwick expanded on the point by observing that the record before the appeals court is devoid of any information about "how prison visits are arranged or structured, where they take place, whether inmates from several cell blocks enjoy visitation rights at the same time, how homosexual inmates other than Lyster might behave in the absence of the challenged policy, whether an open display of physical affection between Whitmire and Lyster might affect other prisoners' behavior even though Lyster's sexual orientation were already known, nor any of the other facts that may bear upon why prison officials, exercising their discretion, decided to implement the challenged policy."

So Whitmire and Lyster are not out of the woods yet. Curiously, the only judge on the three-member panel who did not write an opinion was the appropriately-named Procter Hug, Jr. but an opinion in this case by a judge named Hug might have seemed just a bit much! After all, a kiss is just a kiss, but a hug.…? A.S.L.

Ohio Supreme Court Rules for Lesbians on Name-Change Petition

Voting 6–1, the Ohio Supreme Court ruled on July 31 that it would not violate the state's policy against same-sex marriages for a court to grant a name change so that a lesbian couple could share the same surname. *In re Bicknell*, 96 Ohio St. 3d 76, 771 N.E.2d 846. The decision, announced in an opinion by Justice Alice Robie Resnick, reversed a ruling by the court of appeals, which had affirmed the Butler County Probate Court's refusal to grant the name change.

Jennifer Lane Bicknell and Belinda Lou Priddy filed applications with the Probate Court in January 2000, each seeking to her surname changed to Rylen, a combination of the letters from their last names. The reason cited on the applications was: "Applicant desires to legally have the same last name as her long-term partner of nine (9) years. This name change will only add to the level of commitment they have for each other, as well as that of their unborn child. Also, so that this tender and new family will have a unified name in the eyes of the law." Bicknell was then pregnant through donor insemination. A magistrate denied both applications on three grounds: "To grant their petitions would be contrary to the public good, contrary to encoded public policy, and contrary to natural law." The Probate Court affirmed the holding, although disavowing the magistrate's legal conclusion, instead opining: "It is not reasonable and proper to change the surnames of cohabitating couples, because to do so would be to give an aura of propriety and official sanction to their cohabitation and would undermine the public policy of this state which promotes legal marriages and withholds official sanction from non-marital cohabitation." The court of appeals affirmed, finding that Ohio's policy is to support marriages and discourage cohabitation, and that granting the applications would undermine "Ohio's public policy promoting marriage."

Describing this as "a case of first impression in Ohio," Justice Resnick said that the only legal question properly before the court was whether the name change request "'is reasonable and proper under R.C. 2717.01." The statute itself sets only a few requirements for a name change, including that the applicant has been a bona fide resident of the county for at least a year, specify the requested new name, articulate "the cause for which the change of name is sought," and that the application "show reasonable and proper cause" for changing the applicant's name. Justice Resnick observed that in an earlier interpretation of the statute, the Ohio Supreme Court had stated that it is "universally recognized" that "a person may adopt any name he may choose so long as such change is not made for fraudulent reasons."

After noting that the applicants had satisfied all the objective requirements of the statute, the court turned to law from other jurisdictions, citing cases from New Jersey and Pennsylvania freely allowing name-changes. In particular, the court seemed to rely on *In re Bacharach*, 344 N.J. Super. 126, 780 A.2d 579 (N.J. Super. Ct., 2001), in which the court approved a lesbian couple's request to adopt a hyphenated surname linking their original family names to create the same joint surname.

"In the case at bar," wrote Resnick, "appellants' only stated purpose for changing their names is to carry the same surname to demonstrate their level of commitment to each other and to the children that they planned to have. Both acknowledge that same-sex marriages are illegal in Ohio, and it is not their intention to have this court validate a same-sex union by virtue of granting the name-change applications. Any discussion, then, on the sanctity of marriage, the well-being of society, or the state's endorsement of nonmarital cohabitation is wholly inappropriate and without any basis in law or fact."

Finding that it was "clear that appellants have no criminal or fraudulent purpose for wanting to change their names," and were not attempting to "evade creditors or to create the appearance of a state-sanctioned marriage," Resnick concluded that the reasons given for the proposed change were "reasonable and proper" and so it should be approved.

Dissenting, Justice Lundberg Stratton asserted that the result was contrary to legislative intent, since it was "directly contrary to the state's position against same-sex and common-law marriages, neither of which Ohio recognizes." Stratton asserted that this is the kind of "social policy decision" that should be made by the legislature, not the court.

Scott Knox of Cincinnati represented the lesbian petitioners, with amicus assistance from the ACLU of Ohio, Lambda Legal Defense Fund, and the Ohio Human Rights Bar Association. The American Family Association of Ohio filed an amicus brief urging affirmance of the lower court. A.S.L.

Michigan Supreme Court Finds No Private Right of Action Against Government Employer Under Detroit Gay Rights Provision

By a 4–3 vote that provoked two angry dissenting opinions, the Michigan Supreme Court ruled on July 31 in *Mack v. City of Detroit*, 2002 WL 1764044, that Linda Mack, a lesbian formerly employed as a Detroit police officer, cannot enforce her rights under the Detroit City Charter to be free of sexual orientation discrimination in the workplace by suing the city and its police department in state court. However, Mack is still entitled to pursue a sex discrimination claim. The ruling reversed a decision by the state's court of appeals, and reinstated the trial court's dismissal of Mack's sexual orientation claim. Justice Young wrote for the majority of the court.

Mack alleged that when she was assigned to the sex crimes unit, numerous male officers began hitting on her for sexual favors, and when she declined, stating that she was a lesbian, she suffered further discrimination, including being assigned away from law enforcement to busy-work desk jobs. She also alleged that supervision refused to deal with her grievances because of her sexual orientation. Ultimately, she retired from the police force in disgust, and filed this lawsuit.

The basis for the supreme court's ruling was its interpretation of the Michigan Government Tort Liability Act (GTLA), which provides that, apart from some listed exceptions, government agencies in Michigan are immune from tort liability when "engaged in the exercise or discharge of a governmental function." The exceptions fall into two categories: specific kinds of liability mentioned in the statute, and other state laws specifically subjecting the government to liability. As an example of the first, the government may be sued for injuries due to negligent operation of its motor vehicles. As an example of the second, government entities can be sued for sex discrimination, because the state civil rights law specifically authorizes suits against the government as an employer.

The problem for Linda Mack, according to the supreme court majority, is that although Detroit amended its charter years ago to ban sexual orientation discrimination, Michigan has not added that category to the state's civil rights law. Mack's suit for sexual orientation discrimination, which is based solely on the city charter provision, is not within the jurisdiction of the state courts, according to the majority, because the city does not have authority to enact exceptions to the GTLA.

As a necessary part of its ruling, the majority asserted "that discrimination claims have always been recognized as a species of statutory tort" and thus that they should be covered under the GTLA, although no prior decision by the court had directly held this to be the case.

When she filed her complaint, Mack asserted claims of sex discrimination, sexual orientation discrimination, and intentional infliction of emotional distress. The city moved to dismiss her emotional distress claim on immunity grounds and her sexual orientation claim on the basis that the charter does not authorize individual lawsuits to enforce the non-discrimination provision, instead requiring the filing of complaints with an administrative agency. The trial court dismissed the tort claim on immunity grounds, and Mack did not appeal that ruling. The trial court dismissed the sexual orientation claim on the grounds argued by the city, and was reversed by the court of appeals, which ruled 2–1 that a private lawsuit could be brought under the charter provision. The potential relevance of the GTLA was never mentioned in connection with the sexual orientation claim, and was not briefed to the supreme court, which apparently raised the issue on its own.

The three dissenters, whose views were represented by two opinions, complained that prior to this decision there had been no specific holding that the GTLA applies to discrimination claims, and that the court had done nothing to alert the parties that this issue would be considered, so it was not fully briefed and argued. Justice Cavanaugh charged the majority with subverting the adversarial process by reaching to make a significant legal ruling without having given the parties a chance to brief and argue the question. Justice Young's reply was that this was clearly a central legal issue presented by the case, regardless whether the parties had recognized it as such.

In another part of his opinion for the court, Justice Young also found that Mack's complaint failed to articulate a basis for finding that the government was not immune to her sexual orientation claim. In doing so, the court majority used this opportunity to overrule a long-settled precedent in Michigan that the defending agency, not the plaintiff, has an obligation to raise issues of governmental immunity if they are relevant. The majority judges determined that the decisions adopting this rule were mistaken, and that the burden to raise immunity issues was on the plaintiff at the outset of the case. They applied this ruling to Mack's complaint, and found it lacking, not surprisingly.

This drew a sarcastic rejoinder from dissenting Justice Cavanaugh. How could Mack's attorney have known that the immunity issue had to be addressed in the complaint, if the settled law prior to this case put the burden on the government to raise the issue as a defense argument? "I object to the majority's application of its holding [to Mack]," wrote Cavanaugh, "which placed the burden of prescience on the plaintiff."

Cavanaugh also objected to the court's refusal to grapple with the key legal issue that had been the basis for the court of appeals reversing the trial court's dismissal of Mack's sexual orientation discrimination claim: whether the charter authorizes individual lawsuits. This is an important question beyond the narrow scope of this case, since it would also affect the ability of people experiencing discrimination outlawed by the charter to bring lawsuits against non-governmental defendants.

Justice Young, writing for the majority of the court, disclaimed any ruling on that question, asserting that it was "irrelevant" because the city lacks authority under the charter to make exceptions to the government tort immunity statute. Thus, whether the city intended to create such an individual right to sue was irrelevant, because it lacked the power to authorize anybody to bring suit against the city or its own agencies. Young belittled Cavanaugh's concern with the broader question of right to sue, asserting that this decision only concerns government agency defendants. Given the way the court decided to dispose of this case, a ruling on whether the charter authorizes lawsuits was not necessary, he asserted. (The tone of Young's rejoinders to Cavanaugh is barely civil, apparently cover a level of personal rancor unusually displayed in appellate opinions.)

Cavanaugh and the other dissenters objected strongly to this whole line of reasoning, pointing out that the immunity law might not apply to civil rights claims, and that the question whether the charter provision can be enforced by individual suit is an important one that the court should not evade. The majority's failure to rule on this point leaves doubt whether plaintiffs can sue private employers under the charter provision, even though the majority claimed that their ruling only applies to suits against the city and its agencies.

In the meantime, Mack's claim, which included allegations of sexual harassment and failures by the police department to address grievances arising from such harassment, will be allowed to go forward in the trial court, but only on a sex discrimination theory under the state's civil rights law. A.S.L.

N.Y. Teacher's Sexual Orientation Discrimination Suit Survives Dismissal Motion

Twenty-seven year veteran teacher Joan Lovell, an out lesbian, brought an equal protection suit against the Comsewogue School District alleging a pattern of improper action and inaction by Principal Joseph Rella in response to Lovell's complaint of anti-gay harassment by three students. On Aug. 15, the U.S. District Court for the Eastern District of New York ruled that discovery will proceed, rejecting Defendants' dismissal motion. *Lovell v. Comsewogue School District*, 2002 WL 1869991.

On February 7, 2001, three female students lodged a sexual harassment complaint against Lovell at Comsewogue High School. In apparent violation of School District policy requiring that teachers be informed of complaints as soon as they are lodged, Principal Rella did not inform Lowell of the pending complaint while she was in his office the morning of February 8. One of the students, however, had been given a pass that allowed her to leave Lovell's class at any time. Lovell was first informed of the complaint when she went to the assistant principal's office at 2 pm to inquire about the pass. Lovell alleges that she was not allowed to present facts relevant to the investigation: specifically that the three students had behavior problems, and one who was failing told Lovell that she was going to "get out" of her class.

After Rella determined that the student complaints were frivolous, he failed to discipline the three students. Instead, Rella rewarded one of the students with a 100% grade for independent study after removal from Lovell's class. Due to Rella's failure to take any disciplinary action, the three students began to harass Lovell, calling her a "dyke," "disgusting," and whispering, pointing and hugging each other on seeing Lovell in the hallway. Lovell complained to Defendant Rella, who again took no remedial action.

Rella and the School District moved to dismiss Lovell's complaint. District Judge Spatt handily dissected, and rejected, all of defendants' arguments. The judge found sufficient allegation of an equal protection violation in the implication that the School District's response to sexual harassment complaints varied, depending on the teacher's sexual orientation.

Alleging hostile work environment, Lovell reported that faculty meetings, the Police Bias Unit, and suspension were the district's remedies for complaints of race-based harassment. Contrary to Defendant's "apples to oranges" argument, the judge reasoned that teachers subjected to disparaging remarks based on either race or sexual orientation are both similarly situated. Defendants contended that sexual orientation is not an "impermissible consideration" as a basis for discriminatory conduct. The opinion counters with case law establishing that sexual orientation-based harassment is actionable under the Equal Protection clause. Defendants argued that a case where a police officer was "deprived of a privileged status to which he had no constitutional entitlement" barred Lovell's equal protection claim, but no factual analogy was evident. The School District sought to remove itself as a defendant by arguing that Rella's discriminatory conduct was not taken pursuant to the District's policy or custom. The judge countered that informal but persistent discriminatory practices allow an inference of policy, and that, as principal, Rella's conduct effectively represented official policy in this instance.

Judge Spatt rejected the argument that Rella's conduct is shielded by qualified immunity, be-

cause a "reasonable official" would have understood that "governmental discrimination against homosexuals could violate" equal protection since the Supreme Court's 1996 *Romer* decision. Consequently, Spatt also rejected defendants' contention that Lovell's suit was "patently frivolous," and rejected their prayer for lawyers' fees. After discovery, the court can evaluate the defendants' argument that Principal Rella's actions were reasonable. *Mark Major*

Lesbian Lover of Non-Custodial Mother Accorded Equivalent Visitation Rights to Straight Male's Girlfriend by Mississippi Court of Appeals

A lesbian lover of a non-custodial mother in Mississippi may accompany the mother on visits with the mother's children, ruled the state's court of appeals on July 23. *Lacey v. Lacey*, 2002 WL 1614083.

A precedent from the Mississippi Supreme Court involving a heterosexual couple was applied by the Mississippi Court of Appeals to allow visits by a homosexual couple. The court had stated in *Harrington v. Harrington*, 648 So. 2d 543 (Miss. 1994), that if there is no evidence that a particular restriction on visitation is necessary to avoid harm to the child, then imposition of a restriction on the non-custodial parent's visits is an abuse of discretion. In *Harrington*, the chancellor (a county judicial official) had barred a father's girlfriend from the presence of the father's children. The Mississippi Supreme Court held that this was an error, and that it is preferable for the court merely to restrict the girlfriend from staying overnight during the children's visits.

In *Lacey*, the chancellor in rural Attala County (about 50 miles northeast of Jackson) had hewn to the *Harrington* decision, and applied it to Wanda Lacey and her lover, Laura Farris. The chancellor, on Wanda's petition to modify a custody decree accompanying her divorce from Charles Lacey, allowed Wanda specified visitation with her children and overnight stays with the children at the home of Wanda's parents. However, Laura could not stay overnight during the visits, although she was allowed to accompany Wanda when visiting the children. The appellate court affirmed the chancellor's judgment.

Wanda Lacey had a slew of problems keeping her from obtaining custody of her children, or winning more liberal visitation rights. Lesbianism was only a tangential reason for the stringent restrictions. Among the others: Wanda had a long-standing drug problem involving marijuana, cocaine, crack, and crystal meth; she offered her six-year-old daughter Paxil when she was "in a mood;" she kept a bong in the house and allowed her children to see her using it; performed housework in the nude, and allowed the children to see her nude and in bed with Laura. Since the divorce, she had sexual relationships with three men and five women and she never checked on her children's progress in school.

The court noted that the Mississippi Supreme Court had said that embarrassment at or disapproval of a father's homosexuality is not enough to apply visitation restrictions against the father's lover. *Weigand v. Houghton*, 730 So. 2d 581 (Miss. 1999) (no bar on visiting 15–year-old child). *Alan J. Jacobs*

Florida Appeals Court Says Sperm Donors Have No Parental Rights

The Florida 2nd District Court of Appeals ruled on August 16 that a sperm donor has no parental rights by virtue of Fla. Stats. Sec. 742.14, and reversed a Sarasota County Circuit Court order that had granted unsupervised visitation to a gay man who had donated sperm so that a lesbian couple could have children. *Lamaritata v. Lucas*, No. 2D01–3293. According to the opinion by Chief Judge Blue, which creates a state-wide precedent, Danny Lucas may not seek any parental rights, regardless of any agreement he may have made with Lori Lamaritata, the biological mother of the twin boys who were conceived using Lucas's sperm.

According to Lamaritata's attorney, who spoke to the *Sarasota Herald-Tribune* (Aug. 20), Lamaritata did not know Lucas socially. She had gone to a sperm bank but had been unable to conceive and was told she needed fresh sperm. A friend suggested she interview Lucas, who was willing to donate on the basis that he would have no parental rights or responsibilities. They made an agreement under which Lucas might have occasional supervised visitation at Lamaritata's discretion, but in which Lucas promised not to attempt to assert parental rights. After the twins were born, however, Lucas became interested in more frequent contact, including unsupervised visitation. When Lamaritata resisted, he filed a lawsuit, seeking testing to establish his paternity and a visitation order.

The issue of whether Lucas was entitled to a paternity test went to the court of appeals in 1998. See *L.A.L. v. D.A.L.*, 714 So. 2d 595 (Fla. 2nd D.C.A. 1998). At that time, the appeals court rejected his demand for a paternity test, and instructed the trial court to determine the applicability of the sperm donor statute, which provides that "the donor… shall relinquish all … paternal rights and obligations with respect to the donation or the resulting children." However, the circuit court judge, Becky A. Titus, evidently sympathetic to Lucas, instead issued a visitation order, entitling him to unsupervised visitation on alternate weekends, Father's Day, and the day after Christmas, as well as the right to speak with the children by telephone when they are with their mother and her partner, Mary Ellen Hindman, and consultation rights regarding school events and activities. Lamartita again appealed.

Judge Blue found that the statute totally controls this situation, leaving Lucas not a leg to stand on in his pursuit of court-ordered visitation. "A person who provides sperm for a woman to conceive a child by artificial insemination is not a parent," wrote Blue. "Both the contract between the parties and the Florida statute controlling these arrangements provide that there are no parental rights or responsibilities resulting to the sperm donor." Furthermore, the court ruled that if Lucas would be entitled to any form of visitation under his written agreement with Lamaritata, as a matter of statutory policy that agreement is not enforceable. "The sperm donor here has no legal parental rights," insisted Blue, "and this case should have been dismissed after our prior opinion."

The court reversed the trial court's visitation order and sent the case back to the trial court "for the entry of a final judgment declaring that Mr. Lucas has no enforceable parental rights."

Susan Stockham, a Sarasota attorney who also spoke to the local newspaper after the ruling came down, praised it as "an excellent ruling" and likely "the first case in Florida that upholds the termination of parental rights occurring at the time a donation is made." She and Lamaratita's attorney, Doris Bunnell, both said that they "had frantic phone calls from people concerned about entering in a sperm donation agreement with someone they know instead of taking an anonymous donation" as a result of the trial court's visitation order. Now such people can rest assured that as a matter of law their sperm donors will not be able to claim parental rights. But, of course, that depends on the buck stopping here. Lucas's attorney, Thomas Hudson, said that his client is considering filing a further appeal with the state supreme court. Lucas was not available for comment to the press, and Lamaratita and Hindman are now living out of state, although their attorney indicated that they were planning to move back to Florida soon. A.S.L.

Lambda, ACLU Achieve Settlements of High School Harassment Suits in Nevada and California; Substantial Damages Awarded and Policies Changed

On Aug. 13, the ACLU announced a settlement in a federal court lawsuit it had filed on behalf of George Loomis, a gay man who suffered harassment at Gold West High School in Visalia Unified School District, California, from 1996 to 2000. Under the settlement, Loomis would receive damages of $130,000, and the School District, adding explicit sexual orientation protection to its official policies, would undertake training of students and staff to avoid future homophobic harassment. The California Gay-Straight Alliance Network was a co-plaintiff in the suit, which was filed under both the federal civil rights laws banning sex discrimination in schools that receive federal financial assistance, and the recently-enacted California Student Safety and Violence Prevention Act of 2000, which applied during Loomis's senior year at the high school.

Loomis's complaint against the school district described name-calling by other students within earshot of school employees who did nothing in response, and taunting and offensive jokes that eventually led to Loomis withdrawing from school during his senior year and missing his graduation. He enrolled in self-study classes, but did not complete them. Loomis complained that nobody from the school district had ever apologized to him for this mistreatment, but school officials argued that their willingness to settle the suit and pay damages to Loomis constituted their apology. Loomis eventually moved elsewhere in the state and earned a general equivalency diploma. He announced that he would use the settlement money to return to college.

Two weeks later, another openly-gay high school student's saga of harassment and discrimination ended in triumph when the Washoe County (Reno, Nevada) School District and Derek Hinkle concluded a settlement agreement to end Hinkle's federal lawsuit against that school district. Represented by volunteer lawyers from the law firm of O'Melveny & Myers and the Lambda Legal Defense Fund, Hinkle extracted $451,000 in damages from the school district, as well as a wide-ranging agreement establishing new procedures and rights of free expression for gay students.

Henkle's complaint alleged that he was the victim of violence, bullying, and physical attacks, some observed by school officials and security personnel who did nothing to help him. On one occasion, a principal warned Henkle against "acting like a fag" if he wanted to avoid getting hurt. Although Henkle was a high-performing honors student, the district transferred him to a program for poorly-performing students, ostensibly to get him away from his harassers, who were not punished. Ultimately, Henkle was consigned to attending adult education classes when the harassment continued at his second school, and thus was unable to earn a regular high school diploma, preventing him from obtaining college admission together with his age group. Now 21 and living in San Francisco, Henkle hopes to use the money from the settlement, as well as a revision agreed upon in his high school records, to obtain admission to a regular college program.

The policy changes that the school district agreed to institute in exchange for settlement of the lawsuit are quite extensive. Among other things, the district will formally recognize the right of students to discuss their sexuality openly, and it will establish training programs for students and staff on diversity that are intended to ameliorate some of the problems brought to light by Hinkle's lawsuit. The new policies will also be included in handbooks sent to students' parents. In particular, school security personnel, who had discouraged Hinkle from filing formal complaints against his harassers, will come under a policy requiring them to do just the opposite, to ensure that appropriate administrative mechanisms come into play when student experience harassment.

The school district's initial response to the lawsuit had been to file a motion to dismiss for failure to state a valid legal claim. That motion was decisively rejected in an opinion issued by U.S. Magistrate Judge Robert A. McQuaid, Jr., early in 2001. (See *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D.Nev. 2001).) The loss of the motion, and McQuaid's subsequent rulings against other motions by the school district, encouraged serious settlement talks to begin. Lambda and O'Melveny waived attorney's fees to facilitate settlement of the case. A.S.L.

Scouts Blocked From Connecticut Charitable Campaign Due to Anti-Gay Policies

The state of Connecticut's decision to exclude the Boy Scouts of America (BSA) from participation in an annual charity drive held among state employees does not violate the BSA's constitutional right to discriminate against gay people, according to a decision in *Boy Scouts of America v. Wyman*, 2002 WL 1758408 (D. Ct. July 23, 2002) by Senior U.S. District Judge Warren W. Eginton.

Judge Eginton's ruling was issued in a lawsuit brought by the BSA seeking money allegedly due to them from the 1999 and 2000 campaigns, and also seeking the right to participate in current and future campaigns. After the New Jersey Supreme Court had ruled in *Dale v. Boy Scouts of America*, 734 A.2d 1196 (1999), that the BSA's policies violated New Jersey's Gay Rights Law, the Connecticut Commission on Human Rights and Opportunities (CHRO) ruled that it would violate Connecticut's Gay Rights Law for the Connecticut State Employees Campaign to continue to include the BSA as a charitable beneficiary.

After the U.S. Supreme Court issued its decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), reversing the New Jersey court, the campaign committee requested a new ruling from the CHRO, which concluded that even though the BSA may have a federal constitutional right to discriminate, that does not mean that it has a right to participate in the Connecticut charitable campaign. This ruling triggered the lawsuit by the BSA, which argued both that it was not in violation of Connecticut law and that its victory in *Dale* gave it the right both to discriminate and to participate in the charity drive.

Judge Eginton decisively rejected the BSA's arguments, and particularly its attempt to rely on a federal court decision in *Boy Scouts of America v. Till*, 136 F.Supp.2d 1295 (S.D.Fla. 2001), that prohibited the Broward County Board of Education from banning local BSA units from meeting in public schools. In *Till*, Eginton observed, the school board was banning the BSA from participating in a limited public forum the public school buildings in a way that raised serious First Amendment issues, but he found that in Connecticut, the charity drive among employees is not a public forum, but an internal government employee policy matter. Exclusion from a public forum "requires a compelling state interest," he wrote, "a much more stringent requirement than the reasonableness test of exclusion from a non-public forum… The Court recognizes that compliance with a neutral non-discrimination law is a reasonable requirement for inclusion in the Campaign."

The BSA had argued that it was being treated in a discriminatory manner because the Girl Scouts (which do not discriminate against lesbians) were allowed to participate in the campaign. According to the BSA, because the Girl Scouts limit their membership to girls and do not accept boys as members, they are unlawfully discriminating on the basis of sex. But Eginton noted that relevant laws against sex discrimination make exceptions for traditionally single-sex youth organizations such as the Girl and Boy Scouts. In this case, the contested category is sexual orientation, not sex, and the Girl Scouts pass that test.

The BSA also tried to argue that as an "educational institution" seeking to instill values in boys, it was sheltered by provisions in the Connecticut Gay Rights Law that disavow any interpretation that the state favors homosexuality as an acceptable lifestyle or any requirement that educational institutions communicate a pro-homosexual message. Judge Eginton found that the BSA does not qualify as an educational institution under Connecticut law, so the school provisions were irrelevant to the case, and that enforcing a non-discrimination policy is not the promotion of a particular sexual orientation.

Turning to the main issue, Eginton rejected the argument that excluding the BSA from the campaign is a circumvention of the U.S. Supreme Court's decision. "It is undisputed that the BSA is in the unique position of being allowed to discriminate against gays and lesbians by the ruling of the United States Supreme Court," he wrote, "but the issue before the Court is not a matter of the BSA's viewpoint on homosexuality, but of the BSA's compliance with the laws of the State of Connecticut." The BSA also tried to argue that by including P-FLAG (a pro-gay parents and friends group) and other gay-supportive groups in its campaign while excluding the BSA, Connecticut was discriminating in favor of pro-gay viewpoints in violation of the 1st Amendment and state law. Eginton accepted the CHRO's argument that PFLAG and other pro-gay organizations do not discriminate in violation of the state law, thus distinguishing them from the BSA.

Eginton found support for his ruling in a decision by the Connecticut Supreme Court in *Gay and Lesbian Law Students Assn. v. Board of Trustees*, 236 Conn. 453 (1996), in which the state court ruled that the law school must exclude military recruiters in order to avoid violating the state's gay rights law. In that case, the state high court acknowledged that based on numerous federal court decisions the Defense Department ap-

peared to have a constitutional right to discriminate against gay applicants and members, but held that this did not give the Defense Department the privilege of bringing its discriminatory policies onto the campus of the state university. Eginton found the situation analogous to the Boy Scouts case, and that the ruling was, in any event, binding upon the CHRO as a precedent when it came to rule on the matter of the BSA's participation in the state employee charity drive.

The BSA is likely to appeal this decision to the U.S. Court of Appeals for the 2nd Circuit, given the significant amount of money involved. Boston's Gay & Lesbian Advocates & Defenders joined state attorneys in defending the actions of the CHRO and the campaign committee, intervening on behalf of the Connecticut Women's Education and Legal Fund and the Connecticut Coalition for Lesbian, Gay, Bisexual and Transgender Civil Rights. A.S.L.

Cruising State Trooper Fails to Win Reversal of Discharge

A New York appellate court upheld the firing of a male state trooper for cruising two male college students while on duty, finding the result "not shocking to one's sense of fairness." *Wilburn v. McMahon*, 2002 WL 1690423 (N.Y.A.D., 3rd Dept., July 25, 2002).

Two male college students stopped to ask a trooper for directions. The trooper, Douglas Wilburn, asked the students for their names, which he later used to obtain their e-mail addresses. He then e-mailed the students from his home computer, using the screenname "Like2tryu2." In the e-mails, he told the students that he knew them, inquired about their sexual orientation, and asked if they would like to meet for lunch.

According to the court, the students were upset when they received the e-mails. They determined the sender's identity — the court didn't say how — and complained to the Superintendent of State Police. Wilburn claimed his motivations were altruistic — that is, he believed he could help the students come to terms with their sexuality — and that, at worst, his actions constituted excusable poor judgment.

Wilburn was charged with misusing his position as a member of the State Police to obtain information for a personal reason, and engaging in conduct that tended to discredit the State Police. A panel of three officers found him guilty on both counts and recommended termination. The Superintendent adopted the findings and recommendation.

Reviewing the Superintendent's actions, the appellate panel found "substantial evidence" to support the termination. As to the charge of misusing his position, Wilburn admitted that the students gave him their names because he was a Trooper, and that he'd "had no valid law enforcement reason" to request that information. As to the charge of discrediting the State Police, the court noted that one of the students testified that he "didn't expect that to happen from a State Trooper" and that the other student "wonder[ed] what kind of people they hire." (Gay people, among others. Whatever one thinks of the outcome of the case, using complaining witnesses' testimony as evidence that a trooper discredited the department seems circular at best.)

Wilburn argued that the penalty — loss of his job — was disproportionate to the offense. One might legitimately ask whether a straight trooper who asked women on dates would have received the same treatment — but Wilburn's record makes the question moot. According to the court, Wilburn's record of employment over a 10 year period contained 16 "founded" complaints, including neglect of duty and incompetence, and the Superintendent was entitled to consider them in making his decision. In addition, the standard of review made reversal in the case unlikely, as the court gives the Superintendent "substantial deference" and overturns only those sentences "so disproportionate as to be shocking to one's sense of fairness." *Fred Bernstein*

Nebraska Jury Convicts S&M Master

On July 16, a Wayne County, Nebraska, jury convicted Roger Van, 55, on five felony counts arising from what seems to have begun as a consensual sadomasochistic activity. The verdict in *People v. Van* may result in a prison sentence cumulating as much as 85 years when the defendant is sentenced in September. Van's co-defendant, Jerry Marshall, pled guilty to a misdemeanor charge and was discharged by the court with a sentence of time served from his arrest through the trial, about six months. The *Omaha World-Herald* (July 16 & 17) published a series of articles on the trial by Paul Hammel, a staff writer, who reported the incident in detail.

Last summer, the victim, a 36–year-old man from Houston who was engaged in an S&M relationship with another man, was feeling very useless and depressed and decided he needed a strongly punitive scene, so he searched the Internet and found "Master Roger" of Wayne, Nebraska. Roger Van, a former schoolteacher, operated a florist shop in Wayne and also had invested in downtown commercial and residential real estate, and was a respected member of the business community. The locals didn't know that he had a basement dungeon beneath the store, or that he had an S&M relationship with the handyman who had moved into a basement apartment that fall, Jerry Marshall.

The victim and Van agreed to an extended scene with no safe words and no restrictions, after an exchange of about 300 emails over a three month period. The victim turned up in Wayne last Dec. 7, after staging a fake kidnaping for the benefit of his partner in Houston. After confirming their agreement, Van and Marshall tied the victim down to a ten-foot-table in the dungeon, shaved his body, branded his buttocks, and began to administer beatings and forced sex. During the second day, Van instructed the victim to make a list of all his failings. During this exercise, the victim concluded that he wasn't as worthless as he thought, and decided he didn't want to continue with the scene, but Van refused to accept his change of mind and the scene continued for a total of nine days, with the victim repeatedly asking to be released. According to the victim, he was threatened with death if he tried to escape. Finally, Marshall concluded that the victim really wanted to end the scene and helped him to escape. Once he got back to Houston, the victim contacted the Nebraska State Police.

At trial, Van defended on grounds of consent, and his attorney argued that no crime was committed because the victim, a grown man, a sophisticated college graduate and Army Reserve veteran, got what he bargained for. By contrast, the prosecution argued that consent is not a defense in this kind of case, and that consent, if given at the outset, had been withdrawn. According to the news reports, the victim did not require any medical treatment as a result of his ordeal.

Van posted bond and vowed to appeal his conviction. The news report quoted one juror as stating that they found the case difficult. "We live sheltered lives in small towns," he said. A.S.L.

N.Y. Federal Magistrate Rules Against Gay Discrimination Plaintiff

Julio Viruet, a gay man formerly employed by Citizen Advice Bureau (CAB), a private agency that provides services to the homeless, lost the first (and perhaps final) round of his employment discrimination lawsuit on August 15, when U.S. Magistrate Andrew Peck granted the defendant's motion for summary judgment on all of Viruet's claims. *Viruet v. Citizen Advice Bureau*, 2002 WL 1880731.

Viruet, who does not have a high school diploma, began working for CAB in May 1999 and was discharged in November 2000. He worked as a client case aide at a CAB drop-in center. Viruet claims that he suffered hostile environment harassment and was dismissed in a discriminatory manner and "retaliated against" because he is gay. His termination occurred after a client of the agency wrote a letter, alleging that Viruet, who had invited the man to stay in his apartment, attempted to initiate a sexual relationship with the man against his will, and then threw him out of the apartment without his personal effects at a time when the man would not be able to access the shelter system and thus had to live on the streets.

When CAB administrators investigated these charges, Viruet admitted having violated agency rules by driving the man to various appointments and allowing him to stay in Viruet's apartment, but denied having tried to initiate a sexual relationship. CAB gave his violation of agency rules as the reason for the discharge, and showed that it

had terminated two other employees for violating the same rule.

Viruet filed his discrimination charges with the Equal Employment Opportunity Commission (EEOC), the federal agency that enforces federal employment discrimination statutes, none of which covers sexual orientation. Viruet, who was proceeding on his own without a lawyer, claimed that he was unaware that the prohibition on sex discrimination found in federal law did not apply to anti-gay discrimination. The EEOC sent him a letter explaining that it did not have jurisdiction over sexual orientation discrimination claims. Viruet then filed his suit in federal court, alleging a violation of Title VII of the federal Civil Rights Act, as well as claiming that he was retaliated against and defamed by CAB.

CAB moved for summary judgment, arguing that the court had not authority over a sexual orientation discrimination claim, but that in any event it had not discriminated against Viruet or defamed him in any way. (The defamation claim appeared to stem from an incident where a CAB supervisor asked Viruet whether he had HIV or AIDS, after Viruet asked to enroll in CAB's insurance plan because his Social Security benefits had been terminated.)

The motion was assigned to Magistrate Peck for a decision. Peck's detailed and lengthy opinion seems to have been issued largely to explain to Viruet why he was in the wrong court and why his discrimination allegations were insufficient to withstand the defendant's motion. The case illustrates, yet again, the folly of filing sexual orientation discrimination claims against private employers in federal court, in the absence of the kind of special facts necessary to fit into the narrow coverage under sexual harassment caselaw (the predatory gay supervisor, or the gender-nonconforming plaintiff cases).

Magistrate Peck, noting that Viruet had mentioned the New York City human rights ordinance in passing in the papers he filed in opposition to CAB's motion, took the time to explain why Viruet's claim would also fail under the New York law, which does cover sexual orientation claims. In brief, there was really no evidence that Viruet's homosexuality had anything to do with his discharge, and the only evidence bearing on the hostile environment harassment claim concerned homophobic remarks by clients of the agency, not any actions by agency officials. Furthermore, Viruet had admitted to violating an important agency rule about not forming social relationship with agency clients, conduct for which other employees had been discharged in the past. A.S.L.

6th Circuit Rules Against Gay Employee in Equal-Opportunity-Harasser Case

A unanimous panel of the U.S. Court of Appeals, 6th Circuit, affirmed summary judgment against Travis Walker, a gay man, on his claim that he was sexual harassed in violation of Title VII of the Civil Rights Act of 1964 by Mary Quinones, his former workplace supervisor. *Walker v. National Revenue Corporation*, 2002 WL 1787983 (Aug. 1, 2002) (unpublished disposition). The court also rejected Walker's retaliation claim.

Walker began working for NRC, a debt collection agency, in November 1996. In 1997, he was transferred to NRC's office in Columbus, Ohio, and assigned to work under the supervision of Mary Quinones. Walker alleged that Quinones subjected him to inappropriately amorous behavior, including unwanted touching and sitting so as to reveal her underwear to him. Walker told Quinones that he was gay and not sexually interested in her, and she then stopped making sexual advances, but Walker alleges that she commenced treating him in a physically and verbally abusive manner to such an extent that he developed severe stomach problems and suffered from anxiety attacks and depression. He asked for a transfer, which was turned down. Subsequently, the stomach pains were so severe that Walker soiled himself at work and asked for permission to go home, which was denied by Quinones. After this incident, he again sought a transfer, and this time was assigned to work under a different supervisor in a different department. He alleges that when Quinones heard about his transfer, she threatened to fire him before it became effective and when he brought this to the attention of management, they made the transfer immediate. Walker alleges that Quinones then went out of her way to use copy and fax equipment near Walker's new work station, and to glare at him while doing so, even though such equipment was available to her nearer to her own work station. Although Walker's productivity and income improved in his new assignment, he continued to suffer physical problems and took a three-week leave. During the leave, the company reassigned a few of his collection accounts to other employees for action. When he returned and learned that another employee had been awarded the bonus for collection on one of his accounts, he blew up at management and quit, to the astonishment of his supervisor. There was also evidence that Quinones, who was referred to in the office as "Military Mary," was nasty and abusive to all of her subordinate, regardless of sex.

Walker sued in federal court under Title VII, alleging sexual harassment (hostile environment) and retaliation, as well as state law emotional distress claims. The district court granted summary judgment on the federal claims, and declined to rule on the state law claims.

Rejecting Walker's appeal, Circuit Judge Alice Batchelder contended that Walker's allegations were not sufficient to get him to a jury on the hostile environment claim because he had "failed to present evidence sufficient to permit a jury to find that the conduct complained of was severe or pervasive, that he suffered a job detriment or was denied a job benefit, and that any of the alleged actions taken by Quinones were because of his sex." In other words, the court of appeals joined the district court in its wilful blindness to what was going on in this workplace. For Batchelder, the evidence that Walker finally did achieve a transfer (of a type not normally afforded to other employees) and increased his earnings after the transfer, combined with the evidence that Quinones behaved reprehensibly towards all employees without regard to gender, meant that Walker had not suffered sex discrimination.

Part of the problem was undoubtedly a key bit of evidence that ended up being rejected by the court. In his deposition, Walker testified that he "could not recall Quinones making any comments that were sexual in nature," but in his affidavit attached to his opposition to the summary judgment motion, he said that Quinones had "told him that she could change him and explained sex acts she had engaged in with other men." The court decided that it was inappropriate for Walker to attempt to change his testimony in this manner, and rejected the affidavit.

Without using the term, the court apparently considered this case to fall into the category of the "equal opportunity harasser" whose indiscriminate nastiness cannot constitute sex discrimination because all employees, not just those of one sex, were being treated the same way. The court concluded that because Quinones ceased subjecting Walker to sexually inappropriate behavior after he told her he was gay, that was the end of that matter, and all that counted in the case was that her subsequent conduct towards him was similar to her conduct towards other employees. The court refused to connect the dots and evince any understanding that the motivation for the conduct towards Walker was his sexual rejection of Quinones, and that she would not have made such demands on a female employee.

This case reinforces the need for a more general workplace harassment statute to give employers an incentive to reign in abusive supervisors. A.S.L.

Lesbian Mom Keeps Child Custody Despite Exposure of Child to Sexual Behavior

Reversing a lower court's modification of a lesbian mother's custody of her two children, the Court of Appeals of Oregon ruled on Aug. 14 that the accidental exposure of one of the children to seeing her mother in bed kissing another woman did not constitute a "change in circumstances" sufficient to trigger a reconsideration of her custody status. *Collins v. Collins*, 51 P.3d 691.

The parties had been married seven years and had two children when their marriage was dissolved in 1997. Darcy Collins was awarded sole custody of the children. George, a truck driver who traveled frequently for his work, did not seek custody. George remarried in 2000, and began to have disagreements with Darcy about his visitation schedule. Darcy sought mediation or some modification through court order to deal with the situation. George responded by seeking a change

in custody, contending that Darcy had assaulted the daughter and engaged in "inappropriate sexual activity" in front of the children. The trial court found merit to George's contention, and shifted custody to George, with liberal visitation rights for Darcy, who appealed.

The court of appeals found that the incidents upon which George relied to seek a change in custody were insufficient to amount to the "changed circumstances" required by law to upset an original custody award. George's remarriage does not count as a changed circumstance, since that requirement pertains to the living situation of the children, not a change in the father's status. The "assault" charged stems from an incident in which Darcy shoved her daughter out of frustration that the child was demanding her attention when she was occupied with two other tasks, and the shove resulted in the need for hospital treatment when the child lost her balance and fell over. The "inappropriate behavior" stemmed from an incident when Darcy thought the children were sleeping, and the daughtered wandered into her bedroom while she was in bed with another woman. The court of appeals characterized this as "inadvertant," and found that the trial court had erred in concluding that there were changed circumstances.

Commenting specifically on the issue of the mother's sexual orientation, Judge Schuman wrote for the court: "The fact that mother's companion was of the same sex may have been significant to father; he frankly testified that he disapproved of mother's 'lifestyle.' But it is not and cannot be significant to this court." The court then cited cases finding that sexual orientation discrimination violates the Oregon constitution, and that the same standards for evaluating sexual conduct by parents applies regardless of sexual orientation.

The case is extraordinary in showing the progress in gay rights in Oregon, since on a similar factual record one could reasonably predict that courts in many other states would have affirmed a shift in custody away from the lesbian mother. A.S.L.

N.Y. Appellate Division Sets Aside Large Damage Award in Sexual Orientation Discrimination Case

On July 18, N.Y. Appellate Division (1st Dept.), unanimously reversed a jury verdict that awarded Steven Minichiello a total of $10,160,000 in compensatory damages and $10,002,000 in punitive damages against his former employer, The Supper Club, in a case of sexual orientation discrimination. *Minichiello v. The Supper Club*, 745 N.Y.S.2d 24. The court held that a new trial was required, not only because the damage award was grossly excessive, but also due to plaintiff's counsel, Alan J. Rich, whose inflammatory comments prejudiced the jury, as well as to judicial errors.

Minichiello, who was originally hired in 1992 as the Supper Club's late night manager, later became responsible for its disco and cabaret before being discharged in 1995. He then filed suit claiming he had been verbally and physically harassed. Plaintiff stated that he was "repeatedly subjected to humiliation and to discriminatory epithets regarding his sexual orientation and that he was physically held down and threatened by the general manager."

In a trial before Justice Emily Goodman in New York County Supreme Court, the jury found that Minichiello had been subjected to a hostile work environment, had been discharged because of his sexual orientation and that the general manager had committed assault and battery.

However, the five appellate judges reasoned that "the cumulative effect of the many irrelevant and highly prejudicial comments made by plaintiff's counsel only served to incite the jury's passion and sympathy and effectively prevented a fair and dispassionate consideration of the evidence." The judges further stated that plaintiff's counsel went "far beyond any permissible boundaries" and made inappropriate analogies to Nazi Germany, African-Americans, Latinos and Jews.

Two witnesses, Susan Corcoran, plaintiff's therapist, and Dr. Keston, plaintiff's treating physician, whose testimony could have had an impact on the issue of damages, did not testify at trial. Defendant requested a jury charge on their failure to testify, but Justice Goodman refused to explain to the jury the important significance of their potential testimony.

The court held that Justice Goodman's antipathy toward defense counsel coupled with the jury's awarding of grossly excessive compensatory and punitive damages warrants a new trial. *Audrey Weinberger*

Hawaii Civil Rights Commission Authorizes Investigation of Transsexual Discrimination Complaints on Gender Stereotyping Theory

Having received a several employment discrimination complaints from transgendered individuals, the Executive Director of the Hawaii Civil Rights Commission petitioned the Commission for a declaratory judgment on the question whether such complaints can be investigated under Hawaii's civil rights law, H.R.S. sec. 368–1, which forbids discrimination on the basis of sex or sexual orientation but does not specifically mention gender identity. The contention advanced by the Director was that these complaints could be pursued as a form of sex discrimination, with specific reference to the concept of gender nonconformity in dress and behavior. The respondents to the various discrimination complaints alleged that the Commission was without jurisdiction.

Responding to the petition, the Commission issued a unanimous ruling on June 28, authorizing the Executive Director to proceed on the complaints. The names of the complainants were redacted from the opinion, which is identified merely as *In the Matter of _____, HCRC No. 9951; EEOC No. 37B-A0–0061 et al.*, D.R. No. 02–0015. The essence of the complaints was that the five complainants had encountered discrimination as transsexuals on account of their manner of dress and presentation, which their employers deem inappropriate for males. The complainants are all male-to-female transgendered persons. The Commission's opinion suggests that the respondents accept the proposition that once somebody has undertaken a gender reassignment procedure, they should be regarded as a member of their new gender.

The Commission begins its analysis by noting Hawaii's strong public policy against sex discrimination, as evidenced by the specific inclusion of "sex" in the list of prohibited bases for denying the enjoyment of civil rights in Art I, Sec. 5 of the state constitution, by the addition of an Equal Rights Amendment to the constitution, by reference to the Hawaii Supreme Court's same-sex marriage case, *Baehr v. Lewin*, 852 P.2d 44 (1993), in which the court held that sex is a "suspect classification" for purposes of equality analysis under the state constitution, and by reference to the state's civil rights law, which bans both sex and sexual orientation discrimination. The Commission also noted the state Supreme Court's holding in *Sam Teague, Ltd. v. Hawaii Civil Rights Commission*, 971 P.2d 1104 (1999), that the employment law, as a remedial statute, "must be liberally construed to accomplish its purpose." "Thus," wrote the Commission, "all forms of discrimination in employment because of sex are against public policy, and the law must be liberally construed to prevent such discrimination."

The Commission further noted that the statutory definition of sex discrimination did not specify that the law's protection would extend only to women, or only to men or women, thus leaving open the issue of whether it might apply in the present cases. Certainly, "the failure to mention transsexuals or transgendered individuals in the definition does not necessarily preclude their inclusion in the prohibition against sex discrimination under a liberal construction of the statute." The Commission rejected the respondents' contention that the specific exclusion of transsexuals from coverage under the disability definition carried any weight in deciding about their coverage under the sex definition.

The Commission ultimately premised its declaratory judgment on the U.S. Supreme Court's reasoning in *Price-Waterhouse v. Hopkins*, 490 U.S. 228 (1989), in which the court held that gender stereotyping by employers could be evidence of a sex discriminatory motivation. (In that case, a female candidate for partnership in the firm was turned down in part due to the views of some partners that her behavior and appearance were insufficiently "feminine" to satisfy their expectations of a "lady partner.") After describing the rationale of "Price Waterhouse" and again noting

the remedial nature and liberal interpretation of the Hawaii civil rights law, the Commission stated that "the Executive Director is authorized to investigate complaints of sex discrimination filed by transgendered individuals and transsexuals and make a determination whether reasonable cause exists to believe that an unlawful discriminatory practice has occurred. The Commission will decide on a case by case basis after a contested case hearing whether the alleged discirminatory conduct constitutes sex discrimination."

Thus, it appears that the Hawaii Commission will view a complaint of transgender discrimination as coming within its jurisdiction if there is evidence that gender stereotypes played a role in the discrimination. A.S.L.

Gay Porn Distribution Dispute Surfaces in Court

A ruling by a U.S. Magistrate LaPorte in San Francisco released on August 19 brought to light a three-way legal battle among gay porn businesses on the West Coast, including charges that the former domestic partner of a porn producer had stolen a large collection of master-tapes and licensed them to another company for production and distribution. *Brush Creek Media, Inc. v. Boujaklian*, 2002 WL 1906620 (N.D. Cal.).

The lawsuit began on June 28, when Bear Dog Hoffman, sole owner of Brush Creek Media, Inc., sued in San Francisco Superior Court, charging that his ex-domestic partner (and also former business partner), Jack Boujaklian, had lifted over 300 master video tapes from Brush Creek's office and peddled them to Pacific Sun Entertainment, a prominent distributor of pornographic videos and DVDs. According to the complaint, Boujaklian purported to represent Brush Creek in this transaction (he had been an officer of Brush Creek until Hoffman discovered the theft and fired him), but that the royalty payments from the tapes were coming to Boujaklian personally. (At a hearing before the federal magistrate in August, Boujalkian admitted that he had used some of the money to make payments on a house.) Since his discharge from Brush Creek, Boujaklian has formed his own company, Panther Entertainment.

Hoffman's complaint charged Boujaklian with theft, interference with prospective economic advantage, and various claims of unfair competition and misappropriation of commercial value. Hoffman demanded an accounting of money received from Pacific Sun, which was joined as a co-defendant in the lawsuit, and an injunction against further commercial exploitation of the tapes by the defendants and requiring return of the master tapes to him. Panther Entertainment is also named as a co-defendant.

The Superior Court issued a temporary restraining order when the complaint was filed, which the court converted into a preliminary injunction during a hearing on July 19. The preliminary injunction forbids Boujaklian and Pacific Sun from "manufacturing, selling or marketing the master tapes or from marketing or selling DVDs that are copies of the master tapes," and requires return of the master tapes to Brush Creek Media. The defendants attempted to remove the case to federal court on July 22, arguing that there were elements of copyright law involved in the case, thus giving the federal court exclusive jurisdiction. (Copyright is governed by a federal statute that preempts or displaces state law and state court jurisdiction over copyright disputes.) A few days later, Hoffman filed a motion with the federal court seeking enforcement of the state court's preliminary injunction; he wanted his master tapes back, and right away. Pacific Sun, which claims they negotiated the licensing deal with Boujaklian in ignorance of any charge that he had stolen the master tapes, was apparently resisting returning the tapes.

Just to complicate matters a bit more, on August 2, apparently for the first time, Hoffman took steps to copyright some of the previously unpublished master tapes, by sending registration materials to the federal Copyright Office.

Magistrate LaPorte's August 19 ruling solely concerned whether the federal court has jurisdiction over this dispute, which hinged on whether this is, at least in part, a copyright case. LaPorte concluded that it was not, because at all material times the unpublished master tapes had not yet achieved a copyrighted status. Unpublished material only becomes copyrighted once the copyright office has evaluated the application and issued a registration of copyright. (Different rules apply to published material.) Although there are numerous cases finding federal court jurisdiction upon the filing of a copyright application, LaPorte found that they were based on precedents under the 1909 Copyright Act, which has been superseded by newer provisions clearly requiring a decision by the copyright office. (Some courts had based earlier jurisdiction on the fact that the copyright is backdated to the date of filing, but there is a decision by the U.S. District Court in San Francisco rejecting this rationale.)

LaPorte concluded that the federal court lacks jurisdiction as of now, and ordered the case sent back to the state court. This is good news for Bear Dog Hoffman, who was doing pretty well in this case when it was in the state court. Now he can ask the state court to enforce the order to Pacific Sun to give him back his master tapes. A.S.L.

Civil Litigation Notes

Federal - Alabama — The *Washington Blade* reported on August 16 that U.S. District Judge Ira DeMent (M.D. Ala.) issued a ruling July 25 dismissing a challenge that had been filed against the Alabama sodomy law on behalf of four lesbian and gay plaintiffs, who were not named in the article. We were unable to locate an opinion in this case on the court's website. The news report, which did not specify the constitutional theory under which the plaintiffs were seeking to have the law invalidated, said that Judge DeMent found that the plaintiffs lacked standing to challenge the statute, due to the lack of credible evidence that they faced any serious threat of prosecution. The Alabama statute penalizes anal or oral sex between any persons who are not married to each other. Research in reported cases evidently revealed only one prosecution that had gotten far enough to show up in case records, and that one was pleaded out to a lesser offense. Under the circumstances, wrote DeMent (a senior judge), "Absent allegations supporting the conclusion that there is a tangible threat that the future harms might arise, the court must deem plaintiffs' fears 'unrealistic.'" Thus they did not prove an "injury in fact" and lacked standing to get the court to the merits of their case, which had to be dismissed. Equality Alabama, a gay rights group that sponsored the lawsuit, vowed to find new plaintiffs who had actually been prosecuted in order to get the case back into court.

Federal - New York — The 2nd Circuit Court of Appeals upheld dismissal of a hostile environment workplace discrimination complaint under Title VII in *Trigg v. New York City Transit Authority*, 2002 WL 1900463 (Aug. 16, 2002). Jason Trigg complained about homophobic comments directed his way by an alleged supervisor, who characterized Trigg as "unmanly." The court found that "homophobic" comments may not be the basis for a Title VII claim, since the statute does not extend to sexual orientation discrimination. Apart from the homophobic comments, the court found that Trigg's other allegations of harassment were insufficient to make out a Title VII claim as being insufficiently severe or harassing. In addition, the court rejected Triggs' claim of discriminatory discharge, finding that his poor attendance record fully justified his termination by the TA and could not be attacked as pretextual.

Federal - New York — U.S. District Judge Elfvin (W.D.N.Y.) granted a motion for summary judgment on behalf of the defendant in a hostile environment sexual harassment case involving "perceived sexual orientation" brought under Title VII and the N.Y. Human Rights Law, neither of which specifically applies to sexual orientation claims. *Samborski v. West Valley Nuclear Services Co., Inc.*, 2002 WL 1477610 (June 25). The court's opinion lacks a coherent narrative of the facts, but from what can be pieced together, Dawn Samborski, who worked in the defendant's Decontamination and Decommissioning Department together with an other-wise all-male crew, claimed that somebody started a rumor that she was a lesbian, and then she was subjected to co-worker hostility based on that rumor. She attempted to allege that the hostility was due to gender-stereotyping as well as perceived sexual orientation. The court found that there is no jurisdiction under the relevant statutes for a sexual orientation claim, but that the court could entertaining a gender-stereotyping claim. However, in this situation, the complaint against the employer had to fail be-

cause the alleged harassment came from coworkers, the employer had a disciplinary complaint process in place, and the evidence was lacking that the employer failed to act on complaints.

Federal — Minnesota — A jury returned a verdict for $78,000 in damages in favor of two employees of the Minnesota Department of Corrections who were disciplined for reading their Bibles in protest during a mandated diversity training session that covered, inter alia, workplace homophobia and anti-gay harassment. The U.S. District Court jury in St. Paul, was acting on a case that had already been up to the 8th Circuit on an appeal. We reported on the 1999 federal district court ruling upholding the plaintiffs' cause of action under the 1st Amendment, under the title of *Altman v. Minnesota Dept. of Corrections*, No. 98–CV–1075 (D. Minn., Aug. 9, 1999). *Minneapolis Star Tribune*, Aug. 2.

Federal - Texas — The Equal Employment Opportunity Commission has filed a class action lawsuit on behalf of male Hispanic present and former employees of Craftex Wholesale and Distributors, Inc., claiming that the class members were subjected to sexual harassment by the owner of the business, Henry Langdale. *EEOC v. Craftex Wholesale and Distributors, Inc.*, No. H–02–3021,2 (U.S.Dist.Ct., S.D. Texas, filed 8/12/02). According to the complaint, Langdale subjected these employees to sexual harassment by demanding sexual favors, and in particular oral sex, from these male employees. The complaint asserts that those employees who did not accede to Langdale's demands were fired, sent home without pay, given demeaning work assignments, had their work hours cut back, and/or were subjected to verbal abuse. *BNA Daily Labor Report*, No. 158, 8/15/02, p. A–4.

Federal - Wisconsin - In *Jorenby v. Datex-Ohmeda, Inc.*, 89 Fair Empl. Prac. Cas. (BNA) 739, 2002 WL 1859915 (W.D.Wis., July 16, 2002), U.S. District Judge Crabb granted the employer's motion for summary judgement on a constructive discharge claim but denied the motion as to a hostile environment claim grounded in sex/gender discrimination. The plaintiff, Rosetta R. Jorenby, claimed that she had been continually harassed at work from the inception of her employment in 1990 until her "constructive discharge" after she stopped reporting for work in September 1998. One of the aspects of this harassment was a rumor started by a fellow employee, which continued to dog her throughout her employment, that she was a lesbian. According to her allegations, she suffered nasty remarks and wisecracks from fellow employees, pranks (including petty thefts from her work station and sabotage of her locker), annoying staring by other employees, and insulting gestures. Attempts to get management to take action were generally not fruitful, usually because management told her it could not take action unless she could produce more detailed allegations, including identifying particular perpetrators. From the court's summary of the case, it sounded like the company had lots of information, including the identity of the employee who started the lesbian rumor. The main issue for resolution on the summary judgment motion as to constructive discharge was whether Jorenby had met statutory requirements by including this element of her claim in her filing with the state civil rights agency prior to filing her Title VII lawsuit. The court found that her allegations of hostile environment harassment filed with the agency were not sufficient to include the discharge, which had not been expressly mentioned in the detailed allegations she submitted to the state agency. The main issue regarding the motion on hostile environment arose from the timing of her complaint; only one incident had occurred less than 180 days prior to the filing of her charge. The court relied on the Supreme Court's recent decision in *National Railroad Passenger Corp. v. Morgan* (June 10, 2002), to find that the litany of incidents from 1990 onwards could be considered in determining whether Jorenby adequately alleged severe and pervasive harassment, a requirement that could not be met by reference to the one incident. The court also had to determine that the one incident, when another employee called Jorenby a "dizzy bitch," qualified to link back to the pre-statute of limitations allegations. The court found that this incident was equivocal, and might have had nothing in particular to do with Jorenby's gender, but that on the other hand it might, and that the amibiguity should be resolved in her favor. The, the hostile environment claim survived the motion and remains viable.

California — The City of Oakland was not prejudiced by the retroactive application of the gay rights amendment to the California Fair Employment and Housing Code in a case involving an openly-gay police recruit, because at the time he was forced to resign from the Police Academy, the state Labor Code condemned the same kind of discriminatory conduct, according to an August 15 decision by the California Court of Appeal, 1st District, in *Hoey-Custock v. City of Oakland*, 2002 WL 1875099 (not officially published). The court found that the legislature intended the more recent sexual orientation addition to the FEHC to be a continuation of the policy established under the Labor Code, merely transferring enforcement and modifying procedures to accord with those of the civil rights agency. In addition, the court found plenty of evidence in the trial record to support the jury verdict finding that Mr. Hoey's discrimination claims based on his time at the city's police academy were justified. The opinion sets out those claims in graphic detail; they would provide a good basis for a documentary demonstrating why laws against sexual orientation discrimination are needed, pace former Governors Wilson and Deukmejian who vetoed such laws as "unnecessary." The court affirmed a $500,000 damage award against the city.

California — The California Court of Appeal, 2nd District, rejected Leroy Patterson's appeal from denial of a writ of mandate, seeking to require the Los Angeles Unified School District to afford him a hearing in connection with its rejection of his application for a part-time teaching job. *Patterson v. Los Angeles Unified School District*, 2002 WL 1824961 (Aug. 8, 2002). That simple statement conceals a frustrating case history involving the youthful indiscretions of a gay man. Although the narrative in the unpublished opinion by Judge Ahsmann-Gerst is not ideally clear, it appears that Patterson was convicted of minor offenses in 1964 and 1972, the later a public restroom arrest for sexual activity with another man. These incidents predated California's repeal of its consensual sodomy law and various court decisions cutting back on the activities of the vice squad in arresting gay men for their sexual adventures. In 1987, Patterson was hired by the L.A. school district as an adult education teacher, even though he disclosed his prior convictions, and he worked as a teacher for 12 years before retiring. then, in 1999, he decided to go back to teaching part-time, and seemed to have a position lined up at Fremont Adult School, but the personnel division denied him certification, citing his past criminal record. He sought a hearing but was denied one. Then he sued, claiming he was entitled to a hearing, but the trial court found no entitlement to a hearing on denial of an employment application. On appeal, he tried to add a claim that the district was violating his rights to be free of sexual orientation discrimination under the Fair Employment and Housing Code, but the court of appeal was unimpressed, finding no hearing right and adding that the discrimination claim came much too late in the proceeding. The court also, somewhat egregiously, found that the school district could rely on the past criminal record to deny employment, regardless of Patterson's exemplary employment for 12 years by the school district.

Colorado — A federal court jury in Denver awarded $500,000 in damages to Ann Riske, a lesbian employee of Wheat Ridge King Scoopers, a grocery store, on her claim of hostile work environment. The jury found merit to Riske's charge that store manager Steven Katzenberger and deli manager Robert Jackiewicz created a hostile environment and that the employer compounded the problem by retaliating when Riske complained about it by transferring her to another store instead of taking action against them. Riske testified that every month for several years she received cards and flowers from someone named "Nina" whom she did not know, frightening her, and that Katzenberger and Jackiewicz ultimately confessed that they had sent these items to her. Riske had been concerned that if word got out that she was receiving these items from a woman, fellow employees would find out that she was gay, a fact she was trying to keep secret. *Denver Post*, July 19.

Delaware — In March, we reported based on newspaper stories that a Delaware Family Court Commissioner had ordered a lesbian co-parent to make child support payments on behalf of the child she had been raising with her former partner, the child's biological parent. The court assigned pseudonyms to the parties. Belatedly, the opinion has been made available on Westlaw as *Chambers v. Chambers*, 2002 WL 1940145 (Del. Fam. Ct., Feb. 5, 2002) (unpublished opinion). The decision by Commissioner Carrow finds that the co-parent should be considered a "parent" under Delaware law for purposes of child-support obligations.

Georgia — On August 1, Lambda Legal Defense filed suit in Fulton County Superior Court, Georgia, on behalf of Aimee Bellmore, a lesbian employee who was discharged by United Methodist Children's Home in Decatur, Georgia, charging that the Home, which is virtually entirely funded by the state, with which it has a contract for providing foster youth care, is bound by constitutional non-discrimination requirements. Alan Yorker, a Jewish youth counselor, is co-plaintiff in the suit, claiming he was denied a job because of his religion. In a statement released when the suit was filed, Lambda staff attorney Susan Sommer said, "Citizens of Georgia do not expect their tax dollars to be used to fund religious discrimination." *Washington Times*, Aug. 4. The suit alleges that the Home uses tax funds to proselytize by requiring all youth at the facility to attend Methodist services, and that it also subjects gay youth to various therapies intended to change their sexual orientation.

New Jersey — The New Jersey Appellate Division, following the lead of the recent New York Supreme Court decision in *National Railroad Passenger Corp. v. Morgan*, 122 S.Ct. 2061 (2002), has ruled that a hostile environment sex and sexual orientation discrimination claim can be based on all of the alleged conduct creating the hostile environment, even if much of the conduct occurred prior to the cut-off date imposed by a statutory limitation period for filing claims. *Caggiano v. Fontoura*, 2002 WL 1677472 (July 25, 2002). Karen Caggiano, an Essex County Sheriff's officer who is a lesbian, filed suit under the New Jersey Law Against Discrimination. All but the last of the incidents on which she based her hostile environment claim occurred prior to the cut-off date set by the two-year statute of limitations, and the Superior Court dismissed the hostile environment claim, finding it could only consider the last incident which, by itself, was insufficient to sustain a hostile environment claim. The appellate court found, in line with the U.S. Supreme Court's reasoning under Title VII, that a sensible interpretation of the statute would allow the claim to relate back to all the conduct contributing to the hostile environment, so long as at least some of that conduct occurred within the time limit.

New York — A settlement has been announced in the landmark litigation sparked by Yeshiva University's refusal to allow lesbian and gay students have their same-sex partners live with them in university-operated housing. After the New York Court of Appeals reversed the lower courts and ruled in June 2001 that the civil rights complaint by two medical students raised a valid sexual orientation discrimination claim under New York City law (see *Levin v. Yeshiva University*, 96 N.Y.2d 484, 730 N.Y.S.2d 15, 754 N.E.2d 1099), the case was sent back to the trial court and negotiations ensued. According to an Aug. 11 report in the *New York Times*, the University changed its policy in July, so that a student may now live with any non-student "with whom the student maintains a genuine, close and interdependent relationship that is or is intended to be long-term." The news report reflected uncertainty whether the new policy applied beyond the medical school housing that was at issue in the case.

New York — The "Queen of Mean," real estate heiress Leona Helmsley, was fined $10,000 for failing to appear at a deposition in the ongoing sexual orientation discrimination suit brought against her by Patrick Ward, the former chief operating officer of her real estate empire, who alleged that he was fired after she learned he was gay. Helmsley, age 82, had claimed she was too ill to appear on the scheduled date. Ward's attorney produced a videotape showing Helmsley dining out with her dog at a Greek restaurant in Manhattan on the night of the deposition date. *New York Law Journal*, Aug. 1, p. 1.

New York — We reported last year on *Lane v. Collins & Aikman Floorcoverings, Inc.*, 2001 WL 1338918, 87 F.E.P. Cases 449 (U.S.Dist.Ct., S.D.N.Y. 2001), a diversity case charging sexual orientation discrimination in employment under New York City's gay rights law. In the reported decision, U.S. District Judge Richard M. Berman denied a pre-trial defense motion for summary judgment. The court held a jury trial in the case from April 15 to April 24, 2002, but the jury proved unable to reach a verdict and was discharged, whereupon the defendants moved for judgment as a matter of law. In an opinion issued on August 9, Judge Berman denied the motion, having concluded after reviewing the transcript that there was evidence from which a reasonable jury could conclude that Mr. Lane's discharge was motivated by his sexual orientation. Concluded Berman, after reviewing the pertinent testimony, "This is a case for settlement in the Court's view but, failing that, it is clearly a case for jury determination." Lee F. Bantle, a LeGaL member, represents plaintiff Lawrence B. Lane. *Lane v. Collins & Aikman Floor Coverings, Inc.*, No. 00 Civ. 3241 (RMB) (U.S.Dist.Ct., S.D.N.Y., Aug. 9, 2001).

Pennsylvania — The Legal Intelligencer on Law.com reported Aug. 13 that the Pennsylvania Superior Court had upheld the award of shared child custody to a lesbian mother, E.J., and her former same-sex partner, P.J., finding that the trial record supported the Bucks County Common Pleas Court's conclusion that the children had bonded with P.J.. The women had a 14–year relationship prior to splitting up, and P.J., the co-parent, presented evidence that having the children had been conceived as a joint venture of the couple. The court's opinion in *E.J. v. P.J.* is an unpublished memorandum and we have not been able to locate full text on the Superior Court's website. The news report indicated that the Superior Court panel consisted of Judges Joseph A. Hudock, William F. Cercone, and John P. Hester. Counsel for the parties are MaryBeth McCabe for E.J. and Richard I. Moore for P.J. *E.J. v. P.J.*.

Illinois — The Human Relations Commission in Normal, Illinois, has determined that a discrimination complaint filed by a transsexual, Kellyann Mullen, may not be considered under the categories of sex or sexual orientation discrimination, relying on a prior ruling to the same effect by the Chicago Human Relations Commission. Mullen's complaint was the first to be filed invoking the sexual orientation category since the ordinance was enacted last fall. Mullen had filed a complaint of housing discrimination after being turned down for a lease renewal by Briarwood II Apartments, on grounds that "You have special needs that we cannot accommodate." The Commission will hold a hearing, however, to determine whether Mullen's claim can be considered under the category of "disability." *Bloomington Pantagraph*, July 13.

Indiana — The Indiana Civil Liberties Union filed suit in Marion County Superior Court on Aug. 22 on behalf of three same-sex couples who are seeking marriage licenses. All three of the couples have had civil union ceremonies in Vermont, and now seek to achieve legal recognition of their relationships in their home state of Indiana. The plaintiffs are Ruth Morrison and Teresa Stephens, David Wene and David Squire, and Charlotte Egler and Dawn Egler. The suit pursues two alternative claims: that the same-sex couples are entitled to marry in Indiana, or alternatively that they are entitled to legal recognition of the civil unions they contracted in Vermont. Sean Lemieux, the Indiana Civil Liberties Union's Equal Rights Project Director, will represent the plaintiffs in court. *ICLU Press Release*, Aug. 22.

Virginia — A settlement has been reached in *Kaufman v. Virginia Department of Social Services*, pending in Arlington County, Virginia, Circuit Court, concerning an application by Linda Kaufman, a lesbian Virginia resident who works in the District of Columbia, for approval from Virginia authorities to adopt a child. Kaufman had claimed that D.C. adoption officials refused to facilitate a placement on the basis that Virginia authorities would not approve an adoption by a gay parent. A settlement favorable for Kaufman became feasible after Circuit Judge Joanne F. Alper denied the state's motion to dismiss Kaufman's complaint. The state had argued that it had no specific policy against adoptions by gays. The settlement will now make that official, and Vir-

ginia authorities indicated that based on the facts known to them, it appeared that Kaufman would be approved as an adoptive parent. *Washington Blade*, Aug. 16; *Richmond Times-Dispatch*, Aug. 15. Lambda Legal Defense and the ACLU of Virginia teamed up to represent Kaufman in the litigation and settlement negotiations. Greg Nevins, a Lambda attorney working on the case, told the press that Lambda was prepared to prove that the department had a de facto policy of disapproving gay applicants. A.S.L.

Criminal Litigation Notes

U.S. Supreme Court — Lambda Legal Defense Fund has filed a petition for certiorari with the Supreme Court in the case of *Lawrence v. State of Texas*, 41 S.W.3d 349 (Tex. Ct. App. 2001), in which an en banc panel held that the Texas sodomy law does not violate the Equal Protection Clause, and the Texas Court of Criminal Appeals refused to review the case. The much-litigated Texas sodomy law makes it a misdemeanor for consenting adult same-sex partners to engage in anal or oral sex. Although the lesbian and gay public interest litigation groups have focused on state courts to challenge sodomy laws ever since 1986 when the Supreme Court rejected a sodomy law challenge in *Bowers v. Hardwick*, a consensus has emerged among gay rights attorneys that in the post-*Romer v. Evans* climate, it is time to bring a new sodomy case to the Supreme Court. The Texas law, of course, raises different constitutional issues than did the Georgia law at issue in *Hardwick*, because it applies only to same-sex partners, producing a challenge that rests squarely on Equal Protection, a theory not addressed by the Court's opinion in *Hardwick*.

U.S. Third Circuit — The U.S. Court of Appeals, 3rd Circuit, upheld a 67 month prison sentence for a man who ordered and possessed some videos showing teenagers having sex. *United States v. Davis*, 2002 WL 1754429 (July 26, 2002). Thomas B. Davis was apprehended through a postal sting operation, in which "special agents" and "inspectors" posing as kid-porn connoiseurs lure their investigative targets into ordering contraband porn, and then arrest them when they accept delivery of the goods from a postal inspector posing as a delivery person. Davis tried to argue that his prosecution was faulty because the government did not prove by competent experts that the films in question actually depicted minors, or that he was aware that minors were actually used. (The Supreme Court having recently struck down a portion of the federal child porn law that criminalized possession of "virtual" child porn, in which no minors are used in the creation of pornography that appears to depict minors, the court had to withdraw an earlier opinion in this case and redo its analysis in light of the remaining valid statutory definition.) The court found that it is alright to let postal inspectors testify based on their experience as "experts" on the age of young sex actors, and since the inspectors promoted the films to Davis as depicting underage folk, he has no defense against the charge that he knew what he was doing when he ordered these videos.

U.S. Fifth Circuit — Reversing a writ of habeas corpus issued by U.S. District Judge F. A. Little (W.D.La.), the 5th Circuit ruled in *Gachot v. Stalder*, 2002 WL 1495983 (July 15), that the court should have deferred to the state courts' finding that police interrogation of Michael Gachot, then 15 years old, in the murder of his parents, met constitutional standards so as to make his confession admissable. According to the opinion by Circuit Judge Robert M. Parker, Gachot's father had a history of "openly suspecting that Gachot was homosexual and publicly used demeaning language and epithets toward him; he threatened that if he found out that Gachot was homosexual, he would kill him." Gachot lived with his parents on the grounds of the Angola Penitentiary, where both were employed. They were actively discussing a divorce and neither wanted custody of Gachot. (Talk about feeling loved!) they were quarreling and the father threatened to kill Gachot andhis mother. "During the heated argument, Gachot took his father's pistol and shot him, then shot his mother, killing them both. He claims that he 'lost awareness of his actions' until after the shooting." Gachot then killed his half-brother, Clay, who had worked for the local sheriff's office, told him that fahter had shot mother and then tried to shoot Gachot, but that the father was killed in a struggle for the gun. Clay arranged for Gachot to be questioned by police, with Clay present. After being confronted with physical evidence conflicting with his story, Gachot confessed. He is serving a life sentence without parole for the murder of his mother, and a shorter sentence for the murder of his father. Gachot sought to have his conviction quashed on grounds that the confession was unconstitutionally obtained, and managed to convince a federal magistrate and district judge, but the court of appeals would not be swayed, finding no coercive interrogation and the friendly presence of his half-brother throughout the questioning, during which he repeatedly heard his *Miranda* warnings.

California — In an unpublished opinion, the California Court of Appeal, 4th District, upheld the second degree murder conviction and sentence of 15 years to life of the murderer of an elderly gay man. *People v. Cain*, 2002 WL 1767583 (July 31). The body of Keith Runcorn, age 73, a "nationally known geophysicist," was found in a San Diego hotel room by a housekeeper. Runcorn ws fully clothed, a luggage strap tied tightly around his neck, with much evidence of physical struggle and injury and defensive wounds on forearm and hand. runcorn's wallet and credit cards were missing. Police investigators found a pager in the room belonging to Paul Cain, a kickboxer. Cain was eventually apprehended and convicted of the murder. On appeal, he claimed his trial was tainted by the admission of testimony from various people who had heard him say that if he ever found out somebody was a homosexual, he would beat them to a pulp, and by the court's refusal to admit into evidence various homoerotic material, including gay wrestling videos, found in Runcorn's hotel room. The court rejected these and other challenges to the conviction.

Illinois — A Cook County jury rendered a guilty verdict on July 24 against Kevin Ake, who was accused of leaving more than 100 threatening phone messages for the director of the Lakeview YMCA, a lesbian, after he was unable to reserve meeting space for his Bible Study group at the facility in the summer of 2000. Ake is a tax accountant for the Moody Bible Institute, which indicated it will reevaluate his employment in light of the conviction for harassment. Ake could receive up to 3 years in jail when he is sentenced. *Chicago Tribune*, July 25.

Indiana — Affirming the conviction of Mark Booher for the murder and robbery of Timothy Laflen, a gay man, in Indianapolis in January 1999, the Indiana Supreme Court rejected a claim that the prosecution had fatally tainted the trial by presenting evidence suggesting that Booher and Laflen had been lovers, or at least sexual partners. *Booher v. State of Indiana*, 2002 WL 1923815 (Aug. 20, 2002). Laflen's body was found buried in the snow in front of his house, his diamond ring missing. It was later discovered that checks postdating his death had been written on his checking account, and a cash advance had also been procured in his name. The state introduced witnesses who testified that Laflen was gay and had affairs with a variety of men, including one named "Mark," and Booher's girlfriend also testified that he had been friendly with Laflen. Various other items of circumstantial evidence connected Booher to the death, including a story he had concocted for his girlfriend about robbers having confronted Booher and Laflen when they were meeting for the purpose of Laflen paying off a debt he owed Booher. Booher's counsel made no objection during the trial to questions and testimony suggesting Booher might have been gay or had an affair with Laflen, but Booher sought to raise the issue on appeal, arguing that the jury would have been prejudiced against Booher by irrelevant testimony about his sexual orientation. Writing for the court, Justice Dickson rejected this ground for appeal (as well as several others), noting both the failure to protest at trial and the relevance of the testimony to various issues in the case, including credibility of Booher's alibis and an explanation for his motivations with respect to Laflen. A.S.L.

Legislative Notes

California — Continuing to add important elements to existing law on domestic partners in California, the legislature concluded work on a measure that would extend laws on intestacy to

registered domestic partners. The measure was pending before Gov. Gray Davis as we went to press. A.B. 2215, sponsored by Assemblymember Fred Keeley from Boulder Creek, would amend Section 6401 to provide that registered domestic partners would inherit "the entire intestate estate if the decedent did not leave any surviving issue, parent, brother, sister, or issue of a deceased brother or sister," the same treatment now accorded to surviving legal spouses. A surviving domestic partner would receive the same percentage of an estate as a spouse in cases where there are surviving children or close family members of the deceased. The bill directs the Secretary of State to send a letter to each registered domestic partner on the effective date of the law advising on intestate rights. It passed the state Senate on August 20 and the Assembly on August 22. *Bay City News*, Aug. 23, and Westlaw Billtracking Service.

Kansas — The Unified Board of Commissioners of Wyandotte County and Kansas City, Kansas, have adopted an ethnic intimidation ordinance that authorizes enhanced penaltieis for persons whose crimes are motivated by "antipathy, animosity or hostility based upon the race, color, gender, religion, national origin, age, sexual orientation, ancestry, disability or handicap of another individual or group." The ordinance applies to a list of misdemeanor crimes, and imposes a minimum penalty that would not otherwise apply in the absence of motivation prohibited by the new ordinance. *Kansas City Star*, July 13.

Maine — The city council in Westbrook, Maine, voted on July 29 to adopt approve an ordinance banning sexual orientation discrimination, which the mayor was expected to sign. According to a report in the *Portland Press Herald* on July 30, Westbrook would be the 12th municipal jurisdictions in Maine to adopt such a law, the other communities being Bangor, Bar Harbour, Brunswick, Camden, Castine, Falmouth, Long Island, Orono, Portland, Sorrento, and South Portland. Opponents vowed to get up a petition drive to put a repeal proposition on the local ballot in November. The head of the Christian Coalition of Maine boasted that his group would easily be able to collect the 1200 signatures necessary for that purpose.

Massachusetts — Opponents of a pending state ballot measure to ban same-sex marriage (and possibly also ban domestic partnership laws) managed to block it from going on the ballot by the simple expedient of adjourning a necessary meeting of state legislators that had been convened to consider proposals to amend the state constitution. Led in their parliamentary maneuvers by state Senate President Thomas F. Birmingham, one of the contenders for the Democratic gubernatorial nomination, the legislators effectively vetoed the effect of 130,000 petition signatures. In order to be put on the ballot, the question would have had to draw at least 25% of the votes in a joint session of the House and Senate, labelled as a "constitutional convention." The measure clearly had more than 25% support in the two chambers, but opponents were able to adjourn the meeting without bringing marriage issue to a vote by obtaining a simple majority of the joint session participants. Opponents of gay marriage cried foul, and accused Birmingham of using his leadership position improperly to advance his own political career. *Boston Globe*, July 18.

New York State — New York legislation responding to the 9/11 attacks has made it possible for surviving lesbian and gay partners of people who lost their lives at work that day to receive worker's compensation survivor benefits, thus mooting a lawsuit that had been brought challenging the refusal of several workers compensation carriers to pay out the benefits, CNN reported on Aug. 21 on its news website. The amount involved can be as much as $400 a week in replacement income for the life of the surviving "spouse" or partner. While praising this emergency measure, the Empire State Pride Agenda, New York's statewide lesbian and gay lobbying outfit, called for a more permanent change recognizing gay partners generally, not just those who lost their partners on 9/11.

New York City — The New York City Council passed and Mayor Michael R Bloomberg signed into law a measure by which people who are legally recognized domestic partners (or partners in civil unions) from other states or cities who happen to find themselves in New York will have those relationships honored if they become relevant. For example, if domestic partners from California are vacationing in New York City and one ends up in the hospital here, the partner would have the same rights of visitation and consultation that a registered New York City domestic partner would have. The only requirement is that documentation of the domestic partnership be provided. (Thus, it is certainly prudent for traveling domestic partners to carry a copy of their registration statement with them.) *Associated Press*, Aug. 27.

Pennsylvania — The Allentown, Pennsylvania, City Council ruled on July 31 that Citizens for Traditional Values, a group organized to attempt to repeal a recently enacted municipal gay rights law, had fallen 600 signatures short of the number needed to require a public referendum on the issue. CTV had claimed to have more than 2000 signatures, but then it turned out that deceptive means were used to get many of the signatures, according to allegations accepted by the city council in approving a recommendation from the city clerk to invalidate petition signatures of people who had submitted signed statements saying they were misled by the people who were circulating the petitions. *Allentown Morning Call*, Aug. 1.

Florida — The city council in Sarasota has voted to put a question on the Nov. 5 general election ballot on whether the city should adopt a city charter amendment to ban discrimination on the basis of age, race, gender, religion, national origin, disability, veteran and marital status or sexual orientation in housing, employment and places of public accommodation. *Sarasota Herald-Tribune*, Aug. 7. A.S.L.

Law & Society Notes

The *New York Times* announced on Aug. 18 that beginning in September, the Sunday Styles section will carry announcements of same-sex commitment ceremonies together with the wedding and engagement announcements, under the new combined heading of "Weddings/Celebrations." In order to qualify for an announcement, the same-sex couple must either have a public ceremony of some sort, or enter into a legally recognized civil union or domestic partnership pursuant to state or local law. The *Times* will apply its normal criteria to determine whether to publish any particular announcement, emphasizing "newsworthiness and accomplishments of the couples and their families." Although many newspapers around the U.S., most particularly smaller city and rural papers, have been publishing announcements of same-sex commitments in recent years, the *Times* remained a major and influential "holdout," and has been subjected to considerable lobbying by gay rights groups and individual readers. Its informal status as the "newspaper of record" in the U.S. makes it a trend leader, so it is likely that other major newspapers that have been holding back from doing this will follow suit. That makes this a major cultural moment in the public acceptance of the validity of same-sex couples, although the executive editor of the *Times*, Howell Raines, indicated that the newspaper will maintain neutrality in its news columns in reporting on the continuing debate over legal recognition of same-sex partners through marriage, civil union, or other legal forms. The *Times* announcement received widespread press coverage, and led several other newspapers to announce that they would also print such announcements or were considering doing so. Many news reports quoted the Gay and Lesbian Alliance Against Defamation (GLAAD) as stating that they counted close to 100 U.S. newspapers that currently run such announcements, and that GLAAD intended to use the *Times* action as a vehicle for persuading more newspapers to do so.

An international panel of Anglican bishops that was convened to study issues raised by homosexuality has reported inability to reach agreement after three years of study. According to a report in the Aug. 2 *Chicago Tribune*, "The dozen participants said they were unable to agree about 'a single pattern of holy living' for homosexuals; on interpretation of relevant Bible passages; or on the relation between biblical authority and reason, experience and tradition." The panel urged further dialogue on these issues.

After 9/11, the American Red Cross adjusted its criteria for family assistance to make aid avail-

able to surviving same-sex partners of lesbians and gay men who lost their lives. Since then, the Red Cross has extended this policy to other disaster service programs. In a July 29 bulletin distributed to all chapters, *PlanetOut.com Network* reported on August 26, the Red Cross spelled out its criteria for identifying eligible family members, described as "significant others" and "housemates." Those applying for benefits who are not married to opposite-sex partners could establish eligibility for assistance by verifying joint property ownership, bank accounts, utility bills or domestic partner or civil union status under a state or local registration system. The Red Cross action responded to lobbying by New York City Council members and the Empire State Pride Agenda, a New York gay rights lobbying organization. ESPA claims that the Red Cross is the first national relief agency to adopt detailed policies and procedures for identifying eligible partners and treating them as family members for purposes of disaster relief assistance.

The Tennessee Supreme Court has approved new Rules of Professional Conduct for the Tennessee bar that will go into effect March 1, 2003. The rules, which will replace the existing Code of Professional Responsibility, are the product of a two-year drafting effort by the state's bar association. Among other innovations, they will establish a rule requiring that lawyers not, in the course of representing a client, "knowingly manifest bias or prejducie" based on race, religion, age, sex, sexual orientation or socio-economic status. *Memphis Commercial Appeal*, Aug. 28.

Seeking to keep funding coming from the United Way of Greater Milwaukee, officials of the Milwaukee County Council of the Boy Scouts of America signed the United Way's official nondiscrimination policy, but crossed out the term "sexual orientation." When asked by the press, local Boy Scouts officials said that they will not affirmatively discriminate by seeking to identify gays and excluding them, but if they learn that somebody is gay, they will ask that person to leave the organization, in line with national policy. Annual funding from the United Way has amounted to $650,000 in recent years. The Scout Executive for Milwaukee claimed that this "don't ask, don't tell" policy would not violate the United Way's nondiscrimination policy. United Way officials expressed pleasure that the BSA local unit had signed the non-discrimination policy, and refused to comment on their "editorial" changes. The local gay rights organization expressed discouragement at the turn of events, having won a victory when United Way voted to adopt the nondiscrimination policy. A fight is brewing over this. *St. Paul Pioneer Press*, Aug. 25.

The Tacoma, Washington, City Council's 8–1 vote in April to revise its antidiscrimination law so as to include sexual orientation has sparked an apparently successful petition drive to put a repeal referendum on the ballot this November. The Pierce County Auditor's Office verified that the initiative proponents have obtained the necessary signatures. The City Council could attempt to delay the vote, and there are charges that referendum proponents used illegitimate methods to obtain some of the signatures. A similar ordinance had been passed by the council in 1989, but was repealed in a referendum. An attempt to add sexual orientation to the law through popular vote suffered a crushing defeat at the polls in 1990. The measure might be kept off this year's ballot if the council delays acting on it until after the printing deadline for this year's ballot pamphlet has passed. *Tacoma News Tribune*, Aug. 22.

After Big Brothers-Big Sisters of America sent instructions to its 490 chapters that applicants to be adult mentors should not be excluded on the basis of sexual orientation, the Colorado-based anti-gay so-called "Christian" group, Focus on the Family, attempted to raise a national media fuss about the matter. The Big Brothers move, which otherwise might have attracted little national media coverage, ended up being a major story in newspapers and electronic media for several days. The Focus on the Family protests stimulated numerous editorials and letters to the editor supporting the newly affirmed nondiscrimination policy, and relatively little overt criticism from the public. *Philadelphia Inquirer*, July 20.

Another state legislator comes out: Colorado State Representative Jennifer Veiga, a Democrat representing a Denver district, decided to speak openly about being a lesbian in order to preempt a smear campaign she predicted her Republican opponents would launch in this year's election. "I would never make an issue of my sexual orientation unless I knew the attacks were coming," Veiga said to the *Rocky Mountain News* (Aug. 22). "The truth is, it just shouldn't be an issue." Republican activists confirmed to the newspaper that a smear campaign had been taking shape, engineered by a few ultra-conservative Republicans. Several Republican lawmakers angrily rejected the charge that such a campaign was in the works. Veiga has been moving up within the ranks of Colorado Democratic legislators, and may have a leadership position if the party takes control of the House in this year's election. According to the article, Veiga had identified herself as a lesbian at private fundraising events in the past, and many members of the House were aware of her sexual orientation, but she had never spoken to the press about it or raised the issue in the context of public appearances.

Law enforcement officials in Dade County, Florida, have filed criminal charges against several people involved in the process of gathering petitions for repeal of a county gay rights ordinance, the *Miami Herald* reported on Aug. 20. Despite charges of widespread forgeries of signatures and misrepresentations of the purpose of the petitions, the vote was still expected to be held in September coincident with state primary elections.

The insistence of some states that a person's biological sex at birth remains their legal identification regardless of gender reassignment procedures can lead to some interesting anomalies in the interpretation of marriage law. On July 31, Dawn Kereluik and Katheryn Neudecker were married in a civil ceremony at the Franklin County, Ohio, Probate Court in Columbus. Dawn, who was born male, brought along her birth certificate to prove that, in the eyes of Ohio, this was not a same-sex marriage. Of course, in the eyes of the two brides, it definitely is. *Gay People's Chronicle*, Aug. 9.

In a replay of what seems like ancient history, voters in Dade County, Florida (city of Miami) will decide on September 10 whether to repeal a gay rights ordinance. A similar campaign, run during the summer of 1977 after Dade County became one of the earliest in the U.S. to ban anti-gay discrimination, propelled singer Anita Bryant into national infamy and simultaneously set back the gay rights cause by helping launch a wave of repeal referendum over the following decade and advanced the gay rights clause by stirring up closeted gay people to become more politically active and giving important national media exposure to the gay rights movement. Unlike the first time around, the current campaign has brought out leading government officials, business leaders, and African-American civil rights leaders to champion the inclusion of sexual orientation in the county's civil rights law but, as always in these types of votes, the outcome was too uncertain to predict.

The *Ann Arbor News* reported on Aug. 15 that the Michigan Court of Appeals had reversed a ruling by Washtenaw County Circuit Court Judge Donald Shelton concerning a proposed referendum on repeal of Ypsilanti's civil rights ordinance, which forbids sexual orientation discrimination. Shelton had ordered the town to take the referendum measure off the ballot, because if passed it would have repealed the entire civil rights ordinance, even though petitioners obtained signatures from members of the public by stating that the vote was to remove gay rights protections. The Court of Appeals ordered Shelton to dismiss a lawsuit by the Ypsilanti Campaign for Equality, which had argued that the petitions were tainted by misrepresentations to the voters. A.S.L.

Defense Department Pursues New Strategies on Law School Recruitment

The Defense Department has really gotten serious about getting access to law school career service offices to recruit for the judge advocate general corps of the various armed services. Many law schools have longstanding rules barring recruitment by any employer that maintains discriminatory hiring policies, including discrimination on the basis of sexual orientation, and such rules were reinforced by the adoption of a by-laws provision requiring such policies by the Association

of American Law Schools, an organization to which almost all accredited law schools belong. The Solomon Amendment, a continuing amendment to federal appropriations bills that was provoked during the 1990s by a New York court decision ordering the SUNY-Buffalo Law School (in the congressional district of then-Rep. Gerald Solomon) to exclude military recruiters, provides that institutions of higher education that excluded military recruiters could lose all federal funding under a variety of programs from different departments of the federal government. When it appeared that the Solomon Amendment would force law schools to allow recruiters on campus if they did not want to sacrifice federal loan and grant money for their students, law faculty and students alerted Rep. Barney Frank to this problem, and he worked with allies in Congress to have the Solomon Amendment amended to exclude from its operation any federal money intended to benefit students directly in the form of financial aid, loans or grants. Their student assistance money thus protected, law schools persisted in most instances in banning military recruiters.

But then the military, perhaps emboldened by the wave of patriotism and support for military service following the 9/11 attack on the U.S., moved to reinterpret existing procedures that had confined the effect of excluding military recruiters to the law schools. Under the new interpretation embraced for the current school year, the Defense Department will request that all federal funding (except student aid money) be suspended to Universities whose law schools barred military recruiters. In order to make its point with the biggest possible splash, the Air Force notified Harvard Law School, which has banned military recruiters for the past two decades, long before the AALS by-laws amendment was adopted, that it was out of compliance and that the Defense Department would seek to suspend all federal money to Harvard University if the Law School did not rescind its ban on military recruiters by July 1. (Upon the law school's request for more time to study its options, the deadline was extended to August 1.)

According to a report in the *Chronicle of Higher Education* that was based on a memorandum Harvard Law Dean Robert Clark sent to members of the Harvard community late in August, the Law School decided, "reluctantly," to allow military recruiters on-campus. (Actually, they had been there all along. A military veterans group among Harvard Law students, exercising their right under school policies to invite outside speakers to the law school without censorship, had sponsored a military recruitment program on campus in recent years, which took part separately from the regular activities of the law school's career services office.) The problem was not the law school, as such, which receives no significant federal money apart from student aid money that would not be affected, but the university, which estimated that about 16 percent of its annual operating budget comes from federally-funded research grants to other departments.

The Law School's decision to allow military recruiters began to receive press coverage around the country after the *Chronicle*'s Aug. 27 story, and will likely have a significant impact in giving other research universities "cover" in deciding to allow the military back on campus. Harvard Law student leaders who support the ban vowed to pack the military interview slots with openly-gay students in order to thwart recruitment. Other critics of Harvard's action pointed out the unlikelihood that various departments of the federal government would quickly forego the benefits of getting top Harvard scholars to work on their research problems. If the nation's major research universities stuck together and called the bluff of the Defense Department, the Department might have to back down, especially since its action against Harvard was clearly strategic and symbolic, since as a practical matter the armed forces have had no real problem recruiting at Harvard Law due to the assistance from the student veterans group.

Under the Defense Department's new approach, the only law schools that are likely to be able to preserve their career services nondiscrimination policies are those that stand independent from research universities and those whose affiliated universities receive no significant federal research grants. A.S.L.

South Africa Constitutional Court Rules for Partner Benefits

On July 25, the Constitutional Court of South Africa released a unanimous decision by ten justices of the court in *Satchwell v. President of the Republic of South Africa*, Case CCT 45/01, holding that the failure to include same-sex partners in certain benefits provided to the spouses of judges violates the non-discrimination requirements of the South African Constitution.

The ruling responded to a lawsuit brought by Kathleen Satchwell, a judge who lives with her lesbian life-partner, Lesley Carnelley in a relationship that began in 1986. The women consider themselves married for all practical purposes, although under present South African law there is no legal same-sex marriage. Under the law that provides employee benefits for judges, there is provision authorizing that if a judge dies, the judge's surviving spouse is entitled to be paid 2/3 of the judge's salary for the rest of the spouse's life, and also provides that surviving spouses are entitled to any other benefit that would have been paid to the judge had the judge remained alive, such as a retired judge's pension benefit. Satchwell, determined to secure these benefits rights for her partner, initiated correspondence with the Ministry of Justice beginning in 1997, seeking to have the law amended so that the definition of spouse would include same-sex partners. The Ministry responded favorably, and has been considering a legislative amendment to achieve that purpose, but was apparently dragging its heels over the question whether unmarried opposite-sex couples in long-term relationship should also have such benefits, and had not yet determined how to define qualifying relationships. Satchwell became impatient of any resolution happening soon, and filed her lawsuit in 1999, claiming that the current situation violates the constitution.

The High Court in Pretoria ruled in her favor, declaring that without the addition of the phrase "or partner, in a permanent same-sex life partnership" after the word "spouse" in the statute and accompanying regulations, there would be a constitutional violation. South Africa's is one of the few national constitutions that specifically lists sexual orientation as a prohibited ground for unfair discrimination. (The Canadian Charter of Rights lacks such a specific reference, but has been interpreted by the Supreme Court of Canada to include sexual orientation as an "analogous ground" to those listed, such as sex and race.)

An order of this type by the High Court is not self-enforcing, so Judge Satchwell applied to the Constitutional Court for a binding order against the government. The July 25 ruling provides such an order, but in a slightly different form than that approved by the trial court.

Writing for the court, Justice Tole Madala pointed out that the purpose for providing such benefits to surviving spouses is to acknowledge the reciprocal obligations of financial support between marital partners. "In terms of our common law," wrote Madala, "marriage creates a physical, moral and spiritual community of law which imposes reciprocal duties of cohabitation and support… However, historically our law has only recognised marriages between heterosexual spouses. This narrowness of focus has excluded many relationships which create similar obligations and have a similar social value. Inasmuch as the provisions in question afford benefits to spouses but not to same-sex partners who have established a permanent life relationship similar in other respects to marriage, including accepting the duty to support one another, such provisions constitute unfair discrimination."

Madala was unwilling to hold that such benefits should be extended in the absence of a similar reciprocal obligation. "The Constitution cannot impose obligations towards partners where those partners themselves have failed to undertake such obligations." But that did not mean that the court was unwilling to extend such benefits to same-sex partners, who are disabled at present by the marriage law from undertaking such obligations through marriage. "In a society where the range of family formations has widened, such a duty of support may be inferred as a matter of fact in certain cases of persons involved in permanent, same-sex life partnerships," asserted Madala.

"Whether such a duty of support exists or not will depend on the circumstances of each case. In the present case the applicant and Ms. Carnelley

have lived together for years in a stable and permanent relationship. They have been accepted and recognised as constituting a family by their families and friends and have shared their family responsibilities. They have made financial provision for one another in the event of their death. It appears probable that they have undertaken reciprocal duties of support. However, that is a question we need not decide now. The applicant's challenge is to the legislation. For the reasons given, the legislation does discriminate against persons such as the applicant on the basis of sexual orientation."

The court decided that the appropriate remedy is to "read in" to the statute additional language extending benefits rights to same-sex partners of judges, as the High Court had done, but only to those who have undertaken such reciprocal obligations. Thus, the additional language, by order of the court, will say "or partner, in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support."

In its argument to the Constitutional Court, the government claimed that a remedy limited to same-sex partners and excluding heterosexual partners would itself violate the constitution, but the court rejected the argument, pointing out that heterosexual partners could marry in order to qualify for the benefits. The government's proposed amendment would extend benefits entitlements to all permanent partners, regardless of sex, but its enactment still hangs fire. The court did not indicate that it would have any constitutional problems with an amendment along the lines being considered by the government.

The Satchwell ruling is in certain respects reminiscent to the Canadian Supreme Court's *M. V. H* ruling of a few years ago, which set off a chain reaction of legislation at the federal and provincial levels in Canada extending benefits rights to same-sex partners. This process is already well along in South Africa, but the new decision may well provide additional fuel, as well as signaling the lower courts that the Constitutional Court will be receptive to a same-sex marriage lawsuit. Many legal observers in South Africa have speculated that it is just a matter of time before the highest court rules in favor of same-sex marriage, so the race is on between Canada and South Africa to see which will become the second country in the world to open up the legal status of marriage to same-sex partners. (Germany, France, and several Scandinavian countries have established a status akin to marriage in various respects, but in each case falling short of the full legal status of marriage.) The vehicle for such a ruling was quickly presented to the courts. On July 26, Marie Fourie and Cecelia Bonthuys filed an urgent application in the Pretoria High Court seeking a marriage license, claiming that the marriage laws unconstitutionally excluded same-sex couples. Addressing Judge Eberhardt Bertelsmann, lawyers for the two women claimed that the new constitutional court decision made this issue "cut and dried" and urged swift action. *Sunday Times*, July 28. A.S.L.

International Notes

Canada - Manitoba — On Aug. 1, Manitoba's legislature approved a measure allowing same-sex partners to adopt children, by a vote of 31–22. Individual gay people have already been able to adopt in Manitoba, but the legislative mechanism did not previously exist to allow joint adoptions or second-parent adoption. *Guelph Mercury*, Aug. 2.

Canada — Vancouver — On Aug. 2, Justice Marion Allan of the British Columbia Supreme Court certified a class action lawsuit on behalf of lesbian and gay surviving partners denied pensions under the Canada Pension Plan because their partners died prior to Jan. 1, 1998, the date when the plan was changed to recognize surviving partners. The suit brought by Eric Brogaard and Gail Meredith against the Attorney General of Canada alleges unconstitutional discrimination, in that all Canadians are taxed to support the plan, but same-sex survivors were routinely denied benefits before the change (and continue to be denied benefits if their partners died prior to the change). The suit alleges that a firm cut-off date of this type is arbitrary, and seeks benefits for all applicable survivors retroaction to April 17, 1985, the effective date of the Canadian Charter of Rights and Freedoms. A similar lawsuit has been filed in Ontario. *Canadian Press*, Aug. 3.

Canada - British Columbia — The refusal by the city council of Terrace, B.C., to proclaim and advertise a Lesbian, Gay, Bisexual & Transgender Pride Day, was countermanded by an order from the provincial human rights tribunal, according to a July 30 report in the *National Post*. The tribunal found the city's refusal to be a violation of the province's human rights code, which forbids sexual orientation discrimination by governmental bodies.

Germany — The Federal Constitutional Court of Germany has rejected a challenge to a recently-enacted law that allows same-sex partners to legally formalize their relationships in a marriage-like status. The challenged was filed by the governments of Bavaria, Saxony and Thuringia. An estimated 4,500 gay "marriages" have been registered under the law, of which 800 were registered in Berlin. Manfred Weiss, the Bavarian justice minister, indicated that even though his party had opposed the measure in the Parliament, they would not attempt to repeal it if they won the forthcoming elections, consistent with national candidate Edmund Stoiber's attempt to avoid having the Christian Democrats labeled as having archaic social and moral values. Evidently, in Germany today it is considered a political liability in national politics to be seen as opposed to equality for lesbian and gay citizens. *Financial Times*, July 18.

Great Britain — The British government announced on July 23 that Rowan Williams, an outspoken pro-gay clergyman from Wales, will be installed as the 104th archbishop of Cantebury in October, thus becoming spiritual head of the Church of England. Williams has a long career as an activist for peace, environmentalism, and civil rights, and is the first head of the church from outside of England since the Anglican Church was established during the Reformation of the 16th century. It was widely expected that Williams would set a new, more open tone by the church towards its gay members and clergy. *New York Times*, July 24.

Great Britain — Another country heard from? On July 28, Alan Duncan, the British Conservative Party's spokesman on Middle Eastern issues, confirmed widespread rumors that he is gay, becoming the first Conservative Member of Parliament to "come out" publicly. The Conservative Party has long been identified with anti-gay policies, especially during the Prime Ministership of Margaret Thatcher, when British law was amended to deny funding to local counsels for use in "promoting" homosexuality. Duncan, an MP for Rutland and Melton, stated: "Living in disguise as a politician in the modern world simply isn't an option. I think the only realistic way to behave these days, particularly if you are a politician, is to be absolutely honest and up-front, however inconvenient that may be at first." It was reported that Duncan had the full support of Conservative leader Iain Duncan Smith, who is trying to "modernize" the party's image to include tolerance for diversity. *Daily Telegraph*, July 29.

Ireland — New government policy guidelines published by the Minister of Finance, Mr. McCreevy, forbid discrimination on the basis of gender, marital or family status, sexual orientation, race or religious beliefs, disability or membership of the Travelling community, according to a July 11 report in the *Irish Times*. The report implements government employment policy under the Employment Equality Act 1998. It also provides that civil servants should create a working environment in which differences are respected and in which all people, including staff, clients and customers, are valued as individuals. A.S.L.

Professional Notes

Halee Weinstein, a member of the Maryland Lesbian and Gay Law Association who has been serving as an assistant division chief in the Maryland State Attorney's Office in Baltimore, has been appointed by Gov. Parris N. Glendening to be a judge of the Baltimore City District Court, making her the first openly-lesbian or gay judge in Maryland. A graduate of the University of Wisconsin Law School, Weinstein went into law after she was terminated from military service due to her sexual orientation. Her nomination resulted from a process in which the governor asked the Maryland Lesbian & Gay Law Association for recommendations for judicial appointment. She lives with her domestic partner, Shannon Avery, an assistant at-

torney general in the Maryland Office of the Attorney General, and their two children, a son and a daughter. Among her other activities, Weinstein coaches her son's Little League baseball team. *Washington Blade*, July 26.

Eric Ferrero, who has been working as the Public Education Director at the The American Civil Liberties Union's Lesbian and Gay Rights Project/AIDS Project has moved over to Lambda Legal Defense & Education Fund, to take the position of Communications Director with that organization.

Anthony Edward Dyson, founder of the Homosexual Law Reform Society in England in the late 1950s and a leader in the fight to decriminalize consensual sodomy, died in London on July 30 from a fall down a flight of stairs in his home. He was 74 years old and had been seriously ill for several years. Dyson was a Lecturer in English at University College of Wales when he began his public agitation for gay rights, and subsequently was employed as a Lecturer and Reader at the School of English and American Studies at the University of East Anglia from 1962 until his retirement in 1982. Dyson is best known in the literary world as founder of the Critical Quarterly, a hard-hitting literary journal which was described in the New Pelican Guide to English Literature as "probably the most influential English literary-critical journal in the academic field over the post-war decades." Dyson's fight for sodomy law reform triumphed in 1967 when the Parliament endorsed the Wolfenden Committee's recommendation to decriminalize private consensual sodomy between adults. *The Independent - London*, Aug. 1.

Nassau County, N.Y., Executive Thomas Suozzi has nominated an openly-gay attorney, William J. Borman, to be a member of the county Human Rights Commission. A floor fight is expected from republicans when the ratification issue comes up before the state legislature. *Newsday* Aug. 8, 2002. A.S.L.

AIDS & RELATED LEGAL NOTES

Court Rejects Key Defense Theory in Major Viatical Fraud Prosecution

The federal prosecution of four men on charges of a fraudulent scheme involving viatication of life insurance policies purchased by people with HIV got a boost on August 7 when U.S. District Judge Victor Marrero in Manhattan rejected an attempt by the defendants to have the case dismissed. *United States v. Falkowitz*, 2002 WL 1827809 (S.D.N.Y., Aug. 7, 2002).

The U.S. Attorney's office has charged Michael Falkowitz (also known as "Mike Jacobs") and his co-defendants, Steven Falkowitz, Steven Dryfus, and Benjamino Baiocco, with having concocted a highly profitable scheme to exploit the willingness of life insurance companies to sell policies worth less than $100,000 without requiring HIV tests of purchasers. According to the indictment, some of the defendants formed a company, Empire State Financial Group, that actively recruited HIV+ men to purchase such policies and to state on the applications that they had never been diagnosed as HIV-positive or suffering from AIDS. The defendants were counting on the lax underwriting practices of the life insurers, who do not routinely attempt to verify such information by contacting doctors listed on the applications, even though the applicants sign a statement authorizing their doctors to respond to information requests from the insurers.

After the life insurance policies were issued, Empire would represent the policy-holders in viaticating the policies. Viatication is a process by which a life insurance policy-holder sells to an investor the designation of sole beneficiary under the policy, in return for the investor's payment of some portion of the face value of the policy. Normally investors would only be interested in life insurance policies held by people with fatal diseases. Empire would take a cut of the proceeds as the facilitator of the deal.

The basis for the federal government getting involved is the federal mail and wire fraud statutes, which establish federal crimes to use the U.S. mail or interstate phone lines in furtherance of fraudulent transactions. Empire's business allegedly involved plenty of mail and telephone activity. In his opinion, Judge Marrero rejected the argument that the allegations in the indictment do not provide a basis for arguing that the defendants specifically used the mail and telephone as part of their fraudulent scheme.

The defendants had moved to dismiss the charges, arguing that the insurance companies had all the information they needed to discover the fraud, and that somebody operating their business with reasonable prudence would not have been taken in. This is essentially the standard that many state courts have recognized in private lawsuits for fraudulent inducement of a commercial transaction, where a person or business sues for damages claiming that the defendant has defrauded them.

The big issue that Judge Marrero had to decide was whether the same standard could be applied to a criminal prosecution, an issue that has not been definitively decided by the Supreme Court and as to which lower federal courts are divided. He concluded , in line with a majority of the lower courts, that the private law standard should not apply, because the interests involved are different. In a private suit, the plaintiff is seeking compensation for losses he has incurred as a result of the defendant's fraud. In a criminal prosecution, the government is seeking to vindicate the public interest by terminating a dishonest activity that is using the instrumentalities of interstate commerce (the mail, the telephone system) in a way that may have serious negative consequences on public welfare.

In this case, the argument is that insurance companies were willing to take some risks by selling small life insurance policies (those for less than $100,000) without intensive underwriting (verification of facts that are relevant to the purchaser's insurability), and that their willingness was serving a valuable public function of making such insurance available on an affordable basis. Intensive underwriting is expensive, and would have driven up the price insurers would have to charge for such policies, inevitably pricing some people out of the market. Indeed, it is possible some life insurers would just stop selling smaller policies if they felt they had to undertake expensive underwriting in order to combat widespread fraudulent applications.

Insurers price their product on the assumption that most people who apply for the policies are honest. A scheme that would seek out uninsurable people and get them to lie on applications would upset this assumption and ultimately cause insurers to toughen up their application process and raise their prices for coverage, potentially depriving many people of the ability to obtain life insurance. This is the public interest the government is seeking to protect.

Viatication of life insurance policies by HIV+ policy-holders played an important role during the 1990s in helping people who already owned whole life insurance policies when they discovered they were infected, and who needed immediate access to some of the cash value of their policies in order to meet the expenses imposed by their medical condition. As more effective drugs for HIV came into common use among the middle and upper-middle class people who were likely to find themselves in that situation during the mid to late 1990s, AIDS mortality rates declined and viatication became less available. The prosecution of the Falkowitz's and their co-defendants centers on an operation that was at its height during the mid to late 1990s, when this was still a growing and profitable business. A.S.L.

California Appeals Court Finds "Remote Possibility" of Transmission Sufficient to Order HIV Test of Minor Convicted of Committing Lewd Act

A 17–year-old recent immigrant to the U.S. who forced himself sexually on a 12–year-old girl will be required to take an HIV test, under the ruling in *In re Manuel S.*, 2002 WL 1970236 (Cal. Ct. App., 4th Dist., Aug. 26) (unpublished opinion).

Manuel was visiting at the victim's house to watch a video. He asked to use the bathroom. The victim took him to her mother's bedroom and di-

rected him to the attached bathroom. After using the bathroom, Manuel began kissing the victim and pushed her on top of the bed, took off his shirt, removed his belt, and pulled off the victim's pants and underwear, seeking to initiate sexual intercourse. There is no evidence that he achieved erection, penetration or emission before the victim's older sister came home and stopped the activity. At his court hearing, Manuel admitted to this description of his conduct, but claimed he had not known that this was against the law in the U.S. He admitted knowing the victim's age and that he was present in the U.S. illegally. He also said his initial denials to the probation officer were due to language problems. The juvenile court committed him to the Youth Authority, ordered him to make financial restitution of $100 to the victim, and to submit to an HIV test. Manuel appealed all aspects of the sentence, and his appeal was rejected on all points.

On the HIV testing matter, the state argued that by not objecting at the hearing, Manuel had waived the right to challenge the HIV test on appeal. Writing for the appellate panel, Acting Presiding Judge Richli observed that "involuntary AIDS or HIV testing is strictly limited by state statute," so the waiver argument was invalid. Unless testing is authorized by the statute, the court is without power to order it. But on the merits of the appeal, it was clearly warranted, since the offense for which Manuel was convicted is included in the statutory list for which testing is authorized, provided the court finds probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim. (See Cal. Penal Code, sec. 1202.1(e)(6).) In this case, Manuel admitted at the hearing that he had sexual intercourse with the victim, so probable cause existed, even if there was no evidence that he actually ejaculated in her.

Wrote Richli, "In light of the fact that AIDS is a very serious disease that is subject to an ongoing study by the medical profession, and absent scientific evidence to the contrary, a better judicial practice is to err on the side of caution and order testing if there is even a remote possibility that a bodily fluid transferred by minor to the victim was capable of transmitting HIV. This is particularly appropriate in this case because the victim is 12 years old." A.S.L.

Tax Court Finds PWA Owes Penalty Tax on Early Withdrawal From IRA

A person with AIDS who made a withdrawal from his individual retirement account (IRA) while looking for a job that would provide uncapped health benefits did not qualify for a "disaiblity" exemption from the 10% penalty tax imposed on early IRA withdrawals, the U.S. Tax Court ruled in *West v. Commissioner of Internal Revenue*, T.C. Summ. Op. 2002–30, 2002 WL 1842519 (April 1, 2002).

According to the opinion by Special Trial Judge Goldberg, Gregory West was employed as a manager at Alamo Car Rental in nashville Tennessee in 1995 when symptoms that West self-diagnosed as probably HIV-related caused him to leave his job in march. At that time, he moved to Phoenix, Arizona, to be near his family. He did not go to a doctor to confirm his belief that he was HIV+, and did not actually obtain such confirmation until 1998. West tried to find part-time work with health insurance benefits in the Phoenix area, but did not succeed in finding the kind of job he wanted until mid–1998, when he began working part-time for American Express. During 1997, he withdrew $38,855 from his IRA account, apparently using the proceeds for his living expenses. He claims that he telephoned the IRS helpline to inquire about the tax treatment of this withdrawal and, presumably having told the telephone advisor that he was disabled with HIV/AIDS, was informed he would not owe the early-withdrawal penalty. Although he reported the withdrawal on his income tax, he did not caculate or pay the early withdrawal penalty amount.

The IRS discovered this upon reviewing his return and went after him for the penalty. West took the position that he was entitled to the benefit of the disability exclusion, but, according to the court, there were several problems with this claim. For one thing, since he had not been consulting a doctor prior to 1998 for this condition, West had no documentation for his medical condition in 1997, and the IRS was not willing to go on the supposition that the symptoms he claims to have been experiencing, and the state of his bloodwork in 1998, proved that he had been medically disabled during 1997. For another, in order to claim the disability exclusion, one is supposed to provide documentation of the disability and submit it with one's return for the relevant tax year, which West hadn't done. And, finally, even with such medical documentation, it appeared that West would not qualify for the exclusion, because he was not really "disabled" during 1997 in the way described by the pertinent regulation: "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration." West testified that he had actively been seeking work during 1997 and would have taken a job had he found the right combination o working hours and insurance coverage, so he could not credibly claim that he was "unable to engage in any substantial gainful activity" during that year.

Finally, West's reliance on the telephone advice from IRS was held to have no legal significance. Wrote Judge Goldberg: "While it is unfortunate that petitioner may have received unhelpful or incorrect tax advice from an IRS employee, that advice does not have the force and effect of law.… Although we are very sympathetic to petitioner's medical situation, he has failed to show that he was disabled, as defined in section 72(m)(7), during the year in issue." West was ordered to pay the deficiency for 1997 of $3,886.00. A.S.L.

AIDS Litigation Notes

Federal — Massachusetts — In *Doe v. Raytheon Company*, 2002 WL 1608279 (D. Mass., July 19, 2002), U.S. District Judge Zobel granted a motion for attorneys fees on behalf of private attorneys retained by a former Raytheon Co. employee whose AIDS-related disability benefits were improperly terminated by the company. "John Doe" was diagnosed with CDC-defined AIDS in 1994 and went on medical leave of absence, using benefits provided by the company's long-term disability plan. In September 1999, Raytheon terminated the benefits, even though Doe was still suffering from AIDS. Doe pursued an administrative appeal of the denial, represented by Bennett Klein of Gay & Lesbian Advocates and Defenders. When the company denied the internal appeal, Doe retained private counsel and filed suit under ERISA in federal court. After receiving a detailed complaint, Raytheon caved and agreed to reinstate the benefits. Doe sought a fee award to cover both the private attorneys and Klein, and Raytheon totally opposed any fee award. The court found that fees are not awarded for the internal administrative appeal, but that Doe was entitled to fees as a prevailing party in the lawsuit. The court specifically rejected Raytheon's ridiculous argument that the private attorneys spent excessive time putting together a lengthy, detailed complaint when notice pleading would have been sufficient to commence the lawsuit. Judge Zobel found that "this argument ignores the long history of this matter up to that point and the consistent refusal by defendants to reinstate plaintiff's benefits. Defendants' acknowledgement of error upon receipt of the lengthy detailed copmlaint permits the inference, which I draw, that it was precisely the detail that convinced defendants of their error."

Federal — Pennsylvania — In an unpublished disposition, the 3rd Circuit Court of Appeals upheld convictions of Richard J. Harley and Jacqueline M. Kube, who were charged with crimes "arising out of a scheme to defraud patients and investors by promoting an unsafe and untested therapy for HIV/AIDS." The opinion for the court by Circuit Judge Roth provides no details about the nature of the therapy. The court rejected the various grounds raised by Harley, none going to the merits or substance of the evidence, for challenging his conviction on seven counts of mail fruad, three counts of wire fraud, and three counts of violating the Food, Drug and Cosmetic Act. The court also concluded that there was sufficient record evidence from which the jury could have found the requisite intent to support Kube's conviction on one count of mail fraud. *U.S. v. Harley*, 2002 WL 1558304 (July 16, 2002).

Federal — Pennsylvania — In an unofficially reported decision, Chief Judge Giles of the U.S. District Court in Philadelphia granted a motion for summary judgment on behalf of ActionAIDS, a privately-run but heavily city-funded organization that provides services to people with AIDS, on a claim that the constitutional rights of James Graham, an AIDS services counselor for prisoners, were violated by his discharge. *Graham v. City of Philadelphia*, 2002 WL 1608230 (E.D.Pa., 2002). The opinion rehearses the tensions that frequently exist between line staff of AIDS services organizations, who become fervently committed to their clients, and the administrators of those organizations, who need to maintain good working relationships with other agencies in order to facilitate their operations. Graham believed that Prison Health Services (PHS), a private organization that provides health services in Philadelphia County prisons, was providing deficient services to prisoners with HIV/AIDS. He made these beliefs public, including in testimony at public hearings. After several negative work reviews, ActionAIDS discharged Graham, who claimed that the discharge was instigated by PHS exerting influence with ActionAIDS. Graham charged violations of Title VII, the ADA, and the federal constitution (through the mechanism of 42 USC 1983), and also asserted various state law claims in his federal lawsuit. Having previously dismissed the Title VII and ADA claims, in this opinion Judge Giles analyzed the workings and financing of ActionAIDS and PHS and determined that for purposes of Graham's complaint, these organizations could not be considered "state actors" and thus could not be held liable for alleged constitutional violations. Although both organizations drew substantial portions of their financing from government contracts, their boards were independent of the government and intensive government monitoring and oversight of their operations did not convert them into state actors for purposes of their personnel decisions. Judge Giles declined to assert continuing jurisdiction over the state law claims, having found no further basis for federal jurisdiction in the case.

Federal — District of Columbia — The procedural minefields set up by Congress to make it difficult to sue the government surely achieved their purpose in *Gabriel v. Corrections Corporation of America*, 2002 WL 1733028 (D.D.C., July 16, 2002), in which an HIV+ prisoner suffered adverse summary judgment of most of his claims arising from the gross negligence of prison officials that resulted in a serious gap in his medication with apparently significant medical consequences. Gabriel was first incarcerated in the federal penitentiary in Leavenworth, Kansas, in 1985, where he was diagnosed HIV+ and put on a medical regimen. He was transferred to another federal prison in 1988, and his "medical jacket" was transferred with him, so there was no interruption in treatment. However, in 1990 he was remanded to the custody of the District of Columbia and moved to Lorton prison in Virginia, which is operated by Corrections Corporation of American under contract to the District. His federal medical jacket was not sent to Lorton, and for a period of 8 years he was provided no medication, which he alleges led to a deterioration in his T-cell count and the onset of dementia and depression. Gabriel alleges that even upon learning of his HIV status, the Lorton officials failed to provide an appropriate dosage of medication. He sued the federal Bureau of Prisons, CCA, and the District of Columbia, and suffered summary judgment on his attempted 42 USC 1983 claims and related constitutional claims. He probably should have filed suit in the court of claims rather than the district court, and he could certainly use the services of a lawyer, since he fell afoul of most of the procedural requirements associated with his case.

South Carolina — On July 16, a Richland County, South Carolina, jury convicted David James, 36, an HIV+ prisoner, of rape and hostage taking in an incident involving a prison librarian that took place last summer. News reports stated that the victim, who testified at the trial, was apparently not infected with HIV as a result of the rape. Circuit Court Judge Henry Floyd sentenced James to life in prison without parole for the rape, and tacked on additional sentences of 30 years for hostage-taking and 10 years for exposing another to HIV. *The State*, Columbia, S.C., July 17.

South Dakota — State Circuit Judge Tim Dallas Tucker has sentenced Nikko Briteramos, 19, to 120 days in jail and a five year suspended sentence for intentionally exposing his girlfriend to HIV. Briteramos, a varsity basketball player at Si Tanka-Huron University, was the first person to be convicted in South Dakota under a new state law that provides up to 15 years in prison. His lawyer, James Koch, told the Associated Press (Aug. 30) that Briteramos had been in a monogamous relationship with the victim for several months, and the woman wrote to the judge urging that he not suffer a prison sentence. Briteramos was also ordered to disclose his HIV status to any sex partner, and to perform 200 hours of community service. Briteramos admitted having sex with the woman in his dorm room without revealing his HIV status. The woman has since tested negative. Briteramos's plea bargain saved the woman from having to testify against him in court. He apologized to her and the court, and stated, "I believe I'm capable of much better, and I intend to become a person who helps others." Briteramos was in love with the victim, and did not disclose his HIV status for fear she would spurn him.

New York — A firefighter/emergency medical technician failed to state a cause of action against the government for negligence when the government failed to procure an HIV/HBV test of a biting misdemeanant before she disappeared. *Simeone v. Incorporated Village of Valley Stream*, NYLJ, 7/30/2002 (N.Y.Supreme Ct., Nassau County, Segal, J.). Simeone responded to a reported medical emergency at a clothing store in Green Acres Mall in Valley Stream. At the scene, Simeone sustained a biting wound while attempting to assist the patient, one Carlean Williams, who was arrested by Nassau County police officers. Simeone received prompt medical attention at South Nassau Hospital, including shots and blood testing. Ms Williams pleaded guilty to a misdemeanor and received a conditional discharge, one condition being submitting to blood testing, but she never appeared to give her blood and has "apparently disappeared," according to Justice Segal's opinion. Although Simeone has tested negative for any infectious conditions stemming from this incident, he claims to have continuing emotional distress about the possibility of having been infected, and sued the municipalities involved for negligence in letting Ms. Williams disappear without submitting to a blood test that could set his mind at ease. The court granted summary dismissal of the complaint, finding that the defendants did not owe any duty to Simeone in these circumstances; their duty, if any, in connection with the blood test, was to the public at large. "Finally," wrote Segal, "fortunately for Plaintiff the weight of authority suggests that an individual exposed to HIV virus can be reasonably assured that he is free from infection if tests conducted within six (6) months are negative." A.S.L.

AIDS Law & Society Notes

The White House announced that an openly-gay Baltimore physician, Dr. Joseph O'Neill, has been designated as head of the White House's Office of National AIDS Policy. O'Neill replaces Scott Evertz, an openly-gay non-physician who has accepted an appointment by Secretary Tommy Thompson of the U.S. Department of Health and Human Services to become a special assistant to work on international AIDS issues, and particularly U.S. participation in the activities of the United Nations Global Fund to Fight HIV, Tuberculosis & Malaria. There was speculation that Evertz had been forced out of the White House position due to policy differences over HIV prevention policy in the U.S., the hard-liners in the administration favoring channeling federal money into abstinence education in the schools while Evertz was pushing for federal funding of safer sex and condom education. But this speculation was denied by some gay Republican leaders, who claimed that Evertz's move was actually a promotion. The appointment of O'Neill, who had been serving as acting head of the HHS Office of HIV/AIDS Policy, was generally well-received by AIDS activists. *Washington Blade*, July 26.

Pallotta TeamWorks, the creation of Dan Pallotta, who devised a method of raising money, initially for AIDS services and research, through AIDS Rides in which participating cyclists secured pledges of donations, has suspended operations and laid off 250 employees. *Los Angeles Times*, Aug. 28. Although the organization did

raise millions of dollars for AIDS charities, those millions turned out to be a small proportion of the total amount donated to the AIDS Rides (and similar events organized for other health-related causes), the rest going to the high expenses of running the events and paying large salaries to TeamWorks top officials. According to Pallotta's website, 73% of the proceeds from the first AIDS Ride in 1994 between San Francisco and Los Angeles went to charity, but in 1998, a group of Florida AIDS charities discontinued participation with Pallotta after only 11.83% of the $1.133 million raised through a local AIDS Ride found its way to charitable coffers. More recently, California AIDS charities withdrew from the AIDS Ride and organized their own competing fundraising event, ending up in litigation instigated by Pallotta to try to stop them. Some recipients of AIDS Rides fundraising have defended Pallotta, pointing out that although the amount of money they received was a small percentage of the total amount raised, it nevertheless was newfound money that was vital to their budgets.

Researchers in Shenzhen, China, announced that they have developed a new blood test that they claim is faster and more accurate than existing tests for detecting HIV. According to an Aug. 1 news report in the *South China Morning Post*, the new test, which gives results in 3 hours, will detect the presence of the virus as soon as it infects a person, thus eliminating the "window period" of a month or more during which an infected person will test negative on conventional existing tests. The Piji Bioengineering Company developed the test. A Piji spokesman stated that although the test could produce near-instant positive results, a definitive negative result would require further tests over a longer period, according to the news report.

Defense Minister Mosiuoa Lekota of South Africa created a stir by announcing that the entire 70,000–member South Africa National Defence Force would be "blind" tested for HIV so that the Defense Department could determine the incidence of infection and plan accordingly for its health care costs and deployment policies. Trying to reassure members of the Force, Deputy Defense Minister Nozizwe Madlala-Routledge announced that there would be no compulsory HIV testing, and that any test results obtained from "blind" testing would not be used to identify particular members for personnel purposes. Current estimates are that about a fifth of the force may be HIV positive; a study using a random sample of 1,000 soldiers in 2000 showed an infection rate of 17%, and there is a general belief that the rate of infection has increased over the past two years. *South Africa Business Day*, Aug. 28.

The *Wall Street Journal* published a special report on AIDS in Botswana at the end of August, noting that this southern African country was on the way to being a leader in Third World development until AIDS turned everything around. In the three decades prior to the explosion of AIDS in the country, per capita income had increased tenfold, primary school enrollment had advanced to virtually all school-age children, infant mortality had plunged and life expectancy advanced to nearly 70 years at birth. After less than two decades of AIDS, it appears that about 20% of children will be orphaned, life expectancy has declined below age 40 at birth, and more than a third of the adult population is estimated to be infected. Severe labor shortages have crippled economic activity, and the annual number of deaths has jumped 62% over the past ten years. A call for emergency assistance has elicited help from the Bill and Melinda Gates Foundation and Merck Company Foundation, which have collaborated in recruiting foreign medical specialists to come to Botswana, which has a severe shortage of trained medical personnel to deal with the escalating crisis. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

LESBIAN & GAY & RELATED LEGAL ISSUES:

Alexander, Mark C., *The First Amendment and Problems of Political Viability: The Case of Internet Pornography*, 25 Harv. J. L. & Public Policy 977 (Summer 2002).

Baird, Julie A., *Playing It Straight: An Analysis of Current Legal Protections to Combat Homophobia and Sexual Orientation Discrimination in Intercollegiate Athletics*, 17 Berkeley Women's L.J. 31 (2002).

Cruz, David B., *Disestablishing Sex and Gender*, 90 Cal. L. Rev. 997 (July 2002).

Delphine, Craig, *Will I Receive Your Death Benefit? It All Depends*, 10 Gay & Lesbian L.J. (Australia) 81 (2002).

Dennis, Donna I., *Obscenity Law and the Conditions of Freedom in the Nineteenth-Century United States*, 27 L. & Soc. Inq. 369 (Spring 2002).

Evans, R.L., *U.S. Military Policies Concerning Homosexuals: Development, Implementation, and Outcomes*, 11 L. & Sexuality 113 (2002).

Felder, Myrna, *Visitation by Non-Biological Parents: Is the Tide Turning?*, NYLJ, Aug. 12, 2002, p. 3 (argues in favor of NY Court of Appeals overruling Alison D. v. Virginia M., 77 N.Y.2d 651 (1991), and allowing same-sex co-parents to seek visitation rights).

Fisch, William B., *Hate Speech in the Constitutional Law of the United States*, 50 Am J. Comp. L. 463 (Fall 2002).

Fradella, Henry F, Michael R. Carroll, Edward Chamberlain, and Ryan A. Melendex, *Sexual Orientation, Justice, and Higher Education: Student Attitudes Towards Gay Civil Rights and Hate Crimes*, 11 L. & Sexuality 11 (2002).

Friedelbaum, Stanley H., *The Quest for Privacy: State Courts and an Elusive Right*, 65 Albany L. Rev. 945 (2002).

Fulmer, Jason R., *Dismissing the "Immoral" Teacher for Conduct Outside the Workplace — Do Current Laws Protect the Interests of Both School Authorities and Teachers?*, 31 J. L. & Education 271 (July 2002).

Hargis, Christopher S., *The Scarlet Letter "H": The Brand Left After* Dale, 11 L. & Sexuality 209 (2002) (Winner of the NLGLA Michael Greenberg Writing Competition).

Heinzen, William, Book Review, "The Limits to Union: Same-Sex Marriages and the Politics of Civil Rights, NY L. J., Aug. 21, 2002, p. 2.

Hermann, Donald H.J., *Homosexuality and the High Court: A Review of* Courting Justice: Gay Men and Lesbians v. The Supreme Court, 51 DePaul L. Rev. 1215 (Summer 2002).

Janik, Anton L., Jr., *Combating the Illicit Internet: Decisions by the Tenth Circuit to Apply Harsher Sentences and Lessened Search Requirements to Child Pornographers Using Computers*, 79 Denver U. L. Rev. 379 (2002).

Kendall, Christopher N., *The Harms of Gay Male Pornography: A Sex Equality Perspective Post Little Sisters Book and Art Emporium*, 10 Gay & Lesbian L. J. (Australia) 43 (2002).

Kisthardt, Mary Kay, and Barbara Handschu, *Master Class: Custody Issues*, Nat'l L. J., July 29, 2002, B9 (overview of custody issues faced by lesbian/gay parents).

Krause, Harry D., and David D. Meyer, *What Family for the 21st Century?*, 50 Am. J. Comp. L. 101 (Fall 2002).

Peltz, Richard J., *Use "the Filter You Were Born With": The Unconstitutionality of Mandatory Internet Filtering for the Adult Patrons of Public Libraries*, 77 Wash.L. Rev. 397 (2002).

Rappaport, Aaron J., *Beyond Personhood and Autonomy: Moral Theory and the Premises of Privacy*, 2001 Utah L. Rev. 441.

Ronner, Amy D., *Scouting for Intolerance: The* Dale *Court's Resurrection of the Medieval Leper*, 11 L. & Sexuality 53 (2002).

Ross, Josephine, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 Harv. Civ. Rts.-Civ. Lib. L. Rev. 255 (Summer 2002).

Rubin, Leslie, and Jay Weiser, *Same-Sex Marriage: Law Needs to Catch Up*, National L. J., Aug. 26, 2002 (showing how 9/11 tragedy underlines importance of providing legal recognition for same-sex partners).

Schiek, Dagmar, *A New Framework on Equal Treatment of Persons in EC Law*, 8 European L. J. 290 (June 2002).

Schwartz, David S., *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. Pa. L. Rev. 1697 (June 2002).

Scialdone, Frank, *Sexual Orientation-Based Workplace Discrimination: Carving a Public Policy Exception to Ohio's At-Will Employment Doctrine*, 11 L. & Sexuality 193 (2002).

Sharpe, Andrew N., *In the Shadow of Homosexual Anxiety: Transgender Law Reform in Western Australia*, 10 Gay & Lesbian L.J. (Australia) 1 (2002).

Solove, Daniel J., *Conceptualizing Privacy*, 90 Cal. L. Rev. 1087 (July 2002).

Tomsen, Stephen, *Hate Crimes and Masculine Offending*, 10 Gay & Lesbian L. J. (Australia) 26 (2002).

Trotier, Geoffrey S., *Dude Looks Like a Lady: Protection Based on Gender Stereotyping Discrimination as Developed in* Nichols v. Azteca Restaurant Enterprises, 20 L. & Inequality 237 (Summer 2002).

Winnick, Bruce J., *The Dade County Human Rights Ordinance of 1977: Testimony Revisited in Commemoration of Its Twenty-Fifth Anniversary*, 11 L. & Sexuality 1 (2002)

Student Articles:

Albright, Jennifer Marie, *Gender Assessment: A Legal Approach to Transsexuality*, 55 SMU L. Rev. 593 (Spring 2002).

Alonso, Desiree, *Immigration Sponsorship Rights for Gay and Lesbian Couples: Defining Partnerships*, 8 Cardozo Women's L. J. 207 (2002).

Borten, Laurence Drew, *Sex, Procreation, and the State Interest in Marriage*, 102 Col. L. Rev. 1089 (May 2002) (interesting examination of the changing purposes of marriage in light of shifting sexual practices, inspired by recent decisions on transgender marriage).

Buchan, J. Craig, *Constitutional Law:* Boy Scouts of America v. Dale*: The Scout Oath and Law Survive Government Intrusion*, 55 Okla. L. Rev. 153 (Spring 2002) (guess we know where he's coming from!).

Carnahan, Randall B., *An Examination of Wyoming's Indecent Liberties Statute and Proposals for Reform*, 2 Wyoming L. Rev. 529 (2002).

Case Comment, *Constitutional Law — Government May Not Constitutionally Force Inclusion if It Significantly Interferes with Organization's Expression of Views* — Boy Scouts of America v. Dale*, 530 U.S. 640 (2000)*, 35 Suffolk U. L. Rev. 223 (2001).

Crowley, Timothy P.F., Lofton v. Kearney*: The United States District Court for the Southern District of Florida Holds Florida's Statutory Ban on Gay Adoption Is Not Offensive to the Constitution*, 11 L. & Sexuality 253 (2002).

Epstein, Brian M., *Megan's Law: How Should the State of Massachusetts Apply Its Sex Offender Registry Laws in Light of Other Jurisdictions?*, 28 N. Eng. J. Crim. & Civ. Confinement 247 (Summer 2002).

Frances, Susan, *Every Judgment Is a Weapon If You Hold It Right: Right to Expressive Association in* Boy Scouts of America v. Dale, 26 S.Ill.U.L.J. 361 (Winter 2002).

Green, Matthew, *Sex on the Internet: A Legal* Click *or an Illicit* Trick*?*, 38 Cal. Western L. Rev. 527 (Spring 2002).

Grossman, Sharmila Roy, *The Illusory Rights of* Marvin v. Marvin *for the Same-Sex Couple versus the Preferable Canadian Alternative* M. v. H., 38 Cal. Western L. Rev. 547 (Spring 2002).

Kostenko, Roman A., *Are "Contemporary Community Standards" No Longer Contemporary?*, 49 Cleveland St. L. Rev. 105 (2001).

Kovalcik, Jennifer, Troxel v. Granville*: In the Battle Between Grandparent Visitation Statutes and Parental Rights, "The Best Interest of the Child" Standard Needs Reform*, 40 Brandeis L. J. - U. of Louisville 803 (2002).

Manicki, Joseph M., S.D. Myers v. San Francisco*: Satisfactory C's on the Domestic Partnership Benefits Report Card — The Constitutionality of Contingent City Contracts Under the Commerce Clause*, 11 L. & Sexuality 243 (2002).

Mutterperl, Laura B., *Employment at (God's) Will: The Constitutionality of Antidiscrimination Exemptions in Charitable Choice Legislation*, 37 Harv. Civ. Rts.-Civ. Lib. L. Rev. 389 (Summer 2002).

Note, *In Light of the Evil Presented: What Kind of Prophylactic Antidiscrimination Legislation can Congress Enact After* Garrett*?*, 42 Boston College L. Rev. 697 (May 2002).

Quinn, Kerry L., *Mommy Dearest: The Focus on the Family in Legal Feminism*, 37 Harv. Civ. Rts.-Civ. Lib. L. Rev. 447 (Summer 2002) (includes consideration of queer theory critiques of family).

Runkles-Pearson, P.K., *The Changing Relations of Family and the Workplace: Extending Antidiscrimination Laws to Parents and Nonparents Alike*, 77 N.Y.U. L. Rev. 833 (June 2002).

Ryan, Anne B., *Punishing Thought: A Narrative Deconstructing the Interpretive Dance of Hate Crime Legislation*, 35 J. Marshall L. Rev. 123 (Fall 2001).

Smith, Hillel R., *Another Chapter in First Amendment Jurisprudence: The Right to Exclude Based on Sexual Orientation*, 20 Miss. Coll. L. Rev. 321 (Spring 2000).

Specially Noted:

We have received Vol. 11 of *Law & Sexuality: A Review of Lesbian, Gay, Bisexual, and Transgender Legal Issues* (2002). Inidividual articles are noted above. ••• Vol. 8, No. 3 of *Social Politics* (Fall 2001), focuses on International Studies in Gender, State and Society, with articles about Israel, the UK, and Europe looking at gender issues in workplace and family law. ••• The Australian *Gay and Lesbian Law Journal* has published its 10th volume. Individual articles are noted above. ••• The Spring 2002 issue of *Law and Contemporary Problems*, vol. 65, no. 2, is devoted to an symposium on *Enduring and Empowering: The Bill of Rights in the Third Millennium*.

AIDS & RELATED LEGAL ISSUES:

Adelstein, Richard, *Equity and Efficiency in Markets for Ideas*, 17 Conn. J. Int'l L. 149 (Spring 2002) (part of symposium on Global AIDS Crisis).

Baimu, Evarist, *The Government's Obligation to Provide Anti-Retrovirals to HIV-Positive Pregnant Women in an African Human Rights Context: The South African Nevirapine Case*, 2 African Hum. Rts. L. J. 160 (2002).

Berger, Jonathan M., *Tripping Over Patents: AIDS, Access to Treatment and the Manufacturing of Scarcity*, 17 Conn. J. Int'l L. 157 (Spring 2002).

Berkman, Alan, *Introduction - Symposium - The Global AIDS Crisis*, 17 Conn. J. Int'l L. 149 (Spring 2002).

Cameron, Edwin, *AIDS Denial in South Africa*, 5 the Green Bag 415 (Summer 2002).

Csete, Joanne, *Several for the Price of One: Right to AIDS Treatment as Link to Other Human Rights*, 17 Conn. J. Int'l L. 263 (Spring 2002).

Gathii, James Thuo, *Rights, Patents, Markets and the Global AIDS Pandemic*, 14 Fla. J. Int'l L. 261 (Spring 2002).

Ghosh, Shubha, *Pills, Patents, and Power: State Creation of Gray Markets As a Limit on Patent Rights*, 14 Fla. J. Int'l L. 217 (Spring 2002).

Hoffman, Sharona, *AIDS Caps, Contraceptive Coverage, and the Law: An Analysis of the Federal Anti-Discrimination Statutes' Applicability to Health Insurance*, 23 Cardozo L. Rev. 1315 (March 2002).

Joni, Jennifer, *Access to Treatment for HIV/AIDS: A Human Rights Issue in the Developing World*, 17 Conn. J. Int'l L. 273 (Spring 2002).

Lazzarini, Zita, *Access to HIV Drugs: Are We Changing the Two World Paradigm?*, 17 Conn. J. Int'l L. 281 (Spring 2002).

Nagan, Winston P., *International Intellectual Property, Access to Health Care, and Human Rights: South Africa v. United States*, 14 Fla. J. Int'l L. 155 (Spring 2002).

Otunnu, Ochoro E., *The AIDS Fund for Africa*, 17 Conn. J. Int'l L. 297 (Spring 2002).

Pitler, Lisa R., *Ethics of AIDS Clinical Trials in Developing Countries: A Review*, 57 Food & Drug L. J. 133 (2002).

Rembe, Nasila S., *To Reaffirm Faith in Fundamental Human Rights: The Challenge of Managing Diversity in Africa*, 17 Conn. J. Int'l L. 303 (Spring 2002) (part of symposium on the Global AIDS Crisis).

Rothstein, Mark A., Serge A. Martinez & W. Paul McKinney, *Using Established Medical Criteria to Define Disability: A Proposal to Amend the Americans With Disabilities Act*, 80 Wash. U. L. Q. 243 (Spring 2002).

Rovner, Laura L., *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 Utah L. Rev. 247.

Sell, Susan K., *Post-TRIPS Developments: The Tension Between Commercial and Social Agendas in the Context of Intellectual Property*, 14 Fla. J. Int'l L. 193 (Spring 2002).

Viana, Jose M. N., *Intellectual Property Rights, the World Trade Organization and Public Health: The Brazilian Perspective*, 17 Conn. J. Int'l L. 311 (Spring 2002) (part of symposium on the Global AIDS Crisis).

Vieira, Cesar, *Changing Roles of State and Non-State Actors in the Wake of Drugs Access Decisions in South Africa and Brazil*, 17 Conn. J. Int'l L. 319 (Spring 2002) (part of symposium on the Global AIDS Crisis).

Walker, Nancy E., *Meaningful Participation of Minors With HIV/AIDS in Decisions Regarding Medical Treatment: Balancing the Rights of Children, Parents, and State*, 25 Int'l J. L. & Psych. 271 (May/June 2002).

Zopolsky, Joe, *HIV-Infected Healthcare Workers and Practice Modification*, 78 N. Dak. L. Rev. 77 (2002).

Student Notes & Comments:

Alfred, Janice, *The 45th Session of the Commission on the Status of Women: Gender Discrimination and the AIDS Pandemic*, 18 N.Y.L.S. J. Hum. Rts. 439 (Summer 2002).

Haber, Erica, *The United Nations' Response to HIV/AIDS in Africa*, 18 N.Y.L.S. J. Hum. Rts. 467 (Summer 2002)

Hoffman, Sharona, *AIDS Caps, Contraceptive Coverage, and the Law: An Analysis of the Federal Anti-Discrimination Statutes' Applicability to Health Insurance*, 23 Cardozo L. Rev. 1315 (March 2002).

Klug, Heinz, *Access to Health Care: Judging Implementation in the Context of AIDS:* Treatment Action Committee v. Minister of Health *TPD 21182/2001; unreported,* 18 S. African J. Hum. Rts. 114 (2002).

McCoy, Amy, *Children "Playing Sex for Money": A Brief History of the World's Battle Against the Commercial Sexual Exploitation of Children*, 18 N.Y.L.S. J. Hum. Rts. 499 (Summer 2002).

Specially Noted:

The Spring 2002 issue of the John Marshall Law Review (vol. 35, no. 3), features a transcription of the panel discussion held at the Association of American Law Schools Annual Meeting last year titled "Dealing with International AIDS: A Case Study in the Challenges of Globalization" at p. 381. Panelists include John G. Culhane, Peter Kwan, Andrew L. Strauss, Allyn L. Taylor, Pierre de Vos, and Mark E. Wojcik. ••• The Dec. 2001 issue of *International Relations*, vol. 15, no. 6, is devoted to a symposium titled "The Crisis of HIV/AIDS in Africa." ••• The Spring 2002 issue of the *Connecticut Journal of International Law*, vol. 17, no. 2, includes a symposium titled "The Global AIDS Crisis." Individual articles are noted above. ••• Vol. 353, Nos. 1 & 2 (Fall 2001 & Winter 2002) of the *University of Michigan Journal of Law Reform* is devoted to a symposium titled "The Americans With Disabilities Act: Directions for Reform." •••The Spring 2002 issue of the *Florida Journal of International Law*, vol. 14, no. 2, contains a symposium titled "Intellectual Property, Development, and Human Rights" which focuses primarily on the issue of access to patented pharmaceuticals in developing countries in the context of the AIDS epidemic. Individual articles are noted above.

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.