SUPREME COURT RULES FOR BOY SCOUTS IN GAY MEMBERSHIP DISPUTE

Ruling 5–4 in *Boy Scouts of America v. Dale*, 2000 WL 826941 (June 28), the U.S. Supreme Court held that the New Jersey Supreme Court's application of the state's public accommodation law to require the Boy Scouts of America (BSA) to reinstate openly-gay Jim Dale (described in the Court's opinion as an "avowed homosexual and gay rights activist") as an adult member and scout leader violates the BSA's First Amendment right of expressive association. The majority opinion, by Chief Justice William Rehnquist, apparently an avowed heterosexual, asserted that requiring the reinstatement of Dale would be improperly forcing the BSA to articulate a message that homosexuality is acceptable for its members. In dissent, Justice John Paul Stevens argued that the record supported no such conclusion, and that the First Amendment was not even implicated in the case.

Dale joined the Scouts as an 8–year old, working his way up through the ranks to attain the distinction of an Eagle Scout, the organization's highest rank for a youth member. After turning 18, Dale applied to be an adult member, and was assigned as assistant scoutmaster to his New Jersey troop. Meanwhile, Dale enrolled at Rutgers University, finally accepted his sexual orientation and joined the Lesbian/Gay Alliance, becoming co-president in 1990. After a local newspaper printed an article about Dale's participation in a seminar on problems of gay teens and identified him as co-president of the gay alliance, Dale received a letter from the local Scout council dismissing him from the organization. Responding to his follow-up inquiry, Monmouth Council Executive James Kay told him that the Scouts "specifically forbid membership to homosexuals." In 1991, New Jersey's gay rights law went into effect. Dale filed a lawsuit, asserting that he was being denied participation by a place of public accommodation on the basis of his sexual orientation.

The state trial judge granted the Scouts' motion for summary judgment, finding that the organization is not a place of public accommodation under the statute and, alternatively, that the Scouts are entitled to discriminate in membership based on a First Amendment right of freedom of association. The Appellate Division of the Superior Court reversed, finding that the law applies to the Scouts and rejecting the First Amendment defense, although one judge partially dissented, finding that the organization should be entitled to select its leaders without court interference. The New Jersey Supreme Court unanimously affirmed in 1999, and the Scouts petitioned for certiorari, raising the First Amendment defense as the only federal issue in the case.

Chief Justice Rehnquist's opinion, which was joined by Justices Scalia, Thomas, Kennedy and O'Connor, rather extraordinarily held that the Court must defer to the Scouts' determination of two factual issues vital to the case: that the organization is engaged in an "expressive association" that includes the expression of disapproval of homosexuality, and that compliance with New Jersey's public accommodation law in Dale's case would significantly burden that expressive association. The New Jersey Supreme Court had unanimously ruled against the Scouts on both points, finding that the BSA's publicly articulated policies did not include any coherent anti-gay message or purpose, and thus that the organization's right of expressive association would not be burdened by the court's order to reinstate Mr. Dale as an assistant scoutmaster.

On behalf of the Court, Rehnquist took the view that so long as the BSA's position appeared to be genuinely held and found some support in the record, it would not be appropriate for the Court to substitute its own finding as to what the organization's expressive purpose is. The BSA argued that part of its expressive function is to signal to its members that homosexuality is unacceptable, and that although none of the organization's publications mention homosexuality, this message could be derived from the Scout Oath's injunction to be "morally straight" and the Scout law's command to be "clean in word and deed." Further, the BSA advanced a "role model" theory, arguing that having an openly-gay scoutmaster would present a role model to Boy Scout troop members contradictory to the desired message.

Further, Rehnquist accepted the BSA's argument that accepting Dale, an openly-gay person who was the co-president of a gay student organization, as a scoutmaster would significantly burden the organization's expressive association, embracing without any real analysis or explanation the "contradictory role model" theory.

Finally, without any substantive discussion of the state's justification for burdening expressive association, Rehnquist conclusorily stated that any interests New Jersey sought to advance through its enactment and application of the public accommodations law were outweighed by the significant burden on BSA's expressive association.

Writing for himself and Justices David Souter, Ruth Bader Ginsburg and Stephen Breyer, Justice John Paul Stevens argued that the Court had adopted an "astounding view of the law" when it held that the BSA was entitled to judicial deference on the issue of defining its expressive association and determining the degree of burden placed upon it by the state. Stevens argued that this approach would severely undermine the application of public accommodation laws by giving a free pass to potential sham expressive associational claims. In this case, he pointed out, at the time Dale was dismissed, the BSA had not publicly articulated any position with respect to homosexuality, and had never sought to instruct its members as to any view of this issue. The sole documentation of BSA policy prior to 1991 was an internal memorandum sent in 1978 by the top scout official to the members of the executive board, and, as Stevens noted, even that document indicated an understanding that if states began to outlaw sexual orientation discrimination, the organization would have to adjust its employment policies accordingly.

Stevens found that the documentary record totally supported the New Jersey Supreme Court's conclusion that far from being a central or unified part of the BSA's expressive purposes, homosexuality was an invisible issue in the organization, as to which all overt expression seems to have been carefully avoided. Under the circumstances, it was hard to conclude that the BSA's expressive association would be burdened in any way by having an openly gay man serve as a scoutmaster.

Stevens was particularly critical of the majority's implicit embrace of the idea that an openly-gay person is a virtual political billboard, whose message could be found to be forced on anyone required to associate with him. "The only apparent explanation for the majority's holding, then, is that homosexuals are simply so different from the rest of society that their presence alone — unlike any other individual's — should be singled out for special First Amendment treatment. Under the majority's reasoning, an openly gay male is irreversibly affixed with the label 'homosexual.' That label, even though unseen, communicates a message that permits his exclusion wherever

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he goes. His openness is the sole and sufficient justification for his ostracism. Though unintended, reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority." Stevens described as "mind-boggling" the idea that an organization could be considered to endorse every political position taken by any of its members, pointing out that the Scouts' million-plus adult members must have a wide variety of views on controversial social issues.

Stevens concluded his dissent with a summary of societal change in attitudes towards homosexuality. which is very pleasant to read but whose relevance to the legal analysis is unclear. Indeed, this last section prompted Justice Souter to write a brief separate dissent, joined by Justices Breyer and Ginsburg, observing that societal attitudes, while interesting, were not dispositive of the issues before the Court, and that Souter and his colleagues had joined the dissent because they agreed with Stevens that the BSA failed to show that their expressive association was being burden by the application of the public accommodations law. In his opinion for the Court, Rehnquist acknowledged that social attitudes towards homosexuality have moved towards greater acceptance and toleration, but contended that First Amendment values are all the more importantly implicated to protect those who seek to express their disagreement with societal trends.

Dale was represented in the case by Lambda Legal Defense Fund, whose Senior Staff Attorney Evan Wolfson argued the case at all levels of the litigation. Lambda's cooperating attorney co-counsel in the case was Allyson W. Haynes of Cleary Gottlieb Steen & Hamilton. A wide range of organizations joined together to file sixteen amicus briefs in support of Dale's case (including the Girl Scouts of America and the 4–H Clubs, the nation's other leading youth organizations, while opponents had filed 21 amicus briefs in support of the Boy Scouts.

The long term significance of this case is unclear. Although the Court upheld the BSA's First Amendment claims, Rehnquist's opinion strained to distinguish this case from the growing body of cases rejecting such claims by other membership organizations, and emphasized Dale's own activism in justifying the contention that his present as an assistant scoutmaster would force an unwanted message on the organization. Stevens noted that this is the first case in which the Court has upheld a constitutional defense by a membership organization against the application of a public accommodations statute or ordinance. On the other hand, the Court's articulation of a "deference" policy in reviewing the factual assertions of the BSA, if followed indiscriminately by lower courts, could seriously undermine the enforcement of anti-discrimination laws in a wide range of circumstances. And the case does perpetuate the notion of gay people as walking billboards whose very presence sends messages, giving rise to potential First Amendment claims by who knows how many discrimination law defendants.

Media reaction to the opinion was divided, but many media outlets editorialized that even if the decision was correct, the Court had carefully avoided expressing any support for the BSA's discriminatory policy, and many argued that having won their legal point, the BSA should now revisit the matter and abandon its policy.

The BSA's policy has had one ironic impact: Boy Scout Troop 73 in Matawan, N.J., the troop for which Dale was briefly assistant scoutmaster, is no more. Why? A shortage of adult leaders is one of the reasons given for the decision to disband the troop. (See J. Gold, "Troop is gone, but Scouts cheer court ruling," *Milwaukee Journal Sentinel* (Associated Press Story), July 2.) It sounds very much like the BSA policy is cutting off the organization's nose to spite its face. A.S.L.

LESBIAN/GAY LEGAL NEWS

Texas Appeals Court Holds Sodomy Law Unconstitutional

The Texas 14th District Court of Appeals in Houston ruled June 8 in *Lawrence v. State of Texas*, 2000 WL 729417, that the state's law forbidding oral or anal sex between members of the same sex, Texas Penal Code sec. 12.06, violates the Texas Equal Rights Amendment. This is the fifth time that some version of the resilient Texas sodomy law has been held unconstitutional by a lower court since 1970. Hopes are high that it may be the first such ruling to "stick."

The case arose from the arrest of John G. Lawrence and Tyron Garner in September 1998. According to one newspaper report, a roommate of Lawrence turned in a false report to the police that there was an armed intruder in Lawrence's Houston apartment. Police officers broke into the apartment and found Lawrence and Garner engaged in sex. The men were then prosecuted by the Harris County District Attorney for consensual sodomy. They were first tried in the County Justice Court, which rejected their claim that the statute was unconstitutionally applied to them and fine them each $125. They appealed to the County Criminal Court at Law, where the court against rejected their due process and equal protection claims and upped the fines to $200 each. Then followed their appeal to the court of appeals.

Before the court of appeals, Lawrence and Garner advanced four theories of constitutional attack: that the statute violates their federal equal protection rights, both as applied and on its face; that the statute violates their state constitutional equal protection rights, both as applied and on its face; that the statute violates their state constitutional right to privacy, and that the statute violates their federal constitutional right to privacy. Two panels of the Texas court of appeals in Austin had previously accepted the argument that the statute violates state constitutional privacy, in *City of Dallas v. England*, 846 S.W.2d 957 (Tex. App. - Austin 1993), writ dism'd w.o.j.) and *State v. Morales*, 826 S.W.2d 201 (Tex. App. - Austin 1992), rev'd on other grounds, 869 S.W.2d 941 (Tex. 1994). However, the Texas Supreme Court's reversal on jurisdictional grounds removed the precedential value of those holdings, the Court having held that only the Court of Criminal Appeals in an actual appeal of a prosecution can declare a state penal law unconstitutional. Further, in *Henry v. City of Sherman*, 928 S.W.2d 464 (1996), the Texas Supreme Court had rejected a sexual privacy claim under the state constitution, also undercutting the reasoning of the *England* and *Morales* court of appeals decisions.

In light of these developments, Justice John S. Anderson, writing for himself and Chief Justice Murphy, premised their decision solely on state equal protection, as embodied in the Equal Rights Amendment of the state constitution, which forbids discrimination on the basis of sex. Here some historical background is helpful. Prior to 1974, the Texas sodomy law was a felony law applicable to all *carnal copulation* involving body parts other than a penis interacting with a vagina. (How to put this delicately? Oh, these sex crimes laws!) The sex of the participants was irrelevant to the question of culpability under the statute. A penal code revision in the early 1970s, provoked in part by a decision of a 3–judge federal district court holding the law unconstitutional on federal privacy grounds (which was subsequently vacated and remanded by the U.S. Supreme Court on standing grounds), reduced the offense to a misdemeanor punishable only by fine, and reduced the scope of the law so as to exempt opposite-sex couples from the prohibition. Consequently, Texas, in common with just a handful of other states, only penalizes same-sex intercourse. It was this reformed statute that was declared unconstitutional on state privacy grounds in *England* and *Morales*, and which had been declared unconstitutional on federal privacy and equal protection grounds by the U.S. District Court in Austin in 1982, in a deci-

sion subsequently reversed by the 5th Circuit and denied certiorari by the Supreme Court shortly after its *Bowers v. Hardwick* ruling of 1986 upholding Georgia's sodomy law.

These developments essentially left the Texas ERA as the most viable legal theory, assuming the court was not ready to venture into the speculative realm of federal constitutional law in the wake of *Romer v. Evans*, which it apparently was not. Lawrence and Garner argued, in pursuit of this theory, that by making illegal when committed by same-sex couples behavior that was lawful when committed by opposite-sex couples, the state was penalizing conduct on the basis of the participants' sex, thereby implicating the state constitutional ban on sex discrimination. The majority of the court bought this argument completely. Furthermore, unlike the federal constitution, the Texas constitution specifically lists sex as a forbidden basis for discrimination, and Texas courts have held that sex is thus a suspect classification, and the state must have a compelling interest at stake in order to create a sex classification in its laws.

Describing the legislature's action in 1973 when it revised the law, Anderson wrote, "the Texas Legislature created two standards, demarcated by the sex of the actors: oral and anal intercourse when performed by a man and a woman would henceforth be legal, but oral and anally intercourse performed by two men or two women would remain illegal. Thus, after 1974, the distinction between legal and illegal conduct was not the act, but rather the sex of one of the participants. Accordingly… Lawrence and Garner are treated differently from others who engage in this activity, solely on the basis of their sex."

As to the state's defense to this discrimination charge, "Surprisingly, counsel for the State conceded at oral argument that he could not 'even see how he could begin to frame an argument that there was a compelling State interest,' much less demonstrate that interest for this Court." Instead, the state argued that it has a legitimate purpose to enforce principles of morality and promote family values, and argued that strict scrutiny should not be applied because the prohibition applies equally to men and women and thus does not discriminate between them.

This, of course, is the same conceptual argument the Commonwealth of Virginia made in defending its law against interracial marriage in 1967, contending that as whites and blacks were equally forbidden from marrying across racial lines, there was no discriminatory treatment based on race. Anderson pointed out that the Supreme Court had rejected "this sophistry" in *Loving v. Virginia*, 388 U.S. 1, and the Texas court of appeals would do no less in this case. "Merely punishing men who engage in sodomy with other men and women who engage in sodomy with other women equally, does not salvage the discriminatory classification contained in this statute," Anderson asserted. "The simple fact is, the same behavior is criminal for some but not for others, based solely on the sex of the individuals who engage in the behavior. In other words, the sex of the individual is the sole determinant of the criminality of the conduct." And, since the state did not even attempt to argue that it had a compelling interest to support this discrimination, the court found it unconstitutional on its face.

In footnotes, Anderson responded to Justice J. Harvey Hudson's dissent. Hudson argued that the analogy between this case and *Loving* was inappropriate. He recited the history behind the 14th Amendment, characterizing it as part of a collection of legislative and constitutional acts undertaken after the Civil War to wipe out all vestiges of slavery, and that the Supreme Court in 1967 had identified the racial purity theory on which the Virginia Supreme Court relied to uphold the miscegenation law as being such a vestige of slavery. Thus, in Hudson's view, striking down the miscegenation law was within the broad intent of the framers of the 14th Amendment. On the other hand, he argued, the history of the adoption of Texas's Equal Rights Amendment showed that it was intended by its proponents and the voters who ratified it to redress the imbalance of official treatment as between men and women. Hudson noted that the opponents of the ERA argued that its enactment would lead to approval of same-sex marriage and decriminalization of homosexual conduct, and that they were ridiculed for so predicting. It was thus ironic, in his view, that now the court was using the ERA to strike down the homosexual sodomy law. In Hudson's view, the voters who ratified the ERA did not intend thereby to cast doubt on the constitutionality of the sodomy law.

Anderson's footnote response to this was to observe that when the ERA was enacted, Texas had not yet reformed its sodomy law, and so at the time ERA passed, it could not have been used to strike down that law because the criminality of the behavior did not depend on the sex of the participants. Therefore, according to Anderson, it is not appropriate to impute a particular intent to the Texas voters of 1972 regarding the impact of the measure they were passing on a law that didn't even exist yet.

Hudson accused the majority of applying the literal language of the ERA in a way that distorted its meaning. He would accept the state's argument that there was no sex discrimination here, and would as well accept its argument that the state's police power to enforce public morals provided a legitimate basis for the law. While conceding that the legislature was not necessarily infallible in its selection of moral principles to protect through criminal law, Hudson argued that the determination of which principles to protect is a legislative, not a judicial, function. In addition, of course, he could not resist citing and quoting Leviticus, Blackstone, and anyone else who came to hand to make the point that outlawing homosexual conduct was solidly in the mainstream of western moral tradition.

The Harris County District Attorney announced towards the end of June that his office would request *en banc* review by the full 14th Court of Appeals before attempting to take the case up to the state Court of Criminal Appeals in Austin. *Houston Chronicle*, June 28.

Lawrence and Garner are represented by local counsel Mitchell Katine of Houston, acting as a cooperating attorney for Lambda Legal Defense & Education Fund, where staff attorneys Ruth Harlow (who argued the appeal) and Suzanne Goldberg are working on the case. In a press advisory celebrating the ruling, Lambda pointed out that if this decision stands, there will be only three states — Arkansas, Kansas, and Oklahoma — with laws that specifically target gay sex, while twelve others, mainly in the southeast and the midwest, continue to criminalize all non-vaginal intercourse regardless of the sex of the participants. Lambda is currently representing the plaintiffs in an Arkansas sodomy law challenge, and the ACLU Lesbian and Gay Rights Project is providing counsel for a challenge pending against the Puerto Rican sodomy statute (which is not counted among the twelve mentioned above). A.S.L.

Louisiana Supreme Court Rejects Sodomy Law Challenge

As we were going to press, we learned that the Louisiana Supreme Court had voted 5–2 in a decision released July 6 to reject a pending challenge to the state's sodomy law. In 1999, a panel of the state's intermediate appellate court held that the law violated the state constitutional right of privacy, in a case involving the conviction of a man for having consensual oral sex with a woman. *State of Louisiana v. Smith*, 729 So.2d 648 (4th Cir. Feb. 9, 1999), review granted, June 25, 1999. According to press reports on July 7 and 8, Justice Chet Traylor wrote for the court majority, "Simply put, commission of what the Legislature determines as an immoral act, even if consensual and private, is an injury against society itself… A violation of the criminal law of this state is not justified as an element of the 'liberty' or 'privacy' guaranteed by this state's constitution. The freedom to violate criminal law is simply anarchy and, thus, the antithesis of an ordered constitutional system." The court reportedly relied heavily on the U.S. Supreme Court's 1986 *Hardwick* decision to justify its holding. The ruling reportedly drew heated dissents from Justice Harry Lemmon and Chief Justice Pascal Calogero Jr., who wrote that the state "has no legitimate interest or com-

pelling reasons for regulating, through criminal statutes, adult, private, non-commercial, consensual acts of sexual intimacy."

The *Baton Rouge Advocate* (July 7) also reported that by a 6–1 vote, with the Chief Justice the only dissented, the court also upheld a provision of the law that sets a stiffer sentence for commercial oral sex than for prostitution, in a separate case in which convicted prostitutes had challenged their sentences as excessive.

Still pending is a civil suit filed by the Louisiana Electorate of Gays and Lesbians, which challenges the sodomy law both on privacy and equality grounds, contending that the law is unfairly used to target gays for punishment and stigmatization. This suit won a favorable ruling in March 1999 from Orleans Parish Civil District Judge Carolyn Gill Jefferson, on privacy grounds, but an appeal is pending by the state.

Because the full text of the *State v. Smith* decision was not available as we went to press, we will present fuller coverage of the written opinion in the September issue of *Law Notes*. The quotations above were taken from press reports. *N.Y. Times*, July 8; *Baton Rouge Advocate*, July 7; Lambda Legal Defense Fund Press Release, July 7. A.S.L.

U.S. Supreme Court Rules That Washington Visitation Statute Violates Due Process Rights of Parents

Delving into the emotional thicket of family law disputes, the U.S. Supreme Court recently struck down a broadly worded Washington visitation statute, and denied the appeal of two grandparents who sought court-ordered visitation with their grandchildren. *Troxel v. Granville*, 2000 WL 712807 (U.S. June 5) In a 6–3 ruling that generated six separate opinions, the court held that the statute, which permitted "any person" to petition for visitation rights "at any time" and authorized state superior courts to grant such rights whenever it would serve the best interests of the child, was too broad and violated the Due Process rights of the children's biological mother. Although the case did not explicitly implicate non-traditional families, the court's holding may play a significant role in future litigation between lesbian and gay biological parents and others who seek to compel visitation with their children, including same-sex co-parents and grandparents.

The *Troxel* case was brought by grandparents who, after the death of their son, sought more frequent visitation with their two grandchildren over the objection of the children's mother, to whom their son was never married, defendant Granville. The grandparents requested two weekends of overnight visitation every month and two weeks of continuous visitation each summer; Granville only agreed to one day of visitation per month with no overnight stays. In 1995, the Washington Superior Court entered an order of visitation for one weekend per month, one week during the summer, and four hours on each grandparent's birthday, finding that this middle-of-the-road solution was in the children's best interests under Washington's visitation statute.

The State Court of Appeals reversed and dismissed the Troxel's petition, ruling that the statute only gave non-parents standing to seek visitation if a custody action was pending. Although the Washington Supreme Court disagreed with the reason underlying the appellate court's decision, it upheld the judgment dismissing the Troxel's petition. The court concluded that the visitation statute violated the federal constitution because it infringed on the fundamental right of parents to rear their children. According to the Washington high court, government can only interfere with parental rights in order to prevent harm or potential harm to the child. Since there was no showing by the Troxels of any such harm, the court ruled that Granville was free to limit her children's visitation with third-parties, including their grandparents.

A majority of the United States Supreme Court agreed that the Washington statute as applied in this case by the Superior Court violated the federal constitution, and affirmed the judgment of the Washington Supreme Court. Justice O'Connor, who announced the court's ruling in an opinion joined by Chief Justice Rehnquist and Justices Ginsburg and Breyer, explained that the Due Process Clause of the Fourteenth Amendment has a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests," including parents' fundamental right to make decisions concerning the "care, custody, and control of their children." According to Justice O'Connor, this right is rooted explicitly in "extensive precedent" spanning more than seventy-five years.

Calling the Washington visitation statute "breathtakingly" broad, O'Connor criticized the Washington lower court for not giving Granville's decision concerning visitation special weight or a presumption of validity, and for substituting its own judgment for that of the children's mother. "This case involves nothing more than a simple disagreement between the court and Granville concerning her children's best interests… So long as a parent adequately cares for her or his children, there will normally be no reason for the state to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."

The Court left open the question as to what standards in a visitation statute would pass constitutional muster, saying only that the Washington law as specifically applied to Granville did not. "Because the instant decision rests on section 26.10.160(3)'s sweeping breadth and its application here, there is no need to consider the question of whether the Due Process Clause requires all non-parental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation or to decide the precise scope of the parental due process right in the visitation context," O'Connor explained.

Justice Thomas concurred with the Court's judgment, but wrote a separate opinion to note that since the Washington law implicated a fundamental right under the Due Process Clause, he believed the court should have explicitly applied "strict scrutiny" to its analysis of the visitation statute. According to Thomas, the statute did not survive strict scrutiny review: "Here, the State of Washington lacks even a legitimate governmental interest, to say nothing of a compelling one, in second-guessing a fit parent's decision regarding visitation with third parties."

Justice Souter filed a concurring opinion because he believes that the Washington statute is so broad that it is unconstitutional on its face, and not simply as applied to the facts of this case. Souter agreed with the Washington Supreme Court's conclusion that by permitting petitions to be filed by anyone at anytime, the state statute was per se overly broad and unconstitutional. Souter would have affirmed on that ground, without delving into the particulars of the Troxels' petition.

Cautioning against "ushering in a new regime of judicially prescribed, and federally prescribed, family law," Justice Scalia dissented from the judgment of the Court. Although Scalia opined that the right of parents to direct the upbringing of their children is among the "unalienable rights" referred to in the Declaration of Independence, and that it is also among the rights retained by the people by virtue of the Ninth Amendment, he explained that decisions concerning visitation are best addressed by state legislatures which have "the great advantages" of "being able to correct their mistakes in a flash, and of being removable by the people." Since in his opinion there was no basis to overturn the Washington statute on constitutional grounds, Scalia would have reversed the Washington Supreme Court.

Justices Stevens and Kennedy, while filing separate dissents, articulated complementary critiques of Justice O'Connor's analysis. Each faulted the lead opinion for focusing overwhelmingly on the rights of parents, at the expense of the "best interests of the child" standard. "The almost infinite variety of family relationships that pervade our ever-changing society strongly counsel against the creation by this court of a constitutional rule that treats a biological parent's liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily," Stevens ex-

plained. Stevens would have remanded the case for further proceedings to ensure that the children's interests were properly "balanced in the equation."

Kennedy's focus on the "best interest of the child" standard led him to question whether the Court had truly acknowledged the fact that children are often cared for by de facto parents who may be left without any recourse under its decision. "My principal concern is that the holding seems to proceed from the assumption that the parent or parents who resist visitation have always been the child's primary care-givers and that the third parties who seek visitation have no legitimate and established relationship with the child. That idea, in turn, appears influenced by the concept that the conventional nuclear family ought to establish the visitation standard for every domestic relations case. As we all know, this is simply not the structure or prevailing condition in many households… A fit parent's right vis-…-vis a complete stranger is one thing; her right vis-…-vis another parent or a de facto parent may be another."

Lambda Legal Defense and Education Fund, together with the Gay & Lesbian Advocates and Defenders, filed an amicus brief urging the court to strike down the Washington law. Lambda praised the court's decision: "The court adopted a sound, middle course in this case, one that not only appropriately respects the rights of parents, but acknowledges that no hard-and-fast rule should govern every single family dispute," said Deputy Legal Director Ruth E. Harlow in a Lambda press release concerning the decision.

Yet for the reasons identified in Justice Kennedy's dissent, the practical impact of the Court's opinion on lesbians and gay men cannot yet be fully appraised. While the majority of the Court ruled that parents have a fundamental right to make decisions concerning the "care, custody and control" of their children, this can cut both ways. On the one hand, it likely will give greater protections to lesbian and gay parents who wish to fend off visitation petitions (and other intrusions) by homophobic family members and third-parties. On the other hand, the *Troxel* decision might be used by lesbian and gay parents as a sword to deny visitation and other parental rights to de facto lesbian and gay parents who lack the legal capacity to establish formal ties to children they have cared for and raised. *Ian Chesir-Teran*

[Editor's Note: In a hopeful sign that *Troxel* will not be used to block standing of same-sex coparents, the Maryland Court of Special Appeals refused to do so in *Gestl v. Frederick*, 2000 WL 870874 (July 3), discussed below.]

Supreme Court Strikes Down Sentencing Provisions of New Jersey Hate Crimes Law

In *Apprendi v. New Jersey*, 2000 WL 807189 (June 26, 2000), the U.S. Supreme Court held unconstitutional New Jersey's hate crime sentencing scheme, under which a judge determines by a preponderance of the evidence whether the defendant's motivation comes within the prohibition of the hate crimes law after the defendant has been convicted by proof beyond a reasonable doubt of having committed the underlying offense.

Charles C. Apprendi, Jr., was convicted on firearms charges for firing shots into the house occupied by African-American neighbors. A police officer testified that Apprendi had stated he fired the shots to send a message to the occupants of the house that they were not welcome in the neighborhood because they were black. Apprendi denied that assertion at his sentencing hearing, claiming mental instability was the underlying cause of his actions. Based on the evidence at the sentencing hearing, the trial judge decided the police officer was more credible than Apprendi, and that a preponderance of the evidence showed racist motivation. Consequently, the judge enhanced Apprendi's prison sentence by an extra two years above the maximum sentence that could have been imposed for the underlying offenses. The trial court rejected the argument that Apprendi's due process rights were violated in the process, and the New Jersey Supreme Court, although divided, upheld this application of the statute.

Writing for the Court, Justice Stevens noted that the Court had recently ruled in a federal criminal prosecution that the 5th and 6th Amendments were violated when a federal law took away from the jury the determination of certain factual issues that would affect the maximum penalty for a crime. Stevens said that result "foreshadowed" the result in this case, where the issue was whether the same concerns, expressed through the 14th Amendment's due process clause, would apply to a state prosecution. The 6th Amendment, as applied to the states through the 14th Amendment due process clause, was found by a majority of the Court to require that the issue of bias motivation, because it could have such a drastic effect on the maximum penalty for the crime, must be one of the elements to be proved beyond a reasonably doubt before the trier of fact, normally the jury in a criminal case. (In this case, Apprendi actually pled guilty to the underlying offenses, so no jury was involved in the case.)

"At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without 'due process of law,' and the guarantee that 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.' Taken together, these rights indisputably entitle a criminal defendant to 'a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'"

Stevens rejected the state's argument that the sentence enhancement factor was not an "element" of the crime, pointing to the substantial potential increase in penalty. (Recognizing this reality, most state hate crime laws do treat the bias issue as an element of the crime, so this decision will only affect a few state and local bias crime laws.) Stevens' opinion was bolstered by a concurring opinion by Clarence Thomas that went into much historical detail about how sentencing factors have traditionally been considered basic elements of crimes, and thus covered by the constitutional requirements.

The New Jersey Hate Crimes Law covers, inter alia, crimes motivated by bias on the ground of sexual orientation. After the opinion was announced, New Jersey officials indicated they would quickly seek a legislative change to the state hate crimes law to bring it into compliance with the court's decision. A.S.L.

Maryland Special Appeals Court Finds Lesbian Co-Parent Has Standing to Contest Custody, Even Though Birth Mother and Child Moved Out of State

Deciding a complex question of interstate jurisdiction complicated by co-parent standing issues, the Maryland Court of Special Appeals (an intermediate appellate court), unanimously ruled July 3 that the Baltimore City Circuit Court erred in dismissing a child custody petition brought by an alleged same-sex co-parent. *Gestl v. Frederick*, 2000 WL 870874. The case turned on the court's determination that the jurisdiction to which the birth mother and child had moved, Tennessee, would not provide an available forum for determination of the co-parent's custody claim, due to substantive differences between Maryland and Tennessee family law. In so ruling, the court incidentally (and importantly) held that the U.S. Supreme Court's recent decision in *Troxel v. Granville*, 2000 WL 712807 (June 5), does not bar the co-parent's custody claim, consistent with Maryland law which authorizes "unrelated" third parties to seek custody if they can prove "special circumstances" justifying a court overriding a legal parent's objections.

According to the facts recited in Judge Adkins' decision for the court, Lisa Frederick, the birth mother, became pregnant while living in Tennessee. In November 1992, while still pregnant, she moved to Maryland, where the child was born on March 13, 1993. Donna Gestl alleges that she and Lisa became involved in a relationship during Lisa's pregnancy, that Donna served as a "birth coach" and subsequently as a co-parent of the child. The women

and child began living together in Donna's house in July 1993. Lisa alleges that Donna's role was not parental, but merely of providing "recreation and entertainment" for the child. In August 1998, Lisa moved out of Donna's residence and returned with her child to Tennessee, where she obtained employment as a substitute teacher and obtained special services deemed necessary for the child, who is a "special needs" child. In November 1998, the Tennessee Dept. of Children's Services filed an action seeking custody of the child on grounds of neglect, which was ultimately resolved in a February 1999 consent agreement in the Tennessee Juvenile Court under which Lisa retained custody. In May 1999, Lisa filed suit against the child's alleged biological father, seeking a paternity determination.

Meanwhile, in December 1998, less than six months after Lisa and child moved out of her house, Donna filed an action in the Baltimore City, Maryland, Circuit Court, seeking joint legal custody and visitation rights with the child. Lisa sought to get the case dismissed on jurisdictional grounds. Donna argued that under the Uniform Child Custody Jurisdiction Act, the Maryland court had jurisdiction of the action and should exercise that jurisdiction because the Tennessee courts were unavailable to her. Donna observed that Tennessee law was less permissive than Maryland law in allowing third-parties to seek custody of a child. (Her assertion was subsequently confirmed by the Tennessee Court of Appeals' September 1999 decision of *In re Thompson*, 11 S.W.3d 913, holding that a non-biological parent lacks standing to seek custody in a factual context similar to the instant case. See LGLN, 11/99.)

The Circuit Court judge held a hearing on Lisa's motion on May 27, 1999, after the Tennessee proceeding by the child welfare department had been settled but before the Tennessee Court of Appeals had ruled in the *Thompson* case. After the hearing, the trial judge contacted the Tennessee Juvenile Court to determine the status of the cases pending in Tennessee. On June 21, 1999, the trial judge granted Lisa's motion to dismiss. Although the trial judge found that Maryland did have jurisdiction under the UCCJA, the court determined that Tennessee was the most appropriate forum for the custody dispute, explaining: "The great bulk of the contacts, information and expertise concerning the best interests of the child, both presently and in the future, exist in the state of Tennessee. This court believes, in according with FL section 9–207(c), that Tennessee has a closer connection with the parties and the child's family, and that virtually all of the personal and professional evidence concerning the child's present and future best interest is in Tennessee." Donna appealed.

The Court of Special Appeals agreed with the trial judge that Maryland has jurisdiction of the case. The UCCJA provides that when one parent takes the child out of the state, the parent (or contesting party) who remains in the state can bring an in-state action provided they do so within six months after the child has left, and can show that they resided with the child in the state for a significant period of time, making the state the child's "home state." Clearly, those conditions were met here, as the child was born in Maryland and lived there continuously, with Donna as (at least an alleged) co-parent, from the child's birth in 1993 until the move to Tennessee in 1998, less then six months before Donna filed her lawsuit.

The tougher question was the forum non conveniens issue, because clearly, especially in light of the current living circumstances of Lisa and the child and their history since moving to Tennessee, the trial judge's observations on this issue seemed sound. But, of course, the trial judge rendered judgment before the Tennessee Court of Appeals ruled that, in effect, it would be impossible for Donna to bring a custody action in Tennessee, and the UCCJA does provide for jurisdiction in interstate child custody disputes when the child's new state of residence would not provide a forum for the plaintiff's claim. (The Juvenile Court judge had advised the trial judge that Tennessee would most probably not allow a same-sex co-parent to bring a custody claim, but at that point this was merely a prediction.)

Of course, the Maryland court still had to find that Donna could obtain standing to contest custody in Maryland. Tennessee does not totally rule out third-party custody claims, but requires a showing that the legal parent's custody presents a threat of harm to the well-being of the child. Maryland, however, goes further, and allows the possibility that a third-party can prevail by showing "special circumstances" that would justify the court in interfering with the sole custody of the biological parent. Judge Adkins thus concluded that the trial court erred in dismissing the case, and that Donna should have an opportunity to attempt to establish that there are special circumstances justifying giving her standing to contest custody. As part of that, Donna will have to show that she was a person "acting as a parent" for at least six consecutive months, as required by the UCCJA. After summarizing the allegations on this point from Donna's complaint, Adkins commented: "These facts, if proven, are sufficient to show that appellant was a 'person acting as a parent' within the meaning of section 9–201. Therefore, appellant should be given the opportunity to establish that exceptional circumstances exist that would make it in the child's best interest to grant her custody."

Of course, the court had to take note of the Supreme Court's *Troxel* decision. Adkins observed that Maryland law on third-party custody claims did not appear to violate constitutional due process. Unlike the statute stricken in *Troxel*, the Maryland law places the burden on the third-party to prove exceptional circumstances, and gives substantial weight to the legal parent's wishes. "The Supreme Court's decision in *Troxel* may require some modification of Maryland's standards respecting visitation by third parties, but *Troxel* does not prohibit courts from ordering third-party visitation, so long as the decision-making process affords adequate protection to the parent's constitutional rights," Adkins wrote, pointing out in a footnote that the Supreme Court's plurality opinion in *Troxel* had actually cited a 19993 Maryland Court of Appeals decision applying the state's grandparent visitation state with approval in this regard.

"Because appellant has the right to seek visitation under Maryland law and not under Tennessee law, there is no available alternative forum for appellant's claim for visitation other than Maryland, and the circuit court must exercise its jurisdiction to hear appellant's visitation claims," Adkins concluded. A.S.L.

Pennsylvania Appeals Court Finds Lesbian Co-Parent has Standing to Sue for Visitation

In a case of first impression in the state of Pennsylvania, the Superior Court refused to overturn the trial court's determination that the non-biological lesbian co-parent, the appellee, had standing to sue for rights to visit the child she reared with her ex-lover, the biological mother, the appellant, by virtue of her in loco parentis status with respect to the child. However, the court ultimately vacated the lower court's visitation order and remanded the case for further proceedings in order to determine whether such visits would be in the best interests of the child. *T.B. v. L.R.M.*, 2000 WL 714409 (Pa. Super., en banc, June 5).

The opinion by Judge Kelly sets out the history of the relationship of the parties, how they agreed to have a child together and shared co-parenting rights and responsibilities while living together for the first three years of the child's life. After they broke up, Appellant refused to allow Appellee to visit the child. The Appellee sued for partial custody for purposes of visitation only.

Although the Appellant portrayed Appellee as a mere lodger sharing the house, the court found the facts to be otherwise and determined that Appellee stood in loco parentis with respect to the child. The court cited *Rosado v. Diaz*, 624 A.2d 193, 196 (Pa. Super. 1993): "The phrase 'in loco parentis' refers to a person who puts [herself] in the situation of assuming the obligations incident to a parental relationship without going through the formality of a legal adoption. The status of in loco parentis embodies two ideas: first, the assumption of a parental status, and second, the discharge of

parental duties." Judge Kelly concluded that Appellee had established a parent-like relationship with the child, noting that she played a significant role in the pre-natal and post-natal care of the child, was present in the delivery room, acted as a loving and caring parent, lived together with Appellant and child as a family, with the acquiescence of the biological mother, was open about their lesbian relationship with her family, and was known as "Aunt" to the child.

Given the length of time the parties were together and their relationship, the court found that the couple intended to have a committed, lasting relationship. Citing Pennsylvania statutes to the effect that biological parenthood is not the only source of a right to custody or visitation, Judge Kelly easily found that she had standing to sue for visitation. Furthermore, since Appellee was not seeking full custody of the child order to supplant the biological parent, but only to maintain her relationship with the child through limited visitation, the standard to establish standing was relatively low.

Interestingly, Judge Kelly cited cases from around the country involving same-sex custody and visitation battles, recognizing that society's notion of what makes a family have radically changed. 69Case law from other jurisdictions demonstrates recognition that nontraditional configurations of the nuclear family have replaced traditional models in recent years, which favors equitable considerations such as the doctrine of in loco parentis when deciding third party standing to seek custody/visitation." Both the trial and Superior courts clearly treated the lesbian parties the same as heterosexual parties.

The trial court determined that visitation with Appellee was in the best interests of the child, a finding challenged by the Appellant. Appellant argued that it was based solely on a finding that Appellee and the child had established a psychological bond, without considering other factors. The Superior Court agreed with Appellant and vacated the lower court's visitation order.

Judge Kelly wrote that while bonding is a significant factor in making such a determination, it is not alone sufficient. Other factors to consider are Appellee's child care skills, her ability to understand the child's needs and whether contact would be beneficial to the child, after examining Appellee's general conduct and interests. Judge Kelly found that an examination of these factors was not included in the lower court's analysis and remanded the case for further proceedings in accordance with its opinion. *Elaine Chapnik*

Lambda Wins Big Fee Award in Puerto Rican Police Policy Case

Chief Judge Laffitte of the U.S. District Court in Puerto Rico has awarded attorneys fees and costs in the amount of approximately $207,000 to plaintiffs attorneys in *Padro v. Commonwealth of Puerto Rico*, 2000 WL 791163 (June 15), a case that successfully challenged the constitutionality of a police department policy, Regulation 29, that banned members of the force from associating with homosexuals. The court had granted declaratory relief finding that the policy violated the First Amendment and the Equal Protection Clause, and permanently enjoined the Police Department from disciplining any member of the force because of any association with homosexual persons. The matter had been intensively litigated, and the plaintiffs submitted a very large request for fees and costs. The defendants argued that inasmuch as no police officer had actually been disciplined under Regulation 29, the plaintiff's victory was merely "technical" and so they should not be considered prevailing parties in a civil rights dispute entitled to fees. Judge Laffitte, in effect, laughed them right out of court.

"The Court's ruling did alter the legal relationship between the parties in this case. The Court has enjoined Defendants and their successors from ever disciplining a police officer for associating with a homosexual person. As the Court stated in its opinion and order on Regulation 29, Plaintiff GOAL is an organization whose membership is primarily made up of gay law enforcement officers. The group's objectives including providing support to openly gay law enforcement personnel and combating discrimination against gays. There was evidence in the record that when GOAL members met with Puerto Rico police officers, they did so clandestinely in order to protect the confidentiality of the local police officers. In its opinion, the Court concluded that the rule prevented GOAL from carrying out its activities. The elimination of this rule will facilitate GOAL's ability to meet with Puerto Rico police officers and to promote its agenda in Puerto Rico."

Judge Laffitte also rejected the defendant's argument that only GOAL (Gay Officers Action League) should be considered a prevailing party, since the individual co-plaintiffs had not directly achieved anything, as the injunctive relief only really assisted GOAL. Laffitte found that all the plaintiffs had contributed towards the successful litigation on the motion for summary judgment.

Laffitte did cut down the fees that were requested by plaintiffs, however, noting that three of the four attorneys had appeared pro hac vice and were asking for fees based on prevailing fees in jurisdictions where they practiced, rather than in Puerto Rico. Also, the court disallowed claims for time spent on the case prior to the filing of the amended complaint, when Regulation 29 (which was uncovered by plaintiffs during discovery) was first mentioned, since the plaintiffs were prevailing parties specifically with respect to the issue of Regulation 29's unconstitutionality.

Having calculated adjustments of hours and rates, Laffitte computed total fees of about $207,341, of which $130,989 would go to Lambda Legal Defense & Education Fund, whose staff attorneys Suzanne Goldberg and Ruth Harlow did the major part of the work in representing the plaintiffs. A.S.L.

Connecticut Adopts Legislative Solution to Co-Parent Adoption Problem

In a remarkably swift response to a judicial determination that the state adoption laws were inadequate to deal with the reality of contemporary life, including the reality of lesbian and gay families, the state of Connecticut has amended its adoption law to allow for co-parent adoptions. The state's Supreme Court ruled in *Adoption of Baby Z.*, 724 A.2d 1035 (Conn. 1999) that although it might make sense to let a co-parent adopt the child she was raising together with her partner, the child's legal mother, it could not be done under existing state law.

A bill was quickly formulated, passed through the legislative process, approved by the House on April 28, approved by the Senate on May 3, sent to the governor on May 19, and signed by the Governor on June 1. Titled "An Act Concerning the Best Interest of Children in Adoption Matters," Public Act No. 00–228 (Substitute House Bill No. 5830), the new law amends sec. 45a–724, Conn. Gen. Stats., to include the following: "Subject to the approval of the Court of Probate as provided in section 45a–727, as amended by this act, any parent of a minor child may agree in writing with one other person who shares parental responsibility for the child with such parent that the other person shall adopt or join in the adoption of the child, if the parental rights, if any, of any other person other than the parties to such agreement have been terminated."

With the good comes the bad, however. As is frequently the case when legislation on gay issues is passed, legislators take the opportunity to demonstrate their bona fides or macho status or whatever by inserting disclaimers or policy statements that would not have been desired by the original proponents, and this new law carries at least two such. In the statement of legislative findings, Section 1(4) of the Act, the legislature states: "It is further found that the current public policy of the state of Connecticut is now limited to a marriage between a man and a woman." And the Act concludes, in Section 5, as follows: "Nothing in this act shall be construed to establish or constitute an endorsement of any public policy with respect to mar-

riage, civil union or any other form of relation between unmarried persons or with respect to any rights of or between such persons other than their rights and responsibilities to a child who is a subject of an adoption as provided for in sections 2 and 3 of this Act." A.S.L.

Ninth Circuit Panel Finds Government Entrapped Cross-Dresser in E-Mail Scam

A divided panel of the U.S. Court of Appeals for the 9th Circuit reversed a federal jury verdict, holding that the government had entrapped a military veteran who is a cross-dresser and foot fetishist in crossing state lines to have sex with imaginary teenage girls in violation of a federal law. *United States v. Poehlman*, 2000 WL 821290 (June 27).

Poehlman's fetishes led to his divorce and forced early retirement from the Air Force after 17 years of service. Lonely and depressed, he began searching the Internet for a woman who would marry him and accommodate his special needs. He thought he found her in "Sharon," who responded to his postings and led him through a six-month period of exchanged e-mails, letters, and photos, ultimately setting up an assignation for which Poehlman traveled from Florida to California. As part of the email exchange, Sharon gradually introduced the subject of her teenage daughters, for whom she was seeking a man as a sexual "teacher" and "mentor." Poehlman's initial posting, to which Sharon had responded, mentioned nothing about underage sex, and even after she introduced this topic into their ongoing conversation, he evinced little interest until it was clear that she would not be interested in a relationship with him unless he was sexually interested in her daughters.

Writing for the majority of the panel, Circuit Judge Alex Kozinski found that the trial record would not reasonably support a conclusion that Poehlman was predisposed to engage in sex with minors, finding that the evidence pointed to his desire to find an adult woman who would accommodate his fetishes, and that the government had in effect planted the idea of sex with minors and led him along to the point of actually traveling across state lines in hopes of establishing a relationship with Sharon. Dissenting, Circuit Judge David Thompson argued that the majority of the panel had exceeded its role by roughing the evidence, and that a reasonable jury could have found predisposition by Poehlman to commit the offense of which he was convicted.

In an interview with the Associated Press published June 28, Poehlman's attorney, Edward M. Robinson, contended that federal agents have commonly and unfairly targeted gays and bisexual as they look for pedophiles on-line. "You can't rely on antiquated prejudice and come ot the conclusion that, if you have an interest in alternative, non-heterosexual sex, you are predisposed to have an interest in children," he asserted. In this case, he contended, Poehlman was targeted because he is a transvestite, which has nothing to do with an interest in pedophilia. A.S.L.

Second Circuit Voids Conviction Under Federal Child Porn Law; Statutory Ambiguity at Fault

Finding that the meaning of 18 U.S.C. sec. 2252(a)(4)(B), as it existed in 1994, was so ambiguous that the court was left to "simply guessing about congressional intent," a divided panel of the U.S. Court of Appeals for the 2nd Circuit reversed the conviction of Charles Dauray for possession of child porn. *United States v. Dauray*, 2000 WL 770540 (June 15).

The statute made it a federal offense to possess "3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction [that has moved in interstate commerce] if the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct and such visual depiction is of such conduct." Dauray was arrested by a state police officer while parked in his car in a Connecticut state park, and was in possession of thirteen unbound pictures of minors. Dauray was convicted by a jury under the statute, and the jury specifically found that four of the 13 pictures in his possession came within the statutory definition.

On appeal, Dauray argued that the statute was fatally ambiguous. The only part of the provision under which he could be prosecuted was the "other matter which contain any visual depiction" provision. Dauray argued that "other matter" could not include individual photographs, but must refer to things like the specific items coming before it in the list, such as books, magazines, video tapes. Otherwise, the statute would produce the absurd result that if Dauray possessed a photo album that contained all the pictures, he could not be prosecuted because the album would consist of one "matter," while he could be prosecuted for possessing at least 3 pictures clipped or removed from the album. The pictures that Dauray was arrested with had all been clipped out of magazines; if they all came from the same magazine and Dauray was found in possession of that magazine, he could not be prosecuted because he would be in possession of only one magazine.

Writing for the majority, Circuit Judge Jacobs found that Dauray had made an excellent point. There were plausible alternative ways of reading the provision, and no one way was clearly correct. Furthermore, the result was that it could be unclear to a person in some cases whether he was engaged in prohibited conduct. As such, the court was left guessing about congressional intent, because none of the normal devices of statutory interpretation threw any light on the situation.

"The government did not show that the pictures at issue were taken from more than a single magazine," wrote Jacobs. "At the time of Dauray's arrest, the statute did not forbid possession of such a magazine. Nor did the statute give Dauray notice that removing several pictures from the magazine, and keeping them, would subject him to criminal penalties. This result is unconstitutionally surprising. Under these circumstances, we must apply the rule of lenity and resolve the ambiguity in Dauray's favor."

Circuit Judge Katzmann was not persuaded, pointing out that the Supreme Court has held that mere ambiguity in the meaning of a statute does not necessary render it unconstitutional or merit resort to a rule of lenity in its application. But Katzmann was evidently frustrated by the semantic games suggested by the majority opinion (reading it is like reading a chapter of *Alice in Wonderland*), concluding: "I fully agree with the majority that the statute could result in some incongruous interpretations. But in the end, I conclude that we must 'apply the provision as written, not as we would write it.'"

The statute was subsequently amended to reduce from three to one the number of items the possession of which will subject one to prosecution for possession of child porn, but the ambiguity is not necessarily cured, since the majority seemed to find merit in Dauray's argument that a free-standing photograph might never come within the meaning of "other matter," as one principle of statutory interpretation holds that when a general term is the last item on a list of specific terms, the general term should be interpreted to mean things that are like the specific ones that are listed, and it could plausibly be argued that a single sheet of paper bearing a photograph is not relevantly like a book or magazine or video tape. A.S.L.

Sex Toys Are Therapeutic, Says Louisiana's Highest Court.

On May 16, the Louisiana Supreme Court, the state's highest court, affirmed a decision holding that a law prohibiting the sale of "obscene devices" violates the U.S. Constitution. *State of Louisiana v. Brenan*, 2000 WL 631289. Following nearly an identical jurisprudential path cut last year by the federal district court of Alabama, which struck down that state's obscene devices statute, the court found that the statute lacked a rational relationship to a legitimate state interest and therefore violated the Fourteenth Amendment's due process clause.

In 1997, Christine Brenan was arrested for selling obscene devices at her dance-wear boutique in a small Louisiana town 40 miles north of New Orleans. The devices were located in an area of the boutique separated by latticework

and labeled "For adults only." Most of the items seized were simulated human genitals or packaged explicitly as a means to stimulate the anus or the male or female genitals. Another confiscated item was a scalp massager. Brenan pled not guilty and defended on constitutional grounds. She was convicted and received a suspended sentence (2 years hard labor) and five years probation.

She claimed on appeal that the statute was unconstitutional on its face and as applied because it violates property rights and privacy rights under the Louisiana Constitution and *Griswold v. Connecticut*, 381 U.S. 479 (1965). The state argued that these devices are not constitutionally protected and that their universal ban is a rational measure by the legislature to effect the state's interest to protect minors and unconsenting adults. The Court of Appeal reversed Brenan's convictions, finding the statute supported no reasonable, rational relationship to a legitimate state interest, hence violative of the Fourteenth Amendment's Due Process Clause. The Louisiana State Supreme Court agreed.

The statute at issue is part of a broader anti-obscenity law passed by the Louisiana legislature during its "war on obscenity" in the mid 1980s. The statute bans the sale, manufacture or distribution of any "device, [as] an artificial penis or artificial vagina, which is designed or marketed as useful primarily for the stimulation of human genital organs." Acknowledging the obscenity standards for "works" (not "devices") as established by *Miller v. California*, 413 U.S. 15 (1972), the court recognized this as a case of first impression and that, at most, *Miller* serves as a guide in the determination of whether the devices are obscene or garner constitutional protection.

Writing for the court, Judge Bernett Johnson confessed the court's extreme hesitation to expand the concept of substantive due process. She further defended its reluctance, stating public debate and legislative responsibility concerns. Proceeding forward, the court quickly eliminated Brenan's "if it's legal to own it, it's legal to sell it70 alternative defense, and simultaneously setting a test of constitutional scrutiny. Extending the holdings of a Louisiana and a US Supreme Court obscenity case to include obscene devices, Johnson held that although one may have the privacy right to possess and use the device in the privacy of one's home, it does give rise to a correlate right to sell or transport it. *Stanley v. Georgia*, 394 U.S. 557 (1969), *State v. Honore*, 564 So.2d 345 (La. App. 5th Cir. 1990). Therefore, "[i]f legislation does not burden a constitutionally protected right, then the legislative act faces minimal scrutiny." Considering the passing of the rational basis test for the nearly identical statutes from fellow Deep-South states Texas and Georgia, the stage seemed set for the Louisiana statute to survive.

However, the court put forth another dimension to the statute that apparently eluded either of the litigants. Johnson corrected both parties for assuming the primary purpose behind the statute was to protect minors and unconsenting adults form viewing such devices. State Senate Committee minutes reveal that the purpose of the statue to ban obscene devices was part of an anti-pornography crusade in the mid 1980's culminating in 1986 with the publishing of a report by the Attorney General's Commission on Pornography. However, obscene devices were not the object of the study and the Commission declined to label vibrators as obscene (one doctor on the panel noting that "the ordinary vibrator is no more obscene than the Washington Monument"). Nevertheless, the Louisiana legislature saw fit to label such devices as obscene and ban their sale in order to promote morals and public order, a move the court said was wrong. "The legislature cannot make a device automatically obscene merely through the use of labels."

With the *Miller* test as its guide, the court found three things wrong with the statute: the statute has no evaluation mechanism to establish contemporary community standards or prurient interest, that there is no adversarial process under the statute to determine obscenity and, there exists a medical personnel exception. It is with this third finding that the court delivers the ban its fatal blow.

Johnson explained that some of these devices are "therapeutically appropriate," citing the FDA's promulgation of regulations concerning "powered vaginal muscle stimulators" and "genital vibrators," and the medical evidence used in the striking down of Kansas' and Alabama's obscene device statutes. The court shares with us a history lesson about "the creation of the vibrator [having] its roots in the field of medicine" and how they remain an important tool in the treatment of anorgasmic women. Likewise, it has helped (pre-Viagra era) men with erectile dysfunction.

Given these therapeutic uses, the court found that the state's action of banning all of what it labeled "obscene devices70 without any review of their prurience or medical use is not rationally related to its "war on obscenity,70 and hence violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

In dissent, Judge Chet Traylor rebuked the therapeutic argument, reminding Johnson that the devices in question have labels that warn "Sold as Novelty Only. This Product is not Intended as a Medical Device." Moreover, there was no evidence offered to show that devices designed or marketed in an obscene matter are necessary to achieve a therapeutic result. Lastly, he highlighted that it is the fact of how the use of these devices are communicated (in shapes of human genitals), or displayed or descriptive text is the element that offends unconsenting adults and minors. Because this element of the device is the applicable determination for what is obscene, the *Miller* test is satisfied and thus no constitutional protection.

Shortly, this court is expected to hand down its decision regarding the constitutionality of Louisiana's sodomy law, argued in April, which was brought by the state after being struck down in 1998 by the court of appeal. Since the court chose not to address the right to privacy issues argued in *Brenan*, this is keeping pundits (like this writer, a native New Orleanian) guessing about the future of Louisiana's sodomy laws. *K. Jacob Ruppert*

Alabama's High Court Says Sexual Orientation Evidence is Too Prejudicial and Outweighs Probativeness in Tort Suit Against Doctor

In a slip opinion released June 30, the Supreme Court of Alabama, the state's highest court, affirmed a decision in favor of a male neurologist who was sued in civil court for allegedly fondling a male patient's genitals during treatments after an auto accident. *Mock v. Allen*, 2000 WL 869601.

Shellie Mock Jr. was injured in an automobile accident in 1991. In November 1992, he became a patient of Dr. Robert Allen, who examined or treated Mock several times in the following months for pain in Mock's head, neck, back, left hip and groin and left knee. In October 1993, Mock filed this action against Dr. Allen alleging that Dr. Allen had committed the tort of battery against him when Dr. Allen "fondled, stroked, caressed or otherwise touched [Mock's] genitals without [Mock's] consent and with no medical reason." Mock alleged that this occurred with nearly every office and hospital visit during their doctor/patient relationship. One account describes Mock, in the throes of severe pain, being given a combination of drugs which knocked him out and, upon awakening, looked down between his knees discovering Dr. Allen "messing with" Mock's genitals. Dr. Allen denied all allegations, asserting that all touching was consistent with medical treatment.

At trial, Mock objected to the trial court's ruling that his action against Dr. Allen was governed by the Alabama Medical Liability Act (AMLA). As part of his case, Mock unsuccessfully attempted to offer evidence of other alleged similar "wrongful acts" by Dr. Allen to five other male patients, all of whom were ready to testify against Dr. Allen. Also, the trial court prohibited Mock's attempt to offer evidence of Dr. Allen's alleged sexual orientation. Mock's case was submitted to a jury which returned a verdict in Dr. Allen's favor. Mock appealed.

Writing for the court, Justice Brown affirmed the trial court's decision on all points. On the issue whether the claims against Dr. Allen should be governed by the AMLA, the court followed established precedents that alleged sexual misconduct is considered to have occurred during that delivery of professional services and is therefore cognizable as a medical-malpractice claim. Mock argued that the acts alleged were for no medical reason and thus outside the jurisdiction of the AMLA. However, as the court pointed out, Mock's sole supporting case involved allegations of a sexual relationship between a doctor and patient, which was not the case here. Turning to the prohibition of admissibility of "similar acts" evidence, the court ruled that since there was a finding that the AMLA governed, evidence of similar acts was irrelevant.

Last, the court found that the barring of evidence as to Dr. Allen's alleged homosexual status was properly within the discretion of the trial court, and such discretion had not been abused. Mock argued that Dr. Allen was gay and that this would be of consequence to the jury's determination of whether Dr. Allen had sexually assaulted Mock. Justice Brown observed that such evidence is more likely to be admissible in criminal actions than in civil ones. Relying upon many supporting cases and evidence treatises, the court further stated that the trial court "properly reasoned that the introduction of this evidence would have focused the jury's attention away from what actually happened between Dr. Allen and Mock, and instead, on Dr. Allen's sexual orientation. Whatever the probative value of this evidence, it was substantially outweighed by the danger of unfair prejudice."

Three justices, Lyons, England and See, dissented, arguing that this case fell outside the jurisdiction of the AMLA because an allegation of sexual molestation is not, as the AMLA puts it, a "fail[ure] to exercise such reasonable care, skill and diligence as other similarly situated health care providers in the same general line of practice, ordinarily have and exercise in a like case.70 The dissent argued that because the AMLA does govern, the case should be remanded for new trial on the alleged incidents of battery and on "similar acts" evidence. The dissent was silent as to the admissibility of evidence regarding Dr. Allen's sexual orientation. *K. Jacob Ruppert*

Federal Appeals Courts Grapple With Internet Sex Laws

Just one day apart, two federal appeals courts issued decisions on the constitutionality of laws seeking to restrict access to websites with sexual content. On June 22, a 3rd Circuit panel ruled in *ACLU v. Reno*, 2000 WL 801186, that the Child Online Protection Act was probably unconstitutional, thus affirming a preliminary injunction that had been issued by District Judge Lowell Reed to keep the law from going into effect pending a final determination on the merits. But on June 23, the en banc 4th Circuit ruled 8–4 in *Urofsky v. Gilmore*, 2000 WL 806882, that a Virginia statute banning state employees from accessing sexually-explicit websites from state owned or leased computers is constitutional.

The 3rd Circuit opinion focused on an overbreadth problem in the federal statute: the definition of material "harmful to children" to which the statute applies incorporates the "community standards" language familiar from the Supreme Court's obscenity cases. This establishes a standard that would vary from place to place, depending on local attitudes towards sex and violence. The problem, pointed out Circuit Judge Leonard Garth in the opinion for the panel, was that the Internet, and in particular the World Wide Web at which the statute is specifically targeted, is not a geographical place and knows no boundaries. Thus, a website can be accessed from anywhere in the world, and the operator of the site has no mechanism at present to prevent computer users from particular places from accessing the site. This means, in essence, that the applicability of the statute to any particular site would depend on the community standards of the least permissive jurisdiction in the United States, thus posing obstacles to adults everywhere else in the country from accessing material on-line that it should be perfectly legal for them to access without any impediment due to the more permissive community standards where they live.

By contrast, the 4th Circuit case turned on the court's characterization of public employee speech. Relying on Supreme Court cases involving discipline of public employees for making controversial statements, the court drew a sharp distinction between public employees speaking as private citizens and speaking as government employees, and also made much of the way the Supreme Court has provided lesser First Amendment protection when public employees speak on matters that are not considered to involve public interest. The court found that there was little, if any, First Amendment problem with the Virginia statute, and that the state had a strong interest in forbidding the use of its computers for accessing sexually-explicit material.

Among the many groups banded together as plaintiffs in the case was the American Association of University Professors, arguing on behalf of its members who are faculty at state universities and colleges in Virginia, whose ability to access websites they might need for research purposes would be inhibited by the law. The court was content to rest on a provision allowing institutions of higher education to give prior approval for research relating to projects approved by the university. To the dissenters, this smacked of official censorship of scholarship. Even some of the concurring judges (there were two concurring opinions) found the majority opinion troubling in its rather extreme view of the lack of First Amendment protection for public employees in Virginia.

The American Civil Liberties Union was lead counsel in both cases, and both cases may well be heading for the Supreme Court, which seems to be serving up a steady stream of opinions defining the scope of First Amendment rights on the Internet. A co-plaintiff in the 3rd Circuit case is the *Philadelphia Gay News*, eagerly protecting nationwide free access to its website, seeking to avoid the incumbrance of requiring credit card or adult ID access to comply with the statute. A.S.L.

West Virginia High Court Affirms Summary Judgment in Lesbian Discrimination Dispute

In an opinion that appears to depict serious theoretical confusion either on the part of plaintiff's counsel or the court (or perhaps both), the Supreme Court of Appeals of West Virginia affirmed the grant of summary judgment to the employer in *Minshall v. Health Care & Retirement Corp. of America*, 2000 WL 742225 (June 9), a state law discrimination case filed by a lesbian. The per curiam opinion drew dissenting votes from two members of the court, who did not file an opinion but reserved the right to do so at a future time.

Melanie Minshall was hired as a nursing assistance by the defendant retirement facility in May 1994, and was discharged on September 25, 1995. The defendant claimed Ms Minshall was fired because of a complaint by a patient about the quality of care she provided to him. Minshall filed a complaint in state court alleging three theories: sex discrimination, intentional infliction of emotional distress, and wrongful discharge (breach of contract). The defendant filed a motion for summary judgment. In opposition to the motion, Minshall argued that she was discharged because she is a "female homosexual" and that her female supervisor, whose younger sister knew about Minshall's sexual orientation, had discharged her in order to "protect" her younger sister.

The circuit court granted the summary judgment motion, finding: "Plaintiff's only evidence to support her sex discrimination claim is her bare argument that she was fired because she is a female homosexual and that she would not have been fired if she was a male homosexual. There is no evidence that male homosexuals were treated differently than plaintiff at Heartland of Keyser, nor is there evidence that male homosexuals were ever employed at Heartland of Keyser. Plaintiff's claim that she was discharged on the basis of sex because she

was a female homosexual fails as a matter of law."

Minshall appealed, claiming there were material issues of fact on the discrimination claim that should have precluded summary judgment. At oral argument, her attorney stated that they were abandoning the sexual orientation discrimination claim, and were asserting only a sex discrimination claim. The court found this attempt to change the theory of the case on appeal to be "problematic," pointing out that on the motion the circuit court "was called upon to decide the issue of sexual orientation discrimination, not gender discrimination… Therefore, under our court precedents it was necessary for Ms. Minshall to affirmatively assert her claim of pure gender discrimination and defend against the summary judgment motion before the circuit court."

The court also found that Minshall was an at-will employee and could not bring a breach of contract claim for her discharge. Although West Virginia has recognized an exception to the at-will rule for cases where employers promise job security in writing to employees in a personnel handbook, the court observed that the defendant's handbook, cited by Minshall, contained no statements promising job security. Finally, the court observed that it had only allowed emotional distress claims in connection with employee discharges where the employee alleged facts showing that the discharge was handled in an outrageous manner; emotional distress arising just from the fact of the discharge itself could not be the basis of a tort claim. Here, the court found that Minshall had failed to allege facts suggesting outrageous employer conduct as part of the discharge.

In a footnote, the court observed that because of the way the case came to it and was presented by the plaintiff, it had no occasion to determine whether sexual orientation discrimination is actionable under the state's law banning sex discrimination in employment. Ms. Minshall was represented on appeal by Harley O. Staggers, Jr. of Keyser, West Virginia. A.S.L.

Tennessee Appeals Court Revives Gay Dad's Custody Case

In *Price v. Price*, 2000 WL 704596 (May 31), the Tennessee Court of Appeals reversed a trial court order that had permanently modified a prior joint custody agreement concerning two young teenaged children between a mother and the gay (and now coming out) father in favor of the mother.

The trial court had issued its order, giving the mother sole physical custody and restricting the father's visitation rights, after a hearing which was solely on the issue of whether an ex-parte temporary restraining order awarding custody to the mother pending a hearing of the merits of the mother's petition to modify the custody agreement should be extended until a trial on the issue could be held. During the hearing, the trial court had specifically stated that the *sole* issue before the court was whether irreparable harm would result to the children if the TRO was not extended, and not whether custody should be modified permanently. The trial judge had admonished trial counsel several times for straying to the issue of permanent custody, precluded admission of probative evidence by the father relating to the permanent custody, and had taken proposed findings of fact and memoranda of law relating to the extension of the TRO pending trial. Nonetheless, the court issued an order permanently modifying custody, finding it in the best interest of the children to do so, citing prominently the fathers "alternative lifestyle."

The Court of Appeals reversed, ruling that there was no finding of irreparable harm to the children if the prior arrangement was continued pending trial, and that there was no record evidence to support the trial judge's modification. Neither party had been given an opportunity to present fully the evidence on the permanent custody issue. Therefore, the trial court's order was set aside, the prior joint custody agreement was reinstated pending a hearing on the merits of the respective petition and counter-petition for sole custody.

While the appeals court made it clear that the appeal was being determined on the issues of Tennessee civil procedure, the decision made it equally clear that the trial court had acted out of distaste for the father's sexual preference. Notwithstanding the numerous admonitions issued during the hearing, the trial court judge apparently realized which way he would be inclined to go after the hearing on the merits of the custody petitions, and more or less "cut to the chase." It is equally clear that what began as an amicable divorce was turning bitter as the mother disapproved of the father's homosexuality, of the money that he was able and willing to spend on the children, and of the fact that the children were apparently quite accepting of the father's homosexuality. The appeals court lays all of this out in a degree of detail which is simply impossible to summarize briefly. *Steven Kolodny*

6th Circuit Affirms Summary Judgment on Religious Discrimination Claim by Lesbian

A unanimous panel of the U.S. Court of Appeals for the 6th Circuit upheld a grant of summary judgment in favor of the Baptist Memorial Health Care Center in Memphis, Tennessee, rejecting a religious discrimination claim brought by Glynda Hall, a lesbian. *Hall v. Baptist Memorial Health Care Corp.*, 2000 WL 757717 (June 13). The court found that the employer was exempt from Title VII religious discrimination coverage, but that in any event Hall had failed to allege a prima facie case of religious discrimination.

Hall was hired Aug. 7, 1995, by the College of Health Sciences, a subsidiary of the Health Care Center, as a Student Services Specialist, to work with students and administration in organizing and planning activities of campus student organizations. She was not open about being a lesbian when she was hired. She received frequent commendations for her work. In the spring of 1996, she began the process of becoming a lay minister at Holy Trinity Community Church, a non-denominational gay-friendly Christian church. That summer, her supervisor, Paul Barkley, a Southern Baptist minister, asked her where she attended church. When she told him Holy Trinity, he became concerned because of the church's reputation as being gay-friendly, and brought his concern to Rose Temple, the president of the College, who told Barkley that the College would not intervene in Hall's choice of where to attend church. However, after Hall was ordained, she told Barkley that she is a lesbian and, when he brought this information to Temple's attention, Hall was discharged.

The Medical College and the Health Care Center of which it is a part were founded by three regional divisions of the Southern Baptist Convention, which is an avowedly anti-gay religious movement. The College requires that its students participate in religious instruction. Temple and Barkley took the position that a student services specialist is in a position of influence over students, and that the College should not keep in that position an openly-gay person. However, they did offer to find her a non-student contact position, which she refused.

Hall sued under Title VII of the Civil Rights Act of 1964, alleging that she had been discharged because of her religious practices and beliefs, which differed from those of the College. The College defended on two grounds: a religious exemption from compliance, and a failure by Hall properly to allege a prima facie case of religious discrimination. The trial court granted the College's motion for summary judgment on both grounds.

Writing for the 6th Circuit Panel, District Judge Dan Polster, sitting by designation, found that the trial court was correct on both counts. 42 U.S.C. sec. 2000e–2(e)(2) provides that it is not unlawful for an educational institution that "is, in whole, or in substantial part, owned, supported, controlled or managed by a particular religion or by a particular religious corporation, association, or society" to "hire an employee of a particular religion." Federal courts have broadly interpreted this provision to allow religiously-affiliated educational institutions to insist that their employees comply with the tenets of the sponsoring religion. Thus, in one case a federal circuit court had applied the exemption to a Catholic school that discharged a Prot-

estant tenured teacher when she failed to validate her second marriage by obtaining an annulment of her first marriage through Catholic church procedures. Another decision had applied the exemption to a Baptist college that discharged a tenured faculty member who was a Baptist but who had stated religious views differing from those of his academic dean.

In this case, Hall attacked the conclusion that the Medical College came within the terms of the exemption. Judge Polster found that the Baptist Church had created the parent corporation for the Health Center, of which the College is a subsidiary corporation, and thus that the College "has a direct relationship with the Baptist church." He also found that "the College atmosphere is permeated with religious overtones," noting the method of recruiting students, the frequent articulation of the school's religious mission at public events including student orientation, the frequent prayer breakfasts and chapel programs, and so forth. Polster also rejected Hall's argument that the College had somehow waived its Title VII exemption by accepting federal funds and holding itself out as an equal opportunity employer. Polster asserted that "the statutory exemptions from religious discrimination claims under Title VII cannot be waived by either party," because the exemptions reflected a judgment by Congress that religious organizations had a constitutional right to be free from government interference in their personnel policies.

But even if the exemption did not apply, Polster found, Hall's complaint fell short of stating a religious discrimination claim. Polster stated that it was clear that Hall was being fired because of her sexual orientation, and not her religious activities. Applying the *McDonnell Douglas* framework that federal courts follow under Title VII in cases where there is not direct evidence of unlawful motivation, Polster found that Hall had failed to satisfy the final prong of the test, which he characterized in this case as showing that "she was treated less favorably than similarly-situated persons not a member of the protected class. In other words, Hall has the burden of establishing that comparable co-workers who engaged in substantially the same conduct as she were treated better."

The problem was, Hall could not to the court's satisfaction show that anybody similarly situated to her was treated more favorably on religious grounds. Hall pointed to another employee who had become an ordained minister in the Christian Methodist Episcopal Church but was allowed to continue her employment, even though the Southern Baptist Convention officially opposed ordination of women. Polster rejected the analogy, asserting that the other employee "did not assume a leadership position in an organization that publicly supported homosexual lifestyles" and was thus not similarly situated to Hall. (The illogic of this position is startling: in order to raise an inference of discrimination on the basis of religion, Hall would have to be able to allege that another employee had also become a minister of a non-Baptist church that supported gay rights but was not fired.) Polster also opined that First Amendment protection for the College's free exercise of religion would, in any event, require the federal courts to refrain from "dictating" to religious organizations "how to carry out their religious missions or how to enforce their religious practices."

Polster went even further in support of the summary judgment decision, however, stating that even had Hall alleged an adequate prima facie case, she would not be able to show that the reason for her termination was a pretext for religious discrimination. The College said that it terminated her "because she assumed a leadership position in an organization that publicly supported homosexual lifestyles," a view at odds with the Southern Baptist Convention's position on the issue of homosexuality. Since the College employed faculty and staff who were members of a wide variety of faiths, and even some atheists, it would be hard to assert that the College was requiring religious conformity in general. Indeed, when first informed of where Hall prayed, the College president took no action against her, and she was only terminated after she told her supervisor that she is a lesbian.

Finally, Polster rejected Hall's argument that she was entitled to a "reasonable accommodation" of her religious beliefs, pointing out that the College offered her an accommodation a non-student contact position which she refused.

Reacting to the decision in an interview with the Memphis *Commercial Appeal* (June 14), Hall's attorney, Clyde Keenan, found that court's analysis of the religious exemption to be "unusual," arguing that an employer should not be able to take federal money and claim to be an equal opportunity employer on the one hand, and then be able to hide behind an exemption from compliance with Title VII on the other. Keenan said his client was considering whether to seek further review. A.S.L.

First Circuit Gives Cross-Dresser a Day in Federal Court

The U.S. Court of Appeals for the First Circuit reversed the summary dismissal of a sex discrimination case brought against a bank by a cross-dressed person who was refused a loan application. *Rosa v. Park West Bank & Trust Co.*, 2000 WL 726228 (Jun. 8).

Lucas Rosa, biologically male, sued Park West Bank & Trust Co. under the Equal Credit Opportunity Act (ECOA) and Massachusetts state law, after a bank employee told Rosa that she would not give him a loan application or process his loan request until he "went home and changed" into more traditionally male attire, as he appeared in the three forms of photo identification he provided. District Court Judge Frank Freedman, stating "the issue in this case is not [Rosa's] sex, but rather how he chose to dress ... even if Park West's ... action were based upon ... perceived sexual orientation the Act does not prohibit such," dismissed Rosa's ECOA and pendent state claims. Massachusetts law prohibits sexual orientation discrimination.

Rosa's appeal contended that the district court "fundamentally misconceived the ... applicable [law] by concluding that there may be no relationship, as a matter of law, between telling a bank customer what to wear and sex discrimination," and that it misapplied FRCP 12(b)(6) by resolving factual questions.

In apparent agreement with Rosa's arguments, Circuit Judge Lynch's opinion states that the evidence as to Park West's motive in telling Rosa to "go home and change" is not yet developed. The opinion cites cases interpreting Title VII federal employment discrimination law, including *Oncale v. Sundowner Offshore Servs.*, as the requisite for interpreting the ECOA. Speculating as to Park West's possible motive or motives in denying Rosa the application, the court reversed, finding it reasonable to infer that some of Park West's motives could fall into the prohibited category. Rosa now has the opportunity to show that he suffered disparate treatment based on sex. (Although Lynch's opinion seems to suggest that, for someone to be situated similarly to Rosa, they would have to be "a woman who dresses like a man.")

Rosa is represented by Jennifer Levi, with Mary Bonauto and Gay & Lesbian Advocates & Defenders on the brief. Katherine Franke represented amici curiae NOW Legal Defense and Education Fund and Equal Rights Advocates. *Mark Major*

N.Y. Family Court Judge Lets Lesbian Co-Parent Seek Visitation

In a decision that strains to distinguish adverse controlling precedent in New York State, Westchester County Family Court Judge Joan Cooney ruled in *Matter of J.C. v. C.T.*, published June 23 in the *New York Law Journal*, that a lesbian co-parent might have standing to pursue visitation with the children she had been raising with her former partner, using an equitable estoppel theory. Rejecting a motion to dismiss, Cooney ordered a hearing to determine whether petitioner J.C. could meet the standard recently set out for such cases by the New Jersey Supreme Court in *V.C. v. M.J.B.*, 748 A. 2d 539 (N.J. Sup. Ct., April 6, 2000).

The case presents what has become an unfortunately typical litigation scenario: a lesbian couple decided to have children through donor

insemination, both women participating fully in all the decision-making. One member of the couple bore the children, and both women lived with the children as a family unit, sharing equally the parenting responsibilities and rights, and both bonding equally as a parent with the children. After several years, the couple terminated their relationship. At first, the birth mother allowed the co-parent to have visitation with the children, but eventually she cut off visitation. When the co-parent filed suit seeking visitation, the birth mother moved to dismiss the case on standing grounds, citing *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (N.Y. 1991), in which the Court of Appeals ruled that a co-parent who was a "biological stranger" to the child lacked standing to seek visitation over the objection of the birth mother. That case presented a factual context strikingly similar in many respects to the facts of this case.

Judge Cooney gave a very narrow, literal reading to *Alison D.* as a precedent, holding that the court "did not create a blanket rule to be applied in all cases involving unrelated persons seeking to establish custody or visitation in the face of a fit biological parent, without regard to the best interests of the child." Judge Cooney took her lead from the more recent decision by the Appellate Division, 2nd Department, in *Maby H. v. Joseph H.*, 246 App. Div. 2d 282 (1998), in which that court used an equitable estoppel theory to find standing to seek visitation for a man who had assisted his girlfriend in raising her child to whom he was not biologically related. In essence, the court recognized that the child no less than the parent has an important interest at stake in such a dispute, and that equitable estoppel should be invoked in appropriate circumstances to bar the *Alison D.* defense when there is an established parent-child relationship that was actively created by the defendant.

The judge looked to the recent New Jersey decision in *V.C.* for appropriate standards to apply. The *V.C.* court had in turn borrowed standards articulated by the Wisconsin Supreme Court in *Custody of H.S.H.-K.*, 533 N.W.2d 419 (1995), creating a four-part factual test: (1) the biological or adoptive parent fostered and actively encouraged the development of a parental relationship between the child and the plaintiff; (2) the plaintiff and child lived together in the same household for some period of time; (3) the plaintiff had assumed obligations of parenthood with respect to the child; (4) the duration of the relationship was long enough for the child to have "bonded" psychologically with the plaintiff as a parent.

In this case, the judge found that the allegations of the complaint were sufficient to suggest that the test might be met, but a ruling on the merits of standing would have to await a hearing. A.S.L.

7th Circuit Finds Discriminatory Prison Housing Decision to be Rational

In a decision that presumes without discussion that anti-gay discrimination is subject only to the lowest level of constitutional scrutiny, the U.S. Court of Appeals for the 7th Circuit rejected 8th and 14th Amendment claims by a gay African-American prisoner regarding the housing provided to him in the Indiana State Prison. *Peterson v. Bodlovich*, 2000 WL 702126 (May 24) (unpublished disposition).

Peterson, an inmate at Indiana State Prison, suffers from asthma which is made worse by exposure to cats. Evidently, there are plenty of cats wandering around the prison. Peterson's treating physician recommended that he be moved to an area of the prison with no cats. Peterson had been housed in a "closed" dormitory setting, allegedly because when he previously lived in an "open" setting other prisoners complained about his aggressive homosexual behavior. Responding to the doctor's suggestion, prison authorities relocated Peterson several times but refused to move him into "open" housing, which he had requested because it would leave him freer to move away from any cats in the vicinity.

Peterson filed a pro se action, claiming deliberate indifference to his medical problem and unequal treatment. Among other things, he claimed that prison officials were particularly biased against black gay men, having been told by them that "black homosexuals don't adjust right" to open dormitory living. The district court granted summary judgment in favor of defendants.

The court of appeals' decision is not attributed to any one of the judges. They collectively found that the prison had not exhibited deliberate indifference to Peterson's asthma problem, noting that prison authorities had tried to move him around to avoid exposure to cats and that the doctor had indicated that the condition was not life-threatening.

As to the equal protection claim, the prison authorities admitted that their refusal to put Peterson into open housing was based on his sexual orientation, and that they "tried not to place any admitted homosexuals in an open dormitory because it was disruptive to the other prisoners." The court asserted that this decision "is subject only to rational basis review because homosexuals are neither a suspect nor quasi-suspect class. Under this standard, defendants need only show that their decision was rationally related to a legitimate government interest. We agree with the defendants that their decision not to transfer Peterson was rationally related to their legitimate interest in reducing openly sexual behavior in the prison. Peterson's previous open and aggressive sexual behavior demonstrated to defendants that he was not a suitable candidate for open dormitory living." A.S.L.

Ohio Supreme Court Clarifies Plaintiff's Evidentiary Burdens in Same-Sex Harassment Case

In *Hampel v. Food Ingredients Specialties, Inc.*, 729 N.E.2d 726, 89 Ohio St. 3d 169 (June 21), the Ohio Supreme Court affirmed a jury verdict awarding compensatory damages of $368,750 and punitive damages of $1,280,000 in a same-sex harassment case but, ironically, found that the plaintiff's same-sex harassment claim should not have been submitted to the jury, instead premising the damage award on the plaintiff's intentional infliction of emotional distress claim.

Laszlo Hampel worked as a cook at FIS-Nestle. On April 17, 1995, he encountered some frustration at work due to an ongoing problem of inadequate storage capacity for finished food products, and complained to his supervisor, Jerry Hord. In front of other employees, Hord responded to Hampel's complaint by telling him "Hey, Laz, you can blow me," and when Hampel asked for a clarification, "I said, you can suck my dick." This led to a sordid conversation that is reproduced verbatim in the court's syllabus of the case. At the end of his shift, Hampel went to Hord's office to protest his language, and Hord said if he didn't like it, he should quit his job. The next day, Hampel filed a grievance against Hord with the vice-president of manufacturing. There followed an intense campaign of harassment against Hampel by Hord, none of which was sexual in nature. The campaign continued until Hampel finally quit his job in May 1996, after having taken a medical leave of absence to deal with the extreme depression into which he was driven by Hord's harassment.

Hampel filed suit in state court alleging sexual harassment, retaliation, and intentional infliction of emotional distress. The trial judge rejected the defendants' motions for directed verdict and sent all three claims to the jury, which ruled for Hampel on harassment and emotional distress, while rejecting his retaliation claim. The court of appeals reversed the judgement, finding the evidence did not support a sexual harassment hostile environment claim, and remanded for retrial of the emotional distress claim. Hampel appealed.

The Ohio Supreme Court was very divided over how to handle the case, but all the judges apparently agreed that Hampel had not made out a case of hostile environment sexual harassment. While agreeing with the jury that he suffered from a hostile environment created by his supervisor, the court found that Hord was not motivated by Hampel's sex in so doing. Hampel had staked his sexual harassment claim on the sexual nature of Hord's statements in response

to Hampel's original complaint, but the supreme court agreed with the court of appeals that there was no indication that Hord's statements were seriously intended as a sexual proposition or were particularly targeted at Hampel because of his sex.

Writing for the court on an issue of first impression under Ohio law, Justice Alice Robie Resnick stated: "[We] hold that harassing conduct that is simply abusive, with no sexual element, can support a claim for hostile-environment sexual harassment if it is directed at the plaintiff because of his or her sex. However, harassment is not automatically discrimination because of sex merely because the words used have sexual content or connotations.... While the harasser's words and conduct themselves may sometimes suffice to raise the inference of homosexuality or sexual desire circumstantially, the record in this case points unequivocally to the fact that the expressive function of Hord's language was to mimic rather than reveal any actual sexual desire for Hampel." Furthermore, even though Hord had testified that he wouldn't have said to a woman what he said to Hampel, Resnick found, "In the context of Hord's testimony..., his admission that he would not have used the same language toward a woman reflects some personal morality code, rather than an aversion to men in the workplace, and the record fails to disclose any disparity in the way Hord treated male and female employees."

However, in common with the court of appeals, the supreme court concluded that the record supported sending the intentional infliction of emotional distress claim to a jury. However, the supreme court majority parted company from the court of appeals by concluding that a new trial was not necessary, and the jury's verdict on this claim could be sustained under the "two issues" rule followed by Ohio courts: when there are alternate grounds that would sustain the jury's verdict, it can be sustained on appeal even though one of the grounds is ruled out, where the record would support awarding damages on the other ground and the jury could have done so even had it rejected the illegitimate ground. On this point, three members of the court parted company with Justice Resnick and the rest of the majority, arguing in dissenting opinions by Justices Moyer and Cook that a new trial was necessary so that a jury could focus solely on whether the factual record supported the emotional distress claim, and could calculate damages on that basis.

In an interesting postscript, on the same date, the Ohio Supreme Court dismissed an appeal in another same-sex harassment case, *Retterer v. Whirlpool Corp.*, 729 N.E.2d 760 (June 21), in which it appears that the plaintiff is thrown out of court largely because he failed to preserve certain issues for appeal prior to the U.S. Supreme Court's *Oncale* decision. The court did not issue an opinion on the dismissal, but a concurring opinion was written by Justice Pfeifer with the concurrence of Justice Resnick. "Retterer's sexual-harassment claim should have survived summary judgment," wrote Pfeiffer, noting the ruling in *Hampel* and stating: "This case might have presented the opportunity for us to consider whether discrimination based upon sexual orientation is also actionable under R.C. 4112.02(A). The abusive behavior that might give rise to such a cause of action continues to exist even in this supposedly enlightened day, and certainly it is only a matter of time before the question of sexual-orientation discrimination (and whether it is merely the opposite side of the same sexual-harassment coin) is properly before this court." A.S.L.

Transgender Legal Complications Abound

In *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. — San Antonio 1999), rev. denied, 3/2/2000, rehearing petition for rev. overruled, 5/18/2000, the Texas Court of Appeals held that a post-operative male to female transsexual could not maintain a wrongful death action for the loss of her husband as the result of the alleged negligence of the husband's doctor, refusing to recognize the marriage (contracted in a different state) as valid because Littleton was born a man. If the marriage was not valid, then Littleton was not a surviving spouse, as required to maintain an action under the state's wrongful death statute. Early in July, Littleton filed a petition for certiorari with the U.S. Supreme Court after the Texas Supreme Court had twice refused to take up the case.

Meanwhile, on July 7 the *Wall Street Journal* reported that the same legal issue — the validity of a marriage between a male-to-female transsexual and a man — is working through the Kansas courts. Marshall Gardiner, a very elderly prominent former Kansas state legislator, died intestate, leaving behind his much younger second wife of eleven months, J'Noel Ball Gardiner, and his son by his first marriage, Joe Gardiner, as well as an estate valued at about $2.5 million. Joe, who lived out of state and had not previously met his stepmother, hired a private investigator to look into her past and discovered that she was a post-operative transsexual. The investigator's routine document check turned up the information that J'Noel's social security number had been issued to a man. Joe Gardiner filed suit, contesting the legality of his father's marriage, in order to defeat J'Noel's claim as a surviving widow for half of Marshall's estate. J'Noel, originally named Jay Ball, was born in Wisconsin; after her sex reassignment procedure, that state issued her a new birth certificate identifying her as female. On January 20, 2000, a Kansas trial court issued a ruling similar to the Texas ruling, finding that for purposes of Kansas domestic relations law, J'Noel remained a man and could not have legally married another man. J'Noel is appealing. A.S.L.

Litigation Notes: Civil

The Wisconsin State Department of Workforce Development found probable cause on a sexual orientation discrimination complaint filed by Michael Reisinger, a real estate broker, against his former firm, Michelson Associates & Michelson Management. The Equal Rights Division scheduled a hearing on the claim to take place Aug. 4. Since being terminated as a partner at Michelson, Reisinger has found new employment as a vice president at Polacheck Co. Although he has obtained new employment, if Reisinger prevails on his claim he could receive an award from the ERD administrative judge of lost wages, interest on lost wages, attorneys fees and costs, and a requirement that Michelson offer him a position comparable to the one he lost. If Reisinger seeks other damages, he would have to take his claim into the state court system. *Wisconsin State Journal*, June 16.

The ACLU Lesbian & Gay Rights Project and the Minnesota Civil Liberties Union have announced the filing of a lawsuit challenging the constitutionality of Minnesota's law against consensual sodomy. In an editorial published July 3, the Minneapolis-St. Paul *Star Tribune* editorialized in support of the lawsuit, observing that "even MCLU's critics have a tough time making an argument for keeping the law," concluding: "this law remains an affront to anyone who believes that what a couple of consenting adults do in the privacy of their home is nobody else's business. That's a principle worth going to court for, and the Minnesota Civil Liberties Union should be commended for trying to do what the Legislature should have done long ago." The law is a genuine anomaly, since the state bans discrimination in employment, housing and public accommodations on the basis of sexual orientation.

After the Michigan Court of Appeals affirmed on May 26 a ruling by the Kent County Circuit Court that the estate of Gerry Crane, a gay music teacher who was hounded out of his job in a controversy about his sexual orientation, was entitled to receive the money that the Byron Center School District had agreed to pay to settle Crane's discrimination suit, the Board of Education had a protracted debate about whether to refuse to pay. Crane's settlement agreement with the Board had provided for periodic payments over an agreed time span, but Crane unexpected died from a heart attack and the Board stopped paying, prompting the lawsuit, which was backed by the Michigan Education Association. The Kent County pathologist testified that the stress of Crane's dispute with the Board may have contributed to his untimely

death. The Board had offered to use the money to establish a scholarship fund in Crane's memory, but this offer was declined by Randy Block, Crane's surviving life partner and the representative of the estate. In a press release issued after the vote to settle the case, the Board insisted that the protracted debate had nothing to do with the issue of homosexuality, but was based on the Board's concern about setting a precedent of salary continuation after the death of a former employee. *Grand Rapids Press*, June 11 & June 1.

In 1998, the Kentucky Baptist Homes for Children discharged social worker Alicia Pedreira because of her sexual orientation. There were no allegations of misbehavior or unsatisfactory work on her part, and the discriminatory basis of the discharge is uncontested. The Baptist Homes are largely funded by the state of Kentucky, which has traditionally referred a large proportion of the children in need of institutional residential care to the organization. The ACLU filed suit on Pedreira's behalf against Baptist Homes and the state, theorizing that the Homes were virtually a state institution and thus Pedreira's discharge violated her right to equal protection of the laws. Although the theory is somewhat novel, there is some historical support for the idea that a pervasively regulated entity or an entity deriving much of its revenue from government contracts might be deemed a state actor for certain purposes. Whatever the merits of the legal case, however, the threat of liability for the state has produced interesting political consequences. On June 29, the *Louisville Courier-Journal* reported that the Homes had decided to refuse to renew its contract with the state of Kentucky, as a result of the state's insistence that the Homes agree to assume all costs of defending the suit and all liability in case Pedreira wins. Although the Homes's Board had voted just days previously to renew the contract on the state's terms, the director of the Homes maintained that it would continue its policy of refusing to employ anyone known to be gay, prompting Viola Miller, Secretary of the Cabinet for Families and Children (the state's social welfare agency) to announced that it was possible the state would stop sending children to the Homes, even if it renewed the contract. Since the Homes is paid based on the number of children it takes from the state, the contract would be relatively worthless if the state stopped referring children to the Homes. The contract expired at the end of June, and the Homes was preparing to lay off staff and transfer children to other programs. What is particularly interesting in all this is that Kentucky has no law banning sexual orientation discrimination in employment, although there are some local ordinances whose legal enforceability may be limited. The Homes would, of course, try to claim a religious exemption from compliance with non-discrimination ordinances, which would raise further legal issues regarding the extensive state support for the agency. (We wonder how the Supreme Court's *Boy Scouts v. Dale* decision would affect litigation in this case?) A.S.L.

A Manhattan (New York City) jury awarded $20 million in damages to a gay man who was harassed and fired as manager of a nightclub. *Minichiello v. The Supper Club*, No. 124772/95. Steven Minichiello claimed that everything was fine at the club until a new owner took over, leading to severe harassment producing extreme emotional distress leading up to his discharge, purportedly for refusing to cut off his ponytail. On June 22, the jury brought in a verdict for $10 million in compensatory damages for violation of the New York City Human Rights Ordinance, which bans employment discrimination on the basis of actual or perceived sexual orientation. On June 23, the jury reconvened and determined to award Minichiello an equal amount in punitive damages. The defendants are expected to ask Justice Emily Jane Goodman to reduce the damages as excessive. Minichiello's complaint was filed by the firm of Lipsig, Shapey, Manus & Moverman, which then referred the case out to litigator Alan Rich for trial. Minichiello is currently employed as the manager of another nightclub, the Copacabana. *New York Daily News*, June 23; Amended Verified Complaint.

A Franklin County (Columbus, Ohio) jury has awarded Amy Mier $65,000 in back-pay and expenses in what is claimed to be the first sexual orientation employment discrimination case to go to trial in Ohio under a wrongful discharge in violation of public policy theory. Mier sued her former employer, Certified Oil Company, after she and her domestic partner were both discharged in May 1996. Columbus has a gay rights ordinance, which is not directly enforceable in a civil action. Mier claimed that the tort of wrongful discharge in violation of public policy applied in her case, and was sustained in a pre-trial ruling on a motion to dismiss by trial judge Daniel Hogan, who rejected the precedent of an earlier decision that arose in Cincinnati, attempting to premise the public policy claim on that city's controversial, and subsequently repealed, gay rights ordinance. The jury found that Mier's sexual orientation was a determining factor in her discharge, but that Roush's sexual orientation was not a factor in her discharge. Certified is expected to appeal both the verdict and Hogan's earlier ruling on the legal theory. *Mier & Roush v. Certified Oil Co.*, June 10, 2000. *Reported based on a Queerlaw posting by Columbia attorney Elliot T. Fishman.*

Georgia Superior Court Judge Robert Castellani has dismissed a lesbian co-parent joint custody and visitation petition in *Brandt v. Becht* (DeKalb County Super. Ct., June 2000), citing the U.S. Supreme Court's *Troxel* decision (see above) for the proposition that the birth mother's rights trump whatever rights the co-parent might have. Wrote Castellani, according to an article in the June 15 issue of *Southern Voice*, "Despite what some court may find to be the child's best interests, a parent's right to decide is paramount, absent some threat or harm to the child. Best interests alone will not suffice." Castellani did not specifically address Brandt's argument that she should be treated as a psychological or de facto parent of the child she was raising with her former partner before they split up. • • • *Southern Voice* also reported that the Georgia Supreme Court has refused to review a contempt order issued by Walton County Superior Court Judge Marvin Sorrells against Jean Ann Vawter, for violating the terms of her child custody award by exposing her child to her "meretricious relationship" with her lesbian partner. However, in bring the contempt proceeding, Vawter's ex-husband, Douglas Vawter, did not ask for a change of custody, and since Vawter, her partner and the child are living in North Carolina, there doesn't seem to be any immediate danger to her continued custody (unless, of course, she wants to wander back into Georgia with her child, in which case she might be imprisoned for contempt of court).

The *Baltimore Sun* reported June 30 that Tommie Lee Watkins, who resigned from the U.S. Naval Academy after being accused of homosexual activity, filed suit in the U.S. District Court in that city on June 29 seeking an order blocking the Defense Department from attempting to force him to pay $82,000 for the cost of his education at the Naval Academy. Although the Defense Department adopted a policy in 1994 against attempting to recoup tuition and expense money from cadets who are forced out because they are gay, the Navy is taking the position that Watkins quit without making any declaration about his sexual orientation and thus is not covered by the policy. The Board for Correction of Naval Records, which rarely shows any sympathy for gay sailors, in this case found that the Navy's position constitutes "error and injustice," and points out that the circumstances of Watkins's resignation are clearly related to the charges of homosexuality, even though his letter doesn't mention the issue.

Stephen Smith, Director of the California Department of Industrial Relations, has approved a decision by the state labor commission finding that the Hemet Unified School District violated the rights of lesbian English teacher Alta Kavanaugh by granting a parent's request to remove her daughter from Kavanaugh's class because the parent had religious objections to Kavanaugh mentioning her same-sex partner in class. Smith approved the commission's requirement that the district post notices at schools and headquarters admitting that it violated the law, that the district undertake anti-discrimination training, delete any adverse ref-

erences from Kavanaugh's files and eschew any policy of removing students from classes on this basis. Smith went beyond the original commission order by requiring that the district hire a professional anti-discrimination trainer; the commission would have allowed the district to undertake the training in-house. Also, the commission had not awarded attorney's fees, but Smith ordered that the district pay for Kavanaugh's fees in connection with the commission hearing. If it decides to resist Smith's order, the district would have to appeal to the Superior Court. Kavanaugh has taken a leave of absence and is teaching in another district next year, but has indicated that she would like to return to Hemet schools. Lambda Legal Defense Fund's West Coast Office provided support for Kavanaugh's case. *Riverside Press-Enterprise*, June 21; Lambda Press Release, June 20.

The University of Minnesota agreed to an $80,000 settlement of a lawsuit brought under the state's civil rights law by Richard Marsden, a gay university employee, who claimed he was the victim of a hostile homophobic environment while academic adviser in the athletic department of the university. The University stated out that it did not admit discrimination, but decided to settle in order to save time and money on trial work and appeals. The settlement occurred during the trial in Hennepin County District Court, after Marsden had testified about specific anti-gay incidents that occurred in his workplace. *Star-Tribune*, June 28.

The so-called American Center for Law and Justice, the Pat Robinson founded non-profit law firm, has filed a suit in the Montgomery County, Maryland, Circuit Court, attacking the validity of a county ordinance providing health insurance eligibility for the same-sex domestic partners of county employees. Montgomery County enacted the ordinance late in 1999. Raising an argument on behalf of eleven alleged Maryland taxpayers (who are presumably avowed heterosexuals into the bargain) that "the County Council lacks the legislative authority to redefine the institution of marriage," the complaint charges that only the state legislature "has the authority to redefine marriage or draw legal equivalencies between homosexual relationships and heterosexual marriage relationships." Such arguments have had mixed success in other jurisdictions, most recently producing a decision striking down such benefits in Virginia but a contrary ruling in Vancouver, Washington, where a court recently threw out a challenge to that city's domestic partnership policy in *Heinsma v. City of Vancouver* (Clark Co. (Wash.) Superior Ct., Nichols, J., June 26, 2000). *Washington Post*, July 3; *The Columbian*, June 27.

The *Orlando Sentinel* reported June 27 that a superior court judge in Vermont had refused a last-minute application from anti-gay forces there to prevent the Civil Union Law from going into effect. Beginning July 1, same-sex couples began registering their civil unions, thus obtaining all the rights that married couples have under Vermont state law. Vermont thus became the first U.S. state to make available all the rights and responsibilities of civil marriage to same-sex couples. • • • There is no residency requirement to register a civil union; however, out-of-staters intending to do so are cautioned that the degree of recognition accorded Vermont civil unions outside of that state is entirely unknown at this time, and that the process of terminating a civil union requires submission to Vermont's divorce laws, which include a residency requirement. A.S.L.

Litigation Notes: Criminal

A Multnomah County, Washington, jury has convicted Eric Running of the Feb. 24, 1998 murders of Jacqueline Anderson, his former girlfriend, and her lover Barbara Gilpin. The jury will reconvene July 17 to determine whether Running's aggravated murder conviction merits the death penalty or the alternative of life imprisonment. The jury rejected Running's insanity defense. *The Columbian*, July 7.

The Texas Court of Appeals in Houston rejected Joe Anthony Martinez's challenge of his conviction for aggravated sexual assault of a teenage boy, finding no abuse of discretion in the trial judge's refusing to let Martinez attempt to impeach the victim by showing his anti-gay bias. *Martinez v. State of Texas*, 2000 WL 767825 (June 15). The victim, 13–year-old G.G., had reportedly angrily called a teacher with whom he had a dispute a "no good f g lesbian whore," and had also been heard to call other students "faggots." Martinez tried to present a witness who could testify to these outburst in attempting to impeach G.G.'s testimony that Martinez had performed oral sex with him, but the court refused to let the evidence in. The court of appeals found that a defendant usually has wide latitude to attempt to impeach the honesty, credibility or biases of prosecution witnesses. However, in this case, G.G., examined in the absence of the jury, stated that he had no bias against gays and actually lived in the Montrose neighborhood and had lots of gay friends. The court concluded that the alleged statements by G.G. did not evidence a general bias against gays, and thus should not be allowed in. At the same time, the court rejected Martinez's contention that the trial judge erred by allowing testimony by another young man who claimed to have been a sexual assault victim of Martinez in the past, using the same modus operandus that was alleged in the case of G.G. The court found that the evidence was admissible as impeachment of Martinez's own testimony. A.S.L.

Legislative Notes

The United States Senate voted 57–42 on June 20 to approve a measure that would expand the scope of federal hate crimes laws to include crimes motivated by the victim's sexual orientation or disabled status. In addition, the federal law, which already covers crimes motivated by the victim's race, religion or national origin, will be expanded to include a wider range of offenses. Under current law, there is only a federal crime if the hate crime is committed in connection with the victim's attempt to exercise federally-guaranteed rights. The expanded law would apply to all situations where there is some nexus with interstate commerce. In opposing the measure on the floor of the Senate, U.S. Senator Orin Hatch argued that under recent Supreme Court 11th Amendment doctrine (such as *U.S. v. Morrison*, which struck down the civil enforcement provisions of the Violence Against Women Act) the hate crimes law may be unconstitutional. Hatch offered an amendment, which was adopted, to set up a study of whether states were not adequately addressing hate crimes. The Senate vote was hailed as the first to affirmatively address protection of the rights of lesbians and gay men by either chamber of Congress. However, jubilation of the supporters was muted by the likelihood that the matter would not come to the floor in the House, although there was hope that it might be enacted through attachment to some other bill that the House Republicans want to pass, perhaps in a conference committee. *New York Times*, June 21.

Better late than never? In 1980, the New York Court of Appeals ruled in *People v. Onofre*, 51 N.Y.2d 476 (1980), cert. denied, 451 U.S. 987 (1981), that sec. 130.38 of the New York Penal Code, which outlawed anal or oral sex between people (regardless of gender) who were not married to each other, violated the privacy and equal protection guarantees of the 14th Amendment of the U.S. Constitution. Although the Supreme Court refused to review the case, doubts were raised about its continuing validity after *Bowers v. Hardwick*, 478 U.S. 186 (1986), the case in which the Supreme Court rejected a federal constitutional challenge to Georgia's sodomy law. However, shortly after the *Hardwick* decision, then-Attorney General of N.Y. Robert Abrams issued a statement that in his view *Onofre* remained good law because the N.Y. court applied an equal protection analysis focused on the distinction between married and unmarried partners, which was not present in the Georgia case. Nonetheless, the sodomy law remained on the statute books, and was occasionally invoked by prosecutors despite the court's holding. Now doubts are finally resolved, as the New York legislature passed a sexual offenses reform bill on June 22 (S. 8238/A. 11538), which thoroughly revises and penal

code's sex crimes provisions and, incidentally, repeals the sodomy law. Henceforth, non-consensual sodomy will be dealt with through the sexual assault laws, and sexual activity in public will be dealt with in other laws dealing with public lewdness, and the phrases "sodomy" and "deviate sexual intercourse" will no longer be used in the New York Penal Law to characterize gay sex. The bill was introduced at the request of Governor George Pataki, who had pledged to sign it.

Not quite, but almost as late... For many years, a hate crimes law including sexual orientation has been bottled up in committee in the New York State Senate by the Republican leadership, even though a similar measure had passed the Assembly repeatedly and Republican Governor George Pataki had stated his support for enactment of a hate crimes law covering sexual orientation. This year the political calculus changed; for the first time in a generation, Republican leaders feared that the general election might produce a decline in the Republican's margin in the Senate, and perhaps even a loss of control. Since enactment of hate crimes legislation is very popular in the state, according to political polls, the Senate leadership decided to allow the measure to come to a vote, provided that it was the Republican version of the bill that would finally be enacted. The state Senate passed the measure by a comfortable margin, and in last minute negotiations, a bill acceptable to both chambers was produced and passed on the last night of the session. The bill, A. 30002, avoids the problems found by the Supreme Court in the New Jersey law by requiring that the indictment state that the prosecution is treating the matter as a hate crime, and by including proof of the bias motive as part of the prosecution's burden in the case before the jury. At press time, a signing date had not been announced for the measure, but as it was proposed as part of Governor George Pataki's legislative agenda, no problems about final enactment are expected.

On June 19, Tennessee Governor Don Sunquist signed into law Tennessee Public Chapter No. 896, Senate Bill No. 897, a law adjusting sentencing enhancement factors considered by state courts in criminal cases (see Tenn. Code Ann. sec. 40–35–114), to add as a factor the following circumstance: "The defendant intentionally selects the person against whom the crime is committed or selects the property that is damaged or otherwise affected by the crime in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin, ancestry or gender of that person or of the owner or occupant of that property. However, this subsection should not be construed so as to permit the enhancement of a sexual offense on the basis of gender selection alone." The new law took effect July 1. From the description of the sentencing procedures used in Tennessee contained in a news report about the law, it is unclear whether the Supreme Court's *Apprendi* decision may require some further adjustments. Memphis *Commercial Appeal*, June 8.

Moving to codify and give statewide application to the recent decision in *People of California v. Garcia*, 92 Cal. Rptr. 2d 339, 77 Cal. App. 4th 1269 (4th Dist., Div. 3, Jan. 31, 2000), which held that lawyers could not use peremptory challenges to discriminate against jurors on the basis of sexual orientation, the state of California enacted A.B. 2418, introduced by Assemblymember Carol Migden of San Francisco, which amends section 204 of the California Code of Civil Procedure to add "sexual orientation" to the forbidden list of bases for exemption from jury service, and adds a new section 231.5 to the Code of Civil Procedure as follows: "A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds." Gov. Gray Davis signed the bill into law on June 27.

The Dane County, Wisconsin, Board voted June 16 to approve newly-negotiated union contracts that will extend health insurance coverage to domestic partners of County employees, both same-sex and opposite-sex. *Wisconsin State Journal*, June 16.

The school board in Cleveland, Ohio, adopted a policy in May adding "sexual orientation" to the district's Code of Conduct governing non-discrimination and harassment. Members of the board defended the policy against religiously-based attacks by members of the public at its June 26 meeting. *Cleveland Plain Dealer*, June 30.

A proposal to add "gender identity or expression" to the list of characteristics covered by New York City's Human Rights Ordinance is now under consideration by the City Council. The proposal has been referred to the Council's General Welfare Committee. The Giuliani Administration has not yet taken a position on the legislation, but in light of the Mayor's active career as a transvestite performer at satirical media events, it would be the height of hypocrisy to deny support to this measure. *Newsday*, June 6. A.S.L.

Law & Society Notes

On June 23, President Bill Clinton issued an executive order requiring non-discrimination on the basis of race, sex, color, national origin, disability, religion, age, sexual orientation, or parental status in all federally-conducted education and training programs. The order exempts the military and intelligence services, but directs the Defense Department to develop its own procedures to protect civilians participating in its programs from discrimination on these bases. (In light of the statutory gay service ban, the president would not have authority to order the Defense Department to apply a non-discrimination policy on sexual orientation to its uniformed ranks.) Executive orders do not create rights enforceable against the government in court, but this Order does establish an internal administrative procedure for investigating and resolving discrimination complaints within federal training programs. *White House Press Release*, June 23. The executive order followed a few weeks after Clinton's now-annual proclamation of "Gay and Lesbian Pride Month," which was issued by the White House on June 2. Clinton's proclamation stressed the record number of appointments to government posts of openly-lesbian and gay people during his administration. Clinton's proclamation, issued late on a Friday afternoon, received scant attention from the national media. *Washington Times*, June 3.

The U.S. Small Business Administration, an agency of the U.S. Department of Commerce, signed an agreement on June 19 with the Association of Gay & Lesbian Community Centers under which the SBA will provide a series of workshops at the various gay community centers around the country to assist lesbian and gay entrepreneurs in learning how to obtain federal financial assistance for their community business enterprises. The workshops will cover such topics as how to apply for loans and how to secure contracts and run a small business. Although the agency has no special programs specifically targeted to gay businesses, this program is seen as being similar to partnerships between SBA and the NAACP and the Urban League. The SBA had previously formed such a partnership last December with the National Latina/Latino Lesbian, Gay, Bisexual & Transgender Organization (LLEGO). *Newsday*, June 20.

The Massachusetts Bay Transit Authority has converted a porter's closet at its Reservoir Carhouse into a unisex bathroom for use by an employee who is midway through transitioning from male to female identity. Frequently blasted for its record of failing to prevent racial and sexual harassment among its employees, the MBTA evidently released news of this $8,000 expenditure to prove how sensitive it is becoming to individual employee rights. A spokesperson told the press, "The renovation was done because it's important to ensure a comfortable and stress-free workplace for all employees and we felt the best course of action was to provide a third restroom." Sara Herwig, director of operations for the International Foundation for Gender Equity, told the *Boston Herald* (June 6) that "the bathroom issue" is the most common problem for gender transitioning employees. "The person who's transitioning is absolutely stuck in the middle with no place to go," she said.

"Some companies don't understand that." MBTA's spokesperson said that the employer believed it had to make a "reasonable accommodation" for this employee, but that any employee was free to use the new facility if they wanted extra privacy. A.S.L.

The American Medical Association House of Delegates, meeting in Chicago, approved a resolution opposing purported therapy to "cure" homosexuality, endorsing a position previously taken by the American Psychiatric Association and the American Academy of Pediatrics. *American Political Network, American Health Line*, vol. 6, no. 9 (June 15, 2000).

Momentum continues to build for voluntary extension of domestic partnership benefits by big business in the U.S. Coca-Cola Co., number 99 on the Fortune 500 list of the nation's largest businesses, announced June 22 that it will provide health benefits to same-sex domestic partners of employees, beginning January 1, 2001. *Atlanta Journal and Constitution*, June 23. This followed closely on the announcement that the "Big Three" U.S. auto makers, Ford, General Motors, and Chrysler, have reached agreement with the United Auto Workers Union to include domestic partnership benefits in the collective bargaining package covering thousands of auto workers nationwide. *Wall Street Journal*, June 9.

The public sector also continues to expand partnership benefits. On June 14, the Iowa Board of Regents voted to expand its health insurance benefits in include assuming some of the cost of providing coverage to same-sex partners of University of Iowa employees. Since 1993, employees have been allowed to obtain such coverage for their partners, but only on a totally contributory basis. Now the University will make the same contribution for same-sex partners as it makes for spouses. The vote was 5–3, with one the dissenters actually supporting partnership benefits but proclaiming that the proposal was discriminatory because it did not include unmarried opposite-sex partners. *Des Moines Register*, June 15. • • • Extension of benefits is not without controversy. Public benefits administrators in Kalamazoo, Michigan, extended benefits administratively effective the end of May, leading to an uproarious City Commission meeting on June 5, at which opponents of gay rights vowed to collect enough signatures to force a city referendum to repeal the benefits plan. *Kalamazoo Gazette*, June 6.

In an extraordinary sign of changing times, the U.S. Central Intelligence Agency held its first Gay Pride celebration on June 6, with openly-gay Rep. Barney Frank as the keynote speaker. The Director of Central Intelligence, George J. Tenet, attended the event, which drew about 60 agency employees and a busload of workers from the National Security Agency. Frank, who has been campaigning to end official secrecy about the budgets of the federal intelligence agencies, told the crowd: "Let me be clear. I've not only been trying to cut your budget, I've been trying to out your budget." A Clinton Executive Order of 1995 rescinded the 40–year old order banning employment of gays through the denial of security clearances, and a special interest group of gay agency personnel was started in 1996. *New York Times News Service*, June 9.

The General Assembly of the Presbyterian Church (U.S.A.) voted 268–251 on June 30 to adopt an amendment to the church's constitution that would forbid ministers from performing ceremonies of union for same-sex couples. The measure will take effect in June 2001 if it is ratified by 2/3 of the church's regional jurisdictions. An alternative proposal that would have left the decision of whether to perform such ceremonies up to the discretion of local pastors was narrowly defeated. *New York Times*, July 1 & 2.

There is something sinister about the press reports that Canadian researchers have concluded that gays and lesbian are more likely than the population as a whole to be left-handed. *Globe & Mail*, July 6. The news reports derived from a study published in the current issue of *Psychological Bulletin*, a journal published by the American Psychological Association, based on research done by several psychologists in Toronto, Canada. This constitutes one more bit of confirmatory evidence for the proposition that sexual orientation may be affected by a genetic or physiological component.

A pioneer activist for gay rights. Faygele ben-Mariam (formerly known as John F. Singer; his adopted name literally means "Gay Son of Miriam"in free translation from the Yiddish vernacular) died of cancer June 5 at his home in Seattle, Washington, age 55. Under his former name, benMariam filed two significant lawsuits, *Singer v. Hara*, 522 P.2d 1187 (Wash. App., Div. 1, 1974), an early unsuccessful attempt to obtain a marriage license for a same-sex couple, and *Singer v. U.S. Civil Service Commission*, 530 F.2d 247 (9th Cir. 1976), vacated and remanded, 429 U.S. 1034 (1977), an ultimately successful attempt to challenge his dismissal as a clerical worker at the Seattle office of the Equal Employment Opportunity Commission for being an outrageously openly gay man. (His discharge had more to do with his having filed suit for the marriage license than for anything else, or so it appears from the published opinion in the case.) BenMariam was also a founder of Seattle's Gay Community Social Services organization in the early 1970s, according to a lengthy, quite colorful obituary story that appeared in the *Seattle Post-Intelligencer* on June 7. A.S.L.

Developments in European, U.K. and Canadian Law

European Union. The 15–nation European Union is working on a Draft Charter of Fundamental Rights of the European Union. The most recent proposal for the non-discrimination article, 22(1), reads as follows: "Any discrimination based on aspects such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, association with a national minority, property, birth, disability, age or sexual orientation shall be prohibited." See http://db.consilium.eu.int/df/default.asp?lang=en ("Search," "Show All Documents" beyond right edge of screen, June 4 document by the Praesidium: CHARTE 4333/00). It seems likely that the Charter will be adopted at the December 2000 summit of heads of government in Nice, but will not be a legally binding document. (Germany would like to see it become a legally binding part of a Constitution of the European Union. The United Kingdom is absolutely opposed to its being legally binding.) The Charter will only apply to European Union institutions and to Member States "when acting within the scope of Union law." While regulation of various aspects of employment and intra-Union trade in goods and services comes within the scope of Union law, large areas of law, such as criminal and family law, are generally outside the scope of Union law. Whatever the European Union ends up doing, the European Convention on Human Rights of the 41–nation Council of Europe is legally binding and has universal application to any act or omission of a Member State in any area of law, including criminal and family law.

Council of Europe. On 30 June, the Parliamentary Assembly of the Council of Europe adopted Recommendation 1470 (2000) on the "Situation of gays and lesbians and their partners in respect to asylum and immigration in the member states of the Council of Europe." For the full text, see http://stars.coe.fr/ta/ta00/erec1470.htm. For excerpts from the draft (which was not amended), see [2000] LGLN 60.

Scotland. On June 21, the unicameral Scottish Parliament voted by 99–17 to give final approval to the Ethical Standards in Public Life etc. (Scotland) Bill, http://www.scottish.parliament.uk/parl_bus/legis.html#9. Once the Bill receives Royal Assent, s. 25 of the Act will repeal Section 28 for Scotland (no "intentional promotion of homosexuality" by local authorities), and s. 26 of the Act will substitute a duty on local authorities "to have regard to (a) the value of stable family life in a child's development; and (b) the need to ensure that the content of instruction ... is appropriate, having regard to each child's age, understanding and stage of development."

The large majority in favour of repeal resulted from a last-minute compromise, whereby guidance to be issued to local authorities on sex education will require teachers to "establish an awareness of the importance of stable family relationships, including the responsibilities of parenthood and marriage." This is one of the key aims of sex education identified in para. 4.2 of the Scottish Executive's June 16 "Report of the Working Group on Sex Education in Scottish Schools," http://www.scotland.gov.uk/library2/doc16/sess–00.asp. Other key aims are to "provide opportunities for young people to consider and reflect upon the range of attitudes to gender, sexuality and sexual orientation, relationships and family life" and "develop an appreciation of, and respect for, diversity and of the need to avoid prejudice and discrimination." The Report also notes, at paras. 5.27–5.29, that "[a]ll young people should be helped to understand, at an appropriate age, that different people can have different sexual orientations. Teachers have an important role to play in enabling young people to consider such issues and to discuss them in an open, sensitive and non-discriminatory way in order that all young people may develop understanding of these differences. The central purpose should be to promote understanding and mutual respect for one another, regardless of orientation. This approach is considered an important way of encouraging respect for and valuing the diversity of, human life. ... [S]upport for a young person with concerns about sexuality should not be considered to be promoting homosexuality; ... any suspicion of bullying relating to sexual orientation ... should be referred to a member of the senior management team and dealt with in accordance with the school's anti-bullying policy."

The first attempt to enforce Section 28 since it was enacted in 1988 ended on July 6 in the Scottish Court of Session. Sheila Strain, understood to have been backed by the Christian Institute of Newcastle, England, had sought judicial review of Glasgow City Council's funding of HIV or gay and lesbian organizations. Although she was denied an interim injunction, Glasgow City Council had voluntarily suspended funding to ten organizations. At the full hearing, she withdrew her petition, citing an agreement with the Council that the covering letter accompanying future grant payments would state that grants are not "for the purpose of promoting homosexuality." She was ordered to pay the costs of the Council and the organizations.

Canada. The Modernization of Benefits and Obligations Act, Statutes of Canada 2000, Chapter 12, http://www.parl.gc.ca/cgi-bin/36/pb_gob.pl?e#C–23, [2000] LGLN 39, 60, was passed without amendment by the Senate and received Royal Assent on June 29. The Act extends all the existing rights and obligations of unmarried different-sex couples in federal law to same-sex couples, and extends most of the remaining rights and obligations of married couples in federal law to all "common-law partners." A major step in the legal and political process that led to the Act was the Supreme Court's decision in *Egan and Nesbit v. Canada*, [1995] 2 S.C.R. 513. Jim Egan and Jack Nesbit, partners since 1948, achieved partial success in their challenge to a discriminatory definition of spouse, in relation to a pension benefit, that included unmarried different-sex but not same-sex couples. Bill C–23 had its first reading in the House of Commons on Feb. 11, shortly before Jim Egan died, aged 78, on March 9. The bill had its third and final reading in the Senate on June 14, shortly before Jack Nesbit died, aged 72, on June 23. The 52nd anniversary of their exchanging rings would have been August 23. *Robert Wintemute*

Other International Law Notes

The Ministry of the Interior of Israel will recognize same-sex partners for immigration purposes, according to a story in *Hazman Ha-Varod*, an Israeli gay monthly that was recently distributed to the Queerlaw listserver on the Internet. In an article by Aeyal Gross, a legal advisor to the Agudah, the gay rights movement's umbrella organization in Israel, the publication reports that during a meeting with Interior Ministry officials and Knesset representatives attended by leaders of the Agudah, the official responsible for residency permits, Batya Carmon, stated that gays or lesbians with same-sex foreign partners should apply for temporary residency permits for the partners, disclosing the true nature of the relationship, and one year work permits will be granted, which can be renewed up to four times, at which point a permanent residency application can be made and will most likely be granted. Carmon indicated that in some instances people may have feared disclosing the background of a relationship, resulting in hurting their request because the Ministry was thus not aware of the true nature of the situation. Agudah representatives are asking the Ministry for further clarification, and are suggesting that the period of temporary residency being required before permanent status can be granted is excessive by comparison to opposite-sex couples. *Ha'zman Ha-Varod*, No. 39, March 2000.

There were press reports on July 8 that law enforcement officials of the People's Republic of China have begun a crackdown on gay men in southern China with the arrest of 37 men at a bodybuilding gym in Guangzhou, allegedly for prostitution. According to the *South China Morning Post*, this is part of a "nationwide campaign" instigated by President Jiang Zemin last month in an order to local governments to fight against "social maladies" such as prostitution and homosexuality. An undercover police operative claimed that the gym was actually a gay male brothel, but other sources indicated that gyms are among the few meeting places for gay men in a society that is severely sexually repressive.

While the Boy Scouts of America (U.S.) has stoutly resisted allowing openly lesbian and gay people to be members, Scouts Canada has chartered Rover Troop 129 in Toronto, described as "the world's first gay and lesbian scout troop." "Rovers" is the Canadian designation of troops for young men and women ages 18 to 26. The troop began operations June 18 with two women and four men enrolled. (Another significant difference between Canada and the U.S.: In the U.S., the Boy Scouts of America has staunchly fought off lawsuits by girls who want to be members; Scouts Canada is a co-ed organization and all troops allow both girls and boys, men and women, to participate.) *Globe and Mail*, June 19.

An independent review panel appointed by Canadian Justice Minister Anne McLellan to make recommendations for changes to Canada's Human Rights Act has issued its report, pushing 165 different changes to the Act. Among them, and one of a handful to spur press discussion, was to add "gender identity" to the list of prohibited grounds of discrimination. The Act already has been interpreted to prohibit discrimination on the basis of sexual orientation. *Calgary Sun*, June 22. The Ontario Human Rights Commission decided not to wait for legislation on the issue, announcing that it will accept complaints of discrimination on the basis of gender identity, arguing that such claims are cognizable under the province's Human Rights Code as sex discrimination. *Daily Labor Report* No. 122, 6/23/00, A–5/6.

Planet Out News reported June 9 that the British Columbia, Canada, Supreme Court ruled June 8 that a transgendered plaintiff could bring a sex discrimination suit under the province's human rights law. Kimberly Nixon was dismissed from a volunteer program run by the Vancouver Rape Relief Society on grounds that she is a man. In 1997, Rape Relief obtained an exemption from the sex discrimination provisions of the B.C. Human Rights Code in order to maintain a women-only hiring policy. Nixon, who is a postoperative male-to-female transsexual, identifies herself as a woman, and claims she was wrongly excluded from the program. The Human Rights Commission concluded in 1999 that she had stated a valid claim, but Rape Relief appealed to the Supreme Court, which has now backed up the Commission and ordered a trial on Nixon's complaint against the Society. Nixon's attorney, barbara findlay, claims this is the first court ruling in Canada to extend protection to transgendered individuals under existing human rights legislation.

Judge Michael Hyam of the Criminal Court in London, England, sentenced David Copeland, 24, to six life sentences for his action of planting nail bombs in three locations, targeted at the black, Bangladeshi and gay communities. Three people were killed when one of Copeland's bombs exploded on April 30, 1999, at a gay bar in London's Soho entertainment district, and 70 people were injured. Copeland expressed no remorse for his acts, affirming his disdain for gays, blacks, and Bangladeshi immigrants, and sought to defend his action by pleading mental defect, but the jury convicted on all counts. *National Post*, July 1.

The government of Israel has asked for an expanded panel of the High Court of Justice to reconsider the decision issued by a three-judge panel in *Berner-Kadish v. Minister of the Interior* (May 29). In that case, the panel found that the Interior Ministry did not have discretion to refuse to register a lesbian co-parent and her adoptive child. The government is now arguing that it was improper for the court to answer "questions which raise serious social and moral issues involving the concept of family law and adoption law in Israel," asserting that such issues must first be addressed by the political branch of the government. *Washington Blade* (June 23), reporting based on an article in the *Jerusalem Post*.

The *New York Times* reported June 10 that the Brazilian government has extended de facto recognition to same-sex relationships by granting same-sex couples the right to inherit each other's pension and social security benefits. A broader measure to establish civil partnerships for same-sex couples has been pending in the Brazilian Congress for five years.

The *Washington Blade* also reported June 23 that the Republic of Cyprus has amended its sex-crimes laws to remove derogatory references to gay people. The country had repealed its ban on homosexual sex in 1998 in order to avoid expulsion from the Council of Europe, but had included derogatory language in the repeal measure, leaving open the possibility of further prosecution for gays. The new legislation ends that threat.

The former Soviet Republic of Azerbaijan, whose application for membership in the Council of Europe and the Parliamentary Assembly of the Council of Europe has been pending, has moved to decriminalize consensual sodomy between men as part of an overall penal code reform that is seen as a prerequisite to gaining admission to the European community. A special edition of the Parliament's newspaper, published on May 28, reported that old Article 113, the Soviet-era law against anal intercourse between men, has been replaced with a new Article 150, which bans only forcible sex acts, according to a press release distributed by the International Lesbian and Gay Association on June 24.

Planet Out reported June 24 that the German ruling coalition of the Social Democrats and the Green Party reached agreement on a draft law to establish registered partnerships for same-sex couples. Although the conservative Christian Democratic Union has traditionally opposed such proposals, its new leader, Angela Merkel, is reported to be a supporter of same-sex partnership rights, unlike her predecessor, former Chancellor Helmut Kohl. The London *Daily Telegraph* reported on July 5 that the proposed law would give same-sex couples the same benefits under tax and social security programs as are afforded married couples, but would not create a status akin to marriage for other purposes. The *New York Times* reported on July 8 that the proposal had been formally introduced in the legislature the previous day.

The Romanian Chamber of Deputies voted June 28 to decriminalize private homosexual conduct, but maintained in the criminal code a provision setting prison terms of up to five years for "abnormal sexual practices, including oral and anal sex, if performed in public." Local activists argued that even though the provision is not limited to same-sex conduct, the reference to oral and anal sex is intended to target gays. The measure must still be approved by the Senate before it can become law. *Reuters*, June 29. A.S.L.

Professional Notes

In its June 12 issue, the *National Law Journal* included Evan Wolfson, Lambda Legal Defense Fund attorney, in its list of the 100 most influential lawyers in the Untied States, citing Wolfson's leadership in the right-to-marry battle and his recent Supreme Court argument in *Boy Scouts of America v. Dale*.

The nation's newest openly lesbian or gay judge is Mary Celeste, who was appointed to the Denver (Colorado) County Court by Mayor Wellington Webb and was sworn into office on June 26. *Denver Post*, June 27.

A Massachusetts attorney who is a former assistant attorney general and currently serves in the Massachusetts State Senate, Cheryl A. Jacques, wrote an op-ed article published in the *Boston Globe* on June 1, identifying herself publicly as a lesbian for the first time. Jacques is presently serving her fourth legislative term. She wrote the op-ed piece in opposition to the activities of a conservative parents' group that had secretly taped graphic sexual statements made at a workshop for gay teenagers conducted by employees of the state health department who have since been discharged as a result of the controversy. "As a gay person, I understand the tremendous pressure these young people feel," Jacques wrote. She has been described as a "rising star" in Massachusetts politics. *Worcester Telegram & Gazette*, June 2.

Lambda staff attorney Suzanne Goldberg has announced that she is leaving the organization to take up an appointment to the faculty of Rutgers University Law School in Newark, New Jersey. Goldberg joined the Lambda staff in 1991 and worked on many important lawsuits, most notably *Romer v. Evans*, the landmark U.S. Supreme Court case. She is co-author of a book about that litigation.

David Schwacke, an openly-gay prosecutor in Charleston, South Carolina, who is an avowed Republican, lost his bid for a third term in a contested primary campaign. His opponent, Ralph Hoisington, who campaigned under the slogan "For our families", defeated Schwacke by 255 votes out of 29, 915 cast. *Salt Lake Tribune*, June 16; *The Record*, Northern N.J., June 16

At a ceremony held June 21 at the Ellis Island Immigration Museum in New York Harbor, the American Foundation for AIDS Research presented a special recognition award to the ACLU AIDS & Civil Liberties Project for its pioneering work on legal issues arising from the epidemic. Nan Hunter, William Rubenstein and Matt Coles, the first, second and third directors of the Project, were all on hand to receive recognition for their work.

During the American Bar Association's summer meeting held in New York early in July, the National Lesbian and Gay Law Association presented its annual "Allies for Justice" award to Maryland's governor, Parris N. Glendening, for his outspoken advocacy for lesbian and gay rights. The award was presented at a reception jointly sponsored with the ABA's Section on Individual Rights and Responsibilities. Gov. Glendening has taken a leadership role in the struggle to enact a law banning sexual orientation discrimination in Maryland, but his efforts have been thwarted thus far by conservative leaders in the State Senate. A.S.L.

AIDS & RELATED LEGAL NOTES

Supreme Court Passes Up Chance to Clarify *Bragdon* Ruling

On June 19, the U.S. Supreme Court denied a petition for certiorari in *County of San Diego v. McAlindin*, 2000 WL 462822. In the decision below, *McAlindin v. County of San Diego*, 201 F.3d 1211 (9th Cir. 2000), amending 192 F.3d 1226 (9th Cir. 1999), the court of appeals found that a man who was taking medication for a non-disabling condition was nonetheless a person with a disability because the medication affected his virility, and being able to engage in sexual intercourse involves a major life activity. In its historic *Bragdon v. Abbott* decision (118 S.Ct. 2196 (1998)), the Supreme Court had ruled that a woman with HIV-infection was a "person with a disability" under the Americans With Disabilities Act (and thus protected from discriminatory refusal of treatment by her dentist) because of the impact HIV-infection would have on her reproductive ability. In *McAlindin*, the 9th Circuit had expanded on this to find that a physical impairment affecting the ability to engage in sexual intercourse thus qualified as a disability under the ADA. The precedent may be useful to asymptomatic HIV-infected persons who had not been planning on having children through sexual reproduction, but who nonetheless are restricted in their sexual activity because of their HIV-infection. It is refreshing to have judges acknowledging that engaging in sex is a major life activity. A.S.L.

California Supreme Court Holds Incontestability Clause Trumps Benefits Definition in Disability Insurance Policy

The California Supreme Court has ruled that an insurance company may not deny disability benefits to a policyholder with AIDS just because he did not disclose that he had tested positive for HIV before buying the insurance. *Galanty v. Paul Revere Life Ins. Co.*, 2000 WL 777759 (June 19). The court concluded that the insurance policy, which contained language excluding coverage for preexisting conditions, conflicted with a California law that limits an insurer's ability to contest coverage once the policy has been in effect for more than two years.

The plaintiff, Mark Galanty, bought a disability insurance policy from the Paul Revere Life Insurance Company in the fall of 1988. One year earlier, Galanty had tested HIV+, but did not reveal this fact on his insurance application. (Prior to 1989, California law prohibited insurance companies from denying insurance coverage based on the results of an HIV blood test, so the application forms did not request this information.) Approximately five years after he bought the policy, Galanty presented a claim to Paul Revere for disability benefits due to AIDS and a related neurological condition that prevented him from continuing to work as a court reporter.

Paul Revere initially granted Galanty's claim and began paying benefits. However, after investigating the history of Galanty's HIV status, the company denied further benefits on the ground that his disability stemmed from a condition he had prior to obtaining the insurance policy. Paul Revere's insurance policy limited coverage to disabilities caused by "sickness or disease which first manifests itself after the Date of Issue and while Your Policy is still in force," and excluded coverage for preexisting conditions.

Galanty sued Paul Revere for breach of the insurance contract and several related tort and statutory claims. The California Superior Court granted Paul Revere's motion for summary judgment, and the appellate court affirmed, concluding that the policy issued to Galanty excluded coverage for his AIDS- related disability.

The Supreme Court reversed, holding that the policy provisions relied upon by Paul Revere were unenforceable as a matter of law because they were inconsistent with state mandated "incontestability clauses." Under California law (and the law of many other states), all disability insurance policies must contain either one of two statutorily prescribed incontestability clauses, both of which prohibit an insurer from disclaiming coverage for preexisting conditions once the policy has been in effect for two years. (One of the two versions permits insurers to disclaim coverage even after two years if the policyholder made "fraudulent misstatements" on her or his application. Galanty's policy did not contain this exclusion, nor did Paul Revere allege that Galanty had procured his insurance through fraud.) The court rejected Paul Revere's strained interpretation of the statutory incontestability clauses, which would allow insurers to deny coverage for a preexisting condition that "had manifested itself" prior to the issuance of the policy. According to the court, the statute does not distinguish between preexisting conditions that had manifested themselves prior to the issuance of a policy and those that had not. "In saying that something exists, one does not normally entertain unarticulated mental reservations about manifestation," the court noted almost existentially.

The court went on to reject Paul Revere's concern that a ruling in favor of Galanty would reward dishonest insurance applicants: "Only an insurer like Paul Revere in the case before us, that chooses to forego both contractual protection against fraud and timely verification of the insured's medical condition, runs the risk of having to pay a claim that may turn out to be related to a sickness that first manifested itself before the policy's inception date. Under these circumstances, there is nothing unfair in the Legislature's evident policy judgment that any risk of fraud is outweighed, after the period of contestability has run, by the need to protect the value of the policy to the insured and to reduce litigation."

The court remanded the case to the superior court for a ruling on the merits of Galanty's contract claim and to adjudicate the plaintiff's claims for bad faith and emotional distress.

California has become the sixth state to interpret state-mandated incontestability clauses in favor of policyholders. Only the Supreme Court of New Jersey has resolved the issue of preexisting conditions in favor of insurance companies. Lower courts from other states remain split on the issue.

The plaintiff was represented by former Lambda staff attorney Mary Newcombe, of Caldwell, Leslie, Newcombe & Pettit, and the Lambda Legal Defense and Education Fund. Amicus briefs on behalf of Galanty were filed by entities including the Department of Insurance of the State of California, the AIDS Project Los Angeles, the California Women's Law Center, and the Western Law Center for Disability Rights. Paul Revere was represented by Berger & Wolen. The American Council for Life Insurers filed an amicus brief on behalf of Paul Revere. *Ian Chesir-Teran*

Ohio Appeals Court Voids Felonious Assault Conviction of HIV+ Man, Finding Intent Lacking Under Superseded Statute

In a 2–1 ruling, the Ohio Court of Appeals reversed the felonious assault conviction of an HIV+ man who, knowing of his HIV status, had unprotected sex with a 13–year-old girl. *State of Ohio v. Couturier*, 2000 WL 780936 (Ohio App. 10 Dist., June 20, 2000).

Henry Couturier was convicted of three counts of corruption of a minor, corrupting another with drugs, and felonious assault. The felonious assault charge alleged that Couturier "did knowingly cause or attempt to cause physical harm to [J.L.] by means of a deadly weapon, to wit: HIV infection.70 In May 1998, Couturier provided marijuana to J.L. twice. Afterwards, Couturier asked J.L. if she wanted to "go the bedroom." The court noted that J.L. worked as a prostitute and was a crack cocaine addict. They engaged in vaginal sex three times. Couturier wore a new condom each time. He then engaged in intercourse without a condom. J.L. later tested positive for HIV. She said that she

had only had unprotected sex with Couturier and her boyfriend, and since the boyfriend tested negative for HIV, she concluded that she had contracted it from Couturier.

Couturier claimed that the prosecution presented insufficient evidence to uphold the felonious assault charge. The prosecution used a definition of a deadly weapon under R.C. 2923.11(A) which reads: "...any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.70

Judge Tyack, writing for the majority, found that "no proof indicates that HIV was designed or specially adapted for use as a weapon. The virus is one which has apparently evolved naturally over a significant period of time." Judge Tyack also found that there was no proof that Couturier "knowingly tried to use HIV to harm anyone else." Morally, the court found that Couturier's "conduct is arguably little if any better whether he intended to harm J.L. or not."

Tyack noted that the Ohio Legislature had amended R.C. 2903.11, so that "future offenders will potentially face felonious assault convictions for conduct similar to that which occurred here." However, the statute could not be applied retroactively. Consequently, the felonious assault portion of the conviction had to be set aside.

Couturier asserted that the prosecutors made reference to him having "full blown AIDS" during the closing statement, along with other statements which deprived him of due process rights. While agreeing that the comments were inappropriate, 69especially in the context of a trial involving such sensitive topics as AIDS and HIV,70 the court found that they were ultimately not prejudicial.

Dissenting from the reversal of the conviction, Judge Lazarus wrote that "a person's mental state must often be determined from the surrounding facts and circumstances and that persons are presumed to have intended the natural, reasonable and probable consequences of their voluntary acts." *Daniel Schaffer*

Minnesota Appeals Court Upholds Policy of Deferring Gay Men Who Have Had Sex As Blood Donors

In a unanimous opinion, the Minnesota Court of Appeals overturned a determination by the Minneapolis Human Rights Commission that a plasma centered violated the public accommodations law by refusing to take donations of plasma from a gay man. *Johnson v. Plasma Alliance*, 2000 WL 665603 (May 23) (unpublished disposition).

When Edward Johnson attempted to donate plasma at the Plasma Alliance Center in St. Paul in 1989, he checked "yes" on the intake form in response to the question whether he had sex with another many since 1977, and he was turned away as a donor. When he attempted to donate again in 1993, he was turned away because his name was now on a list of permanently-rejected donors as a "suspect male homosexual." Johnson filed a complaint with the state human rights department, which found no violation. He then went to the Minneapolis Department of Civil Rights, which determined that he had suffered sexual orientation discrimination and awarded him $31,474.16 in compensatory damages and $20,757.84 in costs, disbursements and attorney fees. This large a sum got Plasma Alliance's attention (they apparently had ignored discovery requests in connection with the Civil Rights department's investigation of Johnson's charges), and they promptly appealed.

Writing for the court, Judge Schumacher found that the department's decision was "arbitrary and capricious" because it contained no analysis whatsoever, merely a conclusory statement that Plasma Alliance had discriminated. Furthermore, Schumacher found that Johnson was not qualified to donate plasma, because federal regulations specify that any man who has had sex with another man since 1977 not be allowed to make a donation for fear of HIV contamination of the nation's blood supply. That the federal regulation in question was generated in the mid–1980s and has been rendered archaic by subsequent developments in refining blood testing was not discussed by the court, because the mid–1980s regulation is still in effect. (In a concurring opinion, Judge Anderson criticized the failure of the Minneapolis civil rights department to give any consideration to the possibility that their jurisdiction in this matter might be preempted by federal law governing the operation of plasma centers.)

Judge Schumacher emphasized that Johnson was not being deferred as a donor because of sexual orientation, as such, but rather due to behavior, having admitted in 1989 that he fell within the behaviorally-defined class specified by the federal government as ineligible to donate. Schumacher also noted that the department's opinion provided no basis or explanation for the damage award, which was apparently premised on the idea that Johnson could have earned big bucks by making frequent plasma donations to the Center over the remainder of his natural life.

The opinion is undoubtedly correct on the law, but illustrates the continuing unsuitability of the present state of federal regulation on blood donations and HIV. When this regulation was promulgated in 1986, screening of blood and plasma for the presence of HIV was at a very primitive stage of development. By the mid to late 1990s, the testing technology available to blood banks was far enough advanced to make the cautious assumptions underlying the federal policy quite outmoded, although recent meetings within the Food and Drug Administration aimed at rethinking the policy have not yet produced any change. Nonetheless, at a time of acute shortages of blood, reaching crisis levels in many parts of the country, the overly-broad deferral category of every man who has had sex, even once, with another man at any time in the past 23 years seems extraordinarily overbroad. A.S.L.

Strict Construction of Insurance Law Bars Rescission of Disability Policy

Adopting a strict construction of California Insurance Code sec. 10350.2, U.S. District Judge Walker ruled that an insurance company's incontestability clause, which combined elements of the two forms of contestability clause permitted by the Code, was invalid and should be replaced by the version most favorable to the claimant, a person with AIDS. *Standard Insurance Co. v. Carls*, 2000 WL 769222 (N.D.Cal., June 9, 2000).

Martin Carls applied for disability insurance from Standard Insurance Co. on April 4, 1996. In his application form, he ticked off "no" to a long list of symptoms, as well as the question whether he was taking any prescription medication, and stated that his only doctor visits in the past five years had been for routine checkups. He was issued the policy with an effective date of June 12, 1996. On February 2, 1999, less than three years later, Carls filed a claim under the policy, claiming he had been totally disabled due to AIDS symptoms. Standard investigated at that time, decided that Carls' application had been fraudulent, and denied benefits. Standard also filed suit for rescission of the policy in federal court, and moved promptly for summary judgment. Carls opposed the motion and filed his own cross-motion for summary judgment, asserting that his claim, filed after the two-year contestability period, could not be rejected by Standard, and that standard was precluded from challenging his application for fraud. In the alternative, Carls disputed Standard's factual allegations about his application, alleging that material facts were disputed precluding summary judgment on Standard's claim of fraud.

Carls first argued that a strict construction of Insurance Code sec. 10381.5 would provide that he could not be bound by the statements in his application unless a copy of the application "is attached to or endorsed on the policy when issued as part thereof." Carls argued that since a copy of his application was not attached to the policy that was issued to him, Standard could not rely upon the application to effect a rescission. Judge Walker rejected this argument, finding that the policy essentially incorporated the application by reference, which came

within the statutory requirement in the phrase "endorsed on the policy."

Carls' second, and successful, argument, was that the incontestability clause contained in Standard's policy, which made an express exception to the two-year incontestability period for fraud claims, violated the Insurance Code and could not be enforced against him. The Insurance Code allows insurers two use either of two forms, Form A or Form B. Form A states that after two years from date of issue, "no misstatements, except fraudulent misstatements, made by the applicant…shall be used to void the policy or to deny a claim for loss incurred or disability (as defined in the policy) commencing after the expiration of such two-year period." Form B states: "After this policy has been in force for a period of two years during the lifetime of the insured (excluding any period during which the insured is disabled), it shall become incontestable as to the statements contained in the application."

Standard's policy contains a provision labeled "Time Limit On Certain Defenses" which states: "After two years from the later of this policy's effective and its most recent reinstatement date, no misstatements, except fraudulent misstatements, made by You or the Owner, in the application for the policy or for Reinstatement, shall be used to rescind the policy or Deny a claim for disability starting after the end of such two-year period. Calculation of the two-year period excludes any time you are disabled."

The court, relying on prior court decisions, found that generally insurers use Form B, since Form A makes the policy "less marketable." Carls also noted that Form B is advantageous to insurers because the standard for rescission on the basis of misstatement under the law is materiality, but under Form A, once the two-year period expires, the insurance contract becomes incontestable except upon proof of fraudulent misstatements, so, Carls argued, Form A preserved a more limited right to rescind on the basis of misstatements than that available before the running of the contestability period. Under Form B, on the other hand, an insurer would be able to rescind the policy after the two-year period for any material misstatement, regardless of fraudulent intent, provided the disability arose during the two-year period. Since it is often difficult to prove fraudulent intent, Carls argued, reserving the right to contest for non-fraudulent but material misrepresentations is of value to insurers. Carls argued that Standard's form "incorporates the insurer-friendly aspects of both Form A and form B," and thus violates the provision.

Walker found that Carls' argument "has merit. Section 10350.2 gives insurers a choice of two incontestability clauses, each with its own advantages and disadvantages. But Standard has adopted a hybrid clause that attempts to eliminate the latter. This approach, while obviously in Standard's interest, is not within the bounds of California law." Walker also found that the commissioner's having approved Standard's forms did not create any safe harbor, because the Insurance Code does not expressly authorize the Commissioner to approve variations in the Code's requirements on contestability clauses.

Finally, Walker found that in the absence of an enforceable clause, the court is supposed to use the approved form of the clause that the insurer most likely would have selected. Standard argued it would have selected Form A, pointing to the reservation of the right to rescind for fraudulent misrepresentation in the clause that it used. But Walker found "Carls' suggestion of applying Form B more appropriate. First and foremost, it is in keeping with the well-established principle that uncertainty in an insurance policy should be resolved against its drafter… The court concludes that in this instance, in which an insurer has injected uncertainty into a policy by attempting to adopt the insurer-friendly aspects of alternative statutory provisions, the insurer should not be permitted to rely on the language that suits its needs in a particular case."

Consequently, since the court would use Form B, the insurer could not deny a claim or rescind after the two-year period based on allegation of fraudulent misrepresentations in the application, and Standard's motions must be denied while Carls' motion must be granted.

Judge Walker never mentions the basis for federal jurisdiction in this case, so one surmises it is diversity, as no federal statute or constitutional claim is involved. And that points to the most likely explanation for what may appear a rather bizarre case. Standard is a national insurance company that undoubtedly uses its own standard, insurer-friendly contestability clause, regardless of which state it is dealing in for a particular applicant. State laws differ as to what they will allow or require regarding contestability of insurance policies. Standard apparently has not adjusted its provisions to make forms for use in different states. One doubts that it adopted the particular form noted in this case for the purpose of evading California's law, but rather in the hope that it would, by including familiar elements from many state laws, ultimately be enforceable everywhere. This case teaches the tough lesson (and expensive) lesson to insurers: they may have to develop different forms for use in different states if they want to contest fraudulently-obtained policies. A.S.L.

Federal Court Precludes HIV+ Belizian From Raising Necessity Defense in Deportation Case

U.S. District Judge Schwartz issued an order on May 31 precluding Errol Crown, an HIV+ native of Belize who was indicted for illegal reentry into the U.S., from raising a necessity defense based on his health status, or from even mentioning HIV or AIDS during his trial. *United States v. Crown*, 2000 WL 709003. Crown, who had been deported and illegally reentered the U.S. several times, claimed that at his most recent deportation he had only a two week supply of his AIDS medication, and that such medication was not available in Belize, so he had to return to the U.S.

Judge Schwartz found that the necessity defense requirements could not be met in this case, because Crown had two viable alternatives to illegal reentry. First, he could apply for lawful reentry, and second, he could go to some other country where AIDS medication was more available than in Belize. Both suggestions strike this writer as inherently implausible. If the man had only a two-week supply for medication available, an application for reentry was unlikely to produce a positive result in time to prevent him from suffering permanent medical injury due to an interruption of his medication, and in light of Mr. Crown's history, as detailed in the opinion, it seems highly unlikely that the Justice Department would have granted his application. Crown pointed out that the only countries in which he had ever lived were Belize and the U.S., and that he knew nobody in any other country, rendering quite impractical the suggestion that he go somewhere else for his medication. He also said that the forms he was given at the time of his prior deportation were confusing and contradictory and did not adequately inform him of his options, but Schwartz dismissed this objection, stating that "the fact that defendant finds the INS form confusing, and the fact that his reentry application might have been denied does not undermine the legal validity of the application procedure as an alternative to illegal entry."

Judge Schwartz also ruled that Crown could not present any evidence before the jury at his trial about his HIV/AIDS status, because such evidence might elicit sympathy from the jury and cause them to fail properly to apply the immigration statute to his case.

One could drop a few comments here about the inhumanity of U.S. immigration policies with respect to aliens with HIV, but one will refrain. A.S.L.

AIDS Litigation Notes: Criminal

The N.Y. Court of Appeals ruled June 15 in *People of the State of New York v. David W.*, 2000 WL 769758, 2000 N.Y. Slip Op. 05853, that a person convicted of a sex offense in New York has a constitutional right to a due process hearing before being classified as a sexually violent predator under New York's version of "Megan's Law," known as the Sex Offender Registration Act (SORA). The court reversed the conviction of a man who had refused to register, where an

administrative determination had been made without hearing that he was required to do so. David W. had been convicted on a guilty plea of 2nd degree sodomy and sexual abuse in the first degree in May 1995 and sentenced to 90 days in jail and five years probation. SORA was enacted while he was serving his probation, and there was never a formal hearing on the question of his classification.

The California Supreme Court has affirmed the voluntary manslaughter conviction Ricardo Rios. *People of California v. Rios*, 2000 WL 862845. Rios and a male friend were accosted by two drunken men outside of Rios's house in San Diego. The men called Rios and his friend "fucking faggots". Testimony differs about the degree to which Rios was in danger or might have been in danger from being attacked, but after firing a warning shot from a handgun he was carrying, he shot one of the men in the face after the man did not retreat. Rios was first prosecuted for murder; the jury acquitted him, but deadlocked on the lesser-included offense of manslaughter. Rios was retried and convicted of manslaughter, and sentenced to eleven years. His sentence was affirmed by the court of appeal and the Supreme Court. The Supreme Court opinion is devoted to discussing Rios's claim that the jury was not properly instructed on the elements of manslaughter. The opinion provides a detailed discussion of the manslaughter elements in California and concludes that the jury was adequately instructed.

The California Court of Appeal ruled in *In re On Habeas Corpus of Rosenkrantz, Terhune v. Superior Ct. of Los Angeles County*, 95 Cal. Rptr. 2d 279, 80 Cal. App. 4th 409 (2nd Dist., Div. 1, April 27, 2000), that the continued refusal of the California Parole Board to recommend parole for Robert Rosenkrantz was an abuse of discretion. Rosenkrantz had murdered a man who "outed" Rosenkrantz to his father, at a time when Rosenkrantz, a high school senior, was under intense emotional stress. He was sentenced to 15 years to life, and has served the minimum 15 years, becoming a model prisoner, and avowing that he has matured, come to terms with his homosexuality, and learned to response gracefully to stressful situations without violence. Despite recommendations from a variety of official sources, however, the Parole Board continued to recommend against parole. The court found that this time around there had been absolutely no justification for the Board's decision, and remanded. On June 30, the Board set a release date for Rosenkrantz and sent the matter to Gov. Gray Davis. Davis had previously announced that in general he would refuse to grant parole to any person convicted of murder in California, but Davis has issued no comment about this latest development in the Rosenkrantz case. Rosenkrantz's attorney, Rowan Klein, announced that if the governor denied parole, Klein would file a new lawsuit against the governor on his client's behalf. *Los Angeles Times*, July 1.

The Louisiana Court of Appeal, 4th Circuit, rejected a contention that a life sentence for drug trafficking was unconstitutionally excessive in the case of man with full-blown AIDS. *State of Louisiana v. Alford*, 2000 WL 768854 (June 14). Most of the opinion is taken up with defendant Charles Alford's various contentions going to the merits of his conviction. Because he was a third-time offender, a life sentence was authorized under the applicable laws. The sentencing report set out the defendant's history of drug offenses, noted that he had been HIV+ for at least four years and had developed AIDS, and that his mother had expressed concern that he would die in prison. But the court found that as a third-time defender who was not eligible for the intensive/incarceration program, there was no basis to find any constitutional defect in his life sentence.

Butler County, Ohio, Common Pleas Judge Michael Sage has sentenced Gary L. Cooper, Jr., an HIV+ man, to 20 years in prison for the rape and felonious assault of a thirteen-year old boy who was infected with HIV as a result of Cooper's actions. Cooper, age 40, was infected with HIV in 1988, and had been accused of a series of assaults on the boy beginning in 1997 and extending through 1999. Judge Sage also classified Cooper as a sexual predator, which means that under Ohio law, if he lives to be released from prison, he would have to report to the sheriff's department quarterly and his neighbors would be notified of his sexual predator status. *Cincinnati Enquirer*, June 15, 2000.

The Tennessee Court of Criminal Appeals has rejected a challenge to a five year prison term for a man who was convicted of the voluntary manslaughter of his HIV+ cousin. *State of Tennessee v. Makuach*, 2000 WL 711149 (June 2). Defendant and victim were cousins who immigrated to the United States from Sudan, and they were living together in an apartment complex in Nashville. They both believed that the victim had contracted HIV. An altercation occurred between them on July 24, 1998, during which the victim was brutally beaten to death. At his trial, the defendant claimed that the victim was trying to kill himself and began bleeding profusely from a self-inflicted knife wound; when the defendant tried to disarm the victim, the victim cut him and spit blood at him. The defendant claims he pushed the victim in self defense, they both fell to the floor, and the victim hit his head on a doorknob and bled to death. The medical examiner's report thoroughly disproved the defendant's testimony, indicating the victim suffered at least 20 to 24 blunt force blows and was massively injured in ways totally inconsistent with the defendant's testimony. Nonetheless, on appeal Mucic argued that his belief that the victim was HIV+ and that he was wielding a knife, taken together, were sufficient as a matter of law to excuse his conduct. The court found, based on the evidence, that the trial court did not err in refusing to find a mitigating factor along the lines of defendant's argument. A.S.L.

Homeless HIV+ Challenge Adequacy of NY AIDS Services Housing

The U.S. District Court for the Southern District of New York denied a preliminary injunction, sought by five HIV+ homeless plaintiffs and Housing Works, Inc., that would have required significant changes in the way New York City houses HIV+ homeless people. *Wright v. Giuliani*, 2000 WL 777940 (June 14).

Proposing to bring a class action on behalf of all city residents with AIDS and symptomatic HIV, the plaintiffs asserted that the emergency housing administered by the Human Resources Administration Division of AIDS Services Income Support (DASIS) is unsuitable for persons with compromised immune systems in violation of the Americans with Disabilities Act (ADA), the Rehabilitation Act, implementing regulations, the New York Administrative Code (DASIS Law) and a common law duty of care. Some of the plaintiffs take medications that require refrigeration and that they be taken with food. Plaintiffs were placed in single room occupancy hotels (SROs) that, contrary to the language of the DASIS Law, lack individual refrigerated storage and lockable bathrooms. These hotels also lack soap, toilet paper, and sanitary conditions, thereby denying HIV+ claimants "meaningful access to emergency shelter" as required by the ADA, according to the complaint.

District Judge William Pauley disagreed with the defense argument that *Henrietta D. v. Giuliani*, 1996 WL 633382 (E.D.N.Y.), a case which "involves virtually the same plaintiffs and defendants ... and highly analogous claims," precluded plaintiffs' federal claims in the present case, because the *Henrietta D.* court has not issued a final decision. However, the court stated, "Contrary to plaintiffs' view, the Second Circuit has made clear that in any ADA or Rehabilitation Act analysis, courts must focus on the specific services provided to the able-bodied and compare them to the services provided to the disabled. The ADA and the Rehabilitation Act do not guarantee specific benefits." Citing judicial economy as a concern, the court noted that its analysis of case law under the ADA and Rehabilitation Act is "not on all fours" with the *Henrietta D.* court's holding that "[e]ven if the state has not denied disabled persons a service or benefit available to non-disabled persons, the state still retains the affirmative responsibility to ensure disabled persons have equal and meaningful access to that benefit."

While Judge Pauley found that the present facts could support a prima facie case on the

federal claims, he declined to enjoin the City to increase the quality and inspections of SROs and provide staff sensitivity training, because plaintiffs did not show a clear likelihood of success on the merits of their disability law claims.

The court declined to certify plaintiffs' proposed class, finding it be overly broad, but granted leave to replead as to a class narrowed to patrons of the type of housing that the plaintiffs are challenging in this case. Judge Pauley found it impossible to analyze whether the interests of DASIS clients placed in transitional supported housing units were adequately represented by these plaintiffs, placed in SROs. He also dismissed without prejudice plaintiffs' state and local law claims, citing "novel questions ... that implicate the City's interest in administering its agencies," as to which federal abstention in the absence of controlling state precedents was warranted.

Armen Merjian of Housing Works and Russell Brooks of Milbank Tweed Hadley & McCloy represent the plaintiffs. *Mark Major*

AIDS Litigation Notes: Civil

In *Thaddeus-X v. Wozniak*, 2000 WL 712383 (U.S.Ct.App., 6th Cir. May 23) (unpublished disposition), the court summarily and without any discussion or explanation found that a prisoner who contended his 8th Amendment rights were violated when he was deprived of HIV medication for two days had not stated a claim because it is necessary to allege a "physical injury" as part of an 8th Amendment deliberate indifference case involving medical care. Interesting that the 9th Circuit recently decided, virtually as a matter of judicial notice, that an interruption of HIV meds could provide the basis for an 8th Amendment claim; see *South v. Gomez*, 2000 WL 222611 (9th Cir., Feb. 25, 2000) (unpublished disposition).

In *K-Mart v. Evenson*, 1 P.3d 477 (May 3), the Oregon Court of Appeals upheld a determination of the state's workers compensation board that a retail store employee who was possibly exposed to HIV while on the job had sustained a "compensable injury" for purposes of the compensation law, and was thus covered for the resulting medical testing she had to undergo. Patsy Evenson was assisting and cleaning up after an incontinent customer in a wheelchair, who informed her that he was HIV+. She called the hospital for advice, and was told she should come right in for prophylactic treatment and testing. She has consistently tested negative for HIV and hepatitis, the main subjects of concern. Although the employer paid the initial hospital bill on a "diagnostic" basis, it balked at paying for ongoing follow-up testing. The court supported the board's finding that an on-the-job exposure requiring medical attention and testing constitutes a work-related injury within the broad purposes of the workers compensation law.

In an accident case against the City of New York, the N.Y. Appellate Division, 2nd Department, ruled that when an HIV+ plaintiff's life expectancy is relevant to the calculation of damages, the defendant is entitled to present expert testimony on the impact of HIV infection on life expectancy, and it was error in the case before the court for the trial judge to have refused to allow the city's expert to testify. *Davis v. City of New York*, 2000 WL 798247 (May 1). The opinion does not specify the nature of the accident that gave rise to the litigation.

U.S. District Judge Wexler (E.D.N.Y.) has dismissed a retaliation suit brought by a registered nurse of Haitian ancestry against a hospital arising from a dispute about how the hospital characterized Haitians in its policy and procedure manual's section on AIDS. *Taneus v. Brookhaven Memorial Hospital Medical Center*, 2000 WL 760718 (May 26). The manual originally referred to people from Haiti as an AIDS-risk group, based on a 1990 memorandum from the new York State Health Department. Nurse Margaret Taneus, of Haitian origin, protested in a staff meeting that this was an inappropriate stereotypical characterization. The hospital subsequently revised the manual to remove the reference to Haitians, but Nurse Taneus claims that after this meeting she suffered from various adverse actions, including a disputed confrontation with a doctor of Haitian origin who she says accused her of trying to hurt his reputation by her comments about Haitians in the staff meeting. (The hospital investigated her complaint about the doctor and found it to be without merit.) She ultimately left on a medical leave and never returned to work, but filed a federal lawsuit alleging discrimination based on race, sex, and national origin. Ruling on the hospital's summary judgment motion, Judge Wexler found nothing in the record to support a discrimination claim, and that to the extent that any case was stated, it would have to be a retaliation case. However, Title VII's cause of action for retaliation requires a showing that the plaintiff suffered discrimination because of her protected activity in protesting a discriminatory employment policy. In this case, Taneus was protesting policies involving the labeling of particular patients. Wexler concluded that the complaint stated no cause of action, and granted the hospital's motion.

In *Henrietta D. v. Giuliani*, 81 F. Supp. 2d 425 (E.D.N.Y. Jan. 24, 2000), which we belatedly report here, U.S. District Judge Johnson refused to dismiss or grant summary judgment in favor of the defendant in a case brought by advocates for PWA's alleging violations of federal and state law in the administration of benefits for PWA's by the city and state social service agencies. In particular, the suit alleges that through its inefficiencies and bureaucratic bungling, the city's Division of AIDS Services & Income Support has effectively denied many people with HIV/AIDS equal access to the benefits to which they are entitled, in violation of sec. 504 of the Rehabilitation and the Americans With Disabilities Act, as well as state law requirements governing AIDS services. Judge Johnson rejected the argument that the state defendants are immune from suit on the federal claims under the 11th Amendment, although it was found that such immunity would bar the claims asserted under state law against these defendants. Ultimately, the court found that plaintiffs had sufficiently alleged their federal claims to withstand either a motion to dismiss or a motion for summary judgment. The plaintiffs, a group of people with HIV/AIDS, are represented by the HIV Law Project of NYC, Housing Works, Brooklyn Legal Services Corp. B., and volunteer attorneys from Winthrop, Stimson, Putnam & Roberts.

In *Pearcill v. West*, 2000 WL 778231 (U.S.Ct.App. for Veterans Claims, Jan. 7) (unpublished disposition), the court rejected the plaintiff's argument that his HIV infection, manifested in advanced AIDS during the mid–1990s, could be traced back to his period of military service from May 1982 to September 1983. Although two doctors testified that some ulcers for which Pearcill was treated in the service might be indicative of HIV infection, there was much medical testimony in the record supporting the counter-argument, including his late 1980's marriage and the birth of his son, with neither wife nor son having been infected with HIV. Although an argument could be made that he was infected and had a long asymptomatic period, and that the ex-wife and son were just lucky, the court concluded that because the "clearly erroneous" standard applies to review of the factual findings by the Board of Veterans Appeals, it could not overturn the Board's decision against Pearcill when the record did not clearly point in one direction. Thus, Pearcill is not entitled to have his medical expenses picked up by the Veterans Administration.

In *Gill v. DeFrank*, 2000 WL 877012 (U.S.Dist.Ct., S.D.N.Y., June 30), U.S. District Judge Naomi Buchwald ruled that prison personnel were entitled to qualified immunity against a prisoner's constitutional right of privacy claim regarding disclosure of HIV-related information from his medical records. The incidents in this case took place in 1997. The Magistrate recommended against granting the defendants' motion to dismiss, finding that the right to privacy in AIDS-related information was established by the time these events occurred. Judge Buchwald disagreed. Although the 2nd Circuit had in 1994 recognized a constitutional right to privacy in HIV-related information, Buchwald observed that the 1994 precedent involved a civilian case, and that a prison setting raises different issues. It was not

until *Powell v. Schriver*, 175 F.3d 107 (1999), that the 2nd Circuit specifically ruled on a right to privacy claim involving a prisoner's HIV status, and in that case, the court held that the defendants were entitled to immunity since the law was not "established" in the 2nd Circuit until that opinion was issued. Buchwald also approved the magistrate's recommended to dismiss various other claims, and disapproved the magistrate's recommendation to deny summary judgment on a free exercise of religion claim unrelated to inmate Anthony Gill's HIV-status.

In *Natale v. Gottlieb Memorial Hospital*, 2000 WL 873756 (Ill. Ct. App., 1st Dist., June 30, 2000), the court reiterated prior holdings that an AIDS phobia plaintiff must allege actual exposure to HIV in order to maintain a claim for emotional distress damages. In this case, the hospital notified Mr. Natale that the instrument used to perform a colonoscopy on him may not have been properly sterilized, and offered him blood testing and counseling. The counselor advised him to conduct his life as if he had been exposed to HIV until he had repeatedly tested negative. Natale claims that he suffered severe emotional distress due to fear of contracting AIDS as a result of this incident. He has repeatedly tested negative. The court, affirming a grant of summary judgment to the hospital, refused to distinguish this from prior Illinois cases in which such counseling warnings had not been given, and insisted on adhering to the actual exposure standard. A.S.L.

AIDS Law & Society Notes

More than 5,000 leading scientists, doctors and medical experts joined in a statement published in the July issue of *Nature* that "overwhelming evidence" shows that HIV is the cause of AIDS. The statement, intended for release a week prior to the 13th International Conference on AIDS in Durban, South Africa, to be held beginning on July 9, was a reaction to efforts by South African President Thabo Mbeki to spark new debate about the causes of AIDS. *Reuters*, July 3.

The *Christian Science Monitor* reported June 16 that the U.S. Immigration and Naturalization Service has begun a trial program of relaxing the normal economic tests for refugee status in the case of applicants with HIV infection from countries with inadequate treatment resources. According to the report, there are about 70 refugees who are being admitted provisionally under a test program in which six U.S. cities known for advanced HIV health and hospice networks have been selected to host the refugees: Boston, New York, Chicago, San Diego, Minneapolis and San Francisco. The Dept. of Health and Human Services will cover the medical costs of the refugees until they obtain private insurance.

The success of HIV+ plaintiffs in winning federal discrimination claims appears to depend heavily on where in the country they are living or working when the claim arises. A study of HIV discrimination cases in the federal courts conducted by the staff of *AIDS Policy & Law*, a newsletter published by LRP Publications, found that HIV+ plaintiffs prevailed in only 8% of the cases in the district and appellate courts of the U.S. 4th Circuit, but in 60% of the cases in the 1st Circuit. Next to the 4th Circuit, the least receptive circuits were the 6th and 11th, with 27% and 20% success rates respectively. *AIDS Policy & Law*, vol. 15, no. 13, July 7, 2000, p.1.

Public health officials in San Francisco announced June 30 that the number of new HIV infections among gay men in San Francisco rose sharply during 1999. During the 1990s, new HIV infection cases from all causes reported to the city health department had been averaging about 500 a year, but the total for 1999 was more than 800, of which 575 came from sex between men. Between 1997 and 1999, the percentage of people tested at the city's anonymous testing centers who tested positive rose from 1.3% to 3.7%, almost tripling. Other research shows that the proportion of gay men in San Francisco who say they have unprotected anal sex with multiple partners increased from 23% in 1994 to 43% in 1999, and those who said they always used a condom dropped from 70% to 54% during the same time period. There was speculation that new medications, making AIDS a manageable condition for many of those with access to effective treatment, has lessened the deterrence to unprotected sex that had been posed by the stark mortality rates from the 1980s. *Los Angeles Times*, *San Francisco Chronicle*, July 1.

International AIDS Law Notes:

The *Toronto Star* reported June 27 that Justice Ellen Macdonald of the Superior Court had sharply criticized the Canadian Red Cross Society for transfusing three hemophiliacs with HIV-tainted blood months after the organization had received warnings about problems with its blood supplies. Calling the Society's action "shocking," she awarded $2.3 million (Canadian dollars) in damages plus court costs to the plaintiffs, surviving heirs of the three who have all since died from AIDS. The transfusions took place in 1984, at a time prior to the availability of screening tests for HIV but when the identity of the virus had been discovered and heat treatments were available to render donated blood safe for transfusion. Evidence showed that the Society made a conscious decision not to bother applying the heat treatments to accumulated reserves of donated blood.

The *Daily Yomiuri* reported June 13 that the Chiba (Japan) District Court awarded 6.6 million yen (approximately $66,000) to a 35–year-old Brazilian national of Japanese descent who was discharged after his Japanese employer performed an unauthorized test to determine his HIV status. Presiding Judge Naomi Ichimaya ordered the company to pay 5.1 million yen and the hospital director who had breached the confidentiality of the plaintiff's test result 1.5 million yen, finding that the testing was "an infringement on the man's privacy." According to the news report, "Takigawa Kagaku Kogyo hired the man in September 1997. The following November, when the company conducted its annual employee health check, it had the man's blood tested for HIV without his consent. The man's boss at the time allegedly opened the envelope that contained the test results and fired him because he deemed the presence of an HIV carrier to be detrimental to the company."

Namibia's Defense Ministry has decided not to appeal the May Labor Court ruling striking down its policy of refusing to recruit HIV+ people into the armed services. On June 20, the Ministry withdrew the notice of appeal that had previously been filed. After thoroughly reviewing the opinion by Acting Judge Harold Levy (not the NYC School Chancellor, by the way), Defense officials concluded that it left them with sufficient leeway to remove anybody whose health condition is seriously compromised.

PUBLICATIONS NOTED & ANNOUNCEMENTS

ANNOUNCEMENTS

Lambda Legal Defense & Education Fund, Inc., the country's oldest and largest lesbian and gay legal organization, currently has a number of attorney and legal assistant positions open in offices across the country. For details, please see their website, www.lambdalegal.org.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Aden, Steven H., *A Tale of Two Cities in the Gay Rights* Kulturkampf*: Are the Federal Courts Presiding Over the Cultural Balkanization of America?*, 35 Wake Forest L. Rev. 295 (2000) (Rutherford Institute staff attorney argues that *Lumpkin* and *Shahar* decisions are undermining appropriate judicial protection of the religious beliefs of public employees).

Barnard, Thomas H., and Timothy J. Downing, *Emerging Law on Sexual Orientation and Employment*, 29 U. Memphis L. Rev. 555 (Spring/Summer 1999).

Cain, Patricia A., *Heterosexual Privilege and the Internal Revenue Code*, 34 U. San Fran. L. Rev. 465 (Spring 2000).

Freshman, Clark, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between "Different" Minorities*, 85 Cornell L. Rev. 313 (January 2000) (explores theoretical relationships between racism, sexism, homophobia, ageism and other kinds of discrimination).

Gay & Lesbian Advocates & Defenders, *Protecting Families: Standards for Child Custody in Same-Sex Relationships*, 10 UCLA Women's L.J. 151 (Fall/Winter 1999) (standards developed by public interest law firm in consultation with community activists and other lesbian/gay litigation groups).

Kelly, James B., *The* Charter of Rights and Freedoms *and the Rebalancing of Liberal Constitutionalism in Canada, 1982–1997*, 37 Osgoode Hall L. J. 625 (Fall 1999).

Koppelman, Andrew, *Why Gay Legal History Matters*, 113 Harv. L. Rev. 2035 (June 2000) (book review essay of Eskridge, *Gaylaw: Challenging the Apartheid of the Closet* [Harv. U. Press 1999]).

Leslie, Christopher R., *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 Harv. Civ. Rts. - Civ. Lib. L. Rev. 103 (Winter 2000).

Mischler, Linda Fitts, *Personal Morals Masquerading as Professional Ethics: Regulations Banning Sex Between Domestic Relations Attorneys and Their Clients*, 23 Harvard Women's L.J. 1 (Spring 2000).

Nyquist, Curtis, Patrick Ruiz & Frank Smith, *Using Students as Discussion Leaders on Sexual Orientation and Gender Identity Issues in First-Year Courses*, 49 J. Legal Ed. 535 (December 1999).

Parlow, Matthew J., *Revising* Gay Rights Coalition of Georgetown Law Center v. Georgetown University *A Decade Later: Free Exercise Challenges and the Nondiscrimination Laws Protecting Homosexuals*, 9 Tex. J. Women & L. 219 (Spring 2000).

Polikoff, Nancy D., *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 Amer. U. J. Gender, Soc. Pol. & L. 167 (2000) (commentary responding to Martha Albertson Fineman's article, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 Amer. U. J. Gender, Soc. Pol. & L. 13 (2000), as part of a symposium titled "Gender, Work & Family Project Inaugural Feminist Legal Theory Lecture")

Robbins, Kalyani, *Framers' Intent and Military Power: Has Supreme Court Deference to the Military Gone Too Far?*, 78 Oregon L. Rev. 767 (Fall 1999).

Rubenstein, William B., *Divided We Propagate: An Introduction to* Protecting Families: Standards for Child Custody in Same-Sex Relationships, 10 UCLA Women's L. J. 143 (Fall/Winter 1999) (explaining genesis of guidelines by Gay & Lesbian Advocates & Defenders, see above).

Santiago, Rolando Jose, *Internet Access in Public Libraries: A First Amendment Perspective*, 32 Urban Lawyer 259 (Spring 2000).

Tsesis, Alexander, *The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech*, 40 Santa Clara L. Rev. 729 (2000).

Wakefield, Robin, *City Hall Steps: Battle Over the People's Platform*, 6 City Law 49 (May/June 2000) (City Law is a newsletter published by the Center for New York City Law at New York Law School. The article gives the background and history of recent litigation by Housing Works, an AIDS-services group, seeking more open access to hold political demonstrations on the steps of New York's city hall.)

Williams, Taya N., *Committed Partnership: The Legal Status of Committed Partners and Their Children*, 13 J. Suffolk Academy of L. 221 (1999).

Student Notes & Comments:

Brumby, Edward, *What Is In a Name: Why the European Same-Sex Partnership Acts Create a Valid Marital Relationship*, 28 Georgia J. Int'l & Comp. L. 145 (1999).

Cash, Brian Verbon, *Images of Innocence or Guilt?: The Status of Laws Regulating Child Pornography on the Federal Level and in Alabama and an Evaluation of the Case Against Barnes & Noble*, 51 Alabama L. Rev. 793 (Winter 2000).

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Dombrowsky, Alexander, *Whether the Constitutionality of the Violence Against women Act Will Further Federal Protection From Sexual Orientation Crimes*, 54 U. Miami L. Rev. 587 (April 2000).

Duenas, Christopher A., *Coming to America: The Immigration Obstacle Facing Binational Same-Sex Couples*, 73 S. Cal. L. Rev. 811 (May 2000).

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Hicks, Karolyn Ann, *"Reparative" Therapy: Whether Parental Attempts to Change a Child's Sexual Orientation Can Legally Constitute Child Abuse*, 49 Amer. U. L. Rev. 505 (Dec. 1999).

Hungerford, David, *The Fallacy of* Finley*: Public Fora, Viewpoint Discrimination, and the NEA*, 33 UC Davis L. Rev. 249 (Fall 1999).

Jackson, Rachel, *A Life Sentence by Any Other Name: Ohio's Sexual Offender Laws*, 31 U. Toledo L. Rev. 95 (Fall 1999).

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Patten, Neil C., *The Politics of Art and the Irony of Politics: How the Supreme Court, Congress, the NEA and Karen Finley Misunderstood Art and Law in* National Endowment for the Arts v. Finley, 37 Houston L. Rev. 559 (Summer 2000).

Smith, Gregory K., Powell v. State*: The Demise of Georgia's Consensual Sodomy Statute*, 51 Mercer L. Rev. 987 (Spring 2000).

Somekh, Nati, *The European Total Ban on Human Cloning: An Analysis of the Council of Europe's Actions in Prohibiting Human Cloning*, 17 Bos. U. Int'l L. J. 397 (Fall 1999).

Specially Noted:

Roundtable on Gender and Law, 65 Brooklyn L. Rev. No. 4 (1999), includes the following: Valian, Virginia, *The Cognitive Bases of Gender Bias*, 65 Brooklyn L. Rev. 1037 (1999); LaFrance, Marianne, *The Schemas and Schemes in Sex Discrimination*, 65 Brooklyn L. Rev. 1063

(1999); Poirier, Marc R., *Gender Stereotypes at Work*, 65 Brooklyn L. Rev. 1073 (1999); Schneider, Elizabeth M., *Gender Bias, Cognition, and Power in the Legal Academy*, 65 Brooklyn L. Rev. 1125 (1999).

The Nation published a cover story in its July 10 issue about the current problems under the military's "don't ask, don't tell" policy. This brings together quite a bit of valuable information that has been coming out in bits and pieces over the past few months. Doug Ireland, *Search and Destroy: Gay-Baiting in the Military Under 'Don't Ask, Don't Tell*, The Nation, July 10, 2000, pp. 11–16.

AIDS & RELATED LEGAL ISSUES:

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Caspar, Edward, Doe v. Mutual of Omaha*: Do Insurance Policy Caps on AIDS Treatments Violate the Americans With Disabilities Act?*, 75 Notre Dame L. Rev. 1535 (May 2000).

Cooper, Jeffrey O., *Interpreting the Americans With Disabilities Act: The Trials of Textualism and the Practical Limits of Practical Reason*, 74 Tulane L. Rev. 1207 (March 2000).

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Fornalik, Judith, *Reasonable Accommodations and Collective Bargaining Agreements: A Continuing Dispute*, 31 U. Toledo L. Rev. 117 (Fall 1999).

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Note, *Name Brands: The Effects of Intrusive HIV Legislation on High-Risk Demographic Groups*, 113 Harv. L. Rev. 2098 (June 2000).

Zgarba, Rex J., *Employee's Panacea or Pandora's Box? An Analysis of* Bragdon v. Abbott *and Its Likely Effects Upon Claims Under Title I of the ADA*, 19 Rev. of Litigation 719 (Summer 2000).

Specially Noted:

The AIDS Coordinating Committee of the American Bar Association has published a report, titled *Perspectives on Returning to Work: Changing Legal Issues and the HIV/AIDS Epidemic*. This book provides up-to-date guidance on the legal issues faced by persons with AIDS who were on disability leave or had entirely left the workplace, but are physically able to resume working due to successful response to current therapies. Copies of the report may be obtained from Steve Powell, ABA-AIDS Coordination Project, by calling 202–662–1025, or emailing <powells@staff.abanet.org>.

EDITOR'S NOTE:

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