

UNITED NATIONS COMMITTEE REJECTS SAME-SEX MARRIAGE BID

Two lesbian couples from New Zealand seeking marriage licenses received discouraging news from the United National Human Rights Committee. In a July 30 opinion that recently became available on the Committee's website, it unanimously concluded that the U.N.'s International Covenant on Civil and Political Rights, to which New Zealand is a signatory, is not violated by New Zealand's refusal to authorize legal same-sex marriages. (The U.S. is also a signatory to the Covenant, but not the Optional Protocol that allows citizens of a signatory state to bring an action before the Committee). The Case is identified as Communication No. 902/1999: New Zealand, CCPR/C/75/D/902/1999.

Juliet Joslin and Jennifer Rowan, who have been in a relationship since 1988, and Margaret Pearl and Lindsay Zelf, whose relationship dates from 1993, are raising children from their previous opposite-sex marriages. Each couple applied to a local registry office for a marriage license, and each were rejected on the ground that the country's marriage statute does not provide for same-sex marriages. The two couples applied to the New Zealand courts, but the courts upheld the determination of the Registry Office, also opining that New Zealand was not obligated by any of its international treaty commitments to allow same-sex marriages.

The committee's opinion summarizes at length the parties' arguments. The government's position, in effect, is that marriage is traditionally reserved for opposite sex couples and that New Zealand had undertaken and is continuing to undertake law reform actions extending many rights customarily reserved for marriage to same-sex couples. The government also argued that Article 23 of the Covenant, which provides that men and women have the right to marry, seems clearly to contemplate that the right extends to men marrying women and women marrying men, observing that this is the only Article that mentions the genders of individuals. New Zealand asserts that the drafters of the Covenant did not intend to require signatory states to allow same-sex marriage.

The New Zealand government also denied that its current policies improperly invade the privacy rights of New Zealanders, or discriminate based on sexual orientation. In past deci-

sions, the Committee has concluded that the Covenant provision dealing with sex discrimination also extends to sexual orientation discrimination, but here New Zealand fell back on the old argument that same-sex couples may not marry regardless of the sexual orientation of the individuals who make up the couple, and so in their view this is not sexual orientation discrimination. (There is historical precedent for this view. The Hawaii Supreme Court, in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 993), its famous same-sex marriage opinion, rejected the argument that the state was discriminating on the basis of sexual orientation, but found that the refusal to let same-sex couples marry would constitute discrimination on the basis of sex. Unfortunately, the Court's opinion was overruled by the people of Hawaii, who adopted a constitutional amendment in order to take this subject out of the jurisdiction of the state's courts.)

After reciting many pages of arguments by both sides, the Committee disposed of the matter in just a few sentences: "Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term 'men and women', rather than 'every human being', 'everyone' and 'all persons'. Use of the term 'men and women', rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other." The Committee concluded that in light of the wording of that article, it could not "find that by mere refusal to provide for marriage between homosexual couples" the government of New Zealand had violated any rights under the Covenant.

Sixteen members of the Committee participated in the decision. Two were moved to write a separate statement of their "individual opinion." Rajsoomer Lallah and Martin Scheinin pointed out that the Committee's opinion did not preclude member states from deciding to

allow same-sex marriages. In addition, they insisted that the Committee's opinion "should not be read as a general statement that differential treatment between married couples and same-sex couples not allowed under the law to marry would never amount to a violation of article 26," which forbids discrimination on the basis of sex (and, by interpretation, sexual orientation). "On the contrary, the Committee's jurisprudence supports the position that such differentiation may very well, depending on the circumstances of a concrete case, amount to prohibited discrimination." They specifically singled out denial of benefits to same-sex couples that are available to married couples could be prohibited discrimination "unless otherwise justified on reasonable and objective criteria." They also took note of New Zealand's assertion that as a result of recent law reforms, the lesbian couples in this case, together with their children, are recognized as families for many purposes of New Zealand law. A.S.L.

LESBIAN/GAY LEGAL NEWS

Supreme Court Denies Review in Transsexual Marriage and Intestate Succession Case

Preserving its record of never having decided a matter involving transsexual rights on the merits, the U.S. Supreme Court announced on Oct. 7 that it was denying a petition for certiorari in *Gardiner v. Gardiner*, No. 01-1853, 71 USLW 3002, thus leaving in place a ruling by the Kansas Supreme Court, 42 P.3d 120 (2002), which held that a person's sex is immutable from birth for purposes of Kansas family law, and so a post-operative male-to-female transsexual may not validly marry a man in Kansas, or inherit from his estate by intestate succession.

In the case at bar, Marshall Gardiner had married J'Noel Gardiner, a male-to-female transsexual, knowing about J'Noel's sexual past. Gardiner, a wealthy elderly widower who was estranged from his son, died shortly after the marriage, leaving a large estate but no testamentary document! At first, it appeared that J'Noel and Marshall's son Joe would split the intestate estate, but then Joe, having learned that his stepmother was born a man, decided to claim it all, asserting before the trial court that the marriage was invalid, even though J'Noel had been issued a new birth certificate designating her a woman by the state of her birth. The trial court agreed with Joe, rejecting the argument that it was bound by full faith and credit to consider J'Noel a woman on the basis of the foreign-state birth certificate, and holding that in Kansas this marriage would be void as a

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same-sex marriage. On appeal, the court of appeals reversed, holding that the determination of gender was a more complicated issue than the trial court had acknowledged, and requiring that on remand the trial court apply a multifactorial analysis to determine J'Noel's gender for purposes of deciding whether the marriage was valid. Joe appealed and won a reversal in the state supreme court, which found persuasive a recent ruling by the Texas Court of Appeals in *Littleton v. Prange*, 9 S.W. 3d 223 (Tex. App., San Antonio, 1999), cert. denied, 531 U.S. 872 (2000), in which the U.S. Supreme Court had refused to review the state court's finding that a similar marriage was invalid.

The question of full faith and credit for birth certificate changes, especially when they are more than purely ministerial actions, is an important one for persons who undergo gender reassignment and seek to live in their preferred gender without unnecessary complications to their lives. The U.S. Supreme Court's refusal to get involved in this issue contrasts with the recent action by the European Court of Human Rights, which found that the United Kingdom's continued refusal to recognize the legal effect of sex-reassignment treatment violated the European Charter of Human Rights requirement of respect for private life. *Christine Goodwin v. United Kingdom* (Application No. 28957/95) and *I. v. United Kingdom* (Application No. 25680/94). A.S.L.

Military Defense Counsel's Affair With Client Did Not Taint Conviction; Outed Defense Counsel Commits Suicide

A unanimous panel of the U.S. Army Court of Criminal Appeals affirmed the conviction of Billy E. Cain on two counts of indecent assault, rejecting an argument that a sexual affair between Cain and his military defense attorney presented a conflict of interest that would justify setting aside the sentence and retrying the case. Cain's attorney committed suicide after the affair came to the attention of military authorities. *United States v. Cain*, 2002 WL 31367434 (Oct. 21, 2002).

Sgt. Billy E. Cain was assigned to the ROTC Department at Norwich University in Vermont. According to the findings at his subsequent court martial, in August 1993 he invited a male Norwich student, JM, to come check out Cain's apartment as a prospective roommate, then plied him with beer until the kid passed out, after which Cain removed JM's pants and engaged in a little oral sex. Cain's next recorded sexual escapade came in February 1995, when he invited PH and CD, 18-year-old brothers, to visit in his apartment, got the boys drunk, and told PH to 'crash' on his bed, while CH was passed out in the living room. The following morning, finding PH asleep on his bed, wearing boxer shorts and displaying a morning erection,

Cain initiated oral and anal sexual activity, only stopping when the groggy PH began to awaken.

Eventually these activities came to the attention of military authorities, who brought three forcible sodomy charges against Cain based on his interactions with JM and PH. The Senior Defense Counsel for the U.S. Army Trial Defense Service at Ft. Bragg, where Cain was held pending trial, was Major S, who assigned himself to be Cain's defense attorney. Apparently Major S, a closet case, was quite taken with Cain, because he began a sexual affair with his client within a few days of undertaking the assignment. The sexual relationship lasted throughout the court-martial proceeding, which lasted six months.

Cain told various people about the affair with Major S, indicating that he really was doing this because he thought that it would get the Major to fight harder on his behalf. Everybody to whom he spoke about it — his mother, a friend, a staff member from the Servicemembers Legal Defense Network, and two civilian attorneys with whom he discussed his case — urged him to get a different defense attorney, because this was a clear conflict of interest for Major S, but Cain resisted making a change. For one thing, he could not afford to pay for his own defense counsel, and for another he seemed convinced that without Major S in his corner he faced a lengthy jail sentence.

However, after the first hearing in his case, Cain asked to have a second defense attorney assigned, pointing out that the prosecution had two attorneys at the table and he felt outnumbered. Captain L was assigned as co-counsel for the defense. Cain told his attorneys that he had the consent of JM and PH to their sexual activity and that he would not plead guilty to the charges of forcible sodomy. After reviewing all the evidence, Captain L was dubious and concluded that Cain faced "substantial confinement" as an "ROTC NCO charged with sexually preying on troubled young men." Eventually he brought Major S and Cain around to agreeing that they should negotiate a plea bargain.

Captain L negotiated a deal with the government, which was approved by Major S and Cain, under which Cain would plead guilty to reduced charges of indecent assault in exchange for a promise of a brief period of confinement, dishonorable discharge and loss of rank. The guilty plea was entered on June 2, 1998. The military judge sentenced Cain to 5 years in prison, forfeiture of all pay and allowances, reduction in rank and dishonorable discharge, but the convening authority for the court martial, implementing the plea agreement, reduced the period of confinement to 2 years.

Cain's parents were very upset by all this and, without his knowledge, wrote a letter to the military authorities charging that Major S had

"pressured" Cain "for sexual favors." The letter was shown to Major S's boss on June 16, and he in turn confronted Major S with these charges on June 18. Early the next morning, Major S committed suicide, leaving an audiotape message denying that he had "ever forcibly had sex" with Cain, and stating that his "suicide is not an admission of guilt." Of course, Major S faced the same potential criminal penalties that Cain was facing.

The new attorney assigned to represent Cain in post-trial matters sought a hearing into the charges that Major S had pressured Cain into sex and had represented him with a conflict of interest, but the convening authority refused to schedule a hearing. Cain appealed his conviction to the Army Court of Criminal Appeals, arguing that he had lacked effective legal representation and should be entitled to rescind his guilty plea and have a new trial.

On October 21, a unanimous three-judge panel of the appeals court rejected Cain's arguments. Although the code of legal ethics in force in many states now prohibits attorneys from initiating a new sexual relationship with a client, the military appeals panel did not find this kind of ethical violation sufficient to set aside Cain's guilty plea, noting particular the participation of Captain L, who had taken the leading role in analyzing the case and persuading Cain to agree to a plea bargain. The panel insisted that there was no actual conflict of interest. Of course, gay sex is a criminal offense in the military, but the panel found that "the criminal conduct of a defense counsel creates an actual conflict of interest only when 'there is a danger that the defense attorney would ineffectively represent his client because of fear that authorities might become aware of the attorney's own misconduct if he undertook effective representation.'" But in this case, the panel argued that the incentive ran the other way. If Major S wanted to keep his affair with Cain secret, he had to be as effective as possible in representing Cain. "A disgruntled client would be incompatible with Major S's interest," wrote the appeals court. "In short, not only did Major S and [Cain's] interest not conflict, in some respects, they converged."

The court also found that Cain had waived any actual conflict of interest, since he was advised by several sources, including SLDN and the two civilian attorneys, to ditch Major S, but had consciously decided to go forward with him. Finding that Cain was fully informed when he pleaded guilty, the court concluded that he "knew what he was doing when he made his choice," and that the relationship between Major S and Cain had "no adverse effect on the defense team's performance."

"We are convinced [Cain] knowingly, intelligently, and voluntarily pleaded guilty because, as he told the military judge, 'I know I'm guilty,

Your Honor,' and it was in his best interest to do so." A.S.L.

Mississippi Appeals Court Finds Mother's Lesbianism a "Minor Factor" in Custody Dispute

Reversing a decision by the Sunflower County Chancery Court, the Mississippi Court of Appeals found that the mother's lesbianism had been unduly emphasized by the trial court in awarding custody to the father. *Fulk v. Fulk*, 2002 WL 31248616 (Miss. Ct. App. Oct. 8, 2002). Child custody in Mississippi is determined by analyzing the eleven "Albright factors" taken from *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983). Factor 7 is "moral fitness" of the parents. A judge may not grant custody or base visitation on this factor alone without analyzing all eleven and making a finding on each, ruled the appeals court. Furthermore, lesbianism does not per se make one morally unfit.

The marriage of Jeffrey A. and Rhonda Falk lasted from September 11, 1999, to May 8, 2001. Rhonda gave birth to Jeffrey D. on January 20, 2001, and finally left her husband on February 1 of that year (after having initially left him months before the child was born). Jeffrey A. filed for divorce. The chancellor of Sunflower County granted a no-fault divorce, and awarded custody of the child to Jeffrey. Rhonda was restricted to supervised visitation only at 8 o'clock each Sunday morning at McDonald's for at least one hour.

Rhonda asserted that the chancellor's decision placed too much weight on *Albright* factor no. 7, "moral fitness." Rhonda's lack of moral fitness was purportedly demonstrated by her "adulterous affair with another woman," who testified that she would still be a part of Rhonda's life as a friend and continue to be around the baby. Jeffrey argued that the woman was "severely emotionally unstable" and would not be a good influence on the child. The chancellor found that it was "unacceptable for any child to be around this type of behavior."

Albright instructs that differences in lifestyles and personal values may not be the sole basis for a custody decision. Furthermore, the Mississippi Supreme Court has held that "it is of no consequence that a mother was having an affair with a woman rather than a man." *Plaxico v. Michael*, 735 So. 2d 1036, 1039-40 (Miss. 1999). Moreover, Jeffrey instigated and participated in the affair with Rhonda's lesbian partner. Therefore, the chancellor's reliance on the lesbian affair was an error, especially in light of Jeffrey's involvement.

Neither party was an ideal parent. Rhonda lived with her parents, and her entire family depended on government checks for survival. Jeffrey used drugs and alcohol, and once had absent-mindedly padlocked Rhonda inside their house, requiring Rhonda's father to take

the door off its hinges to allow Rhonda, then pregnant, to get out of the house. Jeffrey had also threatened to kill Rhonda and her entire family with a claw hammer. In light of Jeffrey's disturbing behavior, it was cavalier for the chancellor to rule, "I find that the father may have done some things in the past he is not proud of, but the Court thinks that the responsibility of fatherhood has matured him." Jeffrey's behavior should have been evaluated under all eleven *Albright* factors.

The severe (and bizarre) restriction on Rhonda's visitation was overturned by the appeals court, which found an absence of evidence of harm or danger to the child. In Mississippi, "overnight visitation with the non-custodial parent is the rule, not the exception; indeed, a non-custodial parent is presumptively entitled during reasonable times to overnight visitation with the children." Few circumstances of this case would warrant curtailment of overnight visits.

The appeals court reversed the chancellor, requiring her to re-determine the issue of custody, and, no matter the outcome of the custody dispute, to grant overnight and unrestricted visitation to the mother, unless evidence of harm to the child is presented. *Alan J. Jacobs*

Federal Court Rejects Alabama Sex Toys Ban As Applied to Heterosexual Plaintiffs

A federal district court in Alabama says the right to use vibrators and dildos in the context of consensual adult relationships is protected by the Constitution. The court traced the history of mechanical genital stimulation in America, creating a must-read opinion studded with references to Foucault, sexual historian Rachel Maines, the Sharper Image catalogue, and Bob Dole's Viagra commercials. Finding that the right to use sexual devices — at least by heterosexuals — is "deeply-rooted" in U.S. history, the court struck down a law making it a crime to sell such devices in Alabama. *Williams v. Pryor*, 2002 WL 31296617 (N.D. Ala. October 10, 2002).

In 1998, the Alabama legislature made it a crime to sell "any device designed or marketed as useful primarily for the stimulation of human genital organs." A group of women who use such devices, and two Alabama businesspeople who sell them, brought both "facial" and "as-applied" constitutional claims. In 1999, District Judge C. Lynwood Smith found that the statute had no "rational basis" and enjoined its enforcement. In October 2000, the 11th Circuit Court of Appeals reversed, finding that the law was "rationally related to the State's legitimate power to protect its view of public morality." Specifically, the court found, the statute could be constitutionally applied to prevent gay men and lesbians from performing sexual acts — including masturbation. (In reaching this conclu-

sion, the court relied heavily on *Bowers v. Hardwick*, 478 U.S. 186 (1986); by contrast, the 11th Circuit contended that *Romer v. Evans*, 517 U.S. 620 (1996), had "no bearing" on the case.) As to the as-applied challenge, the court remanded for further consideration of "whether or to what extent the Alabama statute infringes a fundamental right to privacy of the specific plaintiffs."

Three months later, the circuit court withdrew that poorly reasoned opinion [described in Law Notes 11/2000] and substituted another opinion by the same judge. The result was the same, but the court substituted minors for homosexuals — that is, it found that the statute could constitutionally be employed to prevent minors from accessing sexual devices. Again, the court held the statute to be "rationally related to the State's power to protect its view of public morality"; again the court remanded the as-applied challenge so that the district court could determine whether the application of the statute to plaintiffs burdened a fundamental right.

Plaintiff Sherri Williams owns two retailers stores called Pleasures, which sell "vibrating and non-vibrating dildos, penis extensions, ... anal beads ... [and] artificial vaginas." Plaintiff B.J. Bailey, sells similar items through "in-house 'Tupperware'-style parties" under the name Saucy Lady. The court noted that many of Williams' and Bailey's customers claimed that "products purchased at the Saucy Lady parties helped them to become orgasmic."

The "user" plaintiffs included a married woman who had been inorgasmic for 10 years before employing sexual devices; a once-married woman who had used sexual devices to combat post-partum depression; a married woman who credits sexual devices with "restoring ... trust, dialogue and understanding" in her marriage; and an unmarried woman suffering from a chronic disability that makes it difficult for her to enjoy intercourse.

In *Washington v. Glucksburg*, 521 U.S. 702 (1997), the Supreme Court held that a state ban on assisted suicide was constitutional because "there was no history, tradition, or contemporary practice of permitting persons to commit, or assist in the commission of, suicide." Following that logic, the Alabama plaintiffs were required to show that the law burdened a right that is "deeply rooted in this Nation's history and tradition" — that is, have the states long "refrained from interfering in the private, consensual sexual relations of married persons?"

The court began its essay on that subject with Foucault's description of the early 17th century as "a time of direct gestures, shameless discourse, and open transgressions." But the end of that century brought "the advent of the age of repression." Colonial America scrupulously enforced laws regarding adultery, sodomy, and fornication. But even in Colonial times, courts

did not peer into the marital bedroom — indeed, the law “regarded marriage as a complete defense to rape.”

In the eighteenth century, the court, citing Judge Richard Posner, found a “gradual though irregular decline in sexual repression.” By mid-century, men of property, “who as complainants, jurors and witnesses were the backbone of the legal system, had pushed aside the Puritan obsession with pressuring all sinners to acknowledge immoral behavior in the most public setting possible.”

But the nineteenth century witnessed the dawn of “the Victorian age of prudery” — including the view that masturbation was the cause of “feeble-mindedness, criminality, insanity,” and so on. Still, “sexual devices . . . became widely available,” often to treat women deemed “hysterical.” According to historian Rachel Maines: “Massage to orgasm of female patients was a staple of medical practice . . . from the time of Hippocrates until the 1920s, and mechanizing this task significantly increased the number of patients a doctor could treat in a working day. Doctors,” Maines explained, “inherited the task of producing orgasm in women because it was a job nobody else wanted.” The court went on to describe the development of the electromechanical vibrator, and noted that, in the nineteenth century no state outlawed distribution or use of genital-massaging machines.

Between 1873 and 1915, the so-called Comstock Laws (named for a crusading postmaster) regulated many areas of sexual conduct, but not the use of vibrators, which remained available through the Sears-Roebuck catalogue. (Comstock was more concerned with pornography and contraceptives.) In 1879, Massachusetts passed a law banning “instruments . . . for self-abuse,” but no prosecutions were brought.

In short, despite the onset of the Victorian era and the age of Comstock, “there was no accompanying widespread effort to enforce laws dealing with private, consensual, adult sexual activity.” By the 1920s, “the state withdrew almost entirely from the regulation of” such activity. The 1980 draft of the Model Penal Code “except[s] from criminal sanctions deviate sexual intercourse between consenting adults.”

The court noted that, in the late twentieth century, Senator Bob Dole appeared in TV commercials for Viagra, and vibrators were marketed in “airline magazines, *Cosmopolitan*, and such upscale mail-order catalogues as the Sharper Image.” According to Judge Posner, “prosecutions [for adultery] have become so rare as to be front-page news.” Finally, the court notes that, at present, only 11 states make sodomy a crime.

In short, the court found a “deeply-rooted” right to sexual privacy within adult, consensual relationships. Sexual devices, the court noted, are used by plaintiffs either within such rela-

tionships, or for masturbation — which, it noted, has never been a crime “in any state of the Union.” The court then found that Alabama’s statute “imposes a significant burden on the right of married and unmarried persons to sexual privacy” by limiting their access to such devices.

The Alabama legislature had stated its intention to regulate sexual devices as “obscene.” Adopting the logic of obscenity law, the court found that the statute was not “narrowly tailored” to meet the legislature’s objectives, which included “protecting children and unwilling adult viewers from exposure to open displays of sexual devices.” Here, the court noted that the Saucy Lady parties are advertised by word-of-mouth and take place behind closed doors. Neither, the court found, does the statute advance the state’s goal of regulating “autoeroticism, for its own sake, unrelated to marriage,” since plaintiffs asserted that sexual devices improved their sexual relations within marriage. The court noted that “the State of Alabama’s own University Health System Internet site advocates ‘applying a powerful vibrator on the glans of the penis’ to enable men who have suffered spinal cord injuries to ejaculate.”

And with that, the court declared the statute unconstitutional. Given its reasoning, a law preventing the sale of sexual devices to gay men and lesbians might have survived. *Fred A. Bernstein*

Michigan Appeals Court Reverses Damage Award in “Jenny Jones” Murder Case

A divided 3-judge panel of the Michigan Court of Appeals rejected a jury award of \$29 million to the surviving heirs of Scott Amedure, a gay man who was murdered by Jonathan Schmitz three days after the two men participated in a taping of the Jenny Jones television talk show during which Amedure confessed on camera that he had a crush on Schmitz. *Graves v. Warner Bros.*, 2002 WL 31387764 (Oct. 22).

The incident drew international media attention. Schmitz was convicted on murder and weapons charges and sentenced to 25–50 years in prison. Amedure’s heirs filed a civil action against Schmitz and the producers of the television show, seeking damages for the wrongful death of Amedure. They reached an undisclosed monetary settlement with Schmitz and went to trial against the television producers. The negligence claim against the producers argued that they violated a duty to Amedure, which they had assumed by involving him in the television show under circumstances where it was possible that Schmitz could react violently and do harm to Amedure.

The trial judge, rejecting a motion by the defendants to throw out the case, had ruled that it was up to the jury to determine whether a duty

was violated in this case. The trial judge instructed the jury to determine whether the producers violated a duty to Amedure and the jury, concluding in favor of the plaintiffs, awarded the damages. The trial judge rejected a post-trial motion to set aside the jury verdict as contrary to the law.

A majority of the appellate panel, characterizing this case as being about nonfeasance, that is, the failure of the producers to take reasonable steps to prevent harm to Amedure, concluded that there was no such duty under these circumstances. Generally, the law imposes no duty on anybody to prevent a person from committing a crime against another person. The law takes the position that criminal activity is generally deviant and unpredictable, and thus not foreseeable. The law does not impose duties to prevent unforeseeable occurrences.

One exception to this rule, created by statute, makes bartenders liable when they serve a visibly intoxicated person with alcoholic beverages and the customer then goes out and causes injury to others due to their inebriated condition. Another exception, created by the courts, is for situations where the parties have a special relationship that would justify imposing extra responsibility, for example, when parents are held liable for harm caused by children with whom they entrust weapons. The appeals court found that this kind of exception did not apply to the relationship between the television producers and Amedure.

Writing for the majority, Judge Richard Allen Griffin asserted, “Logic compels the conclusion that the defendants in this case had no duty to anticipate and prevent the act of murder committed by Schmitz three days after leaving defendants’ studio and hundreds of miles away. Here, the only special relationship, if any, that ever existed between defendants and plaintiff’s decedent, or between defendants and Schmitz, was that of business invitor to invitee. However, any duty ends when the relationship ends.” The court invoked precedents holding that shopkeepers have no duty to protect customers from being assaulted in their shops by other customers.

The court also rejected the argument that the producers had some obligation, when setting up this kind of ambush programming, to check the mental stability of the participants in order to avoid violent results. The court commented that there was nothing in the circumstances to alert the producers to the possibility of a violent reaction by Schmitz. Wrote Griffin: “This case presents no exceptional circumstances warranting departure from the general rule because the evidence at trial disclosed no ‘reason to expect the contrary’ here. Schmitz gave every appearance of being a normal, well-adjusted adult who consented to being surprised on the show by a secret admirer of unknown sex and identity. The evidence of record indicates that

nothing in Schmitz's demeanor, or in any of his interactions with the show, put defendants on notice that he posed a risk of violence to others."

The decision drew a vigorous, sometimes indignant-sounding, dissent from Judge William B. Murphy, who argued that the majority had mischaracterized the case and apparently misstated the facts, at least according to the testimony in the trial record. The issue was not whether the producers had a duty to prevent harm to Amedure and failed to act accordingly, according to Judge Murphy, but rather whether they had a duty to refrain from carelessly creating a set of circumstances in which harm to Amedure was possible. In this case, it seems, Schmitz actually was a rather unstable character, and his behavior prior to the show, according to Murphy, was such as to put the producers on notice that they were creating a volatile situation.

For one thing, when the idea of the show was broached to Schmitz, including that his secret admirer might be of either sex, Schmitz made clear that he did not want a secret admirer of the same sex. In addition, Murphy pointed out, Schmitz had phoned the producers so frequently in the days leading up to the show that they were becoming perturbed with him. Signs were there for anyone to see that trouble might be brewing, especially since the producers knew that their secret admirer was going to be another man.

Perhaps more significantly, Murphy pointed out that Schmitz's "personal history... included mental illness, alcohol and drug abuse, suicide attempts, anger management problems, and sexual identity concerns... Certainly," insisted Murphy, "reasonable men and women could differ on whether Schmitz's violent act foreseeably resulted from defendants' actions in manipulating and exploiting the lives, emotions, and sexual identities of individuals for the purpose of producing their television talk show." A jury could reasonably conclude that producers concocting such a tension-generating situation had some sort of duty that was violated in these circumstances.

In light of the large amount of money at stake and the strong dissenting opinion (which suggests that the majority of the panel has seriously misrepresented the factual record), it seems likely that a further appeal of this case to the Michigan Supreme Court is in the cards. A.S.L.

Gay Investors Lose Bid for Damages Due to Failed Plan for New Gay Sex Club

U.S. District Judge Loretta Preska (Southern District of New York), granted a dismissal motion in the case of two gay plaintiffs claiming discriminatory treatment at the hands of city agencies and a non-profit organization regarding their attempt to open a gay club in the Man-

hattan garment district. The slip opinion in *Dix v. City of New York*, 2002 WL 31175251 (Sept. 30), recounts allegations made both by and against the plaintiffs that seem unlikely to reach a fact-finder.

In November, 1999, Craig Dix and Paul Galluccio, "admittedly both homosexual males" in Judge Preska's words, incorporated Club 585 "for the purpose of operating a physical culture establishment servicing predominately, but not exclusively, the gay and lesbian community," and specifically, a "male clientele." They leased space at 585 Eighth Ave., and in May, 2000 filed a Special Permit Application with the Board of Standards and Appeals (BSA) for zoning compliance. At some point, Manhattan Community Board No.4 held a hearing where plaintiffs "disclosed their intentions to cater to a predominately male, gay and lesbian clientele." In July the Community Board informed BSA that it did not oppose the application, and that the attached plans looked appropriate to an establishment seeking to "improve or affect a person's physical condition" by exercise or massage.

In September BSA Inspector R. Sacklow issued a "Stop Work" order, alleging that construction on the leased space did not conform with BSA records. The space was padlocked, precluding plaintiffs from showing it to potential sublet tenants. Dix and Galluccio claim disparate treatment as compared to similarly situated applications based upon their sex, gender, gender identity and sexual orientation. Their takings-type claim under 42 U.S.C. 1983 is not "ripe" for review, however, because they withdrew their application before receiving a final decision on it from BSA. The pair argued that waiting for a final decision would be futile, but Judge Preska ruled that the Second Circuit's narrow futility exception does not apply to this case. Dix and Galluccio allege that Sacklow harassed their construction contractors at the premises and by telephoning them at home, inquiring into their immigration status, making threatening statements to their family members, and threatening contractors' future ability to work within New York's jurisdiction if they continued work on Club 585. Sacklow allegedly stated that the Department of Buildings' work permit was invalidated by the Office of Midtown Enforcement (Task Force).

Also in September, the Chief of Operations for the Task Force wrote to BSA opposing the application. The Task Force letter cites the installation of partitions, sauna, and shower rooms without approval, and alleges that the business address for Club 585, Inc. is 227 East 56th St., a physical culture establishment named East Side Sauna, itself the subject of numerous violations since 1977, including installation of steam room and sauna without permits and operating contrary to certificate of occupancy and without public assembly permit. In

1999, states the letter, Department of Health inspectors observed unsafe sex on the East Side Sauna premises. Dix and Galluccio assert that these statements are false. The Director of the Fashion Center Business Improvement District (BID) also wrote an opposition letter citing a needle exchange program, methadone clinic, parole board office, several adult entertainment establishments, drug dealing and other criminal activities as comparable barriers to revitalizing the district. BSA received at least 22 letters written by or at the behest of BID. Ultimately, BID asked BSA for a postponement so that it could thoroughly research its "understanding ... that this is being opened as a sex club." Judge Preska found that these communications by the Task Force and BID, made in the course of administrative proceedings, are privileged and cannot ground defamation claims.

Dix and Galluccio alleged generally that BID and the City Defendants, acting with "class-based discriminatory animus," conspired to deprive them of equal protection in violation of 42 U.S.C. sec. 1985." Noting other federal trial court decisions from New York State, Preska asserted that the claim was invalid because the U.S. Supreme Court does not recognize sexual orientation as a 'suspect classification' protected from discrimination. Preska's opinion is just another in an unfortunately long line of cases where the judges refuse to accept the clear implication of the Supreme Court's 1996 *Romer v. Evans* opinion, ... namely, that anti-gay discrimination does violate the Constitution." ("Not a Federal Case," by Arthur S. Leonard, *Gay City News*, Oct. 11)

Dix and Galluccio also alleged tortious interference with contracts entered by Club 585, but didn't plead with specificity. Having dismissed their federal claims, Judge Preska declined to exercise supplemental jurisdiction over their discrimination claim under New York City Administrative Code sec. 8-107(9), apparently a section which no reported authority has yet interpreted. BID argued that the plaintiffs' claims "mocked the judicial process" and sought attorney fees, which the Judge, citing complex issues in the case, denied. *Mark Major*

Openly-Gay Supervisor Held Not Liable for Workplace Harassment Based on Sexual Remarks

The U.S. District Court for the Middle District of Pennsylvania has ruled that an openly-gay male supervisor's sexually-oriented remarks to a female employee did not create a hostile work environment for the employee, even though she was subjectively offended by the remarks. *Ogden v. Keystone Residence*, 2001 WL 31299598 (Oct. 10, 2002). U.S. District Judge McClure granted motions for summary judgment from all defendants in the case, including the supervisor, Joseph Bergen, who was sued individually.

Keystone Residence is a non-profit agency serving people with mental disabilities in both residential and non-residential programs. Keystone hired Shirley Ogden in December 1997 to work as a Community Support Associate in Keystone's Hudson Street facility Harrisburg, Pennsylvania. Joseph Bergen was the Service Area Director for Keystone, having supervisory authority over a variety of programs at different locations including Hudson Street. Early in her employment, Ogden complained that she was being underpaid in comparison with a male employee, in light of the "hazardous" work that she was doing. She made this complaint to Bergen and her immediate supervisor, Program Director Pamela Covert, but Covert and Bergen rejected her complaint, pointing out that her pay level was based on the funding for the overall program. They also offered to transfer her to another program where she would be better compensated, but she declined the offer.

On June 4, 1999, Ogden wrote a letter to the head of the agency, complaining about a variety of problems with the program, and then a few days later resigned her job, based on her psychiatrist's recommendation. Ogden claimed that she was forced to quit because she could not put up with Bergen's sexual remarks, although she had never complained about these remarks to management while she was an employee. According to Ogden, an African-American woman, Bergen made sexually-oriented remarks in Ogden's presence throughout her employment at Keystone.

Ogden said that Bergen told her twice that he was gay, and once asked her to "set him up" with Pete Thompson, a Keystone employee who was an acquaintance of Ogden. Bergen would comment to Ogden about the appearance of male employees and about his sexual preference for black men, using sexually and racially graphic language. According to Ogden, Bergen told her that he "loved niggers" and that he was a "better bitch" than she was and could please a black man better than she could. He also allegedly told her that he "loved black dick." When testifying about these remarks, Ogden could not recall exactly when they were made or how often Bergen made them, only that they were frequent and that she found them upsetting and offensive.

After quitting her job, Ogden sued Keystone, Bergen, and other supervisors. The essence of her case was that she had been subjected to a hostile environment on the basis of race and sex because of Bergen's remarks. She speculated in her deposition testimony that Bergen spoke to her in the way he did because she was an African-American woman and he was a gay man sexually interested in black men, and that he would not necessarily have spoken this way to a male employee or a Caucasian employee.

Judge McClure accepted Ogden's rationale that these comments were directed at her be-

cause of her gender and race, but found that her complaint failed to satisfy the other criteria necessary for finding hostile work environment — most particularly that the comments were not shown to have been so severe and pervasive that a reasonable person in her position would have found the comments to have rendered the workplace intolerable. "While Bergen may have used inappropriate language in describing his preference for black men," wrote Judge McClure, "Ogden cannot cite the frequency of these comments. The record contains no indication that Bergen's behavior could be characterized as constant or even frequent. . . . Further, the harassment fails to satisfy the Supreme Court's 'severe or pervasive' standard. As stated, the conduct was not pervasive. Neither was it severe. Bergen's comments regarded primarily his own sexual preferences and had relatively little to do with Ogden herself. Bergen never touched Ogden, and he never propositioned her for a relationship. There is no indication that he was attempting to belittle or demean her."

The court also found, most importantly, that "there is no evidence that Bergen's comments unreasonably interfered with Ogden's work performance. Because Bergen's behavior was not of the type that would have detrimentally affected a reasonable person of the same sex or race in Ogden's position, the 'objective test' is not met, and Ogden's claim fails."

On top of all this, McClure noted that Ogden never complained to management about Bergen, even though she freely complained about other aspects of her pay and job. The harassment claim was first advanced in litigation, taking away from its credibility. The court granted summary judgment to Keystone and to Bergen as an individual defendant, and also rejected the charge that Bergen was guilty of intentionally inflicting emotional distress on Ogden, a state law claim that requires a finding of "outrageous misconduct" which the court was unable to find based on Ogden's factual allegations. Ogden had also named several other management officials as individual defendants, but summary judgment was granted in their favor as well. A.S.L.

Mississippi Appeals Court Gives Custody to Mom Despite Lesbian Affair

In *McDonald v. McDonald*, 2002 WL 31170188 (Miss. Ct. App., Oct. 1), a Mississippi man was so crazed about his wife turning out to be a lesbian that he defied visitation orders to the point of contempt of court in order to prevent his two younger children from seeing their mother. On October 1, the Mississippi Court of Appeals handed down its ruling in this divorce/custody case in favor of the wife, giving her custody of the children.

In April 1998, the McDonalds officially divorced. The chancellor granted the divorce to Howard because of his wife's adultery. Rosemary was having a sexual relationship with another woman. Howard was granted custody of the two youngest children, and Rosemary was granted custody of the oldest child. The original visitation decree prohibited Rosemary's visitation in the presence of anyone with whom she was having a relationship.

Later in the same year, Rosemary filed for modification, claiming that her husband was violating visitation orders. A chancellor was appointed and he established a visitation schedule to which both parties agreed in open court. Although he expressed reluctance, Howard did state his agreement. Later, when the order was sent to Howard, he refused to sign it, but this did not affect the legal validity of the order. At the next hearing, the chancellor found that Howard did everything in his power to interfere with court visitation orders.

On August 3, 1999, an order for temporary custody of the two minor children was granted to Rosemary. Howard appealed on three grounds. First he asserted that the chancellor did not have jurisdiction. Second, he claimed that an order was entered without his signature. And third, he was wrongly charged with contempt. Writing for the court, Judge Southwick stated that the special chancellor was properly appointed and did have authority to act in this case. Secondly, the order entered without Mr. McDonald's signature was agreed to by both parties in open court and that was sufficient agreement for the Court of Appeals. Lastly, the court noted that the record in this case was filled with instances of Mr. McDonald's behavior being deliberate.

The Mississippi Court of Appeals was not persuaded by any of Howard's arguments, finding no procedural irregularities in the prior orders, and that the special chancellor made appropriate findings for why he switched custody back to Rosemary. It was clear to the court that Howard's behavior was purposeful and the chancellor believed he was making a mockery of the legal system. Maybe he was acting out his frustration from discovering that he had lost his wife to another woman. Regardless of his motives, the court was not willing to ignore a man attempting to disregard the orders issued by a court. This case is hopefully a sign of the Mississippi courts being more sympathetic to a lesbian mom, as opposed to allowing a husband to act irrationally because he was outraged to have found out that his ex-wife was a lesbian. *Tara Scavo*

Federal Magistrate Holds No Title VII Protection for Harassed Gay Corrections Officer

To sustain a federal sexual harassment claim, a homosexual man must demonstrate that he

“acts, or is even perceived to act, in an effeminate manner,¹⁷⁰ according to U.S. Magistrate Judge Randolph F. Treece in *Martin v. New York State Department of Correctional Services*, 2002 WL 31133238 (N.D.N.Y. Sept. 26, 2002).

David Martin, a homosexual corrections officer at Coxsackie Correctional Facility in upstate New York, was constantly harassed by his co-workers over the last 10 years. Martin's co-workers regularly made comments to Martin's face such as “pervert,” “fucking faggot,” “cock-sucker,” the ever popular “fudge packer,” and “you gay bastard.” Martin's co-workers also left sexually explicit pictures in his work area and written statements and pictures on restroom walls. Martin complained about this behavior to his supervisors and, in response, he was retaliated against for filing a claim. Interestingly, Martin's lesbian co-workers were not subject to the same harassment because the corrections officers considered it “cool” to be a lesbian. Relying on the Second Circuit's decision in *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), Judge Treece found that sex means gender and Title VII does not cover sexual harassment claims based upon sexual orientation. Based on this, Treece held that to establish a gender-based sexual harassment claim, a homosexual would have to show evidence that he was overtly effeminate or, at least, perceived to be effeminate. However, because Martin failed to demonstrate any evidence of effeminate behavior, Treece wrote “the torment endured by Martin, as reprehensible as it is, relates to his sexual orientation,” not gender, and is not actionable under Title VII. Accordingly, the court dismissed Martin's Title VII claims. One can only imagine what would happen to an overtly effeminate gay man working as a corrections officer in an upstate New York prison. We would never get to the point of litigating his sexual harassment claims because he would be dead before he could bring them. The decision is another in a long series of outrageous decisions where the courts essentially say, if you are a man who acts like a woman we will treat you like a woman for purposes of sexual harassment law, but, if you are a masculine gay man, don't come crying to us when you get harassed at work. Not only does this leave a majority of gay men without any protection from sexual harassment under Title VII, but it continues the stereotype that females are the weaker sex and a gay man who acts effeminately is more analogous to a female than a male. This reasoning promotes the stereotype that women are the weaker sex. Clearly, since the lesbian correctional officers are considered “cool,” this is not the case. This nonsense has to stop. Gender and sexual orientation are not the same. Gay men are not sexually harassed because they act effeminately. A gay man is harassed as soon as one of his co-workers perceives that he engages in gay sex. It is the image

of the sexual act itself, and not the overt behavior of the gay man, that leads to the sexual harassment. Maybe someday the courts will figure this out. *Todd V. Lamb*

Federal Housing Laws Do Not Bar Anti-Gay Discrimination

While noting that anti-gay epithets could contribute to a hostile housing environment, the federal district court in Kansas reiterated that sexual orientation discrimination is not actionable under the Fair Housing Act or 42 U.S.C. sec. 1982. *Smith v. Mission Assoc. Ltd. P'ship*, 2002 WL 31260439 (Oct. 4, 2002).

As part of an ongoing pattern of harassment, the on-site property manager of the apartment complex involved in the case repeatedly called one of the plaintiffs gay, encouraged other gay tenants to “hit on” him, and wrote notes on the blackboard in the leasing office suggesting that he was gay. But District Judge Robinson found that there was no evidence that the discriminatory treatment was “because of sex.” Therefore, the court reviewed the case of hostile housing environment as one based solely on race, and the homophobia of the situation counted for nothing. *Sharon McGowan*

Federal — District of Columbia — A federal magistrate who had previously helped to mediate a settlement agreement in a dispute between a transgendered federal prisoner and prison officials concerning treatment issues has decided to grant a recusal motion filed by the government in response to the magistrate's new assignment to adjudicate an ongoing dispute about the meaning of the settlement agreement, concluding that acting as a judge and recommender of a decision in the current dispute would present a conflict in the event that the federal district judge might call the magistrate as a witness should the matter end up being litigated before the judge. *Black v. Kendig*, 2002 WL 31422810 (D.D.C., Oct. 28, 2002).

Federal — Kansas — An Oct. 25 decision by U.S. District Judge Robinson (D. Kansas) in *Budenz v. Sprint Spectrum, L.P.*, 2002 WL 31422891, findings that the male sexual harassment plaintiff's failure to provide evidence that his supervisor was gay fatally undermines his quid pro quo harassment claim. Larry Budenz claimed that his supervisor, Roger McNeill, subjected him to unwanted regular shoulder massages, even after Budenz claims he asked McNeill not to touch him that way. Budenz also claimed that McNeill made various remarks alluding to “alternative life style” friends and publications, which Budenz construed to support his belief that McNeill desired to have sex with Budenz, even though he never came out and asked for it or went any further than the shoulder massages. Budenz claimed also that when he finally made a formal complaint after suffering these massages for

many months, he was retaliated against in the form of false negative employee evaluations and denials of promotions. Granting summary judgment to the employer on Budenz's harassment complaint, Judge Robinson found that there was only speculation in the record that McNeill was gay, an assertion that McNeill stoutly denies. However, Robinson refused to grant summary judgment on the retaliation claim, finding that Budenz had at least made out a prima facie case and that a reasonable jury could find that he suffered negative consequences for making a complaint about the shoulder massages (making a complaint would be a protected activity), such that he is entitled to trial on that claim. The court's insistence on the necessity of Budenz providing proof of McNeill's homosexual orientation was rooted in its reading of *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), in which Justice Scalia wrote for the unanimous Supreme Court that a same-sex harassment claim would require proof either that the alleged harasser was gay, was biased against the presence of members of his own sex in the workplace, or treated men in the workplace differently from women.

Federal — New York — In what was described in press reports as a “landmark” ruling, U.S. District Judge Charles Sifton (E.D.N.Y.) Awarded nearly \$200,000 in legal fees to three transsexuals who had sued to protest discrimination against them in a Brooklyn Toys “R” Us store. Noting that this was “the first case in which the rights of transsexuals were asserted and vindicated” under public accommodations laws, Judge Sifton concluded that “This is one of those unusual freak circumstances in which attorneys' fees should be awarded,” also noting that “this is the first public accommodations case to go to trial under the New York City human-rights law.” A jury ruled in favor of the plaintiffs after a two-week trial held in June, 2002. LeGaL Member Thomas Shanahan represents the plaintiffs, Donna McGrath, Norbert ‘Tara’ Lopez, and Robert ‘Tanya’ Jinks (as the names were reported in the *N.Y. Post* on Oct. 31). Toys “R” Us announced it will appeal the decision.

California — California courts have rejected a novel defense raised by a gay organization in a same-sex harassment case brought by a former employee against its executive director. In *Brown v. Professional Organization of Women in Entertainment Reaching Up*, 2002 WL 31423624 (Cal. App., 2nd Dist., Oct. 29, 2002) (not officially published), Karen Pearson Brown is claiming that she was subjected to sexual harassment by her boss, Stacy Codikow, the executive director of this lesbian-empowerment organization. According to the opinion for the court of appeal by Judge Vogel, “Brown alleges numerous unwelcome conversations involving Codikow's talking about her own sex life, inquiring about Brown's sex life,

and inquiring whether Codikow and Brown would have sex,” and the complete also alleges that the organization, POWER-UP, should be held liable for Codikow’s misconduct. The defendants filed a motion to strike the complaint under Cal. Code of Civil Proc. Sec. 425.16 (the so-called SLAPP statute), alleging that the complaint was brought to stifle the free speech of Codikow. Affirming the trial judge, the court of appeal found that the SLAPP statute is not applicable to a hostile environment sexual harassment claim. The statute was enacted to combat “lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” The court found that there is “nothing in Brown’s complaint to suggest Codikow was acting in furtherance of the exercise of a constitutional right of petition or free speech in connection with a public issue or an issue of public interest. The complaint involves only private conversations about Codikow’s sex life and her inquiries about Brown’s sex life... Merely showing that Codikow’s ‘speech’ is the basis for Brown’s complaint is *not* enough to sustain defendants’ initial burden to show the SLAPP statute applies.”

District of Columbia — The District of Columbia was one of the earliest jurisdictions in the U.S. to ban discrimination in employment on the basis of sexual orientation, but the existence of such a ban is to little purpose if it is not enforced. The Oct. 10 decision by the D.C. Court of Appeals in *Boulton v. Institute of International Education*, 2002 WL 31357170, illustrates the difficulty of enforcing such statutory rights. Richard C. Boulton claimed he was discharged due to his sexual orientation, had been subjected to other instances of sexual orientation discrimination prior to his discharge, and that the employee handbook conferred contract rights upon him that were violated by his discharge as well. The employer took the position that all his complaints except the discharge were time-barred, that as an at-will employee he had no contractual rights based on the handbook, and that he was discharged due to elimination of his position. Since Boulton presented no direct evidence of discriminatory intent, he had to rely on alleging the elements of a prima facie case to raise an inference of discrimination. The court found that he failed to do that, since one element in a discharge case is to be able to allege that the employer hired somebody else to fill the plaintiff’s position or was advertising for applicants. In the absence of direct evidence of discriminatory intent, a court will not infer such intent from the mere fact of discharge of a member of a “protected group” where the employer does not then fill the position with a different person. The court also upheld the employer’s content that other allegations of discrimination were time-barred, finding that they did not relate to the discharge

incident so as to create a continuing pattern. And, it found that the disclaimer in the employee handbook rendered unenforceable the promise contained therein that employees with seniority subject to layoff would be found other positions with the employer.

Florida — Sore losers? Proponents of repeal of the Miami-Dade gay rights law have filed a court challenge to the outcome of the election, which went against them by a narrow margin. They claim the voting machines were rigged and the overall process discriminated against people living in areas where there was great support for the repeal measure. The suit was filed on September 27. *South Florida Sun-Sentinel*, Oct. 1.

Massachusetts — Justice Francis X. Spina of the state supreme court dismissed a petition by Massachusetts Citizens for Marriage, which sought to compel state Senate President Tom Birmingham to reconvene a joint constitutional session of the legislature in order to take up a proposed ballot initiative to ban same-sex marriages. The MCM was outraged that Birmingham had stage-managed a prior session to have the measure tabled so it could not be placed on the general election ballot. A lawsuit is pending before the Massachusetts courts seeking a declaration that the denial of marriage to same-sex couples violates the state constitution’s equality guarantees. MCM was seeking to moot the lawsuit by amending the constitution before the case can be decided. *Associated Press*, Oct. 10.

Montana — The Montana Human Rights Commission has rejected a claim that the state university violated the state constitution by refusing to extend health benefits to same-sex partners of its employees. Carla Grayson and Carol Snetsinger and their partners, who filed the discrimination claim, are expected to move their dispute to the state courts, although they have been the targets of violent attacks since the case was filed last winter. *Billings Gazette*, Oct. 19.

New York — One criticism occasionally made of the N.Y. tenant succession regulations is their apparent emphasis on evidence of financial comingling in order to establish that unmarried life partners are members of each other’s “family,” the criticism being that poor people are unlikely to have much of this kind of evidence. In *Diaz v. Perine*, NYLJ, 10/9/2002, p. 26 (N.Y. Supreme Ct., N.Y. Co., Shafer, J.), the court found that other, non-economic evidence, such as affidavits from neighbors, could serve to prove that an elderly man and woman and lived together in her Mitchell-Lama subsidized apartment as domestic partners.

New York — When the N.Y. Court of Appeals ruled in *City of New York v. Dezer Properties, Inc.*, 710 N.Y.S.2d 836 ([memo], May 4, 2000), that it would not allow the city to enforce its adult-uses zoning ordinance against business that were in compliance with a regulation that

defined adult uses as businesses that devoted more than 40% of their physical space to sexually-oriented activities and materials, the Giuliani Administration’s response was to propose new regulations to replace the quantitative test with a more qualitative test for classifying businesses. The proposal was adopted during the final months of Rudolph Giuliani’s administration, and the new regulations were set to go into effect Nov. 1, but business owners had filed suit to challenge their constitutionality. On Oct. 29, N.Y. Supreme Court Justice Louis York, before whom the challenges were pending, finding that serious state constitutional questions were raised, extended a temporary restraining order to stop the new regulation from going into effect, pending ultimate disposition on the merits of the claim. The city promptly filed an emergency appeal with a judge of the appellate Division, but York’s TRO was upheld. Similar challenges are also pending before U.S. District Judge Allen G. Schwartz (ironically, a former N.Y.C. Corporation Counsel), in the Southern District of New York, but these are brought under the 1st Amendment of the federal constitution. The attorneys for the plaintiffs argue that the new regulation was adopted in the absence of any study or evidence showing the “secondary effects” of adult businesses in the city, which would be required to provide the basis for this draconian zoning restriction based on the expressive content of a business’s activities, goods and services.

Ohio — In *State ex rel. Moore v. Malone*, 775 N.E.2d 812 (Ohio, Sept. 17, 2002), the Ohio Supreme Court rejected a petition for a writ of mandamus brought by Tracie B. Moore, a resident of Cleveland Heights, who is part of a group seeking a referendum to overturn the city’s domestic partnership benefits ordinance. The city charter requires that a petition have valid signatures from 15% of “the electors of the City” from the last election of city officers. The city clerk found that the petitions submitted by Moore and her supporters fell short by a few hundred signatures. Moore observed that she was given conflicting numbers from different sources about the number of electors, based on a series of misunderstandings of how to determine the appropriate number. The court, siding with the city clerk, found that all qualified, registered voters should be counted for this purpose, not just those who actually voted. As a result, the petitions had insufficient signatures to put the repeal question on this November’s ballot.

Oklahoma — The Oklahoma City council voted 8–1 on Oct. 8 to accept a proposed settlement of a lawsuit against the city brought by the Cimarron Alliance, a gay rights group, which was protesting the refusal to let it display gay pride banners on utility poles in conjunction with an annual gay pride march. In a preliminary ruling, a federal judge had opined that the

group had a valid First Amendment claim against the city. Under the terms of the settlement, the city must allow the group to display its banners for next summer's parade, pay nominal damages, and wait until January 14 until it begins consideration of changing or repealing the ordinance governing such displays. *The Oklahoman*, Oct. 9. A.S.L.

Criminal Litigation Notes

Federal — Montana — A divided panel of the U.S. Court of Appeals for the 9th Circuit upheld a sharp downward departure from the federal sentencing guidelines for a man who pleaded guilty to two counts of possessing child pornography in *United States v. Parish*, 2002 WL 31324065 (Oct. 18, 2002). What is newsworthy about the case is not so much the reasons for the departure, but the nature of the offense itself in this case. It seems that when one visits a website on the internet and views graphic images on one's computer screen, files are automatically downloaded into a temporary internet cache folder on the hard drive and remain there for some period of time. Robert Parish apparently visited many internet sites that showed child pornography while using a laptop issued to him by his employer. In May 1999, he was discharged by the employer for abusing his travel expenses and spending too much time browsing the internet when he was supposed to be working. After he surrendered his laptop, an employee assigned to clean out the hard drive discovered files that appeared to contain child pornography, and the employer, after consulting legal counsel, turned the laptop over to the local police department, which in turn sent it to the FBI for analysis. The FBI found that over a six-month period Parish had routinely visited numerous child porn sites, and that about 9,000 sexual images of children were stored in the temporary internet cache folder. Parish was prosecuted for violating a federal criminal statute on possession of child pornography, and pled guilty to two felony counts. Apparently, this fact pattern is viewed as violating the statute, even though the downloading of files is inadvertent on the part of the person who visits a porn site. So, in effect, convictions on facts like these extend the apparent meaning of the statute: it is not only a federal offense to possess these files, but also, in effect, a federal offense to view child pornography on a web site, even when one does not affirmatively download the contents. (The grounds for downward departure were (1) that Parish's offense fell outside the "heartland" of conduct covered under the statute, because he did not affirmatively download the files, and (2) that the trial court evaluated Parish as particularly susceptible to abuse by other prisoners due to his stature, naivete and the nature of his offense. The partial dissenter objected to taking the last ground into account,

observing that there is a circuit split on the issue and arguing that this panel comes down on the wrong side of the circuit split, because the nature of the offense is already taken into account in computing the position of the offense within the guidelines.)

Federal - New York — In an opinion published in the *New York Law Journal* on Oct. 22, U.S. District Judge Robert Patterson (S.D.N.Y.), vacated a guilty plea for receiving child pornography under 18 U.S.C. sec. 2252A(a)(2)(a), finding that when the defendant, Brian Reilly, pleaded guilty, he had not been asked whether he knew that the materials he received were made using real children, as opposed to being computer-generated "virtual" child pornography. *United States v. Reilly*, Oct. 17. Noting that he had accepted the guilty plea prior to reading the Supreme Court's recent decision in *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389 (2002), in which the Supreme Court ruled that the exception created to 1st Amendment protection for child pornography did not apply to such "virtual" pornography, because the reason for the exception — preventing real children from sexual exploitation — was inapplicable, Patterson opined that it was possible that a defendant under the statute who did not know the origin of the child pornography he was receiving would lack the necessary state of mind for criminal culpability. Patterson noted that during the plea process, the government had never claimed that it would prove that Reilly knew he was receiving "real" child pornography, but that in light of the Supreme Court precedents, a defendant in such a case would have to admit "that he knew the visual depictions were of actual minors" in order to assure that he was not being punished for accessing material whose possession is lawful. Harking back to a prior interpretation of the federal statute in issue, Patterson observed that the Supreme Court has ruled that a defendant prosecuted under the statute, which bans "knowing possession," must be shown to have known that he possessed contraband images. He rejected the government's argument that the "knowing" requirement should be construed only to require the government to prove that the defendant knew the images he possessed appeared to be of minors and were sexually explicit. Indeed, Patterson concluded, "a defendant in possession of materials containing visual depictions of real minors engaging in sexually explicit conduct must know that real minors were the subject of the visual depictions." Should Patterson's interpretation be followed, the current federal law on possession of child pornography could prove extremely difficult to enforce.

California — The California Court of Appeal, 4th District, upheld a sentence of 19 years to life imposed on Julio Salazar Estrada for the knifing murder of Dennis Morgan in July 1997. *People of California v. Estrada*, 2002 WL

31319735 (Cal. App., 4 Dist., Oct. 17, 2002) (not officially published). Estrada was hitchhiking when Morgan picked him up and took him to Morgan's parents' house, where he served Estrada a drink and, according to Estrada, asked him to engage in oral sex. (At trial, Estrada presented evidence from other men who recounted similar incidents in which Morgan had served them drinks and asked them to engage in oral sex, and Morgan's ex-lover also testified during a pretrial hearing that Morgan would from time to time bring home hitchhikers.) Estrada resisted Morgan's increasingly insistent sexual demands, and finally claims that he used a knife when Morgan would not allow him to leave the house. Estrada then took the car keys and drove off in Morgan's car. He was subsequently apprehended in possession of the car. He was tried on a first-degree murder charge, for a murder committed during a robbery, but the jury evidently believed the robbery was an afterthought, because it convicted him of second degree murder and auto theft. On appeal, Estrada alleged jury irregularities and objected to the introduction of certain evidence about his criminal past and exclusion of certain evidence about Morgan's past. The court concluded that the trial court had ruled correctly on just about everything that counted, and that some minor errors were not outcome determinative.

New York — A prominent fugitive in a controversial gay-bashing murder has been found dead. Esat Bici, who was convicted of the anti-gay murder of Julio Rivera of Queens, New York, won a technical reversal of his conviction from the New York appellate division and then fled the jurisdiction and has been a fugitive since 1996, so he was never retried. The Appellate Division decision cast no doubt on his guilt, but noted that his constitutional rights to a fair trial had been violated by the judge's in camera questioning of potential jurors concerning their attitudes and experiences with respect to homosexuality. Bici was killed Oct. 2 in Tijuana, Mexico, in a drug-related shooting. *Newsday*, Oct. 13. A.S.L.

Legislative Notes

Florida — The Palm Beach county school board voted 5-1 on Oct. 14 in support of a revised policy on harassment and discrimination that would add "sexual orientation" to the list of categories already included under the policy. A final vote on the policy was expected to take place on Nov. 18. Teachers in the school district are already protected from discrimination under the collective bargaining agreement with the Classroom Teachers Association, but the new policy would extend such protection to students, administrators, and other schools personnel. *South Florida Sun-Sentinel*, Oct. 15.

Illinois — The Bloomington City Council voted 6–2 on Oct. 28 to approve an amendment to the city’s human relations law to add protection against discrimination on the basis of sexual orientation, defined to include homosexuality, bisexuality and heterosexuality. Religious and other “faith-based organizations” were exempted from complying with respect to this characteristic. The vote was a major turnaround, since as recently as 1996 the Council had rejected a similar proposal by a vote of 6–1. *Bloomington Pantagraph*, Oct. 30. ••• On Oct. 7, the Decatur, Illinois, City Council passed an amendment to its civil rights law adding sexual orientation to the list of prohibited grounds. The vote was 6–1. *Chicago Tribune*, Oct. 8.

New York — Expanding on a gubernatorial executive order that had authorized benefits for surviving same-sex partners of September 11, 2001, terrorism victims, the New York State Crime Victims Board has decided to recognize same-sex partners of crime victims on the same basis as spouses of crime victims in making compensation decisions, according to an announcement circulated by the New York Gay and Lesbian Anti-Violence Project.

North Carolina — The city of Durham will provide health benefits to domestic partners of city workers, pursuant to a 4–3 vote by the City Council on Oct. 7 that was supported by Pro Tem Mayor Lewis Cheek, who changed his decisive vote from a prior rejection of the policy. In the prior vote, Cheek had stated lack of any philosophical opposition to such benefits, but said at that time that he thought the council had insufficient information on which to enact the policy. In the interim, Cheek said, the council had received information substantiating the cost of the policy change would be negligible and assuaging concerns about fraud through the addition of certain provisions in the proposal. Cheek said that it was now “a matter of fairness” to treat traditional and non-traditional families equal in the sphere of public benefits. *Associated Press*, Oct. 8; *Raleigh News & Observer*, Oct. 8.

Oregon — The Portland City Council voted 4–0 to notify various charities that they will be given until 2004 to come into compliance with the non-discrimination policies of the city, which include sexual orientation as a prohibited grounds of discrimination. The vote was provoked by continued support for the Boy Scouts by the local United Way. The Multnomah County Board of Commissioners has also given an ultimatum to the United Way. If the Boy Scouts don’t change their anti-gay exclusionary membership policies by 2004, and the umbrella charities continue to donate money to the BSA, then the city and county will withdraw from campaigns for employee donations to the charities. *Portland Oregonian*, Oct. 31. A.S.L.

Law & Society Notes

A founder of the gay rights movement in the United States passed away to considerable media attention on October 24. Harry Hay, a co-founder of the first Mattachine Society chapter in Los Angeles in 1950, was 90 years old. He had a background as a Communist Party member, a labor organizer and a musician when he conceived the idea with a few friends to start a secretive discussion group about their homosexual identities, and he is credited with the initial insight to conceive of homosexuality as a defining characteristic for a political minority group and to campaign for civil rights protection on that basis. His radical background led to his subsequent replacement as more “moderate” individuals began to join the organization and feared the “subversive” label that might come from Hay’s continued involvement. He went on to start a new organization, the Radical Faeries, and continued as a gadfly and observer of the efforts of the gay rights movement. With his partner of 40 years, John Burnside, he emerged as a role model for long-term partner commitments in the community, although, unconventional almost to the last, he and Burnside delayed registering their domestic partnership until weeks before Hay’s death. Hay and Burnside were featured in the late-1970s documentary film, “Word Is Out.” *New York Times*, Oct. 25.

The lack of coverage for “gender identity” in hate crimes laws was brought forward into the public conversation during October as the result of the murder of a 17-year-old cross-dressing man from Newark, California, at a high school party. News reports noted that persons of diverse gender identity, who probably need protection from hate crimes as much if not more than any group currently protected, enjoy such protection by statute in only five states and the District of Columbia. The problem is particularly acute from gender non-conformists in the nation’s high schools. *San Francisco Chronicle*, Oct. 23.

The U.S. Defense Department’s drive to gain access to law school placement facilities for recruitment to the Judge Advocate General Corps continued to make newspaper headlines as several more major law schools, including Vanderbilt and Columbia, fell into line. At Yale Law School, where no recruitment is allowed on campus, the JAG recruiters contented themselves with newly-acquired equal access to use the services of the placement office to schedule interviews off-campus, the same as other employers, while Yale announced that it was planning to file suit challenging the military’s claim to access. *Hartford Courant*, Oct. 5; *Tennessean-Nashville*, Oct. 4.

Mike Taylor, a Republican candidate for the U.S. Senate against Democratic incumbent Max Baucus, officially withdrew from the race

on Oct. 10, stating that a Democratic Party advertisement suggested to voters that he was gay. Taylor, who is married, had worked for a time as a hairdresser earlier in his career, and he claimed that the depiction of him in that job would communicate a message to voters about his sexuality. Talk about trading on stereotypes! Democratic spokespersons disclaimed any intent to communicate such a message, and suggested that Taylor, who was far behind in the polls, was looking for a way to drop out of the race. The advertisement was aimed at charges that Taylor, a state senator, had been involved in a scam involving student loan money when he was running a Colorado beauty school during the 1990s. *Chicago Tribune*, Oct. 11. Then, a few weeks later, reacting to press comment about the withdrawal, Taylor suddenly announced that he would resume active campaigning. His name had never been removed from the ballot, since he had withdrawn too close in time to the election. *Chicago Tribune*, Oct. 23.

The sudden death of Senator Paul Wellstone, a strong gay rights supporter, in an airplane crash less than two weeks before the election, led the Minnesota Democratic Party to nominate former Vice President and Senator Walter Mondale as replacement candidate. In 1984, Mondale was the first major party presidential candidate ever to address a gay political dinner, a Human Rights Campaign Fund event held at the Waldorf Astoria Hotel in New York City. Although Mondale did appear and spoke generally about human rights, he never used the words gay, lesbian or homosexual during his speech, at which your editor was present. One presumes he would do so today.

What might have struck Eastman Kodak’s human resources department as a routine disciplinary matter has blown up into a cause celebre for the anti-gay religious right. In connection with National Coming Out Day, Kodak had sent email to all its employees stating the company line in support of diversity and toleration, and urging particular support for Kodak employees who might decide to be open about their sexuality. Rolf Szabo, a 20-year Kodak production worker, responded in an email that went to about 1,000 co-workers, stating he found the pro-gay email to be “disgusting and offensive” and asking not to be sent similar messages in the future. Kodak officials responded by discharging Szabo when he refused to apologize for sending his email. Szabo brought the matter to the attention of such staunch civil libertarians as Rev. Jerry Falwell and Rev. Louis P. Sheldon, who publicly criticized Kodak for violating the free speech rights of its employees and attempting to enforce “political correctness.” This brought a rebuttal from Kodak, that Szabo was not dismissed for his opinions, but rather for broadcasting a statement to 1,000 employees that Kodak felt

could create a hostile work environment for lesbian and gay employees. These arguments are sure to continue. The Rutherford Institute, a religious anti-gay litigation outfit, has offered to represent Szabo in suing Kodak, but only if his views were religiously-inspired! *Wall Street Journal, Rochester Democrat & Chronicle*, Oct. 30.

Principled stand or corrupt bargain? Just days before the Empire State Pride Agenda, New York State's lesbian and gay lobbying group, was to make its endorsement decision in the gubernatorial election, the Republican State Senate Majority Leader, Joseph Bruno, announced that a vote would be held in the Senate on the Sexual Orientation Non-Discrimination Act, which has been hanging fire for many years — but in the lame-duck session to be held after the election. Incumbent Republican Governor George Pataki has been promising passage of the bill (which passes the Democratic-controlled Assembly by substantial margins with bipartisan support every session) for several years now, and seemed to have made a very firm commitment a year ago that it would be passed during this session. In any event, despite cries of foul from gay Democratic politicians who are all supporting State Comptroller Carl McCall's campaign, the ESPA announced its endorsement for Pataki's reelection. Principled stand or corrupt bargain? You decide.

Esera Tuaolo, a former professional football player, became the third in his sport to "come out" as gay. As with his predecessors, David Kopay and Jerry Smith, Tuaolo did not come out publicly until after he had retired from active competition. Tuaolo had planned to come out in a pre-taped television interview, but news leaked and the story was featured in many media outlets before the interview was broadcast on Nov. 1. He stated that he could have continued playing professional football for more than 9 years, but that he became tired of hiding his sexuality and so took an early retirement. He and his partner have adopted children and he felt it was time to be open about his identity. "I want my children to know when they grow up that their father is comfortable with who he is and we don't have anything to hide. It's like a mountain was lifted off my shoulders when I came out," he said. "But then I jumped on the scale this morning and I'm still 310 pounds." Tuaolo commented that he hoped other former pro athletes would come up, but that he did not advise active players to do so. "I don't think the NFL is ready for an openly gay player," he said. *Associated Press*, Nov. 1.

San Francisco's Tax Assessor, Doris Ward, announced that, with the support of City Attorney Dennis Herrera, she was adopting a new interpretation of the tax laws to exempt the joint real property owned by registered domestic partners from the automatic reassessment and

tax bill that would otherwise occur as a result of the death of a partner. One of the perquisites of marriage under California law is that married couples are exempt from such reassessment. The reassessment and subsequent tax bill can present a substantial financial burden to surviving same-sex partners of couples that had substantial joint real estate holdings. *Associated Press*, Oct. 13.

American Family Insurance, with close to 8,000 employees nationwide, has announced that beginning in 2003 its health plan options will include domestic partners benefits for both opposite-sex and same-sex couples and dependent children. The company projected that the new benefit would not have major cost implications for its overall benefits costs, which are expected to rise 16 percent this year for all employees due to premium increases. *Madison Capital Times*, Oct. 22.

The recent decision by the *New York Times* to print same-sex commitment ceremony announcements has inspired various other newspapers to follow suit. The *Boston Globe*, which is owned by the New York Times Company, made its own independent decision on this, announcing on Sept. 29 that it would carry same-sex commitment announcements. On Oct. 27, the Associated Press reported that the *Oregonian*, Oregon's largest newspaper, will begin accepting such announcements. The report noted that several Oregon counties have established domestic partner registration systems. The *Columbus Dispatch*, the daily newspaper in Ohio's capital city, made a similar announcement on Oct. 20. A.S.L.

International Notes

Australia — The government in the state of Tasmania is proposing that gay couples be legally allowed to adopt children, and that they be able to register their domestic-partnerships with the Office of Births, Deaths and Marriages. If the measure is approved in the legislature, Tasmania will be the second state in Australia to have allowed joint adoptions by gay couples, as this became possible in Western Australia earlier in 2002. But Tasmania would be the first to establish a state registration system for same-sex couples. *News.com (Australia)*, Nov. 1.

Belgium — Belgium took another step towards same-sex marriage when the Senate Justice Commission voted 11-4 to support a bill that would grant same-sex couples the same legal rights that heterosexual couples attain through marriage. The bill needs to be passed by both chambers of the parliament before it can become law. *Datalounge*, Oct. 25.

Europe — The Commission of the European Communities has awarded a contract to Leiden University in the Netherlands to establish a European Group of Experts on Combating Sexual Orientation Discrimination to advise the

European Commission on enforcement of Directive 2000/87/EC on equal treatment in employment. Dr. Kees Waaldijk, a member of the faculty of law of the University, will coordinate the activities of the group with the assistance of Mr. Matteo Bonini-Baraldi, an Italian lawyer. The group will include professors and practicing lawyers from several different member countries. Dr. Waaldijk is an occasional contributor to *Law Notes* on legal developments in The Netherlands.

France — Bertrand Delanoe, the openly-gay Mayor of Paris, survived an assassination attempt by Azzedine Berkane, described by police as a "deranged homophobe". Berkane stabbed Delanoe in the stomach in City Hall during an all-night social event. Delanoe was hospitalized with injuries that proved serious but non-fatal.

Israel — The Knesset, Israel's parliament, has its first openly-gay member, Uzi Even, a university chemistry professor and gay rights activist who was designated by the Meretz Party, a leftist peace party, to fill a vacancy created by the retirement of another member of the party. Even had been on the Meretz list at the last legislative election, but was not high enough on the list to win a seat at that time based on the number of seats that Meretz won in that election. Even is generally credited with having persuaded the Knesset to ban anti-gay discrimination in the Israel Defence Forces, having testified on this issue after his own discharge as an intelligence officer in 1983 on account of his sexual orientation. Even was scheduled to take the oath of office on November 4. *New York Times*, Oct. 16.

Israel — On Oct. 2, the Inner Council of the Tel Aviv-Jaffa Municipality approved a council decision to recognize domestic partners whose marriages were not sanctioned by the Chief Rabbinate, including same-sex couples, for purposes of "municipal deductions" (or special discount rates) that are accorded to families. The main beneficiaries of this move will be opposite-sex couples who go abroad to marry because their marriages would not be performed by the Orthodox rabbis who control legal marriage in Israel, but same-sex couples are swept in by the egalitarian nature of the reform. According to New Family, a non-governmental organization that lobbies for the rights of unmarried couples, most such couples in Israel live in the Tel Aviv metropolitan area, which is generally seen as the most socially liberal part of the country. *Jerusalem Post*, Oct. 4.

South Africa — Reversing a ruling of the High Court, the South Africa Constitutional Court ruled by 6-5 vote that provisions of the Sexual Offences Act 1957 criminalizing prostitution do not violate the Constitution. The Constitutional Court also affirmed the High Court's ruling upholding the conviction of some of the defendants for running a brothel, finding the

criminalization of such commercial sex activity to be constitutional. The ruling in *Jordan and others v. State*, Case CCT 31/01, announced on October 9, marks an unusual setback for sexual libertarians in a court that has been noteworthy for protecting the rights of sexual minorities. In partial dissent, Justices O'Regan and Sachs accepted the argument that the prostitution provision constitutes unfair sex discrimination, noting that the overwhelming majority of sex workers are female and that their patrons, almost all male, are not subject to criminal penalties. In an editorial published on October 15, *South Africa Business Day* observed that the law commission is studying revisions of the Sexual Offences Act and has recently called for comment on the wisdom of retaining criminal penalties for prostitution. The editorial notes that in a country battling with a severe HIV epidemic, continued criminalization of prostitution makes little sense, as it drives the practice underground and makes it difficult to reach sex workers with safe sex information and appropriate barrier contraception supplies.

South Africa — At a hearing on Oct. 16 in a pending case in which a lesbian couple is seeking a marriage license, it appeared that the judge was not inclined to rule on the merits of their claim. Judge Pierre Roux found technical fault with the notice of motion brought by the plaintiffs, and subsequently gave judgment against the couple. An appeal would have been necessary, in any event, had the judge ruled in their favor on constitutional grounds, for the result to be binding on the government. In the meantime, the fond wishes of Adriaana Fourie and Cecelia Johanna Bonthuys to be legally recognized as a married couple are still “on hold.”

United Kingdom — The House of Lords voted to block a measure that had passed the House of Commons that would have allowed unmarried couples, including same-sex couples, to adopt children. The vote was 196–162 on October 16. An official spokesperson for the government of Prime Minister Tony Blair announced that the government will continue to seek enactment by reviving the measure in the next Parliament. The Lords can delay enactment of a law, but cannot finally block it if it passes several times in the Commons. *Reuters*, Oct. 16.

United Kingdom — The British Home Office has granted asylum petitions from two gay Jamaicans, who alleged that their lives were endangered if they remained in Jamaica. The applications were supported by evidence of official oppression and severe cultural oppression, as well as criminal laws prescribing stiff penalties for homosexual conduct. The Office is considering many other petitions from gay Jamaicans, under a recent House of Lords ruling that included homosexuals as being within “particular social groups” who may be qualified to seek asylum in the U.K. based on fear of persecution. *London Sunday Times*, Oct. 13.

United Kingdom — Documents made public under a 30-year-rule caused a small press sensation by revealing that the British Navy had undertaken a “secret crackdown” on gays in the service as a result of an investigation sparked by the discovery of “scores of sexually explicit photographs of British sailors” in an apartment in Bermuda that was apparently being used as a gay brothel. The documents revealed that internal studies persuaded Naval command personnel that a substantial proportion of the sailors in the Navy were engaging in homosexual activity. In one newly-revealed re-

port, the write said that naval officers had estimated that about half of the men under their command had “sinned homosexuality,” but that a strict interpretation of regulations requiring their discharge would have the effect of rendering the Navy inoperable. The U.K. abandoned its rules against military service by gay people a few years ago in response to a ruling by the European Court of Human Rights. *Times of London*, Oct. 31. The United States is now the only major English-speaking military power that bans service by openly-gay people, significantly undermining the verses in our national anthem describing this country as the “land of the free and the home of the brave.” Evidently our military commanders believe that the rank and file is not “brave” enough to behave themselves properly in the presence of gay colleagues. A.S.L.

Professional Notes

Mark Agrast, an openly-gay lawyer who serves as Counsel and Legislative Director for U.S. Rep. William Delahunt (D.-Mass.), has become chair of the American Bar Association's Section of Individual Rights and Responsibilities, which is the Section within the ABA with jurisdiction over many of the legal issues surrounding sexual orientation, gender identity, and HIV/AIDS issues. Agrast is a past co-chair of the National Lesbian and Gay Law Association, and has taken a leadership role in the National Capital ACLU.

Welcome to the Utah Lawyers for Human Rights, the newest addition to the growing list of lesbian, gay, bi & transgendered bar groups that are distributing *Law Notes* to their members under license from the LeGaL Foundation. Representatives of other groups that desire to undertake a similar arrangement should contact Daniel R Schaffer at LeGaL. A.S.L.

AIDS & RELATED LEGAL NOTES

7th Circuit Rejects ADA Claim from HIV+ Jail Guard

In an unpublished decision, a panel of the U.S. Court of Appeals, 7th Circuit, affirmed summary judgment against a jail guard who claimed that he contracted HIV at work. *Devine v. Board of Commissioners of Elkhart County*, 2002 WL 31260942 (Oct. 7, 2002). John Devine claimed violations of the Americans with Disabilities Act and the First Amendment.

Devine worked for the Elkhart County Sheriff's Department. In March of 1993 an inmate suffered a seizure. Devine and two other officers aided the inmate. Devine looked for, but could not find, latex gloves. He had cuts on his hands at the time. The inmate spat a substantial amount of blood on Devine. Devine then wrote the warden complaining about the lack of

gloves. The warden responded in writing with “Damit [sic], make do!! Too much \$ being spent!!” A few weeks later Devine had infectious hepatitis and over the next several years suffered illnesses including Hepatitis B, chronic pneumonia, swollen glands, fevers, and rashes that covered his body. He was diagnosed in 1998 with AIDS.

Devine reviewed jail records and concluded that he may have been exposed to HIV during the 1993 incident, as the inmate had HIV. Devine filed a workers compensation claim which was denied by the County, which asserted that there was no proof that the illness was work-related.

After Devine confronted jail officials, he was told that his illness made him a “liability.” Josh Mann, a local television reporter, contacted Devine. Mann was doing an investigation of De-

vine, who had been a Township Trustee. Mann said that he had been tipped off by someone, whom he would not identify, of improprieties when Devine served as a Trustee. Mann asked about a state audit conducted two years earlier which led to Devine repaying \$11,000. A few days later they met at Devine's home. Devine told Mann that he believed that the publicity over the audit related to his illness and thought that someone, possibly from the sheriff's office, leaked the information to discredit his compensation claim. Devine told Mann about the 1993 incident and gave him a copy of the memorandum and the response. Devine also gave Mann confidential medical records showing that the inmate involved in the 1993 incident had HIV. Devine claimed that the copies were redacted to protect the inmate's identity, but that Mann stole the original documents when left alone

during the interview. Devine reported the theft to the Sheriff. Four days later, on October 8, 1999, Devine was fired for releasing confidential inmate medical records. Devine claimed that he was fired because he had AIDS or because he talked about the shortage of latex gloves.

Regarding the ADA claim, the District Court found that Devine made an application for Social Security Disability benefits several months after his termination in which he claimed that he was unable to work on the date of his termination and that this precluded asserting that he was a qualified individual with a disability for purposes of the ADA. The District Court also rejected Devine's First Amendment claim, finding that he failed to show that the justification for firing him was a "pretext for unlawful retaliation." The District Court granted summary judgement to the County on both claims.

In upholding the District Court, the panel noted that Devine told the Social Security Administration (SSA) that "his poor health" prevented him from working as of the day of his termination. Devine's claim that "the side effects & symptoms of my infections continue to prevent me from working" conflicted with an ADA claim because he could not "be both unable to work and capable of performing the essential duties of a jail officer." (To be protected under the ADA, an individual must be capable of performing essential job duties despite any impairments he may suffer.) Despite his SSA claim, Devine said that he was working on the day he was fired, and aside from "a number of absences, was performing the job well." Devine's new statement, the Panel found, would make his SSA claim false.

"Although we are not unsympathetic to Devine's difficult situation, he has not offered a sufficient explanation of the inconsistent positions taken in his claim for disability benefits and his ADA lawsuit," wrote the court. *Daniel R Schaffer*

HIV+ Non-Citizen's Petition to Avoid Deportation Rejected on Exhaustion Grounds

In a complicated decision that illustrates the extraordinary complexity facing non-citizens who seek to remain in the U.S. despite their past tangles with law enforcement, a panel of the U.S. Court of Appeals, 7th Circuit, while recognizing that petitioner Stephen Bosede may actually have a basis for being granted some relief from threatened deportation, held that under the complexities of immigration law the court was precluded from granting such relief, since his very relevant new evidence needs to be submitted in the first instance to the Immigration Service.

Bosede, a Nigerian native who has been living in the U.S. since 1980 and has been a lawful permanent resident here since 1982, is married

to an American citizen with whom he has two children, also American citizens. Bosede is employed as a cabdriver. Both he and his wife were diagnosed HIV+ in 1997, and her disease is sufficiently advanced that she requires a wheelchair. On March 1, 2000, Bosede was convicted of retail theft as a result of an incident where he was caught drinking liquor from a bottle in a store. As a result of this conviction, the INS moved to deport him, since he had two prior drug offenses on his record, dating from 1993 and 1995. According to the information in possession of the INS, a cover sheet from the Cook County prosecutor for the 1993 conviction showed possession with intent to distribute. On that basis, that he had a conviction as a drug dealer, the INS determined that he had committed at least one serious offense, requiring his deportation back to Nigeria.

Bosede retained an attorney to represent him before the INS, but the attorney was apparently not particularly effective. The Immigration Judge chastised the attorney "for not appreciating the seriousness of the proceedings and 'oversimplifying the issues,'" and also for not showing up at several scheduled hearings. A major part of Bosede's arguments against deportation was that he should be found eligible for asylum, since he was a Christian and his parents in Nigeria had been killed by Muslim fundamentalists, or that he should be entitled to withholding of deportation as an HIV+ person who was likely to be subjected to persecution in Nigeria, including being held in prison without access to the medications he needs to sustain his health. Within the Immigration adjudication system, Bosede was notably unsuccessful on all his arguments, and his problems were severely complicated by the 1993 conviction record, which Bosede consistently asserted was inaccurate, that although he was charge with intent to distribute, the case was negotiated down to a simple possession conviction, and he was given a sentence at that time one year below the minimum for an intent to distribute conviction.

His attorney having failed either to discover and submit the evidence to support Bosede's assertions about the 1993 conviction or to document the likelihood of persecution should he be returned to Nigeria, the Immigration Judge and the Board of Immigration Appeals rejected his arguments and ordered him deported. In his appeal to the 7th Circuit, he found an appellate panel that seemed sympathetic to his plight, especially when he finally was able to submit in support of his claim the full case file from Cook County verifying his account of his 1993 conviction. Since his ineligibility for withholding of deportation turned on the characterization of that one conviction as a "serious crime" (which mere possession would not be), Judge Diane Wood of the panel intimated that if they could consider his case on the merits, they might well hold in his favor.

However, under the complex scheme set up by Congress, Bosede must now go back to step one and do pro se (as he is now) what his incompetent attorney failed to do in the first instance, and petition the INS to reopen his case so it can take into account the full case file from Cook County and reconsider whether to allow him to stay in the U.S. The court dismissed the appeal on the ground that Bosede had failed to exhaust administrative remedies. But the reader of this opinion will surely be exhausted. A.S.L.

Substantial AIDS Phobia Verdict Reversed on Choice of Law Question

The Supreme Court of Nebraska has reversed a \$200,000 jury verdict against the Marriott hotel chain in favor of a woman who claimed she sustained emotional injury, partly due to fear of having contracted HIV-infection, after being stuck by a foreign needle and syringe in her hotel room in 1994. *Malena v. Marriott International, Inc.*, 2002 WL 31268461 (Oct. 11). The court unanimously ruled that although the woman was a resident of Nebraska, and commenced her lawsuit in Nebraska, California law applied because the incident occurred in California. The court remanded the case for a new trial, and directed that the jury be instructed to apply California substantive law, which is more restrictive than Nebraska substantive law.

The Malenas, residents of Nebraska, stayed at a Marriott hotel in San Francisco in September 1994. When Audrey Malenas reached under a nightstand to find a lotion bottle cap that had fallen, she was stuck by a hypodermic needle and syringe. The needle went through her skin and into the muscle. She felt a cold tingling sensation moving up her arm. Audrey's husband, Daryl, immediately called several AIDS hotline numbers. The next morning, they went to a hospital in San Francisco for treatment. After returning to Nebraska, Audrey was treated by her regular physician and an infectious disease specialist. From the time of the incident through February of 1996, Audrey was regularly tested for HIV, hepatitis and syphilis. All of the test results were negative. (The needle and syringe were never tested.) As a result of the uncertainty over whether Audrey had contracted any illness from the needle, Audrey no longer donated blood platelets to her daughter, who suffered from a bone marrow disease, myelofibrosis, although Audrey had done so at least seven times prior to the Marriott incident. Audrey and Daryl's daughter died in December of 1994 from complications of her disease. Before the San Francisco needle-stick injury, Audrey had been treated for depression and anxiety related to her daughter's disease.

The Malenas sued Marriott for negligence, alleging that Marriott should have discovered and removed the hypodermic needle before renting the room to them. They sought \$641 in

special damages for the cost of Audrey's medical treatment; damages for Audrey's alleged mental suffering because of her fear of contracting AIDS or hepatitis; and damages for Audrey's alleged emotional distress over her inability to donate blood platelets to her daughter. Daryl sought damages for loss of companionship and consortium.

Marriott denied the factual allegations, and moved for summary judgment, arguing that the Malenas were not entitled to any recovery under California law governing the operation of its hotel in San Francisco. The district court denied Marriott's motion. At trial, the district court ruled that Nebraska law applied to Audrey's claims. The jury returned a verdict in the Malena's favor, awarding Audrey \$200,000 and Daryl \$17,500. Marriott appealed.

The Nebraska Supreme Court, ruling per curiam, noted from the outset that there is a difference between California and Nebraska substantive law concerning the recovery of parasitic damages (damages for anxiety caused by a reasonable fear of future harm attributable to physical injury caused by someone else's negligence). Unlike under California law, under Nebraska law a plaintiff need not show actual exposure to infected body fluids to recover parasitic damages caused by the fear of contracting AIDS. Rather, a plaintiff whose claim is governed by Nebraska law need only show that he or she "may have been exposed, via a medically sufficient channel of transmission, to the tissue, blood, or body fluid of another in circumstances where the identity of the patient upon whom the contaminated needle or instrument was used is unknown, and when it is impossible or impracticable to ascertain whether any such tissue, blood, or bodily fluid may be HIV positive." A plaintiff who can prove these prima facie elements then may present proof of parasitic damages for the "window of anxiety" during which the plaintiff's fear of HIV infection and contracting AIDS was reasonable. Under California law, a plaintiff must establish that his or her fear "stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop the illness in the future due to toxic exposure."

The court agreed with Marriott's position that California law applied to the Malenas' claims. The court, quoting from various provisions of the Restatement (Second) on Conflict of Laws, ruled that California law applied since the couple's injuries occurred in California, and since Nebraska did not have a more significant relationship to the parties and the occurrence than California. The court concluded that Nebraska's public policy recognizing and placing a value on the injuries suffered by its domiciliaries did not outweigh California's own "counter policy reasons for its limitations on claims entitled to legal protection." Since the district court

instructed the jury on the wrong legal standard, the Supreme Court reversed the jury verdict and remanded the case for a new trial.

In a brief concurring opinion, Justice Miller-Lerman expressed "puzzlement" over the development of California's policy concerning parasitic damages over the fear of contracting AIDS. Miller-Lerman noted that California first applied its rule to cases involving the fear of developing cancer, and then extended that rule to the fear of contracting AIDS. "The course and profiles of cancer and AIDS are markedly different, and the fear of cancer due to generalized exposure and fear of AIDS due to a discrete event are not fungible."

Marriott was represented by Melvin C. Hansen, Judith A. Wolf, and William Gilner. Rasmussen & Mitchell represented the Malenas. *Ian Chesir-Teran*

HIV-Related Harassment Held Insufficient to Justify Quitting Job

On Sept. 25, the Ohio Court of Appeals affirmed a decision by the state's Unemployment Compensation Review Commission that Opal Morris did not have cause to quit her job, premised on alleged HIV-related harassment by fellow workers. *Morris v. Director, Ohio Dep't of Job & Family Servs.*, 2002 WL 31170458 (Ohio Ct. App.7th Dist) (slip copy - not officially reported).. Morris's harassment claim was premised on two incidents.

The first occurred in the late summer of 1998 when a co-worker, Larry Galloway, allegedly solicited Rene Siderich, a second co-worker, to beat up Morris. Siderich refused, but told Morris' boyfriend about the solicitation. Morris did not learn about it until her boyfriend told her a year later. Siderich did not report the solicitation to management until July 1999.

The second incident happened after Morris telephoned another co-worker, Jennifer Chers, and left a message on her answering machine. Not knowing that the phone failed to disconnect the line, Morris then called her mother and discussed various medical problems with her, not realizing that the conversation was being recorded on Chers's answering machine. In the course of that conversation, Morris mentioned that she was considering taking an HIV test. Chers was unable to decipher the entire conversation and thought that the person leaving the message was referring to the fiancée of a friend's brother who might have AIDS. Chers brought the tape to work and one colleague identified the voice as Morris's, and word spread. Morris confronted Chers and told her that she intended to sue for slander.

After the confrontation, Chers began to verbally harass Morris and called her names such as "AIDS-infested whore [and] fucking bitch." Morris also discovered graffiti written in blood on the bathroom stall that read "Opal's infested

[with] AIDS" and "AIDS kills" in black magic marker on a separate stall. Morris admitted that she never saw Chers write these things and only assumed she did. All of this took place in 1999.

Morris reported Chers's behavior to management, but claims that Sterling never investigated her report, although Morris acknowledged that their plant manager spoke with Chers. After finding Morris's claims unsubstantiated, Sterling took preventative measures to separate Chers and Morris, and instructed the managers to be vigilant of any harassment of Morris. And after the alleged harassment continued, Morris sued in Columbiana County Court of Common Pleas, seeking an anti-stalking restraining order against Chers. The court found that both parties had harassed one another and that Chers's behavior was inconsiderate but did not constitute stalking. The court instructed both parties to stay away from one another. Morris also solicited help from Northeast Ohio Legal Services, which sent a letter to Sterling on Morris's behalf.

Morris claims Chers's continued harassment exacerbated her stress and nervous tension to such a degree that her doctor advised Sterling that her workload needed to be reduced. Her irritable bowel syndrome was aggravated to such a point that she needed a schedule that could accommodate fifteen to twenty restroom breaks a day. Sterling did not have any positions that could accommodate such a request. In late August 2000, Morris found a new position with Sugardale Foods and agreed to work the overnight shift in order to attend school during the day. She enrolled in school the day before she left Sterling and then began working for Sugardale Foods on September 11, 2000. Shortly thereafter, her new position at Sugardale was downsized and Morris filed for unemployment. The Ohio Department of Job and Family Services denied her claim, concluding that Morris quit employment with Sterling without just cause, and its denial was upheld by the court of common pleas.

Writing for the appeals panel, Judge DeGenaro affirmed the trial court. Morris could only receive unemployment benefits if she had just cause for quitting. The court stated, "Traditionally, just cause, in the statutory sense, is that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act." The court held that a reasonable person reviewing the evidence could not have concluded that Morris quit her job for any justifiable reason. "Quitting one job in order to begin employment at a new job or to attend school is not quitting employment for just cause. The apparent connection between the problem Morris experienced with her co-workers and her decision to quit ... seems tenuous at best ... and her claims about those problems were greatly exaggerated and, thus, an ordinary, in-

telligent person would not have quit their employment for that reason.”

The key issue before the appeals court was whether, “under the circumstances of this case, any ordinary and intelligent person would have acted in the same manner as Morris... [T]he Act’s purpose is to enable unfortunate employees, who become and remain involuntarily unemployed by adverse business and industrial conditions, to subsist on a reasonably decent level and is in keeping with the humanitarian and enlightened concepts of this modern day.”

Morris’s main argument was that she quit for just cause related to the problems resulting from her relationship with Chers. As a general rule employees must notify their employer of any work related-problems, they must request it be remedied, and give the employer time to solve them before a court will justify an employee’s just cause for quitting work. The court noted that Morris quit for four reasons: “1) a co-worker solicited another co-worker to harm her; 2) problems resulting from her relationship with Chers at work; 3) her desire to go work for another employer; and, 4) her desire to attend school.” In addressing each issue, the court concluded that Morris did not have just cause. First, the solicitation to harm Morris happened two years prior to accepting new employment, not to mention that it became known to Morris after the tape playing incident. Sec-

ond, the court concluded that an employee’s mere perception that they have been subjected to harassment does not constitute just cause. And generally, “neither quitting work with one employer to accept work for another nor quitting work to attend school is considered to be quitting work for just cause as contemplated by R.C. 4141.29(D)(2)(a).” Therefore, the court found no basis upon which to hold that Morris quit for just cause and affirmed the Commission’s findings. *Audrey Weinberger*

Prison Term for Sexual Assault Imposed on HIV+ Pennsylvania Man

Juan Anthony Rodriguez, an HIV+ man, was sentenced to up to 12 years in prison, the maximum sentence authorized under state law on charges of reckless endangerment and aggravated indecent sexual assault, for sexually assaulting a woman who had allowed him to sleep over at her house. Northampton County, PA, Judge William F. Moran acceded to a prosecution request to impose the maximum on Rodriguez, despite his expressed contrition for his acts and the evidence that the victim has not seroconverted since the July 31, 2001, incident. Judge Moran stated from the bench, in imposing sentence on Oct. 1: “You put her at risk. You exposed her to a fatal disease. you did that solely for the purpose of your own sexual

gratification, for no other reason.” *Allentown Morning Call*, Oct. 2. A.S.L.

California Governor Vetoes Needle Exchange Bills

California Governor Gray Davis vetoed a bill that would have made it easier to purchase hypodermic needles, stating that the measure authorized the purchase of too many needles simultaneously while not requiring users to enroll in drug treatment programs. Under current law, one-for-one exchanges are required, while the vetoed bill would have allowed adults to purchase as many as 30 syringes at a time without a prescription. At the same time, Davis vetoed another bill that would have liberalized the requirements for cities or counties to establish needle exchange programs. A.S.L.

First Chinese City Enacts HIV Discrimination Law

The city of Suzhou has become the first in China to enact an ordinance forbidding discrimination against people with HIV. HIV+ persons and their families are guaranteed equal access to employment, education and health-care under this law, which also enacts privacy guarantees for medical records and authorizes fines for violations. *South China Morning Post*, Oct. 17. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

MOVEMENT JOB ANNOUNCEMENTS

The Freedom to Marry Collaborative (“FMC”) - a new organization to facilitate a sustained and affirmative campaign to win the freedom to marry for same-sex couples — is now hiring Program Staff (not necessarily lawyers), a Development Director, and an Administrative Assistant. Based in New York, FMC will launch in early 2003. For job descriptions or more information, check www.freedomtomarry.org or contact Executive Director Evan Wolfson at evan@freedomtomarry.org.

The Lesbian & Gay Rights and AIDS Projects of the American Civil Liberties Union seek applicants for a legal fellowship in New York City. The fellow will help with the litigation and legislative/policy work of the Projects. The fellow will do legal and other kinds of research, write policy and legal memos, and write pleadings, briefs and other litigation documents. The fellow will help ACLU state affiliates with issues on which the fellow works. The fellow may be asked to appear at conferences or other public events as a representative of the ACLU. The fellowship, which will commence in September 2003, is for one year with a possible renewal for a second year. Recent graduates and third-year law students are invited to apply.

Familiarity with lesbian and gay rights, AIDS/HIV and other civil liberties issues is desirable; commitment to those issues is essential. Excellent research and writing skills and a willingness to learn public speaking are required. Salary is covered by the ACLU scale. Medical and dental benefits are provided. The deadline is November 15, 2002, but applications will be accepted until the position is filled. Send a cover letter, resume, writing sample, transcript, and list of references to: James Esseks, Litigation Director, ACLU Lesbian and Gay Rights & AIDS Projects, 125 Broad Street, 18th Floor, New York, New York 10004-2400 (212) 549-2650 (fax) jesseks@aclu.org. The ACLU Foundation is an equal opportunity/affirmative action employer. People of Color, Persons with Disabilities, People with HIV, Women, Lesbians, Gay Men, Bisexuals, and Transgendered Persons are encouraged to apply. The American Civil Liberties Union seeks an attorney to specialize in lesbian & gay rights and AIDS, working primarily in Chicago and the Midwest with some time spent in the ACLU national office in New York working with the ACLU’s Lesbian & Gay Rights Project and AIDS Project. The attorney will be responsible for significant constitutional and statutory litigation, litigation back-up, and policy work on a

wide range of LGBT and HIV related issues. Work will include all phases of litigation and policy analysis. The attorney will also provide technical assistance and advice to ACLU staff, affiliates, private attorneys who handle cases for the Projects and affiliates, and others who seek help from the Projects. The staff attorney must be able to speak publicly and to represent ACLU positions to the media and the public generally. The job may also include supervision of support staff and student interns. The job also requires occasional fund-raising activities, including attendance and speaking at events, and meeting with donors. Some travel will be required. Familiarity with lesbian and gay rights, AIDS/HIV and other civil liberties issues is desirable; commitment to those issues is essential. Excellent analytic skills and the ability to write and speak clearly are essential. Significant litigation experience, including constitutional and federal court litigation, is preferred but not required. Salary is governed by the ACLU scale for lawyers, which is based on years out of law school. Excellent health and welfare benefits are provided. Applications will be accepted until the position is filled, which will not be before December 1, 2002. Applicants should send a cover letter, resume and one legal writing sample to: Harvey Grossman,

Legal Director, ACLU of Illinois, 180 North Michigan Avenue, Suite 2300, Chicago, IL 60601. The ACLU Foundation is an equal opportunity/affirmative action employer and actively recruits women, people of color, persons with disabilities, and lesbians, gay men, bisexuals, and transgendered individuals.

LESBIAN & GAY & RELATED LEGAL ISSUES:

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Drew, Josiah N., *Caught Between the Scylla and Charybdis: Ameliorating the Collision Course of Sexual Orientation Anti-discrimination Rights and Religious Free Exercise Rights in the Public Workplace*, 16 BYU J. of Public L. 287 (2002).

Farhat, Sarah J., *California Adds a New Remedy for the Ever-Changing Face of Hate*, 33 McGeorge L. Rev. 187 (2002).

Greenberg, Julie A., *Deconstructing Binary Race and Sex Categories: A Comparison of the Multiracial and Transgendered Experience*, 39 San Diego L. Rev. 917 (Aug-Sep 2002).

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ordinance to protect transgendered persons from discrimination).

Kohn, Sally, *Greasing the Wheel: How the Criminal Justice System Hurts Gay, Lesbian, Bisexual and Transgendered People and Why Hate Crime Laws Won't Save Them*, 27 N.Y.U. Rev. L. & Social Change 257 (2001-02).

Koppelman, Andrew, *Signs of the Times: Dale v. Boy Scouts of America and the Changing Meaning of Nondiscrimination*, 23 Cardozo L. Rev. 1819 (May 2002).

Lynch, Mona, *Pedophiles and Cyber-Predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation*, 27 L. & Social Inquiry 529 (Summer 2002).

Rubenstein, William B., *The Concept of Equality in Civil Procedure*, 23 Cardozo L. Rev. 1865 (May 2002).

Spencer, Shaun B., *Reasonable Expectations and the Erosion of Privacy*, 39 San Diego L. Rev. 843 (Aug-Sep 2002).

Student Articles:

Foster, Travis O., *Dale v. Boy Scouts of America: "Morally Straight, Clean and Still Unworthy" — The Supreme Court's Failure to Provide the Proper Legal Antidote*, 26 Thurgood Marshall L. Rev. 27 (Fall 2000).

Jaffree, Nailah A., *Halfway Out of the Closet: Oncale's Limitations in Protecting Homosexual*

Victims of Sex Discrimination, 54 Fla. L. Rev. 799 (Sept. 2002).

Note, *Scouting Out Discrimination Against the Discriminating Boy Scouts: Does Connecticut's Exclusion of the Boy Scouts from Its State Employee Charitable Campaign Violate First Amendment Rights?*, 3 Col. J. L. & Social Problems 255 (Spring 2002) (author answers question affirmatively).

Specially Noted:

A review of Wintemute & Andenes (eds.), *Legal Recognition of Same-Sex Partnerships*, appears in 61 Cambridge L. J. 473 (July 2002).

AIDS & RELATED LEGAL ISSUES:

Merjian, Armen H., *The Court at the Epicenter of a New Civil Rights Struggle: HIV/AIDS in the New York Court of Appeals*, 76 St. John's L. Rev. 115 (Winter 2002).

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 Le-GaL 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.