

## STATE CHIEF JUSTICE SEEKS TO SHIELD CHILDREN FROM "EVIL" GAYS

Chief Justice Roy Moore of the Supreme Court of Alabama believes that lesbians and gay men are presumptively unfit to have custody of their children, because their behavior is "an inherent evil against which children must be protected." So he wrote in a special concurring opinion in *Ex parte H.H.; In re D.H. v. H.H.*, 2002 WL 227956 (Feb. 15), in which the court voted unanimously to reverse a decision by the Court of Civil Appeals that had ordered that primary custody of three teenage children should be changed from their father to their lesbian mother. Although Moore did not write the opinion for the court, all the media attention flowing from the case has focused on his incendiary concurrence.

Mother and father were living in California with their three young children when they were divorced in 1992. The court awarded them joint custody, with the mother receiving primary physical custody. The father moved to Alabama and remarried. The mother "came out" as lesbian and petitioned the court in 1996 to change primary physical custody of the children to their father. The children moved to Alabama to live with their father, and mother began to live with a lesbian partner in California. Evidently the children, now teenagers, told their mother that their father was an excessive disciplinarian, engaging in corporal punishment and placing restrictions on them which they resented. In February 1999, the mother filed a petition in the California court seeking to regain primary physical custody. The father responded by filing an action in Jefferson County, Alabama, Circuit Court, requesting that the case be transferred to Alabama, the domicile of the children, and apparently the California court ceded jurisdiction, thus apparently dooming the mother's petition (based on the extraordinarily anti-gay record of Alabama courts in contested custody cases).

True to form, the Circuit Court rejected the mother's contention that the father was engaging in child abuse and found that the mother failed to prove a material change in circumstances that would justify a change in physical custody. Among its findings, the trial court stated: "The [mother] says the [father] is a domestic abuser. The [father] says the [mother] is an alcoholic lesbian. There can be no surprise

that these children have serious issues in their lives. In fact, it is probably remarkable that the children have done as well as they have. While not approving of the [father's] occasional excessive disciplinary measures or condoning the [mother's] lifestyle, this Court cannot rewrite the lives of the parties or [the] children. It can only rule based upon application of the law to the facts in evidence and attempt such remedial measures as may seem appropriate." Responding to a post-judgment motion by the father to clarify its findings, the court reiterated: "The Court does not find that 'domestic abuse occurred.' What the Court did find was that the [father] used 'occasional excessive disciplinary measures.'" While refusing to approve a change in custody, the court did order the father to attend parenting classes and ordered both parents to refrain from interfering with the children's communications with the other parent.

The mother appealed to the Court of Civil Appeals which, amazingly in light of Alabama precedents, reversed. This court asserted that the Circuit Court's findings of excessive disciplinary measures confirmed the mother's charges and constituted the material change in circumstances necessary to support a change in custody, which would be in the best interest of the children. "The father's verbal, emotional, and physical abuse can be considered family violence, and that abuse constitutes a change of circumstances," wrote the appellate courts in its June 1, 2001, order. Now the father appealed.

Reversing the Court of Civil Appeals in an opinion by Justice Gorman Houston, the Supreme Court found that the intermediate court had departed from its proper role by "reweighing" the evidence. The trial court insisted that it had not found the father to be a domestic abuser, and that it had not found circumstances to have materially changed so as to justify a change of custody. Justice Houston asserted that it is not the role of appellate courts to second-guess factual findings by trial courts that have evidentiary support. Much in the record was controverted between the parties, and the issue on appeal, according to Houston, is not whether the appeals court believes the evidence preponderates in favor of one party over the other, but rather whether there is evidence

in the record that provides a basis for the trial court's decision. Justice Houston never mentions the mother's sexuality or lifestyle in the analysis portion of his opinion, and only mentions it in passing in summarizing the facts and the rulings by the lower courts.

This disposition was clearly insufficient for Chief Justice Moore, who rode a wave of red-neck support to election in 2000 after a colorful career as a right-wing, fundamentalist Christian trial judge who insisted on posting the 10 Commandments in his courtroom against the direct orders of higher courts. After a sentence concurring in the holding, he launched his diatribe: "I write specially to state that the homosexual conduct of a parent conduct involving a sexual relationship between two persons of the same gender creates a strong presumption of unfitness that alone is sufficient justification for denying that parent custody of his or her own children or prohibiting the adoption of the children of others." (Not content to opine on this case, Moore reached out to disqualify gays from adopting as well as having custody of their own children.)

After noting that the mother had entered into a "domestic partnership" as provided under California law, Moore staked his claim for Alabama virtue: "But Alabama expressly does not recognize same-sex marriages or domestic partnerships. Sec. 30-1-19, Ala. Code 1975. Homosexual conduct is, and has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God upon which this Nation and our laws are predicated." [So much for the Establishment Clause of the U.S. Bill of Rights.] "Such conduct violates both the criminal and civil laws of this State [Justice Moore fails to provide any citation of how homosexual conduct violates the civil laws of Alabama] and is destructive to a basic building block of society the family. The law of Alabama is not only clear in its condemning such conduct, but the courts of this State have consistently held that exposing a child to such behavior has a destructive and seriously detrimental effect on the children. It is an inherent evil against which children must be protected."

Moore insisted that in finding that there was no evidence that the mother's homosexual conduct was detrimental to the children, the Court of Civil Appeals had failed to apply established Alabama precedent, which has uniformly found that children should not be exposed to their parents' homosexual relationships. His summary of Alabama case law is undoubtedly accurate, as he quotes a 1998 Alabama Supreme Court opinion, *Ex parte D.W.W.*, 717 So.2d 793, in which the court found that "continued exposure" to a mother's lesbian lifestyle constitutes

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“demonstrable harm.” He also quotes older decisions in sodomy cases which characterize gay sex as having “an inherent quality of baseness, vileness, depravity,” and notes one appellate decision that says of sodomy: “We are aware of no other crime at common law that has been as vehemently and copiously characterized as infamous.” He then goes into a historical treatise on early common law roots, tracing them to “natural law”, which he characterizes as “the law of nature and of nature’s God as understood by men through reason, but aided by direct revelation found in the Holy Scriptures,” and he quotes Blackstone for the proposition that the common law is derived from Holy Revelation. He then rehearses various mentions of natural law in early American legal sources, including the Declaration of Independence, which asserted, in its opening sentence, that the entitlement of the colonists to equal treatment with other British subjects was derived from “the laws of nature and nature’s God.” He also roots the prohibition of sodomy in Leviticus.

He concludes with an essentialist paean to the traditional heterosexual family. “No matter how much society appears to change, the law on this subject has remained steadfast from the earliest history of the law, and that law is and must be our law today. The common law designates homosexuality as an inherent evil, and if a person openly engages in such a practice, that fact alone would render him or her an unfit parent.” Contrary to the Court of Civil Appeals, he asserted, a parent’s homosexuality would have a “detrimental effect” on her children as a matter of course: “The ‘detrimental effect’ of such conduct is established by the great mass of Alabama law, which prohibits and condemns homosexual conduct. Courts must make decisions based on fixed principles. Judges should not make decisions based on the latest psychological or sociological study or statistical poll, the interpretations of which are subject to bias and philosophical leanings of researchers, and which are subject to being refuted by other studies.” Here, he cites to the controversial article “(How) Does the Sexual Orientation of Parents Matter?”, by Judith Stacey and Timothy J. Biblarz, 66 J. Amer. Sociological Assoc’n 159 (April 2001), which posits that studies of gay parenting have tended to understate (for political reasons) the likelihood that children raised in gay households will be affected by their parents’ sexual orientation.

Concluding his diatribe, Moore proclaims: “Homosexual behavior is a ground for divorce, an act of sexual misconduct punishable as a crime in Alabama, a crime against nature, an inherent evil, and an act so heinous that it defies one’s ability to describe it. That is enough under the law to allow a court to consider such activity harmful to a child. To declare that homosexuality is harmful is not to make new law

but to reaffirm the old; to say that it is not harmful is to experiment with people’s lives, particularly the lives of children.” Just to make sure nobody missed his point, Moore restated this entire argument in a concluding paragraph strewn with such choice words as “inherently immoral,” “illicit,” “detestable,” “abominable” and “sin.”

While gay rights groups called for Moore’s resignation from the court, and the court itself appeared to hesitate about officially publishing the decision, which was made public and available on electronic databases on Feb. 15 with the caution “Not Yet Released for Publication,” Moore was undoubtedly quite happy to have stirred up yet another hornet’s nest while fanning the flames of prejudice upon which he originally rode into office. But he may have stirred up more trouble than he expected, because the southern regional office of Lambda Legal Defense Fund filed a formal complaint with the Alabama Judicial Inquiry Commission, alleging ethical violations by Justice Moore, on Feb. 20. According to Hector Varga, regional director in Lambda’s Atlanta office, “Chief Justice Moore’s statements make it abundantly clear that he is incapable of giving any lesbian or gay person in Alabama their fair day in court. Rather than displaying a fair and open mind when addressing legal claims regardless of anyone’s sexual orientation, the judge blindly condemns gay people and explicitly refuses to rule based on the actual evidence in a case.”

On Feb. 19, the Associated Press reported that Birmingham attorney Wendy Crew, who represents the mother, is planning to seek review in the Supreme Court, arguing among other things that the decision sets up a conflict between California law and Alabama law. (One presumes she will come up with some text-based constitutional arguments as well, such as due process and equal protection.) The father’s attorney, John Durward, told the Associated Press that the case turns entirely on state law issues not suitable for Supreme Court review, and that the main issue was that the children have been living in Birmingham with their father for six years and the court saw no reason to move the children across the country to California. *Columbus (GA) Ledger-Enquirer*, Feb. 19. A.S.L.

#### **MASS. HIGH COURT CLARIFIES SEX LAWS: PRIVATE CONSENSUAL GAY SEX IS NOT A CRIME IN THE COMMONWEALTH**

Responding to a complaint filed by Gay & Lesbian Advocates & Defenders, New England’s gay rights public interest law firm, seeking a declaration that two Massachusetts sex crimes statutes do not apply to private, consensual gay sex, the state’s Supreme Judicial Court found there was no “actual controversy” and so the

case must be dismissed, but not before giving GLAD just what it was seeking. The peculiar, unanimous ruling in *Gay & Lesbian Advocates & Defenders v. Attorney General*, 2002 WL 242298 (Feb. 21), “clarified” existing Massachusetts precedents to make clear that private, consensual sex is beyond the reach of the law.

Massachusetts did not embrace the Model Penal Code reforms of the mid-20th century, instead retaining the archaic wording of the old British sex crimes laws. Chapter 272, section 34, penalizes the “abominable and detestable crime against nature,” and section 35 outlaws “any unnatural and lascivious act with another person.” The former has been construed as applying to anal sex, and the later to oral sex. In 1974, the court ruled in *Commonwealth v. Balthazar*, 366 Mass. 298, that section 35 could not be used to punish a heterosexual couple engaged in private, consensual oral sex, a result that was reaffirmed in *Commonwealth v. Scagliotti*, 373 Mass. 626 (1977), and *Commonwealth v. Ferguson*, 384 Mass. 13 (1981). The broad wording of these holdings suggested that neither section 34 nor section 35 could be used to prosecute private, consensual sex, regardless of the sexual identity of the adult participants, but the court had never addressed the issue in a same-sex case. The Massachusetts cases had also taken a broad view of what is “private,” refusing to adopt a categorical description of public and private places, preferring to judge on a case-by-case basis whether people were engaging in activity in a location where they could reasonably expect not to be seen by third parties.

Writing for the unanimous court, Justice Roderick Ireland stated that the rationale of these earlier cases was to find that the purpose of the laws was to protect the public from seeing offensive conduct, and not to punish “persons who desire privacy and who take reasonable measures to secure it. This rationale applies equally to the ‘crime against nature,’ and we now clarify that our holdings in the *Balthazar* and *Ferguson* cases concerning acts conducted in private between consenting adults extend to sec. 34, as well.”

In light of the dismissal for lack of controversy, Ireland need not have said any more, but he did briefly discuss the limits of the court’s authority to make binding declarations of rights in non-contested cases, and noted that the only controversy in a particular case was likely to involve whether the conduct was “public,” which must necessarily be resolved in a particular case involving a prosecution. “The plaintiffs’ stipulation that they commit these acts in their residences, vehicles parked in a parking lot, wooded outdoor areas, and secluded areas of public beaches, is too general to permit us to conclude that there is an actual controversy over whether the location of their conduct is public or private,” he wrote, and rejected the

idea that a facial challenge to the constitutionality of the provisions was, by itself, sufficient to generate the "actual controversy" needed to invoke the court's jurisdiction. The cases were remanded to county court for dismissal.

Jennifer Levi of the GLAD staff argued the case to the court. In addition to a John Doe plaintiff who claimed to have been arrested in the past for violation of a sex crimes law, the other named plaintiffs were Mark Merante, Adrien Saks, Sue Hyde, Justin Deabler, Beth

Jacklin, Carl Koechlin, N. Tyson Smith-Ray, and Tim Smith-Ray, who are to be congratulated for putting themselves on the line by agreeing to be named plaintiffs in this case. GLAD also joined as a representative plaintiff for numerous lesbian and gay Massachusetts residents who could not lend their names individually to the struggle.

In its Feb. 22 report on the decision, the *Boston Globe*, stating that the court had "gutted longstanding sodomy laws," characterized the

case as holding that "people who engage in sodomy in semipublic places such as parking lots, wooded areas, and public beaches cannot be prosecuted as long as they make sure they cannot be seen by others," and quoted Levi as saying that "she expects the ruling to curtail, if not eliminate, law enforcement sweeps on so-called gay cruising areas such as highway rest-stops... 'By limiting the scope of these laws, we take away some of the police's ability to target gay people in a discriminatory way,' Levi said." Once can but hope. A.S.L.

## LESBIAN/GAY LEGAL NEWS

### First U.S. Intersexual Discrimination Suit Unsuccessful

What may be the first attempt by an intersexual person to sue for sex discrimination apparently failed at its first step, according to a report in the *Washington Blade* of February 1, 2002. The *Blade* reports that Oakland County, Michigan, Circuit Judge Fred Mester found that the state's law banning sex discrimination in employment was not applicable to the case of Naomi Solomons, formerly known as David Solomons, who sued Transition Team, a Troy, Michigan, company, for discrimination. According to the short news story, Solomons encountered discrimination as a result of naturally occurring bodily changes attributable to an intersexual condition, during which her breasts began to grow spontaneously, she lost facial hair, and her voice changed. The news report states that Judge Mester found that the legislature did not intend to prohibit discrimination against transsexuals and intersexuals, while Solomons' lawyer, Andrew Mudryk of Ann Arbor, contended that her case should be cognizable as sex discrimination. The news article did not include that date of the decision in *Solomons v. Transition Team*. Subsequent email communication with Attorney Mudryk indicates that the ruling was given orally from the bench, and that an appeal is contemplated. A.S.L.

### Kansas Appeals Court Rejects Equal Protection Challenge to Disparate Sodomy Law Sentencing for Teen

A mildly mentally retarded 18 year old male resident of a residential facility for persons with development disabilities will be sentenced to more than 17 years in prison for having consensual oral sex with a 15-year-old male resident, even though had they been of opposite sex the likely sentence would have been about a year. This presents no constitutional problem for the Kansas Court of Appeals, which rejected an equal protection challenge in *State of Kansas v. Limon*, 2002 Kan. App. LEXIS 104 (Feb. 1) (not designated for publication). The per curiam ruling manages to misconstrue the rele-

vant federal precedents and demonstrates striking ignorance of federal constitutional law, while unctuously referring to the "excellent briefs filed in Limon's behalf" that point out how backwards Kansas law is on these issues.

At the time of the "crime" Matthew Limon, then 18, was a resident of Lakemary Center, having been diagnosed "in the intellectual range between 'borderline intellectual functioning' and 'mild mental retardation.'" Just after his 18th birthday, unfortunately, he got a 15 year old to agree to oral sex. When the boy asked Limon to stop sucking his penis, Limon stopped. The opinion indicates ignorance about how the police got involved in this case, but when they interviewed Limon, he admitted what had happened and was prosecuted for criminal sodomy.

Kansas has a so-called "Romeo and Juliet" law, under which teenagers who engage in illicit sexual conduct with members of the opposite sex are subject to relatively mild penalties. In this case, had Limon performed oral sex on a 15 year old girl with her consent, the sentence would have been 13-15 months. But, as Limon was an "adult" (just barely), his partner was more than three years younger, and they were performing same-sex sodomy (a serious felony crime in Kansas), and Limon had a past record of similar conduct, he was sentenced to 206 months (17 years and two months) plus five years of post-release supervision.

Miami County District Court Judge Richard M. Smith rejected the public defender's argument that the discrepancy in sentencing offended equal protection guarantees of the state and federal constitutions, and Limon appealed. On appeal, he had amicus assistance from the DKT Liberty Project and the ACLU of Kansas (with assistance from the national ACLU's Lesbian and Gay Rights Project).

The three-judge appellate panel of David S. Knudson, G. Joseph Pierron, Jr., and Harry W. Green, Jr., exhibited the most simplistic notions of constitutional theory in their unpublished per curiam rejecting the appeal. For them, this was a case about "homosexual sodomy" and thus, under *Bowers v. Hardwick*, 478 U.S. 186 (1986), the appellant must lose. Limon's attor-

neys sought to frame the issue as sex discrimination in violation of state and federal Equal Protection, but the court was having none of that. This was, in their view, a conduct case, and the question was "whether the United States and Kansas Constitutions allow the Kansas Legislature to so discriminate between homosexual and heterosexual activity."

Since they decided it was really a conduct case, they followed the line of reasoning that essentially rejects the concept of "sexual orientation" and instead considers whether "persons who engage in homosexual behavior" can constitute a "suspect class," making the kinds of errors at the conceptual level that would earn them a D on most law school constitutional law examinations, unless Supreme Court Justices Antonin Scalia or Clarence Thomas were grading the papers, in which case, judging by Scalia's dissent in *Romer v. Evans*, they would earn an A+.

The line of reasoning goes that because, in *Bowers*, the Court held that homosexual sodomy does not enjoy constitutional protection, then a class defined by its propensity to engage in such behavior may be the subject of governmental discrimination pretty much without restriction. This conflates due process (privacy) analysis with equal protection analysis in a way that is thoroughly inconsistent with the Supreme Court's equal protection ruling in *Romer v. Evans*, 517 U.S. 620 (1996), which is why Justice Scalia expressed such distress in his *Romer* dissent with the majority's failure even to mention *Hardwick*, much less accord that decision decisive effect in the equal protection case. But the *Limon* court saw no inconsistency with *Romer* because, in their eloquent description, "While the decision did extend protection to homosexuals from state action, the issue was not one of protecting the right to engage in sodomy, but protecting the right to engage in the political process to seek protection from discrimination."

Thus, of course, missing the point that Limon's appeal is about discrimination in sentencing, not a frontal attack on the state sodomy law per se.

Wrote the Kansas judges, "The impact of *Bowers* on our case is obvious. The United States Supreme Court does not recognize homosexual behavior to be in a protected class requiring strict scrutiny of any statutes restricting it. Therefore, there is no denial of equal protection when that behavior is criminalized or treated differently, at least under an equal protection analysis." This "obvious" conclusion fails entirely to respond to Limon's argument that this is really a sex discrimination case (an argument that the court describes at the beginning of its analysis, but then never mentions again, even to dispute it), or to acknowledge that deciding whether strict scrutiny applies is not the end of an equal protection analysis, because a discriminatory policy may fail to survive "heightened scrutiny" in a sex discrimination case or may even be struck as irrational, as the Court did in *Romer*.

Rather than engage in any heavy constitutional lifting here, the court resorted to the familiar refuge of intermediate appellate judges, disclaiming authority to venture into new territory. While acknowledging the "excellent briefs" filed by amici in support of Limon, documenting the overwhelming trend toward decriminalization of consensual sodomy in the U.S., the court said that such "facts should be considered by legislatures in evaluating the fairness or humanity of their criminal laws," but not directed to this court, which "is without proper authority to ignore the rulings of the United States Supreme Court or the federal constitutional provisions concerning equal protection jurisdiction, or the Kansas Supreme Court's likely adherence to them in interpreting our state constitutional provisions in that area."

In addition to rejecting Limon's equal protection claim, the court also rejected the argument that the trial court should not have applied enhancement factors to the sentence in reliance upon prior juvenile adjudications. (Had the court not taken into account Limon's priors, the sentence would have been around 5 years.) In this case, there was a direct Kansas Supreme Court precedent rejecting the argument that taking into account juvenile convictions to enhance the sentencing of an adult is unconstitutional, so there was nothing the court could do, or so it asserted.

In concluding, the court observed that its decision was not dealing with potential 8th Amendment arguments (that a 17 year sentence for consensual oral sex between teenage boys could be seen as cruel and unusual punishment any doubt of that?) which had not been raised in this appeal, and the court disclaimed judgment about "the wisdom of the statute involved, as that is left to the legislature in our governmental system with its separation of powers." A.S.L.

### Gay Discrimination Claim Not Subject to Arbitration After All

In *Circuit City Stores v. Adams*, 121 S. Ct. 1302 (2001), the Supreme Court decided that the Federal Arbitration Act (FAA) applies to arbitration agreements between employers and employees, and remanded to the 9th Circuit to decide whether the district court erred in exercising its authority under the Act to compel arbitration of a claim brought by a gay employee under California's law forbidding sexual orientation discrimination. On Feb. 4, the 9th Circuit held that the entire arbitration agreement was unenforceable as a matter of state contract law, and therefore reversed the district court's order compelling arbitration. 2002 WL 152986.

Saint Clair Adams signed the "Circuit City Dispute Resolution Agreement" (DRA) in order to obtain employment with Circuit City. The DRA requires employees to submit all claims and disputes to binding arbitration. The problem with this arbitration agreement is that it limits the amount of damages an employee may receive. Notably, Circuit City is not required under the agreement to arbitrate any claims against the employee. Adams could not have worked at Circuit City without signing the DRA.

In November 1997, Adams had filed a state court lawsuit against Circuit City and three co-workers alleging sexual harassment and discrimination based on sexual orientation. (California state law forbids such discrimination.) Adams sought compensatory, punitive, and emotional distress damages for the alleged repeated sexual harassment. Circuit City responded by filing a petition in federal district court to stay the state court proceedings and compel arbitration pursuant to the DRA.

The 9th Circuit found the entire arbitration agreement unenforceable because it was a contract of adhesion. Writing for the court, Circuit Judge Nelson stated that the FAA provides for federal courts to apply ordinary state law principles that govern contract formation in determining the validity of an arbitration agreement. Therefore, California state law applies in this case. The Circuit City DRA is unconscionable under California law because Circuit City has considerably more bargaining power and employees do not have a choice in signing it — they must take it or leave it.

The court relies on a recent decision by the California Supreme Court, *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P3d 669 (Cal. 2000), in which the court reversed an order compelling arbitration of a discrimination claim because the arbitration agreement at issue required arbitration only of employees' claims and excluded damages that would otherwise be available under the state Fair Employment and Housing Code. The 9th Circuit found

the agreement in *Armendariz* to be materially indistinguishable from that of Circuit City. They are both one-sided, favoring the employer. The agreement limits damages and it imposes a strict one-year statute of limitations.

Circuit City's agreement fails to meet two minimum requirements: it fails to provide for all types of relief that would otherwise be available in court, or to ensure that employees do not have to pay unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum. For all the reasons stated above, the 9th Circuit ruled that the arbitration agreement as a whole was unconscionable and unenforceable, therefore reversing the district court's order compelling arbitration. *Tara Scavo*

### Georgia Supreme Court Rules in Estate Dispute Between Surviving Partner and Relatives of Deceased

In a brief, unanimous decision affirming a ruling by the Fulton County Probate Court, the Georgia Supreme Court rejected the contention of surviving relatives of a gay man that his surviving partner should not be the sole heir to all of the personal property in the estate. *Delbello v. Bilyeu*, 2002 WL 200674 (Feb. 11).

Robert Delbello had attorney Randie Siegel draft his will. Under the will, his real estate was to be sold off and the proceeds divided evenly between his mother, brother, and partner Dexter Varnum, and Varnum was to inherit all his personal property. After Delbello died, his executor advised the parties that he was uncertain about how to proceed regarding two items in the will, and Varnum filed suit in the probate court seeking an interpretation of the will on these questions. The first question was whether the costs associated with selling the real property (including paying off an outstanding mortgage) should be assessed against the revenue from the sale or charged to the entire estate, and the second was whether various brokerage and bank accounts were included within the "personal property" that was bequeathed to Varnum.

Fulton County Probate Judge Floyd E. Probst concluded that the mortgage and other expenses connected with the sale should be treated the same way as all other debts and charged against the estate in general, relying primarily on the lack of any specific provision in the will directing that the bequest of the property should bear all the costs of sale and outstanding indebtedness, and noting that the will provided that all lawful debts of the testator should be paid out of the estate.

As to the second question, the Probate Court relied on the testimony of attorney Siegel that Delbello had told her that the only part of the estate he wanted divided was the real property and that all other assets should go to Varnum.

Thus, it was clearly the testator's intent that the intangibles (brokerage accounts and bank accounts) be included within the bequest of all personal property.

Delbello's relatives appealed the ruling on this second question. After the appeal was filed, Varnum passed away and his executor was substituted as appellee. Writing for the state supreme court, Justice Thompson rejected the argument that the probate court's decision lacked evidentiary support. Applying the "clearly erroneous" test for overturning factual findings, Thompson stated: "Because the scrivener of the will testified as to the testator's intentions regarding the meaning of the term 'personal property,' there was evidence presented to support the findings by the probate court, notwithstanding contrary testimony from appellant Delbello. Accordingly, we will not disturb the court's ruling."

The court also rejected various technical objections raised by the family, including their objection that it had been premature to bring the declaratory judgment action because the executor had not yet taken any action to distribute the estate assets. Here, the executor's expression of uncertainty about how to proceed was sufficient to trigger the requisites for a declaratory judgment, since the heirs were entitled to a judicial construction "when the question is subject to doubt and [there are] plausible contrary contentions of the parties at interest."

Too bad Varnum didn't live to receive his bequest. It is interesting that one could read the decision and never even realize that the case involved a gay couple, as neither the parties nor the court made any mention of that aspect of the case, merely referring to Varnum as Delbello's "domestic partner" and leaving it to the reader to reach her own conclusions based on the first names of individuals. (Indeed, this discussion of the case is presuming that Robert and Dexter were a gay couple based solely on their genders and the court's use of the term "domestic partner." A.S.L.

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### Mass. Appeals Court Upholds Conviction of Aggressive Gay Cruiser

In *Commonwealth v. Harris*, 2002 WL 130915 (Mass.App.Ct., Feb. 1) (not officially published), the Massachusetts Court of Appeals affirmed a conviction of assault and battery, and of indecent exposure as a lesser included offense of open and gross lewdness, over claims that the trial court had improperly admitted evidence of prior bad acts of a similar nature, and had improperly admitted photos of the defendant which may have suggested to the jury that the police had these photos because the defendant had been arrested in the past (in particular, that the defendant was a sex offender).

Donald Harris was arrested after picking up a hitchhiker who later claimed that Harris had

driven him down a dirt road, touched the hitchhiker on the chest, and exposed himself. The hitchhiker rebuffed the advance and left the car. The hitchhiker later identified Harris, his car and his license plate. Harris denied picking up the hitchhiker, but admitted to police that he had picked up other hitchhikers in the area and had "consensual homosexual encounters" with others in that area under similar circumstances two weeks before and five hours after the incident alleged.

Harris did not testify at trial. Harris had objected to admission of his statements to the police as impermissible evidence of prior bad acts and propensity to commit the crimes charged. He asserted on appeal that the admission of these statements was particularly damaging because of the possible prejudice against homosexuals on the part of the jury. The court of appeals rejected this argument because Harris had denied that he had done the deeds complained of, but conceded that he had a car, was in the area on the specified night, and had undertaken similar conduct at about the same time. In a per curiam opinion, the court reasoned that this would permissibly allow a jury to conclude that there was a plan or pattern of conduct by the same person, contrary to his denial.

Any undue prejudice was found to be cured by limiting instructions to the jury. Harris also claimed that introduction of a "mug shot" from which the hitchhiker identified him when presented as part of a photo array was error, because accompanying testimony revealed that Harris had interacted with the police in the past. The court of appeals rejected this argument because of limiting instructions by the judge that the jury should draw no adverse inferences from the police's possession of Harris's photo, because the police could have had it for any of a variety of reasons, from homicide to traffic violation. Harris's concern that the possession of the photo by the police would lead to an inference that he was a sex offender was unfounded. *Steve Kolodny*

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### Tennessee Appeals Court Says School Board Must Bargain About Discrimination Provision

The Court of Appeals of Tennessee ruled on Jan. 30 that a school board must negotiate in good faith over a demand by a teachers union for a sexual orientation non-discrimination provision in its collective bargaining agreement. *Blount County Education Association v. Blount County Board of Education*, 2002 WL 122914 (Tenn. Ct. App.). The decision reversed a decision by the Blount County Circuit Court, which had ruled that the subject was merely "permissive" and the board had no obligation to bargain about it.

Under the National Labor Relations Act, which governs most private sector collective

bargaining, there is a broad definition of mandatory bargaining subjects, which are those subjects as to which a good faith bargaining duty applies. By contrast, under state statutes governing public employee negotiations, the subjects of bargaining may be rather limited, due to the state's concern not to subject its policy-making prerogatives to collective bargaining. Such is the case in Tennessee, where the public sector labor relations statute contains a specific list of topics as to which there is a bargaining duty. The list does not include discrimination policies, but it does include "working conditions." Circuit Judge W. Dale Young consulted a dictionary to determine the meaning of this term, which is not defined in the statute, and concluded that it referred to the physical workplace.

The Court of Appeals, in an opinion by Judge D. Michael Swiney, agreed with the circuit court that Tennessee's definition of "working conditions" is narrower than that prescribed by the National Labor Relations Act, but found that a non-discrimination provision fits within the definition. While agreeing with the circuit court that "working conditions" can be defined as being "descriptive of a proper condition for work or a state of being fit for work," Swiney concluded that "a non-discrimination clause does involve a proper condition for work or state of being fit for work and is properly classified as a 'working condition.' Under several federal laws as well as the Tennessee Human Rights Act, various forms of discrimination are prohibited, e.g., discrimination on the basis of age, sex, race, national origin, etc. There are, however, other categories of discrimination which are not prohibited by these laws and which could result in an employee being deemed not 'fit for work' based on membership in a particular category. Examples would include residency requirements, marital status and sexual orientation, just to name a few. Accordingly, we hold that non-discrimination is a 'working condition' and thus a mandatory subject of bargaining. The parties are required to negotiate in good faith on this topic..." A.S.L.

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### Gay Plaintiff Loses Title VII Sexual Harassment Case

Merely alleging that a man's boss called him "faggot" shortly before firing him is not sufficient evidence for a trial court to find same-sex sexual harassment under federal law. Reporting the incident to a civil rights commission and calling it "sexual harassment" does not necessarily make it a credible case of retaliatory firing. *Ianetta v. Putnam Investments, Inc.*, 2002 WL 226752 (D. Mass. Jan. 29, 2002). Summary judgment was granted to the employer, which claimed germane, work-related reasons for the termination. An earlier ruling by the same judge, U.S. District Judge Joseph L.

Tauro, had held that Lawrence Ianetta's claims, if proven, were actionable under Title VII of the Civil Rights Act of 1964, allowing Ianetta into federal court. 142 F. Supp. 2d 131 (D. Mass. 2001). But the new Jan. 29 decision removes the case from federal court. Lawrence Ianetta was an employee at Putnam Investments in Boston with a poor work record as evidenced by supervisors' observations and performance reviews. On Feb. 17, 1999, Ianetta's boss, Gary Sullivan, and Sullivan's boss, Stephen Marx, contacted the human resources department and prepared to give Ianetta a "final written warning," to be delivered to Ianetta on Feb. 19. Before Ianetta received that warning, on the morning of Feb. 19, Sullivan called Ianetta a "fucking faggot" while Marx looked on smirkingly, according to Ianetta. (He also alleges having been called "faggot" one other time.) Ianetta promptly e-mailed the head of the employee relations department, Edward Whalen, to arrange a meeting concerning Putnam's policy on sexual orientation discrimination. In a few days, Whalen met with Ianetta. He then investigated the charges, and found them without merit. But before meeting with Whalen, Ianetta filed a complaint with the Massachusetts Commission Against Discrimination (MCAD), alleging discrimination based on sex stereotyping and sexual orientation. Ianetta was terminated on March 23, 1999, after he made a major error in recording transactions that might have cost Putnam customers \$5,000,000 if it had not been discovered. The judge had allowed the case into federal court as one alleging as the reason for Ianetta's firing: (1) sexual harassment for failure to conform to a male gender stereotype, and (2) retaliation for filing a complaint with the MCAD. Courts in the 1st Circuit have allowed sex stereotyping cases to proceed under Title VII. On the same day that Judge Tauro handed down this decision, another judge in the Massachusetts district, Nancy Gertner, ruled that if an employee can credibly allege that he was being harassed for failure to conform to gender stereotypes, the harassment can be characterized as sex discrimination. *Centola v. Potter*, 2002 WL 122296 (D. Mass. 2002) [reported at 2002 Lesbian/Gay Law Notes 23 (Feb.)]. Centola's complaint against the U.S. Postal Service alleged a sustained, humiliating series of incidents intended to demean him as an effeminate man, which eventually led to his firing. Judge Tauro noted that sexual orientation discrimination is not prohibited by Title VII, but that the 1st Circuit has held that "a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity." *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999). (The 2nd, 3rd and 7th circuits have also acknowledged that gender stereotyping is an actionable claim, allowing plaintiffs into court

who ultimately failed to persuade the trier of fact that a job action had been based on gender stereotyping.) In this case, Tauro concluded that, at most, Ianetta may have been harassed for his sexual orientation, and he may have suffered discrimination because of it. But he "has not produced the necessary evidentiary base . . . to find he was harassed because of his sex." Therefore, there was no actionable Title VII claim, and Putnam won summary judgment on the issue. The judge had also allowed Ianetta to pursue a claim that he was dismissed in retaliation for complaining to the MCAD. Ianetta asserted that the fact that he was fired so soon after filing charges shows that "poor performance" was only a pretext. Judge Tauro replied that "temporal proximity may give rise to a 'suggestion of retaliation,' [but] that 'suggestion' is not necessarily conclusive." No rational factfinder, concluded Judge Tauro, could possibly believe that Ianetta's firing was based on retaliation. Summary judgment for Putnam, therefore, is appropriate. *Alan J. Jacobs*

#### **NAMBLA Member Loses Constitutional Challenge to Dismissal from Bronx Science**

U.S. District Judge Frederic Block issued a ruling on Feb. 26 rejecting Peter Melzer's argument that the Board of Education violated his First Amendment rights when it discharged him from the faculty of Bronx High School of Science because of his NAMBLA membership and activities. *Melzer v. Board of Education*, 2002 WL 264619 (E.D.N.Y.).

Melzer began teaching in the New York City public schools in 1963, shortly after graduating from City College, and joined the faculty at Bronx Science in 1968. He earned tenure at Bronx Science as a physics teacher. According to Judge Block's opinion, he "received numerous teaching commendations and all of his evaluations have been satisfactory." There is no evidence that he ever initiated sexual activity with any of his students or any other underage people, or violated any policies of the Board of Education in the course of his employment.

Melzer became a member of NAMBLA (North American Man/Boy Love Association) shortly after its founding, and has been actively involved as a member on and off since the late 1970s. Unlike many other members of NAMBLA, which advocates the repeal of age of consent laws and takes the position that sex between men and boys is not necessarily abusive and can be healthy for the participants, Melzer did not use a pseudonym, but rather joined openly and participated from time to time in editing and writing for NAMBLA's publications.

During the 1984-85 school year, the principal of Bronx Science received an anonymous letter accusing Melzer of being a pedophile member of NAMBLA, but Melzer "declined to confirm whether he was a member" when the

Board of Education's Office of the Inspector General called him in for an interview, and no action was taken until May, 1992, when a new investigative office set up by Mayor Dinkins reopened unresolved cases. While this investigation was going on (and while Melzer was on a paid sabbatical leave during the 1992-93 school year), an investigative reporter for Channel 4 news broadcast a report that identified Melzer as an active member of NAMBLA who was a physics teacher at Bronx Science. This broadcast caused a sensation at the school, among the parents of Bronx Science students, and at the Board of Education.

After further investigation, Melzer was suspended and then terminated, an action that was upheld throughout the internal appeals process within the Board of Education. The process ended in a lengthy report issued by a hearing officer on April 22, 2000, after an extensive hearing with numerous witnesses, in which the hearing officer concluded that Melzer's activities had created "the reasonable appearance that he has approved material that endorses and possibly promotes actual sexual activity between men and boys in violation of the New York State Penal Law." The hearing officer found that the Board "has shown the existence of legitimate interests harmed by the above characterization of Melzer's off-duty conduct."

The hearing officer concluded that Melzer's continued association with NAMBLA "will predictably cause significant disruption to the Board's ability to deliver a valid educational experience to the students at BHSS." This finding was based on testimony that parents of Bronx Science students were threatening to withdraw their children from the school if Melzer was allowed to return to the classroom, and that most of the students surveyed expressed opposition to Melzer's return. One parent group had threatened a boycott and picketing of the school. An expert witness for the School Board, a child psychologist, testified that Melzer's presence would distract students from their educational mission and cause anxiety for many.

The hearing officer further noted that teachers have an obligation to report incidents concerning unprofessional conduct by other teachers, including sex with students, and that this would be difficult for Melzer to do in line with his views. Melzer's response to questions about this during the investigation showed ambivalence on his part, although he made clear that he did not advocate sex between students and teachers and thought that teachers should not engage in such activity. He also asserted that in a conflict between his professional obligations and his NAMBLA loyalties, his profession would come first.

Melzer filed his First Amendment claim in federal court in Brooklyn, asserting that the First Amendment protects his right to associate

with NAMBLA and publish his views about man/boy sex in the NAMBLA newsletter. In effect, Melzer argued that his NAMBLA activities were off-duty conduct that involves political advocacy, a core protected First Amendment activity, and that his teaching record was unblemished. In cases where public employees have been fired for engaging in activity that qualifies for First Amendment protection, the Supreme Court and the lower federal courts have come up with a complex analytical process for determining how strong the First Amendment interest is and whether the government's interests outweigh the employee's First Amendment interest.

In his lengthy opinion, Judge Block wrestled with unsettled issues about which analytical tests to apply to this case, which was in many ways unlike any previous case that has been decided about the discharge of a public employee for engaging in expressive or political activity. Although it seems clear from the outset of the opinion where Block is heading, to uphold the termination, he does some agonizing to get there.

"It is doubtful whether any degree of disruption to the internal affairs of the school could justify Melzer's firing if he simply were a passive member of an expressive association espousing unpopular, indeed repulsive, notions of age-related parameters of homosexual relationships. To hold otherwise would be to eviscerate the time-honored notion, even if such organization be deemed unlawful, that 'those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees,'" wrote Block, quoting language from a 1966 Supreme Court opinion. "It is equally uncertain whether Melzer could be fired simply for external disruptions occasioned by the community's reactions since 'the reaction of a community cannot always dictate constitutional protections to employees. However, the Court need not grapple with these issues since it has found that Melzer was discharged solely because of the likely disruption to the internal operations of the school as a consequence of the public exposure of the activities in which he participated during the course of his active, not passive, membership in NAMBLA... Given the limited First Amendment value that the Court ascribes to Melzer's protected activities and the nature of his public employment, Melzer's dismissal from the teaching ranks, under the facts and circumstances of this case, was warranted."

In the course of his opinion, Block also opined that social views about homosexuality have advanced to the point that if Melzer's activities were with a gay rights organization that did not advocate for sex between adults and minors, he would certainly be protected by the First Amendment from adverse action by the

school. Although he did not cite any precedent cases for this point, Block's statement may be unduly optimistic, since there is a significant body of cases upholding the discharge of public school teachers who were discovered to be gay. However, in recent years there has been a trend toward more legal protection for gay teachers, especially in states and localities that have passed laws forbidding sexual orientation discrimination. A.S.L.

### **Gay Panic Defense Fails Again; Habeas Rejected in Murder Conviction Case**

The 9th Circuit rejected a habeas corpus challenge to the conviction of a man who brutally stabbed and murdered a gay man in California, but has remanded the case to the district court for an evidentiary hearing on the issue of whether his counsel rendered constitutionally inadequate assistance during the penalty phase, which resulted in a death sentence. *Turner v. Calderon*, 2002 WL 206453 (Feb. 12, 2002). While rejecting Turner's argument that his counsel did not vigorously pursue his "gay panic" defense, the court found that there were substantial issues regarding his history of drug use and child abuse that should have been investigated and presented to the sentencing jury.

Thaddaeus Louis Turner was imprisoned from June 1982 to September 1983 after pleading guilty to possession of stolen property. Upon his release from prison, Turner returned to his mother's home in California, where he worked as a carpenter's helper and laborer. One day, while waiting for the bus, Turner met Roy Savage, who offered him a ride. During their two-mile ride together, Turner described the work he was doing and Savage offered him a job doing yard work at his house. Savage called Turner again a week later to reiterate the offer, and they agreed that Savage would pick Turner up on April 14, 1982.

When Savage arrived that morning, Turner was already high, having smoked half a marijuana cigarette laced with PCP (a "sherm"). While at Savage's house, Turner did not do much in the way of yard work, but rather toured the house, ate lunch and drank, listened to some music, accompanied Savage to the store and bought some clothes with him. At some point, Turner smoked the other half of his sherm. Turner subsequently attacked and killed Savage, stabbing him over forty times.

At his trial, Turner claimed that he had attacked Savage after Savage had sexually propositioned him. The jury rejected this explanation, however, finding instead that Turner had gone to Savage's house with the intent to rob him. One of the key pieces of state's evidence in support of the robbery-gone-sour theory was the fact that the telephone cords in Savage's house had been cut, but had no blood stains on

them, which indicated that the cutting had taken place prior to the attack.

After returning the guilty verdicts, the jury proceeded to the sentencing phase, which lasted only one day. Within one hour of retiring, the jury returned a sentence of death. The California Supreme Court affirmed the conviction and the sentence on March 20, 1995.

In April 1996, Turner filed a writ of habeas corpus in federal court, asserting 37 grounds for relief. The district court rejected all of them, and denied Turner's request that his petition be certified for appeal. Reviewing the claims, the Ninth Circuit found that thirteen of the claims did not warrant a certificate of appealability, and summarily affirmed the district court.

The panel next addressed a series of arguments made by Turner that merited some discussion, although not ultimately found to justify habeas relief. The court rejected claims that Turner's counsel had provided inadequate assistance during the guilt phase by failing to present evidence of his narcotics use or his abusive childhood and history of family problems. Likewise, the court found no merit in Turner's argument that his counsel failed to pursue vigorously his "gay panic" defense, and dismissed other accusations that his counsel's trial strategy had been insufficient. The court determined that Turner's counsel had adequately advised him of the risks associated with going to trial, and therefore found no error in his failure to convince Turner to accept a second degree murder plea offer.

The court expressed some concern about the sufficiency of the evidence to support the theory that Turner intended to rob Savage, but determined that the cutting of the telephone cords could provide a sufficient basis for a rational trier of fact to have found proof of guilt beyond a reasonable doubt. The failure of the trial court to instruct the jury on lesser included offenses was determined to be consistent with state law and satisfied the federal constitution because the jury had the option of finding the defendant guilty of first degree murder without the special circumstances (i.e., murder committed during the commission of a robbery), which would have been a noncapital offense. The panel also found that the jury instructions, which used the words "shall impose," still allowed the jury to make an individual determination in defendant's case. Despite some irregularities during the process by which the jury returned the two verdict forms to the court, the panel also rejected Turner's double jeopardy claim.

With regard to his trial counsel's performance during the penalty phase, however, the court determined that the failure to investigate and present evidence of Turner's drug abuse during the time of the crime, and the extent to which it may have affected his perceptions and may have caused him to react violently to a perceived sexual advance, fell below the floor of

constitutionally acceptable assistance. Likewise, the court found that counsel's failure to introduce evidence of the abusive treatment the defendant had suffered at the hands of his father as a child may have been crucial in the jury's decision to return a death verdict. Counsel also failed to call a number of witnesses who were allegedly available to testify to the extreme change in Turner's behavior caused by his drug use, and his positive qualities that were present when he was not high. Turner's counsel had, in fact, admitted to the court that he was not prepared to present a case in mitigation, but the sentencing had gone forward nonetheless. Based on these deficiencies, the court remanded the case to the district court for an evidentiary hearing on the issue of whether defendant's request for habeas relief from his death sentence should be granted. The court reiterated that Turner's conviction was constitutionally sound, and that only issues regarding his sentence should be revisited.

One can be comforted by the fact that neither the judge nor the jury accepted Turner's gay panic defense. In an interesting twist, however, this gay basher attempted to introduce the defense by arguing that his intoxicated state, rather than his own innate homophobia, "made him" kill. Unfortunately, this is probably not the last time that gay-bashing defendants will try to get their panic defense in through the back door. *Sharon McGowan*

### Delaware Family Court Says Lesbian Co-Parent Has Support Obligation

The Associated Press reported on Feb. 13 that Delaware Family Court Commissioner John Carrow issued an order on Feb. 5 finding that a lesbian co-parent has an obligation to contribute financially to the support of a child conceived through donor in vitro insemination by agreement four years ago between herself and her former partner. Referring to the parties by the pseudonyms of Carol and Karen Chambers, Carrow ordered the women to participate in a child support hearing to determine whether Karen's claim for \$550/month during 2000 is justified. Carol had argued that because Delaware does not legally recognize same-sex partners as having a marital relationship, the government could not order her to provide support. The brief news report about the unpublished decision does not clearly identify the legal theory upon which Carrow acted, but appears to suggest that he found Carol to be a "parent" of the child for purposes of state laws on child support obligations. A similar argument was rejected last year in *State ex rel. D.R.M. v. Wood*, 34 P3d 887 (Wash. Ct. App. 2001). A.S.L.

### Boy Scouts of America Reaffirms Anti-Gay Stance

Over recent months, several local Scouting organizations have communicated with the national organization, asking it to reconsider its policies concerning participation by gay boys and men. The response, issued early in February, was a solid reaffirmation of the existing anti-gay policy. According to a report in the *Capital Times*, Madison, Wisconsin, published Feb. 12, the national officers of the Boy Scouts of America approved a resolution stated that "an avowed homosexual cannot serve as a role model" and that every local unit of the organization must affirm that policy. Also, on the issue of participation by those who do not believe in God, the organization stated that "duty to God is not a mere ideal for those choosing to associate with the Boy Scouts of America; it is an obligation." These statements are expected to fuel a new round of agonizing by charitable benefactors of the BSA, most prominently United Way chapters, many of whom have adopted non-discrimination policies in reaction to the public discussion prompted by the Supreme Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), which held that the organization was privileged under the 1st Amendment to refuse to allow an openly-gay man who was self-described as a gay rights activist to serve as an assistant scoutmaster of a New Jersey troop. A.S.L.

### Civil Litigation Notes

*Massachusetts* — In *Pardo v. General Hospital Corporation*, 2001 WL 1772030 (Mass. Super. Ct., Nov. 6, 2001), a belated reported decision by Justice Wendie I. Gershengorn of the Massachusetts Superior Court, the court rejected an attempt by the defendants, Harvard Medical School and a group of individual named administrators and faculty, to dispose of a sexual orientation discrimination claim brought by Dr. Francisco Pardo, who also claims to have been discriminated against because he asked to have time off to care for a sick same-sex partner. While rejecting Pardo's disability discrimination claim, the court found that there were grounds to proceed with Pardo's claim that he was denied a promotion due to his sexual orientation, and the court also allowed various state law tort claims to continue.

*Florida* — *U.S. 11th Circuit* — On Feb. 14, the ACLU filed an appeal to the U.S. Court of Appeals for the 11th Circuit in the case of *Lof-ton v. Kearney*, 157 F.Supp.2d 1372 (S.D.Fla. Aug. 30, 2001), in which the trial court rejected a constitutional challenge to Florida's ban on gay people adopting children. *South Florida Sun-Sentinel*, Feb. 15.

*Delaware* — Quite belatedly, the September 28, 2001, decision by the Family Court of Delaware approving a second-parent adoption by a

gay man has shown up on Westlaw: *In the Interest of Peter & George Hart*, 2001 WL 1773607. This unofficial publication is quite useful, since Family Court decisions in Delaware are not normally published. The opinion has not yet appeared on Lexis.

*Maryland* — Eugene Delgaudio, an outraged conservative, has filed a complaint with the U.S. Department of Education's Office of Civil Rights against Montgomery County, Maryland, where the public school system has imposed a fee on groups using public school buildings. Delgaudio claims that the fee imposed on Boy Scout troops that have been meeting in the school is unlawful under the recently enacted federal education bill, which bans discrimination in access to public school buildings against the Boy Scouts of America or any other youth organization based on its membership policies regarding sexual orientation. The county responded that the fee is imposed on all groups who want to use the school, not just the Boy Scouts. Local Boy Scouts officials told the press that they have no connection with Delgaudio and did not ask him to file this complaint. *Washington Post*, Feb. 15.

*Pennsylvania* — In *Bianchi v. City of Philadelphia*, 2002 WL 23942 (E.D. Pa., Jan. 7), previously reported in the February 2002 issue of *Law Notes*, the district court dismissed a firefighter's claim of discrimination under Title VII premised on his being forced to quit his job because he was perceived by other firefighters as being gay, finding that plaintiff Robert Bianchi had not alleged that he suffered discrimination because of failure to conform to gender stereotypes. However, the court allowed his case to go to trial on claims under 42 U.S.C. sec. 1983 (violation of civil rights) and due process, as well as a Title VII retaliation claim. On Feb. 19, the jury ruled in his favor, awarding damages of \$225,000 in backpay, \$512,000 in front pay, and \$500,000 in damages for emotional distress. The city's attorney indicated they were considering a post-trial motion to set aside the verdict or an appeal. *Law.com*, Feb. 22.

The *Providence Journal* reported Feb. 20 that U.S. Senior District Judge Ronald R. Lagueux issued a decision excoriating the Providence Board of Licenses for denying liquor and entertainment licenses to a new gay strip club set to operate in an area zoned for such usages. The court ruled in a suit brought by Alan Bogossian on behalf of his company, R.I. Cranston Entertainment. Quoting from comments by board members, the court noted that the denial of Bogossian's applications was clearly motivated by the fact that he would be presenting nude male dancing, an activity that the court found to be protected as expressive conduct under the First Amendment of the U.S. Constitution's Bill of Rights. Characterizing the board's action as "extortion," Judge Lagueux wrote, "While there is no explicit right to a liquor license,

there is a right not to have a liquor license [denied] as a tool to silence First Amendment rights...The board's actions reek of a government decision-maker using its unbridled power to silence unpopular speech." In a prior case, Judge Lagueux had found unconstitutional a decision by the board to enforce a citywide moratorium on new licenses for such clubs at the request of the mayor. The City's Solicitor denied that the license denial in Bogossian's case had anything to do with the gay nature of the club, insisting that the board was concerned about an emerging trend of liquor licenses in that neighborhood leading to the creation of a Red Light district.

*California* - A state trial jury in San Mateo County rejected a claim by Teresa Curl, a lesbian San Mateo County high school teacher, that she had been subjected to harassment on the basis of sexual orientation by fellow teachers at her school. The jury vote against Curl's claim was reportedly 9-3. *Curl v. Ida & Ramirez*. *Los Angeles Times*, Feb. 23.

In *Werner v. Tiffany & Co.*, 2002 WL 246640, 2002 N.Y. Slip. Op. 01376 (N.Y. App. Div., 1st Dept., Feb. 21), the court revived a perceived sexual orientation discrimination claim by Elwood Werner, reversing the trial court's refusal to restore the case to the calendar after it had been dismissed by operation of law when plaintiff's counsel failed to meet a pre-trial deadline. The appellate division panel found that the missed date was not due to the fault of the plaintiff, who had been actively in touch with his attorney in preparing the case for trial, but was due to a mishap in the attorney's office ("law office failure") stemming from the attorney misplacing his calendar book and then failing to include the relevant date during his attempt to reconstruct his calendar.

*Tacoma, Washington* The Tacoma Human Rights commission wants to revive the issue of a municipal ban on sexual orientation discrimination. Such a ban was enacted in 1989, but immediately repealed in a voter referendum. The City Council will hold public hearings on the issue during March and vote on April 23. *News Tribune*, Feb. 27.

*Columbus, Ohio* The Columbus Community Relations Commission has ruled that the city violated its sexual orientation non-discrimination policy by failing to extend to same-sex partners of employees the same benefits received by employees' spouses. The Commission vote was 9-3. This action reopens a long-running debate over partner benefits in Columbus. In December 1998, the City Council approved a benefits plan, but then repealed it when angry residents threatened to hold a referendum. The City passed an ordinance banning sexual orientation discrimination in employment in 1994. *Columbus Dispatch*, Feb. 27. A.S.L.

## Criminal Litigation Notes

*Wisconsin* — A Jefferson County, Wisconsin, Circuit Court jury found Darrin Grosskopf guilty of first-degree intentional homicide in the stabbing death of Keith Ward on Feb. 9. The jury also ruled that this was a hate crime; that Grosskopf killed Ward because he believed Ward was gay (although the only evidence presented at trial on the issue of Ward's sexual orientation came from two women who testified they believed he was heterosexual). The two men had been partying with friends, using cocaine and marijuana and drinking beer late into the evening. Ward was later found stabbed to death in the chest with a buck knife laying near his body. The prosecutor claimed that after the stabbing, Grosskopf wandered around town visiting friends and bragging that he had killed a gay man. Grosskopf's defense was that Ward had sexually assaulted him, prompting him to stab Ward in order to get him off Grosskopf's back. Grosskopf's conviction sets him up for a life sentence; the hate crime finding would authorize an enhancement of the prison term. *Wisconsin State Journal*, Feb. 10.

*New Mexico* — The *Washington Blade* reported Feb. 15 that Shaun Murphy pled guilty to second-degree murder in Montezuma County, New Mexico, District Court on Feb. 7 in the death of Fred C. Martinez, Jr., age 16, who self-identified as gay, transgendered and two-spirited (Martinez was a Native American). Murphy reportedly bragged to friends prior to his arrest that he had "beat up a fag" but the district attorney had declined to prosecute this as a hate crime. During a preliminary hearing, Murphy had claimed self-defense. A sentencing hearing is scheduled for May 16.

*Oregon* Multnomah County Circuit Judge Ronald E. Cinniger ordered that Lon Mabon, anti-gay head of the Oregon Citizens Alliance, go to jail for contempt of court, for failure to pay a damage award arising from a lawsuit against him and the Alliance by a lesbian who was assaulted when she attempted to attend a public meeting held by the Alliance, which was formed primarily to generate anti-gay and anti-abortion ballot measures in Oregon. Cinniger also indicated that he would jail Mabon's wife as well, a co-defendant in the case, if she did not come up with the money to begin paying the judgment, which is now ten years old. *Portland Oregonian*, Feb. 21. A.S.L.

## Legislative Notes

*New York* — *Sexual Orientation Discrimination* — On Jan. 28, the New York State Assembly passed the Sexual Orientation Non-Discrimination Act by the unprecedentedly large margin of 113-27, and for the first time, a majority of the Republican members of the Assembly voted for the bill, which was extolled by

Gov. George Pataki in his annual State of the State message to the legislature. The governor, who is expected to make a strong pitch for gay votes in his campaign to win a third term later this year, has made passage of the bill part of his legislative agenda, and there were hopes that Republican Senate Majority Leader Joe Bruno will finally allow the bill to come to a vote this year. Transgender rights activists continue to protest the omission of "gender identity" from the bill, and an alternative measure sponsored by openly-gay Senator Tom Duane, incorporating protection for transgendered persons was expected to be introduced, although gay lobbying groups voiced opposition to introducing a new element into the equation that they believed could stall passage of the gay rights measure.

*Illinois Sexual Orientation Discrimination* Another governor calling for passage of a state law banning sexual orientation in his annual state-of-the-state address was Illinois Governor George Ryan, a Republican. "It's time to amend our statutes, not to allow special rights or privileges, but (to allow) equal protection to all our citizens white, black, brown, yellow, male, female, straight and gay," said Ryan, according to a Feb. 21 report in *The Pantagraph*, a daily newspaper in Bloomington where gay rights is on the agenda of the local Human Relations Commission for consideration. The Democratic-controlled House of Representatives in Illinois approved a gay rights bill last spring, but it has not moved in the Senate, where the Republican leader, James Philip, stated uncertainty whether it would receive a Senate vote this spring.

*Charleston, West Virginia* — *Hate Crimes* — On Feb. 4, the Charleston, West Virginia, City Council enacted a hate crimes ordinance that adds "disability" and "sexual orientation" to the categories already covered under a state law, which makes it a felony to commit crimes of violence motivated by the race, color, religion, ancestry, national origin, political affiliation or sex of the victim. Reflecting limitations on municipal legislative authority, the ordinance provides for an add-on misdemeanor penalty of up to 30 days in jail and a \$500 fine if the victim is assaulted because of any of the categories covered by state law or the two additional categories added by the city ordinance. The vote in favor of the bill, sponsored by Councilmembers Charlie Loeb and Tom Lane, was 32-3. *Charleston Gazette*, Feb. 5. ••• But on Feb. 26 the West Virginia House Judiciary Committee postponed indefinitely (effectively killing for this session) consideration of a bill to add disability and sexual orientation to the state's Civil Rights Law, having previously rejected an attempt to add these categories to the Hate Crimes Law. The decision to kill the bill was attributed in a news report to disapproval of the measure expressed by the American Legion

and the Veterans of Foreign Wars. *Charleston Gazette*, Feb. 26 & 27.

*Virginia — Education Restrictions* — Those warm and fuzzy state legislators from Virginia are at it again: on Feb. 4, the state House passed H.B. 88, which requires Virginia school boards to “develop policies prohibiting presentations, classroom discussions, school-sponsored assemblies and student meetings” that deal with sodomy and “crimes against nature.” According to press reports, this would require close monitoring of any student gay-straight alliances to make sure there is no discussion of sex during their meetings. Said a legislative aid to the chief sponsor of the bill, responding to criticisms that the law would gut AIDS prevention programs in the schools, “may be contracted through the exchange of bodily fluids. Enough said. Do you need to see a nasty picture of the act?” A spokesperson for the Gay, Lesbian and Straight Education Network expressed concern that the bill would curtail AIDS prevention efforts, and added, “We think it’s a coded way to prevent gay-straight alliances to form in our public schools.” *Richmond Times-Dispatch*, Feb. 9.

*New York — Miscellaneous Gay-Related Assembly Bills* — On Feb. 5, the New York State Assembly approved five bills of relevance to the lesbian and gay community: A. 2634, the Dignity for All Students Act, would protect students from harassment and discrimination in public schools on the basis of sexual orientation, gender identity and expression; A. 8919, the Campus Bias Bill, requires all institutions of higher education in the state to develop policies to deal with bias incidents and communicate those policies to incoming students; A. 1720 allows victims of bias violence to bring their own damage actions against the perpetrators; A. 2678 prohibits discrimination on the basis of sexual orientation in issuing insurance policies and disallows questions about sexual orientation in the underwriting process; and A. 1720, amendments to the Family Court Act, would open up family courts to domestic partners. *Washington Blade*, Feb. 15.

*Portland, Oregon — Domestic Partners* — The City Council of Portland, Oregon, voted unanimously to amend the city charter in order to make pension benefits available to same-sex domestic partners of city police and firefighters. To be eligible, the partners must register with the city as “dependent domestic partners.” *Portland Oregonian*, Feb. 14.

*Minnesota — Domestic Partners* — On Feb. 1, the Minnesota House Rules Committee rejected a proposal to extend health, dental and life insurance benefits eligibility to same-sex partners of House members and staff, even though the Senate Rules Committee had previously voted in favor of such a proposal. *Star-Tribune*, Feb. 5. The administration of Minnesota Governor Jesse Ventura and the House leg-

islature are at loggerheads over domestic partnership insurance benefits for same-sex partners of state workers. As part of collective bargaining agreements reached after a brief strike last year, the administration agreed to include such benefits in five of the six contracts that were being negotiated. But on Feb. 13, the House voted 75 - 54 to approve a non-binding resolution objecting to the benefits, and legislators threatened to exercise their veto over the agreements if the administration does not renegotiate the labor contracts to exclude these benefits. The governor has so far indicated no intention to back down on this. The collective agreements cannot go into effect without legislative ratification under state laws governing public sector labor relations. *Star Tribune*, Minneapolis-St. Paul, Feb. 14. On Feb. 19, the Senate State and Local Government Operations Committee voted 7-5 to ratify the labor agreements, despite the previous House resolution. A real battle royale is shaping up. *Star-Tribune*, Feb. 20.

*Dallas, Texas* After being sworn in as the mayor of Dallas on Feb. 20, Laura Miller announced nine goals for her administration. Among them was a pledge to pass an ordinance banning sexual orientation discrimination. *Dallas Morning News*, Feb. 21. A.S.L.

#### Law & Society Notes

A battle of the experts is shaping up over adoption of children by gay people (including co-parent adoptions). As we reported in February, the American Academy of Pediatrics published a report urging that such adoptions be allowed under state laws. In England, the Blair Government was reported to be moving toward the same direction, although impending change in Britain brought forth a book from a conservative think-tank, called the Institute for the Study of Civil Society, challenging the view that children are not harmed by being raised in gay households. *Children as Trophies*, by Patricia Morgan, is a compendium of all the crack-pot studies purporting to find severe identity problems for children raised by gay people, and argues that gays have questionable motives in seeking to adopt children. *Mail on Sunday*, Feb. 3. Across the U.S., major newspapers treated the story of the AAP report as headline news, but the *South Florida Sun-Sentinel* (Feb. 5) reported that it was unlikely that this would lead the Florida legislature to repeal the state’s overtly discriminatory ban on adoptions by gay people, pointing out that it is a legislative election year and this is the kind of hot button issue that legislators would shy away from addressing.

Four days after being arrested in a police raid on an X-rated video store in Johnston, Connecticut, 55-year-old Stuart E. Denton, chair of the Plainfield Planning and Zoning Commis-

sion, hanged himself in a shed in his backyard. The suicide led to protests by gay rights supporters, who picketed the Johnston Town Hall with signs reading “Capital Punishment for a Misdemeanor.” But local officials were unrepentant. The *Hartford Courant* (Feb. 1) quoted Johnston Mayor William R. Macera as rejecting demands for an official apology for the police action. Macera said that those arrested “should apologize to the residents of Johnston for engaging in that alleged behavior.” Undercover police had observed the arrestees engaged in masturbation activities, both solo and group, while watching a sex video in the Amazing Express video store, which has a 42-seat theater. Police claimed that the raid was undertaken in response to citizen complaints. It sound like something out of the 1950s...

A recurring drama in New York City each March surrounds the St. Patrick’s Day Parade and the continuing efforts of the Irish Lesbian and Gay Organization (ILGO) either to be included in the parade or to conduct their own parade on 5th Avenue on the same day as the “official” parade, whose organizers have persisted in excluding ILGO. Another part of the drama is whether the mayor of the City of New York marches in the parade. Mayor Giuliani always marched; Mayor Dinkins had stopped marching as a result of the ILGO exclusion. The newest mayor, Michael Bloomberg, has announced that he will march in the parade on March 16, but also that he will march in the separate Queens St. Patrick’s Day Parade, scheduled this year to take place on March 3. The Queens parade, which is gay-inclusive, will pay tribute this year to Rev. Mychal Judge, the Fire Department chaplain, a Catholic priest, who died in the World Trade Center attacks and who has been reported to have been gay. *New York Daily News*, Feb. 6.

The National Education Association (NEA), the largest professional association of public school teachers in the U.S., has called on school districts to adopt policies protecting lesbian, gay, bisexual and transgendered students from harassment and to develop factual materials for classroom discussions on sexuality. The NEA will also encourage its members and students to speak up when they see or experience discrimination based on sexual orientation at school. These new policies were embodied in a resolution approved by the NEA’s board of directors on Feb. 8. The NEA represents 2.6 million teachers and other school employees. *Associated Press*, Feb. 9.

Overruling a vote last summer by its annual convention to allow ordination of gay and lesbian ministers, a majority of the 173 regional bodies of the Presbyterian Church (USA) voted against such ordinations. The nationwide voting was needed because the convention measure constituted an amendment to the church’s constitution, which must be ratified by the re-

gional bodies. By the third week in February, 88 of the regional bodies had voted to maintain the existing "fidelity/chastity" rules governing ordination, which effectively rule out ordination of openly lesbian or gay candidates. Some of those who support the existing rules point out that they apply to all aspirants, not just gays. *San Francisco Chronicle*, Feb. 21.

Yet another embattled transsexual, this time a widower, has emerged in national news stories. Sean Brookings, a female-to-male transsexual who married the late Dimple L. McKinney in Canton, Ohio, in 1994, was arrested on February 6 on charges brought by Stark County, Ohio, Probate Judge R.R. Denny Clunk, alleging that Brookings lied about his gender on the marriage license application. (Clunk takes the position that regardless of his sex reassignment surgery, Brookings is legally female and thus was not qualified for a license to marry a woman.) Over in Summit County, Brookings is embroiled in a dispute with McKinney's children from a prior marriage over possession of the trailer in which Brookings and McKinney lived together. The children claim that Brookings hoodwinked McKinney into marrying him by concealing his transgender past and also several past marriages. It is unclear whether Brookings was formally divorced from all past spouses when he married McKinney. McKinney died leaving a will that designated Brookings, "her loving husband," as sole beneficiary, a move not calculated to endear Brookings to his (adult) step-children. On February 5, Summit County Probate Judge Bill Spicer invalidated the marriage to McKinney, finding that Brookings had falsified the application form because he was still married to his previous wife; in the course of that opinion, Spicer indeed found that Brookings had been legally married to his prior wife, thus conflicting with Judge Clunk in the neighboring county. *Akron Beacon Journal*, Feb. 6 & 7; *Gay People's Chronicle* (Cleveland), Feb. 22.

Just days after they filed a lawsuit alleging that the Montana University system unlawfully discriminated by failing to afford employee benefits to domestic partners, Carla Grayson and Adrienne Neff suffered a suspicious fire at their house, having received death threats in the mail. Grayson teaches at the University of Montana in Missoula. Lambda Legal Defense Fund represents the women in the lawsuit. *Chicago Tribune*, Feb. 9. According to the *Denver Post* of Feb. 25, tensions have escalated since the fire, as one radio station has removed a right-wing religious broadcaster from the air for anti-gay remarks, and there have been two message-oriented vandalism incidents - a fundamentalist church was defaced with spray painting of pink triangles and obscenities, and a Christian billboard was covered over and spray-painted with the slogan "What you do in the name of your God scares me. Stop burning

houses." Several hundred people rallied in support of Grayson and Neff, as right-wingers circulated stories that they had set the fire themselves to gain attention for their lawsuit.

The *Washington Times* reported on Feb. 11 that the United States Students Association, described as a "Washington, D.C.-based national confederacy of hundreds of college-level student bodies," has called for colleges and universities to construct single-stall, "gender neutral" restrooms to help prevent harassment and physical attacks against transsexuals. A spokesperson for the organization, Kristy Ringor, told the *Times*, "We're the nation's oldest student association, and we believe access to education should be open to all, regardless of gender, ethnicity, or sexual identity." The same article reported that a state legislator in West Virginia, Sen. Mike Ross, has introduced a bill to put unisex restrooms at rest stops along the state's highways, but his motivation has nothing to do with transsexuals. Rather, it was inspired by a situation that developed when an elderly couple stopped at a rest-stop last summer; the wife went to the women's room, her Alzheimer-afflicted husband went to the men's room, wandered off, and she still hasn't found him.

The *Albuquerque Journal* reported Feb. 12 that Daniel Sogen, 55, a foreign languages instructor at the New Mexico Academy of Sciences and Mathematics, had hanged himself in his jail cell after being arrested on charges of sending child pornography over the internet. He was arrested Feb. 7, after an undercover police officer posing as a 13-year-old boy received nude photos of adolescents and of Sogen after chatting up Sogen in a chatroom called "Little boys sex chat." He was found dead in his cell on Feb. 9.

Here's a strange twist on "don't ask, don't tell." The *Charlotte Observer* reported Feb. 11 that the Army has refused to discharge Captain David Donovan, a married man who has outed himself to his commander as a bisexual after 17 years of active duty, and asked to be discharged. Although Donovan stated he should be discharged for "homosexual activities" and is willing to pay back the military for the cost of his training, his four requests to be discharged have all been denied, even when one was backed up by his commanding officers, who has apparently tired of the whole issue and doesn't want to go through further investigations. The military board that reviews such requests has told Donovan's attorney that they are looking out to prevent soldiers from avoiding their enlistment obligations by faking their sexual status, but that seems unlikely in Donovan's case, since he would be forfeiting substantial benefits, including a life pension that he could earn by staying in the service for three more years.

Republican Governor Bob Taft of Ohio set off consternation among state conservatives by in-

dicating his choice for running mate in his reelection campaign, Columbus City Councilmember Jennette Bradley, an African-American woman who is a strong supporter for domestic partnership benefits for unmarried partners of city employees. Said a spokesperson for the "Pro-Family Network," "Bob Taft has betrayed the families of Ohio. She's anti-family and anti-child. She's a racist and bigot. He wants to capitulate to everyone. He stands for nothing." Interestingly, the governor's likely opponent in the fall elections has also selected an African-American woman who sits on the Columbus City Council as his running mate. *Akron Beacon Journal*, Feb. 14.

Out to celebrate Valentine's Day in style, Kathy Gilbert-O'Neil and Robin Gilbert-O'Neil, who had their same-sex commitment ceremony last June and changed their names to signify their commitment, dressed up in wedding gowns and went to the Fremont, California, Hall of Justice on Feb. 14 seeking a marriage license. Not surprisingly, they were turned down, but after all, they were just trying to make a point, together with several supporters who rallied on the steps of the building afterwards. *San Jose Mercury News*, Feb. 15.

The *Wisconsin State Journal* (Feb. 27) reports that the Four Lakes Council of the Boy Scouts of America decided to end ongoing tensions with the local United Way by withdrawing its application for general United Way funds. The tension arose over the national Scout's anti-gay membership policies, which conflict with the non-discrimination policy adopted by the United Way. The Scouts will still be eligible to receive donations directed by the donors through the United Way. A.S.L.

#### International Notes

*European Court of Human Rights* At the end of February, a 7-member chamber of the European Court of Human Rights rejected the contention that the refusal of French officials to certify a gay man as a potential adoptive parent violates the European Convention on Human Rights. We will have full details about this decision next month in a report from our European correspondent, Robert Wintemute of King's College, London.

*India* — The Delhi High Court, in New Delhi, India, has scheduled arguments to be held on April 23 on petitions challenging the constitutionality of an Indian statute that criminalizes gay sex. According to a February 10 report in the *Times of India*, the case pending before the court actually combined several cases in which petitions have been filed. The petitioners argue: "Private, consensual adult sexual relation falls within the intimate associations protected from State intrusions under Article 21 (of the Constitution), the exercise of which lies at the core of individual autonomy

and are key to the development of one's personality. There exists no compelling State interest to justify the curtailment of such an important element in the fundamental right to life and liberty." The court has asked the government to respond to the constitutional argument. The challenged statute, Section 377 of the Indian Penal Code, provides: "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment which may extend to 10 years." The news report did not indicate how courts decide which of the specified penalties to apply. The most recent petition filed to challenge the statute originated from the NAZ Foundation, a gay rights organization.

*United Kingdom* — Some confusing newspaper reports out of the U.K. indicate that a change in policy may be in the offing for members of Parliament and other civil servants who wish to qualify their unmarried same or opposite sex partners for pension benefits. The reports were unclear about whether the policy change has been approved or is yet to be voted upon, but in either event indicated that the change would take place next fall, and that due to objections by the Treasury Department, the pensions would be funded entirely through worker contributions without drawing on public funds. *Evening Standard - London*, Feb. 5; *Daily Mail*, Feb. 5.

*Canada* — The *National Post* in Canada reported Feb. 6 that potential jurors in a same-sex sexual assault case pending in the Nova Scotia Superior Court in Halifax had been questioned about their attitudes towards homosexuality in order to determine whether they could fairly decide the case. Several whose comments intimated discomfort with the issue were excused from service. ••• A Canadian judge ruled on Jan. 31 that police officers had violated the Canadian Charter of Rights and Freedoms by sending male undercover officers to raid a lesbian bathhouse event. Justice Peter Hryn stated, "I find their personal rights to privacy were violated," and threw out all charges against Jill Hornick and Rachel Aitcheson, who had secured the liquor licenses to hold the event. "The male police officers knew the patrons were in various states of undress and in a highly sexualized environment," wrote Hryn, who asserted that if it was necessary for the police to check stage a liquor event inspection, they should have sent female officers, and who compared the circumstances to a "strip search." The court found that the women attending the event had a reasonable expectation of privacy, and that some women police officials had already collected most of the evidence of liquor violations before five male officers entered the building to make arrests. All the evidence was dismissed, as having been collected in violation of charter rights. *Toronto Star*, Feb. 1.

According to the *National Post* (Feb. 22), Quebec Justice Minister Paul Begin has recommended that same-sex couples be given full rights as parents in the child adoption process. Begin was speaking on the last day of parliamentary hearings on a bill to establish same-sex civil unions in Quebec. Begin's department had originally proposed a draft bill that did not include adoption rights, but he indicated that he had been impressed by testimony and other input from the gay community, and plans to introduce a new version of the bill when the province's parliament reconvenes in mid-March.

*Sweden* — On Jan. 31, a Swedish court ruled that a man who had donated sperm to a lesbian couple is the legal father of the resulting children and thus obligated to make child support payments. Anna Bjurling, the biological mother of the three children conceived with Igor Lehnberg's sperm, sought support payments when she broke up with her same-sex partner. Lehnberg had signed a statement that he was the biological father of the children, he said, so that they would know their genetic origin, and had not intended to assume parental responsibilities, but the court found that he was legally bound by the document. *Orlando Sentinel*, Feb. 1. ••• The Swedish government has announced that it will introduce legislation giving same-sex couples the right to adopt children. *Orlando Sentinel*, Feb. 6.

*New Zealand* The *London Evening Standard* reported on Feb. 22 that included in the official welcoming party for Queen Elizabeth and Prince Philip, traveling in the Pacific on a Commonwealth Tour to mark the 50th Anniversary of Elizabeth II's coronation, was the Member of Parliament for Wairarapa, Georgina Beyer, described as the "world's first transsexual MP." "I thought the Queen looked remarkably well and it was really a privilege to meet her and greet her to New Zealand," Ms. Beyer told a Reuters correspondent. There was no comment from the Queen on this historic meeting.

*World Bank* — The Board of Directors of the World Bank, an international institution in which 182 countries participate as members, voted Feb. 7 to extend domestic partner benefits to both same and opposite sex unmarried partners of the Bank's employees. This replaces a limited program of benefits to same-sex partners only. The benefits will include insurance coverage, mobility/expatriate benefits, survivor benefits, home-leave benefits, and re-assignment and pre-assignment benefits on change of duty station. To be eligible, employees will have to file affidavits registering their domestic partner with the Bank. *Washington Blade*, Feb. 15.

*Israel* — The newspaper *Ha'aretz* reported Feb. 24 that the national Income Tax Authority has asked the attorney general to adopt an interpretation of the inheritance law that would allow tax-free transfer of property rights be-

tween same-sex partners. Income Tax Commissioner Tali Yaron-Eldar, in a speech before a Businesswomen's Forum in Tel Aviv on Feb. 22, pointed out that unmarried opposite-sex couples (common law spouses) now enjoy this privilege, and there was no good reason not to extend it to same-sex partners on the same basis. (Due to restrictions on marriage imposed by the orthodox rabbinate in Israel, there is a significant population of unmarried couples who have gradually been accorded recognition and a wide variety of civil law rights over the years, which provides a body of ready precedent and helps to explain the surprising rapidity with which same-sex partners have been gaining legal recognition and rights in the Israeli courts.) A.S.L.

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### Professional Notes

*Massachusetts Lawyers Weekly's* Dec. 31 issue named Mark D. Mason, a former board member of the Massachusetts Lesbian and Gay Bar Association, as one of its ten "lawyers of the year." Mason was recognized for representing a male member of the Massachusetts Air National Guard whose sexual harassment claim stemming from a hazing incident has had a continuing impact on the operation of that organization, according to a report in the January issue of the *MLGBA Legal Briefs* newsletter.

We sadly note the death on Feb. 14 of the Honorable Jerold A. Krieger, age 58, an openly-gay attorney who was appointed to the municipal court bench in Los Angeles in 1983 and elected to the Superior Court in 1988. Krieger had been a leader within the judiciary as a member of the California Judiciary's Access and Fairness Commission, and was also a co-founder of Los Angeles Lawyers for Human Rights, among the first lesbian & gay bar associations, and of Beth Chayim Chadashim, the world's first lesbian and gay synagogue. He was a graduate of UCLA Law School. *Los Angeles Times*, Feb. 17; Feb. 20.

The Boston College Law School alumni magazine for Fall 2001 made special note of the National Lesbian and Gay Law Association's award of its 2001 Allies for Justice Award to B.C. Law Professor James Rodgers while interim dean of the law school during the struggles over the Solomon Amendment in recent years. Rodgers had formed a task force at the law school to deal with the issue, and supported the students who were working for repeal of the Amendment.

Lambda Legal Defense Fund has added five new board members, including two from Dallas in anticipation of the opening of Lambda's Dallas office later this year. The new board members are Chuck Loring of Indianapolis, Susan Ketcham of San Francisco, Anthony Timiraos of Stamford, Connecticut, and from Dallas Nan Arnold and Charles MarLett. The new board

members come from a variety of occupations; MarLett is associate general counsel and corporate secretary of American Airlines. *Lambda Press Release*, Feb. 20. A.S.L.

## AIDS & RELATED LEGAL NOTES

### 8th Circuit Holds Employee Request for Accommodation Necessary to Trigger Employer Obligation Under ADA

Under the Americans with Disabilities Act (ADA), an employee must both inform the employer of her disability and affirmatively request an accommodation before the employer's obligation to engage in an interactive process to determine an appropriate accommodation is triggered, according to the U.S. Court of Appeals for the 8th Circuit in *Burke v. Iowa Methodist Medical Center*, 2002 WL 181241 (Feb. 6) (unpublished opinion).

Debra Burke was a long-time employee of the Medical Center. In 1993, as a registered nurse in the neurosurgery department, Burke was exposed to and infected with HIV while providing care to a patient. In 1996, Burke began to suffer from a major depressive disorder related to her HIV-infection and ultimately became "totally disabled" from her full-time work. From 1996 to 1998, Burke collected disability insurance and worker's compensation benefits for her disability. During that same time, she performed part time volunteer work. In 1998, the long-term disability carrier, based upon updated medical information, believed that Burke's condition had improved enough for her to go back to work. The Center offered her a low to medium duty full time job. The Center's letter indicated that Burke must respond within thirty (30) days or her employment would be terminated. Burke, responding through her attorney, indicated that she could not perform full-time work because of her disability. There was no further dialogue between the parties and Burke's employment terminated.

Burke filed suit under the ADA, claiming that the Center violated her rights by failing to participate in an interactive process to find a reasonable accommodation for her disability. The U.S. District Court for the Southern District of Iowa granted summary judgment to the Center. A three-judge panel of the 8th Circuit affirmed, finding that Burke needed to request an accommodation in her letter responding to the job offer in order to trigger the employer's duty to participate in interactive discussions to find an appropriate accommodation. *Todd V. Lamb*

### Delaware Supreme Court Orders New Trial in HIV-Transfusion Case

Finding that a trial court's "obvious hostility" to the plaintiffs' expert witness had tainted a jury trial on a blood bank's liability for supplying HIV-infected blood for a 1984 transfusion, the Delaware Supreme Court has ordered a new trial in *Price v. Blood Bank of Delaware*, 2002 WL 243283 (Feb. 14).

At trial, the main issue was whether the Blood Bank of Delaware was negligent in its screening of blood donors during 1984, before there was a screening test for HIV antibodies. The theory of the plaintiffs (the heirs of Nathaniel Price) is that by 1984 the Blood Bank's duty of care would require surrogate testing for hepatitis B antibodies and/or individualized screening of male donors in order to determine whether their sexual or drug-using practices would put them in a high risk group for HIV. Plaintiffs offered as their medical expert Dr. Theodore Koerner, a hematology professor at the University of Iowa Medical School, where he also runs the blood bank at the university hospital. Dr. Koerner had previously operated a blood bank at Tulane University Hospital. Amazingly, it appears that although the defendant filed a motion in limine seeking to limit or exclude Koerner's testimony, the trial judge allowed him to testify in front of the jury without even having been voir dired. During his testimony, he tried to establish that as Delaware was part of the Philadelphia metropolitan area, by 1984 the blood bank there should have been aware of the AIDS risks presented by gay male blood donors who went into Philadelphia to have sex. This testimony drew skeptical, aggressive questioning from the judge, some of it going to the question of Dr. Koerner's qualifications to testify about the sex habits of suburban Delaware gay men in the mid-1980s.

Ultimately, the judge struck some of Koerner's opinion testimony from the record, but allowed the jury to consider some parts of it. Plaintiff's counsel had objected to much of this out of hearing of the jury, and the plaintiffs appealed the jury's adverse verdict, arguing that the judge's intervention in questioning had exhibited bias.

Writing for the unanimous three-judge panel of the Supreme Court, Justice Walsh agreed with the plaintiffs' criticisms, finding that a full voir dire should have been conducted out of hearing of the jury prior to Dr. Koerner's testimony, and that the judge's aggressive intervention during Koerner's direct examination had crossed the permissible line. Acknowledging that under the *Daubert* interpretation of Federal Rule of Evidence 702, which is generally followed by Delaware courts under the state version of the rule, trial judges are to serve as gatekeepers regarding expert testimony, and may have to take an active role in questioning to as-

certain whether there is a valid scientific foundation for a proffered expert opinion, but the court cautioned that this must be done carefully to avoid communicating to the jury a bias for or against any particular expert's opinions. The court ordered a new trial for the Prices, without opining directly on the issue of whether Dr. Koerner's testimony was admissible.

Addressing another issue, the court found that the trial judge erred in refusing to charge the jury on negligence *per se* based on federal blood screening regulations. The Prices had argued that the failure of the blood bank to ascertain the individual health status of donors violated a federal regulation that provides that "donors shall be in good health, as indicated in part by: . . . (6) Freedom from any disease transmittable by blood transfusion, insofar as can be determined by history and examination included above." Elsewhere, the regulation provides that the examination should establish a normal temperature, blood pressure within a normal range, a specified blood hemoglobin level, freedom from acute respiratory diseases, and freedom from infectious skin disease. The Blood Bank objected to this instruction, arguing there was no evidence to show it had failed to comply with the regulation. The trial court's stated basis for refusing to charge the jury on this was that they might be confused into treating this as a strict liability case.

Justice Walsh wrote that it is "long-settled Delaware law that the violation of a statute, or regulation having the force of statute, enacted for the safety of others is negligence in law or negligence *per se*." In this case, plaintiff was entitled to the charge "if he establishes a factual basis for causation. Given the general language of the FDA protocol for screening donors, that may prove difficult, but we leave that matter to the presentation of evidence in the event of a retrial."

Finally, the court approved the trial court's rejection of the Blood Bank's argument that only those of Mr. Price's children who had actually appeared at trial or produced evidence should be allowed to recover damages for wrongful death. The court agreed that evidence at trial established the closeness of the Price family, obviating the need for each child to testify about his or her individual loss as a result of their father's death. A.S.L.

### Proof of Exposure Required Even When HIV Strain Is Undetectable

A Georgia appeals court ruled Feb. 6 that a woman who feared she was exposed to a rare, undetectable strain of HIV cannot recover for her emotional distress without proving she was actually exposed to the virus. *Mantooth v. American National Red Cross*, 2002 WL 181271 (Ga.App.).

In October of 1998, Bernice Mantooth was notified that a transfusion of blood she received in a hospital emergency room came from a donor who had lived in central Africa for more than a year. The Red Cross has a policy against accepting blood from such donors because of a rare strain of HIV found in the region which is undetectable by currently-used blood screening methods. Mantooth repeatedly tested negative for HIV antibodies, but she was nonetheless afraid that she might have contracted the undetectable strain.

Mantooth sued the Red Cross, the hospital and her treating physicians for negligent and intentional inflictions of emotional distress, but the court upheld the trial court's grant of summary judgment to the Red Cross and the hospital. Even if it were negligent for the Red Cross to have accepted the blood in contravention of its own standards, Judge Mikell held that Mantooth was still required to prove she was actually exposed to the virus. According to the court, the fact that this case possibly involved an undetectable strain of HIV did not distinguish it from Georgia precedent that found proof of actual exposure necessary. Since Mantooth could not show exposure and also never sought medical treatment for her claimed emotional distress, the court found her case inadequate.

As for the hospital, the court found that no legal theory could support Mantooth's claim that it was vicariously liable for the actions of her treating physicians who were, at the time of her transfusion, not directly employed by the hospital.

Mantooth, who last year died at age 75, suffered from numerous maladies, including congestive heart failure and lung cancer. Her estate continues the suit. *T. J. Tu*

### California Appeal Court Adopts Expansive View of HIV Testing Requirement for Criminal Defendants

A Feb. 14 ruling by the California Court of Appeal, 5th District, adopts a broad view of the situations where courts can order a criminal defendant to submit to HIV testing. *People of California v. Ojeda*, 2002 WL 241340 (not officially published).

Defendant Jose Angel Ojeda pled no contest to two counts of violating Penal Code section 266c, unlawful sexual intercourse procured by false or fraudulent representation with intent to create fear. Ojeda represented himself to be a "curandero" or folk medicine healer, and persuaded the victim, Ms. A.R., to have sex with him on two occasions in order to cure her of a "fatal illness." Kings County Superior Court Judge Lynn C. Atkinson imposed a sentence to five years in prison and an HIV test. In the appeal, Ojeda objected to certain of the aggravating factors Judge Atkinson took into account in sentencing him at the high end of the range, and

objected to the HIV test as not being authorized by statute.

California's state authorizing imposing an HIV test requirement on criminal defendants lists penal code sections for which such testing is authorized, and sec. 266c is not on the list. In its *per curiam* ruling, the appeal court notes that in *People v. Adames*, 54 Cal. App. 4th 198 (1997), the court was faced with a similar situation a defendant was convicted of sexual abuse of a child under a penal code section not listed in the HIV testing law and the court ruled that testing could be ordered if the conduct for which the defendant was convicted was "encompassed" within the listed provisions. The *Ojeda* court upheld the Judge Atkinson's ruling on this basis. Ojeda pled guilty to an indictment that stated that he "did willfully and unlawfully induce [A.R.] to engage in sexual intercourse, penetration of the genital and anal openings by a foreign object, substance, instrument and device, oral copulation and sodomy when her/his consent was procured by false and fraudulent representation" (tracking the language of sec. 266c). Wrote the court, "The variety of sexual offenses subsumed in this language offers a wide range of potential for exchange of bodily fluids (and therefore transmission of "the probable causative agent" of AIDS (sec. 1202.1, subd. (A)), ranging from the unlikely to the extremely probable. It is, therefore, unsurprising that section 266c is not listed in section 1202.1, subdivision (e), since in many instances of the offense transmission of the disease will not be an issue. Here, however, the factual basis for the plea clearly demonstrates that defendant committed unprotected sexual intercourse with the victim," thus coming within the logic of the *Adames* ruling and justifying imposing the testing requirement. A.S.L.

### AIDS Litigation Notes

*Wisconsin* — Quality Foods IGA of Schofield, Wisconsin, will pay \$89,000 in emotional distress damages and \$1,000 for lost wages to Korrin Krause, a teenager who was discharged from her job as a part-time bagger after the story learned she was HIV+ in March 2001. Under the consent decree in *EEOC v. Schofield Foods Inc.*, No. 01-C-0547-S (W.E. Wisc.), signed by District Judge John C. Shabaz on February 1, the employer denies violating the ADA but concedes that an "unfortunate series of miscommunications" took place over the reasons for Krause's discharge. *BNA Daily Labor Report* No. 24, 2/5/02, A-1.

*Florida* — Mystery Case Revealed: In the January issue of *Law Notes* we reported on a Florida Supreme Court decision reviving an emotional distress claim on behalf of a woman who believed there was a used condom in her bottle of Coca Cola, but we omitted through an editorial mistake to include the name of the

case: *Hagan v. Coca-Cola Bottling Co.*, 2001 WL 1585282, 26 Fla. L. Weekly S812 (Fla. Supreme Ct., Dec. 13, 2001).

*New York* — In *Evans v. Nassau County*, 2002 WL 214758 (U.S. Dist. Ct., E.D.N.Y., Feb. 13, 2002), U.S. District Judge Spatt refused to dismiss a complaint against the county, the police, and the local jail, by an HIV+ inmate who claims, among other things, that the jail is not providing his medication on an appropriate schedule. The judge found that Evans' pro se complaint, although somewhat ambiguous on various points, was sufficient to comply with the requirements of federal notice-pleading. The opinion does not have any substantive discussion of the HIV treatment claim.

*Connecticut* — Connecticut Superior Court Judge Beverly J. Hodgson awarded a total of \$12,433.22 in damages to Robert Civitello, who suffered an injury to his mouth as a result of biting fragments of hypodermic needle baked into a breakfast sandwich he ate at a Burger King restaurant in Waterbury. *Civitello v. Burger King Corp.*, 2002 WL 241491 (Conn. Super. Ct., Feb. 5, 2002) (not officially published). Most of the opinion was devoted to Judge Hodgson's skepticism about Civitello's claim that for a period of six months (until he repeatedly had tested HIV-negative), he suffered from fear that he may have contracted HIV from the incident. Nonetheless, having found that he suffered an actual injury requiring medical treatment as a result of Burger King's "defective" product, she awarded unreimbursed medical costs plus \$12,000 for non-economic injuries, including "the physical pain of the injury itself, the inconvenience of having to seek medical testing and treatment, the pain of injections to a person who described himself as very anxious about injections, and fear of the possibility that even though an initial HIV test had been negative, a future test might not be. The court finds that this fear was neither as lengthy nor as intense as the plaintiff wished the court to believe."

*Connecticut* — In *Doe v. Yale University*, 2002 WL 234778, A.2d (Conn. Super., Feb. 7), Superior Court Judge Sheldon rejected Yale University's attempt to have the retrial of a case involving a claim that Yale Medical School was negligent in training the plaintiff, a former medical student who contracted HIV through a needlestick injury transferred to a special complex litigation court. Judge Sheldon agreed with the plaintiff's argument that the case is not really any more complex than other medical malpractice cases in its requirement of expert testimony to delineate a standard of care, and that transfer would unduly delay the trial, since the Superior Court in New Haven was ready to assign a single judge to handle all pretrial matters and give a relatively early trial date. In light of the "precarious" health status of the plaintiff, the court was unwilling to brook further delay on a case that has been kicking around at vari-

ous levels of the Connecticut court system since the mid-1990s.

*10th Circuit — Colorado* — In a case involving a jailer in Clear Creek County, Colorado, who suffered from a heart condition, the U.S. Court of Appeals for the 10th Circuit on several important evidentiary issues in ADA litigation. *Bristol v. Board of County Commissioners*, 2002 WL 265824 (Feb. 26). Among other things, the court held that in an ADA jury trial, the judge initially makes a determination whether the plaintiff has identified “impairments” and “major life activities” recognized under the ADA, but it is the jury’s function to determine whether the impairment “substantially limits” a major life activity. The court also ruled that in a reasonable accommodation situation, a position is “vacant,” for purposes of determining whether an employer has a duty to transfer an employee with a disability, “only if the employer knows, at the time the employee asks for a reasonable accommodation, that the job opening exists or will exist in the fairly immediate future.” A.S.L.

#### AIDS Law & Society Notes

We reported last month that President Bush would designate former U.S. Rep. Tom Coburn and former U.S. Secretary of Health and Human Services Louis Sullivan to co-chair the Presidential Advisory Council on HIV/AIDS. The appointment of Coburn, a physician, was criticized by some because of his history of opposition to needle-exchange programs and his dedication to “abstinence education” as the main vehicle for AIDS prevention. The fire surrounding the Coburn appointment is intensified by the recent announcement that President Bush will also designate Dr. Joseph McIlhane to sit on the Advisory Council. McIlhane, the author of a book titled “Why Condoms Aren’t Safe,” is also an opponent of safer-sex education that incorporates reference to barrier contraceptives and is an ardent proponent of abstinence education. His appointment was seen as “payback” to the religious right-wing of the Republican Party by some critics. *Austin American-Statesman*, Feb. 6.

Merck & Co. announced some progress in AIDS vaccine research, winning headlines around the world. Preliminary tests of a complicated new multi-stage vaccine procedure are described as “encouraging.” According to Emilio Emini, Merck’s head of vaccine research, “This is an important year” because by the end of the year Merck will have decided whether to commit to large-scale human trials of the new vaccine. *Wall Street Journal*, Feb. 27.

New York State Senator Tom Duane (D-Manhattan) and Assemblymember Roger Green (D-Brooklyn) have introduced a bill seeking to combine all AIDS services provided by New York State under one new agency, to be

called the Division of AIDS Services. They contend that the multiplicity of different agencies running AIDS programs presents a confusing situation that prevents many people with HIV/AIDS from obtaining services to which they are entitled under state law. They point to the New York City Division of AIDS Services, an agency created under a bill that Duane introduced while a member of the City Council, as precedent. *Newsday*, Feb. 10.

The *Associated Press* reported that David Autrey, a ranch hand from Chilton, Texas, was infected by HIV during a transfusion performed at Scott & White Hospital in Temple, Texas, in August 2000. The reason the story made national news was because this was the first documented case of transfusion AIDS since U.S. blood banks implemented new HIV-screening technology three years ago. The new technology was supposed to virtually eliminate the problem of the “window period” during which a recently infected individual can give blood in which the presence of HIV was not detectable by prior screening methods. Evidently no technology is fool proof, however. *Newsday*, Feb. 10.

HIV+ AIDS Activists Michael Petrelis and David Pasquarelli have been released from a San Francisco jail after 73 days incarceration since their Nov. 28 arrests on charges of harassing, stalking and making criminal threats against various public health officials, AIDS researchers and news reporters. They will stand trial later this year in San Francisco Superior Court, Superior Court Judge Perker Meeks having found that there was sufficient evidence that the two men made threats intended to cause fear in the recipients. Bail had been originally set for over \$1 million, but ultimately the court agreed to release them when supporters posted a combined \$220,000 bond to guarantee their appearance for trial. *San Francisco Chronicle*, *Los Angeles Times*, Feb. 13.

Christian evangelical leader Rev. Franklin Graham, the head of a North Carolina-based charity called “Samaritan’s Purse,” called for the Christian community to throw itself into the world-wide struggle against HIV. “Unfortunately and shamefully, the church has been somewhat asleep on this issue, and maybe it’s because of the social stigma,” Graham said, pointing out that more lives were lost last year to AIDS in North America than to terrorism. “We’re not spending near as much money on HIV as we are on terrorism. But which is the greater threat?” he asked. Graham spoke at an international conference in Washington, D.C., convened by his charity, to discuss methods of dealing with the epidemic. *Washington Post*, Feb. 19. Another speaker at the conference was U.S. Senator Jesse Helms of North Carolina, a right-wing Republican not generally known as a supporter of AIDS measures. According to a report in Helms’s hometown newspaper, the *News & Observer* of Raleigh, N.C. (Feb. 21),

Helms stated, “I have been too lax too long in doing something really significant about AIDS. I’m not going to lay it aside on my agenda for the remaining months I have.” (Helms was referring to his retirement from the Senate at the end of this year.) Cause for hope or cause for concern? In past fulminations on the Senate floor, Helms has opposed federal money going to any group trying to promote safer sex education, arguing that the federal government should not be teaching gays how to have sodomy safely. Could this signal a new openness to reason? A.S.L.

#### International AIDS Notes:

*World Bank* — The World Bank announced that it will double the amount of money it is planning to spend fighting AIDS in Africa this year, to \$1 billion. The money is expected to be used particularly to address the issue of HIV transmission across national borders. *Wall Street Journal*, Feb. 8.

*El Salvador* — According to a Knight Ridder News Service story published Feb. 10 in the *Philadelphia Inquirer*, the Republic of El Salvador recently enacted a comprehensive aids policy law with both positive and negative features. A positive feature is forbidding discrimination in employment against people infected with HIV. A negative feature (an amendment added in the legislature and not in the original draft submitted by the Health Ministry) mandates that job candidates be tested for HIV so that employers can take appropriate steps to guard against workplace transmission. Observers indicated that El Salvador may be the only nation on earth that has passed legislation mandating HIV testing of all job applicants. Among other positive features of the law: it creates a federally funded AIDS commission, it protects the right to education for HIV-infected children, it provides rights to treatment, provides shelters for orphaned children and abandoned adults, and requires motels that rent rooms by the hour to offer two condoms to each customer (now, there’s legislative realism)! The law criminalizes HIV transmission, and compels anyone diagnosed HIV+ to notify current, past, and potential sexual partners. ••• The *Christian Science Monitor* reported on Feb. 22 that a group of persons with AIDS and advocates in El Salvador is planning to mount a legal challenge to the testing law, claiming that by requiring testing, the government was setting up HIV+ people for job discrimination, even though the statute also forbids such discrimination. Said Licida Bautista, director of AIDS Action for Central America, “The employer is not going to say he is firing someone because they are HIV+, because they could be denounced legally for that. They are going to say it’s for another reason, give that person all the severance they are entitled to, and nobody will be able to challenge it.”

*Libya* The prosecution of six Bulgarian healthcare workers accused of infecting hundreds of Libyan children with HIV hit a snag when the People's Court determined that it did not have jurisdiction because the matter does not involve national security. (Odd that it took them two years of trial to figure this out.) The defendants pled not-guilty to charges of sabotage, cooperation with foreign parties, murder and conspiracy. The case may be abandoned, or referred to a criminal court to be again. *Akron Beacon Journal*, Feb. 18.

*South Africa* — *The Guardian* reported Feb. 18 that Nelson Mandela was attempting to intervene on behalf of AIDS activists to get the African National Congress to abandon South Africa

can President Mbeki's continued reluctance to have his government take an aggressive stance towards AIDS treatment and prevention. The *New York Times News Service* reported on Feb. 19 that officials in Gauteng province, which includes the city of Johannesburg, have announced they will provide nevirapine to pregnant women in public hospitals in an attempt to cut down on transmission of HIV to infants during delivery. This is the second provincial government to defy the national government by insisting on providing anti-HIV medication. Mandela's intervention may have had quick results, because by Feb. 21 several English newspapers reported that the ANC government was proposing a sharp increase in AIDS spending

for the next budget year. *Financial Times*, Feb. 21.

*Korea* — Korean Justice Ministry officials were reportedly investigating the bizarre allegations that an inmate serving a life sentence after being convicted of organized crime activities had deliberately infected himself with HIV in an attempt to win early release. According to the Feb. 15 report in the *Korea Times*, one Mr. Kim managed to get hold of a hypodermic syringe and to inject himself with blood from a fellow prisoner who was HIV+. Kim tested HIV+ himself on Jan. 16. The story goes that Kim believed that a cure for HIV infection will be found soon, and hoped for some sort of compassionate release. A.S.L.

## PUBLICATIONS NOTED & ANNOUNCEMENTS

### ANNOUNCEMENTS

The Phil Zwickler Charitable and Memorial Foundation has made a grant to the Cornell University Human Sexuality Collection to assist scholars researching human sexuality issues at the collection's site in Ithaca, New York. The collection includes important archival materials from major lesbian and gay rights and community organizations. Applications for grants for use during 2002 will be accepted until March 8. For information, contact the Collection's archivist, Brenda J. Marston, at [bjm4@cornell.edu](mailto:bjm4@cornell.edu).

### LESBIAN & GAY & RELATED LEGAL ISSUES:

Alexander, Sharon Debbage, *Gays in the Military: European-U.S. Perspectives and the Equation for Change in U.S. Policy*, 2 *Georgetown J. Gender & L.* 707 (Summer 2001).

Buchanan, Sidney, *A Constitutional Cross-Road for Gay Rights*, 38 *Houston L. Rev.* 1269 (Winter 2001) (essay).

Cohen-Almagor, Raphael, *Ethical Considerations in Media Coverage of Hate Speech in Canada*, 6 *Rev. of Constitutional Studies* 79 (2001).

Goldfarb, Sally F., *Visitation for Nonparents After Troxel v. Granville: Where Should States Draw the Line?*, 32 *Rutgers L.J.* 783 (Spring 2001).

Kellogg, Catherine, *A Review of Lesbian and Gay Rights in Canada: Social Movements and Equality Seeking, 1971-1995* by Miriam Smith, 6 *Rev. of Constitutional Studies* 117 (2001).

Lee, Andrew R., *Estate and Disposition Planning Issues for Same-Sex or Unmarried Couples*, 141 *Trusts & Estates* No. 1, 51 (Jan. 2002).

Meiselman, Alyson Dodi, Phyllis Randolph Frye, and Katrina C. Rose, *Slavery, Sex & Gender, and the Ancient Doctrine of Stare Decisis: A Re-Examination of the Doctrine in Light of*

*Time-Influenced Legal Reasoning and the Current State of Transgender Legal Issues*, 2 *Georgetown J. Gender & L.* 735 (Summer 2001).

Meyer, David D., *Constitutional Pragmatism for a Changing American Family*, 32 *Rutgers L. J.* 711 (Spring 2001).

Polikoff, Nancy D., *The Impact of Troxel v. Granville on Lesbian and Gay Parents*, 32 *Rutgers L.J.* 825 (Spring 2001).

Romero, Victor C., *Restricting Hate Speech Against "Private Figures": Lessons in Power-Based Censorship from Defamation Law*, 33 *Col. Hum. Rts. L. Rev.* 1 (Fall 2001).

Rubenstein, William B., *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 *S. Cal. L. Rev.* 65 (Nov. 2001).

Solomon, Lewis D., and Matthew J. Vlissides, Jr., *Faith-Based Charities and the Quest to Solve America's Social Ills: A Legal and Policy Analysis*, 10 *Cornell J. L. & Pub. Pol.* 265 (Spring 2001).

#### Student Articles:

Comment, *Sex Changes and "Opposite-Sex" Marriage: Applying the Full Faith and Credit Clause to Compel Interstate Recognition of Transgendered Persons' Amended Legal Sex for Marital Purposes*, 38 *San Diego L. Rev.* 1113 (Nov-Dec. 2001).

Hubins, Jeffery, *Proposition 22: Veiled Discrimination or Sound Constitutional Law?*, 23 *Whittier L. Rev.* 239 (Fall 2001).

Kaplan, Shana, *From A to Z: Analysis of Massachusetts' Approach to the Enforceability of Cryopreserved Pre-Embryo Disposition Agreements*, 81 *B. U. L. Rev.* 1093 (Dec. 2001).

Manke, Carie, *Student-on-Student Sexual Harassment: A Case Comment on the Supreme Court's Decision in Davis v. Monroe County Board of Education*, 78 *Denver U. L. Rev.* 149 (2000).

Minear, Jennifer, *Performance and Politics: An Argument for Expanded First Amendment*

*Protection of Homosexual Expression*, 10 *Cornell J. L. & Pub. Pol.* 601 (Spring 2001).

Recent Cases, *Constitutional Law First Amendment Third Circuit Finds School District's Antiharassment Policy Unconstitutionally Overbroad*, 115 *Harv. L. Rev.* 907 (Jan. 2002).

Shaw, Kristine, *Local Sexual Orientation Non-Discrimination Laws: A Means of Community Empowerment*, 10 *Cornell J. L. & Pub. Pol.* 385 (Spring 2001).

Smolka, Angie, *That's the Ticket: A New Way of Defining Family*, 10 *Cornell J. L. & Pub. Pol.* 629 (Spring 2001).

#### Specially Noted:

On February 3, the *Philadelphia Inquirer* published a lengthy article looking at discrimination against same-sex partners in the real estate markets. The article emphasized the establishment of websites where gays can find gay-friendly real estate brokers to assist them in securing desirable real estate without encountering discrimination from mortgage lenders, sellers or brokers. The news hook for the story was a session on "diversity" held at the annual convention of the National Association of Realtors in Chicago.

Vol. 32, No. 3 (Spring 2001) of the *Rutgers Law Journal* is devoted to a symposium on the constitutional status of parental rights in light of the Supreme Court's decision in *Troxel v. Granville*. Some articles with particular relevance to Law Notes readers are individually noted above.

A review of research on lesbian and gay families titled "Meet the Parents" has been published by the Gay & Lesbian Rights Lobby of Sydney, Australia. Written by Jenni Millbank, senior lecturer in law at the University of Sydney, the report reviews research into lesbian and gay parenting from the US, Canada, the United Kingdom and Australia. The report concludes that the sexuality of a child's parents has no bearing on their development or well being.

Rather, it is the care and love put into a child's upbringing that is of the greatest importance, and lesbians and gay men demonstrate just as good capabilities at loving and caring for their children as their heterosexual counterparts. The report can be accessed at <http://www.girl.org.au/>. The report has been prepared in a format suitable for use in family law proceedings.

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#### AIDS & RELATED LEGAL ISSUES:

Asiedu, Dorothy, *African Community Groups' (ACGs) Knowledge and Participation in the Implementation of the International Guidelines on HIV/AIDS and Human Rights*, AFLA Quarterly, Jan-Mar 2001, 18.

Caesar, Mary, *The Inter-Relationship between HIV, AIDS and Violence Against Women*, AFLA Quarterly, Jan-Mar 2001, 22.

Clotey-Sefa, Daniel, *HIV/AIDS and Discrimination: Observations from Ghana*, AFLA Quarterly, Jan-Mar 2001, 15.

Maluwa, Miriam, *Law, HIV/AIDS and Human Rights*, AFLA Quarterly, Jan-Mar 2001, 9.

Mwesigwa, Kindyamunda Rosemary, *HIV/AIDS and Human Rights: Perspectives from a Developing Country Ravaged by the Epidemic*, AFLA Quarterly, Jan-Mar 2001, 6.

#### Student Notes & Comments:

Curti, Andrea M., *The WTO Dispute Settlement Understanding: An Unlikely Weapon in the Fight Against AIDS*, 27 Am. J. L. & Med. 469 (2001).

Gonen, Julianna S., *Removing Informed Consent from HIV-Testing of Pregnant Women: A Return to the Maternal-Fetal Conflict*, 2 Georgetown J. Gender & L. 765 (Summer 2001).

Mekel, Michele L. *Kiss and Tell: Making the Case for the Tortious Transmission of Herpes and Human Papillomavirus*, 66 Mo. L. Rev. 929 (Fall 2001).

Osode, Patrick C., *Defining the Limits of Permissible Employment Discrimination Against*

*Persons Living With HIV/AIDS in South Africa: Hoffman v. South African Airways [2000] 12 BLLR 1365, 45 J. African L. 217 (2001).*

#### Specially Noted:

The Africa Legal Aid Quarterly for Jan-Mar 2001 was devoted to a symposium on AIDS law issues in Africa. Individual articles are noted above. In addition to the articles, this issue reprints the International Guidelines on HIV/AIDS and Human Rights.

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#### EDITOR'S NOTE:

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