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SYMPOSIUM 2000 CHRONICLING A MOVEMENT: A SYMPOSIUM TO RECOGNIZE THE TWENTIETH ANNIVERSARY OF THE LESBIAN/GAY LAW NOTES EDITED BY PROFESSOR ARTHUR S. LEONARD: INTRODUCTION Chronicling a Movement: 20 Years of Lesbian/Gay Law Notes

NAME: Arthur S. Leonard

SUMMARY:

... When the Law Group was incorporated as "Bar Association for Human Rights of Greater New York" in 1984, the organization renamed the publication "Lesbian/Gay Law Notes" beginning with the June issue, and the purely organizational announcements (calendar of events, committee news, and the like) was spun off into a separate newsletter. ... In support of this view, he cited *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which the Court rejected extension of privacy rights to consensual homosexual acts. ... The court cited *Cain v. Hyatt*, 734 F.Supp. 671 (E.D.Pa. 1990) (another case involving AIDS discrimination in law firm employment) for the proposition that procreation is a major life activity limited by HIV. ... They insisted that the visitation statute was, in common with the marriage statute, the custody statute, and the adoption statute (which the court recently construed to forbid adoption by a lesbian co-parent of her partner's children), intended to occupy the field and oust the courts of any traditional equitable powers they might have in the field of family law. ... May 1998: SUPREME COURT OF CANADA READS SEXUAL ORIENTATION INTO ALBERTA'S ANTI-DISCRIMINATION LAW: For the first time, lesbian and gay Canadians have achieved a complete victory before the Supreme Court of Canada. ...

TEXT:

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In the early months of 1978, when I was just starting out in law practice, I placed a "personals" advertisement in the Village Voice, announcing an attempt to start an organization for gay lawyers in New York. I received enough responses to call a meeting in my apartment in March, which drew ten people, of whom about half were lawyers. We continued to meet informally once a month, with numbers growing through word of mouth and occasional notices I would place in the New York Law Journal, under the name "New York Law Group." I sent a monthly meeting notice to everybody on the mailing list and during 1979 began to add brief news items about legal developments that came to my attention. By January 1980, I was calling the monthly newsletter "New York Law Group Notes." This was produced on my portable electric typewriter at home, consisted of equal parts organizational announcements and legal news, and fit on two sides of a sheet of paper.

Before long, the amount of legal news was taking up most of the monthly mailing. When the Law Group was incorporated as "Bar Association for Human Rights of Greater New York" in 1984, the organization renamed the publication "Lesbian/Gay Law Notes" beginning with the June issue, and the purely organizational announcements (calendar of events, committee news, and the like) was spun off into a separate newsletter. A typical issue then was four pages, word-processed at New York Law School (whose faculty I joined beginning with the Fall 1982 Term), with a supplement included, most months, summarizing the criminal laws affecting gay sex in one of the states. This state law project had been started late in 1983 by Daniel W. Meyer, a retired attorney who was interested in contributing some original research to the lesbian and gay legal movement, and who was directed to me by Abby Rubenfeld, Lambda Legal Defense Fund's first full-time staff attorney. Mr. Meyer, since deceased, stuck with the project through thick and thin, completing analyses of the sex crimes laws in all the states over a period of about seven years. (He was the uncle of

Carlin Meyer, who is now a professor at New York Law School.) Beginning [*416] in 1986, I began to compile an annual table of all the cases cited in Law Notes, which we distributed to any subscriber who requested it at year's end.

When the AIDS epidemic began to generate its own legal stories, I decided to report them together with the lesbian and gay legal news. Many of the early cases involved gay litigants, and even those that did not appear likely to generate precedents that would be important for gay litigants and lawyers. Soon AIDS legal news was taking up a major part of each issue, and remains a significant portion of the monthly Law Notes. As the AIDS legal news peaked in the early 1990's, I faced the question of whether to cut back on AIDS coverage to focus only on cases that had a gay "angle;" but I ultimately decided that all AIDS legal developments were of potential importance to the many lawyers who were reading Law Notes, and we have continued to provide as full coverage of AIDS law as possible. The first mention of AIDS was in the May 1983 issue, which reported the first public acknowledgment of the epidemic by then-Mayor Edward I. Koch (many would argue at least two years too late). The first substantive legal report on AIDS came in the July 1983 issue, noting that the City Human Rights Commission was accepting AIDS discrimination charges under its jurisdiction over instances of discrimination on the basis of "physical handicap or disability."

Law Notes readers must have been startled to receive the August 1988 issue, having become accustomed to the dot matrix printer from my office computer and suddenly being confronted with beautiful Times Roman typeface and bold headlines. This was the first issue formatted by my partner, Tim Nenko, who had recently taken a new job in the publishing industry and offered to provide a more professional look for the newsletter. The next format innovation came with the November 1988 issue, when Tim introduced columns to make the thick paragraphs of text more readable. The last issue of 1988 featured six pages of two-column text, plus Dan Meyer's state law summary for Nevada. As we attempted to save on postage costs, Tim began shrinking the type-face and went to three columns of text with the Summer 1989 issue.

In 1991, the Bar Association for Human Rights hired its first office worker, Florence Oser, who took over the responsibility for circulation of the monthly newsletter. Prior to that time, I had handled circulation, doing the mailings from my home in the early [*417] years, then holding a monthly "mailing party" in the old faculty library at New York Law School with a hardy band of volunteers who loyally appeared the first Monday evening of each month to help collocate the pages, fold, stuff and seal. Florence Oser's name first appeared on the masthead as Circulation Manager in June 1991. Subsequent circulation managers employed by the Association were Audrey Hartmann, from 1992 to 1995, and Daniel Schaffer, who took over the task in the summer of 1995.

Another important change took place on the masthead of Law Notes with the October 1991 issue. The "bar association that dare not speak its name," as the Bar Association for Human Rights was known among some of its more activist members, had voted to come fully out of the closet, and the publisher of the newsletter was identified for the first time that month as the Lesbian and Gay Law Association of Greater New York (LeGaL). After LeGaL formed an educational non-profit foundation under section 501(c)(3) of the federal tax laws as an umbrella organization of its public education and public service activities, the LeGaL Foundation became the publisher of Law Notes.

The March 1992 masthead carried, for the first time, the name of a contributing writer, Colin Crawford, then a writing instructor at Brooklyn Law School, who was joined early in 1993 by Todd V. Lamb, then a New York Law School student who was my student research assistant for 1993-94. Beginning in October 1993, Paula Ettelbrick, then on the staff of the National Center for Lesbian Rights (and previously Lambda Legal Defense Fund's Legal Director), and Dirk Williams, then a student at Northeastern Law School, began writing for Law Notes. Many other contributing writers have come and gone over the years since then, including several of my student research assistants at New York Law School, some of whom continued to contribute after graduation. All of the contributing writers are listed below. Most of the contributors write about one case for each monthly issue, and I write the balance, which remains the majority of the newsletter. For a few years in the mid-1990's, Colin Crawford participated as a contributing editor, supervising the contributions of numerous Brooklyn Law School students. During the early years of contributing writers, they were identified by their initials after their articles and listed on the masthead. More recently, all contributors' full names have been listed [*418] after their articles, but I have continued to use my initials for my contributions.

The next major development in the history of Law Notes was sparked by reader reaction to my report of the trial court decision in *Thomas S. v. Robin Y.*, 599 N.Y.S.2d 377 (N.Y.Fam.Ct. Apr. 13, 1993), rev'd, 618 N.Y.S.2d 356 (N.Y.A.D. 1 Dept., Nov. 17, 1994), a dispute between a gay male sperm donor and a lesbian couple over visitation by the donor with the child who had been conceived using his donated sperm. The Law Notes report, headlined "Judge Denies Parental Standing to Gay Sperm Donor," 1993 Lesbian/Gay Law Notes 33 (May), was based on the trial judge's opinion, as published in the New York Law Journal, the Law Journal's story about the case, and an article in The New

York Times in which the attorneys in the case were interviewed. The lesbian and gay community (and especially the lesbian and gay legal community) was sharply split about the court's handling of the case. The trial judge had concluded that the sperm donor's visitation petition should be denied, in an opinion that recognized the family unit of the lesbian couple with their children and concluded that it would not be in the child's best interest to order visitation in light of the circumstances of the case. I attempted to provide a balanced report, noting how the opinion might be considered progressive by some and conservative by others.

My article caused the first real controversy in the Law Notes' history, resulting in a stream of letters to the editor (which we printed and distributed with ensuing issues), a resolution by the board of LeGaL that each issue of the Law Notes should carry a disclaimer that views stated in the newsletter were not necessarily those of the organization, and a suggestion that the publication would benefit from more voices. Those who approved of the court's decision felt that I had presented the case from the perspective of the defeated sperm donor, as a "defeat," whereas they viewed the opinion as a "victory" for its recognition of the lesbian family and its insistence on preserving the terms of the original, unwritten agreement between the sperm donor and the women, under which he agreed not to assert parental rights. The tone of the letters indicated that some writers, who considered the Law Notes to be "their" publication and, in some sense, the official record of gay law, felt betrayed by a depiction of the case that did not treat the opinion as an unalloyed victory. I leave it to readers of the article [*419] to draw their own conclusions on that score. In the selection of materials from Law Notes that follows, I have included the original article and some selections from the letters.

Law Notes debuted in cyberspace in January 1996, when the Queer Resources Directory (www.qrd.org), administered by Ron Buckmire of the Occidental College Mathematics Department, began to archive Law Notes issues and our website address appeared for the first time on the masthead in February 1996. We uploaded several years of back-issues (and case tables) to the archive, and each monthly issued is now added as it is published.

The sheer volume of lesbian and gay legal news today, compared to 1980, is truly extraordinary. During 1999, the eleven issues of Law Notes totaled 200 pages, an average of 18 pages per issue, and the total for 2000 appears likely to surpass that. Today, Law Notes is read by the members of seven lesbian and gay bar associations and several hundred individual subscribers, some of whom receive it by direct email transmission from the LeGaL Foundation, as well as thousands each month who access the website. More than a hundred Law School libraries subscribe to Law Notes, and it is frequently cited in law review articles as a source of information on litigation, legislation, and otherwise unpublished decisions.

Contributing Writers to Lesbian/Gay Law Notes

Eva G. Anthony, Monica Barrett, Robert Bourguignon, David Buchanan, Elaine Chapnik, Ian Chesir-Teran, Colin Crawford, Otis R. Damslet, Leslie S. Deutsch, Paula L. Ettelbrick, Klayton Fennell, Philip Friedman, E. Terry Giuliano, Carolyn Grose, Patrick J. Henigan, Julia Herd, Kevin Isom, Courtney Joslin, Steven Kolodny, Todd V. Lamb, Mary Ann LeFort, Ross D. Levi, Arthur L. Levy, Mark Major, Sharon McGowan, Daniel W. Meyer, William M. "Barnaby" Millard, Robin Miller, David Pumo, Clarice B. Rabinowitz, Seth M. Rosen, K. Jacob Ruppert, Kenneth Rutman, Michael Shay Ryan, Daniel R. Schaffer, Mark N. Sperber, Angela Thompson, Paul R. Twarog, Helen Ullrich, Kees Waldijk, Charles Wertheimer, Dirk Williams, Robert Wintemute, Leo L. Wong

Selections from Lesbian/Gay Law Notes

The following selections are taken from Lesbian/Gay Law Notes and its predecessor publication, Law Group Notes. Some articles [*420] have been abbreviated. Bracketed material, providing citations, identifications of writers and others, has been added. This selection does not include every case of significance reported over the past twenty years. It is intended to give the flavor of the times and show how Law Notes reported some of the major landmark decisions and other legally significant events. During the first few years, many reports were only a few sentences long, and headlines did not start to appear until the 1981 issues. I wrote all of the articles until the advent of contributing writers in 1992, and their contributions are noted below. To avoid culture-shock for regular Law Notes readers, the material is arranged in columns with small print!

[vc2,13,1] January 1980: The U.S. Justice Department has advised the immigration service that it must continue to enforce the legal exclusion of gay people from the U.S., despite the Public Health Service's refusal to examine people for "homosexual tendencies."

February 1980: The February issue reproduced an article from the New York Times, dateline February 1, reporting that the New York Appellate Division, 4th Department, had ruled the previous week that the New York Sodomy Law

was unconstitutional, and that the Onondaga County District Attorney had "tentatively" decided to appeal to the New York Court of Appeals. The full text of the decision, taken from the New York Law Journal, was reproduced in the newsletter. [*People v. Onofre*, 72 App. Div. 2d 268, 424 N.Y.S.2d 566 (1980), aff'd, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), cert. denied, 451 U.S. 987 (1981).]

April 1980: The Bar Association [Association of the Bar of the City of New York] forum on gay rights was well attended, but the message of the speakers was mainly negative. In summary, they commented as follows: Ted Weiss [U.S. Congressman]: A federal gay rights bill cannot be passed in the near future. A new generation of Congresspeople will be necessary. Richard Gottfried [State Assemblyman]: Less pessimistic than Weiss, but feels the state legislature is not ready to confront the gay rights issue openly. Jane Trichter [City Council member]: The current racist, sexist, homophobic power structure of this city will not allow enactment of a city gay rights bill. Cary Boggan [Lambda Legal Defense Fund co-founder and board member]: The trend of recent court and administrative decisions is positive. All of the speakers emphasized the need for the gay community to get better organized for political action.

June 1980: The U.S. District Court in Milwaukee has held unconstitutional the Army's regulation requiring immediate separation of gays from the service. In striking down Regulation 135-178, Judge Terrance Evans issued a writ of mandamus ordering the Army to restore Miriam Ben Shalom to her place in the 84th Army Reserve unit. The decision was limited, however, to the issue of discharges based on status. The Regulation had required separation from the service for any soldier "who evidences homosexual tendencies, desires, or interests." Evans ruled that "constitutional privacy principles clearly protect one's sexual preferences in and of themselves from governmental regulations." The decision was based on the First, Fifth and Ninth Amendments. [*BenShalom v. Secretary of the Army*, [*421] 489 F.Supp. 964 (E.D.Wis. 1980), settlement enforced, 826 F.2d 722 (7th Cir. 1987).]

September 1980: Lesbian activist Rosemary Dempsey, of Trenton, New Jersey, a Rutgers Law student who has lived with her lover for five years, was awarded custody of her two children by Superior Court Judge William D'Annunzio. The judge described the home, which also included Dempsey's lover's children, as "warm and loving, though unconventional," and referred to them as a family.

October 1980: On September 9, 1980, Leonard Matlovich won an order reinstating him in the Air Force from Federal District Court Judge Gesell of the U.S. District Court in D.C. Judge Gesell's opinion was given orally from the bench, and thus will not appear in Federal Supplement, however it has been published in BNA's Fair Employment Practice Cases, Volume 23, page 1251. Ruling on cross-motions for summary judgment upon the remand from the D.C. Court of Appeals, Judge Gesell commented that it was "apparent that the Air Force, either through a total breakdown in its own communications or by an intentional trifling with the legal process, has misled two courts and confused the issues in this long, drawn-out case." He noted that "the Air force not only misrepresented the standards which had been applied in the past, but... is totally unable in any way to clarify or explicate its position either generally or as applicable to Plaintiff Matlovich." Judge Gesell concluded that, because the Air Force was unable to articulate "standards which can be evenly, fairly and objectively sustained and applied throughout the Air Force command," the discharge of Matlovich must be held improper... The Air Force has announced that it will appeal the decision to the Court of Appeals.

November 1980: NYC Criminal Court Judge Herman Klarsfield recently made history by ruling that sexual preference cannot be the cause for excluding a juror. The issue arose in the trial of "gay-bashers" who were arrested for assaults in Greenwich Village last December. The defense lawyer asked for exclusion of a potential juror who said he was gay. The judge filed a decision on his ruling against the motion, stating: "Certainly there is no doubt that homosexuals comprise a significant segment of our population (the National Gay Task Force estimates that 800,000 persons in New York City are homosexual) and that they are as diverse in their opinions as their numbers. To say that this entire group of citizens who may be otherwise qualified, would be unable to sit as impartial jurors in this case, merely because of their homosexuality, is tantamount to a denial of equal protection under the United States Constitution." The juror was excluded anyway, however, when the defense lawyer decided to use his last peremptory challenge to strike him from the panel. [*People v. Viggiani*, 431 N.Y.S.2d 979 (N.Y.C. Crim. Ct. 1980).]

December 1980: The U.S. Army has settled a civil lawsuit brought by a former employee of GTE Sylvania, Warren Preston, on the basis that the Army will grant Preston a security clearance and will rewrite its regulations so that gays will not automatically be denied such clearances. Preston, who lost his job when a clearance was denied, will also receive a \$ 10,000 settlement. A historic journalistic first: The NY Times, in reporting on the case, ran the following headline: "Army Allows Clearances to Gays" (November 16, 1980). The Times did not enclose the word "Gays" in quotation marks. Is the Gray Lady coming around? [The comment was premature. This was a slip-up by the Times from its

style manual requirements, and the newspaper did not begin to use the word "gay" to refer to lesbians and gay men, apart [*422] from its use in quotations, until much later in the 1980's.]

January 1981: N.Y. SODOMY LAW STRICKEN BY N.Y.C.A., 5-2! In a historic 5-2 decision, the New York Court of Appeals declared Penal Law sec. 130.38 (which forbids consensual adult sodomy) unconstitutional on December 18, 1980. The majority decision by Judge Hugh Jones... is based on alternative grounds of privacy and equal protection developed under the federal constitution. Significantly, the decision does not mention the state constitution and is based solely on analysis of federal precedents. Jones' decision gained the concurrence of three other judges, giving it the support of an absolute majority of the court. Judge Jasen concurred in the result in a separate opinion based solely on equal protection. Judge Gabrielli dissented in an opinion joined by Chief Judge Cooke. [This summary was followed by excerpts from the opinions. *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980), cert. denied, 451 U.S. 987 (1981).]

February 1981: LAW GROUP MEMBER SCORES BIG WIN IN GAY ADOPTION CASE; ONOFRE CITED! Law Group member Michael Lavery achieved a new breakthrough in gay rights litigation, winning a decision from Family Court Judge Deutsch in Manhattan that adult gays can adopt each other to create a legal basis for their gay relationship. The decision in *Matter of Adult Anonymous* was published in the New York Law Journal on February 3, 1981. The court received a petition from a 22-year-old man, seeking to adopt his 26-year-old lover. The 22-year-old's mother had recently died, and the couple felt that had they adopted reversed roles (the 26-year-old adopting the 22-year-old), the younger man might have had trouble collecting from the estate of his mother, who died intestate. Judge Deutsch held that, as both of the individuals involved were adults, New York law did not require a best interest of the child analysis, which is usually applied in adoption cases involving minors. Rather, Deutsch held that the only test posed by the law was whether the proposed adoption would violate any public policy. Noting that the couple was proposing to give a legal context to a homosexual relationship, the Judge found that the recent Court of Appeals decision in *People v. Onofre*, overturning the state's ban of consensual adult sodomy, had removed any argument that there was a public policy against such a relationship. [*In re Adult Anonymous*, 435 N.Y.S.2d 527 (Fam. Ct., Kings Co. 1981).]

May 1981: FOURTH CIRCUIT RECOGNIZES RIGHTS OF GAY CITIZENSHIP: The Fourth Circuit Court of Appeals ruled on April 27 in the case of Horst Nemetz that a gay immigrant cannot be denied U.S. citizenship on the basis of his sexuality. The Federal District Court had found that Nemetz, who openly revealed his sexuality and his longstanding relationship with a lover, did not meet the requirement for good moral character. The Fourth Circuit stated that his "homosexual activity cannot serve as the basis for a denial of a finding of good moral character because it has been purely private, consensual and without harm to the public." [*Nemetz v. Immigration and Naturalization Service*, 647 F.2d 432 (4th Cir. 1981).]

June 1981: Several sources report that Parkman Realty Company has sent eviction notices to 7 gay couples living in an apartment house in Greenwich Village, with the rationale being that the lease was violated because only one member of each couple had signed the lease. Also, it was reported that two straight couples had received similar notices. According to the Advocate, one of those evicted is New York Human Rights Commissioner David Rothenberg. [This was the first glimmering of an issue that ultimately led to [*423] passage of the N.Y. Roommate Law, allowing tenants to have unrelated roommates.]

October 1981: The Buffalo Mattachine Society has filed a lawsuit challenging the New York State loitering law, which has been used by police around the state to prosecute gay people. Although consensual sodomy is now legal when engaged in privately, it remains "illegal" to stand around for the purpose of finding a consenting adult with which [sic] to do it! The lawsuit, a class-action on behalf of all gay people in the state, is also challenging the use of police entrapment and surveillance techniques against gays.

November 1981: A federal district court has held that sexual orientation is not a basis for firing a teacher. On October 23, a federal jury awarded \$ 40,000 in back-pay to Marjorie Rowland after U.S. Magistrate Robert Steinberg of the federal court in Dayton, Ohio, ruled that a local school district had violated her rights to freedom of speech and equal protection of the laws. This was the end of a long chain of litigation involving two district court dismissals, two decisions from the Sixth Circuit Court of Appeals, and finally a trial before Magistrate Steinberg. [Unfortunately, this was not the end of the case. The school board appealed again, and the Sixth Circuit reversed the verdict, with the Supreme Court denying certiorari over a dissent by *Justices Brennan and Marshall*. *Rowland v. Mad River Local School District*, 730 F.2d 444 (6th Cir. 1984), cert. denied, 470 U.S. 1009 (1985).]

December 1981: Wisconsin state assembly has approved a state-wide gay rights bill; favorable action on the nation's first such legislation is expected soon in the state senate.

January 1982: Finally, an arbitration decision is reported holding that off-duty homosexual conduct is not just cause for discharge under a standard union contract. In *Ralph's Grocery Co.*, 77 BNA Lab. Arb. 867 (Kaufman, Arb., 1981), Arbitrator Walter Kaufman vacated the "constructive discharge" of a gay supermarket employee who had been forced out of his job after he hosted a "wild" party at which some other employees, both gay and straight, had been present. Noted the Arbitrator: "As already noted, an employee's conduct when the employee is off duty and off company property is beyond the employer's disciplinary reach under the collective bargaining agreement, unless the conduct adversely affects the operation of the business. That must be no less true for homosexual than heterosexual conduct. Moreover, the employer has the burden of proving any such adverse effects. Management's disapproval alone does not satisfy the contractual standard of 'good cause.'" The Arbitrator found that nobody who had attended the party had registered any complaints with the employer, and that allegations about employees complaining about having to work with gays were unfounded. The Arbitrator ordered the employee to be reinstated with back pay and no loss of seniority.

February 1982: A hearing last week on the national gay civil rights bill (HR 1454) held in Washington brought waves of positive testimony and a dramatic "coming out" by Syracuse University Law School Dean Craig Christenson. However, chances of the bill passing in this Congress are rated as dim. The bill now has 52 sponsors, including one new addition of a formerly anti-gay representative who has bowed to heavy constituent pressure to endorse the bill, organized by local operatives of the Gay Rights National Lobby in his district. [Note: Dean Christenson subsequently served as President of the Law School Admission Council, was a visiting professor for a time at New York Law School, and is now a professor at Southwestern University School of Law. He has the distinction of being [*424] the first openly-gay dean of an accredited U.S. law school.]

March 1982: Your blood will boil when you read *Childers v. Dallas Police Department*, 513 F. Supp. 134 (N.D. Tex. 1981), in which the court upheld the refusal of the Dallas Police Department to hire a gay man as a storeroom clerk. The man had been employed for several years as a clerk by the city government, had an outstanding record, and had achieved the highest score on the competitive civil service exam for the storeroom clerk position. However, in his interview, it came out that he was a deacon of Metropolitan Community Church, had marched in gay rights demonstrations, and lived with his male lover. On that basis, the Department refused to hire him. The court upheld this refusal, noting that consensual sodomy was a crime in Texas and that the Police Department had a right to bar a habitual criminal offender from a sensitive position as a storeroom clerk. The court's decision is full of the sorts of gratuitous slurs against gays which reveal a blatant bias, such as the assumption that a gay person could not be trusted to handle responsibly evidence seized by the police in gay-related cases, and would probably leak information about planned raids on gay establishments. A truly disgusting performance by the court!

April 1982: Law Group member Steven Weinstock was successful in helping an openly gay client obtain U.S. citizenship recently. The client had stated in his application that his draft status was 4F and, when questioned at his interview, said it was because he was gay. He also stated, in response to questioning, that he engages in gay acts. The examiner, astounded by this novel "admission," accepted the case under advisement. When Steve brought to his attention the Fourth Circuit decision in *Nemetz v. INS*, holding that commission of gay acts on a private consensual basis could not serve as grounds for a lack of good moral character (the pertinent legal standard), the application for citizenship was approved. The moral of the story: every gay immigration lawyer should carry around a copy of the *Nemetz* decision!

June 1982: The big news this month is the stunning victory won by Gay Rights Advocates (SF) in the Carl Hill immigration case. District Judge Aguilar (N.D. Ca.) held that the Immigration Service may not ignore its own rules and guidelines with respect to psychological testing and diagnosis. Because the U.S. Public Health Service has refused to certify gays as "psychopathic" since 1979, the Immigration Service thus is precluded from excluding gays from the U.S. on statutory grounds of "psychopathic personality." However, as gay columnist Larry Bush notes in *The Advocate*, the State Department continues to discriminate in the issuance of visas overseas; consequently, the Hill decision is not the final word in the battle to end U.S. immigration discrimination against gays. It is expected that the government will appeal the April 22 decision to the 9th Circuit. [The government did appeal, and lost. *Lesbian/Gay Freedom Day Committee, Inc. v. U.S. Immigration & Naturalization Service*, 541 F. Supp. 569 (N.D. Cal. 1982), aff'd in part, vacated in part, sub nom. *Hill v. U.S. Immigration & Naturalization Service*, 714 F.2d 1470 (9th Circ. 1983).]

June 1982: Law Group member Henry Weiss recently negotiated a cooperative agreement with the National Park Service covering some property on Fire Island which contains a non-discrimination clause with respect to use of the property based on "race, creed, color, sex, sexual orientation, or national origin." Henry comments: "Since this is believed to be one of the first coop agreements of its kind between a not-for-profit organization and the Park Service, we are hopeful that it will serve as a prototype and that the [*425] "sexual orientation" language will sneak into other

agreements." [Henry Weiss was a pioneer in the field of lesbian and gay estates and trusts law. Although he subsequently died from AIDS, his legacy continues in the Manhattan law firm of Weiss, Buell and Bell.]

September 1982: Constitutional Rights: A federal district court has held for the first time that a state sodomy law violates the United States Constitution. Ruling on August 17 in *Baker v. Wade*, District Judge Jerry Buckmeyer held that the Texas law against sodomy, one of the harshest in the nation in terms of penalties, violated both the right of privacy and the equal protection clause. In a 53-page opinion characterized by several sources as "wide ranging" in scope, the judge noted that there was no rational basis for such legislation, and that moral indignation on the part of conservative legislators was not a justification for invading constitutional rights. It is expected that Texas will appeal the decision to the Fifth Circuit. [The state of Texas did not appeal, but a local prosecutor did and won a reversal by the en banc 5th Circuit, which was more impressed by moral indignation than was Judge Buchmeyer. The Supreme Court refused to review the case. *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982), reversed en banc, 769 F.2d 289 (5th Cir. 1985), cert. denied, 478 U.S. 1022 (1986). After this report was published, we were contacted by Dr. Arthur Warner of Princeton, New Jersey, who had served, under the pseudonym of "Austin Wade" as the legal committee chair of the Mat-tachine Society in New York during the 1960's and co-chaired the National Committee for Sexual Civil Liberties. Dr. Warner advised us of a prior federal court ruling finding an earlier version of the Texas sodomy law unconstitutional. *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex.), vacated on jurisdictional grounds, 401 U.S. 989 (1971). This was the first time a letter to Law Notes sparked a correction in a subsequent issue of the newsletter. Dr. Warner, a retired college history professor who graduated from Harvard Law School, became a frequent correspondent.]

February 1983: In *U.S. v. Lemons*, the U.S. Court of Appeals for the 8th Circuit has declined the opportunity to declare the Arkansas sodomy law unconstitutional. According to a report in GCN [Gay Community News, a Boston-based newspaper], Lemons, who was convicted in federal district court of having oral sex in a public lavatory in Hot Springs National Park, was held by the court to lack standing to assert a constitutionally based privacy argument, on the ground that he engaged in sodomy in a public place. However, the GCN report notes that the majority opinion of the court broadly hints that the court might strike down the law in a case involving purely private acts. Senior Judge Henley, dissenting, argued that the law exists only to discriminate against gays, and thus does not fulfill a legitimate government interest. Consequently, it should be struck down as a violation of equal protection of the laws under the Fourteenth Amendment. [*U.S. v. Lemons*, 697 F.2d 832 (8th Cir. 1983).]

March 1983: NYCA RULES GAY SOLICITATION LAW UNCONSTITUTIONAL: On 2/23/83, the New York Court of Appeals issued its decision in *People v. Uplinger*, holding unconstitutional *N.Y. Penal Law sec. 240.35(3)*, which prohibits "loitering in a public place for the purpose of engaging or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature." In its decision... the Court stated that this statute was a companion statute to the consensual sodomy law, which had been declared unconstitutional in *People v. Onofre*, 51 N.Y.2d 476 (1981). The vote was 6-1, with Judge Jasen arguing [*426] in dissent that the decision was an inappropriate application of the "over breadth" principle in equal protection jurisprudence. Congratulations to lead counsel Bill Gardner and the many amicus groups who participated in this great victory. [*People v. Uplinger*, 58 N.Y.2d 936 (1983), cert. dismissed as improvidently granted, 476 U.S. 246 (1984).]

July 1983: Landlords won the battle in *Hudson View Properties v. Weiss*, but they definitely lost the war, as the decision was overturned by the state legislature in less than two months through the vehicle of the biennial renewal of the rent stabilization law. The new provisions allow tenants to have roommates without the approval of the landlord, but also provide that the roommates do not thereby gain any independent rights to the apartment. Similar legislation is pending in the New York City Council, where Intro No. 576 would amend the city's human rights ordinance to make it unlawful for a landlord to evict or attempt to evict a tenant for taking in a roommate. If the Intro passes, gay tenants will have two different forums for enforcing their rights to live with whom they please. Most significantly, the city legislation would specifically provide that a tenant threatened with eviction could obtain preliminary relief from a court once the tenant had filed a complaint with the City Commission on Human Rights. [In *Hudson View Properties v. Weiss*, 59 N.Y.2d 733 (1983), reported in Law Notes in June 1983, the Court of Appeals held that taking in an unrelated roommate was a substantial violation of a lease term limiting occupancy to family members of a tenant, and that the landlord was not unlawfully discriminating on the basis of marital status by seeking to evict the tenant. As noted above, the decision provoked an immediate legislative reversal.]

September 1983: AIDS AND THE LAW: This is the summer that AIDS became a legal as well as a medical issue. As the following news items indicate, the AIDS epidemic has important implications for the legal rights of gays which will require gay attorneys to acquire a new sophistication in previously unexplored fields of law, such as handi-

cap/disability discrimination. *LaRocca v. Dalsheim*, NYLJ, 8/12/83 (S.Ct., Dutchess Co., Rosenblatt, J.), is apparently the first court decision to deal with many issues which are common to AIDS-discrimination cases. In *LaRocca*, inmates of a New York state prison sued the prison, alleging that they were being endangered by the presence of prisoners with AIDS and asking that all such prisoners be removed. The prisoners also requested that they not be assigned maintenance work in the prison clinic where prisoners with AIDS had been housed, and that all incoming prisoners be screened for AIDS and diverted if evidence of the disease was found. The court dismissed the suit in a scholarly decision which made reference to the medical literature and expert testimony on AIDS. The court concluded that "current medical evidence... supports the view that AIDS is not communicable by means other than sexual contact or through blood." The court also noted statements of public health officials that AIDS was not spread by casual contact. This decision will be important in dealing with recalcitrant employers or others who seek to isolate or exclude people with AIDS from employment, housing, public accommodations or government services. [*LaRocca v. Dalsheim*, 467 N.Y.S.2d 302 (Sup.Ct., Dutchess Co. 1983). The trial judge, Albert M. Rosenblatt, went on to a distinguished career as an appellate judge in New York State.]

October 1983: AIDS DISCRIMINATION; THE CONTINUING BATTLE GOES PUBLIC: Cases involving discrimination based on AIDS continue to occur, and the NYLG's Pro Bono Panel [*427] and Lambda Legal Defense Fund have become involved with several interesting cases. In the first major public litigation in NY, the State Attorney General and Lambda have gone to court to stay the eviction of a gay doctor, Joseph Sonnabend, who was refused a lease renewal for his office by the board of the co-op building in which his office is located. The board specifically refused to renew the lease because Sonnabend treats people with AIDS. Charges filed with the State Division of Human Rights form the basis for a temporary restraining order which was obtained in State Supreme Court on September 30, to prevent the October 1 eviction of the doctor. The rather novel legal theory underlying the case is that the doctor's office is a public accommodation, thus covered by the Human Rights Law's provisions against discrimination on the basis of physical disability. In another case filed with State Division of Human Rights, a major airline has agreed to return a gay male flight attendant to active duty after having suspended him when he developed swollen glands. The same airline has been the subject of several such charges of discrimination, and is being sued by another flight attendant on the West Coast. A group of volunteers from the NYLG panel is working on some cases in which health insurance companies have canceled the health insurance policies of gay men who have developed AIDS. The insurers claim that the policyholders had failed to disclose various physical conditions at the time they applied for insurance, thus giving the companies the right to cancel their policies. The gay men claim that disclosures were made to the extent that the men had knowledge of their conditions at the time of the applications. The legal questions involved are novel, and NYLG members who may be knowledgeable about insurance law could provide a great service by contacting the administrator of the panel, Steve Gittleson, to provide assistance. [Note: The NYLG pro bono panel was largely absorbed into the legal department of Gay Men's Health Crisis when GMHC agreed, after some resistance, to start that department. Steve Gittleson became the first director of Legal Services at GMHC in 1984.]

November 1983: BOY SCOUTS CAN'T DISCRIMINATE AGAINST GAYS: The Second California District Court of Appeals has ruled in *Curran v. Mt. Diablo Council of Boy Scouts of America*, 2-Civ.-66755 (10/3/83), that the Boy Scouts may not exclude an otherwise qualified adult from working as a Scouts volunteer leader, based on a "common law right of fair procedure" and the California Unruh Civil Rights Act. The court commented: "We have determined that using the status of homosexuality as a basis of expulsion is substantively arbitrary and therefore violative of the common law right of fair procedure." The unanimous three-judge panel reversed a trial court ruling and stated that the Boy Scouts would have to show a rational connection between homosexual conduct and "any significant danger of harm to the association resulting from the continued membership of the homosexual person" in order to prevail at trial. [Here is an ironic news item, in light of recent events. The *Curran* case kicked around the California court system for an unconscionable period of time before ultimately resulting in a ruling by the California Supreme Court that the Boy Scouts of America is not covered as a public accommodation under the *Unruh Civil Rights Act*. *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218 (Cal. 1998).]

December 1983: NY GOVERNOR ISSUES NARROW PRO-GAY EXECUTIVE ORDER: After almost eleven months of delay and frustration for the gay community, NY Governor Mario Cuomo issued Executive Order No. 28 on November 18, fulfilling pledges [*428] made in his primary and general election campaigns last year. The Order, which includes a defensive preamble seeking to placate opponents of gay rights, orders all state agencies not to discriminate against gay people with respect to employment or provision of services. A Task Force is established to make reports and recommendations with respect to employment or provision of state services to the gay community. The state Office of Employment Relations is directed to "promulgate clear and consistent guidelines prohibiting discrimination based on sexual orientation." Conspicuously absent from the Order is any requirement for contractors of the state to

comply with the anti-discrimination policy. Aides to the Governor have sought to justify the omission by citing to a mid-1970's NY Court of Appeals decision voiding a state executive order which required contractors to establish affirmative action programs. Gay activists are taking steps to document the constitutionality of extending the Order to state contractors.

January 1984: GAY LAW PROFESSORS TO MEET AT ANNUAL LAW SCHOOLS CONVENTION IN SAN FRANCISCO: The first official meeting of the American Association of Law Schools Section on Gay and Lesbian Legal Issues will be held at the annual AALS meeting in San Francisco during the first week of January. The section will present a program on "The Right of Privacy after Baker v. Wade," with Jim Barber, Baker's attorney, as speaker. A panel of commentators will include Professor Kenneth Karst and David Richards and attorney Mary Dunlap. Prof. Rhonda Rivera of Ohio State University Law School has headed the section through its formative year, and Dean Craig Christensen of Syracuse University Law School will be leading the Section for 1984.

March 1984: NON-PROFIT INCORPORATION DENIED GAY GROUPS BY MISSISSIPPI ATTORNEY GENERAL: The Mississippi Gay Alliance and a Mississippi chapter of Parents & Friends of Lesbians and Gays have been denied non-profit corporate status by the state's Attorney General. In a letter to the two groups explaining refusal to approve their corporate charters, Assistant AG Richard Allen cited the Mississippi sodomy law and stated: "For the state of Mississippi to approve a non-profit corporate charter of the type you submit would ostensibly give official legal status to an organization dedicated on its face to subverting this criminal statute." The two groups were planning to submit a third corporate charter for approval during February, using the name "Mississippi Alliance for Human Rights." The charters already submitted were described as using language similar to that in approved charters of other non-profit organizations, with nothing but their names giving any indication that they were "gay organizations." A spokesperson for both groups noted that Metropolitan Community Church was able to obtain approval for a corporate charter in Mississippi, and was hopeful that a name change on the submitted charter would be sufficient to get state approval.

May 1984: In *Korf v. Ball State University*, 726 F.2d 1222 (7th Cir. 1984), the court upheld the discharge of a gay university music professor who was charged with trading grades for sex with his male students. The professor argued that professor who carried on with students of the opposite sex were not subjected to discharge, but he was unable to refute the evidence that he had apparently enticed students with promises of academic rewards and could not cite any actual instance of the same conduct by a heterosexual teacher at Ball State. The court held that neither his constitutional rights nor his employment contract (which incorporates by reference various professional [*429] ethical codes) were violated by the discharge.

June 1984: LAW GROUP BECOMES BAR ASSOCIATION FOR HUMAN RIGHTS: After consultation by telephone among committee chairs and active members, the new name Bar Association for Human Rights of Greater New York (BAHR-GNY) was selected at the beginning of May. New incorporation papers were signed by Incorporator Arthur Leonard on May 3, the charter was cleared by the NY State Attorney General's Office on May 4, the charter was approved by Justice Jawn A. Sandifer of New York Supreme Court, New York County, on May 7 (see NYLJ, 5/9/84, p.12, col.5 [Special Term, Part 2]), and was accepted for filing by the New York Department of State on May 14. We are now official! On May 29, the Incorporator adopted the By-Laws which had been approved in our general membership meetings, and appointed an interim Board to conduct business until elections can be held. At its meeting on May 29, the Interim Board approved the change in name of the newsletter. Details of organizational activity will be reported in the BAHHR Organizational Report, which will be sent to members. Henceforth, this newsletter will deal with lesbian/gay legal news and will mention BAHHR developments when they are relevant thereto. [This was the first issue to appear under the name "Lesbian/Gay Law Notes."]

June 1984: SUPREME COURT REFUSES TO RESOLVE IMMIGRATION SPLIT: On May 29, the U.S. Supreme Court announced that it would not grant review in the Longstaff case, in which the Fifth Circuit Court of Appeals held that a gay man could not become a United States citizen because he was excludable under the Immigration laws. In denying certiorari, the Court left in place a split in circuit authority, as the Ninth Circuit has recently held that gays are not excludable under the Immigration laws as currently written. While a denial of review by the Court is not supposed to be interpreted as a decision on the merits, it is feared that lower courts will interpret the Court's action as approval of the Fifth Circuit's position. [*In re Longstaff*, 538 F. Supp. 589 (N.D. Tex. 1982), *aff'd*, 716 F.2d 1439 (5th Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984).]

Summer 1984: NEW YORK MAY GET FIRST OPENLY GAY JUDGE: Mayor Ed Koch has announced that, pending Bar Association approval, he will designate William Thom, a founder and first president of Lambda Legal Defense & Education Fund and a prominent member of the gay legal community, to serve on the Civil Court in New York

County for an interim term expiring December 31, 1984. Bill was reported favorably by the Independent Democratic Judicial Screening Panel last month, and is presently campaigning for the Democratic nomination for a full ten-year term on the Civil Court from Manhattan's first judicial district (lower Manhattan and Greenwich Village) with the endorsements of the Village Reform Democratic Club and the Gay & Lesbian Independent Democratic Club. If elected, he would become the first openly-gay elected judge in the United States. [Note: Thom was never successful in winning election to the Civil Court in several tries, but he was appointed to a series of interim vacancies by Mayor Koch.]

September 1984: FIFTH CIRCUIT HOLDS FOR GAY STUDENTS, AGAINST LESBIAN TEACHER: In two recent decisions, the U.S. Court of Appeals for the Fifth Circuit has dealt with the rights of gays on college campuses. In *Gay Student Services v. Texas A & M University*, announced August 3, the court, consistent with precedents in the First, Fourth, and Eighth Circuits, held that the failure of the public university's administration to extend recognition [*430] to the gay student organization violated the students' First Amendment rights of free speech and association. However, just three days later, in *Naragon v. Wharton*, a different panel of the circuit, with one dissent, held that Louisiana State University officials had not violated First and Fourteenth Amendment rights of a lesbian music instructor when they assigned her to non-teaching duties as a result of her affair with an undergraduate student. The student was above the age of consent and was not eligible for enrollment in any course taught by the instructor. The court found that the school's decision was not prompted by her homosexuality, but rather by the unprofessionalism of her conduct. In an angry dissent, Circuit Judge Irving Goldberg asserted that the majority was wearing blinders when it found that sexual orientation was not an issue in the case, noting testimony that heterosexual affairs between faculty and student had not provoked similar actions by the administration, raising serious equal protection issues. These two decisions are of particular interest to gay court-watchers, since a panel of the Fifth Circuit is still deliberating on the constitutionality of the Texas sodomy law, a fact which is footnoted in the *Gay Students* decision. Neither decision gives any hint as to the outcome of the pending case, but the unanimous opinion in *Texas A & M*, the strong Goldberg dissent in *Naragon*, and the efforts of the *Naragon* majority to show that her reassignment was not due to her lesbianism, may auger well for the imminent decision in *Baker v. Wade*. [My tea leaves were flawed, alas. *Gay Student Services v. Texas A & M University*, 737 F.2d 1317 (5th Cir. 1984); *Naragon v. Wharton*, 737 F.2d 1403 (5th Cir. 1984).]

October 1984: LANDMARK DECISION IN LESBIAN CUSTODY BATTLE: In a ruling which has drawn national attention, Alameda County (California) Superior Court Judge Demetrius Agretelis has ruled that Linda Loftin, a lesbian, may seek visitation rights with respect to the child of Mary Flournoy, her lover, after the couple's relationship has ended. The couple decided to have a child after being united in a 1977 church ceremony. Loftin's brother donated sperm so that Flournoy could bear a child, who was given the family name Loftin, with Linda Loftin listed as the "father" on the birth certificate. The couple split in 1980, with Loftin making voluntary support payments for the child, but Flournoy denied visitation rights to her. The judge held that Loftin was a psychological parent of the child and entitled to seek visitation rights. The director of a local sperm bank in Oakland stated that 40% of the recipients of sperm were lesbians, mostly members of couples. The sperm bank advises such couples to make contracts anticipating custody/support/visitation issues. [This opinion was not published, but I brought the case to the attention of Prof. E. Donald Shapiro of New York Law School, a leading scholar in the field of medicine and law, and he co-authored a law review article with his student research assistant, quoting extensively from the trial transcripts and the unpublished decision of the court. Prof. Shapiro, now retired, told me this was his most frequently-cited publication. E.D. Shapiro and S. Schultz, *Single-Sex Families: The Impact of Birth Innovations Upon Traditional Family Notions*, 24 *J. Fam. L.* 271 (1985-86).]

February 1985: VIRGINIA SUPREME COURT DENIES CUSTODY AND VISITATION TO GAY FATHER: In a unanimous decision issued January 18, the Virginia Supreme Court held that a ten year old girl who had been living with her gay father and his lover with "no adverse effect" under a trial court's joint custody order must be given over to the sole custody of the mother, with [*431] "a cassation of any visitations in the father's home, or in the presence of his homosexual lover, while his present living arrangements continue." *Roe v. Roe*, No. 832044 (Va. S. Ct., 1/18/85, Opinion by Russell, J.). The court's opinion does not discuss any expert testimony with respect to the best interests of the child. It does note that the trial court had conditioned partial custody for the father on "the requirement that he and his lover not share the same bed or bedroom." The supreme court held that the father's conduct in maintaining a gay relationship in the presence of his daughter "flies in the face of ... society's mores." Noting that the father's relationship is "punishable as a class six felony (Code Sec. 18.2-361) which is prosecuted with considerable frequency and vigor," the court termed the relationship "illicit" and intimated that adverse effects on the child could be presumed, despite the trial court's finding to the contrary. This decision shockingly illustrates the enormous task facing the gay legal community in educating the judiciary about homosexuality, for here is a decision poisoned by mythology and prejudice about gays and

children. The decision also underscores the importance of sodomy law reform, since the decision cites and relies upon the Virginia sodomy law. [*Roe v. Roe*, 324 S.E.2d 691 (Va. 1985).]

March 1985. **ACLU TO HIRE FULL-TIME GAY RIGHTS LAWYER:** The American Civil Liberties Union has tentatively agreed to hire a full-time lawyer to work on gay rights cases. The lawyer will be based in ACLU national headquarters in New York, and will concentrate at first on sodomy-challenge litigation. The ACLU decision grew out of a series of conferences coordinated by Lambda Legal Defense in which gay rights lawyers from around the country conferred on strategies for attacking sodomy laws in the remaining non-reform states. [Nan Hunter, now a professor at Brooklyn Law School, became the first director of the ACLU's Lesbian and Gay Rights Project.]

April 1985: **SUPREME COURT ROUNDUP: BOARD OF EDUCATION OF CITY OF OKLAHOMA CITY V. NGTF:** The Court announced on March 26 that the decision of the 10th Circuit Court of Appeals, holding unconstitutional an Oklahoma statute which authorized the discharge of public school teachers who spoke favorably about homosexuality, would be affirmed by vote of an equally divided court. Although the identities of the justices on each side of the issue were not revealed, observers speculated that Justices Brennan, Marshall, Blackmun and Stevens had voted to affirm and Justices Rehnquist, O'Connor, White and Chief Justice Burger voted to reverse, with Justice Powell (who missed the oral argument due to illness) abstaining. The announcement that three other cases argued during Justice Powell's absence from the bench would be set for reargument led some to speculate that Justice Powell agreed with the result in the split vote affirming the 10th Circuit. Because there was no written opinion for the court and no clear majority, this decision has no formal precedential value, but it preserves an important Circuit Court victory for the political rights of gays and our supporters. [*National Gay Task Force v. Board of Education of the City of Oklahoma City*, 729 F.2d 1270 (10th Cir. 1984), aff'd without opinion by equally divided Court, 470 U.S. 903 (1985).]

June 1985: **ELEVENTH CIRCUIT HOLDS GAY SEX WITHIN CONSTITUTIONAL PRIVACY SPHERE:** In a 2-1 panel decision announced May 21, 1985, the United States Court of Appeals for the Eleventh Circuit in Atlanta, Georgia, has held that "the Georgia sodomy statute implicates a fundamental right of [plaintiff] Michael Hardwick. The activity he hopes to engage [*432] in is quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation... We therefore remand this case for trial, at which time the State must prove in order to prevail that it has a compelling interest in regulating this behavior and that this statute is the most narrowly drawn means of safeguarding that interest."... Circuit Judge Frank Johnson, one of the heroic figures of the civil rights movement for his decisions as a district judge in Alabama and a member of the old Fifth Circuit, held with the concurrence of Senior Circuit Judge Tuttle that *Doe v. Commonwealth's Attorney* does not necessarily control the pending action, due both to *Doe's* uncertain scope as a summary affirmance without opinion which might have been disposed of on procedural grounds, and to developments subsequent to *Doe*, including Supreme Court decisions embracing a more expansive view of personal privacy rights and indications that a majority of the Supreme Court still considers the issue of gay sex to be an open constitutional question... This is a decision of great significance, since it essentially endorses the privacy analysis of the Texas district court in *Baker v. Wade*, which awaits reargument this month in the Fifth Circuit, and directly contradicts the privacy analysis of the D.C. Circuit in *Dronenburg v. Zech*, 741 F.2d 1388, in which Judge Bork held that no constitutional privacy right attaches to gay sex. With a decision in *Baker v. Wade* likely before the end of the year, and the direct circuit conflict with *Dronenburg*, it is reasonable to predict that this issue will be before the United States Supreme Court within a few years. [All too true; the Supreme Court reversed this opinion in *Bowers v. Hardwick* the following year. *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985), rev'd, sub nom. *Bowers v. Hardwick*, 478 U.S. 186 (1986).]

Summer 1985: **NEW YORK COURT OF APPEALS INVALIDATES PRO-GAY EXECUTIVE ORDER:** Announcing its 6-1 ruling on June 28, the sixteenth anniversary of the Stonewall Riots, New York's highest court held that Mayor Ed Koch's Executive Order 50, banning employment discrimination against gays by NY City contractors, was unconstitutional. The court reversed a 2-1 decision by the Appellate Division, First Department, which had held that the order was supported by the mayor's obligation under the Equal Protection provisions of the U.S. and state constitutions to avoid discriminatory state action. Key to both rulings was the characterization of the activities by the contractors. The Appellate Division majority argued that contractors who were providing social services to the general public with city money were engaging in state action. The Court of Appeals disagreed, holding that employment discrimination by city contractors would only amount to state action if the city were in some sense "responsible" for the discriminatory conduct... [Under *21 v. Koch*, 65 N.Y.2d 344 (1985). This problem was cured a year later when the City Council finally passed a local law forbidding employment discrimination, thus providing a legislative basis for a new executive order refusing city contracts to discriminatory contractors. But the mayor sought to avoid confrontation with religious chari-

ties that contracted with the city to provide social services, and so exempted them from compliance with the new executive order.]

October 1985: FEDERAL JUDGE RULES MILITARY POLICY MUST OVERRIDE LOCAL GAY RIGHTS ORDINANCE: In an order filed September 11 in *Temple University v. City of Philadelphia*, No. 85-1422 (E.D.Pa.), Judge James T. Giles held that Philadelphia's Fair Practices Act, which forbids, among other things, discrimination on the basis of sexual orientation by employment [*433] agencies, may not be sued to ban Department of Defense Recruiters from the Temple University Law School Placement office. Relying on rulings in several federal circuits upholding the constitutionality of the military's policy against recruitment of gay people, Judge Giles reasoned that the Supremacy Clause of the US Constitution made it invalid for a city to regulate or burden that military policy. The judge declined to rule on Temple's contention that the city law also infringed the university's First Amendment free speech rights. There is no written opinion in the case, because the judge ruled orally from the bench in response to cross-motions for summary judgment. Lambda Legal Defense Fund had filed an amicus brief on behalf of the Philadelphia Commission on Human Relations, which had been defending its February 15, 1985 order that Temple ban military recruiters. The lesbian and gay law students who had brought the original case at the City Commission, represented by attorney David Webber, are appealing the court's refusal to allow them to intervene in this case. It is likely that the whole matter will be brought before the Third Circuit. [So it was, the circuit affirming Judge Giles in *United States v. City of Philadelphia*, 798 F.2d 81 (3rd Cir. 1986).]

November 1985: An important case for those who are preparing wills for persons with AIDS is *Estate of Richard T. Thaler*, NYLJ, 10/3/85, p.7, col.1 (Surr. Ct., N.Y. Co., Lambert, S.), in which the court upheld a will executed in the hospital by a man who later died from AIDS. The will left the bulk of the man's estate to his lover, and was challenged by his parents. Important points were affidavits by attending medical personnel as to the state of mind of the testator, and evidence that the testator had not received any sedatives for more than a day before the execution ceremony. It is important to note, however, that this was not a "deathbed will," as the testator's condition improved after execution and he went home from the hospital shortly after making the will. The court rejected claims of undue influence by the lover, commenting that "the intimate nature of the relationship does not per se constitute undue influence."

January 1986: SHUTTLEWORTH VICTORY A RARE BRIGHT SPOT IN AIDS LEGAL NEWS: IN a decision widely hailed by advocates for the rights of persons with AIDS (PWA's), Florida Commission on Human Relations Executive Director Donal A. Griffin ruled on December 11 in *Shuttleworth v. Broward County Office of Budget and Management Policy*, FCHR No. 85-0624 (BNA Daily Labor Report No. 242, 12/17/85) that the Florida Human Rights Law, *Fla. Stats. Sec. 760.01-760.10*, forbids employment discrimination because of AIDS. Although agency officials in several other jurisdictions have taken a similar position with respect to the applicability of their state handicap discrimination provisions, the Florida decision was particularly anticipated because Florida is one of a handful of states in which the term "handicap" is not defined in the statute. See Leonard, "Employment Discrimination Against Persons With AIDS," 10 Univ. of Dayton L. Rev. 681, 692 n.48 (1985). In addition, the Shuttleworth case was the first to attract national media attention, and so could well set the tone for consideration of this issue in other jurisdictions. * * * Griffin relied on CDC policy statements that AIDS was not casually transmitted in reaching his ruling, and relied on the Eleventh Circuit's important decision in *Arline v. School Board of Nassau County*, 772 F.2d 759 (1985), to conclude that an infectious illness such as AIDS could be considered a handicap within the meaning of the state law. Now that Griffin has ruled, the parties are expected to negotiate an appropriate settlement of the case, although [*434] the County has the option to appeal the ruling to the full Commission. [The County did appeal, and the matter ended up in court, where Shuttleworth prevailed. *Shuttleworth v. Broward County Office of Budget & Management Policy*, 649 F. Supp. 35 (S.D.Fla.1986).]

February 1986: GEORGIA APPEALS COURT UPHOLDS TELEPHONE BOOK BAN: The Georgia Court of Appeals upheld Bellsouth Advertising & Publishing Corporation's decision to deny Christopher's Kind Bookstore the right to advertise in South Georgia Yellow Pages as a vendor of lesbian and gay literature. *Loring v. Bellsouth*, No. 70673, December 5, 1985. The decision, which will be appealed to the Georgia Supreme Court, produced a split of views on the court. Four judges concurred in the opinion, one concurred in the judgment only, two concurred specially, and one dissented. In essence, the court held that Bellsouth, a separate corporate entity from the telephone company, was not a regulated utility of the type that might be required to respect First Amendment rights; there being no state action in the decision that the words "lesbian and gay" could not appear in the directory, no constitutional right had been violated. Judge Pope, dissenting, argued that Bellsouth was a wholly owned subsidiary of the telephone company, the directory was part of the company's public service function, and the company had no rational basis for excluding the

advertising. [*Loring v. Bellsouth*, 339 S.E.2d 372 (Ga. Ct.App. 1985). The Georgia Supreme Court denied certiorari on January 29, 1986.]

March 1986: SUPREME COURT ARGUMENT IN HARDWICK SET FOR MARCH 31: ... Court watchers speculate that the result may hinge largely on the views of Justice Lewis Powell, whose failure to participate in last year's gay rights case before the Court (challenging an Oklahoma law mandating discharge of school teachers who supported gay rights) resulted in a split vote with no opinion for the Court. Although, as noted above, the Court may follow its practice of avoiding the controversial constitutional issue by deciding the case on standing, or may instead use the case as a vehicle for clarifying the precedential value of summary affirmances in cases such as *Doe v. Commonwealth's Attorney*, it seems more likely that, having passed by the opportunity to rule on the privacy issues in *Onofre* (51 N.Y.2d 476, cert. denied, 451 U.S. 987 [1981]) and *Uplinger* (58 N.Y.2d 936, cert. dismissed, 467 U.S. 246 [1984]), the Court's decision to take this case for argument signals its intention to confront the merits at long last. If the Court restricts itself to the questions presented by the certiorari petition and briefs and rules that privacy doctrine does extend to lesbian/gay sex, the result would be a remand for trial on the issue of state justification for the law. Although the compelling justification test would be hard to meet, it is predictable that the resulting trial would become an important test of the significance of AIDS for the sodomy law reform movement.

March 1986: NY COURT HOLDS AIDS A "HANDICAP" UNDER FEDERAL LAW: In a thoughtful and scholarly opinion, Queens County Supreme Court Justice Harold Hyman ruled on February 11 in *District 27 v. Board of Education*, No. 14940/85, that exclusion of children with AIDS from New York public schools could violate the Vocational Rehabilitation Act of 1973, sec. 504, which prohibits discrimination against the handicapped by any program receiving federal financial assistance. Holding that the City's decision to evaluate children and make attendance decisions on a case-by-case basis was not arbitrary and capricious, Hyman concluded on the basis of expert testimony and documentation that the virus believed to cause AIDS was [*435] not casually transmitted in a school setting, that transmission through "biting behavior" was remote at best, and that the fears of parents were unjustified, although understandable. He criticized the City for failing to take appropriate steps to develop policy in an open manner that would have educated the public to the underlying facts. (In a similar holding, Orange County, California Superior Court Judge Harmon Scoville ruled early in February that an 11 year old boy with AIDS had a right to attend classes; the Indiana controversy over school attendance by Ryan White is continuing as a state court judge is apparently trying to overrule federal holdings in the controversy!) Judge Hyman's Rehabilitation Act holding is of crucial significance, because it is likely to be the first published decision so holding, with important implications for the rights of PWA's in a wide variety of circumstances, including employment, publicly-assisted services, and federally subsidized housing. The federal administration has been vacillating about the applicability of the Act to AIDS, with Regional Offices accepting complaints but no formal position being taken. We are informed that Hal Freeman, the Regional Manager of the Office of Civil Rights of the U.S. Dept. of Health and Human Services in San Francisco, has resigned in protest over the refusal of department higher-ups to commit themselves to a position that the Act covers AIDS as a handicap. Recognition of AIDS as a handicap would be consistent with two significant US Courts of Appeals decisions, *Arline v. School Board of Nassau County*, a recent 11th Circuit case holding that tuberculosis was a handicap, and *New York State Association for Retarded Children, Inc. v. Carey*, a 1979 2nd Circuit decision holding that hepatitis B infection was a handicap. [*Local District Board 27 v. Board of Education*, 130 Misc.2d 398, 502 N.Y.S.2d 325 (N.Y.Sup.Ct., Queens Co. 1986).]

April 1986: GAY RIGHTS LAWS ADOPTED IN NEW YORK CITY, ATLANTA, AND DAVIS (CA): By a surprisingly wide margin of 21-14, the New York City Council on March 20 enacted amendments to the City's Human Rights ordinance which will include sexual orientation among prohibited bases of discrimination in employment, housing and public accommodations. The amendments, expected to be signed into law on April 2 by Mayor Ed Koch, will be enforced by the New York City Commission on Human Rights. Earlier versions of the legislation had been pending in the City Council for fifteen years, but this was only the second time that the bill had been voted out of committee for a full debate and vote by the Council. Opponents of the measure, led by Councilman Noach Dear and Cardinal John O'Connor, pledged to block its implementation through litigation or a referendum. According to city legal officers, a referendum could only be held to amend the city charter, not to repeal a specific law. The New York vote capped a busy legislative period for gay rights, as the Atlanta City Council had voted 14-4 on March 3 to amend that city's charter to protect gay and lesbian city employees from discrimination, and the Davis, California, city council had voted 4-1 on February 19 to adopt a comprehensive civil rights law on housing, employment and public accommodations which includes sexual orientation. A local group in Davis is trying to get a petition drive going for a referendum to remove sexual orientation from the law.

June 1986: CALIFORNIA A.G. OPINES GAYS PROTECTED UNDER STATE LABOR CODE: Expanding on the California Supreme Court's 1979 decision in *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*, 595 P.2d 592, Attorney General John Van de Kamp issued his Opinion on April 30 that lesbian and gay people are [*436] a "political class" protected from employment discrimination under secs. 1101 and 1102 of the Labor Code, originally enacted in 1915. The Opinion responded to an inquiry from Assemblyman Art Agnos, prime sponsor of a state gay rights bill which passed the legislature but was vetoed by the governor. California gays are already protected from discrimination in housing and public accommodations under the Unruh Civil Rights Act, Civil Code sec. 51. Thus, the AG's opinion would appear to complete a package resembling the traditional "human rights" law. However, Agnos states that a "Gay Rights Bill" is still needed in order to create the administrative machinery to enforce protected rights. Under the Labor Code, an aggrieved individual must retain his own attorney and initiate private litigation. Under a typical human rights law, filing of a complaint with an agency will set in motion an administrative process which usually results in the settlement of a case without actual litigation.

June 1986: NEW MOVEMENT LAWYERS ANNOUNCED: The American Civil Liberties Union has announced the appointment of Nan Hunter as staff counsel for its new Lesbian/Gay Rights Project. Nan is the first full-time ACLU national staff member whose work is devoted exclusively to lesbian and gay legal issues. She was previously employed as staff counsel for the ACLU's Reproductive Freedom Project. Lambda Legal Defense & Education Fund has announced the appointment of Paula L. Ettelbrick as its new staff attorney. Paula will work in Lambda's legal program directed by Legal Director Abby Rubenfeld. [She] was formerly associated with a major firm in Detroit, and has served on the board of directors of the Michigan Organization for Human Rights and its litigation committee.

Summer 1986: SUPREME COURT MAJORITY RULES AGAINST PRIVACY RIGHTS FOR GAYS IN GEORGIA CASE, DENIES REVIEW IN TEXAS CASE: A five-judge majority of the Supreme Court ruled on June 30 in *Bowers v. Hardwick*, No. 85-140, a challenge to the Georgia sodomy law, that the Constitution does not confer "a fundamental right upon homosexuals to engage in sodomy." On July 7, the Court dismissed petitions for certiorari pending in *Baker v. Wade*, a challenge to the Texas sodomy law, thus leaving in place a Fifth Circuit decision holding the law constitutional. Writing for the Court in *Hardwick*, Justice Byron White described as "facetious" the claim that a right of adults to engage in consensual gay sex in the privacy of a home could be described either as "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty," formulations the Court uses to describe fundamental rights protected from governmental invasion by the 5th and 14th Amendments. Joining White's opinion were Chief Justice Burger and Justices Powell, Rehnquist and O'Connor. In a separate opinion, the Chief Justice catalogued the history of prohibitions on sodomy dating from the Bible as a reason for holding that sodomy not be "protected" as a "fundamental right." Justice Powell's concurrence stated uneasiness with imposing a substantial prison term for consensual sodomy, but noted that the declaratory judgment action before the Court did not properly present the 8th Amendment issue of "cruel and unusual punishment." * * * In a dissenting opinion joined by Justices Brennan, Marshall and Stevens, Justice Harry Blackmun contended the majority had mischaracterized the case. Although it was brought by a gay man arrested for engaging in oral sex in his home, Blackmun asserted the case was not about "homosexual sodomy" as such, but rather about sexual privacy in the home. Where Justice White (a frequent dissenter in sexual privacy cases) found no "resemblance" between the [*437] right of gays to have sex and other privacy interests held protected by the Court, Justice Blackmun found such a resemblance based on his view that the privacy cases rest on a theoretical framework protecting the individual's right to make fundamental decisions about how to live his life and the individual's right to privacy in his home, stating: "the case before us implicates both the decisional and spatial aspects of the right to privacy." In a separate opinion joined by Brennan and Marshall, Stevens argued that the case raised serious issues of Equal Protection and vagueness which the Court should have addressed. Noting the concession by Georgia's attorney that the sodomy law would probably be invalid as applied to heterosexuals, Stevens asserted that "the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations." Assuming the statute's invalidity as applied to heterosexuals and lack of guidance for prosecutors, Stevens commented that undue discretion was given law enforcement officials for selective enforcement, raising serious vagueness issues. [*Bowers v. Hardwick*, 478 U.S. 186 (1986).]

September 1986: U.S. FINALLY ISSUES AIDS DISCRIMINATION RULING. After a two year delay during which the complainant died, the Office of Civil Rights, Department of Health and Human Services, issued a letter ruling in *Doe v. Charlotte (NC) Memorial Hospital*, #04-84-3096, holding that the hospital's refusal to consider reinstatement of a registered nurse with AIDS, whose doctors advised that he should be returned to work, violated sec. 504 of the Rehabilitation Act. The charge was filed by Lambda cooperating attorney John Boddie with the Atlanta Regional Office of OCR in 1984; the nurse died in February, 1986. Announcement of the ruling came at a hearing before the House Subcommittee on Intergovernmental Relations and Human Resources in Washington on August 6, at which Tom Stoddard

of Lambda testified about the inordinate delays in processing of AIDS discrimination charges by OCR. Betty Dotson, Director of OCR, testified that her agency was bound by the Justice Department's memorandum opinion that discrimination based on fear of contagion was not prohibited by sec. 504. However, the letter ruling states that even though the hospital cited fear of contagion as the reason for excluding the nurse, "the hospital could not have been motivated by the transmissible nature of complainant's condition because the function of the hospital's infectious disease control process is to evaluate all employees suffering from potentially transmissible ailments. Instead, the denial was motivated by the fact of the complainant's particular condition, i.e., AIDS." * * * At the same hearing, Rep. Barney Frank intensively cross-examined Assistant Attorney General Charles Cooper on the Justice Department's opinion. Cooper refused to waiver from his position, although he conceded that some of the assertions in the memo about medical opinions on transmissibility may have been faulty. Arthur Leonard testified that the opinion was wrong as a matter of law, inconsistent with existing precedents, and bad policy. The memo will be tested in *School Board v. Arline* and in *Shuttleworth v. Broward County*, 41 Fair Emp. Prac. Cases (BNA) 406 (S.D.Fla., July 8), in which the court overruled a motion to dismiss a sec. 504 claim by a PWA and set the matter for trial in December. There are also reports of a west coast federal court suit by a former Justice Department employee with IADS, which may provide another court test for the memorandum. The CDC count as of August 11 was 23,7000 cases. [The Shuttleworth case was settled before trial, but the Justice Department's [*438] memorandum was decisively repudiated by the Supreme Court in *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273 (1987).]

November 1986: FEDERAL JUDGE UPHOLDS CONSTITUTIONALITY OF DC AIDS-INSURANCE LAW: U.S. District Judge Thomas F. Hogan has ruled that the District of Columbia Council had a rational basis for enacting a law severely restricting the ability of insurance companies from discriminating against applicants suspected of being at risk for AIDS. *American Council of Life Insurance v. District of Columbia*, 55 U.S.L.Wk. (BNA) 2184 (D.D.C., 9/19/86). Rejecting an attack on the law by insurance industry associations, Judge Hogan noted that economic regulation enjoys the presumption of constitutionality when it is rationally related to a legitimate government purpose, and found that the Council's expressed purpose of ensuring access to care and treatment and assisting in the District's AIDS public health program satisfied the requirement of a legitimate purpose. Judge Hogan did express reservations about the five-year moratorium imposed on AIDS testing, given the rapidly changing knowledge of AIDS, and suggested that the Council need not wait five years to reconsider the wisdom of its policy. [*American Council of Life Insurance v. District of Columbia*, 645 F.Supp. 84 (D.D.C. 1986).]

January 1987: MINNESOTA COURT DECLARES SODOMY LAW UNCONSTITUTIONAL: Ruling December 1 on a motion to dismiss a criminal complaint in *State v. Gray*, No. 3103327, Hennepin County District Judge Pamela G. Alexander ruled that the Minnesota sodomy law, sec. 609.293(5), violates the Minnesota Constitution's right of privacy. Richard Gray, 45, had been charged with "oral sodomy" in July, after reporting a theft to police. The thief was a 16 year old, who represented himself to be 18 when Gray picked him up in downtown Minneapolis. The court found that their sexual relations had been voluntary, despite evidence that Gray paid the youth for sex at least once. The law prohibits oral and anal sex, regardless of gender or marital status of participants. * * * Noting the Supreme Court's *Bowers v. Hardwick* decision, Judge Alexander wrote: "In *Bowers*, the Court specifically left open the right of state courts to invalidate such laws on state constitutional grounds... Furthermore, the *Bowers* case was decided on a narrow issue - whether the Federal Constitution grants a fundamental right upon homosexuals to engage in sodomy. Unlike *Bowers*, the issue before this Court is whether the statute is unconstitutional on its face as could be applied to the public in general, in addition to the application of the statute to the defendant as to his right to be free from governmental intrusion concerning his private sexual decisions." [Unfortunately, the state successfully appealed this case on the ground that Gray's conduct came within the prostitution laws and could not provide the basis for a privacy challenge to the sodomy law. *State v. Gray*, 413 N.W.2d 107 (Minn. 1987). Judge Alexander's trial court opinion was not officially published.]

March 1987: CALIFORNIA COMMISSION ISSUES STRONG AIDS HANDICAP RULING; URGES PRELIMINARY INJUNCTIVE RELIEF IN DISCRIMINATION CASES: Reversing an Administrative Law Judge ruling from last summer which held AIDS was not a handicap under California law, the state's Fair Employment and Housing Commission ruled February 5 that discrimination against persons with AIDS based on fear of contagion violates the state's Fair Employment & Housing Act. *Dep't of Fair Employment & Housing v. Raytheon Co.*, No. FEP83-84 L1-031p L-33676 87-04 (full text in BNA's Daily Labor Report No. 29, 2/13/87, E-1.) The Commission [*439] unanimously rejected the argument that the state's law was preempted by the federal Rehabilitation Act (applicable to Raytheon as a federal contractor), which was interpreted by the Justice Department last year not to forbid AIDS discrimination. The Commission also rejected the notion that IADS was not a handicap because of its failure to fit neatly into the statutory language, relying upon *American Nat'l Ins. Co. v. FEHC*, 32 Cal.3d 603 (1982), where the state's Su-

preme Court held that a broad interpretation was appropriate, embracing any physically disabling condition that "makes achievement unusually difficult" and also "conditions ... that may handicap in the future but have no present disabling effect."

April 1987: SUPREME COURT EXTENDS DISCRIMINATION LAW PROTECTION TO PERSONS DISABLED BY CONTAGIOUS DISEASES: The U.S. Supreme court was busy handing victories (albeit oblique or partial in some cases) to gay people during March. The most decisive, by a vote of 7-2, came in *School Board of Nassau County, Florida v. Arline*, 107 Sup. Ct. - , 55 U.S.L.Wk. (BNA) 4245, 43 F.E.P.Cas. (BNA) 81, 42 E.P.D. (CCH) para. 36,791 (March 3, 1987), in which the Court rejected the theory underlying the Justice Department's AIDS Memorandum of last summer. Federal officials had contended that sec. 504 of the Rehabilitation Act of 1973, which forbids discrimination in programs receiving federal money "solely by reason of ... handicap," would not forbid discrimination against persons with AIDS if motivated by fear of contagion. The Justice Department admitted that AIDS was a "handicap" ("handicap" being defined as a "physical impairment" "affecting a major life activity"), but contended that only discrimination motivated by the "impairment" as such was handicap discrimination, and that contagiousness was not itself an "impairment." The Department also opined that persons believed to be infected but not actually impaired would not be protected from discrimination either. * * * ... Rejecting the Justice Department's view of the statute, the Court stated: "Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of sec. 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others. By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." The Court refrained from stating whether HIV-seropositive persons are protected by sec. 504, noting that the issue was not directly presented by the case because Ms. Arline's tuberculosis gave rise to an actual impairment. However, the Court's reasoning gave hope to legal advocates for persons affected by AIDS that seropositive persons would be protected as persons who "are regarded as having an impairment." The footnote on AIDS (the only mention of AIDS in the opinion) may have been necessary to secure certain votes on the Court... [*School Board of Nassau County, Florida v. Arline*, 480 U.S. 273 (1987).]

June 1987: TO TEST OR NOT TO TEST, THAT IS THE AIDS QUESTION!: So-called "AIDS testing," i.e., blood tests for antibodies to HIV, a retro virus believed to be a causative agent for AIDS, became the central issue of debate as the CDC case count approached 36,000 during May. President Reagan announced he will appoint [*440] a national commission to recommend policies on AIDS; furious debate ensued over White House statements that no provision would be made for gay representation on the commission, and it was noted that the president was appointing a commission to preempt Congressional efforts to establish such a body over which the president would not have full appointing power. AIDS became a more personal matter for Congress as Rep. Stewart B. McKinney, a Connecticut Republican, died from AIDS and the Washington Post reported that McKinney, a married father, had engaged in homosexual affairs.

Summer 1987: D.C. CIRCUIT: NO EQUAL PROTECTION FOR GAYS: A three-judge panel of the U.S. Court of Appeals for the D.C. Circuit ruled June 26 in *Padula v. Webster*, No. 86-5053, that employment discrimination against gays by the Federal Bureau of Investigation does not offend the Constitution. Basing its decision *Bowers v. Hardwick*, 106 S.Ct. 2841 (1986) and *Dronenburg v. Zech*, 741 F.2d 1388 (D.C.Cir. 1984), the court ruled that the Bureau's refusal to hire a well-qualified job applicant who is an out-of-the-closet lesbian was justified on the basis of fears of blackmail and the assertion that the FBI's credibility would be undermined by employment of agents whose sexual activities were subject to criminal prosecution in many states. * * * The opinion by Judge Laurence Silberman (Judge Robert Bork was also on the panel) is a classic in judicial homophobia. The court defines the purported "class" for equal protection analysis as "persons who engage in homosexual conduct" and comments: "It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause. More importantly, in all those cases in which the Supreme Court has accorded suspect or quasi-suspect status to a class, the Court's holding was predicated on an unarticulated, but necessarily implicit, notion that it is plainly unjustifiable (in accordance with standards not altogether clear to us) to discriminate invidiously against the particular class ... If the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." In other words, discrimination against gays is not invidious because it is justifiable! Although the court then goes

on to say that a rational basis is required for the discriminatory policy, it finds it easy to imagine at least two: the credibility and blackmail rationales. [*Padula v. Webster*, 822 F.2d 97 (D.C.Cir. 1987).]

September 1987: S.F. FEDERAL JUDGE: YES TO EQUAL PROTECTION FOR GAYS: U.S. District Judge Thelton E. Henderson's decision in *High Tech Gays v. Defense Industrial Security Clearance Office*, No. C84-6078 (U.S.D.Ct., N.D.Cal., 8/19/87), holding that homosexuality is a "quasi-suspect classification" subject to "heightened scrutiny" under the Constitutional requirement of Equal Protection, directly contradicts the holding and reasoning of the D.C. Circuit Court of Appeals in *Padula v. Webster*, 822 F.2d 97 (1987) (reported at 1987 LGLN 38 [Summer]). Ruling on cross-motions to dismiss in a challenge to the Defense Department's procedures for dealing with security clearance applications by lesbians and gay men, Judge Henderson (a Carter appointee) held that the Defense Industrial Security Clearance Office (DISCO) may not subject applicants to extended and usually negative procedures merely on the basis that they are gay or suspected of being [*441] gay. He further ruled that DISCO's practice of singling out members of gay organizations for special investigation violates the First Amendment. Richard Gayer, Esq., of San Francisco, brought the class action suit on behalf of members of High Tech Gays, an organization of gays employed in technological occupations. The certified class includes all applicants or holders of security clearances over the past five years... [*High Tech Gays v. Defense Industrial Security Clearance Office*, 668 F.Supp. 1361 (N.D.Cal. 1987), reversed, 895 F.2d 563 (9th Cir.), denial of rehearing en banc, 909 F.2d 375 (9th Cir. 1990).]

September 1987: PRESIDENTIAL AIDS COMMISSION EXCLUDES EXPERTS: The major AIDS news of the summer, as the CDC case count surpassed 40,000, was President Reagan's appointment of a national AIDS commission which included no experts on the epidemic, and was sharply tilted in its membership toward right-wing demagogues. Although the commission has already made history by including the first openly-gay presidential appointee in American history, Dr. Frank Lilly of Albert Einstein Medical College (a biochemist whose background does not include any direct AIDS research - Dr. Lilly is also the only biomedical researcher on the panel), the bulk of the appointments (including Cardinal John O'Connor of New York, a leading homophobic bigot) has spurred Congressional action to create a real national commission of experts. Rep. Henry Waxman and Senator Edward Kennedy have jointly introduced a major legislative proposal, H.R. 3071, to fund more widespread voluntary HIV antibody-testing programs and to enact federal protection against discrimination for seropositive persons. But the Public Health Service issued new guidelines on testing (36 MMWR No. 31, 8/14/87) which seriously undermine the positive results that came out of last February's CDC conference on the subject; the guidelines, reportedly redrafted by White House ideologue Gary Bauer and his staff, essentially adopt the position articulated by President Reagan favoring widespread "routine" testing for hospital admittees, women of childbearing age, marriage license applicants and the like. The political crisis surrounding AIDS is becoming vicious. [Note: It is fair to comment that Reagan's AIDS Commission surprised everybody by issuing a list of recommendations that included legal protection for privacy and against discrimination, largely drafted by the Commission's staff of real experts retained by the figurehead commissioners.]

December 1987: GEORGETOWN UNIVERSITY GAY STUDENTS WIN EQUAL TREATMENT: After two years of consideration, a divided en banc District of Columbia Court of Appeals has determined that gay student organizations at Georgetown University are entitled to equal treatment with other student organizations, but that the University may not be compelled to extend "official recognition" to them. *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, No. 84-50 & 84-51 (11/20/87). The case dates from early 1979, when Gay People at Georgetown University (GPGU) received Student Government approval but was denied "university recognition" as an official organization by the administration on the ground that Georgetown, a "Catholic university," could not grant recognition compatibly with its religious mission. Later in 1979 the Gay Rights Coalition at the Law School encountered a similar refusal. Both student groups brought suit under the District of Columbia's Human Rights Act, which forbids, inter alia, discrimination in educational opportunities on the basis of sexual orientation. [The full report of the case in Law Notes was the [*442] longest article to appear up to that time, due to the convoluted decision of the court, which generated seven lengthy opinions, with various coalitions of judges combining on each point of the holding.] ... Trial counsel for the gay student groups was BHR member Ron Bogard, now an Assistant Corporation Counsel in New York City. Appellate counsel was Richard A. Gross. Amicus briefs were filed by a host of organizations on both sides of the case. (The ACLU had an embarrassing split: the head of the local organization filed a brief on behalf of Georgetown, while the national ACLU filed a brief in support of the student groups.) [*Gay Rights Coalition v. Georgetown University*, 536 A.2d 1 (D.C.App. 1987).]

February 1988: COURT REBUFFS CHALLENGE TO REAGAN AIDS COMMISSION: In a December 16 opinion, U.S. District Judge Oliver Gasch denied a motion to grant preliminary injunctive relief against further operation of

President Reagan's AIDS Commission, holding that "Plaintiffs are not likely to succeed on the merits of their complaint and no irreparable harm is likely to result in the absence of a preliminary injunction." *National Association of People With AIDS v. Reagan*, No. 87-2777-OG (D.Ct., D.C.). The action, brought by a coalition of AIDS service groups and persons with AIDS, contended that the composition of the Commission violated the president's executive order creating it as well as the Federal Advisory Committee Act, 5 U.S.C. App. I, secs. 3 & 5(b)(2), which requires that advisory commissions "be fairly balanced in terms of the points of view represented and the functions to be performed;" the president's order provided for a commission consisting of persons with relevant expertise. * * * The suit was filed in October after several unsuccessful attempts by the plaintiff groups to persuade the White House to appoint additional Commissioners representative of people with AIDS and those who represented their interests. The complaint alleged that the Commission was stacked with people lacking relevant expertise who had stated views about aspects of the epidemic outside the "mainstream" of current medical thought. Judge Gash noted the resignation of two members and their replacement by two persons who have been more directly active in AIDS matters (the two new commissioners are members of organizations which are plaintiffs in the case), and also observed that "another is directly involved in the treatment of AIDS patients - Cardinal O'Connor." One is hard-pressed to interpret this last statement; is O'Connor's credential that he is nominal head of a Catholic hospital system in New York with many AIDS patients, or that he shows up at one of those hospitals from time to time to carry some bedpans and talk to patients? * * * Further, Judge Gasch observed that the complaint had actually singled out for attack as "extremist" only four of the commissioners out of the 13 members, and described as "surrealistic" the standard suggested by plaintiffs for determining whether commissioners are in the "mainstream," which he described essentially as letting the immediately affected groups (PWA's and health care providers) define the "mainstream." The judge also noted that the Commission had been holding public hearings at which representatives of the plaintiff groups had been allowed to testify; thus, he concluded, the failure to afford them direct representation on the Commission was not locking them out of the process. The judge dismissed as "speculative" the contention that allowing the Commission to continue its work would result in irreparable injury. The ruling came shortly after the Commission issued its preliminary report, which spokespersons for the plaintiff organizations had greeted with measured praise in statements to the media.

[*443] March 1988: NINTH CIRCUIT VOIDS ANTIGAY ARMY REGULATIONS: In a major breakthrough for gay rights under the Equal Protection requirements of the Constitution, the U.S. Court of Appeals for the Ninth Circuit ruled February 10 in *Watkins v. U.S. Army*, No. 85-4006, that "sexual orientation" is a suspect classification and the military's purported justifications for excluding gays fail to withstand strict scrutiny required by Equal Protection precedents. The 3-judge panel (all Carter appointees) split 2-1, but dissenting Judge Stephen Reinhardt indicated that were it not for *Hardwick and Beller v. Middendorf*, he would have joined his colleagues in the majority... [*Watkins v. U.S. Army*, 837 F.2d 1428 (1988), aff'd on other grounds en banc, 875 F.2d 699 (9th Cir. 1989)]. Although a victory for the plaintiff, the en banc decision erased the first federal appellate decision to hold that anti-gay discrimination by the government is subject to strict scrutiny by the courts.]

May 1988: ISRAEL REPEALS SODOMY LAW: The most surprising legislative development this month comes from the Holy Land! On March 23, the Israeli Knesset (Parliament) enacted a package of bills reforming Israel's sex crimes statutes which effectively decriminalized consensual sodomy, lowered the age of consent, and made homosexual and heterosexual rape equal offenses. The repealed sodomy law, which provided for a ten year prison sentence, dated from the British Mandate (which expired in 1948), but had never been enforced. The right-wing Religious parties absented themselves from the Knesset during the vote.

August 1988: UNANIMOUS 8TH CIRCUIT PANEL RULES FOR ARKANSAS LESBIAN/GAY STUDENTS: A 3-judge panel of the 8th Circuit Court of Appeals ruled June 22 in *Gay and Lesbian Students Assoc'n v. Gohn*, No. 87-1569, that the University of Arkansas at Fayetteville violated the First Amendment by refusing to overturn the Student Senate's 1985 decision to deny funding to the Gay and Lesbian Students Association (GLSA). GLSA, formed in 1983, requested funding that year and in subsequent years. The 1983 request was voted down, although GLSA met requirements for funding, no other student group was denied funding, and there was excess money in the treasury. In 1984, GLSA's funding request got through as part of a package with other student groups; immediately after the vote, the Senate resolved to forbid future funding of groups organized around "sexual preference" and state legislators met with University officials to protest funding the gay and lesbian student group. When the Senate voted down GLSA's 1985 request and University officials refused to overrule the vote, GLSA sued. * * * The District Court held for the University, emphasizing there was no entitlement to government funding. The Court of Appeals reversed in an opinion by Circuit Judge Richard Arnold (a Carter appointee), holding that even if government funding was not a right, once it was authorized it must be impartially administered without regard to the political content of programs presented by individual groups, unless the content was not subject to First Amendment protection. The Court asserted that "the record is replete

with evidence that the Senate's action was based on viewpoint discrimination... The GLSA met all objective criteria for funding... It is apparent that GLSA was denied... funds because of the views it espoused."... The University has not indicated whether it will appeal. GLSA was represented on appeal by the ACLU Gay and Lesbian Rights Project, whose director, Nan Hunter, argued the case. [*Gay and Lesbian Students Association v. Gohn*, 850 F.2d 361 (8th Cir. 1988).]

[*444] September 1988: NATIONAL LEGAL CONFERENCE ON LESBIAN & GAY ISSUES IN NOVEMBER: A national conference on Lesbian and Gay Legal Issues, "Lavender Law," will occur Saturday and Sunday, November 12 & 13, 1988, at Golden Gate Law School in San Francisco. The AIDS Legal Referral Panel of San Francisco will present a conference on AIDS legal issues on Friday, November 11, at the War Memorial Building. The Lavender Law conference, organized by a committee established at the March on Washington in October 1987, will feature speakers from across the country and is co-sponsored by several legal organizations and gay lawyer associations. [This first Lavender Law Conference led to the formation of the National Lesbian & Gay Law Association, which has sponsored successive conferences.]

November 1988: L.A. CITY COUNCIL APPROVES LIMITED DOMESTIC PARTNER BENEFITS: The first positive result of last spring's Los Angeles Family Diversity Task Force Report was an October 4 vote by the Los Angeles City Council to approve the concept of inclusion of domestic partners in the definition of "immediate family" for family sick leave and bereavement leave allowances. The 10-2 vote approved "in principle" Task Force Recommendation No. 104, which suggested amending the Administrative Code to allow city employees to use paid leave to care for ailing domestic partners or to attend the funeral of a domestic partner. Domestic partners would have to register their status by filing an affidavit with the Personnel Department, alleging that they have resided together in the same household for 12 months, share the common necessities of life, have a mutual obligation of support and are each other's sole domestic partner, are both over 18 years of age and are competent to contract, are not married or related by blood to each other, and will notify the appropriate agency within 30 days of any change with regard to their status.

March 1989: 8TH CIRCUIT: MANDATORY TESTING BY PUBLIC EMPLOYER BARRED BY 4TH AMENDMENT: A unanimous panel of the 8th Circuit Court of Appeals ruled on February 6 that Eastern Nebraska Community Office of Retardation violated the 4th Amendment rights of its employees to be free of unreasonable searches and seizures when it adopted a policy of mandatory HIV antibody testing. Affirming a trial court decision in *Glover v. ENCOR*, 686 F. Supp. 243 (D. Neb. 1988), the Court held that evidence introduced at trial supported the determination that HIV infected employees would present virtually no risk of workplace transmission to the mentally retarded clients of ENCOR. The Court cautioned, however, that such a determination had to be based on the individual factual situation, and that it was not adopting a "broad-based rule with regard to testing public employees for any infectious disease, including AIDS." ENCOR employees were represented by Omaha attorney Patrick Kennison and the ACLU of Nebraska. * * * Despite the cautious note sounded by the Court, the strongly worded district court opinion should provide a firm constitutional basis for challenging other governmental testing programs. In that regard, Lambda Legal Defense Fund recently filed a motion for summary judgment in its challenge to the U.S. Department of Labor's testing program for Job Corps participants, *Dorsey v. U.S. Dept. of Labor*, urging the federal district court in Washington, D.C., to rule that the program was adopted in violation of the Administrative Procedure Act. If the motion succeeds, the policy might have to be rescinded pending proper publication and comment. The Job Corps contends that the case is moot because it has modified its policy away from automatic exclusion of all HIV [*445] positive applicants. [*Glover v. Eastern Nebraska Community Office of Retardation*, 867 F.2d 361 (8th Cir. 1989), cert. denied, 110 S.Ct. 321 (1989).]

May 1989: BAHR PRESIDENT WINS MAJOR AIDS TRIAL ON BEHALF OF PROMINENT GAY PHYSICIANS: BAHR President Morton Newburgh won a jury verdict March 31 in *Seitzman and Minola v. Hudson River Associates* (Sup. Ct., N.Y. Co., Baer, J.), in which doctors Peter Seitzman and Joseph Minola charged the sponsor of a cooperative apartment building with breach of a contract to sell them an apartment for use as a medical office. Testimony at trial centered on the risk, if any, to other occupants of the building from having a medical office where persons with AIDS were treated; Dr. Stephen Joseph, NY City's Health Commissioner, responding to the question of risk, stated "None whatsoever... Absolutely none. Zero." However, the doctors have to be content with a monetary award, since the cooperative sponsor no longer has voting control of the building and the apartment was sold to others before trial. The jury awarded approximately \$ 90,000 in compensatory damages; the overall claim, including punitive damages, was settled after the verdict for \$ 180,500.

Summer 1989: NEW YORK HIGH COURT RECOGNIZES GAY FAMILIES: The New York Court of Appeals ruled 4-2 in *Braschi v. Stahl Associates* on July 6 that unmarried domestic partners of deceased tenants in rent controlled apartments were entitled to protection from eviction as "family members" under a state rent control regulation

which forbids eviction of members of a deceased tenant's family who resided with the tenant. * * * The case involved a gay male couple, Leslie Blanchard and Miguel Braschi. When Blanchard died from AIDS, the landlord sought to evict Braschi from the apartment where they had resided together for ten years. Braschi sued to enjoin his eviction. Trial judge Harold Baer, Jr., ruled that their relationship "fulfills any definitional criteria of the term 'family,'" but the Appellate Division, First Department, reversed, holding that the regulation, Section 2204.6(d), which does not define "family," should be construed narrowly to include only relatives by blood, marriage or adoption. * * * The Court of Appeals disagreed. A plurality opinion by Judge Vito Titone adopts a broad, policy-based view of the regulation... [extended quotation from the opinion omitted here] Judge Titone's opinion does not specifically mention gay people or sexual orientation, and due to the gender-neutrality of Blanchard's first name (Leslie) one could read the first twelve pages of the opinion without even realizing it involved a same-sex couple. At that point, in evaluating the facts in Braschi's complaint, Titone first refers to the couple as "the two men," and concludes that a court could reasonably hold that the two men "were more than mere roommates." The plurality clearly treated the case generically as involving all unmarried adult domestic partners (although the term "domestic partner" is never used in the opinion)... Bill Rubenstein of the ACLU Lesbian and Gay Rights Project argued the appeal for Braschi. Seven amicus briefs were filed in Braschi's behalf, including briefs from the City of New York (urging broad construction of the term "family") and the Association of the Bar of the City of New York (urging a broader decision on constitutional equal protection grounds). The Court refrained from any mention of constitutional grounds, thus restricting the decision to the rent control context and leaving numerous pending cases on similar facts to be resolved under the Rent Stabilization Law, while precluding a United States Supreme Court appeal. [*Braschi v. Stahl Associates Co.*, 74 N.Y.2d 201, [*446] 543 N.E.2d 49, 544 N.Y.S.2d 784 (N.Y. 1989).]

September 1989: NEW YORK MAYOR KOCH ISSUES EXECUTIVE ORDER ON DOMESTIC PARTNERSHIPS: New York City Mayor Edward I. Koch issued Executive Order 123 on August 7, authorizing the city's Department of Personnel to accept registration statements from "domestic partners" and extending the city's policy on bereavement leave so that city employees may take paid leave to attend funerals for their domestic partners, partners' parents or children, or other relatives of the partner living with them. The policy binds all mayoral agencies, and is also expected to be followed by the Health and Hospitals Corporation and the Board of Education. The Order defines "domestic partnerships" as consisting of "two people, both of whom are 18 years of age or older and neither of whom is married, who have a close and committed personal relationship involving shared responsibilities, who have lived together for a period of one year or more on a continuous basis at the time of registration, and who have registered as domestic partners..."

September 1989: BUSH MAKES AIDS COMMISSION APPOINTMENTS: President George Bush finally made his appointments to the National AIDS Commission in July, naming Belinda Mason, president of the National Association of People with AIDS, and Professor David Rogers of Cornell Medical College, who chairs New York State and City AIDS Task Forces. PWA advocacy groups hailed the choices. Unlike President Reagan's "HIV Commission," appointed to include few persons with AIDS expertise, the new Commission, jointly appointed by the President, the Senate and the House of Representatives, includes leading AIDS "experts" and advocates. At its first meeting, the Commission elected Dean June Osborn of the University of Michigan School of Public Health as its chair.

December 1989: MASSACHUSETTS ENACTS GAY RIGHTS LAW: Massachusetts became the second state to enact a gay rights law on November 15, when Governor Michael S. Dukakis signed H 5427, which amends the Massachusetts Law Against Discrimination to add to the prohibited bases for discrimination "sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object." (Those who might find this category odd are reminded that the North American Man/Boy Love Association was founded in Massachusetts and is a major issue for local politicians.) Sexual orientation is defined as "having an orientation for or being identified as having an orientation for heterosexuality, bisexuality, or homosexuality." * * * In addition to banning discrimination in employment, housing, bonding, and public accommodations, the bill gives the Massachusetts Commission Against Discrimination authority to investigate and prosecute violations. The chair of the MCAD, Alex Rodriguez, told a reporter from BNA that the agency projected a 15% increase in its caseload as a result of the new categories covered by the law, which goes into effect in February. Opponents vowed to secure sufficient signatures to force a statewide referendum on the law next November. * * * Enactment capped seventeen years of organizing and lobbying efforts by Massachusetts gays. Arlene Isaacson, head of the state's principal lesbian and gay rights lobbying organization, emerged as the leading spokesperson. A last minute strategic decision to support passage with some weakening amendments added by the state Senate clouds the victory, however. One of the amendments may preclude litigating the issue of domestic partner benefits under the statute, while others excuse all religious institutions from compliance [*447] and disclaim any intent to authorize or require placement of adoptive or foster children with gays. The law also includes a ritualistic statement that

the law does not involve an endorsement or approval of homosexuality or bisexuality. The inclusion of such demeaning statements in a civil rights law reaffirms the status of gays as perhaps the least popular minority group, even among those who acknowledge that we are entitled to civil rights.

January 1990: MASS. A.G. BLOCKS GAY RIGHTS REFERENDUM: Massachusetts Attorney General James Shannon has ruled that because the recently enacted Gay Rights Law "relates to religion, religious practices, or religious institutions," it may not be the subject of a referendum vote because such laws are expressly excluded by the state's constitution from voter initiatives. In an opinion issued on December 7, Shannon reasoned that the religious exclusion provisions (which were insisted upon by legislative opponents of the Gay Rights Law) conferred a benefit upon religious institutions by broadly exempting them from compliance with the Massachusetts Law Against Discrimination, and thus could not be put up for a repeal vote by the general public. Amendment Article 48 of the Massachusetts Constitution requires the Attorney General to certify that petitions submitted to initiate the referendum process are in proper form and do not include material expressly excluded from consideration by that Article. Gay & Lesbian Advocates and Defenders, a public interest law firm in Boston, filed a brief with Shannon arguing that the various provisions of the Gay Rights Law dealing with exclusions and exemptions for religious institutions brought the law within the ambit of the constitutional exclusion. [Note: the Massachusetts Supreme Judicial Court subsequently confirmed Attorney General Shannon's opinion in *Collins v. Secretary of Commonwealth*, 407 Mass. 837, 556 N.E.2d 348 (Mass. 1990).]

February 1990: LAW SCHOOLS VOTE DISCRIMINATION BAN: The House of Representatives of the Association of American Law Schools (AALS) voted January 6 in San Francisco to amend the AALS By-Law Section 6-4 to require member schools to "provide equality of opportunity in legal education for all persons, including faculty and employees, with respect to hiring, continuation, promotion and tenure, applicants for admission, enrolled students, and graduates, without discrimination or segregation on the ground of ... handicap or disability, or sexual orientation." The new By-Laws also provide, "A member school shall communicate to each employer to whom it furnishes assistance and facilities for interviewing and other placement functions the school's firm expectation that the employer will observe the principle of equal opportunity." This provision follows a sentence which requires schools to "pursue a policy of providing its students and graduates with equal opportunity to obtain employment, without discrimination or segregation on the ground of ... handicap or disability, or sexual orientation." Taken together, this may mean that the law school community has enlisted in the campaign to end the Justice Department's homophobic exclusionary policies, as well as adopting policies protecting people with AIDS from discrimination under the "disability" rubric. The House also added "age" to the list of protected categories, and adopted an affirmative action requirement with regard to race, color and sex.

April 1990: IOWA SUPREME COURT RULES FOR GAY FATHER ON VISITATION: The Iowa Supreme Court unanimously ruled in *Walsh v. Walsh*, 1990 WL 16834 (2/21/90) that a trial court erred by restricting Michael Walsh's visitation with his young children to times when "no unrelated [*448] adult" was present. Susan Walsh had conceded that Michael was a "good, loving and responsible father to his children." The trial court had awarded joint custody, the children to reside with Susan but with liberal visitation rights for Michael, whose "coming out" precipitated the divorce. The Supreme Court commented, "This unusual provision was obviously imposed on account of Michael's homosexual lifestyle," noted the findings about Michael's fitness and his assertion that his children would not be "exposed" to his "private sex life," and concluded that "Michael's visitation rights should not be restricted by limiting them to times when no unrelated adult is present." The court also ruled that Michael's visitation should be expanded to include a full week during the summer. The trial court had only awarded weekend visitations. Lambda Legal Defense and National Center for Lesbian Rights filed a joint amicus brief, centering on scientific research on gay parenting and child rearing. [*Walsh v. Walsh*, 451 N.W.2d 492 (Ia. 1990).]

May 1990: OHIO SUPREME COURT APPROVES ADOPTION BY GAY MAN; REVERSES MOST HOMOPHOBIC OPINION OF RECENT YEARS: Repudiating what may be the most homophobic appellate decision of recent years, the Ohio Supreme Court approved the adoption of an eight-year-old boy by a gay psychologist on March 28 in *Matter of Adoption of Charles B.*, No. 88-2163. The 6-1 vote decisively rejected a 1988 decision by the 5th District Court of Appeals, which had ruled that "the goals of announced homosexuality are hostile to the goals of the adoption statute" and that, as a matter of law, it is not in the best interest of the then-seven-year-old child to be "placed for adoption into the home of a pair of adult male homosexual lovers." This may be the first time a highest state court has explicitly approved an adoption of a minor by an openly gay adult. * * * Attorney C. William Rickrich represented the minor, Charles, as guardian ad litem, and attorney Robin Lyn Green represented the gay psychologist, referred to in the opinion as "Mr. B." Amicus briefs were also filed on Mr. B's behalf by Lambda Legal Defense & Education Fund, the ACLU,

the Institute for Child Advocacy, and the Gay & Lesbian Parenting Group of Central Ohio ... [*In re Adoption of Charles B.*, 50 Ohio St.3d 88, 552 N.E.2d 884 (Ohio 1990).]

June 1990: GAYS INVITED TO SIGNING OF BIAS BILL AT WHITE HOUSE: For the first time, representatives of gay and lesbian groups were invited to the White House to witness the signing of the first federal law to deal explicitly with sexual orientation as a protected class [sic]. President George Bush signed the new federal Hate Crimes Statistics Act on April 23 with representatives of the National Gay and Lesbian Task Force and the Human Rights Campaign Fund in attendance. The law mandates the Justice Department to compile national figures on hate crimes, including crimes motivated by actual or perceived sexual orientation of the victim. Bush announced that a national toll-free phone number would be established for reporting such crimes. Pointedly not invited to the signing ceremony was Task Force Executive Director Urvashi Vaid, who earned White House antipathy by publicly interrupting a Bush speech on AIDS.

October 1990: CALIFORNIA APPEALS COURT RULES AGAINST LESBIAN CO-PARENT: In one of two similar cases working their way through the California courts, the Court of Appeal for the Third Appellate District ruled August 22 that Angela Curiale, co-parent of a child borne by Robin Reagan, did not have standing to bring an action for determination of visitation rights... On appeal, the [*449] unanimous court in an opinion by Presiding Judge Puglia agreed that no provision of California statutory law gave any support to Curiale's claim. In addition, the court rejected Curiale's argument that it should strike out into new territory in "the best interests of the child by conferring legal parental status on those who in reality act as the child's parent, without totally depriving the biological or adoptive parent of their rights." Asserting that plaintiff "misconceives the role of the judiciary as an innovator of social policy," the court holds that it is up to the legislature to determine whether the de facto parent doctrine should be used to confer standing on "unrelated" parents to contest custody and visitation ... Nancy Kirk and M. Jane Pearce represented Curiale and William Neil Shepard represented Reagan. [*Curiale v. Reagan*, 222 Cal.App.3d 1597, 272 Cal. Rptr. 520 (Cal.App. 3rd Dist. 1990).]

December 1990: CONGRESS REPEALS ANTI-GAY IMMIGRATION POLICIES: As Congress rushed to adjourn before the elections, the Senate and House overwhelmingly passed the Family Unity and Employment Opportunity Act of 1990. The Bush Administration supported the bill in its final form, and approval was expected from the President. Among other things, the Act ends an anti-gay exclusionary policy of fifty years standing. It may also eventually end the policy of excluding HIV-seropositive immigrants. The Senate vote Oct. 26 was 89-8; the House vote Oct. 27 was 264-118. * * * Repealing the anti-gay exclusion (included in the medical exclusion section of the law under the headings of "psychopathic personality" and "sexual deviation") was the principal legislative project of Rep. Barney Frank (D-Mass.). Frank introduced repeal bills for several years and secured favorable testimony from representatives of the Reagan and Bush administrations. This year he succeeded in getting the measure attached as a House amendment to the Family Unity Act, and it survived the final conference on dissimilar bills passed by the two chambers. Frank initially opposed trying to get a repeal of the 1987 Helms Amendment, which mandated exclusion of HIV-positive immigrants, asserting it might kill the bill due to a Helms filibuster. However, as things came together in the final weeks, AIDS activists saw an opportunity to take advantage of the overall reform of medical exclusions, and were able to obtain language vesting discretion in the Secretary of Health and Human Services to determine which "communicable diseases of public health significance" are to be excluded. There is no guarantee that HHS Secretary Louis Sullivan (miffed at AIDS activists for disrupting his speech at the International AIDS Conference in June) will omit HIV infection from the list, but activists were counting on the widespread consensus that such an exclusion is of no benefit to the public health. * * * While the anti-gay exclusion does not directly affect many American gays, its removal is a major event in the unfolding history of gay liberation. The exclusion dates from days when orthodox medical opinion insisted homosexuality was a mental illness, and the political right contended homosexuals in public office (particularly the State Department) were traitors who could not be trusted. The McCarthy-era McCarran-Walter Act of 1952 called for exclusion of those afflicted with "psychopathic personality," which the Supreme Court construed in *Boutilier v. Immigration and Naturalization Service*, 387 U.S. 118 (1967), to apply to homosexuals. Reacting to the argument that "psychopathic personality" might not apply to all homosexuals, Congress amended the law to add "sexual deviation" as an excludable condition. The statute established a medical diagnosis prerequisite for exclusion under these categories; Public Health Service doctors were to "diagnose" those afflicted. In 1979, [*450] Surgeon General Julius Richmond ruled that homosexuality was no longer considered an illness by mental health professionals, so his doctors would no longer diagnose it. Circuit courts of appeals split on whether such a diagnosis was a prerequisite to exclusion or denial of naturalization of an admitted homosexual, but the Supreme Court refused to take a case to resolve the split. Discriminatory U.S. immigration policies became the focus of world protest in 1990 during the International AIDS Conference, and Harvard University had indicated it might forego hosting a similar conference in 1992 if the HIV-exclusionary policy

was not changed by then. [Note: Dr. Sullivan disappointed the AIDS activists and, bowing to pressure from Congressional Republicans, included HIV infection on the official listing of excludable conditions under the revised immigration law, where it remains to this day.]

January 1991: NY APPELLATE DIVISION NARROWS PRIVACY RIGHTS: In a memorandum decision upholding a continuing injunction against operation of the New Saint Mark's Baths in New York City, a unanimous panel of the New York Appellate Division, First Department, adopted a narrow interpretation of the sexual privacy rights protected in *People v. Onofre*, 51 N.Y.2d 476, cert. denied, 451 U.S. 987, the historic 1980 decision barring prosecution of sodomy between consenting adults in private, non-commercial settings. The usual interpretation of Onofre has been that reference to "non-commercial" settings was intended to exempt from protection sex for hire (prostitution). However, the Appellate Division construed the exemption much more broadly, implying that a private room rented in a bathhouse is not a non-commercial setting. By this logic, the N.Y. sodomy statute (which has not been modified or repealed) might apply to consensual sodomy between adults in a hotel or motel room... The injunction allowed the bathhouse to reopen at the end of September 1990, provided there were no "private rooms which are not continuously open to visual inspection" on the premises. The bathhouse did not reopen. [*City of New York v. New St. Marks Baths*, 168 A.D.2d 311, 562 N.Y.S.2d 642 (N.Y. App. Div. 1990), appeal dismissed, 77 N.Y.2d 939, 569 N.Y.S.2d 612, 572 N.E.2d 53 (N.Y. 1991). The gay bathhouses in New York City were casualties of the decision by the city government to be seen to be "doing something" in response to the AIDS epidemic. The gay community itself was heavily split over the question whether it made more sense to let bathhouses stay open under strict regulation of conduct, or to close them down.]

February 1991: BROOKLYN SURROGATE SAYS NO TO SPOUSAL ELECTION BID: Kings County, New York, Acting Surrogate Vincent Pizzuto has dismissed an attempt by a surviving gay life partner to claim a spousal share against the estate of his deceased partner. Ruling in *Estate of William Thomas Cooper*, Surrogate Pizzuto rejected the argument that refusal to allow a gay partner to elect against an estate violated Equal Protection requirements or the Court of Appeals' 1989 Braschi decision. * * * Of perhaps more significance, Surrogate Pizzuto went behind the estates law claim to rule that exclusion of gays from the ability to marry in New York is constitutional. Citing old case law from other jurisdictions (the most recent appellate rulings on gay marriage date from the 1970s), Pizzuto held that the state's interest in promoting heterosexual marriage as a stable environment for procreation and the raising of children justified the state's refusal to make marriage available to lesbians and gay men. The contestant, Ernest Chin, had argued that his exclusion from electing a spousal share was a compounded [*451] Equal Protection violation because of the underlying exclusion from marriage. * * * In rejecting the claim that the Braschi decision, which recognized gay partners as family members for purposes of a regulation governing evictions from rent controlled apartments, would control this case, Pizzuto commented: "There is a great distinction between being part of a family entitled to the protection of rent control laws because of public policy and legislative intent and in being a surviving spouse of a decedent." He also said that it would be inappropriate "judicial legislation" for him to extend the right to a spousal share beyond the relationships recognized by the legislature. * * * Bradley B. Davis represented Mr. Chin. [*Cooper, In the Matter of the Estate of William Thomas*, 149 Misc.2d 282, 564 N.Y.S.2d 684 (Sur.Ct., Kings Co., 1990), affirmed, 187 A.D.2d 128, 592 N.Y.S.2d 797 (N.Y.A.D., 2nd Dept. 1993), appeal dismissed, 82 N.Y.2d 801, 624 N.E.2d 696 (1993). By the early 1990's, same-sex marriage had emerged as a major topic of gay rights litigation after a hiatus of a decade, as will be seen below.]

March 1991: CENSUS BUREAU REPORTS NON-TRADITIONAL FAMILIES GREW DURING 1980s: The U.S. Census Bureau announced Jan. 29 that a recent household survey showed that the trend toward non-traditional families continued during the 1980s, although at a slower rate than during the 1970s. As summarized in the Jan. 30 New York Times, in 1970 40% of the nation's households were made up of a married couple with one or more minor children. That figure dropped to 31% by 1980 and 26% by 1990. Average household size also continued to drop, from 3.14 persons in 1970 to 2.76 in 1980 and 2.63 in 1990. The number of households consisting of "single" parents with children grew by 41% during the 1980s. More detailed figures are expected later this year based on the 1990 national census. * * * The growth in non-traditional families provides the demographic basis for the movement toward domestic partnership ordinances, which provide formal recognition for non-traditional families. Major cities which have enacted such ordinances in recent years include San Francisco, Seattle, Madison (WI), and Minneapolis. These ordinances allow unmarried couples (including same-sex couples) to register with city authorities as domestic partners. Some of these and similar ordinances in smaller municipalities also extend various benefits otherwise granted only to legally recognized spouses.

April 1991: FLORIDA COURT DECLARES BAN ON ADOPTIONS BY GAYS UNCONSTITUTIONAL: Circuit Court Judge M. Ignatius Lester of the Florida Circuit Court of the 16th Judicial Circuit (Key West, Monroe

County), ruled March 15 in *Seebol v. Farie*, No. 90-923-CA-18, that *sec. 63.042(3), Florida Statutes*, barring gays from being adoptive parents, violates the Florida Constitution's privacy amendment as well as federal and state due process and equal protection provisions. Lester ruled on a challenge brought by Edward Seebol, a prospective adoptive parent who had participated in the state's guardianship and guardian ad litem programs but was turned down by the state Department of Health and Rehabilitative Services when he applied to become an adoptive parent. The statute, enacted in 1977 in the wake of the Anita Bryant "Save Our Children" campaign to repeal a local gay rights ordinance in Dade County, states: "No person eligible to adopt under this statute may adopt if that person is a homosexual." * * * The Privacy Amendment, Art. I, sec. 23 of the state's constitution, was adopted in 1980, and was recently invoked by the state Supreme Court in support of a woman's right to an abortion, but has not previously been construed in the context of gay rights. Florida activists [*452] have been contemplating a challenge to the state's misdemeanor sodomy law under this amendment. Lester's opinion indicates such a challenge would have a strong chance of success. Lester noted that two years prior to passage of the amendment, the Florida Supreme Court ruled that the homosexuality of an applicant for admission to practice law was not a disqualifying factor, stating that "governmental regulation in the area of private morality is generally considered anachronistic in the absence of a clear and convincing showing that there is a substantial connection between the private acts regulated and public interest and welfare," leading Lester to conclude: "The strong message from *In re Florida Board of Bar Examiners* [358 So.2d 7 (Fla. 1978)] is that sexual orientation was entitled, in 1978, to at least some measure of constitutional protection. The fact that two years later the people chose to expand constitutional protection for privacy strongly supports the position that they felt existing constitutional protections were inadequate and that the Florida right to privacy should encompass a broader realm of privacy rights than that in the Federal Constitution... That broader realm certainly must include protection for an individual's sexual orientation, which is a 'decision [] vitally affecting his private life according to his own conscience'..., and protection against penalization of sexual orientation." The state is violating the privacy amendment by inquiring into the sexual orientation of applicants as a disqualifying factor, because it has no compelling justification for the inquiry. Based on existing literature on lesbian and gay parenting, Lester concludes that any state interest in protecting the best interests of children "is not advanced by this statutory exclusion..." * * * An interesting sidelight: In discussing the right of privacy, Lester notes the recent comment by retired Justice Lewis F. Powell, Jr. that "he recognized his mistake in not voting for an extension of the constitutional right to privacy in *Bowers v. Hardwick*." Even though Justice Powell's comments to the press are obiter dicta, they may have some weight as judges have to grapple with the precedential effect of *Hardwick*. * * * Seebol is jointly represented by West Palm Beach attorney Lynn G. Waxman and Florida ACLU Legal Director James K. Green. [*Seebol v. Farie*, 17 *Fam. L. Rep. (BNA)* 1331 (Fla.Cir.Ct., Monroe County, Mar. 15, 1991).]

June 1991: NGRA DISBANDS: National Gay Rights Advocates, a San Francisco-based public interest law firm, closed its door in May. Founded in the mid-1970s as Gay Rights Advocates, the firm was known for the famous Pacific Telephone case, in which the California Supreme Court ruled that a regulated utility like the telephone company was bound by state constitutional and regulatory policies not to discriminate on the basis of sexual orientation. During the AIDS crisis, NGRA was particularly active on insurance issues, participating on a special study panel of the National Association of Insurance Commissioners, surveying state insurance departments on their policies, and instituting complaints against several insurance companies for discriminatory practices on the basis of HIV status or perceived sexual orientation. NGRA suffered a major blow in 1989 when its long-time Legal Director, Leonard Graff, resigned and Executive Director Jean O'Leary discharged the remaining staff attorneys. Several other staff members then resigned. O'Leary subsequently resigned after former staffers alleged a variety of improprieties. Although NGRA hired new attorneys in 1990, the organization never recovered from the shocks of 1989, and the faltering economy hurt an organization that relied almost exclusively on direct mail solicitation for funding. * * * NGRA's demise leaves two national lesbian and [*453] gay public interest firms: Lambda Legal Defense & Education Fund (main office in New York, branch office in Los Angeles) and the National Center for Lesbian Rights (San Francisco). The ACLU's Lesbian and Gay Rights Project employs staff attorneys in New York, Washington, Chicago, San Francisco and Los Angeles. Regional organizations with smaller litigation dockets exist in Massachusetts, Texas, and Michigan.

Summer 1991: BOWING TO POLITICAL PRESSURE, CDC SAYS HIV-INFECTED PHYSICIANS & DENTISTS SHOULD TELL PATIENTS; CONGRESS FOLLOWS SUIT: The Centers for Disease Control announced in the July 12 issue of its *Morbidity and Mortality Weekly Report* (vol. 40, no. RR-8) its new "Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients during Exposure-Prone Invasive Procedures." Despite no documented case of transmission from a physician to a patient during invasive procedures, and only one documented case where an infected dentist's lax infection control procedures may have led to infection of five patients, CDC recommended that all health care workers who perform invasive procedures "should know their HIV-antibody status" as well as their status with regard to contagious hepatitis B (HBV), should refrain from "ex-

posure-prone procedures unless they have sought counsel from an expert review panel," and should notify "prospective patients of the [health care worker's] seropositivity before they undergo exposure-prone invasive procedures." Although stated as "Recommendations," CDC's statement seemed likely to become a requirement rather quickly. Within days of its release, the noted medical and AIDS expert Senator Jesse Helms of North Carolina had persuaded the Senate to amend an appropriations bill to make it a federal crime for an HIV-or infectious HBV-infected health care worker to perform an invasive procedure without notifying the patient. Other legislative leaders crafted a less onerous amendment, which also passed the Senate easily, requiring states to adopt the CDC Guidelines as part of their licensing requirements for health care professionals. It was not known how these amendments would fare in the House of Representatives, but the panic to do something about protecting straight people from AIDS has fueled irrational legislative thinking on this issue. The likely consequence will be further to deter health care workers from performing invasive procedures on patients they know or suspect to be HIV-infected (or to demand HIV testing of all patients), and to attempt to conceal their HIV-status from colleagues and employers, knowing that if they were forced to reveal their status to patients their practices would be destroyed. Meanwhile, legislation is pending in several states requiring infected health care workers to disclose their status to patients. That these unscientific and damaging developments stem from a freak coincidence in one dentist's office is a disgrace for the credibility of national public health policy.

October 1991: D.C. JUDGE GRANTS TWO-PARENT ADOPTION FOR LESBIAN COUPLE: Judge Geoffrey M. Alprin, who heads the Family Law Division of the D.C. Superior Court, ruled August 30 that each member of a lesbian couple could adopt the child of the other without cutting off parental rights. Although two-parent adoptions have become routine in some California counties, and have been granted in some other states, including Alaska, Minnesota, and Oregon, this decision, *Ex Parte in the Matter of the Petitions of L.S. and V.L., Adoptions No. A-269-90 & A-27090* [17 *Fam. L. Rep. (BNA) 1523*], appears to be the first published decision expressly to consider granting [*454] the adoption petition of one woman without cutting off the other woman's parental rights, according to American University Law School Professor Nancy Polikoff, a leading authority on this issue and the lead counsel for the petitioners. The case may also be the first in which a court has approved a "joint" adoption where each of the women is already established as the mother of one of the children prior to the adoption.

November 1991: TULANE PUBLISHES FIRST LESBIAN & GAY LAW REVIEW: Students at Tulane University Law School have succeeded in publishing what is probably the first law-school-sponsored law review devoted primarily to lesbian and gay legal issues in the United States. The first issue of *Law & Sexuality: A Review of Lesbian and Gay Legal Issues* arrived in subscribers' mail late in October. All of the articles and comments are listed in the Publications Noted section of this Newsletter.

December 1991: CALIFORNIA APPEALS COURT SAYS GAYS ARE PROTECTED FROM PRIVATE SECTOR EMPLOYMENT DISCRIMINATION; WILSON CLAIMS VINDICATION: Ruling October 28 in *Soroka v. Dayton Hudson Corporation*, a three-judge panel of the California Court of Appeal for the First District unanimously ruled that the state's Labor Code prohibits discrimination on the basis of sexual orientation by private sector employees. Relying on the 1979 Pacific Telephone decision of the California Supreme Court (which cited the Labor Code's political freedom provisions to hold that a highly-regulated public utility was barred from systematic discrimination against openly gay employees) and subsequent developments in the lower courts, Justice Timothy Reardon flatly stated: "These statutes also prohibit a private employer from discriminating against an employee on the basis of his or her sexual orientation." However, attorneys representing the three plaintiffs in the case, which had broader implications for pre-employment testing of applicants because of its holding with regard to state privacy law, cautioned that the case was likely to go up on appeal to the California Supreme Court, which is a much more conservative bench than it was when the key 1979 precedent was rendered (by a 4-3 vote). * * * Governor Pete Wilson's deputy press secretary, Franz R. Wisner, was quoted in the *New York Times* as stating that the ruling vindicated Wilson's position that the recently vetoed gay rights employment bill was unnecessary. Wisner asserted that the Governor had treated this as a "policy issue" and that the court ruling confirmed the correctness of his position. However, critics of Wilson's veto had pointed out that existing legal protections, whatever their extent, placed a significant burden on gay discriminates to litigate without the assistance of the Fair Employment and Housing Commission, and without the strong possibility of a government-assisted settlement in the administrative process, forestalling the need to litigate in most cases. [*Soroka v. Dayton-Hudson Corporation*, 235 *Cal.App.3d* 654, 1 *Cal.Rptr.2d* 77 (Cal.App., 1st Dist. 1991), review granted, 4 *Cal.Rptr.2d* 180, 822 *P.2d* 1327 (Cal. 1992), review dismissed as moot, 862 *P.2d* 148, 24 *Cal. Rptr. 2d* 587 (Cal. 1993). The case became moot because the legislature codified the ruling by adding amendments to the Labor Code specifically forbidding sexual orientation discrimination in employment, which Governor Wilson signed.]

January 1992: MINNESOTA COURT NAMES THOMPSON GUARDIAN OF KOWALSKI: A unanimous panel of the Minnesota Court of Appeals ruled Dec. 17 that Sharon Kowalski, seriously injured in a 1983 automobile accident, should be placed under the guardianship and custody of Karen [*455] Thompson, her domestic partner before the accident. 1991 WL 263225. Reversing St. Louis County District Court Judge Robert Campbell on virtually all points of his April 23, 1991, ruling, the court held that Campbell abused his discretion by denying Thompson's guardianship petition and instead appointing Karen Tomberlin, a friend and neighbor of Kowalski's parents. Judge Jack Davies' decision for the court pointedly observes that Sharon's choice to live with Karen Thompson "is further supported by the fact that Thompson and Sharon are a family of affinity, which ought to be accorded respect." * * * After the accident, when Thompson informed Sharon's parents that Karen and Sharon were lesbian partners, they moved to exclude Karen from any contact with Sharon. They repeatedly denied that their daughter was a lesbian, and Donald Kowalski was able to secure sole appointment as legal guardian of his adult daughter, moving her to a nursing home remote from the home that she shared with Thompson. Thompson established a legal defense fund to support her efforts to have the guardianship decision modified or overturned. The effort took her through the state court system and an unsuccessful attempt to get the U.S. Supreme Court to intervene in the case. Thompson's big breakthrough came when she discovered that Donald Kowalski failed to have new medical evaluations made as required by Minnesota law. In 1988, Campbell granted Thompson's petition to compel a medical evaluation of Sharon and, when the doctors indicated that Sharon wanted to see Thompson (from whom she had been kept totally isolated for five years), Campbell ordered that visitation be allowed and that Sharon be moved to a facility closer to Thompson's home where better medical services would be available. Later in 1988, bowing to the inevitable, Donald Kowalski notified the court that he wished to be relieved as guardian due to "his own medical problems," and Thompson petitioned for guardianship. * * * Campbell ruled on April 23, 1991, that a "neutral" person, Tomberlin, should be the guardian. Tomberlin never formally applied for appointment, although she suggested it in a private letter to Judge Campbell. Thompson received no notice prior to Campbell's decision that Tomberlin was proposed to be the guardian. * * * Davies' opinion is highly critical of Campbell's decision-making, which appeared to disregard the medical testimony presented at the hearing. Davies pointed out that doctors testified without contradiction that Sharon was capable of expressing a preference, but Campbell found she was not. All the expert testimony showed Thompson was fully qualified to serve as guardian, but there was no evidence on Tomberlin's qualifications. Indeed, Davies emphasized, the doctors' treatment goal for Sharon was to achieve a living situation outside an institution; Thompson was prepared to provide this, having constructed a fully-accessible and equipped home in St. Cloud; Tomberlin was unable to do more than supervise Sharon's treatment in an institution. Furthermore, Davies rejected Campbell's characterization of Tomberlin as a "neutral" party, observing that she had opposed Thompson's appointment, was a friend of the Kowalskis, and had facilitated appearances of two other witnesses opposing Thompson's appointment. Hardly neutral! * * * At press time, it was not clear whether Tomberlin would appeal the court's ruling. Thompson was represented by M. Sue Wilson and Christine N. Howard of Wilson & Binder, a Minneapolis firm. Amicus briefs were submitted on behalf of Thompson by Lambda Legal Defense & Education Fund (Suzanne Born, cooperating attorney), the Minnesota Civil Liberties Union (Brian B. O'Neill, John R. Bedosky, and Michael A Ponto, cooperating attorneys), and the National Organization for Women (Sonja R. Peterson, cooperating attorney). [*456] [*In re Guardianship of Sharon Kowalski, Ward, 478 N.W.2d 790 (Minn. App. 1991)*, rev. denied, Feb. 10, 1992.]

January 1992: CDC ABANDONS "EXPOSURE-PRONE" PROCEDURE LIST: Despite official statements that it still intends to proceed with publishing a list of "exposure-prone" procedures which HIV-infected surgeons and dentists should not be allowed to perform, officials of the Centers for Disease Control (CDC) have indicated that such a list will not be issued for the foreseeable future. Bowing to pressure from its members, the American Medical Association finally indicated in December that it would join with other health care professional organizations in refusing to cooperate in producing a list of procedures that HIV-infected health care workers would be barred from performing. This is not surprising, since to date no surgical or dental procedures have been identified as actually having been a vector of HIV transmission.

February 1992: CO-FOUNDER OF GAY LEGAL RIGHTS MOVEMENT DIES: E. Carrington Boggan, a co-founder of Lambda Legal Defense & Education Fund and a leading advocate for lesbian and gay rights within the organized bar, has died in Los Angeles on Jan. 20, age 48. Cary Boggan was the first openly-gay section chair in the American Bar Association, and litigated many important gay rights cases during the 1970's as a board member of Lambda. He was also one of the first to teach a law school gay rights course, as an adjunct instructor at New York Law School beginning in 1978. With William J. Thom, he co-founded the firm of Boggan & Thom, one of the earliest "gay law firms" in the country.

April 1992: **GEORGIA SUPREME COURT ENFORCES LESBIAN COUPLE'S CONTRACT:** Reversing a trial court ruling, the Georgia Supreme Court held March 19 that a joint property ownership agreement by a lesbian couple is not unenforceable as a matter of public policy. *Crooke v. Gilden*. The lower court premised its decision on the sodomy law, which was upheld against federal constitutional challenge in *Bowers v. Hardwick*. * * * Patricia Gilden and Florence Crooke began their relationship in 1982, and executed a written joint property ownership agreement to govern their house and other personal property. The agreement was drafted by a lawyer whom they retained for that purpose. Crooke, original owner of the home, was to convey half-interest to Gilden, while Gilden was to contribute money toward household renovations. The contract also designated property owned by the women before the agreement or acquired during their relationship as jointly-owned, to be equally divided in the event their relationship ended. Crooke refused to honor the agreement when the relationship ended in 1989. Gilden sought specific enforcement with respect to the real estate. The trial court ruled that the contract was unenforceable on public policy grounds, commenting that enforcement would "facilitate a relationship which in Georgia is considered illegal and immoral." Section 13-8-1 of the Georgia statutes provides: "A contract to do an immoral or illegal thing is void." * * * The Supreme Court disagreed with this application of the statute. "Nothing in the contract casts upon either of the parties the responsibility to perform any illegal activity," wrote Chief Justice Clarke. "Further, the parol evidence admitted demonstrates that the alleged illegal activity was at most incidental to the contract rather than required by it." Finding the contract was supported by legal consideration and that the promises contained in the contract "are also legal," the court asserted: "Enforcement of those promises does not contravene *OCGA sec. 13-8-1*." * * * Lambda Legal Defense Fund, National [*457] Center for Lesbian Rights and the ACLU filed amicus briefs in the case, urging enforceability of the agreement. The trial court's decision had startled Georgia attorneys who assist lesbian and gay couples in formalizing their relationships through contractual agreements, since if affirmed it would have made it virtually impossible for gays in the state to make binding agreements to govern the economic terms of their relationships. [*Crooke v. Gilden*, 262 Ga. 122, 414 S.E.2d 645 (Ga. 1992).]

May 1992: **FEDERAL ALJ ORDERS FUNDING CUT-OFF AT DISCRIMINATORY HOSPITAL:** For the first time in the AIDS epidemic, a federal administrative law judge (ALJ) ordered suspension of federal funding for a private hospital that maintains a policy of discriminating against HIV-infected health care workers. Ruling April 20 in *In the Matter of Westchester County Medical Center*, Docket No. 91-504-2, Decision No. 191, ALJ Steven T. Kessel determined that the hospital's refusal to employ the John Doe complainant as a pharmacist without work restrictions violates sec. 504 of the Rehabilitation Act of 1973. The only remedy for a violation that can be imposed by federal authorities is suspension of federal financial assistance. The hospital derives 40% of its annual budget from Medicare and Medicaid reimbursements, which could be ended by Judge Kessel's order. (By contrast, a private action brought under sec. 504 in federal court would expose the hospital to the possibility of full remedial relief, including, according to at least one recent federal court ruling, compensatory and punitive damages.) The hospital indicated it would appeal to the Department of Health and Human Services' Departmental Appeals Board. A parallel proceeding by the complainant under the New York State Human Rights Law continues on appeal in state courts. The complainant is represented by Lambda Legal Defense & Education Fund, where Evan Wolfson is the lead attorney on the case.

June 1992: **IRONY, THE NAME IS FEMA!:** On May 11, *Federal Times*, a newspaper for federal civil servants, published a lengthy front-page story by Daniel J. Roy titled "Being Gay in Government: Facing Choice of Openness At the Office," which profiled openly lesbian and gay employees of the federal government. First described in the article was Lorri Jean, a member of the Board of Directors of Lambda Legal Defense and Education Fund, who is Deputy Regional Director (San Francisco) of the Federal Emergency Management Agency (FEMA). In the article, Jean recounts how her boss was fully supportive after she participated in a television news interview as a lesbian activist, and she had been promoted to this job (with a top secret security clearance) after coming out. Sounds great! * * * On May 14, leading national newspapers reported that a FEMA employee in Washington, Jerald E. Johnson, had been pressured by agency officials to give them a list of agency employees Johnson suspected might be gay, as a condition for obtaining a necessary security clearance to undertake an overseas assignment. Johnson's own remarks during an earlier security clearance proceeding appear to have sparked the agency demand: responding to a question about sexual activity, Johnson stated he was gay and did not consider that an issue, since there were plenty of other gay people at FEMA with clearances. Agency security officials asked him to name names, and he initially refused and withdrew his application. Then when the opportunity for the overseas job came up and it was made clear he would not get a clearance without naming names, he submitted a list on the understanding it would be confidential. When Johnson returned from his assignment and discovered the list had been turned over to security officials, [*458] he decided to go public. The *New York Times* ran a front-page article May 14, titled "Government Agency Ferreted Out Names of Its Gay Workers," and editorialized on May 15 that the government action was inappropriate and demonstrated the need for federal laws ban-

ning anti-gay discrimination. U.S. Rep. Barney Frank announced he would hold a subcommittee hearing to grill agency director Wallace E. Stickney, who initially defended the agency's actions by claiming that closeted gay employees pose a security risk. On May 19, the Times reported that the agency had shredded the list and Frank had postponed his hearing. Director Stickney also announced he would convene a "board of review" to examine the agency's Security Department, after indications that it "may be operating under outmoded procedures." Although federal Office of Personnel Management guidelines state that sexual orientation is not grounds per se for agency personnel actions, security agencies and clearance procedures focusing on gays have been upheld by the courts and are required by internal rules of some agencies, including the Defense Department, FBI, and CIA. Guess who was called to Washington by Stickney for advice on how to deal with this exploding issue? Lorri Jean!

October 1992: KENTUCKY SUPREME COURT STRIKES SODOMY LAW, 4-3: In the first sodomy law reform victory in a state's highest court since the *Hardwick* decision, the Kentucky Supreme Court ruled 4-3 in *Commonwealth v. Wasson* (9/24/92), that a sodomy law prohibiting only same-sex activity violates the state's constitution. A similar challenge is pending before the Texas Supreme court. The ruling is premised solely on state constitutional grounds, so it is not subject to further appeal. * * * Jeffrey Wasson was arrested in a Lexington, Kentucky, parking lot in 1986 by an undercover police officer and charged with solicitation to commit a crime in violation of KRS 506.300. The officer charged that Wasson invited him home to engage in gay sex violative of KRS 510.100, which punishes "deviate sexual intercourse with another person of the same sex" and specifies that consent is not a defense. Deviate sexual intercourse is defined as sexual contact between the genitals of one person and the mouth or anus of the other. Violation of the sodomy law is a class A misdemeanor; solicitation to violate it is a class B misdemeanor. Wasson asserted that the sodomy law is unconstitutional and thus no charge of solicitation to commit a crime could be lodged against him. * * * Trial and intermediate appellate courts agreed with Wasson, finding the law violative of privacy (at the trial level) and additionally of equal protection (at the intermediate appellate level). The state Supreme Court affirmed on both theories, in an opinion by Justice Charles M. Leibson, joined by Chief Justice Robert F. Stephens and Justices Dan Jack Combs and Thomas B. Spain. Justice Combs also wrote a concurring opinion, which was joined by the Chief Justice. Justices Joseph E. Lambert and Donald C. Wintersheimer wrote dissents. Justice Charles H. Reynolds joined the Lambert dissent. * * * Counsel for Jeffrey Wasson through six years of litigation include Ernesto Scorsone, Pam Goldman and Dean W. Bucalos of Lexington. Amici too numerous to list here filed briefs on both sides of the case; briefs from an array of professional medical and mental health groups, as well as religious groups supportive of gay rights, were specifically noted by Leibson in his opinion. [*Commonwealth of Kentucky v. Wasson*, 842 S.W.2d 487 (Ky. 1992).]

December 1992: CLINTON VICTORY MAY SIGNAL END TO MILITARY BAN: On Nov. 3, U.S. voters elected the first president ever to campaign on a platform including a pledge to lift the [*459] U.S. Defense Department's ban on openly gay and lesbian service members. Even more astonishing to many media pundits and the Defense Department, Bill Clinton, governor of a state with a criminal sodomy law and no state or local bans on anti-gay discrimination, appeared to mean what he said on this issue, responding to a question at his first post-election press conference by reiterating his intention of ending the ban. A prolonged nationwide media uproar ensued, as various military "experts," from Chair of the joint Chiefs of Staff Colin Powell to Senate Armed Services Committee Chair Sam Nunn, to anonymous soldiers interviewed by reporters, predicted massive problems should the ban be lifted. (Where were these people during the campaign, one wonders?) Several newspapers rushed to take on the opponents, editorializing that the nay-sayers sounded too much like those who opposed racial integration of the armed forces more than forty years ago by President Truman's Executive Order. (The *Washington Blade* did a brilliant job of juxtaposing old and new quotes to illustrate this point in its Nov. 20 issue). Although not wavering on his overall intention, Clinton did follow his accustomed approach when he announced that he would consult widely, perhaps setting up a study committee on implementation, and that he would insist on stringent regulations governing conduct (without specifying in his announcement what conduct would be banned by the regulations). Resulting skepticism in the gay press brought reminders that Truman had done something similar in 1948: issued an order suspending the existing segregation while appointing a commission to oversee implementation. * * * The press was then full of recommendations on how Clinton should or should not do it: The *New Republic* accompanied a scathing expose of mistreatment of lesbians and gays in the military with an editorial calling for an immediate end of the automatic expulsion of gays, and a delayed (to January 1994) end to the ban on enlistments, to give the military time to process the change and adopt appropriate regulations. Meanwhile, media military "experts," such as big-mouth retired colonel David Hackworth of *Newsweek*, raised specters of gay soldiers making passes in the showers. In a typical display of bad timing, the Navy decided to implement a new oath policy for its Reserve Officer Training Corps (ROTC) units on college campuses, under which enlistees swear that they are not gay and promise to return all their ROTC scholarship money if it later comes out that they are. And a bevy

of Congress members, led by Rep. Gerry Studds of Massachusetts, sent a letter to the Pentagon demanding suspension of process of gays for discharge pending the expected policy change.

December 1992: TEXAS COURT UPHOLDS LIFE SENTENCE IN SPITTING CASE: The Texas Court of Criminal Appeals has refused to review the Texas Court of Appeals' July 9 decision in *Weeks v. State*, 834 S.W.2d 559, upholding a virtual life sentence for Curtis Weeks, an HIV-infected man convicted of attempted murder for spitting at a prison guard. At trial, the state presented two so-called "experts" - a social psychologist and a dental hygienist/orthopedic surgeon, neither with academic training in infectious diseases - who swore that HIV can be transmitted by spitting; the Court of Appeals found no error on the part of the trial court in relying on these "experts." At the time of his conviction, Weeks was six weeks short of release from a robbery sentence. Weeks claimed he was provoked to spit at a guard when he was denied use of bathroom facilities. Weeks is represented on appeal by the ACLU Aids and Civil Liberties Project (attorneys Bill Rubenstein and Ruth Harlow) and cooperating attorneys Steven Alan Reiss and Curt P. Beck [*460] from Weil, Gotshall & Manges. [*Weeks v. State*, 834 S.W.2d 559 (Tex. Ct. App. 1992), discretionary rev. denied, Oct. 14, 1992, habeas corpus denied, sub nom *Weeks v. Collins*, 867 F. Supp. 544 (S.D.Tex. 1994), aff'd sub nom. *Weeks v. Scott*, 55 F.3d 1059 (5th Cir. 1995).]

February 1992:

CLINTON IN STRATEGIC COMPROMISE ON MILITARY BAN: Reiterating that he intended to redeem his pledge to end the ban on military service by lesbians and gay men, President Bill Clinton deferred issuing an Executive Order when it became clear during the second week of his administration that Congressional opponents would try to overrule any such Order by attaching an amendment in the Senate to pending administration legislation. * * * Immediately after the inauguration, Clinton staffers floated a trial balloon: an Executive Order would be delayed while language was negotiated with military personnel, but informally the armed services would be instructed to cease inquiring about the sexual orientation of new recruits and cease processing for discharge those service members discovered to be gay. By the end of his first full week in office, Clinton had met with the joint chiefs of staff, who furiously opposed lifting the ban, and congressional leaders, who warned Clinton to hold off for fear of endangering his legislative program. By the end of January, it had come down to direct negotiations between Clinton, Senate Armed Services Committee Chair Sam Nunn of Georgia, and General Colin Powell, Chairman of the Joint Chiefs of Staff, while Congress was flooded with phone calls generated largely by the religious right and conservative radio talk show hosts. On Jan. 29 Clinton announced the result: an Executive Order drafted by Defense Secretary Les Aspin will be issued July 15; in the meantime, Sen. Nunn will hold hearings on the issue, the Defense Department will omit questions about sexual orientation from enlistment forms, judges will be requested to stay proceedings in pending lawsuits involving the ban, and instead of being discharged, gays will be placed on unpaid reserve status, from which they would have to petition for reinstatement when the ban is lifted. However, Republican Senators Dan Coats and Bob Dole repeated threats to attempt to amend the first bill to come before the Senate with a codification of the current ban, setting up a confrontation in the Senate during the first week of February, when floor action is expected on the Family and Medical Leave Bill.

February 1992: NEW YORK HOSPITAL SETTLES LONG-RUNNING AIDS DISPUTE: Westchester County (NY) Medical Center abandoned further appeals in its quest to deny unrestricted employment to an HIV-infected pharmacist, after being ordered to offer such employment by both the U.S. Department of Health and Human Services (HHS) and the New York State Division of Human Rights (SDHR). The case arose when an offer of employment to the John Doe plaintiff was rescinded after a nurse employed by the Medical Center breached the confidentiality of the plaintiff's medical records to inform the physician in charge of hiring for the hospital's Pharmacy Department that the plaintiff was HIV-infected. The plaintiff filed charges in 1986 with the SDHR under the state's disability discrimination law, and with HHS, alleging a violation of sec. 504 of the Rehabilitation Act of 1973. The hospital previously attempted to settle by offering Doe a restricted job, excluding preparation of intravenous medications. The hospital's position was that allowing an HIV-infected pharmacist to prepare intravenous solutions posed a significant risk of contamination and transmission of HIV to patients. Both the state and federal agencies found no credible support for this. Doe's case [*461] was the first to result in a final order by HHS to suspend federal payments to a hospital as a result of a finding of AIDS-related discrimination, which was undoubtedly the main incentive for the Westchester County legislature to vote in January to fund the settlement, which amounts to approximately \$ 330,000 in back pay, legal fees, and compensation for emotional damage (available under the N.Y. Human Rights Law). Doe was represented throughout the proceedings by a succession of cooperating and staff attorneys from Lambda Legal Defense & Education Fund, and at one point by students and staff of the former Columbia University Law School AIDS Law Clinic.

May 1993: JUDGE DENIES PARENTAL STANDING TO GAY SPERM DONOR: N.Y. City Family Court Judge Edward M. Kaufmann ruled April 13 that a gay man who donated sperm to a lesbian couple was equitably estopped

from asserting parental rights with respect to their 11-year old child. *Thomas S. v. Robin Y.*, NYLJ, 4/16/93, p. 27. Kaufmann found that for a period of about three years after the birth of Ry to Robin Young, donor Thomas Steel, a gay attorney in San Francisco, made no attempt to establish contact with Ry, having agreed with the birth mother and her life partner, Sandra Russo, prior to donating the sperm that he would not attempt to assert parental rights. Contact was initiated by the mothers, who wanted to respond to their daughters' inquiries about their fathers (Russo previously bore a child using sperm from a different donor). After successful initial contact, a relationship was established with visits back and forth between San Francisco and New York and calls and correspondence. Based on documentary evidence and testimony at trial (especially notes and cards written by Ry to Steel), the relationship appears to have become increasingly affectionate. As Ry grew older and her relationship with Steel became more extensive, her mothers apparently became concerned about encroachment on their New York-based family unit and sought to limit contact. Steel brought this action seeking a declaration of paternity and a visitation order to establish a formal right to preserve and develop his relationship with Ry. * * * The biological father of a child is normally entitled to assert parental rights unless shown to be unfit. The few precedents involving sperm donors indicate that courts will accord them similar rights if the sperm donation was neither anonymous nor made with a physician as an intermediary, as provided in the Uniform Parentage Act. See *Jhordan C. v. Mary K.*, 179 Cal.App. 3d 386, 224 Cal. Rptr. 530 (1st Dist. 1986). Kaufmann ordered psychological studies of Ry, from which he concluded that it would not be in her best interest to formalize Steel's parental status. While noting that Ry's recent emotional resistance to Steel was shaped by her mothers' attitudes, Kaufmann concluded it was nonetheless real, and that the circumstances under which Steel agreed to donate sperm and lack of contact for three years after Ry's birth provided the basis for raising an estoppel against his petition. Kaufmann also speculated that Steel's HIV status may have caused him to seek a closer relationship with Ry.

The decision might be seen as a progressive one in recognizing a family unit consisting of two lesbians and their children, conceived through alternative insemination. On another level, the decision might be seen as analogous to recent appellate decisions denying the standing of lesbian co-parents to seek visitation rights with children they helped to raise but to whom they were not legally related. Newspaper accounts describing letters and cards to Steel seem to indicate that Steel's relationship with Ry, prior to the falling out with Ry's mothers, was closer and more [*462] "parental" than Kaufmann's decision suggests. The decision may actually appear conservative in clinging to a view of families limited to a two-parent model and not accepting the possibility in the gay context of different kinds of parental relationships. Yet the opinion contains strong language recognizing the legitimacy of the non-traditional family unit Young and Russo had created.

Young and Russo are represented by Peter Bienstock. Steel is represented by Emily Olshansky, who indicated in an interview with The New York Times that an appeal is contemplated. [*Thomas S. v. Robin Y.*, 599 N.Y.S.2d 377 (N.Y.Fam.Ct. Apr. 13, 1993), rev'd, 618 N.Y.S.2d 356 (N.Y.A.D. 1 Dept., Nov. 17, 1994).]

Letters to Law Notes: Following are excerpts from letters published with the June 1993 issue of Law Notes: In *Thomas S. v. Robin Y.*, a family law court, for the first time in history, gave its fullest, most affirming respect to a family consisting of a lesbian couple and their two daughters. The court found that the child's sense of her family was her two mothers and her older sister, and that a donor who had agreed to donate sperm and agreed that he would not be in any way considered a father could not claim paternity merely because of his biological relationship with the child. This is an astounding decision, not only because it supports lesbian families, but because it gives credit to the original agreements made among the parties in the creation of their family, a notion that we, as advocates for lesbian and gay families, have been trying to convince courts to follow since the first child was ever conceived by donor insemination. * * * Why then was this most affirming victory for lesbian and gay families reported by the Law Notes, a lesbian and gay publication, as a defeat? And why would the Law Notes, a reporter of legal decisions, rely more substantially on "facts" as reported in the newspaper rather than the facts as found by the Family Court after 28 days of trial testimony? Such reporting makes the lesbian mothers appear irrational and controlling (as if having a donor file a paternity action after twelve years would not make any of us retreat into protecting our families) and the donor appear to be the epitome of fatherhood (even though by his own account, he only saw the child approximately 120 days out of her entire life of eleven and one-half years). The Law Notes' reporting of this case was uncharacteristically incognizant of the consistency of theories between this and other lesbian and gay family cases and it appeared to be distressingly sexist in its presentation of the facts ... Paula Ettlbrick.

I was distressed to read Arthur Leonard's comments on the *Thomas S. v. Robin Y.* case. Almost everyone I know regards this as an important legal victory for the rights of lesbian mothers. Leonard includes an alternative interpretation in his notes which seems reasonable until one compares his summary with the actual court decision. By summarizing the judge's decision in a highly biased manner, Leonard manages to mute the meaning of the case... I believe LeGaL

would better serve our community by having a lesbian co-editor of the Newsnotes. However, if this is not possible, surely it would be possible to have a lesbian member review Leonard's comments on cases of concern to women before they are published. Jim Levin.

I am shocked at the gay press for not coming to the defense of a gay, HIV-positive man who functioned as the child's father from the time the child was three years old. I am sure that the judge in the case took very careful notice of this man, including his sexual orientation and his HIV status... This brings me to the conclusion that although everyone involved in the case is gay, including the man's lawyer, this [*463] isn't a gay/straight issue but rather a Have/Have Not issue. White middle class gay men have been trying to persuade the gay community to assimilate into the straight, white, middle class-dominated world so we can get a slice of what little money and privilege there is left in this country, all the while peddling the politic of "we're no different from straight people - we just sleep with the same sex," as our ticket into assimilation. As a lesbian, I want to see gays get all the rights they can. However, if it means getting the right to "act straight," as in defending the nuclear family against real or imagined attacks by gay brothers or sisters, count me out. Lia Brigante.

Responsible discussion of this case requires a restraint from a rush to judgment and a resistance of fall into political rhetoric. Art Leonard's thoughtful and thorough summary of the case makes an important contribution to a full understanding of the issues presented. Having presided over many domestic relations cases as a judge, I appreciate the complexities and difficulties in deciding such a case. But I also learned that to tailor an equitable and fair remedy, a court must consider all relevant facts, not simply those that support a predetermined notion of what the result should look like. In this case, the court seemed to be unable to envision any resolution of this case that looked like anything other than a traditional nuclear family. Rebecca Westerfield.

I represent Thomas Steel, the gay man whose application for paternity and visitation was dismissed by the Family Court in *Thomas S. v. Robin Y.* I am writing in response to the reporting of the decision in the Lesbian/Gay Law Notes and to the controversy that has arisen as a result. Although Judge Kaufman's decision is being hailed in some quarters as a step forward in securing lesbian and gay rights, Mr. Leonard recognized that it is, in fact, a conservative decision that ignores the struggle of lesbian and gay parents to establish alternative family structures. As Mr. Leonard indicates, the decision clings to a view of families that is limited to a two-parent model mimicking heterosexual marriage. Those critical of Mr. Leonard's note mistakenly assume that Tom Steel's assertion of parental rights is based solely on his status as Ry's biological father. This is hardly the case. Tom Steel is not a sperm donor who suddenly and inexplicably appeared out of the woodwork to assert his rights to paternity. Rather, Mr. Steel bases his struggle to maintain continued visitation with his daughter on the warm and loving relationship that they established and maintained over the course of the last six years... . Emily Olshansky.

Art Leonard performs a tremendously valuable public and scholarly service by researching and writing the Law Notes each month. Nevertheless, I do think that LeGaL must take steps to ensure that, whether it be in the Law Notes or in letters to various publications, it is made clear that he is not the spokesperson for LeGaL. Unfortunately, some readers of the Law Notes have interpreted the Thomas S. commentary to mean that LeGaL places a higher priority on the rights and interests of gay men than on those of lesbians. Such a perception is patently false, of course. Nevertheless, I am concerned because even "false impressions" can have a powerful impact on the reputation and, ultimately, the effectiveness of LeGaL. This particular controversy comes at a time when LeGaL is placing special emphasis on increasing lesbian membership and participation. I would hate to think that our efforts might be undermined. Erica Bell.

[As a follow-up to the controversy over Law Notes' reporting of this case, the LeGaL board voted to require that each issue of the newsletter carry a statement indicating that views expressed [*464] were not necessarily those of the Association. Additional letters were published with the following two issues of Law Notes, further rehashing the case and its reporting in the publication. The controversy was also aired at a public forum at the Association of the Bar of the City of New York, at which counsel for both parties spoke.]

June 1993: HAWAII SUPREME COURT REVIVES MARRIAGE SUIT: STATE EQUAL RIGHTS AMENDMENT MAY BE VIOLATED BY SAME-SEX EXCLUSION: The Hawaii Supreme Court ruled May 5 that denying same-sex couples the right to marry may violate the equal protection provision of Hawaii's constitution, but does not violate the state constitutional right to privacy. *Baehr v. Lewin*, 1993 WL 142682. The court remanded for trial on the question whether the state has a compelling justification for the exclusion. Justice Steven H. Levinson wrote a plurality opinion for himself and Acting Chief Justice Arnold Moon; Intermediate Court of Appeals Chief Judge James Burns (sitting in place of Chief Justice Lum, who retired March 31 and recused himself from the case) wrote a concurring opinion. Intermediate Court of Appeals Judge Walter Heen (sitting in place of Justice Klein, who recused himself,

having been the trial judge in the case) dissented, in an opinion agreed to by Retired Justice Hayashi, whose appointment expired before opinions were filed. * * * The immediate result was a 2-1-2 decision; due to the peculiar reasoning of Burns's concurrence, it was initially unclear what the trial court would be doing on remand. The state filed a motion for reconsideration or clarification on May 17. On May 27, newly reconstituted with the appointment of Justice Nakayama in place of Justice Hayashi, and confirmation of Moon as Chief Justice, the court issued a paragraph of clarification, agreed upon by all except Judges Burns and Heen, ordering that proceedings at trial be conducted "consistent with the plurality opinion," which belatedly became the opinion of the court. Burns issued a separate statement, asserting that the case required compilation of a trial record, but not agreeing with the reasoning of the Levinson opinion. * * * This is the first U.S. court opinion to hold that excluding same-sex couples from marriage is sex discrimination. Both the Levinson opinion and the Heen dissent agreed that sexual orientation was irrelevant to disposition of the case. Burns's concurrence made sexual orientation a central issue.

Levinson first held that exclusion of same-sex couples from marriage does not violate the right of privacy. The Hawaii constitution (art. I, 6) includes an express right of privacy that may not be abridged absent a compelling state interest. However, wrote Levinson, the convention that adopted this provision made clear that its purpose was to provide a textual privacy right coequal with the federal constitutional privacy right as then defined in case law. Levinson concluded that the federal right extends only to heterosexual marriage, because the Supreme Court always links it with procreation. Levinson stated: "We do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty..." * * * On the other hand, Levinson found that Hawaii's equal protection guarantee, which specifically mentions "sex," might be violated, asserting that refusal to let same-sex couples marry "deprives them of access to a multiplicity of rights and benefits that are contingent upon that status." Addressing a question Hawaii [*465] courts had refrained from deciding in several cases since the equal rights amendment was adopted, Levinson held that the state constitution requires that sex-discriminatory policies be subjected to a test of strict scrutiny, placing a high burden on the government to justify any use of a sexual classification. (Burns apparently agreed on this point.) * * * Rebutting arguments by the dissent, Levinson refuted the reasoning adopted by courts of other states that previously rejected same-sex marriage challenges. Relying heavily on *Loving v. Virginia*, 388 U.S. 1 (1967), the plurality rejected the argument that excluding same-sex couples from marriage was not sex discrimination because both men and women were equally forbidden from marrying persons of the same sex. In *Loving*, the Supreme Court rejected the argument that a miscegenation law did not discriminate racially because it equally forbade whites from marrying blacks and blacks from marrying whites; the evil was the use of a racial classification in a government policy without compelling justification. Quoting from the *Loving* opinion, Levinson commented that one could substitute the word "sex" for "race" and reach the same result, and called the dissent an "exercise in tortured and conclusory sophistry." Levinson held that the marriage law must be presumed to be unconstitutional unless the state meets the burden of showing that its "sex-based classification is justified by compelling state interests and the statute is narrowly drawn to avoid unnecessary abridgments of the applicant couples' constitutional rights." * * * Levinson remarked that the plaintiffs' sexual orientation was irrelevant to their constitutional challenge, since heterosexuals were equally forbidden from contracting same-sex marriages. Thus, it was unnecessary to determine whether sexual orientation is a suspect classification. * * * Judge Burns concurred on different grounds. Burns stated that if "sexual orientation" is "biologically fated," then it is an immutable aspect of sexual identity just as "gender" is. "Therefore, the questions whether heterosexuality, homosexuality, bisexuality, and asexuality are 'biologically fated' are relevant questions of fact which must be determined before the issue presented in this case can be answered. If the answers are yes, then each person's 'sex' includes both the 'biologically fated' male-female difference and the 'biologically fated' sexual orientation difference, and the Hawaii constitution probably bars the State from discriminating against the sexual orientation difference by permitting opposite-sex Hawaii Civil Law Marriages and not permitting same-sex Hawaii Civil Law Marriages. If the answers are no, then each person's 'sex' does not include the sexual orientation difference, and the Hawaii constitution may permit the State to encourage heterosexuality and discourage homosexuality, bisexuality, and asexuality by permitting opposite-sex Hawaii Civil Law Marriages and not permitting same-sex Hawaii Civil Law Marriages." Burns's analysis originally threatened to create significant confusion on remand; the subsequent clarification, with Nakayama apparently joining Moon and Levinson's plurality opinion, may render Burns's peculiar approach irrelevant.

Judge Heen's dissent endorsed *Singer v. Hara*, 522 P. 2d 1187 (Wash.App.), rev. denied, 84 Wash. 2d 1008 (1974), the most recent appellate decision on point, where the court held there was no sex discrimination because men and women are equally forbidden from contracting same-sex marriages. "The effect of the statute is to prohibit same sex marriages on the part of professed or non-professed heterosexuals, homosexuals, bisexuals, or asexuals, and does not

effect an invidious discrimination." Heen added: "Appellants' sexual preferences or lifestyles are completely irrelevant. Although the plurality [*466] appears to recognize the irrelevance, the real thrust of the plurality opinion disregards the true import of the statute. The statute treats everyone alike and applies equally to both sexes." Heen argued that the question whether to extend marriage to same-sex couples was for the legislature, and noted that some cities adopted domestic partnership ordinances for this purpose. * * * The plaintiffs are represented by Daniel R. Foley, with amicus support from Lambda Legal Defense and the ACLU Foundation of Hawaii. The state is represented by Deputy Attorney General Sonia Faust, with amicus support from the Rutherford Institute. [*Baehr v. Lewin*, 852 P.2d 44 (Haw., May 5, 1993).]

Summer 1993: SUPREME COURT UPHOLDS CONSTITUTIONALITY OF HATE CRIMES LAWS; NARROWS EQUAL PROTECTION AND TITLE VII PROTECTION: The U.S. Supreme Court unanimously ruled June 11 that laws providing penalty enhancement for the commission of bias-motivated crimes may be constitutional. *Wisconsin v. Mitchell*, 113 S.Ct. 2194. In an opinion by Chief Justice William H. Rehnquist, the Court rejected the Wisconsin Supreme Court's holding that a bias crime law violated the 1st Amendment by imposing a penalty for offensive thought or by chilling the speech of potential offenders. The Wisconsin court decision, issued after last term's decision in *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992), was the first of several from state courts suggesting that hate crimes laws must fall under the same rationale, i.e., that enhancing punishment for acts that are already criminal because of the element of categorical bias in selecting the victim implicates freedom of thought. * * * Rehnquist distinguished *R.A.V.* by noting that "whereas the ordinance struck down in *R.A.V.* was explicitly directed at expression (i.e., 'speech' or 'messages'), the statute in this case is aimed at conducted unprotected by the First Amendment." He emphasized that sentencing judges have traditionally been allowed to take motivation of defendants into account in imposing sentences, and distinguished between defendant speech going to "abstract beliefs" and speech indicating a particular animus against a defendant based on a particular characteristic, such as race. Rehnquist also noted the analogy between the role of motivation in hate crimes laws and in discrimination laws, which the Court in *R.A.V.* had cited "as an example of permissible content-neutral regulation of speech." * * * Rehnquist said it was "attenuated and unlikely" that hate crimes laws would violate the over breadth doctrine by chilling protected speech, asserting that such a scenario was "too speculative a hypothesis to support Mitchell's over breadth claim." A.S.L. [*Wisconsin v. Mitchell*, 508 U.S. 476 (1992). Initials of writers began to appear at the end of articles in the summer of 1993, as Law Notes acquired its first contributing writers.]

September 1993: COLORADO SUPREME COURT FINDS AMENDMENT 2 "PROBABLY UNCONSTITUTIONAL": On July 19, the Colorado Supreme Court affirmed that the constitutionality of Amendment 2 to the state constitution - the anti-gay and lesbian rights provision - is subject to "strict scrutiny" review. *Evans v. Romer*, 1993 WL 264693. The decision, written by Chief Justice Luis D. Rovira, was hailed as a victory in the fight to overturn the Amendment has resulted in the loss of million of dollars of tourist revenues to the state as a result of a gay-led boycott. * * * Amendment 2 was passed by Colorado voters on Nov. 3, 1992. Plaintiffs - including tennis star Martina Navratilova and the cities of Denver, Boulder and Aspen, all of which had sexual orientation discrimination ordinances on the books - filed suit in Denver District Court on [*467] Nov. 12, seeking to enjoin enforcement of Amendment 2 on grounds of unconstitutionality. They sought an expedited hearing on the merits, concerned that the amendment was to go into effect on Jan. 15. When this request was denied, plaintiffs sought and secured a preliminary injunction against its enforcement, which was granted by District Court Judge Jeffrey Bayless on the grounds that plaintiffs had demonstrated "that enjoining the enforcement of Amendment 2 was necessary to protect their right to equal protection of the laws under the United States Constitution." Bayless observed that because Amendment 2 "may burden the fundamental rights of an identifiable group," strict scrutiny was the appropriate standard of review. * * * Defendants appealed pursuant to C.A.R. 1(a)(3), alleging that the trial court improperly applied Colorado's six-part test for injunctive relief in order to protect existing fundamental constitutional rights (as articulated in *Rathke v. MacFarlane*, 648 P.2d 648, 653-654 (Colo. 1982).) On appeal, "the gravamen of defendants' allegation of error is their contention that the trial court 'did not base its decision on any direct precedent,' but rather 'extrapolated from several federal court decisions' the right identified an allegedly infringed by Amendment 2. Moreover, defendants argue, there is no applicable legal precedent or established right under the Equal Protection Clause of the United States Constitution which Amendment 2 can be shown to infringe upon." Although the Supreme Court noted that an appellate court reviewing issuance of a preliminary injunction usually shows great deference to the lower court, because the question for review was strictly a question of law, its review would be an independent one. As a result, the court was not limited to assessing only the right identified and relied on by the trial court. * * * The Supreme Court began its substantive analysis by observing that while "gay men, lesbians, and bisexuals have not been found to constitute a suspect class, ... and that plaintiffs do not claim that they constitute such a class do not [sic] render the Equal Protection Clause inapplicable to them." The court stated that its

task was two-fold: to determine which standard of review applies and whether under that standard "and to a reasonable degree of probability," Amendment 2 can be shown to violate equal protection. * * * The court concluded that for over 30 years, U.S. Supreme Court equal protection jurisprudence has clearly "guaranteed the fundamental right to participate equally in the political process and that any attempt to infringe on an independently identifiable group's ability to exercise that right is subject to strict judicial scrutiny." The court relied, for example, on *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969), which disallowed any legislative restriction of the franchise, *Reynolds v. Sims*, 377 U.S. 533 (1964) and related cases concerning attempts to dilute voting rights through reapportionment, and the "candidate eligibility" cases, notably *Williams v. Rhodes*, 393 U.S. 23 (1968), which struck down statutes that made it difficult for marginal or new political parties to field candidates. The Colorado court recognized that none of these cases was directly controlling. However, it argued that taken together they constituted a consistent recognition of "the paramount importance of political participation in our system of government... . This principle is what unifies the cases, in spite of different factual and legal circumstances ... the common thread which unites them with one another, and with the cases before us, is the principle that laws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process absent a compelling state interest." * * * But the cases held by the court to be most applicable to the dispute over Amendment 2 are a series of decisions [*468] involving "legislation which prevented the normal political institutions and processes from enacting particular legislation desired by an identifiable group of voters," especially *Hunter v. Erickson*, 393 U.S. 385 (1969), which struck a charter amendment requiring that fair housing ordinances to be approved by the electorate. Chief Justice Rovira insisted that although Hunter was concerned with preventing racial discrimination, the opinion "speaks to concerns which are broader than the repugnancy of racial discrimination alone" - and in particular concerns about the importance of the opportunity to participate equally in the political process. In support of its view that Hunter and subsequent cases were not limited solely to questions of racial discrimination, the court observed that the U.S. Supreme Court similarly stressed the importance of political participation in *Gordon v. Lance*, 403 U.S. 1 (1971) (seeking a declaratory judgment that a law requiring 60% voter approval of proposed bond indebtedness or state tax rates was unconstitutional under the Equal Protection Clause.) The Colorado court favorably quoted the conclusion of Gordon that "no sector of the population may be said to be 'fenced out' from the franchise because of the way they will vote." * * * In sum, the court concluded that these cases support the view that "the United States Constitution protects the fundamental right to participate equally in the political process, and that any legislation or state constitutional amendment which infringes on this right by 'fencing out' an independently identifiable class of persons must be subject to strict judicial scrutiny." The court rejected "defendants' contention that Amendment 2 cannot be understood to infringe on any recognized right protected under the Equal Protection Clause" for several reasons. First, it argued that U.S. Supreme Court precedent is not limited to racial minorities. Second, it looked to the fact that precedent disallows discriminating against segments of the voting population. Third, the court held that if the U.S. Supreme Court had wished only to protect "suspect" classes, it would not have consistently stressed the importance of political participation. "We therefore conclude that defendants' argument that the right to participate equally in the political process applies only to traditionally suspect classes is without merit. Similarly, we reject their argument that the above cited authorities are properly understood only as 'suspect class' cases, and not 'fundamental rights' cases." * * *

* Having concluded that strict scrutiny applies, the Colorado Supreme Court looked at the question of whether Amendment 2 seems likely to infringe the fundamental right to participate equally in the political process. Because Amendment 2 had both the proximate effect of repealing any existing laws banning sexual orientation discrimination and because its end result would be to prohibit any governmental entity from adopting gay-protective statutes, "the right to participate equally in the political process is clearly affected by Amendment 2, because it bars gay men, lesbians, and bisexuals from having an effective voice in governmental affairs insofar as those persons deem it beneficial to seek legislation that would protect them from discrimination... . Amendment 2 expressly fences out an independently identifiable group... . Strict scrutiny is thus required because the normal political processes no longer operate to protect these persons." In conclusion, the court said that although an amendment passed by a majority of voters through the initiative process is an electoral mandate meriting great deference, this voting event could not threaten the right to life, liberty and property to which all citizens are entitled. * * *

* The sole dissenter was Justice Erickson. In an opinion that matched the majority opinion's 38 pages, Erickson argued that because the "district court's delineation [*469] of the fundamental right supporting the preliminary injunction has never been identified or recognized by the United States Supreme Court or by any other court ... the district court's recognition of a new fundamental right is based on an underlying legal premise that is erroneous." In Erickson's reading of U.S. Supreme Court jurisprudence, the list of "fundamental rights" is extremely limited. In support of this view, he cited *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which the Court rejected extension of privacy rights to consensual homosexual acts. Erickson further disagreed with the majority that the district court had engaged in a fundamental rights analysis, holding instead that the cases it had cited involved traditionally suspect classifications. Moreover, Erickson concluded "that the majority's underlying legal premise that the Su-

preme Court has recognized a fundamental right to participate equally in the political process is erroneous." By contrast, Erickson interpreted the cases cited by the majority as being concerned either with the fundamental rights of voting or ballot access or suspect classifications. "To date, ... the Supreme Court has never explicitly stated that a fundamental right to participate equally in the political process exists that is subject to the strict scrutiny standard of review. Nor has the Supreme Court found such a fundamental right within the penumbras of the Constitution. At some point in the future, the Supreme Court may agree with the majority's underlying legal premise and identify such an expansive fundamental right to participate equally in the political process" but has not yet, in Erickson's view, done so. Erickson concluded that he would have reversed the preliminary injunction and remand for trial on the permanent injunction. * * * The State promptly announced its intention to appeal to the U.S. Supreme Court. Although Governor Roy Romer campaigned against Amendment 2 in the 1992 elections, he said that his "duty as governor is to fully represent those who voted for that law in the process of the courts," recognizing a need for certainty on this contentious issue. BNA Daily Lab. Rep. No. 137 (July 20, 1993), at A-13. State Attorney General Gale Norton "said the state has raised a number of issue indicating why Amendment 2 is justified, among them that it preserves present civil rights and concerns the state's ability to address moral issues." Norton reported that the state had 90 days to appeal but would do so in half that time. Will Perkins, Chair of Coloradans for Family Values, the group that sponsored Amendment 2 at the initiative level, seemed encouraged by the fact that this might receive U.S. Supreme Court review, indicating that it was important to have a national debate on the issue. BNA Daily Lab. Rep. No. 138 (July 21, 1993) at A-5. Shortly after the court's ruling, Judge Bayless rejected a request by the state to delay trial of the matter, reaffirming an October trial date despite the state's intent to petition for review. C.C. [*Evans v. Romer*, 854 P.2d 1270 (Colo.), cert. denied 114 S.Ct. 419 (1993)]. The subsequent trial, appeals, and U.S. Supreme Court opinion are reported below. The article is by Colin Crawford.]

October 1993: MASSACHUSETTS HIGH COURT APPROVES JOINT ADOPTIONS BY SAME-SEX COUPLES: Voting 4-3, the Massachusetts Supreme Judicial Court ruled Sept. 10 that the state adoption law may be interpreted to allow "unmarried cohabitants" to adopt where it is in the child's best interest and where the biological parent is party to the joint adoption, affirming a trial court decision approving such an adoption. *Adoption of Tammy*, 1993 WL 346566. The groundbreaking ruling is the second by a state's highest court to allow lesbian and gay non-biological parents the chance to legalize their relationship with the child they are raising with the [*470] biological parent, following a unanimous Vermont Supreme Court ruling (628 A.2d 1271) earlier in 1993. In a companion case reported the same day, *Adoption of Susan*, the court remanded a similar case to the Probate and Family Court for appropriate resolution. * * * A lesbian couple, Helen and Susan, conceived and gave birth to a child through donor insemination with the agreement that they would raise the child as equal parents, which they have done for the past 5-1/2 years of Tammy's life. The record was full of experts, friends, the guardian ad litem, and even a parish priest and nun, supporting the adoption. The case also involved a known donor who voluntarily surrendered parental rights and supported the adoption. Reciting case law mandating a liberal construction of the adoption law to advance the best interest of the child, Justice Greaney held that the court had jurisdiction to grant "a joint petition for adoption brought by two unmarried cohabitants in the petitioners' circumstances." Stating that nothing in the statute precluded unmarried couples from adopting, Greaney concluded that the statutory statement that a "person" may petition to adopt should be construed to allow for more than one person to adopt jointly. Thus, in Massachusetts these adoptions will proceed as joint adoptions, in contrast to other jurisdictions where only the non-biological parent petitions for adoption. The question then arises whether the biological mother's rights must be terminated, as is done in traditional adoptions outside the step-parent context. The court held that "the Legislature obviously did not intend that a natural parent's legal relationship to its child be terminated when the natural parent is a party to the adoption petition." * * * Dissenting, Justice Lynch disagreed with the court's statutory interpretation allowing unmarried couples to adopt jointly. He seems, though, to adopt an interpretation that would allow for the non-biological parent to adopt as a single parent with the biological mother's consent, but does not comment on whether the biological mother's rights must be terminated. Justice Nolan joined Justice Lynch's dissent in all respects but for Lynch's "first few sentences," which state that he does not disapprove of the adoption because the petitioners are lesbians. * * * Katherine Triantafillou represented the petitioning mothers in the Tammy case; Mary L. Bonauto of Gay & Lesbian Advocates & Defenders represented the petitioning mothers in the Susan case, with GLAD participating as an amicus in Tammy. The Women's Bar Association of Massachusetts and other groups also filed an amicus brief in support of the petitioners in Tammy. P.L.E. [*Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993)]. Article written by Paula L. Ettelbrick.]

November 1993: DOMESTIC PARTNER HAD STANDING TO SUE OVER LOVER'S FUNERAL: Michael Stewart had standing to enjoin his deceased lover's family from conducting an Orthodox Jewish funeral ceremony. *Stewart v. Schwartz Brothers-Jeffers Memorial Chapel, Inc.*, NYLJ, 9/13/93 p. 21 (N.Y. Sup.Ct., Queens County). Drew Stanton died on July 19, 1993, due to complications from AIDS. Joyce and Scott Sobel, Stanton's mother and brother,

took possession of the remains and shipped the body to Schwartz Brothers-Jeffer Memorial Chapel, Inc., for an elaborate funeral and burial. Stewart, Stanton's lover and companion of five years, filed an emergency action to enjoin the funeral, claiming that Stanton had stated that he did not want an Orthodox Jewish funeral. Stanton's will was silent as to the disposition of his body. * * * The only issue before the court was whether Stewart had standing to sue. Generally, only the deceased's surviving spouse or next of kin would have standing. Judge William D. Friedman noted in his decision that had Stewart claimed to be [*471] Stanton's surviving spouse or next of kin, the court probably would not have granted him standing, because New York courts have been reluctant to treat gay relationships as familial ones beyond the context of rent and eviction laws. Oddly, however, it was the "spousal-like relationship" that existed between Stewart and Stanton along with Stanton's strained relationship with his family that led Judge Friedman to find that Stewart had standing to enjoin the funeral. Friedman cited *Matter of Conroy*, 138 A.D.2d 212 (N.Y.App.Div. 3rd dept, 1988), which held that decedent's short-time girlfriend had standing as a representative of his wishes to oppose the family's attempt to disinter his remains. Before a decision could be made on who should get possession of Stanton's remains, the parties reached a settlement. Stanton's body was cremated and the parties split the ashes. T.V.L. [*Stewart v. Schwartze Brothers-Jeffer Memorial Chapel, Inc.*, 606 N.Y.S.2d 965 (N.Y.Sup.Ct., Queens County 1993)]. The article is by Todd V. Lamb.]

December 1993: NY CITY EXTENDS DOMESTIC PARTNER BENEFITS IN SETTLEMENT OF GAY TEACHERS SUIT: After New York State Insurance Superintendent Salvatore Curiale stated that the Insurance Department would approve sale of group health insurance policies covering domestic partners of employees upon a showing of financial interdependence, NY City Mayor David Dinkins announced he would direct city attorneys to negotiate a settlement of Lesbian & Gay Teachers Association v. Board of Education, as to which trial was pending in State Supreme Court after a determination by the Appellate Division that failure to provide such benefits presented a plausible cause of action under state and local law. See 585 N.Y.S.2d 1016 (1st Dept. 1992). Settlement was complicated, since the mayor hoped to resolve at the same time a charge filed against the city by a coalition of lesbian and gay city employees seeking domestic partnership benefits city-wide, and the mayor had consistently taken the position that such a sweeping change required agreement with municipal unions. * * * Hoping to resolve the issue prior to the Nov. 2 elections, the city, the unions, and counsel for the Lesbian & Gay Teachers Association finally reached agreement on Oct. 29. At a press conference on Oct. 30, the parties announced that domestic partnership coverage would be extended to all city employees. Prerequisites for coverage would include registration of the partnership and filing of an application accompanied by evidence of financial interdependence. The city undertakes as of Jan. 1, 1994, to "make health insurance benefits and options available to the domestic partners (and their dependent children) of its active and retired employees that are in every way identical to the health insurance benefits and options offered to married spouses (and their dependent children) of its active and retired employees." Acceptable evidence of financial interdependence requires two items of proof, drawn from a list of a dozen items on a form titled "Declaration of Financial Interdependence." They include joint ownership of bank accounts, credit cards, homes, cars, residential leases, and a variety of family planning documents, such as powers of attorney, wills, health care proxies, etc. * * * Because this was undertaken as a formal settlement of the Lesbian & Gay Teachers litigation (in a written stipulation of settlement approved by NY State Supreme Court Justice Karla Moskowitz), the settlement is binding despite the change in mayor on Jan. 1. Republican-Liberal Rudolph Giuliani, who won the election a few days later, indicated on Oct. 30 that he was not opposed to domestic partnership benefits but questioned how they would be paid for. Lambda Legal Defense Fund and pro bono attorneys from Morrison & [*472] Foerster and Sullivan & Cromwell represented the Gay Teachers Association, and will monitor compliance with the settlement agreement. A.S.L.

February 1994: COWARDLY TEXAS HIGH COURT BLOWS OFF SODOMY CHALLENGE: Voting 5-4, the Texas Supreme Court ruled Jan. 12 in *State v. Morales*, 1994 WL 6714, that it lacked jurisdiction to rule on a pending constitutional challenge to the state's sodomy law, Penal Code sec. 21.06, which penalizes only same-sex sodomy. Justice Bob Gammage wrote a sharply worded dissent for himself and Chief Justice Thomas Phillips. Justices Lloyd Doggett and Rose Spector, accusing the court of "shirking its equitable duty to provide a remedy for a wrong... [by allowing] the State to insulate its laws from judicial scrutiny." Three of the five justices in the majority are up for re-election this year. * * * *State v. Morales* is a test case, brought in the district court in Austin as a class action attack on the state's misdemeanor sodomy law. Texas has a bifurcated judicial system, with separate civil and criminal courts, culminating in a Supreme Court for civil matters and a Court of Criminal Appeals for criminal matters. Although the state contested jurisdiction of this action on the civil equity side in district court, arguing that only the criminal courts in the context of an actual prosecution had jurisdiction to determine the constitutionality of the state's sodomy law, both the district and intermediate appeals courts rejected this argument, finding that recent decisions of the Supreme Court had afforded equity relief in cases where personal or property rights were endangered by an unconstitutional penal statute and review

on the criminal side was unlikely. See *826 S.W.2d 201*. Since the state conceded from the outset that it was not interested in prosecuting consensual same-sex sodomy between adults in private, it was unlikely that the issue of the sodomy law's constitutionality would ever come before the criminal courts in an actual prosecution for consensual sodomy. Thus, the courts below found that they had jurisdiction because the plaintiffs otherwise would have no remedy, and ruled that the sodomy law violated the state constitution. * * * The Supreme Court, in an opinion by Justice John Cornyn, joined by Justices Raul Gonzalez, Jack Hightower, Nathan Hecht, and Craig Enoch, claimed that the lower courts had misconstrued its recent precedents. The court insisted that in no recent case had an equity court asserted jurisdiction to make a "naked" declaration on the constitutionality of a statute. Rather, in each case, the plaintiffs had shown either that enforcement against them of a potentially unconstitutional statute was imminent, or the plaintiffs were not seeking a declaration of unconstitutionality of a statute, but rather an injunction against a particular body whose pending enforcement of a statute against the plaintiff would cause irreparable injury to the plaintiff's personal or property rights. "An injunction will not issue unless it is shown that the respondent will engage in the activity enjoined," wrote Cornyn. "As we have already noted, there is no allegation that absent an injunction prohibiting enforcement of 21.06, that the statute will be enforced." The court reversed the decision of the court of appeals holding the statute un-

constitutional, and remanded to the district court with instructions to "dismiss for want of jurisdiction." * * * In his dissent, Justice Gammage sharply disputed the court's narrow construction of its leading recent precedent on equity jurisdiction, *Passel v. Fort Worth Independent School District*, 440 S.W.2d 61 (Tex. 1969), in which the court had enjoined school officials from forbidding students from attending school unless the students disclaimed all membership or participation in certain student clubs that the school officials found objectionable. In that case, [*473] according to Gammage, the court had abandoned its long-standing precedent that civil equity would only enjoin the operation of a criminal statute where irreparable injury to property rights was in question, and ruled that equity could also enjoin operation of a criminal statute where personal rights were at stake "because the plaintiffs had no way to test the penal statute because no prosecutions were threatened or even contemplated." Gammage argued that this test case fit neatly into the *Passel* precedent's scope. Indeed, in this case, the plaintiffs had demonstrated harms flowing from the mere existence of the statute, in contexts where their stigmatization as "criminals" was held against them in the context of employment and family law cases. * * * "Under the court's analysis," charged Gammage, "the State may adopt all manner of criminal laws affecting the civil or personal rights of any number of citizens, and by declining to prosecute under them, ensure that no court ever reviews them. Declining to even consider the merits of the pleas for equitable relief before us today could have an impact far beyond the class of citizens to any individual or group of citizens who seek equitable relief under the Texas Constitution, because of an unenforced Texas criminal statute, for the alleged deprivation of any personal liberty or civil right which does not also involve what the court may perceive as an adequate vested property interest." * * * Where does this leave the Texas sodomy law? The Texas Supreme Court's ruling does not go to the merits, so it is not a holding that the law is valid, although it reverses the court of appeals' ruling in this case that the law is invalid. The Supreme Court previously denied review in *City of Dallas v. England*, 846 S.W.2d 957 (Tex.App. - Austin 1993), in which the court of appeals held that the Dallas police department could not deny employment to a lesbian applicant on the basis of the sodomy law, because the sodomy law was unconstitutional as applied to private, consensual behavior. The Texas Supreme Court denied the city's petition for review in *England* because the city failed first to file a motion for rehearing in the court of appeals, apparently a jurisdictional prerequisite. (See *Morales*, fn5.) Thus, the denial of review in *England* was not a ruling on the merits by the Texas Supreme Court. Apparently, then, what we are left with is a final decision in the *England* case in which the court of appeals held the sodomy law unconstitutional, and a holding by the Texas Supreme Court in *Morales* that a Texas equity court does not have jurisdiction to consider the constitutionality of the sodomy law with respect to consensual, private behavior in a declaratory judgment proceeding. But, the facts in *England* appear, at first blush, to satisfy the requirements specified in *Morales* for finding equity court jurisdiction to declare a criminal statute unconstitutional; *England* did not seek a "naked" declaration of unconstitutionality, but rather an adjudication of the validity of a particular policy that disadvantaged her and that was premised on the sodomy law. The bottom line: Perhaps the cowardly Supreme Court justices up for election saw a way to leave the situation as follows: The sodomy law is unconstitutional (per *England*) without the Supreme Court having to rule on the merits. Or is this paragraph wishful thinking? We'd be eager to hear readers' views on this. * * * The *Morales* case was devised and litigated by the Texas Human Rights Foundation and its cooperating attorneys. A.S.L. [*State v. Morales*, 869 S.W.2d 941 (Tex.1994).]

May 1994: COLORADO COURT OF APPEALS: DOMESTIC PARTNER NOT PART OF "IMMEDIATE FAMILY": In December 1991, Mary Ross, a social worker employed by the Denver Department of Health and Hospitals, applied for family sick leave benefits when she took three days off to care for her domestic partner. The Department [*474] denied Ross' application since her domestic partner was not a member of Ross' immediate family as de-

ined in the Career Service Authority Rules. The decision was reversed on appeal by the Career Service Authority, which found that the definition of "immediate family" in the Rules resulted in Ross' being discriminated against on the basis of sexual orientation, in violation of an anti-discrimination rule. This was reversed by the Career Service Board. Ross sought review of the Board's decision in the district court, which reversed the Board's decision. This decision was appealed yet again. * * * On appeal, the first issue the court addressed was whether the Authority's rule, which prohibits discrimination on the basis of sexual orientation, superseded the definition of immediate family. *Ross v. Denver Department of Health and Hospitals, et al., 1994 WL 115870* (Colo. App., April 7). "Immediate family" includes a husband or wife, but not a domestic partner. Ross argued that denial of sick leave to care for her domestic partner was discrimination based on her sexual orientation because employees are entitled to take sick leave to care for members of their immediate family. The court found that there was no intent for the rule to supersede the definition of immediate family. It further held that there was no evidence that the regulatory definition of immediate family discriminated on the basis of sexual orientation, since the definition in the rule applied equally to homosexual and heterosexual employees. The court emphasized that the differentiation in the definition was not founded on distinctions between heterosexual and homosexual employees, but rather on distinctions between married and unmarried employees. * * * Ross argued that her inability to marry her same-sex partner distinguished her situation from that of an unmarried heterosexual. The court rejected this argument, stating that it was really a "perceived unfairness of the state's marital laws" for which the state legislature is responsible. Ross also urged the court to adopt a more expansive, sociologically based definition of family, like the N.Y. Court of Appeals in *Braschi v. Stahl Associates*. The court declined to do so, explaining that since the term family is defined in the Rule, the courts are not free to design a new definition. Finally, Ross argued that the definition of "immediate family" violated the equal protection and due process guarantees of the Colorado and United States Constitutions because it created a class of persons who were denied sick leave benefits on the basis of sexual orientation. The court reiterated that the discriminatory result that Ross experienced stemmed from her marital status rather than her sexual orientation. A.T. [*Ross v. Denver Dept. of Health & Hospitals, 883 P.2d 516 (Colo.App. 1994)*]. The article is by Angela Thompson.]

Summer 1994: DELAWARE COURT DENIES AIDS-PHOBIA CLAIM: In *Brzoska v. Olsen, 1994 WL 233866* (Del.Super.), the Superior Court of Delaware dismissed an AIDS-phobia suit of 38 patients against a now deceased dentist. On March 1, 1991, Dr. Raymond Owens died of AIDS. Subsequently, the Delaware Division of Public Health notified his patients of their possible HIV exposure. Each patient was offered free testing and counselling for HIV, and all of the patients tested negative. Upon learning that Dr. Owens died of AIDS, plaintiffs sued his estate, alleging that Dr. Owens performed invasive procedures upon them while he had open skin lesions and that his infection control procedures were deficient, which put them at risk for HIV exposure. * * * Defendants moved for summary judgment, asserting that no plaintiff had tested positive for HIV and it had been over three years since their last possible contact with Dr. Owens. Defendants also asserted that plaintiffs had not been damaged because [*475] they will not contract AIDS from exposure to Dr. Owens and that they may not recover simply for the fear of contracting AIDS. Alternatively, plaintiffs argued that their tort claims against Dr. Owens (negligence, recklessness, battery, fraudulent misrepresentation, and false pretenses) contained material issues of fact which remained unsettled and, therefore, summary judgment should have been denied. They also argued that they had suffered a compensable injury; the fear of AIDS is reasonable, it has caused severe emotional distress, and they are entitled to recover for their damages. Essentially, plaintiffs' claim was that they should be able to recover although the risk of transmission was slight, because the consequences of contracting the disease are so great. * * * The court observed that an AIDS-phobia case had not previously arisen in Delaware, so it reviewed numerous cases from other jurisdictions. It eventually focused on a Delaware case which involved fear of contracting cancer, *Margenthaler v. Asbestos Corp. of Am., 480 A.2d 647 (Del. Super. 1984)*, which involved a claim by wives of asbestos workers for fear of contracting cancer as a result of household exposure to asbestos fibers on their husbands' clothing. Their claim was denied as there was no assertion by the plaintiffs-wives that asbestos fibers were physically present in their bodies. The court stated: "In any claim for mental anguish, whether it arises from witnessing the ailments of another or from the claimants own apprehension, an essential element of the claim is that the claimant have a present physical injury." * * * Relying on this reasoning, the Delaware court rejected the "fear of AIDS" cause of action and granted summary judgment for the defendants. As none of the plaintiffs were able to show actual exposure to HIV, the court stated that they would not be permitted to pursue recovery merely for mental distress that they allegedly suffered while they awaited HIV test results. * * * This case came on the heels of renewed media speculation about the Congressional testimony of Kimberly Bergalis, a 23 year-old Floridian who died of AIDS after claiming that she contracted HIV through professional care from her dentist. Bergalis went to Washington to press Congress for mandatory HIV testing and disclosure of health care workers. An op-ed piece in the New York Times (July 10) raised new doubts about Ms. Bergalis' claim that she was a virgin, and thus her dentist was her only possible contact with HIV. P.T. [The article is by Paul Twarog.]

September 1994: FEDERAL COURT RULES ADA PROHIBITS AIDS-BASED DISCRIMINATION: In a real-life version of the film Philadelphia, an HIV-positive attorney alleges his firm terminated his employment because he has AIDS. *Doe v. Kohn, Nast & Graf*, 1994 WL 416269 (E.D.Pa. Aug. 4). Doe (a pseudonym) alleged a violation of the Americans With Disabilities Act (ADA), ERISA, the Pennsylvania Human Relations Act, and Pennsylvania wage laws. Doe also alleged breach of contract, breach of covenant of good faith and fair dealing, invasion of privacy, defamation, civil conspiracy, and intentional infliction of emotional distress, claiming both actual and punitive damages. The firm moved for summary judgment, arguing among other things that HIV infection is not a disability covered by the ADA. The court denied the employer's motion on all counts except emotional distress, oral contract, and the wage law claim; regarding the ADA, the court ruled that symptomatic HIV infection is a protected disability. * * * Doe began working for defendant in 1991. His supervisor often praised his work and the firm awarded him a larger-than-expected bonus. In November, 1992, Doe's secretary, while processing incoming mail, opened a letter from Johns Hopkins Division of Infectious [*476] Diseases; the letter indirectly intimated that Doe had AIDS. Doe asserts that within days his supervisor stopped assigning him work, stopped speaking with him, and avoided physical contact. In January, 1993, the firm decided not to give Doe a pay raise. Doe's supervisor told him that his written work did not meet expectations and that his contract would not be renewed for 1994. The supervisor memorialized the conversation in a memo for the firm's files, which also contained a copy of the letter indicating Doe had AIDS. In March, 1993, Doe hired a lawyer and sent a box of documents from the office to support his claim against the firm. A principal member of the firm threatened to "black-ball" Doe if he sued. Within days, Doe found the contents of his office boxed up and the office locks changed. Doe sued the firm and his supervisor in August 1993. Doe claimed that the stated reasons for his termination were pretextual and that the real reasons were his disability (AIDS) and retaliation for his efforts to file a claim. * * * District Judge Gawthrop found sufficient evidence to allow the retaliation claim to proceed on a mixed motives theory. Applying the analysis of Title VII cases, the court found that the plaintiff had made out the elements of a prima facie case: (1) protected activity or status, (2) contemporaneous or subsequent discharge, and (3) a causal link between the two. The court noted that a retaliation plaintiff may establish protected activity based on a threat to sue, or consulting an attorney. In a mixed motives case, the plaintiff meets the causal burden by showing conduct or statements by a decision-maker that directly reflect discriminatory animus or at least a discriminatory attitude. The court found the evidence sufficient to bring the claim before a jury. * * * Applying the same analysis to ADA coverage, the court turned to the question of whether the plaintiff had a disability that would bring him within the scope of ADA, i.e., "a physical or mental impairment that substantially limits one or more of the major life activities" or a record or perception of such an impairment. Finding no express guidance on whether this definition includes HIV, the court looked to interpretive guidelines from the Department of Labor. Translating the regulations with the help of a medical dictionary, the court observed that they protected as disabled persons whom a lay observer would not consider to have a disability - for example, persons with high blood pressure. The court ruled that plaintiff's fever and skin rashes, and HIV itself, created physical impairments within the meaning of the regulations. The court then noted that the impairment must limit a major life activity, but not necessarily a work-related activity, and that the list of such activities in the regulations was intended to be illustrative rather than exclusive. The court cited *Cain v. Hyatt*, 734 F.Supp. 671 (E.D.Pa. 1990) (another case involving AIDS discrimination in law firm employment) for the proposition that procreation is a major life activity limited by HIV. * * * Oddly, the court found that Doe did not have a record of impairment. Distinguishing the case from *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) (teacher with recurrent TB had a protected disability), the court observed that Doe's diagnosis was only about a year old, unlike the thirty-year history in Arline. The court decided that Doe's impairment lacked sufficient duration to constitute a record of impairment. The court did not give a reason why a record must be long in order to constitute a statutory "record." Also surprising is the opinion's lack of reference to *Chalk v. U.S. District Court*, 840 F.2d 701 (9th Cir. 1988). Ruling on a preliminary injunction, the court in Chalk decided provisionally that AIDS is a handicap protected by the Rehabilitation Act. Because the ADA definition of disability follows the [*477] Rehabilitation Act, Chalk lends further support to the court's decision in Doe. The court ruled that the evidence of perceived disability discrimination was sufficient to bring that claim to the jury. * * * As to ERISA, the court found sufficient evidence to raise a jury question of whether the firm terminated Doe's employment at least partly to deprive him of benefits under the firm's disability plan, in violation of sec. 510. * * *

On the remaining state law claims, the court held that analysis under the Pennsylvania Human Relations Act is the same as Title VII analysis, and thus leads to the same result as the ADA. The court upheld the breach of contract claim to the extent that it relied on Doe's written contract, but cited the parole evidence rule in dismissing claims based on implied oral promises (including the wage law claim, which had sought compensation for unused paid vacation time). The court similarly upheld the claim for breach of covenant of good faith and fair dealing. The court ruled that the evidence established jury questions on the claims for invasion of privacy, defamation, and civil conspiracy. The court dismissed Doe's claim for intentional infliction of emotional distress, ruling that such a claim required truly outrageous conduct,

not merely mean-spirited conduct with an improper motive. Lastly, the court allowed Doe to proceed on his claims for punitive damages under all surviving theories except the breach of contract claim, ruling that the ADA, the PHRA, and common law claims (other than contracts) all allow punitive damages. O.R.D. [*Doe v. Kohn, Nast & Graf, P.C.*, 866 F.Supp. 190 (E.D.Pa., Oct. 6, 1994), 1994 WL 517989 (E.D.Pa., Sept. 20, 1994), 862 F.Supp. 1310 (E.D.Pa., Aug. 4, 1994), 853 F.Supp. 147 (E.D.Pa., May 13, 1994)]. The article is by Otis R. Damslet.]

November 1994: COLORADO SUPREME COURT STRIKES DOWN AMENDMENT 2: On Oct. 11 (coincidentally, "National Coming Out Day), the Colorado Supreme Court granted a permanent injunction against the implementation of the anti-gay voter initiative, known as Amendment 2. In so doing, it became the first state supreme court in the country to rule that voter initiatives that prevent government from enacting legal protection for lesbians, gay men and bisexuals are unconstitutional. The decision came after the initial appeal of the preliminary injunction, where the court held that the denial of access to the political process implicated a fundamental right, which required strict scrutiny, and a two-week trial on the state's alleged compelling justifications. The Amendment 2 case, *Evans v. Romer*, 1994 WL 554621, was also the first of its kind to go to trial. Six of the seven justices found Amendment 2 unconstitutional. * * * In brief, Amendment 2 sought to amend the state's constitution to prohibit state and local government from enacting any laws or policies "whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall... entitle any person... to claim any minority status, quota preferences, protected status or claim of discrimination." After a trial with extensive testimony and, at times, outrageous assertions by the state's witnesses, trial judge H. Jeffrey Bayless found that such a provision either lacked a compelling state rationale or, where a compelling rationale was implicated, the provision was too broadly drawn. * * * In its prior decision, the Supreme Court had held that, based on U.S. Supreme Court case law, there exists a fundamental right to have equal access to the political process. Denying lesbians, gay men and bisexuals the opportunity to lobby their elected officials to enact legislation protecting their interests (which would be the effect of Amendment 2) denied them such access. In the Oct. 11 decision by Chief Justice Rovira, the court refused to reconsider this holding. The central issue on this second appeal, [*478] therefore, was whether the state had proved any compelling justification for denying access to this class of persons, and whether Amendment 2 was "narrowly tailored" to achieve such an interest without unnecessarily burdening the constitutional right of participation. * * * While the Colorado Supreme Court's opinion upholding the trial court's decision lacks the eloquent, impassioned call for justice that has come through in some other similar decisions, the court effectively and methodically picked apart each of the state's asserted justifications. First, the court rejected the state's assertion that Amendment 2 protects the sanctity of religious, familial and personal privacy. While religious and familial privacy are certainly compelling state interests, the court found that Amendment 2 was not narrowly enough drawn to further those particular interests. The less restrictive way to protect religious freedom would be to include religious exemptions in civil rights legislation. Further, the state's interest in preserving the right of some parents to teach traditional moral values to their children fails "because it rests on the assumption that the right of familial privacy engenders an interest in having government endorse certain values as moral or immoral." The personal privacy argument fails because Amendment 2 would forbid government from banning discrimination in "all aspects of commercial and public life, no matter how impersonal." The narrower means of meeting this concern, according to the court, is to exempt, for instance, owner-occupied housing units from the non-discrimination law, as has been done and accepted in other contexts. * * * Second, the court rejected the state's claim that Amendment 2 serves the compelling state interest in seeing that limited resources are dedicated to the enforcement of laws protecting those who fall into suspect classes, rather than diverting some funds to protect lesbians, gay men and bisexuals from discrimination. Preservation of fiscal resources and administrative convenience are not compelling state interests. And, even if they were, Amendment 2 does not achieve the goal of preserving fiscal resources since the facts from other jurisdictions indicate that enforcing sexual orientation prohibitions has not had a significant financial impact on the state. * * * Third, the state argued that Amendment 2 allows the state's citizens to establish public social and moral norms, which are defined as a) preserving heterosexual families and marriage, and b) sending the societal message condemning lesbians, gay men and bisexuals as immoral. Interestingly, the court responded by saying it knew of "no authority to support the proposition that the promotion of public morality constitutes a compelling governmental interest." At most, according to the court, this interest is substantial, but not compelling. "Antidiscrimination laws make no assumptions about the morality of protected classes - they simply recognize that certain characteristics, be they moral or immoral (sic) - have no relevance in enumerated commercial contexts." Furthermore, employment termination and evictions on the basis of sexual orientation are not appropriate ways of advancing even valid moral beliefs. * * * Fourth, the court rejected the state's argument that Amendment 2 prevents government from supporting the political objectives of a special interest group. Because virtually any law could be regarded as benefitting a "special interest group," the state's argument would "justify striking down almost any legislative enactment imaginable." * * * Finally, the court rejected the state's obviously absurd argument that Amendment 2 would prevent factionalism and divisiveness over the controversial issue of homosexuality. This is accomplished by eliminat-

ing the "city-by-city and county-by-county battles over this issue." The court pointed out that the state sought to end debate [*479] over the issue by preventing one side (lesbians, gay men, etc.) from having a forum to discuss their concerns. * * * Justice Scott filed a concurring opinion in which he attempts to resurrect the privileges and immunities provision of the Equal Protection Clause as the correct means to analyze the voters' attempt to cut certain people out of the process. While Judge Scott's concurrence is interesting, significant downsides to his theory are that the privileges and immunities clause applies only to those who are citizens, and the clause has been a virtual dead letter of constitutional law since the 1873 Slaughter-House cases. * * * Justice Erickson dissented from the majority's view, as he did in the prior appeal, arguing that there is no basis for the court's claim that there exists a fundamental right to engage in the political process. Instead, he analyzes the claim as an Equal Protection argument and applies rational basis scrutiny to the claims raised by the state. (Since the trial court's decision rejecting strict scrutiny analysis on the basis of sexual orientation was not raised on appeal, the majority did not address this issue.) * * *

The State of Colorado announced that it will seek review by the U.S. Supreme Court. Now pending before the 6th Circuit Court of Appeals is the Cincinnati Issue 3 case, in which the trial court used the same analysis as the Colorado Supreme Court in finding an equal protection violation. It seems unlikely that the Supreme Court will take up this question for review until the 6th Circuit decides that case. As yet, there is no split among the state high courts or the circuit courts on this issue. P.L.E. [*Evans v. Romer*, 882 P.2d 1335 (Colo., Oct. 11, 1994). The article is by Paula L. Ettelbrick.]

January 1995: ALASKA SUPREME COURT RULES ON PROPERTY DISPOSITION IN BREAK-UP OF LESBIAN COUPLE: In *D.M. v. D.A.*, 1994 WL 671558 (Dec. 2), the Alaska Supreme court considered an appeal in an action for dissolution of a partnership of a lesbian couple. At issue was the valuation and allocation of interest in the couple's principal residence and of assets of a horse breeding business which they had jointly held. The sexual orientation of the parties was not at issue in the decision, save for the care which the court showed to conceal their identities and gender. Indeed, gender could only be determined by a close reading of the facts. * * * The couple began an "intimate personal relationship" early in 1985. Except for a 3 month period in 1986, they lived together from early 1985 until March 1991, first in D.M.'s house, then in D.A.'s. In December 1988, D.A. quitclaimed her interest in her property to herself and D.M. "in consideration of love and affection." At the time of trial, assets of the partnership also included two Arabian stallions, a mare, and two foals. The couple separate in March 1991 and signed a separation agreement a month later dividing their property. The agreement was never performed. Instead, D.A. filed a petition for dissolution of the partnership in May 1991, and D.M. counterclaimed for enforcement of the agreement and partition of the principal residence. * * * The trial court held the agreement void based on a finding of duress (a history of domestic violence which D.M. did not dispute on appeal), and concluded that D.M. was entitled to no interest in the principal residence because the parties were found to have intended the transfer to D.M. to have been made solely for tax purposes. Because the trial court found that D.M.'s contributions to costs relating to the principal residence above and beyond rental approximately equaled D.A.'s interest in the partnership, D.M. was awarded all interest in the horse breeding business. The trial court also divided up the other personal property. * * * On appeal, the Alaska Supreme Court held that the [*480] trial court had handled the matter too casually, and ruled that the division of the property held jointly was to be in accordance with procedures in place for any other business relationship. The trial court made its factual determinations on D.A.'s reformation of her quitclaim deed based upon a preponderance of the evidence. This was improper, ruled the Supreme Court, as the evidentiary standard in reformation cases was "clear and convincing evidence." The trial court was to consider on remand whether the conveyance had been intended to be a gift, or pursuant to a contract between the parties, for which parol evidence could be considered. If the conveyance was pursuant to contract, D.A. would have to prove that it was not intended to have conveyed an undivided half interest and, if so, what interest was intended to be conveyed. In considering this question, the trial court was directed to consider how tax deductions for the property were to be allocated, the cohabitation of the parties, other joint financial acts, and how other properties previously held individually were to be disposed of. The Supreme Court also ruled that the value of the horse breeding business was to be recalculated, because the numbers used by the trial court simply did not add up. S.K. [*D.M. v. D.A.*, 885 P.2d 94 (Alaska, 1994). The article is by Steven Kolodny.]

March 1995: CALIFORNIA APPEALS COURT IMPOSES TARASOFF DUTY ON DOCTORS IN HIV SEXUAL-TRANSMISSION CASE: In an opinion by Justice Miriam Vogel, a California Court of Appeal reversed the dismissal of an HIV+ plaintiff's negligence claim against his girlfriend's doctors, holding that the doctors had a duty, even to an unidentified third party, to take reasonable steps to protect his safety. *Reisner v. Regents of the University of California*, 1995 WL 29397 (2nd Dist., Jan. 26). Plaintiff Daniel Reisner was the boyfriend of Jennifer Lawson, who was a patient of the defendants at UCLA Medical Center. During surgery in 1988, when she was 12, Lawson received a blood transfusion containing HIV antibodies. The doctors learned that the blood was tainted the following day, but told

neither Lawson nor her parents. Approximately 3 years later, Lawson began dating Reisner, with whom she eventually had sex. Lawson learned she had AIDS in 1990 and informed Reisner that he was at risk. Lawson died a month later and Reisner learned he was HIV+. * * * The court based its finding of a duty between the defendants and *Reisner on Tarasoff v. Regents of the Univ. of Calif.*, 17 Cal. 3d 425 (1976), which held that a doctor has a duty to take "steps ... necessary under the circumstances") to protect third parties from injury, and *Myers v. Quesenberry*, 144 Cal. App. 3d 888 (1983), which held that doctors who allowed a distraught diabetic patient to drive could be liable to foreseeable though not readily identifiable third parties injured when the patient crashed her car. The court held that a warning to Lawson or her parents would have been a reasonable step for the doctors to take with regard to their duty to Reisner, and other third parties. The holding is therefore relative narrow in that it explicitly rejects the notion that the defendants' duty would require them to seek out and warn unknown and unknowable third parties. Nor will floodgates of litigation open, the court reasons, because the plaintiff carries a heavy burden in showing causation. (Here, Reisner would have to show that a warning to Lawson would have been transmitted to him, that he would have abstained from sex with Lawson and that he could not have acquired the disease elsewhere.) * * * Notably, the court avoids two traps: it does not vilify Reisner and Lawson for being sexually active at a young age, nor does it demonize people with HIV and AIDS as [*481] latter day "Typhoid Marys." We are not completely out of the woods, however. The court's discomfort with writing about sex is apparent in its use of the euphemism, "becoming intimate." D.W. [*Reisner v. Regents of the Univ. of California*, 31 Cal.App.4th 1195 (Cal.App. 1995)]. The article was written by Dirk Williams.]

May 1995: VIRGINIA SUPREME COURT DEPRIVES BOTTOMS OF CUSTODY; FINDS "ACTIVE LESBIANISM" A BAR: The Virginia Supreme Court voted 4-3 to reverse the state court of appeals and confirm the decision of the Henrico County District Court awarding custody of Tyler Doustou to his grandmother, Pamela Kay Bottoms, rather than his mother, Sharon Lynne Bottoms, who is a lesbian. *Bottoms v. Bottoms*, 1995 WL 234222 (April 21). Grandmother, known as Kay Bottoms, instituted the action after her daughter "came out" to her. * * * Justice A. Christian Compton's opinion sets the stage by acknowledging that the court previously held that parental sexual orientation is not a per se basis for finding unfitness, and that there is a rebuttable presumption that a biological parent is entitled to custody in a dispute with a third party. Contrary to the court of appeals, the supreme court found that there was sufficient evidence of unfitness in the record to sustain the trial court's finding. Compton stated that on appeal the trial court's findings of fact "are entitled to the weight accorded a jury verdict, and these findings should not be disturbed by an appellate court unless they are plainly wrong or without evidence to support them... Absent clear evidence to the contrary in the record, the judgment of a trial court comes to an appellate court with a presumption that the law was correctly applied to the facts. And, the appellate court should view the facts in the light most favorable to the party prevailing before the trial court. Accordingly, we shall summarize the facts in the light most favorable to the grandmother, resolving all conflicts in the evidence in her favor." * * * Given this view of the court's role, its factual summary, crediting virtually all of Kay Bottoms's negative allegations, provides an apparently damning bill of particulars against Sharon, who is described, in sum, as a high school drop-out ne'er-do-well, neglectful of her young son's welfare to the point of hitting the infant so hard as to leave marks "on his person," conducting sexual relationships with a variety of men and then her lover April Wade in the same room of the small apartment as the baby's crib, and having no means of providing financial support for the child apart from April's wages. (Sharon's ex-husband has shown no interest in Tyler and paid no child support, according to the court.) The court rehearsed in detail Kay's allegations that Tyler spent about 70 percent of the two years prior to the trial in Kay's physical custody, that when returning from visits with his mother Tyler engaged in foul language of a type not used in Kay's household, and that Tyler was left with his grandmother so often that Sharon kept a suitcase of Tyler's clothes permanently packed for the purpose. The court also repeated the allegation that Sharon's lover made physical threats against Kay when arguments arose about visitation, and had admitted striking Tyler. The court also noted as significant that the guardian ad litem recommended giving custody to Kay, reciting the guardian's trial testimony at some length. The court asserted that based on these findings it was plausible for the trial court to conclude that Sharon was unfit. The court never mentioned evidence introduced by Sharon about her mother's conduct, or the abusive circumstances to which Sharon alleged her mother subjected her. * * * The court specified as significant factors in determining unfitness "the parent's misconduct that affects the child, neglect of the child, and a [*482] demonstrated unwillingness and inability to promote the emotional and physical well-being of the child. Other important considerations include the nature of the home environment and moral climate in which the child is to be raised." Repeating his prior observation that a lesbian mother is not per se unfit, Compton asserted: "Conduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth ...; thus, that conduct is another important consideration in determining custody." Compton spent several paragraphs repeating the bill of particulars against Sharon, culminating in her lesbian relationship: "And, we shall not overlook the mother's relationship with Wade, and the environment in which the child would be raised if custody is awarded the mother. We have previously said that daily living under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child by reason

of the "social condemnation" attached to such an arrangement, which will inevitably afflict the child's relationships with its "peers and with the community at large." *Roe v. Roe*, 228 Va. 722, 728, 324 S.E.2d 691, 694 (1985). We do not retreat from that statement; such a result is likely under these facts. Also, Wade has struck the child and, when there was a dispute over visitation, she has threatened violence when her views were not accepted." * * * Thus, the court infers that the child will be harmed solely on the basis of societal disapproval of the mother's relationship, and not based on any direct evidence of harm. Holding that the trial court ruled correctly in light of the evidence when viewed in a light most favorable to Kay Bottoms, the court reinstated the trial court's custody order. * * * Justice Keenan dissented, joined by Justices Whiting and Lacy. Keenan argued that the court erred by presuming that a lesbian mother in a relationship was unfit, without specific proof that her relationship negatively affected the child. Furthermore, since the trial court "applied the wrong rule of law in this custody determination," argued Keenan, the case should be remanded for application of the appropriate rule of law to the factual record. Thus, Keenan would have affirmed the court of appeals' holding that the trial court erred, but instead of entering judgment ordering custody for Sharon would have remanded for further determination by the trial court under the correct standard. * * * The damage done by this opinion might be limited by emphasizing the "factual record" on which the court based its ruling, which - as related by the court - paints a negative picture of Sharon's parenting abilities apart from her sexuality. One might argue, trying to limit its precedential scope, that even a court which concluded that Sharon's lesbianism did not have a negative effect on Tyler could determine that she lacked the aptitude and personality traits to be a competent mother, if the court believed Kay's factual allegations and was inclined to give significant weight to the damning testimony of the guardian ad litem. On the other hand, the court makes quite clear that Sharon's "active lesbianism" (the very use of the term in this context suggests that Compton views it as some sort of affliction) is a major factor in its decision, and while disavowing a per se disqualification of gay parents, as much as holds that if such parents have a sex life, much less a live-in partner, they are unfit for custody. As such, the opinion puts Virginia among the most regressive jurisdictions on this issue. * * * Sharon Bottoms was represented on appeal by the ACLU of Virginia with amicus assistance from Lambda Legal Defense Fund, National Center for Lesbian Rights, and other advocacy groups. The court's reliance on societal disapproval of Bottoms' relationship as a significant factor in denying custody suggests a constitutional ground for objection to the decision under *Palmore v. [483] Sidoti*, 466 U.S. 429 (1984), but the total lack of discussion on this point in the court's opinion (or, more significantly, in the dissent) leaves unclear whether this ground was adequately preserved for appeal to the U.S. Supreme Court. A.S.L. [*Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995).]

Summer 1995: WISCONSIN SUPREME COURT SUPPORTS CO-PARENT VISITATION: On June 13 the Wisconsin Supreme Court became the first state highest court to hold that a lesbian co-parent can seek a visitation order after the breakup of her partnership with a child's biological mother. In re Custody of H.S.H-K.: *Holtzman v. Knott*, 1995 WL 357902. The 4-3 decision drew three dissenting opinions, arguing that the court was engaging in inappropriate legislative action and violating the biological mother's constitutional rights. The decision for the court by Justice Shirley S. Abrahamson was foreshadowed by dissenting opinions by Justices Abrahamson and William A. Bablitch in *In re Interest of Z.J.H.*, 471 N.W.2d 202, a 1991 decision in which the court, by an equally narrow vote, had dismissed a custody and visitation petition from a lesbian co-parent. The membership of the court has changed since 1991, and one of the dissenting justices suggested that this was the main reason for the changed outcome in the case. Appellate courts in several other states have rejected such visitation petitions on standing grounds, although the New Mexico Court of Appeals reversed a trial court dismissal of such a petition in *A.C. v. C.B.*, 829 P.2d 660 (1992), cert. denied, 827 P.2d 837 (N.M. 1992). * * * Sandra Lynne Holtzman and Elsbeth Knott met in February 1983 and "shared a close, committed relationship for more than ten years ... On September 15, 1984, they solemnized their commitment to each other, exchanging vows and rings in a private ceremony." They decided to raise a child together by having Knott conceive through donor insemination. Their son was born on December 15, 1988. "Holtzman and Knott jointly selected a name for the baby, using first and middle names from each of their families and a surname which combined their last names. Both women were named as the child's parents at the child's dedication ceremony at their church. Holtzman's parents were recognized as the child's grandparents and Holtzman's sister was formally named as his godmother." This family stayed together through a move from Boston to Madison, Wisconsin, so Holtzman could attend law school there, but the relationship later deteriorated and on January 1, 1993, Knott told Holtzman "that their relationship was over," although "the two women agreed that they would continue to live together in the home for the child's sake." This did not work out, however, and Knott and the child moved out a few months later. Holtzman attempted to maintain contact with the child, but Knott terminated contact late in August of 1993. * * * Knott filed a court petition seeking an order restraining Holtzman from attempting to contact the child. This was subsequently dismissed by stipulation, but Holtzman filed a custody petition on September 16, 1993, and a visitation petition on September 21, 1993, and quickly moved for summary judgment. The trial judge "reluctantly" granted the motion for summary judgment, feeling bound by the Z.J.H. decision. Holtzman sought direct appeal to the state supreme court, which was granted, and a visitation order was en-

tered pending the outcome of the case. * * * In her decision for the 4-member majority, Justice Abrahamson agreed with the trial judge that the allegations in Holtzman's complaint were insufficient to support her custody petition. Constitutional principles stand in the way of terminating the custody of a biological parent who is not shown to be unfit, and the court found that Holtzman's allegations about Knott did not rise to [*484] this level. The dissenting judges also agreed with this part of the decision. However, while also finding that Holtzman did not have standing to petition for a visitation order under the visitation statute, *Wis. Stat. section 767.245*, the provision under which Holtzman had filed her petition, Abrahamson asserted that the statute did not evince any legislative intent to "occupy the field," thus leaving the state courts free to exercise their residual equitable powers to entertain a visitation petition from a non-parent. * * * Describing this judicial authority, Abrahamson set forth the following summary before undertaking a lengthy analysis of legislative history, statutory construction, and case law. "Finally, mindful of preserving a biological or adoptive parent's constitutionally protected interests and the best interest of a child, we conclude that a circuit court may determine whether visitation is in a child's best interest if the petitioner first proves that he or she has a parent-like relationship with the child and that a significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent. To meet these two requirements, the petitioner must prove the component elements of each one." In spelling out the component elements, the court emphasizes the origin, nature and quality of the relationship between the child and the petitioner, and in effect identifies a situation such as that in this case as a suitable "triggering event" for judicial intervention. * * * In his concurring opinion, Justice Bablitch emphasized the needs of children living in non-traditional families when the families break up. "My focus is on the completely innocent victim in this case, and the thousands of others like him: the children of dissolving non-traditional relationships. The issue is the best interests of these children, and the role of the court in protecting them." Criticizing the dissenting opinions for leaving the courts "powerless in the face of... legislative silence" about how to deal with nontraditional families, Bablitch asserted scornfully: "The dissents would have us believe that the legislature intends these children to somehow engage in a societal Dickensian drift, with both the children and possibly society paying what could be an incalculable price for the errors of others. I do not believe the legislature could intend that harsh a result." Bablitch also emphasized that the court's opinion did not provide automatic visitation rights; on remand, Holtzman would face a considerable burden to prove the elements specified in Justice Abrahamson's opinion. * * * Each of the dissenting justices wrote separately, although Justice Day also joined Justice Steinmetz's dissent. They insisted that the visitation statute was, in common with the marriage statute, the custody statute, and the adoption statute (which the court recently construed to forbid adoption by a lesbian co-parent of her partner's children), intended to occupy the field and oust the courts of any traditional equitable powers they might have in the field of family law. They also emphasized U.S. Supreme Court cases that identified strong parental rights of control over children in the Due Process Clause of the 14th Amendment, and argued that the majority's approach to the case violated the constitutional right of Knott to determine with whom her child should associate. The dissents provide a roadmap for Knott's attorney, should Knott seek further review of the decision in federal court. The Washington Blade reported July 7 that Knott's attorney intended to file an action in federal district court, presumably seeking a declaration of his client's constitutional rights to exclude biological strangers from visitation with her child. The attorney indicated he might also file a petition with the U.S. Supreme Court. A.S.L. [*Custody of H.S.H.-K.: Holtzman v. Knott*, 533 N.W.2d 419 (Wis. 1995).]

[*485] September 1995: CLINTON ENDS GAY SECURITY CLEARANCE BAN: Overturning a federal policy that dates from the early days of the Cold War, President Bill Clinton issued an Executive Order on Access to Classified Information on August 4 that forbids discrimination on the basis of sexual orientation in making determinations about access. Part 3 of the Order, titled Access Eligibility Standards, states in pertinent part: "Sec. 3.1 Standards... (c) The United States Government does not discriminate on the basis of race, color, religion, sex, national origin, disability or sexual orientation in granting access to classified information. (d) In determining eligibility for access under this order, agencies may investigate and consider any matter that relates to the determination of whether access is clearly consistent with the interests of national security. No inference concerning the standards in this section may be raised solely on the basis of the sexual orientation of the employee." The order also provides new procedures for appealing denials of security clearances, and imposes strict new financial disclosure requirements on those holding clearances, responding to the infamous Aldrich Ames case. A.S.L.

September 1995: MASSACHUSETTS HIGH COURT APPROVES SCHOOLS CONDOM PROGRAM: A program allowing junior and senior high school students to obtain condoms in schools and receive literature on HIV and AIDS does not violate parents' constitutional rights to oversee the upbringing of their children, ruled the Supreme Judicial Court of Massachusetts on July 17. Writing for the court, Chief Justice Paul J. Liacos held in *Curtis v. School Committee of Falmouth*, 420 Mass. 749, 652 N.E.2d 580, that the voluntary program "does not supplant the parents' role as advisor in the moral and religious development of their children. * * * In January 1992, the Falmouth school commit-

tee authorized the superintendent of schools to establish a "program of condom availability." Students in grades 7 - 12 could request condoms from school nurses, and students in the town's high school could purchase condoms from a vending machine. Before receiving condoms from the school nurse, students would be counseled and given literature on HIV and AIDS. The committee also directed the superintendent to stress abstinence as the only certain method of avoiding sexually transmitted diseases. * * * A parents group brought suit, claiming that the lack of an opt-out provision violated their 14th amendment due process rights by depriving them of the power to control their children's education, and also violated their right to free exercise of religion under the 1st amendment. A lower court granted summary judgment to the school committee. In the Supreme Judicial Court, amicus briefs were filed by the ACLU, the state's Attorney General, and the American Jewish Congress. * * * Upholding the summary judgment, Liacos noted, "The condom availability program is in all respects voluntary and in no way intrudes into the realm of constitutionally protected rights." Citing *Epperson v. Arkansas*, 393 U.S. 97 (1968), Liacos wrote, "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." He asserted that the condom distribution program is wholly unlike the compulsory requirements at issue in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923), relied on by the plaintiffs. In this case, the plaintiffs "have failed to demonstrate how interests are burdened by the condom availability program to an extent which would constitute an unconstitutional interference by the State." The requirement that parents send their children to school "does not vest the [*486] condom program with the aura of 'compulsion' necessary to make out a viable claim of deprivation of a fundamental constitutional right." * * * "Students are not required to seek out and accept condoms, read the literature accompanying them, or participate in counseling regarding their use," Liacos declared. "In other words, the students are free to decline to participate in the program." And while the existence of the program "may offend the religious sensibilities of the plaintiffs, mere exposure at public schools to offensive programs does not amount to a violation of free exercise of religion." Under the doctrine set out in *Epperson*, he noted, "parents have no right to tailor public school programs to meet their individual religions or preferences." * * * The plaintiffs pointed to a ruling by the *New York Appellate Division, Alfonso v. Fernandez*, 195 App. Div. 2d 46 (1993), in which the court found condom distribution to be a medical service requiring parental consent. They also raised *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992), to support their claim that parents have a constitutionally protected interest in a child's decision to bear children. In refuting these precedents, Liacos said that Alfonso turned on a question of state statutory construction, and the Supreme Judicial Court disagreed with its reasoning. The analogy to the requirement of parental notification for abortion in *Casey* is also inapt, he noted, because "the two situations are hardly comparable: abortion involves a medical procedure, while obtaining a condom does not." The court's decision was unanimous. M.N.S. [The article is by Mark N. Sperber.]

December 1995: APPELLATE COURTS APPROVE CO-PARENT ADOPTION IN NEW YORK AND NEW JERSEY: Within a week of each other, the New York Court of Appeals and the Appellate Division of the New Jersey Superior Court interpreted the state adoption laws to allow the domestic partner of a lesbian birth mother to adopt her partner's children without cutting off the birth mother's parental rights. Sometimes referred to as "second parent adoptions," these types of proceedings had previously been approved by the highest courts in Vermont, Massachusetts and the District of Columbia, and by numerous lower level courts in other states (including the Illinois Court of Appeals). However, the Wisconsin Supreme Court has refused to interpret the law to allow such adoptions, and some lower court judges have followed suit (including those in the New York and New Jersey cases described here). * * * Interestingly, the New York and New Jersey courts reached their results through different routes, New Jersey focusing on an expansive interpretation of a "stepparent" adoption provision while New York focused on a limiting interpretation of the "cut-off" provision, which describes the effect of an adoption on the rights and duties of birth parents. * * * The New Jersey case, *Matter of Adoption of Two Children by H.N.R.*, 1995 WL 649120, 22 *Fam.L.Rep. (BNA)* 1028 (Appellate Division, Oct. 27), involved a lesbian couple, "Hannah" and "Mary," who decided to have a child through donor insemination. Hannah, the elder, tried to become pregnant first but was unsuccessful. Mary then became pregnant and bore twins. Hannah petitioned to adopt the twins, with Mary's consent. The Children's Aid and Adoption Society home study strongly supported the adoption, but the trial judge, deciding that the adoption statute did not authorize such an adoption, dismissed the petition without reaching the question whether the adoption would be in the child's best interest. * * * The appellate division panel was split 2-1, with Presiding Judge Sylvia Pressler holding for the court that Hannah should be treated analogously to a stepparent. "As we understand the [*487] trial judge's reasoning, he was of the view that since the plaintiff was not the legal spouse of the natural mother, she could not qualify as a stepparent and, consequently, her adoption petition could not be granted since it would have the inevitable and unintended effect of terminating the biological mother's parental rights. We are, however, persuaded that statutory provision, read in context and construed in light of both the liberal-construction mandate and the best-interests test, does not support the trial judge's denial of the petition. In sum, we conclude that the stepparent exception to the natural parent's termination of rights

should not be read literally and restrictively where to do so would defeat the best interests of the children and would produce a wholly absurd and untenable result." * * * In New York, the Appellate Division in the 4th Department, ruling in *Matter of Jacob*, held that the male domestic partner of a single mother could not adopt her child, and the Appellate Division in the 2nd Department, ruling in *Matter of Dana*, held that a lesbian co-parent could not adopt her partner's child, conceived by agreement of the couple through donor insemination. The cases were consolidated for review, so the issue facing the court was whether the unmarried domestic partner of a birth mother, regardless of gender or sexual orientation, could adopt the child without cutting off the parental rights of the birth mother. Although New York has a stepparent provision similar to New Jersey's, the opinion for the court by Chief Judge Judith Kaye in *Matter of Jacob*, 1995 WL 643833 (Nov. 2), focused on interpreting the "cut-off" provision, which provides, in essence, that after an adoption the parental rights and duties of birth parents are terminated. Three members of the seven-judge court dissented from the majority's interpretation of the statute. * * * Judge Kaye began her analysis with a section devoted to "context," in which she established the basic premise for her opinion: although adoption statutes are to be strictly construed since adoption is "solely the creature of statute," it is the "legislative purpose" as much as the "legislative language" that is to be "applied rigorously." "Thus," she asserted, "the adoption statute must be applied in harmony with the humanitarian principle that adoption is a means of securing the best possible home for a child." In that light, these two cases seemed to fall easily into a best interests analysis supporting the adoption petitions: "This policy would certainly be advanced in situations like those presented here by allowing the two adults who actually function as a child's parents to become the child's legal parents," wrote Kaye, going on to describe some of the advantages to the child of formalizing these relationships. * * * Another part of this "contextual" introduction to the analysis focused on the history of New York's adoption statute, which is a patchwork of old provisions and newer amendments rather than a unified code. "The statute today contains language from the 1870's alongside language from the 1990's," Kaye found, thus countering the dissent's contention that the statute is a "methodical and meticulous" expression of legislative judgment. * * * Turning to interpretation, Kaye first rejected the argument that *sec. 110 of the N.Y. Domestic Relations Law*, which provides that an "adult unmarried person or an adult husband and his adult wife together may adopt another person," necessarily excludes adoptions by the unmarried domestic partners of birth parents. The lower courts found that they were compelled to reject the adoption petitions under this language. Kaye saw no such compulsion, pointing to modern amendments to the statute that had expanded the circle of prospective adoptive parents (including the stepparent provision), and concluded that recognizing standing by the petitioners in these cases "is therefore consistent [*488] with the words of the statute as well as the spirit behind the modern-day amendments: encouraging the adoption of as many children as possible regardless of the sexual orientation or marital status of the individuals seeking to adopt them." * * * Turning to *sec. 117*, the "cut-off" provision, which provides that after "the making of an order of adoption the natural parents of the adoptive child shall be relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child or to his property by descent or succession," Kaye argued that "neither the language nor policy underlying section 117 dictates" that the birth mother's parental status would be terminated by granting the adoption petitions in these cases. Focusing first on the language, Kaye contended that it was concerned primarily with issues of descent and distribution, pointing especially to a subsection of the provision added by amendment after the initial enactment of *sec. 117*, which Kaye contended "appears to limit the applicability of the entire first half of section 117 - including the language concerning termination in subsection (1)(a) - 'only to the intestate descent and distribution of real and personal property'" (emphasis supplied by Judge Kaye). Perhaps even more importantly, Kaye demonstrated that a variety of amendments to *sec. 117* over the years had created quite a few internal inconsistencies and ambiguities. * * * In light of the ambiguities in the statute, Kaye sought to find an overall theme or purpose to the section that could be used to give it a rational interpretation. She proposed that the overall legislative purpose is to avoid the problem of the new family created by an adoption suffering interference from the child's former family, or, as she put it, "to prevent unwanted intrusion by the child's former biological relatives to promote the stability of the new adoptive family." Given such a purpose, there would be no reason to apply *sec. 117* to the kinds of adoptive families that would be created by granting the petitions in these cases, because the child's only biological parent is the domestic partner of the petitioner, and the adoptive family will include both of these individuals as parent. Kaye pointed to the 1951 amendment of *sec. 117* that added the stepparent adoption provisions as an example of legislative acknowledgment that the cut-off provision should not apply when the purpose of sheltering an adoptive family from the instability of intrusion from birth parents was no longer an issue. She also found other amendments, authorizing "open adoptions" and "adoptions by minors," as further evidence of legislative openness to exceptions to the cut-off policy under appropriate circumstances. * * * While describing as a "statutory puzzle" the ambiguities and contradictions created by the various amendments to *sec. 117*, Kaye drew one conclusion: "that section 117 does not invariably require termination in the situation where the biological parent, having consented to the adoption, has agreed to retain parental rights and to raise the child together with the second parent," and that the various exceptions contained in amendments provided this "common denominator" that

could guide the court in interpreting the statute. Since section 117 lent itself to various interpretations, Kaye asserted that it should be construed in a way that advances the legislature purpose. She noted that this was particularly appropriate in Dana, since the lesbian co-parents could not marry to take advantage of section 117's specific authorization of joint adoptions by married partners. (And she suggested, without further developing the point, that denying these adoptions might set up a constitutional challenge to the adoption statute by same-sex couples.) * * * Unlike the New Jersey court, which determined that the factual record was sufficient to grant the adoption, the New York court remanded the [*489] two cases back to their respective family courts of origin for the factual findings necessary to make a best interests determination. In his opinion for the dissenters, Judge Bellacosa focused on the limited role of the court in a statutory interpretation case, arguing that regardless of the merit of the result reached in this case, the court should leave to the legislature the task of unraveling any inconsistencies or ambiguities in the law. * * * The New Jersey case was argued by Montclair attorney Barbara Fox, with assistance from the ACLU of New Jersey. In New York, Jacob was argued by Nicholas S. Priore, and Dana was argued by Beatrice Dohrn, Legal Director of Lambda Legal Defense & Education Fund, which represented the petitioner on appeal. Since these opinions are premised on statutory interpretation, they are subject to legislative reversal. In New York, there were some rumblings of discontent from the Republican governor and state senate majority leader, so the story of co-parent adoption under New York law may not be at an end. In the District of Columbia, where the highest appellate court authorized such an adoption earlier this year, there were signs that the decision might be overruled by Congress as part of the annual District of Columbia appropriations bill. A.S.L. [Adoption of Two Children by H.N.R., 285 N.J.Super.1, 666 A.2d 535 (N.J.Super.Ct.App.Div. 1995); *Matter of Jacob*, *Matter of Dana*, 86 N.Y.2d 651, 636 N.Y.S.2d 716, 660 N.E.2d 397, 64 USLW 2294 (N.Y., Nov. 2, 1995).]

January 1996: FEDERAL COURT FINDS CONSTITUTIONAL VIOLATION IN REMOVAL OF LESBIAN NOVEL FROM HIGH SCHOOL LIBRARIES: In a reaffirmation of the right of high school students to access a diversity of ideas, a Kansas federal district court, in *Case v. Unified School District No. 233*, 1995 WL 708288 (Nov. 29), held that a school board's removal of *Annie on My Mind*, an award-winning book about a romantic relationship between two teenage girls, from the district's libraries violated the First Amendment and its analogue in the Kansas constitution. * * * Accompanied by substantial publicity, Project 21 (since renamed the P.E.R.S.O.N. project) donated several copies of the book, along with copies of *All American Boys*, a similar story involving teenage boys, to the Kansas City-area school district for placement in the district's high school libraries. Ironically, the libraries already had a number of copies of *Annie*. All of the district's high school librarians agreed that *Annie* had literary merit, but that *Boys* did not. A school official then wrote Project 21, accepting *Annie* but declining *Boys*. * * * The school district's superintendent then intervened and unilaterally determined that all of the district's copies of *Annie*, including those previously present, would be removed. Subsequently, the school board ratified the superintendent's action at a public meeting, and several current and former district students, their parents, and a district teacher commenced this litigation. * * * Initially, the court made significant standing determinations. While the current high school students, their parents, and the high school teacher had standing, the former high school students, and a student who was in grade school when *Annie* was removed, did not, the court held, as neither had had access to the high school libraries at the time of the book's removal. * * * Turning to the merits, the court adopted the holding of the plurality opinion in *Board of Education v. Pico*, 457 U.S.853 (1982), as this was the only Supreme Court opinion specifically addressing the removal of books from a public school library. That opinion declared that school officials' conduct was unconstitutional if the officials intended to deny students access to ideas with which the officials disagreed, and if this was the decisive [*490] factor in the officials' decision. The court found the board's action invalid under this rule, as the four board members voting to support the removal of *Annie* stated that they had done so because the book "glorified and promoted" homosexuality. In making this assessment, the court looked behind the board members' invocation of "educational unsuitability," which the court found to represent nothing more than viewpoint discrimination. The court also deemed it important that the board disregarded its own established procedures for reviewing the suitability of library books, and that the board failed to consider less restrictive alternatives to the complete removal of the book. * * * Rejecting the board's claims in defense, the court held that the board did not have unfettered discretion to "transmit community values," while the book's availability in other libraries in the area did not cure the constitutional violation. * * * Also rejecting the plaintiffs' secondary claims, the court found no due process violation, as the plaintiffs had no liberty or property interest in the book's presence in the library, and the holding of an open school board meeting had provided the plaintiffs with procedural due process. R.M. [*Case v. Unified School Dist. No. 233*, 908 F.Supp. 864 (D.Kan. 1995). The article was written by Robin Miller.]

March 1996: LOCAL ZONING LAWS OR RESIDENTIAL RESTRICTIVE COVENANTS DO NOT PROHIBIT USE OF RESIDENCES AS GROUP HOMES FOR AIDS PATIENTS: In two cases from opposite ends of the nation, state courts gave rulings making it more difficult for communities to oust group homes for AIDS patients under local zoning rules or residential restrictive covenants. * * * The Supreme Court of New Mexico in *Hill v. Community of Da-*

mien of Molokai, 1996 WL 55953 (N.M. Jan. 9), ruled that a group home for four persons with AIDS, by virtue of their communal meals and spiritual activities, as well as their mutual reliance on each other for social, emotional and financial support, made the home more akin to a traditional family residence than a commercial rooming house. The court held that the undefined term "family" as used in the restrictive family covenant which regulated the neighborhood should be broadly defined to include more than a group of individuals related by blood or law. The court found that the group home exhibited the stability, permanency and functional lifestyle of a traditional family unit, which would be the controlling factor in determining whether a group of unrelated individuals living together as a single housekeeping unit constituted a family. "There is a strong [federal and state] public policy in favor of including small group homes within the definition of the term 'family,'" wrote Justice Frost for the court. * * * The court also found that the Federal Fair Housing Act prohibited enforcement of the restrictive covenant because it had the effect of discriminating on the basis of handicap. Although no discriminatory motive was found, the covenant was found to have the effect of denying housing to disabled individuals who need congregate living arrangements in order to live in traditional neighborhoods and communities. In its balancing test, the court found the negative effects of increased traffic were outweighed by the home's interest in maintaining a home for people with AIDS. The plaintiff-appellee's arguments that the group home created vehicular traffic in excess of what would be expected in an average residential area was irrelevant in determining whether the group home violated the residential covenant, since nothing in restrictive covenant regulated either traffic or parking. * * * Meanwhile, in *Eichlin v. Zoning Hearing Board of New Hope Borough*, 1996 WL 61330 (Pa.Cmwlth., Feb. 14), the Commonwealth Court of Pennsylvania [*491] upheld a ruling that a non-profit corporation could renovate a structure for use as a family home for eight HIV-infected persons without running afoul of local zoning rules. The court found that under local ordinances the use of the dwelling would be the functional equivalent of a traditional family home, as characterized by its nurturing environment and lack of profit-making motive. Because the individuals would live, cook, clean, worship, socialize and share the premises as a single housekeeping unit, the court determined the property owner to have established a caring, nurturing environment, thus allowing the home to operate under the zoning ordinance. The fact that the residents would pay rent and have leases were inconclusive in either determining a profit motive or that the cohabitation was impermanent. "Even though children will not be raised in the home, the group home in this case will exhibit the characteristics of affection and companionship common to a traditional family ... [making it] the equivalent of a traditional family, as defined in ... the Ordinance," wrote Judge Colins. R.D.L. [*Hill v. Community of Damien of Molokai*, 911 P.2d 861 (N.M. 1996); *Eichlin v. Zoning Hearing Bd. of New Hope Borough*, 671 A.2d 1173 (Pa.Cmwlth. 1996)]. The article was written by Ross D. Levi.]

May 1996: EN BANC FOURTH CIRCUIT APPROVES "DON'T ASK, DON'T TELL" MILITARY POLICY: In a 9-4 decision, the U.S. Court of Appeals for the 4th Circuit, sitting en banc, has upheld the military's "Don't Ask, Don't Tell" policy as a legitimate use of congressional power. Deference to legislative judgment was the selling point for Chief Judge J. Harvie Wilkinson (a Reagan appointee), who wrote for the majority in *Thomasson v. Perry*, 1996 WL 157451 (April 5). Of the 8 other judges who signed onto the majority opinion, all but one were Republican appointees. * * * Thomasson, an exemplary officer, was dismissed from the Navy after he revealed his homosexuality in a letter to four of his commanding officers. The "Don't Ask, Don't Tell" policy provides that this type of statement "creates a rebuttable presumption that the officer engages in homosexual acts or has a propensity or intent to do so." Finding the requirement of rebuttal degrading, Thomasson refused to do so and was thus dismissed. Thomasson filed suit to prevent his discharge and, after losing in the District Court, appealed to the Circuit Court claiming the Government's policy toward gays in the military violated Equal Protection, the First Amendment, and the Due Process Clause. * * * Writing for the court, Judge Wilkinson stressed that the policy was the result of strenuous debate by both houses of Congress and warned that judicial judgment should only supplant legislative judgment in rare cases, lest the democratic will of the people be disenfranchised by an overreaching judiciary. In addition, Wilkinson pointed out that the authority to raise and regulate the military is constitutionally allocated to the Legislative and Executive branches. Traditionally the Supreme Court has shown great deference to congressional decisions regarding matters of national security and military regulation. Finally, the majority cited authority for the proposition that service members are not afforded full protection under the First Amendment. Wilkinson noted that First Amendment challenges to military regulations are handled more deferentially than similar civilian laws. * * * The court concluded that based on the deference owed to the democratic decision-making apparatus, the correct level of judicial scrutiny to evaluate Thomasson's equal protection challenge is rational basis, under which the government would simply have to show that the policy is rationally related to a legitimate governmental interest. The court determined that banning homosexual acts and creating a rebuttable presumption [*492] that declared homosexuals have a propensity to engage in prohibited sexual conduct is rationally related to serving the military interest in preserving unit cohesion. * * * As for Thomasson's First Amendment challenge, the court held that the policy is not directed at speech, but at the conduct that the speech evidences. The military can validly proscribe homosexual activity, and a service member who "tells" creates a rebuttable presumption that the service member

has a propensity or intent to engage in the prohibited activity. * * * Judge Luttig, in a concurring opinion joined by five other judges, forcefully asserted that the policy, as enacted by Congress, maintains the ban on military service by gay people and is not, as it has been recharacterized by lawyers for the Government, a conduct-based restriction. This, ironically, is the same argument made by Thomasson. Judge Luttig, however, felt that it is fully within the power of Congress to exclude homosexuals from military service, regardless of their conduct. * * * After examining the records of the congressional hearings concerning the new policy, Luttig determined that Congress enacted the policy only after it was convinced that the ban on gays in the military would be retained. The new policy differed from the old only in that a new recruit or service member would not be questioned about his or her sexual orientation, unless there was some manifestation of homosexuality (either through action or statement), in which case discharge would be required unless the service member could prove that he or she is not a homosexual. * * * Luttig pointed out that the Solicitor General, in an attempt to avoid a constitutionality question, recharacterized the policy as a conduct-based restriction. When Congress enacted the policy mandating dismissal for service members who demonstrate a "propensity" to engage in homosexual acts, they intended "propensity" in its common sense meaning of "natural inclination" rather than "likelihood," as it was subsequently redefined by the Administration and Government lawyers. So defined, the policy targets known homosexuals, rather than homosexual acts. This is demonstrated by the fact that pursuant to the policy, a heterosexual who engages in homosexual acts (apart from sodomy) will not be dismissed if he demonstrates that he is not a homosexual. Luttig would strike down the policy as implemented by the administration as contrary to statutory mandate, but uphold the statute as enacted by the Congress as rationally related to a legitimate government interest. * * * In a dissenting opinion, Judge Hall chastised the majority for giving legal force to private prejudices. He argued that the government's proffered interest in maintaining "unit cohesion" is nothing more than a request to tolerate the intolerances of other service members. This, he maintained, is an impermissible governmental purpose. In addition, Judge Hall argued that the policy is directed at suppressing speech since it targets only admitted homosexuals. Granting that the military may suppress speech when it is likely to interfere with vital prerequisites to military effectiveness, Hall pointed out that the "vital prerequisite" involved is the accommodation of the prejudices of non-gay service members. Accommodating private prejudices, he argued, can never be a legitimate legislative end. E.T.G. [*Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) cert. denied, 117 S.Ct. 358 (1997)]. The article was written by E. Terry Giuliano.]

June 1996: AMENDMENT 2 HELD UNCONSTITUTIONAL: In a decision that a dissenting member asserted contradicts *Bowers v. Hardwick*, the Supreme Court ruled 6-3 that Colorado's Amendment 2 violates the *Equal Protection Clause of the 14th Amendment*. *Romer v. Evans*, 1996 WL 262293 (May 20). * * * In his decision for the Court, Justice Anthony Kennedy declared that [*493] the state ballot initiative that repealed all laws or policies protecting homosexuals or bisexuals from discrimination and prohibited enactment of such policies failed to meet the usually lenient rational basis test of judicial review. Justice Antonin Scalia's dissent, joined by Chief Justice William Rehnquist and Justice Clarence Thomas, argued that the *Hardwick* precedent, which went unmentioned in the Court's opinion, compelled the opposite result. Joining Kennedy's opinion were Justices John Paul Stevens, Sandra Day O'Connor, David Souter, Ruth Bader Ginsburg, and Stephen Breyer. (Justice O'Connor was part of the Court's majority in *Hardwick*, while Justice Stevens had written one of the dissenting opinions in that case.) The decision was the first to attain a majority of the Court in support of gay rights since *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962), in which the Court held that non-obscene gay-related matter could not be excluded from the U.S. mails. * * * The *Romer* case began when Colorado voters approved Amendment 2 in November, 1992. A coalition of plaintiffs, including the three cities whose sexual orientation discrimination laws were affected and several lesbian and gay Coloradans, filed suit in Denver District Court, obtaining a preliminary injunction that has kept the measure from ever taking effect. The case went to the Colorado Supreme Court twice. The first time, that court upheld preliminary injunctive relief, adopting a theory that Amendment 2 violated a fundamental right of equal participation in the political process by posing special barriers to proponents of non-discrimination for gays, lesbians and bisexuals. The case was then remanded for trial, after which both the district court and the state supreme court found that the state had failed to meet its burden of demonstrating that Amendment 2 was narrowly tailored to meet a compelling state interest. The U.S. Supreme Court granted the state's petition for certiorari and heard oral argument on October 10, 1995. Legal observers predicted based on the oral argument that Amendment 2 would be overturned, but there was widespread uncertainty about what theory the Court might use to do so, the Colorado Supreme Court's theory having been widely criticized as lacking a firm basis in constitutional precedents. * * * In the event, the Court's decision issued on May 20 expressly disavowed reliance on the Colorado Supreme Court's political participation theory, although several comments in Justice Kennedy's opinion suggested that the Court may have been tacitly embracing the main elements of that theory. Introducing his opinion, Kennedy quoted from the dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), in which the Court had upheld racial segregation in public accommodations over the dissenter's protest that the Constitution "neither knows nor tolerates classes among citizens." Justice Kennedy's theme for the opinion was that Amendment 2 established classes of citizenship, relegating lesbians

and gay men to inferior status. (Kennedy omitted mention of bisexuals throughout the opinion, even though Amendment 2 explicitly mentions them. This omission drew speculative comment in the aftermath of the opinion, but there is no evident explanation for the omission.) Coming full circle at the end of his opinion, Kennedy quoted a similar comment from the *Civil Rights Cases*, 109 U.S. 3 (1883), in which the Court had scornfully referred to "class legislation" as being "obnoxious to the prohibitions of the Fourteenth Amendment." * * * After reciting the history of Amendment 2 and describing its effect, as found by the Colorado Supreme Court, Kennedy immediately focused on the constitutional objection to the measure: "Sweeping and comprehensive is the change in legal status effected by this law... Homosexuals, by state decree, [*494] are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies." Kennedy then described how the various states, discerning the inadequacy of common law nondiscrimination requirements imposed on operators of public accommodations, had begun to enact laws specifying prohibited grounds for discrimination, and extending the protection beyond public accommodations to housing, employment, insurance, and other transactions, noting that such laws went beyond the "suspect classifications" of race and alienage identified in the Court's Equal Protection jurisprudence. Amendment 2 would exclude gays from participation in this kind of statutory protection. * * * In addition, Kennedy observed, Amendment 2 would repeal Colorado Governor Romer's 1990 executive order banning discrimination by the state, and similar policies that had been adopted in public colleges and universities in the state. Further, Kennedy noted the controversial argument made to the Court that Amendment 2 might even intrude into the enforcement of laws of general application. The Colorado courts had not found this to be so, and Kennedy observed that it was unnecessary for the Supreme Court to reach the question, because the deprivations of civil rights of homosexuals already described were sufficient to render the measure unconstitutional. * * * In light of this history of the development of civil rights protection in the U.S., Kennedy explicitly rejected the state's argument that Amendment 2 "does no more than deny homosexuals special rights." Kennedy found this argument "implausible," asserting: "To the contrary, the amendment imposes a special disability upon those persons [i.e., homosexuals] alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury. We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civil life in a free society." * * * Having concluded that Amendment 2 raises an Equal Protection issue, Kennedy turned to the appropriate standard of judicial review. Here the opinion took a surprising turn. Kennedy insisted that Amendment 2 would not yield to the established analytic method of suspect classification or fundamental rights, asserting that it "defies[] ... this conventional inquiry." This was a case, wrote Kennedy, in which a challenged measure "lacks a rational relationship to legitimate state interests." Amendment 2 thus joins that exclusive, small group of legislative measures to have been invalidated on the basis of total irrationality, a result that most commentators would have found unlikely in light of the Court's 1993 decision in *Heller v. Doe*, 113 S.Ct. 2637, in which the Court had seemed to erect insurmountable barriers to constitutional invalidation via Equal Protection of almost any measure that did not implicate a fundamental right or a suspect classification. * * * Kennedy premised this development on two factors: "First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of [*495] legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." In short, Kennedy found that the proponents' interest in stigmatizing homosexuality was the motivation for the measure, and the various "state interests" articulated during the many stages of the litigation were mere pretexts or makeweights. * * * "It is not within our constitutional tradition to enact laws of this sort," wrote Kennedy. "Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance... A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." Is this not merely a restatement of the Colorado Supreme Court's "equal participation in the political process" theory? Kennedy went on to assert that measures like Amendment 2 "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected," and quoted with apparent approval from Justice William Brennan's opinion for the Court in *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), in which the Court had invalidated a provision of the food stamp law that was intended to exclude hippie communes from qualifying for the benefits of the law. * * * Concluding that Amendment 2 was not "directed to any identifiable legitimate purpose or discrete objective," Kennedy stated: "It is a status-based enactment di-

vanced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit ... We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed." * * * Kennedy's opinion was immediately criticized as deficient in analysis, and not only by those who disagreed with its conclusion. The opinion never mentioned or attempted to deal with *Bowers v. Hardwick*, and surprisingly so, in light of the frequent citation of *Hardwick* by lower federal and state courts in rejecting Equal Protection claims raised by gay litigants. Furthermore, Kennedy never really explained why the asserted state interests argued by Colorado were deficient; he merely asserted their deficiency in conclusorily. Kennedy did offer an attempt to distinguish this case from *Heller v. Doe* (in which he was in the majority of the Court that had appeared to reject most rational basis challenges under the Equal Protection Clause), but few found the attempt satisfying. * * * The first, and most vehement, critic, was Justice Scalia, whose dissenting opinion was dripping with scorn for the Court and the challengers of Amendment 2. "The Court has mistaken a Kulturkampf for a fit of spite," he began, sending legal analysts to their political science dictionaries for some clue to his ambiguous meaning. Scalia apparently comes at the issues raised by Amendment 2 with certain implicit premises not shared by the majority of the Court. One is that homosexuality is entirely a matter of behavioral choice, so Scalia rejects Kennedy's description of Amendment 2 as "status-based" legislation. Another is that all government enactments forbidding discrimination against particular groups of people are, in essence, "special rights" laws, because in the absence of such legislation, [*496] employers, landlords and others are free to decide with whom they will associate and do business. And, finally and most importantly for Scalia, because the Court in *Hardwick* held that the states may make "homosexual conduct" a crime, any lesser state disparagement of or discrimination against homosexuals could not credibly be said to raise a constitutional issue. * * * In this last point, Scalia was stating a proposition that has become commonplace among the federal courts of appeals dealing with gay Equal Protection cases. Beginning with the D.C. Circuit in *Padula v. Webster*, 822 F.2d 97 (1987), and continuing through the military cases in various circuits, the federal appeals courts have cited *Hardwick* as the premise for denying any heightened scrutiny for Equal Protection challenges to anti-gay policies, and have generously deferred without much question to whatever arguments the government has made in support of those policies. (The main exception, at least in part, has been the 9th Circuit, which may well take encouragement in its on-going consideration of military challenges from the *Romer* Court's willingness to cast a suspicious eye on official justifications for anti-gay policies based on fear or dislike of gay people.) * * * Thus, to Scalia it is outrageous that the Court casts down Amendment 2 without even confronting the effect of *Hardwick*. "In holding that homosexuality cannot be singled out for disfavorable treatment," he wrote, "the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, see *Bowers v. Hardwick*, 478 U.S. 186 (1986), and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias." Well, thank-you Justice Scalia for that carelessly broad overstatement. (In a footnote, he backtracks and observes that the Court has not in this case designated sexual orientation a suspect classification, which would have been the logical import of his fulmination in the main text.) * * * Scalia asserted, to the contrary, that having been among the first states to decriminalize consensual sodomy in its adoption of the Model Penal Code, Colorado could yet (without any imputation of ill will toward homosexuals) legitimately wish to deter homosexual conduct and enforce public morality by treating homosexuals with disfavor or, at the least, excluding them from the "special protection" of civil rights laws. Ultimately, Scalia argued, a facial constitutional challenge to Amendment 2 must fail in light of *Hardwick*, because the logical implication of that case is that Colorado may, at least, legitimately discriminate against persons who engage in homosexual conduct, and such action would come within the broad ambit of Amendment 2. (Scalia argues by analogy that the Court has never questioned the constitutionality of state constitutional prohibitions of polygamy, citing a 19th century case that upheld a Utah territorial law depriving polygamists of all civil rights, including the right to vote.) * * * Scalia's extended diatribe is too long to describe here in further detail, other than to note that it unfolds with apparent logic from the premises described above. At the end, Scalia concludes that the Court's decision is political rather than legal, and charges that it reflects the cultural views of the majority of the Court's members, "reflecting the views and values of the lawyer class from which the Court's Members are drawn." Scalia notes that the nation's law schools, through the Association of American Law Schools, have voted to ban anti-gay discrimination in their placement offices, and offers this up as evidence of the elitist views of the legal profession which he asserts undergird the Court's decision. * * * "Today's opinion has no foundation in American constitutional law," insisted Scalia, "and barely pretends to." Strong words indeed, considering that an amicus brief [*497] written by Prof. Laurence Tribe of Harvard and co-signed by several of the nation's leading constitutional law scholars, urged the very approach taken by the majority. "The people of Colorado have adopted an entirely reasonable provision which does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment. Amendment 2 is designed to prevent piecemeal

deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate means to that legitimate end, but a means that Americans have employed before. Striking it down is an act, not of judicial judgment, but of political will. I dissent." * * * The decision drew widespread media coverage and comment, although President Clinton, whose Justice Department refused to file an amicus brief in the case, tersely described the opinion as "appropriate." Governor Romer of Colorado, who had opposed Amendment 2 but then served as the defendant in the litigation (and argued that the result of the initiative process should be respected), voiced relief at the outcome and hope that the state could unite in accepting the Court's ruling. The Romer decision cast immediate doubt on the 6th Circuit's 1995 decision upholding a similar amendment passed in Cincinnati, Ohio, and seemed likely as well to dictate the outcome in pending litigation challenging a similar measure enacted in Alachua County, Florida. The Supreme Court was expected to announce its disposition of the Cincinnati case, for which a certiorari petition was pending, by the first week in June. A.S.L. [*Romer v. Evans*, 517 U.S. 620 (1996).]

Summer 1996: N.J. SUPREME COURT UPHOLDS BLOOD BANK INDUSTRY LIABILITY FOR 1994 HIV-INFECTED TRANSFUSION: The New Jersey Supreme Court joined the minority of courts holding that blood transfusion recipients may hold the blood banking industry liable for negligent infection with HIV. *Snyder v. American Assn. of Blood Banks*, 1996 WL 290907 (June 4). William Snyder received blood products infected with HIV in 1984, several months before the HIV blood test became available. In 1987, the blood bank determined that the blood he had received was HIV+, and Snyder subsequently tested positive. Snyder and his wife alleged various negligence theories of liability against the hospital, doctors, and blood banks. The case went to trial against a lone defendant, the American Association of Blood Banks (AABB), a blood bank trade association, the other defendants having settled or been dismissed. A jury found that the AABB had negligently failed to recommend surrogate testing, which would have weeded out blood samples from donors considered to be at high risk for HIV. * * * Writing for a 6-1 majority, Justice Pollock begins by tracing the early history of HIV disease and the public policy struggle in the early 1980s when it began to appear that HIV was being transmitted via blood transfusions. Although by 1983 some scientists at the Centers for Disease Control (CDC) advocated surrogate testing - testing blood samples for blood abnormalities common to people who went on to develop AIDS - the AABB resisted implementing such tests. The AABB held a central position in the blood banking industry; it created authoritative standards in the field and many states deferred to its standards in their regulations. * * * The AABB had a duty of care to the plaintiff, the court held. The AABB assumed the duty of assuring the safety of the nation's blood supply by promulgating its own standards and by accrediting blood banks. The AABB "wrote the rules and set the standards" for blood banks, the court reasoned, and therefore had a duty to protect blood recipients. Although evidence of blood transfusions causing AIDS may have been inconclusive, it was nonetheless [*498] foreseeable that blood transfusions could spread the virus. Among other evidence of foreseeability, the CDC believe in 1982 that AIDS could be transmitted by blood transfusions and a 1984 New England Journal of Medicine article confirmed the link between blood transfusions and AIDS. By the time of Snyder's transfusion, therefore, the AABB should have foreseen the risk that a blood transfusion could transmit AIDS. * * * The court also refused to extend qualified immunity to the AABB on the ground that it was performing a quasi-governmental function, because to do so would give the AABB a benefit without the burdens of public office. In other words, the AABB was not subject to public scrutiny, governmental oversight or procedural safeguards. The court also dismissed the argument that the AABB should be given charitable immunity, because it was a trade association focused on promoting its members' interests and not devoted solely to a charitable purpose. * * * In a lengthy dissent, Justice Garibaldi argued that the AABB should have been extended qualified immunity for its quasi-governmental acts. Because the AABB performed tasks that the state would otherwise have had to perform, it should be qualifiedly immune from liability for doing so, she argued. The AABB acted with implicit and explicit state approval as a regulatory body. Courts have granted qualified immunity to private entities acting in quasi-governmental capacities in a variety of contexts. Without qualified immunity, private groups would be hesitant to take part in the formulation of public health policy, Garibaldi reasoned. D.W. [*Snyder v. American Assn. of Blood Banks*, 676 A.2d 1036 (N.J. Jun. 4, 1996). This article was written by Dirk Williams.]

September 1996: 7TH CIRCUIT FINDS CONSTITUTIONAL PROTECTION FOR GAY PUBLIC SCHOOL STUDENT: On July 31, the 7th Circuit Court of Appeals reversed a decision of the United States District Court for the Western District of Wisconsin, which had granted summary judgment against a high school student who claimed that the school system discriminated against him based on his homosexuality by failing to enforce its sexual harassment policy on his behalf. *Nabozny v. Podlesny*, 1996 WL 428031. The decision, the first to find that a school district might be liable for failing to address anti-gay harassment of students, was rendered by an appellate panel of three judges appointed by Republican presidents, William J. Bauer (Ford), Joel M. Flaum and Jesse F. Eschbach (Reagan). * * * Jamie Nabozny was a student in the Ashland Public School District in Ashland, Wisconsin. He acknowledged that he was homosexual in the seventh grade. From that time forward, he was continuously harassed and physically abused by fellow

students because of his homosexuality. On numerous occasions, Nabozny reported this harassment and abuse to school officials and asked those officials to protect him and punish his assailants. His numerous requests fell on deaf ears, and on more than one occasion he was mocked by school officials due to his homosexuality or told he would have to expect harassment because he was gay. On one occasion, a group of Nabozny's fellow students harassed him by performing a mock rape on him. When Nabozny complained to the Principal, Mrs. Podlesny's alleged response was "Boys will be boys." Nabozny twice attempted suicide and eventually dropped out of school as a result of the harassment. * * * Nabozny filed suit against several school officials and the school district alleging that, among other things, the school district and officials violated his 14th Amendment right to equal protection by discriminating against him based on his gender and his sexual orientation, and violated his right to due process by exacerbating the [*499] risk that he would be harmed by fellow students and by encouraging an environment in which he would be harmed. The defendants moved for summary judgment which the District Court granted in its entirety. On appeal, that decision was reversed in part and affirmed in part. * * * Since at least 1988, the Ashland Public School District has had a formal policy of prohibiting discrimination against students on the basis of gender or sexual orientation. The District's policy and practice includes protecting students from student-on-student sexual harassment. Nabozny maintained that the defendants denied him the equal protection of the law by denying him the protection extended to other students, based on gender and sexual orientation. The district court found that Nabozny had proffered no evidence to support his equal protection claims; and, in the alternative, the court granted the defendants qualified immunity. The Court of Appeals disagreed. * * * Writing for the court, Judge Eschbach found that the evidence suggests that Nabozny was treated differently from other students. The defendants stipulated that they had a commendable record of enforcing the District's anti-harassment policies when female students were harassed by male students, but Nabozny provided ample evidence that the District did not enforce their policies as applied to him. The court found it hard to believe that had a female student been the subject of a mock rape the school administration would have responded "Boys will be boys." The court reversed summary judgment on the gender discrimination issue, finding that Nabozny, a male, was treated differently from female students who brought harassment complaints. * * * The district court never specifically addressed Nabozny's sexual orientation discrimination claim. It appears that the district court's intention was to fully dispose of all of Nabozny's claims. The appeals court found that there can be little doubt that homosexuals are an identifiable minority subject to discrimination in our society. In addition, the Wisconsin legislature specifically recognized the need to enact laws to protect homosexuals from harassment. In analyzing this issue, Judge Eschbach applied the rational relationship test, the lowest form of scrutiny in a 14th Amendment case, but the court was unable to garner any rational basis for permitting one student to assault another student based on the victim's sexual orientation and reversed the district court's ruling on the sexual orientation discrimination issue. In a footnote to part of the opinion rejecting the defendants' attempt to rely on *Bowers v. Hardwick* to sustain their position that Nabozny could not state an equal protection claim, the court noted that the recent decision in *Romer v. Evans*, 116 S.Ct. 1620 (1996), suggested that *Bowers* would be of limited relevance in equal protection cases in the future. However, the court did not rely on *Romer* in rendering its decision, because in a suit against public officials who have qualified constitutional immunity, the issue is whether they would have known at the time of the incident that their action might violate the constitution, so *Romer* could not be applied retroactively to judge the defendants' conduct in this case. * * * On Nabozny's due process arguments, the court cited *J.O. v. Alton Community School District 11*, 909 F.2d 267 (7th Cir. 1990), in which the 7th Circuit found that school administrators do not have a special relationship with students and absent that special relationship, a state actor has no duty to protect a potential victim. The court found that the school district did nothing to exacerbate Nabozny's risk of harm from his fellow students, and affirmed the district court on this issue. Nabozny also argued that defendants violated his right to due process by acting with deliberate indifference in maintaining a policy of failing to punish his assailants, thereby encouraging a harmful environment. [*500] The court found that since the harm suffered by Nabozny was at the hands of his fellow students and not perpetrated by school employees, there was no state action. The district court's decision was affirmed on this issue. * * * The case is being remanded to the district court on the equal protection gender and sexual orientation discrimination claims. Of course, we will carefully follow this matter and report any future developments. T.V.L. [*Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir.1996)]. This article was written by Todd V. Lamb. The case was settled during the remand trial for almost \$ 1 million in damages.]

January 1997: ILLINOIS APPEALS COURT HOLDS CUSTODY DETERMINATIONS TO BE "SEXUAL ORIENTATION NEUTRAL": Child custody determinations in the state of Illinois are "sexual orientation neutral"; furthermore, the potential for social condemnation due to a parent's homosexuality is not, in itself, enough to justify a change in custody, it was unanimously declared in the Dec. 16 decision *In re Marriage of R.S. and S.S.*, 1996 WL 724557 (Ill. App., 3rd District). This was reported to be the first time an appellate court in Illinois has upheld custody for a bisexual or lesbian mother. * * * This positive decision overturned a trial court ruling from Jan. 31, 1996, which had been stayed pending this appeal, reversing the existing custody arrangement involving the two children of Rebecca

and Stuart Schroeder. Presiding Justice Peg Breslin wrote on behalf of the three-judge appellate panel, finding that the original arrangement giving custody of the children to the mother, to which both parents had initially agreed, should not be overturned simply because the mother was now living with a woman in a sexual relationship. * * * The Schroeders were divorced in 1991. In 1993, Rebecca, who identifies as bisexual, met J.S., who also identifies as bisexual. They began a sexual relationship and J.S. moved into Rebecca's home later that year. In 1993 Stuart remarried, and in August of 1993 he filed for modification of custody, alleging that a substantial change in circumstances had occurred due to his new marriage and to his ex-wife having "embraced an openly homosexual lifestyle" which placed "her sexual desires ahead of the emotional, moral and educational needs of the children." In June 1994, Rebecca sold her home and moved with her children into J.S.'s home in a nearby town. * * * The Illinois Marriage and Dissolution of Marriage Act creates a presumption in favor of current custodial arrangements so as to promote stability and continuity in children's lives. In order to modify custody, the burden of proof rests with the party requesting modification, who must prove by clear and convincing evidence that there has been a change in the circumstances of the child or the custodial parent, and that modification is necessary in order to serve the best interests of the child. * * * The trial court, straining to find in favor of the father, had noted three factors which, together, it found amounted to a substantial change in circumstances: (1) the father's remarriage and the children's familial relationship with the father's wife and children; (2) the mother's reduction in the children's contact with their paternal grandmother, and (3) the mother's involvement in a conjugal lesbian relationship. Based on these circumstances, the court found that it was in the best interests of the children to modify custody and award it to the father. The mother appealed. The sole issue on appeal was whether Stuart Schroeder presented clear and convincing evidence at trial to show that a change in custody was necessary to serve the best interests of the children. * * * In her review of the record, Judge Breslin noted preliminarily that two of the trial court's findings were unsupported by the record. First, [*501] although the trial court found that Stuart and his new wife had "other children" with whom the parties' children had forged a familial relationship, there was in fact only a newborn. Additionally, Judge Breslin found no evidence that Rebecca's living arrangements were unstable or lacking in familial relationship. She thus agreed that while the father could provide a good home for the children, the children's relationship with his new family in and of itself did not support a modification of custody. Second, the trial court had found that Rebecca had limited the children's contact with the grandmother. However, Judge Breslin found that this was due to the maturing of the children, their move to a nearby town, and the grandmother's reluctance to initiate contact on her own. She found no evidence that Rebecca actively interfered with the relationship between the children and their grandmother. * * * Thus, the sole change in circumstances to warrant a change in custody was the mother's lesbian relationship. Judge Breslin noted that the trial court had made no finding that the children were adversely affected by the relationship. Indeed, the parents, the paternal grandmother, the children's teachers, and two clinical psychologists all agreed that the children were healthy and well adjusted, although the trial court's psychologist did find that there would be a "slight" advantage to the father's having custody because of the risk of societal condemnation of homosexual relationships. * * * The father argued that he was entitled to a change in custody based solely on the "immorality" of the mother's sexual relationship, citing an old Illinois case, *Jarrett v. Jarrett*, 400 N.E.2d 421 (1979), in which it was found that the "open and notorious" nature of the mother's sexual relationship with an unmarried man endangered the moral well-being of the children and required a change in custody. However, as the appellate court here noted, four years after *Jarrett*, the Illinois Supreme Court overruled *Jarrett* with *In re Marriage of Thompson*, 449 N.E.2d 88, 93 (1983), holding that *Jarrett* did not establish a conclusive presumption that the child is harmed by a parent's living with a member of the opposite sex, and that all the circumstances must be considered that affect the best interests of the child. Judge Breslin concluded that while cohabitation with a member of the same sex differs from that with a member of the opposite sex, "the clear import" of *Thompson* is that Illinois courts should not adopt any absolute rule that would require a change in custody based on conduct of the custodial parent if that conduct does not impact the children. * * * Although the trial court did not find that the children had suffered any negative consequences as a result of their mother's sexual relationship, it theorized that the children might suffer some future social condemnation. Citing Virginia's infamous *Bottoms v. Bottoms*, 249 Va. 410, 457 S.E.2d 102 (1995), for the proposition that the potential for social condemnation is a factor to be considered when making a custody determination, the trial court concluded that this threat was reason to change custody. In addition, Stuart Schroeder argued that the court should not wait until actual harm had occurred before modifying the prior custody order. * * * The issue, according to Judge Breslin, is that while the court may consider the custodial parent's homosexual relationship when making a custody determination, the trial court's function is solely to determine the effect of the parent's conduct upon the children. The judge noted that *Bottoms* also stood for the proposition that a lesbian mother is not to be presumed to be an unfit parent, but rather that custody determinations are made by considering several factors, including "misconduct that affects the child." Unlike *Bottoms*, which found evidence of harm including significant abuse, neglect, and abandonment, in the instant case there was [*502] no evidence of any harm to the children due to their mother's living situation. Although there was risk of social condemnation as a result of

her sexual relationship, Judge Breslin noted that this risk would not be eliminated by awarding custody to the father. Furthermore, the fact that the trial court's psychologist found that there was a "slight" advantage to the father's having custody due to potential societal condemnation was not enough. The law does not change custody when one arrangement is slightly better than another; rather the proposed arrangement must be shown necessary by clear and convincing evidence. * * * Similarly, the father's claim that the mother's conduct endangered the moral well-being of the children must be shown by clear and convincing evidence. Judge Breslin noted that Stuart Schroeder failed to present any evidence on this issue at all. Thus, he failed to meet his burden of proof and his request to modify custody was denied. * * *

* Patricia M. Logue, managing attorney for Lambda Legal Defense and Education Fund's Midwest Regional Office, argued the case. Her co-counsel was Zane Lucas of Carter & Grimsley in Peoria, Illinois. Amicus briefs were filed by the National Association of Social Workers, the Illinois Chapter of the National Association of Social Workers, the National Organization for Woman Legal Defense and Education Fund, and the Bloomington Illinois chapter of Parents, Families and Friends of Lesbians and Gays. J.H. [*In re Marriage of R.S. and S.S.*, 677 N.E.2d 1297 (Ill. App. Ct., 3rd Dist., 1996)]. The article was written by Julia Herd.]

March 1997: Professional Notes: Supporters of civil rights and civil liberties mourned the death of Thomas B. Stoddard, 48, from AIDS on Feb. 12. Stoddard was a pioneering leader in the struggle for lesbian and gay rights, civil liberties and privacy. As legislative director of the N.Y. Civil Liberties Union, executive director of Lambda Legal Defense & Education Fund, director of the Campaign for Military Service, and vice-president of the American Foundation for AIDS Research (AMFAR), Stoddard played a key role in the important struggles of the 1970s, 1980s and 1990s. He was also among the first to teach a gay rights law course, at N.Y. University in the early 1980s, where he continued to serve until recently as an adjunct professor and also taught courses on legislation. NYU Law School established the Tom Stoddard Fellowship in 1996, to fund law students working with gay rights public interest organizations. Perhaps most importantly, as an eloquent public spokesperson, Stoddard provided an important role model for lesbians and gay men in the legal profession and for lesbian and gay youth seeking positive images in the media. The loss is enormous. Commenting on his death, the New York Times stated: "Few New Yorkers - or few Americans, for that matter - have done as much to bring issues affecting gay men and lesbians into the mainstream of legal and political debate, or been as successful at changing laws and attitudes." (Feb. 19) Stoddard is survived by his spouse, Walter Rieman, a partner at Paul Weiss Rifkind Wharton & Garrison in New York, and other family members. A.S.L.

VERMONT SUPREME COURT RULES AGAINST LESBIAN CO-PARENT IN VISITATION DISPUTE: In a surprising change of stance for a gay-friendly jurisdiction, the Vermont Supreme Court rejected a lesbian partner's effort to establish visitation with her former partner's adopted child, holding that there is no legal right by which the court might fashion an equitable remedy, and that the court was unwilling to create a new legal right of "equitable parentage" for third parties seeking visitation, as was suggested by the firmly-worded dissent. *Titchenal v. Dexter*, 1997 WL 82730, 23 Fam. L. Rep. (BNA) 1224 (Feb. 28). * * *

The dispute arose from the breakup of a relationship between Chris Titchenal and Diane Dexter, who had both participated in raising a child adopted by Dexter. In 1985, the parties began an intimate relationship in which they jointly purchased a home, held joint bank accounts, and jointly owned their cars. They both contributed financially to their household, and regarded each other as life partners. At some point, they decided to have a child. When attempts to conceive via a sperm donor failed, they decided to adopt. In July 1991, defendant adopted a newborn girl, who was named Sarah Ruth Dexter-Titchenal. The parties held themselves out to Sarah and all others as her parents. For the first 3-1/2 years of Sarah's life, Titchenal cared for the child approximately 65 percent of the time. Plaintiff did not seek adoption of Sarah because the parties believed that the adoption statute would not allow both of them to do so. * * *

In 1994, the parties' relationship deteriorated and the defendant moved out, taking Sarah. For the next five months, Sarah stayed with Titchenal twice a week. By spring of 1995, defendant had severely curtailed plaintiff's contact with Sarah and refused plaintiff's offer of financial assistance. * * *

In October 1995, realizing that the family court lacks jurisdiction to adjudicate her claim, plaintiff requested the superior court to exercise its equitable jurisdiction to establish and enforce regular unsupervised visitation between her and Sarah. The court granted defendant's motion to dismiss, refusing to recognize a cause of action for parent-child contact absent a common law or statutory basis. Titchenal argued on appeal that the superior court has equitable jurisdiction under the state's *parens patriae* authority to consider her claim, and that public policy and the doctrines of *in loco parentis* and *de facto* parenthood allow the court to exercise equitable authority in cases such as this. * * *

Chief Justice Allen, writing for the court, found no legal basis for the plaintiff's proposal, stating that the courts cannot exert equitable powers unless they first have jurisdiction over the subject matter and the parties. "[A] court may exert its equitable powers to grant appropriate relief only when a judicially cognizable right exists, and no adequate legal remedy is available." The inquiry then changed to whether there is an underlying legal basis for plaintiff's claim that would allow the superior court to apply its equitable powers, which courts may exert based on common-law, statutory, constitutional rights or on public policy

considerations. The court found no legal basis for plaintiff's claimed as an equitable or de facto parent, nor for her argument that public policy compels such a result. "There is no common-law history of Vermont courts interfering with the rights and responsibilities of fit parents absent statutory authority to do so." Making clear the exception of *parens patriae* power to adjudicate custody matters in neglect petitions, the court topped its reasoning off with the common-law rule that "parents have the right to the custody, control and services of their minor children free from governmental interference." * * * The court further explained that "persons affected by this decision [including same-sex couples] can protect their interests" by adoption, which Titchenal did not attempt because the parties believed that Vermont's adoption laws at the time would not permit it. Effectively telling the plaintiff that she brought this problem on herself, the court stated that she actually could have adopted Sarah since "as of December 1991, when Sarah was only five months old, at least one Vermont probate court had allowed the female partner of a child's adoptive mother to adopt the child as a second parent." Moreover, in June of 1993, more than a year before the end of the parties' relationship, the Vermont Supreme Court [*504] construed the adoption statute to allow same-sex couple adoptions, under which unmarried adoptive partners could petition the family court regarding parental rights and responsibilities or parent-child contact. * * * On public policy considerations, the court further sank the plaintiff's case by citing cases on the dangers of forcing parents to defend third-party visitation claims and the risk of abuse of the process to continue unwanted relationships or to harass the legal parents. "[Nothing] would ... prevent parents from having to defend themselves against the merits of petitions brought by a potentially wide range of third parties claiming a parent-like relationship with their child," citing as examples *In re Hood*, 847 P.2d 1300 (Kan.1993) (day-care provider); *L. v. G.*, 497 A.2d 215 (N.J.Super.Ct. Ch.Div.1985) (adult siblings); *Bessette v. Saratoga County Comm'r*, 619 N.Y.S.2d 359 (N.Y.App. Div. 1994) (former foster parents). * * * However, in what seems to be an olive branch offering, the court insists that its opinion should not be read to impede same-sex partners from child-rearing (although it does respect the public policy concerns "in this age of the disintegrating nuclear family"), but absent statutory authority extending the family court's jurisdiction to adjudicate third-party visitation requests, legal parents retain the right to determine whether third-party visitation is in their child's best interest. The court concludes that equity will not aid those who fail to take advantage of a remedy available at law, and that if the plaintiff wanted to adopt Sarah, she should have attempted to do so. Instead, plaintiff made no such attempt, but now seeks equitable relief years later. * * * The dissent, penned by Justice Morse and joined by Justice Johnson, suggests the doctrine of equitable adoption, as an alternative, well-established remedy that is well suited to the factual circumstances of this case. This "equitable-parentage" theory is based on the doctrine of equitable adoption used in cases of intestate succession to permit participation in the estate by a foster child who was never legally adopted by the decedent. Upon the foster parent's death, a court declares the child is entitled to share in the estate as if she were legally adopted. Across the country, this doctrine has been invoked to entitle a child to maintain an action for wrongful death, death benefits under workers' compensation statutes, and to support the parental rights of a non-biological father to the daughter born while he was married to the mother. * * * Morse proposes applying the original Vermont equitable adoption concept established in *Whitchurch v. Perry*, 408 A.2d 627 (1979), but in a "novel factual context." Titchenal "contends that she would have adopted [Sarah] when she was born in 1991, but that the adoption statute then appeared to allow only one unmarried person to adopt, and defendant was designated as the adoptive parent." Given the subsequent rule changes, Plaintiff should be allowed to prove "an intent to establish an adoptive relationship with the child that was never formally consummated because of the then current state of the law" and Titchenal's relationship with the defendant. Family court would be the proper venue because it is expressly empowered to "hear and dispose of issues pertaining to parental rights and responsibilities [of] ... two unmarried persons, who have adopted a minor child," 15A V.S.A. sec. 1-112, and is further vested with full 'equitable ... powers' to determine whether one of the parties is entitled to adoptive parent status. 4 V.S.A. sec. 453(a)." * * * The five-page dissent concludes that the case should be remanded to the family court to determine if Titchenal would have adopted Sarah except for the legal impediment and, if so, she would be deemed the equitable adoptive mother and the court presumably could accord her all the rights of a legal adoptive [*505] parent. * * * The court rejected this approach on several grounds. First, regarding family court jurisdiction, it argued that family court lacks the proper jurisdiction because, despite the dissent's analysis, the fact remains that the plaintiff never adopted the child, the fact that triggers family court jurisdiction. The court cannot "remand" to family court as the dissent suggests, since the appeal is from superior court and the plaintiff never claimed that family court has jurisdiction to adjudicate the dispute. Second, the court rather colorfully chides the dissent for "stretching the doctrine ... beyond recognition in an effort to provide relief to this particular plaintiff" while providing no "principled" justification or limitation. To do so would foreclose all others having legitimate reasons for failing to adopt from seeking equitable relief. The majority acknowledges that not many courts have embraced the equitable-parent doctrine and of those that did, the court does not find that any have limited it in the manner proposed by the dissent. The dissent responds claiming that it is simply invoking an application much closer to the original equitable-adoption concept: to find, in retrospect, an intent to adopt by a person who had never formally done so, for the purpose of achieving a just result.

Responding to the issue of "principled justification," the dissent argues that its proposal is no more "unprincipled" than any other equitable doctrine, "unless the court also considers equitable estoppel, equitable servitudes, constructive trusts, specific performance, and every other equitable remedy to be unprincipled." * * * Finally, the court advances that the plaintiff somehow could, and should, have attempted to adopt the minor child prior to the couple's separation in 1994. The dissent states that it would be unfair to conclude that the plaintiff, or anyone similarly situated, should have known that she had the legal right to adopt prior to the effective date of the new adoption statute. "It is one thing to presume that parties are aware of, and bound by, general enactments of the Legislature that amend the law; it is quite another, however, to impute to a non-attorney specific knowledge of one probate decision and a later, confirming appellate court decision." Although the court denies the parties' presumed knowledge of the state of the law at a given time, it does contend that for the doctrine to apply, there must either be an agreement to adopt or an undertaking to effect a statutory adoption, neither of which took place. In addition, equitable adoption "merely confers a right of inheritance," not to be construed as an actual adoption. *Whitchurch*, 408 A.2d at 632. * * * Julie A. Frame and Jennifer E. Nelson represented the plaintiff-appellant; John R. Durrance, Jr., represented the defendant-appellee. An amicus curie brief in support of plaintiff was filed by Gay & Lesbian Advocates & Defenders (GLAD) of Boston. K.J.R. [*Titchenal v. Dexter*, 693 A.2d 682 (Vt. 1997)]. The article was written by K. Jacob Ruppert.]

May 1997: FLORIDA APPEALS COURT ENFORCES LIVING-TOGETHER AGREEMENT OF FEMALE COUPLE: When a court begins its opinion, "Emma... and Nancy... were close friends and more," good things must surely follow. Thus begins a Florida Court of Appeals opinion enforcing a living together agreement between two women. *Posik v. Layton*, 1997 WL 136208 (Fla. App. 5th Dist., Mar. 27). * * * As a condition of following Nancy Layton to a different job in a different county, Emma Posik insisted they execute an agreement which provided that, inter alia, Layton would make substantial monthly payments of "liquidated damages" to Posik if the relationship ended. Four years later, the parties broke up and Posik sued to enforce the agreement. A trial judge refused to enforce the liquidated damages [*506] provision, feeling it amounted to a penalty because Posik's actual damages (loss of employment and costs of relocation) were ascertainable. The Court of Appeals disagreed and, calling the agreement a "nuptial" agreement between "live-ins," held that it was enforceable. * * * The court studiously avoids the question of whether public policy proscribes the enforcement of the parties' agreement: it interprets anti-gay and -lesbian adoption and marriage cases not to prohibit the right of parties to create such obligations by contract. Florida's sodomy law is simply never mentioned. The liquidated damages provision was enforceable, the court opined, because Posik's damages included more than lost wages and moving expenses, and the liquidated damages were reasonable under the circumstances. The monthly payments were less than Posik had made in years before she entered the agreement and less than she would have received had other long term provisions of the contract been performed, e.g., Layton's agreement to make Posik the sole heir of all of her probate and non-probate assets. * * * The court interpreted several other provisions of the agreement in Posik's favor and concluded, pithily, "Contracts can be dangerous to one's well-being. That is why they are kept away from children. Perhaps warning labels should be attached. In any event, contracts should be taken seriously." D.W. [*Posik v. Layton*, 695 So.2d 759 (Fla. App. 5th Dist., 1997)]. The article was written by Dirk Williams.]

June 1997: SEXUALITY ISSUES IN EUROPEAN COMMUNITY JURISPRUDENCE: Transsexual Man Denied Recognition as Father: On April 22, in *X, Y and Z v. United Kingdom*, the European Court of Human Rights held (by 14-6) that a refusal to permit a post-operative female-to-male transsexual person (X) to be registered as the father of the child by donor insemination (Z) of his non-transsexual female partner of 18 years (Y) did not violate Articles 8 and 14 of the Convention. If X were considered a man under English law, he would automatically be the legal father under sec. 28(3) of the Human Fertilisation and Embryology Act 1990. The Court found that the Article 8 right to "respect for family life" was applicable, because "de facto family ties link the three applicants." However, "given that transsexuality raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the [Convention's] Contracting States, the Court [was] of the opinion that Article 8 cannot, in this context, be taken to imply an obligation for the respondent State formally to recognize as the father of a child a person who is not the biological father." The Court considered that "the State may justifiably be cautious in changing the law, since it is possible that the amendment sought might have unforeseen or undesirable consequences for [AID] children." It also noted the inconsistency of treating X as the father of Z but as female for other legal purposes. The Court's judgment was a disappointment after the Report of the European Commission of Human Rights, adopted on June 27, 1995 (Application No. 21830/93), which had found a violation of Article 8 (by 13-5). For more information about the case, please contact X, who is in fact law professor Stephen Whittle, School of Law, Manchester Metropolitan University, Elizabeth Gaskell Campus, Hathersage Road, Manchester M13 0JA (s.t.whittle@mmu.ac.uk; fax: 44-161-224-0893). * * * Failure to Recognize Gender Reassignments Violates Convention:

Transsexual applicants from Britain have consistently failed before the Court where they have sought marital or parental rights. However, a preliminary victory has been achieved in *Sheffield v. U.K.* (Application No. 23390/94) and *Horsham v. U.K.* (Application [*507] No. 22985/93). In Reports adopted on Jan. 21, the Commission held (by 15-1 in both cases) that the male-to-female transsexual applicants' inability to obtain legal recognition of their gender reassignments constitutes "a failure to respect [their] right to private life" under Article 8, and (by 9-7 and 10-6) that it was not necessary to examine separately the applicants' complaints under Article 12 (right to marry). The Commission has referred both cases to the Court. R.W. [This article was written by Robert Wintemute.]

September 1997: N.Y. APPELLATE COURTS EXHIBIT CONTINUED HOSTILITY TO GAY TENANT SUCCESSION CLAIMS: Exhibiting unmistakable hostility to lesbian and gay apartment succession claims and ignoring the spirit of *Braschi v. Stahl Associates Co.*, 74 N.Y.2d 201 (1989), two New York appellate decisions, announced within days of each other, each yielding a strong dissenting opinion, held that a family relationship had not been established under Rent Stabilization Code provisions modeled after the *Braschi* family definition guidelines (9NYCRR 2520.6(o)). * * * In *West End Associates v. Wildfoerster*, 1997 WL 417216 (App. Div., 1st Dept., July 27), affirming by a 3 to 1 majority an Appellate Term decision upholding a grant of possession to the landlord after a non-jury trial, the court adhered to the trial court's finding that prior to the tenant's AIDS-related death, he and Frederick B. Wildfoerster, III, had a "very close, loving relationship" of 20 years, that Wildfoerster was totally dependent upon the tenant financially, the latter paying for all household expenses and providing Wildfoerster complete financial support. Wildfoerster worked as the tenant's business assistant and personal secretary, lived with the tenant for 2 years prior to the tenant's death as well as during an earlier 2 year period, and from the time the tenant first showed signs of AIDS, cared for the tenant "as a family member would."

In support of their finding of no family relationship, the majority pointed principally to the absence of financial protection by the tenant for Wildfoerster by will, insurance, or monetary gift, and also to evidence that Wildfoerster received his mail at a different address, which he listed on credit applications, his driver's license and tax returns, and that there was no commingling of finances, no joint ownerships, and no indication of sharing of household expenses.

In a dissenting opinion, Justice E. Leo Milonas repeatedly invoked *Braschi* and concluded that in the context of "the totality of their relationship," Wildfoerster demonstrated the dedication, caring and self-sacrifice necessary to meet his burden under the statute, and established that a family relationship existed. In addition to the evidence referred to and rejected by the majority, Milonas cited undisputed testimony that the two worked out of the apartment, traveled together, attended business and social functions and entertained together, were visited by friends and Wildfoerster's parents as a couple, and behaved as a family. Milonas also cited undisputed testimony of several witnesses found credible by the trial court that the two shared a very close and loving relationship, including testimony by a 31-year friend of the tenant that the latter had declared to him his love for Wildfoerster. * * * In explanation of the absence of financial sharing and post-death provision for Wildfoerster, and Wildfoerster's use of a different mailing address after he moved in with the tenant, Milonas found that those facts painted an "entirely consistent portrait" with the finding by the trial court that the tenant was an intensely private man who took pains to hide his homosexuality; refused to acknowledge publicly his relationship with Wildfoerster or even [*508] the nature of his illness; the tenant's passion for personal secrecy was so great that Wildfoerster and the tenant's close friends exhibited a reluctance to disclose personal information about the tenant even after his death; and that the foregoing was consistent with Wildfoerster's facade to the outside world downplaying their relationship. Milonas concluded that, instead of considering the totality of the relationship, the trial court had focused on a single factor, the absence of a will. * * * Gay Men's Health Crisis filed an amicus brief in support of Wildfoerster's appeal. * * * In *54 Featherco, Inc. v. Correa and Maisonet*, N.Y.L.J., July 30, 1997, p. 21, Col. 1 (App. Term, 1st Dept.), affirming by a 2 to 1 majority the trial court's denial to Maisonet of succession rights, Maisonet and Correa, the tenant of record, had been live-in lovers for 13 years, until Correa moved out to deal with family problems in Puerto Rico. They had shared holidays, social activities, and travel, hosted parties, attended events at relatives' homes, were in the words of one witness "always together," called themselves "lovers," and were financially interdependent. Correa had supported Maisonet, who was disabled, and Maisonet turned over her welfare checks to Correa, who signed them over to the landlord. * * * Giving deference to the findings of fact and credibility of the trial judge (Pierre B. Turner), who derogatorily defined "lovers" as "somebody is going to bed with (somebody)... That doesn't mean ... a long term caring relationship," the court held Maisonet failed to sustain her burden of proof. Acknowledging that Correa and Maisonet had lived and socialized together for over ten years, the majority termed them no more than "close friends" and based their denial of succession rights on the absence of documentation corroborating the intermingling of finances, sharing of household expenses, or formalizing their joint obligations, and on a letter Correa had sent to the Department of Social Services terming Maisonet a "boarder." * * * In her dissenting opinion, Justice Helen Freedman found that the two had a close, loving relationship in which they shared their lives and finances "in every

sense of the word." Invoking Braschi and itemizing the RSC family definition criteria, Freedman countered the majority's emphasis on their lack of formalized legal obligations by pointing out that Correa and Maisonet had limited income and few possessions and were financially unsophisticated; and that the only thing of value they had was the apartment lease, which Correa had attempted to "will" to Maisonet by writing a letter asking that Maisonet be allowed to retain it. Freedman concluded that in such cases courts deemed the absence of formalized legal obligations non-dispositive. Freedman criticized the trial court's derisive reference to lovers, noting that under the definition in the American Heritage Dictionary (2d. College Ed., 1991), lovers are "a couple in love with each other," which implies more than a sexual relationship. * * * The issue arose in a non-payment proceeding against Correa as tenant of record. The court held that Maisonet was without standing to defend and that Correa continued to be obligated to pay rent, leaving open the possibility that if Correa had paid the rent in her own name, the succession issue might not have arisen. A.J.L. [*West End Associates v. Wildfoerster*, 661 N.Y.S.2d 202 (N.Y. App.Div., 1st Dept., 1997); *54 Featherco, Inc. v. Correa and Maisonet*, N.Y.L.J., 7/30/97, p.21, col. 1 (N.Y.Sup.Ct., App. Term., 1st Dept.)]. This article was written by Arthur J. Levy.]

November 1997: SIXTH CIRCUIT RECOGNIZES EQUAL PROTECTION CLAIM BASED ON SEXUAL ORIENTATION DISCRIMINATION IN SELECTIVE PROSECUTION CASE: On Oct. 8, the U.S. Court of Appeals for the 6th Circuit revived an equal protection claim brought by a [*509] woman against whom DUI laws were selectively enforced based on her supposed sexual orientation. *Stemler v. City of Florence, Chipman v. City of Florence*, 1997 WL 615760. * * * According to the facts related by Circuit Judge Boggs, while dancing at a bar with boyfriend Steve Kritis, Conni Black met Susan Stemler. They went to the women's restroom to discuss their respective boyfriends; Black told Stemler that she wanted to leave Kritis. Kritis burst into the restroom cursing, grabbed Black, threatened to kill her, slammed her against a toilet stall, then pulled her out of the restroom. Black briefly passed out after Kritis pulled her out of the restroom a second time and slammed her into a wall. Kritis menaced Black with his fist. At Black's request, Stemler agreed to drive her home. As they were leaving, Kritis hit Stemler in the head with a blunt object. * * * Kritis chased Stemler's car with his truck, headlights off. Kritis rear-ended Stemler and tried to trap her car in a residential cul-de-sac. When Kritis got out of his truck to pound on the window of Stemler's car and yell at Black (waking additional witnesses who called 911), Stemler drove around the truck. Kritis resumed the chase at sixty m.p.h. on a residential sidewalk. The 911 caller and a witness already following the two vehicles followed in their cars. At a traffic light one of the witnesses flashed his lights at police Lt. Thomas Dusing (responding to the 911 call) and told him that Kritis appeared to threaten the safety of the women. Dusing cut-off the two vehicles at the intersection; Stemler ran out of her car to Dusing and cried, explaining that the drunk Kritis assaulted the two and threatened murder. While Stemler was talking to Dusing, Kritis told Officer Reuthe that Stemler was a lesbian who was kidnaping his girlfriend. (Stemler denies that she is a lesbian.) Reuthe told Dusing that he smelled alcohol on Kritis and that Stemler was a lesbian. Despite his obvious intoxication, no one conducted a sobriety test on Kritis or asked him to step out of the truck. (Later testing put his blood alcohol at the time of the stop at .155-.175, at least one-and-a-half times the legal limit.) Kritis repeated to Dusing that Stemler was a lesbian and asked him to bring Black to his truck. Dusing told Kritis that he would see what he could do and asked Kritis if he would testify against Stemler. Dusing's report claimed that he did not smell alcohol on Kritis, despite his contemporaneous statements to two witnesses that he did. * * * Dusing ordered Officer Wince to test Stemler's sobriety despite her lack of DUI indicators (e.g. impaired balance), finding a blood alcohol level of .105 by a breathalyzer which Stemler alleges was improperly calibrated. All the officers heard Kritis claim that Stemler was a lesbian, and they agreed with Dusing's decision to arrest Stemler for DUI. On Stemler's pointing at Kritis (who hadn't turned his headlights on) to ask Wince "Why don't you check him?," Wince pulled her arm behind her back and handcuffed her. A witness, angered by Stemler's arrest, told the complete story of the chase to two other officers. They told him that he didn't know what was going on but would be contacted to testify against Stemler. Mysteriously, all records of this witness were lost. Meanwhile, two officers made a point of telling the 911 caller that Stemler was a lesbian; their certainty surprised the witness given Stemler's out-of-state license plates. Dusing ordered Black arrested for public intoxication "if she didn't want to leave with the male." Two officers then lifted the insensate Black out of Stemler's car and placed her in the passenger seat of Kritis' truck. Kritis immediately drove off with Black, who again passed out. Five minutes later Kritis' truck broadsided a guardrail, throwing Black partially out of the passenger side window and severing her head in two. Kritis drove another 2.5 miles before stopping to flag down a passing motorist, who described [*510] Kritis as nonchalant, though obviously drunk. Police arriving at the scene saw probable cause to arrest Kritis without need of a field sobriety test. * * * Stemler states that she had half of a beer and two Irish coffees that night. An hour after testing Stemler's blood alcohol level at .105, Wince allegedly tested Stemler at .17. A forensic scientist concluded that the integrity of this sample was destroyed as Wince (for the first time in his career) held the sample for five days, didn't submit required documentation, then drove it to the lab personally. At Stemler's first DUI trial (resulting in a hung jury), Wince admitted that he had not completed an evidence card which he produced at her second trial, claiming it was completed at the time of arrest. Stemler was acquitted. Black's estate has a wrongful death appeal pending against

the police. * * * Stemler then sued the City of Florence and law enforcement officials in federal court, alleging a violation of her rights to due process and equal protection of the laws. Because the state court found that the police had probable cause to arrest Stemler, her false arrest and malicious prosecution claims were properly dismissed by the district court. The court of appeals found itself "powerless" to review the due process issue of Wince's evidence-tampering, reasoning that Stemler didn't raise it in her complaint but only after Wince was dismissed from suit. * * * However, "this is the rare case in which a plaintiff has successfully stated a claim of selective prosecution... The... officers chose to arrest and prosecute her for [DUI] because they perceived her to be a lesbian, and out of a desire to effectuate an animus against homosexuals... Kritis was similarly situated to Stemler (or, indeed, far drunker than she)," but they chose not to arrest him at the time they arrested Stemler because they perceived him to be heterosexual. The court rejected defendants' citation of *Bowers v. Hardwick* as support for the proposition that it is always constitutional to discriminate on the basis of sexual orientation, holding that the police would violate the core principle of the Equal Protection Clause by basing enforcement decisions on an "arbitrary classification," and noting that the availability of such a claim is not limited to groups accorded heightened scrutiny under equal protection jurisprudence. The district court's decision on the equal protection claim was reversed with respect to the individual police defendants and remanded for further proceedings. M.M. [*Stemler v. City of Florence, Chipman v. City of Florence, 126 F.3d 856 (6th Cir. 1997)*]. This article was written by Mark Major.]

December 1997: ATLANTA'S DOMESTIC PARTNER BENEFIT ORDINANCE HELD CONSTITUTIONAL: The city of Atlanta has won round two of its battle to extend substantive benefits to the domestic partners of its employees. In a 5-2 opinion, the Supreme Court of Georgia upheld the constitutionality of Atlanta's revised domestic partner benefit ordinance, reversing the judgment of the *Fulton County Superior Court*. *City of Atlanta v. Moran, 1997 WL 677314* (Nov. 3). The ordinance was challenged by Lamar Moran, a city resident who contended that Georgia's constitution did not permit local governments to extend insurance benefits to domestic partners. * * * Georgia law authorizes municipalities to provide insurance and other benefits to their employees and the employees' dependents, although the statute does not define who qualifies as a dependent. The City of Atlanta Council had passed two domestic partner ordinances: a registration ordinance, and an ordinance defining 'dependents' as registered domestic partners of city employees. In an earlier decision, the court had upheld the first but struck down the second ordinance, ruling that it extended the definition of dependent in a manner [*511] inconsistent with state law. The court held that the benefits ordinance impermissibly recognized domestic partners as a family relationship, and defined 'dependent' based on status rather than financial dependency. * * * On Sept. 3, 1996, the City of Atlanta Council tried again and passed Ordinance 96-O-1018. This ordinance defined an eligible dependent as "one who relies on another for financial support." The ordinance grants insurance benefits only to those dependents who are registered as domestic partners. The court has now approved of this structure, in an opinion by Justice Hunstein. * * * First, the Hunstein compared the ordinance's definition of 'dependent' with the term's dictionary definition, as well as its definition in other statutory and common law contexts. By not defining dependent in a way so as to recognize a new family relationship similar to marriage, the ordinance avoided constitutional flaws raised in the prior case. The court also held that since a municipality need not legislate to the fullest extent of its home rule authority, the City Council was within its right to extend benefits to fewer than all of its employees' dependents. * * * Justices Carley and Thompson dissented, in an opinion by Justice Carley. The dissent argued that the court's prior decision had only upheld the domestic partner registration ordinance precisely because it did not confer any substantive rights to registered partners. The dissent accused the majority of ruling contrary to the letter and spirit of its prior holding by now extending insurance benefits to domestic partners. The dissent posited that the city has no authority to create a contract comparable to marriage, and concluded that the domestic partner ordinance was preempted by marriage and divorce laws. * * * The Moran decision is another step towards recognizing family relationships other than heterosexual marriage. The practical long-term significance of the case is less certain, however, since the Georgia legislature retains the authority to defining the term dependent so as to exclude domestic partners. Opponents of the Atlanta ordinance say they feel particularly encouraged to press for legislative action in light of Congress' recent passage of the Defense of Marriage Act. Domestic partner proponents must wait and hope that this issue will remain a two-round fight. * * * The ordinance was defended by Atlanta City Attorneys Kendric E. Smith and Robin Joy Shahar, with amicus assistance from Harry H. Harkins, Jr., and J. Patrick McCrary. I.C.-T. [*City of Atlanta v. Moran, 492 S.E.2d 193 (Ga. 1997)*]. This article was written by Ian Chesir-Teran.]

February 1998: MISSOURI APPEALS COURT REVERSES GROUND ON GAY PARENTS; ADOPTS NEXUS TEST IN CONTESTED CUSTODY CASE: Potentially putting an end to more than two decades of gay-parent bashing in the Missouri state courts, a panel of the Western District Court of Appeals ruled on January 20 that the courts should no longer presume that it will not be in the best interest of children to be in the custody of their gay parents. *DeLong v. DeLong, 1998 WL 15536*. Instead, the court ruled that the burden would be on the parent who opposes giving a gay par-

ent custody to show that the gay parent's homosexuality is having a harmful effect on the child. * * * Beginning in 1980 and continuing through seven different decisions by various panels of the Missouri appellate courts, the courts of that state have consistently taken the position that it can never be in the best interest of children to be raised by a gay parent, and had even gone so far as to require that when gay parents exercise visitation rights, they have another non-gay adult with them at all times. The courts had rested their determinations on the idea that exposure to a gay parent will endanger the moral development of the child, or that the child [*512] would inevitably suffer social disadvantage through being associated with a gay parent. Now, an appellate panel of the state has rejected this approach for the first time. * * * The turnabout came in the divorce case of Frederick and Janice DeLong. They married in 1985. At that time, Frederick was an attorney age 36 earning \$ 80,000 a year, while Janice was a beginning school teacher age 24 earning \$ 13,000. Before the wedding, they signed an antenuptial agreement under which Janice agreed to give up her career to stay home and take care of Frederick's son from an earlier marriage and the children they hoped to have together. In the agreement, she also gave up her right to claim marital property in the event of a divorce, limiting her entitlement to whatever assets she brought to the marriage plus a payment of \$ 2,000 for each year of the marriage and a \$ 10,000 payment upon signing the agreement. Fred also required that Janice undergo an evaluation by a psychologist to determine her compatibility with married life. * * * During the first five years of the marriage, they had three children, but by 1991 Janice had figured out that she was really more interested in women and began a series of extramarital affairs. After the couple broke up, Fred also had an extramarital affair. Janice was careful to keep from her children any knowledge about her lesbianism. * * * During the divorce proceeding, Fred sought sole custody of the children, and Boone County Circuit Court Judge Ronald M. Belt, following the Missouri precedents, found that the children's best interest would be served by placing them with Fred. Citing Janice's promiscuous series of four homosexual affairs," the court also restricted visitation, requiring Janice to "keep any and all aspects of the homosexual lifestyle away from the minor children during the children's periods of visitation with her." In addition, Belt ordered that the children not be exposed to any known lesbians or "any other female, unrelated by blood or marriage, with whom [she] may be living." The court also ordered the guardian ad litem, appointed to represent the children's interest, to supervise a "telling session" at which Janice would tell the two older children about her sexual orientation. (This seems inconsistent with the visitation order, but consistency isn't a strong suit of homophobic judges.) * * * The Court of Appeals decision, written by Presiding Judge Robert Ulrich, totally rejected this approach. After reviewing the past history of gay parenting decisions in the Missouri appeals courts, Ulrich asserted: "To the extent that Missouri case law automatically presumes that a homosexual parent is per se unfit to be custodian of his or her child, it is not followed in this case." * * * Instead, the court explicitly adopted the "nexus test" that has been advanced by gay rights litigators: A parent's sexual conduct, including homosexual conduct, is not to be presumed to be a negative factor, and is only relevant if it can be shown to be harming the child. * * * Furthermore, the court rejected the idea that parental homosexual conduct can always be assumed to be harmful to the child. "Generalizations regarding the possible impact a parent's sexual conduct outside the presence of a child may have on a child are impermissible," wrote Ulrich. "Likewise, the disapproval of morals or other personal characteristics, without evidence of how the morals or characteristics adversely impact the child, should not be used to determine the fitness of a parent to care for a child." Disclaiming any purpose to "condone" homosexuality, Ulrich asserted that the sole purpose of the court in a custody case should be to determine what placement will be in the child's best interest. * * * Turning to this case, Ulrich noted that the trial court had focused on the mother's homosexuality without making any real inquiry into how her sexual orientation actually affected (or didn't affect) her [*513] children. Thus, the lower court "misapplied the law" and the case had to be remanded to the lower court for reconsideration of custody and visitation. * * * Janice had also challenged the pre-marital property agreement. Two of the three judges on the panel agreed that the property agreement was unconscionably one-sided at the time it was made, and so should be set aside. Also reversing the trial court on this point, the court directed that a property determination be made by the lower court consistent with Missouri legal principles. * * * This decision by the Western District court is only binding in the western portion of the state, but Frederick DeLong has announced he will petition for rehearing and, if unsuccessful, will attempt to take the case to the Missouri Supreme Court (which in the past has apparently avoided ruling on this issue). If the decision is upheld by the state supreme court, it will become a statewide precedent. * * * Janice is represented by the San Francisco-based National Center for Lesbian Rights, a public interest law firm that has specialized in litigating custody and visitation claims on behalf of gay parents. A.S.L.

The rest of the story:

October 1998: MISSOURI SUPREME COURT RENDERS MIXED RULING IN CUSTODY CASE: In its first substantive ruling in a custody and visitation case involving a lesbian mother, the Missouri Supreme Court unanimously upheld the trial court's award of custody to the heterosexual father, but disapproved of the trial court's order that the children not be exposed to any known lesbians while the mother is exercising her visitation rights and remanded for

reconsideration of the visitation issue. *J.A.D. v. F.J.D. III*, 1998 WL 652165 (Mo. En Banc, Sept. 24). * * * Joseph petitioned to have the case transferred to the Supreme Court, which petition was granted. * * * In its per curiam opinion, the court devoted much of its attention to criticizing the work of Janice's attorney in preparing the appeal papers, asserting that the appeal failed various technical requirements of pleading under Missouri law, and that appellant was improperly asking the court to undertake a virtual de novo review of the trial court's factual findings. However, the court went ahead to decide some substantive questions raised by the appeal. * * * On the issue of custody, the court rejected Janice's assertion that the trial court had based its custody order solely on her sexual orientation. "This contention is false," the court asserted. "The judgment recites that custody was placed with father for a number of reasons. Without question, the guiding star in a custody determination is the best interest of the children. A homosexual parent is not ipso facto unfit for custody of his or her child, and no reported Missouri case has held otherwise. It is not error, however, to consider the impact of homosexual or heterosexual misconduct upon the children in making a custody determination." (The court cites a 1985 Missouri Supreme Court opinion in support of this point, but the cited opinion is not a ruling on the merits on this point, but rather a ruling on an evidentiary point concerning spousal privilege in the context of a custody dispute. The 1985 decision, *T.C.H. v. K.M.H.*, 693 S.W.2d 802, does, however, quote with apparent approval a lower Missouri court statement that requires that harm to the children due to the parent's homosexual activity be shown in order for such activity to be a factor in determining custody.) The court concluded that there was substantial evidence in the record supporting the trial court's findings underlying the custody decision. * * * However, the court found the restrictions imposed on visitation to be "too broad," because they prohibit exposure of the children to a broad class of people without regard to whether any individual in the class would be "[*514] harmful to the children." In remanding the case, the court directed the trial court "to limit the conditions to apply only to those individuals whose presence and conduct may be contrary to the best interests of the children." * * * The per curiam opinion is quite disingenuous in its characterization of the trial court's ruling. Most of the factors cited by the trial court either relate to the mother's status as a lesbian or derive from the court's characterization of virtually any homosexual conduct or relationship by a lesbian parent as being "misconduct." (The unspoken subtext here is the Missouri penal code, under which, in fact, almost any homosexual conduct by a parent could be characterized as "misconduct" because it is potentially illegal. In Missouri, even mutual masturbation is illegal.) Further, the trial court (as the court of appeal had found) virtually presumed harm to the children from such conduct without requiring the father to prove that such harm had occurred or would occur. Thus, while on its face the court's ruling appears quite "tolerant," in fact it does no more than to track prior Missouri appellate decisions that have piously proclaimed that they are not ruling against lesbian mothers because of their sexual orientation, while proceeding to terminate their custody because of their "misconduct," which consists of living in a loving relationship with another woman. A.S.L. [*DeLong v. DeLong*, 1998 WL 15536 (Mo. App. W.D. Jan. 20, 1998), aff'd in part, reversed in part, remanded in part, sub nom. *J.A.D. v. F.J.D. III*, 978 S.W.2d 336 (1998).]

March 1998: 6TH CIRCUIT RULES AGAINST FOOD-HANDLER'S DISCRIMINATION CLAIM: On Feb. 4, the U.S. Court of Appeals for the 6th Circuit ruled that a supermarket did not violate the Americans with Disabilities Act when it fired a produce clerk who refused to submit to a medical examination after revealing he had tested positive for HIV. *EEOC v. Prevo's Family Market*, 1998 WL 39370. The majority purported to base its decision on the "unique" facts and circumstances of the case. Nonetheless, the legal analysis underlying the court's holding belies this assertion. The case will undoubtedly narrow the scope of the ADA's protection for employees with HIV and other infectious diseases in the 6th Circuit. * * * Steven Sharp was a part-time produce clerk in a family-owned grocery store in Michigan. After working there for several months, Sharp informed his employer that he had tested positive for HIV and planned to speak at a neighborhood AIDS awareness and education program. The president of the chain suggested that Sharp be reassigned to the receiving area of the supermarket with comparable hours and pay, and Sharp agreed. However, several days later he complained that he missed working with customers and was concerned about his co-employees who began asking why he had been reassigned. Sharp then agreed to be placed on a leave of absence with pay and health benefits (to which he was otherwise not entitled as a part-time employee) to give everyone an opportunity to "handle the situation." Sharp consented to verify his HIV status with his personal physician and to report his findings to his employer. * * * The supermarket expressed concern about the increased risk of HIV transmission as a result of the frequent cuts and nicks suffered by food clerks like Sharp in the course of preparing produce for sale. Sharp's employer also believed he would be susceptible to other infectious diseases like hepatitis and tuberculosis, compounding the risk to co-workers and customers. Sharp failed to show up for a medical examination scheduled and paid for by his employer despite several promises to do so. He also refused to accept an alternate position developing marketing information for the supermarket at home. Instead, Sharp sent [*515] his employer a letter from his physician stating he tested negative for hepatitis and tuberculosis and was ready to resume his duties as a produce clerk. When continued efforts to have Sharp examined by a physician chosen by the supermarket failed, he was terminated - almost one year after he first told the supermarket that he had tested positive for HIV. * * * The district court granted summary judgment to the EEOC on the

issue of liability, ruling that Sharp's employer violated the ADA when it required Sharp to submit to a medical examination without showing that the examination was job-related and consistent with business necessity. The issue of damages was tried by a jury. Sharp was awarded \$ 10,000 in compensatory damages and \$ 45,000 in punitive damages. The district court also ordered that Sharp be reinstated to his original position as produce clerk. * * * A divided panel for the 6th circuit reversed. The majority opinion by Circuit Judge Eric L. Clay, joined by Judge Suhrheinrich, concluded that requiring Sharp to submit to a medical examination was permissible under the ADA because it served a legitimate business purpose: to protect the health of Sharp, its other employees and the general public from HIV infection. The majority rejected the EEOC's position that an individual medical examination was unnecessary since available medical information already showed that the risk of HIV transmission by food handlers like Sharp was negligible. Instead, the court credited evidence in the record suggesting that issues such as Sharp's intellect and personal hygiene could affect the risk of his transmitting HIV to others at the supermarket. The court concluded that the ADA and rules promulgated by the EEOC permitted an individualized examination to assess these subjective facts as they related to the supermarket's operation. * * * On a bolder and more fundamental note, the majority concluded that the demand for a medical examination was justified because the supermarket was not required to take Sharp at his word as to his HIV status. The court appeared concerned if not miffed that the record never confirmed whether Sharp was indeed HIV+, faulting Sharp for preventing his employer from knowing whether he "had a condition for which federal law may require accommodation." Yet the majority did not reveal why this was legally material, since Sharp never requested an accommodation from his employer. The broader implication of this is particularly distressing, as it suggests that if an employee reveals that he or she has a medical condition that might conceivably require an accommodation under the ADA at some unknown point in the future (even though the employee does not request an accommodation at the time), the employer may subject the employee to a medical examination to verify the employee's diagnosis. * * * In her dissenting opinion, Circuit Judge Karen Nelson Moore highlighted how the majority's analysis did not conform to the statutory mandates of the ADA. Her recurring theme was that the majority's position condoned an employer's choice of "fear over fact, ignorance over information, and mythology over medical evidence." * * * First, Moore emphasized that the supermarket failed to meet its duty to seek out current objective medical information about the risk of HIV/AIDS transmission before it reassigned Sharp or required him to submit to a medical examination. Sharp referred the supermarket to several organizations, and even gave Mr. Prevo the name of his personal physician, who is an infectious disease specialist. The supermarket president spoke only to a neighbor and to human resources personnel. Contrary to the majority's position, Judge Moore held that this did not satisfy federal regulations that employers obtain the "best available medical evidence" when determining if an employee posed [*516] a direct threat to co-workers or customers. * * * The supermarket's own expert witness testified that under ordinary circumstances food handlers do not pose any threat of HIV transmission and need no restrictions in their employment. Moore cited statistics in the record that the odds of Sharp infecting a co-worker with HIV were one in 10 million under normal circumstances. Even in the most egregious situation - if one of Sharp's co-workers had a fresh cut, held the wound right open, and Sharp bled into it - the likelihood of transmission was one in 3,000. Moore argued that even if these odds were statistically significant, Sharp could nonetheless be reasonably accommodated with steel gloves or a separate set of produce knives, for example. With these accommodations, Sharp would constitute a "qualified worker" under the ADA and could not be reassigned or subjected to a medical examination. * * * Moore's most compelling argument was based on that portion of the ADA which addresses employment of food handlers with infectious diseases. Based on 11th-hour congressional negotiations, the ADA requires the Secretary of Health and Human Services to prepare an annual list of infectious and communicable diseases that can be transmitted through food handling. Employers are permitted to reassign employees infected with these diseases. Since 1990, however, neither HIV nor AIDS has ever appeared on this list. By ignoring this omission, claimed Moore, the majority overstepped the boundaries of the statute, and adopted as the law of the 6th Circuit the very fear, prejudice and ignorance which the ADA sought to eliminate. [*EEOC v. Prevo's Family Market*, 135 F.3d 1089 (6th Cir. 1998)]. This article was written by Ian Chesir-Teran.]

April 1998: SUPREME COURT FINDS SAME-SEX HARASSMENT ACTIONABLE UNDER TITLE VII: The U.S. Supreme Court unanimously upheld a plaintiff's right to sue for sexual harassment under Title VII of the Civil Rights Act of 1964, regardless of the harasser's sex or sexual orientation. *Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998 (March 4). * * * Plaintiff Joseph Oncale suffered a nasty campaign of physical and verbal sexual harassment by co-workers and supervisors on an oil rig. (See Law Notes, October 1995, June 1996, and January 1998). The harassment included simulated sexual assaults, even though everyone involved was heterosexual and male. After complaining unsuccessfully to supervisory personnel, Oncale quit, requesting his pink slip reflect that he "left due to sexual harassment and verbal abuse." Oncale sued but the U.S. District Court for the Eastern District of Louisiana dismissed, bound by *Garcia v. Elf Atochem North America*, 28 F.3d 446 (5th Cir. 1994) (same-sex harassment not actionable under Title VII). The Fifth Circuit affirmed, following *Garcia*. * * * The Supreme Court reversed. Writing for a unani-

mous Court, Justice Antonin Scalia looked to the plain language of the statute, which prohibits "discrimination because of ... sex" in the "terms" or "conditions" of employment. "Our holding [in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986)] that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements," Scalia wrote. * * * Addressing floodgate arguments, Scalia quoted Meritor: "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment - an environment that a reasonable person would find hostile or abusive - is beyond Title VII's purview." However, Scalia noted that the same actions might have different implications in different contexts: "A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads [*517] onto the field - even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office." * * * Scalia refuted the claim that Title VII was intended solely to prevent one sex from discriminating against the other. "As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." One hopes this reasoning might prevail over "original intent" arguments elsewhere as well, for example enforcing the Equal Protection clause to stop states denying same-sex couples the equal protection of the laws governing marriage. * * * Justice Clarence Thomas joined the unanimous opinion and added a one-sentence concurrence: "I concur because the Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination 'because of ... sex.'" * * * The Court disposed of two other same-sex harassment cases on March 9. It denied certiorari in *Fredette v. BVP Management Associates*, 112 F.3d 1503 (11th Cir. May 22, 1997) (cert. denied sub nom. *BVP Mgmt. Assoc. v. Fredette*, 1998 WL 97294), allowing a male employee to sue for harassment by a male supervisor. The Court vacated *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir., July 17, 1997) (see Law Notes, September 1997), remanding for reconsideration in light of *Oncala*, in which Scalia characterized *Belleville* as holding "that workplace harassment that is sexual in content is always actionable, regardless of the harasser's ... motivations." (In fact, *Belleville* found workplace harassment that included an assault on the victim's testicles actionable because the victim necessarily experienced it "as a male.") [This article was written by Otis R. Damslet.]

May 1998: SUPREME COURT OF CANADA READS SEXUAL ORIENTATION INTO ALBERTA'S ANTI-DISCRIMINATION LAW: For the first time, lesbian and gay Canadians have achieved a complete victory before the Supreme Court of Canada. On April 2 in *Vriend v. Alberta*, File No. 25285, the Court held (by 8-0) that the Alberta legislature's failure to include sexual orientation in its anti-discrimination legislation violates sec. 15(1) of the Canadian Charter of Rights and Freedoms, and (by 7-1) that the appropriate remedy is the "reading in" of sexual orientation into the Alberta legislation with immediate effect. * * * Delwin Vriend was dismissed from his job as a laboratory coordinator at King's College in Edmonton after disclosing that he was gay. The Alberta Human Rights Commission refused to accept his complaint of employment discrimination because sexual orientation was not one of the prohibited grounds in the Individual's Rights Protection Act or IRPA, which covers race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry and place of origin. Vriend and three lesbian and gay organizations brought a constitutional challenge to the omission of sexual orientation under the equality rights provision of the Canadian Charter (sec. 15(1)). * * * Justice Cory (writing for the Court with Justice Iacobucci) began by considering whether the application of the Charter to provincial legislatures under sec. 32 (the "government action" provision) could extend to a legislative omission. He concluded that sec. 32 does not require "a positive act encroaching on rights" and does not preclude application of the Charter to legislation "that is underinclusive as a result of an omission," rather than an explicit exclusion. It was not necessary to decide whether [*518] the legislature's deliberate decision to omit sexual orientation was an "act," or whether a complete failure to legislate (e.g., the absence of any anti-discrimination legislation) could be challenged under the Charter. As for the argument that the IRPA applies, unlike the Charter, to private activity, and that a decision in favour of Vriend would have the indirect effect of prohibiting private sector sexual orientation discrimination, Justice Cory responded that the Charter applies to "laws that regulate private activity" and that the case concerned an Act of the Alberta legislature, not the acts of King's College or any other private entity. * * * Turning to sec. 15(1), Justice Cory asked "first, whether there is a distinction which results in the denial of equality before or under the law, or of equal protection or benefit of the law; and second, whether the denial constitutes discrimination on the basis of an enumerated or analogous ground." In finding a distinction, he rejected the argument that the IRPA's silence with regard to sexual orientation is "neutral," and that "the IRPA extends full protection on the grounds contained within it to heterosexuals and homosexuals alike" (e.g., both lesbian and heterosexual women can complain of gender discrimination). "Lesbian and gay individuals are still denied protection under the ground that may be the most significant for them: sexual orientation." The IRPA draws a distinction (denying formal equality) "between homosexuals and other disadvantaged groups which are protected under the Act," and a distinction (denying substantive equality) "between homosexuals and hetero-

sexuals," in that "the exclusion of the ground of sexual orientation clearly has a disproportionate impact on [gays and lesbians] as opposed to heterosexuals." * * * Were these distinctions on the basis of an "enumerated or analogous ground" and were they "discriminatory?" The Court had already held unanimously in *Egan v. Canada*, [1995] 2 S.C.R. 513, that sexual orientation is "analogous to the other personal characteristics enumerated in sec. 15(1)," which are race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. In looking for evidence of "discrimination," Justice Cory found it unnecessary to decide whether the Alberta legislature's purpose in excluding sexual orientation was itself discriminatory, noting that "a finding of discrimination does not depend on an invidious, discriminatory intent," and that "either an unconstitutional purpose or an unconstitutional effect is sufficient." The exclusion's discriminatory effects were clear, especially in view of the comprehensive nature of the IRPA (i.e., it did not target just one type of discrimination). Apart from the absence of effective legal recourse, the exclusion "sends a strong and sinister message," suggesting that "discrimination on the ground of sexual orientation is not as serious or as deserving of condemnation as other forms of discrimination," which may be "tantamount to condoning or even encouraging discrimination against lesbians and gay men." Psychological harm may result: "fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem;" and the exclusion strengthens "the view that gays and lesbians are less worthy of protection as individuals," which may harm their "dignity and perceived worth." The Alberta legislature "has, in effect, stated that 'all persons are equal in dignity and rights,' except gay men and lesbians. Such a message, even if it is only implicit, must offend sec. 15(1)." * * * The respondents argued that a decision in favour of *Vriend* would mean that all federal, provincial and territorial anti-discrimination legislation would have to "mirror" the Charter, by including the nine enumerated sec. 15(1) grounds and the three analogous sec. 15(1) grounds the Court has identified to [*519] date (citizenship, marital status and sexual orientation). Justice Cory acknowledged that "the omission of one of the enumerated or analogous grounds from comprehensive human rights legislation would always be vulnerable to constitutional challenge." But no "simplistic ... mirroring" would be required. "Whether an omission is unconstitutional must be assessed in each case, taking into account the nature of the exclusion, the type of legislation, and the context in which it was enacted," as well as any justification for the exclusion under sec. 1 of the Charter. * * * Justice Iacobucci dealt with the Alberta government's attempt to justify the violation of sec. 15(1) under sec. 1 as a "reasonable limit[] prescribed by law [that] can be demonstrably justified in a free and democratic society." He held that, under the first stage of the sec. 1 justification test, the Alberta government had failed to demonstrate that the omission of sexual orientation had a "pressing and substantial objective." Regardless of whether "moral considerations" would be sufficient, they had not been argued. And the respondents' "explanations" for the omission (the IRPA cannot address parental acceptance; the IRPA cannot change attitudes; insufficient examples of discrimination had been provided; "codification of marginal grounds which affect few persons raises objections from larger numbers of others, adding to the number of exemptions") did not constitute an "objective." * * * Even assuming that the IRPA as a whole had a pressing and substantial objective (providing protection against discrimination), Justice Iacobucci found no "rational connection" between this objective and the exclusion of gay men and lesbians from the IRPA. Indeed, "denying protection to a group which this Court has recognized as historically disadvantaged [is] antithetical to that goal." As for the argument that the Alberta government must be permitted to use "incremental means" in expanding the IRPA, Justice Iacobucci found no evidence of incrementalism with regard to gays and lesbians or of a substantial budgetary impact that would justify judicial deference. Indeed, incrementalism was not generally an appropriate justification: "groups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time." * * * The Alberta government also argued that there had been "minimal impairment" of sec. 15(1) rights because the IRPA is social policy legislation requiring the legislature to mediate between competing interests: religious freedom and homosexuality. Justice Iacobucci again found no need for judicial deference. Any conflicts with religious freedom can be dealt with on a case-by-case basis under the IRPA's exceptions. (The fact that King's College is a "private fundamentalist Christian college" was not, strictly speaking, an issue in this suit against the province for omitting sexual orientation from the IRPA.) The exclusion of sexual orientation "constitutes total, not minimal, impairment of the Charter guarantee of equality." * * * As for the appropriate remedy, Justice Iacobucci observed that "striking down the IRPA would deprive all Albertans of human rights protection and thereby unduly interfere with the scheme enacted by the Legislature." Reading sexual orientation into the preamble and seven sections of the IRPA (dealing with employment, goods, services and housing) was to be preferred because "it is reasonable to assume that, if the Legislature had been faced with the choice of having no human rights statute or having one that offered protection on the ground of sexual orientation, the latter option would have been chosen," especially in view of the size of the excluded group. The term "sexual orientation" did not require a definition, and the Alberta legislature could deal with "matters [*520] of detail not dictated by the Constitution," such as the application to sexual orientation cases of an IRPA exception dealing with retirement, pension and insurance plans. Suspension of the remedy (e.g., for one year) was not warranted because "there

is no risk of harmful unintended consequences upon private parties or public funds" and IRPA mechanisms "require no significant adjustment." At the end of an extensive defense of judicial review of legislation, Justice Iacobucci concluded that "parliamentary safeguards" remain. * * * "Governments are free to modify the amended legislation by passing exceptions and defenses which they feel can be justified under sec. 1 of the Charter. Moreover, the legislators can always turn to sec. 33 of the Charter, the override provision." * * * Whether or not the Supreme Court would permit it, repeal of the IRPA (now known as the Human Rights, Citizenship and Multiculturalism Act) is not politically feasible. This left the Alberta government with two main options: (a) avoid complying with *Vriend* by invoking sec. 33 and re-enacting the IRPA without sexual orientation; or (b) accept *Vriend* but limit its impact by amending the IRPA and other legislation (in ways that the Supreme Court might uphold). * * * The sec. 33 override is a unique feature of the Canadian Charter. It permits a legislature to expressly declare that an Act "shall operate notwithstanding a provision of sec. 2 or sec. 7 to 15" (roughly equivalent to U.S. Constitutional Amendments 1, 4-6, 8 and 14), but the declaration ceases to have effect after five years. The sec. 33 override represents a political compromise that was necessary to obtain the consent of all provinces but Quebec to the Constitution Act, 1982, which added the Charter to the Canadian Constitution and provided a procedure for amending the Constitution in Canada (rather than Britain). Some see it as a gaping hole in the Charter's protection, while others see it as a valid means of reconciling judicial review of legislation and democracy by giving the legislature the final say. * * * On April 9, after a week of heated public debate and a stormy closed-door meeting, two-thirds of the governing Progressive Conservative Party's legislators voted to accept the Supreme Court's decision. But a cabinet committee will look at creating "fences" around other Alberta legislation so as to limit the impact of *Vriend*. Issues to be considered may include same-sex marriages, the definition of "spouse" in 63 provincial statutes, employment benefits for same-sex partners, adoptions by gays and lesbians, and the inclusion of material about homosexuality in school curricula. * * * To U.S. lawyers, *Vriend* must seem a fairly radical decision, both with regard to the constitutional violation and the remedy. It goes well beyond *Romer v. Evans* (U.S. Sup. Ct. 1996) by requiring that anti-discrimination laws include sexual orientation, regardless of the views of the legislature or the electorate. An argument that the U.S. Constitution imposes a similar requirement is almost certainly a non-starter. * * * The main effect of *Vriend* will be to fill in the gaps in legislative protection against sexual orientation discrimination. Express protection exists at the federal level, in 8 of 10 provinces (British Columbia, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia and Newfoundland), and in the Yukon Territory. *Vriend* will effectively require judicial reading in, not only in Alberta, but also in Prince Edward Island, the Northwest Territories and the soon-to-be-created Inuit territory of Nunavut. The result will be "coast-to-coast" protection in Canada. [*Vriend v. Alberta*, 50 C.R.R. (2nd) 1, [1998] 1 S.C.R. 493 (1998). This article was written by Robert Wintemute. Mr. Wintemute, author of *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian [521] Charter* (Oxford Univ. Press), teaches law at King's College, London, U.K.]

CLINTON ISSUES EXECUTIVE ORDER BANNING SEXUAL ORIENTATION DISCRIMINATION IN THE EXECUTIVE BRANCH: In a much-delayed follow-up on a promise from the 1992 election campaign, U.S. President Bill Clinton signed an Executive Order on May 28, formally amending Executive Order 11478 (Equal Employment Opportunity in the Federal Government), to add "sexual orientation" to the characteristics covered by the federal government's equal opportunity policy. This action was largely symbolic, since most of the departments, agencies and bureaus of the Executive Branch had adopted their own non-discrimination policies several years ago in response to a Clinton directive to the heads of all agencies urging such a course of action. The policy applies only to civilian employment, and thus does not affect the policy of excluding openly lesbian and gay people from uniformed military service as agreed by Congress and Clinton in 1993. * * * Furthermore, although victims of discrimination may seek redress through informal administrative procedures within their agencies, the executive order does not create any rights enforceable in the federal courts, because the president does not have any legislative authority. Acknowledging this basic limitation on his handiwork, Clinton accompanied the order with a renewed call to Congress to pass the Employment Non-Discrimination Act (ENDA), a pending bill that would ban disparate treatment on the basis of sexual orientation in public and private employment to the extent of Congress's power under the Commerce Clause. This call was nothing new, either, as Clinton has endorsed the bill several times in the past, and little likelihood is given for its passage so long as control of Congress lies in Republican hands. * * * In an unusual high point of support, 49 Senators voted for ENDA shortly before the 1996 elections, as part of a deal under which the Defense of Marriage Act (DOMA), which bans federal recognition of same-sex marriages and purports to excuse the states from any obligation they have to recognize such marriages when contracted in other states, was brought to the floor under a rule precluding floor amendments. Under the circumstances, Senators had an opportunity to demonstrate that their support for DOMA was not intended as "gay-bashing" while secure in the knowledge that ENDA would not be enacted because it hadn't a prayer of even coming to the floor in the House of Representatives. These unusual circumstances are unlikely to recur soon.

A.S.L.

Summer 1998: SUPREME COURT RULES 5-4 THAT "ASYMPTOMATIC" HIV-INFECTION MAY BE COVERED AS A DISABILITY BY ADA: A majority of the U.S. Supreme Court ruled in *Bragdon v. Abbott*, 1998 WL 332958 (June 25), that asymptomatic HIV infection can be covered as a disability under the Americans With Disabilities Act, but vacated and remanded a decision by the 1st Circuit for further proceedings on the issue of whether an HIV-infected dental patient would present a "direct threat" of injury to a dentist, as that term is defined in the ADA. This was the first decision by the Supreme Court to undertake a substantive interpretation of the ADA, and also the first decision by the Court directly to address legal questions raised by the AIDS epidemic. * * * Justice Anthony M. Kennedy wrote for the Court, with concurring opinions by Justices John Paul Stevens (joined by Justice Stephen Breyer) and Ruth Bader Ginsburg. Justice David Souter was the fifth member of the majority. Chief Justice William Rehnquist dissented, joined by Justices Antonin Scalia, Clarence Thomas and, in part, Sandra Day O'Connor, who also wrote a separate [*522] brief dissent. * * * The case arose in September 1994 when Dr. Randon Bragdon declined to fill a cavity for Sidney Abbott, who had disclosed her HIV+ status, in his Bangor, Maine, dental office. Bragdon maintained that his office did not have sufficient infection control capacity to deal with an HIV+ patient, and offered to fill the cavity in a hospital dental clinic setting instead. Abbott rejected this offer and sued under Title III of the ADA, alleging discrimination in the provision of public accommodations. In a deposition, Abbott stated that upon learning her HIV status she had decided not to have children, out of concern that she might infect her sexual partner, pass the infection to her child, and be unable to raise a child should she progress to symptomatic AIDS. Abbott also stated that she was not presently limited in any of her other life activities by her HIV-infection. * * * Under the ADA, an individual with a disability is defined, inter alia, as a person who has a "physical or mental impairment" that "substantially limits a major life activity" of that person. There was little dispute that HIV infection is a physical impairment, but Bragdon argued that Abbott, who did not have symptomatic AIDS, was not substantially limited in a major life activity. Abbott argued that reproduction is a major life activity, and that her HIV infection imposes a substantial limitation on her ability to engage in such activity. Bragdon's rejoinder was that reproduction is not a major life activity, and even if it were, that the possibility of transmitting HIV to a sexual partner or child or of being unable to complete the process of raising the child did not constitute substantial limitations, since they did not actually prevent Abbott from becoming pregnant and bearing a child. * * * The ADA also provides that a person with a disability may be denied services if providing the services would present a "direct threat" to the health or safety of others. The statute defines "direct threat" as a "significant risk... that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services." Abbott argued that the risk to Dr. Bragdon in filling her cavity was so slight as to be insignificant, particularly if Bragdon followed the guidelines issued by the Centers for Disease Control and Prevention (which have been given the force of law through their adoption by the Occupational Safety and Health Administration as safety standards for dental offices). Bragdon countered that in light of the severe consequences should HIV be transmitted, even the slight possibility that transmission might take place when the guidelines are being followed are sufficient to present a "significant risk" of transmission, referring to the analysis of numerous lower federal courts that have ruled against discrimination claims by HIV+ health care workers based on their assessment of the risk of HIV transmission from health care workers to patients. * * * Granting summary judgment in favor of Abbott, the lower courts resolved both of these issues against Bragdon. The Supreme Court affirmed as to the first issue - whether asymptomatic HIV-infection is a disability - by a 5-4 vote, but was more divided over the "direct threat" issue. Seven members of the Court (three in the majority on the first issue, and four in the dissent on the first issue) concluded that the case should be remanded to the 1st Circuit for further proceedings, although those who were members of the majority on the first issue had a different view from the dissenters as to the standard to be employed by the lower courts in resolving the question. Two members of the majority, Justices Stevens and Breyer, would have affirmed the lower courts outright on the second issue. * * * Justice Kennedy's opinion on the first issue presents a careful, step-by-step analysis of each part of the statutory definition. First, noting the impact of HIV infection [*523] on the hemic and lymphatic systems, Kennedy concluded that HIV infection is a physical impairment. Kennedy provided a detailed summary of current knowledge about the natural history of HIV infection in humans that is remarkable for a court opinion. In a passage that directly contradicts the holdings of several of the circuit courts of appeals, Kennedy concluded: "In light of the immediacy with which the virus begins to damage the infected person's white blood cells and the severity of the disease, we hold that it is an impairment from the moment of infection... HIV infection must be regarded as a physiological disorder with a constant and detrimental effect on the infected person's hemic and lymphatic systems from the moment of infection. HIV infection satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease." Indeed, Kennedy suggested that the term "asymptomatic" cannot properly be applied to HIV infection at any stage. * * * The next issue is whether the impairment "affects a major life activity." Abbott was argued that HIV infection affected her ability to reproduce, which she contended is a major life activity. Because the Court is constitutionally limited to deciding actual cases, the meticulously cautious Justice Kennedy would not be pulled into the more general question of whether HIV infection is a per se

disability, but rather focused this section of the opinion on whether the life activity identified by Abbott sufficed to meet the statutory definition. However, he noted: "Given the pervasive, and invariably fatal, course of the disease, its effect on major life activities of many sorts might have been relevant to our inquiry. Respondent and a number of amici make arguments about HIV's profound impact on almost every phase of the infected person's life. In light of these submissions, it may seem legalistic to circumscribe our discussion to the activity of reproduction." But because the lower courts had dealt solely with reproduction, Kennedy said, the Court would follow its practice of speaking only to the issues properly raised on appeal. * * * As to that, Kennedy said, the majority of the Court had "little difficulty" in concluding that reproduction is a major life activity, noting with approval the 1st Circuit's construction of "major" as denoting "comparative importance" and "significance." "Reproduction and the sexual dynamics surrounding it," wrote Kennedy, "are central to the life process itself." Kennedy went on to reject Bragdon's argument, embraced in the dissents, that Congress intended to focus only on those life activities that had a "public, economic or daily dimension." * * * Kennedy then considered whether HIV's effect on reproduction was such as to constitute a substantial limitation on that activity. The Court found that the impairment was substantial in two ways: the risk of transmitting HIV to a sexual partner, and the risk of transmitting HIV to a child during gestation and childbirth. The Court rejected the contention that because an HIV+ woman was physically able to conceive a child, her reproductive ability was not substantially limited. "The Act addresses substantial limitations on major life activities, not utter inabilities," Kennedy insisted. "Conception and childbirth are not impossible for an HIV victim but, without doubt, are dangerous to the public health. This meets the definition of a substantial limitation. The decision to reproduce carries economic and legal consequences as well. There are added costs for antiretroviral therapy, supplemental insurance, and long-term health care for the child who must be examined and, tragic to think, treated for the infection. The laws of some States, moreover, forbid persons infected with HIV from having sex with others, regardless of consent." * * * Kennedy rejected the argument that refraining from reproduction due to HIV infection was merely a matter of personal [*524] choice, and asserted that "when significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable." Concluding that there was no triable issue of fact remaining on this issue, a majority of the Court held that Abbott had established her coverage as an individual with a disability, and sustained the lower courts' grant of summary judgment on this issue. * * * In his dissent, Chief Justice Rehnquist revived the arguments accepted by some of the circuit courts that so-called "asymptomatic" HIV infection does not limit a person's daily life activities and thus cannot constitute a disability, even alluded approvingly to some lower court decision that hold that people with rather serious medical conditions were not protected by the ADA because there were medications that could alleviate their physical symptoms. (Although the majority opinion did not directly address this point, its very silence on the issue, in light of the flood of amicus briefs on both sides of the medical questions, might implicitly suggest a lack of sympathy for this argument. Indeed, the notion that the existence of medical remediation of symptoms eliminates the disability contradicts the logical basis for Kennedy's conclusion that "asymptomatic" HIV infection is a disability.) * * * There was some speculation after the opinion was announced that the Court's narrow treatment of the disability issue left open the question of whether an HIV+ gay man who had never expressed an interest in having children, or an HIV+ individual who was otherwise incapable of reproductive activity (e.g., a person who had been surgically sterilized prior to learning of their HIV status), would be protected by the ADA. On this point, Kennedy's dicta, reinforced by a short concurring opinion in which Justice Ginsburg enumerated the array of activities affected by HIV infection, suggested that the lower courts should recognize virtually all persons with HIV infection as being covered under the statute. Although the Court noted that Abbott stated her decision to refrain from having children, the opinion did not seem to rest heavily on that point. Also, the analytical method Kennedy followed suggested that a majority of the Court was generally receptive to a broad construction of the definition of disability. * * * And if there were any doubts about the broader effect of the ruling, Kennedy added two points that suggested such a broader effect. First, he noted that agencies and courts had construed the Rehabilitation Act's relevant provisions to apply to HIV infection, and observed that Congress had expressly provided that the ADA should be construed to be at least as protective as the earlier statute. Second, he noted the broad reading that regulatory agencies have given to the definition of disability, emphasizing the deference that the Court normally pays to such interpretations. On the issue of "direct threat," Kennedy was hesitant to render a final decision. He noted that the relevant statutory language stemmed from the Court's prior decision in *School Board v. Arline*, 480 U.S. 273 (1987), and Congressional reaction to that decision embodied in amendments to the Rehabilitation Act, which were then carried forward using the same language and concepts in the ADA. "The existence, or nonexistence, of a significant risk must be determined from the standpoint of the person who refuses the treatment or accommodation, and the risk assessment must be based on medical or other objective evidence," he wrote. Significantly, Kennedy rejected Dr. Bragdon's argument that if he had a good faith belief that the risk was significant, he should be excused from treating Abbott. Kennedy asserted that "petitioner receives no special deference simply because he is a health care professional." Instead, Kennedy said that the judgment should be based on an objective assessment of scientific information, and as to

that, "[*525] the views of public health authorities, such as the U.S. Public Health Service, CDC, and the National Institutes of Health, are of special weight and authority... The views of these organizations are not conclusive, however. A health care professional who disagrees with the prevailing medical consensus may refute it by citing a credible scientific basis for deviating from the accepted norm." * * * However, having reviewed the record, Kennedy was not satisfied that the 1st Circuit's holding was necessarily supported by the summary of the evidence found there. In particular, Kennedy was concerned that the circuit court may have placed too much weight on 1993 CDC Guidelines that did not contain an express risk assessment, and on a 1991 American Dental Association statement that, Kennedy speculated, may have had more to do with notions of professional ethical obligation than with scientific risk assessment. Kennedy acknowledged that there was evidence in the record of statements by public health officials that it was safe for dentists to treat HIV+ patients, but noted that the timing of those statements was not clear. * * * In remanding the case, Kennedy suggested that the 1st Circuit might well, on the basis of the record, reaffirm its earlier decision, but that it was necessary for the lower court to conduct a searching review of the record, and if need be remand for further hearings, to make sure it had relevant evidence on the state of knowledge as of September 1994 when Dr. Bragdon refused his services to Abbott. * * * Justice Stevens, joined by Justice Breyer, agreed with Kennedy's discussion of the legal standard, but felt that the 1st Circuit's decision on this issue was sufficiently grounded in the record to justify affirmance. However, concerned that a remand by seven members of the Court who were split 3-4 on the appropriate standard would create confusion (and, Stevens left unspoken, might even suggest that Chief Justice Rehnquist's dissent was speaking for the Court as a "plurality opinion" on this point), Stevens and Breyer joined the Court's decision to remand on the basis of Justice Kennedy's legal analysis. * * * In dissent, Rehnquist argued that no special weight should be given to the views of public health officials in deciding whether a health care worker was justified in refusing services due to concern over the health or safety of himself or his patients. Rehnquist asserted that Bragdon had presented sufficient evidence to avoid summary judgment on the "direct threat" issue, by showing that as of September 1994 the CDC was investigating seven instances of possible transmission of HIV from patients to dental workers. "One need only demonstrate 'risk,' not certainty of infection," argued Rehnquist. "Given the 'severity of the risk' involved here, i.e., near certain death, and the fact that no public health authority had outlined a protocol for eliminating this risk in the context of routine dental treatment, it seems likely that petitioner can establish that it was objectively reasonable for him to conclude that treating respondent in his office posed a 'direct threat' to his safety." In this quotation, Rehnquist exactly mirrored the reasoning of several lower courts that have refused to protect HIV+ health care workers from employment discrimination under the Rehabilitation Act and the ADA. * * * Rehnquist also noted the evidence that as of that time there were 42 documented cases of HIV transmission from patients to health care workers other than dentists, as bearing the reasonableness of Bragdon's objections to treating Abbott in his office. * * * Thus, although the Court's decision establishes, by majority vote, that HIV+ women of childbearing capacity are covered by the ADA, and that most probably so is everybody else who suffers HIV infection, regardless of symptomatic status, the Court did not ultimately decide the important question [*526] whether health care workers have an obligation under the ADA to perform invasive procedures that may involve blood exposure upon HIV+ patients. Justice Kennedy's discussion of this issue strongly suggests, in light of current information and more recent statements by the CDC and other public health agencies, that the answer to that question today should be "yes," but more litigation will be necessary to establish the point. The question is important not only for determining the right to treatment of HIV+ patients, but also bears on the degree of protection the ADA might afford to HIV-infected health care workers. * * * Abbott's case was argued before the Supreme Court by Bennett Klein, a staff attorney specializing in AIDS law at Gay and Lesbian Advocates & Defenders, a Boston-based public interest law firm. Numerous amicus briefs were filed in support of Abbott's position, some of which were cited and expressly relied upon by the Court, particularly as to the scientific grounds for the disability decision. A.S.L. [*Bragdon v. Abbott*, 118 S.Ct. 2196 (1998).]

Summer 1998: WASHINGTON APPEALS COURT DISCOUNTS CLAIM OF HOMOPHOBIC PREJUDICE BY JURORS: In *Frye v. Jack*, 1998 WL 283055 (June 1), the Court of Appeals of Washington, Division One, held that the jurors' comments about Barbara Frye's sexual orientation during deliberations did not justify granting Frye a new trial because the comments that "inhered" in the verdict were inadmissible to impeach the verdict, and those that did not inhere in the verdict did not rise to the level of showing that juror bias affected the verdict. * * * The case involved an automobile accident involving Barbara Frye and Sandra Jack in June 1994. Although the parties disputed who had the right of way, Jack nevertheless hit Frye, knocking her off her motor scooter, causing headaches, thumb and knee pain, which "greatly diminished [Frye's] ability to work and enjoy her favorite activities." Frye's roommate, Annie Thoe, testified as to Frye's condition prior to the accident. During the trial, Frye and Thoe revealed that they were co-owners of a house in which they lived, worked at the same location, traveled together and shared the same group of friends. * * * The jury ruled unanimously (12-0) in favor of Jack, but immediately thereafter, one of the jurors telephoned the trial judge to express her concern about comments made by several other jurors during deliberations, and tried to change her

vote. According to three other jurors, the initial vote was 8-4 in favor of Jack. As the jury reconsidered, one juror questioned the "true" nature of the relationship between Frye and Thoe, saying, "I wonder what their relationship really is and if they're hiding that I wonder what else they're hiding." * * * Another juror then speculated that Frye and her "girlie" friends had been drinking beer at dinner prior to Frye's accident, and that Frye probably "blew through the stop sign" in order "to get home to be with her 'girlie friend' to do whatever it is that 'girlie friends' do to each other." After considering these comments, the jury voted again, this time 9-3 in favor of Jack. Finally, the three jurors (who had submitted affidavits to the judge about the comments made during deliberations) changed their votes. Afterwards the three jurors claimed they were not aware that a hung jury was an option in a civil trial, even though the judge had instructed them that ten votes were necessary for a verdict. The trial judge found that the comments of the two jurors speculating about Frye's sexual orientation was inappropriate because there had been no evidence submitted concerning the issue. The trial judge ordered a new trial, finding that the juror misconduct had prevented Frye from receiving a fair and unbiased jury trial. Jack appealed the decision. * * * Reversing the trial [*527] court, Appeals Judge Coleman briefly discussed the standard of review, noting that "parties are entitled to a fair but not necessarily perfect trial by a panel of impartial, indifferent jurors." Coleman then analyzed the conduct of the jurors, noting that the first juror's comments questioning the nature of the relationship between Frye and Thoe, and their truthfulness in other matters did not reflect either pro-or anti-homosexuality bias. Instead, "it was merely one juror's evaluation of Frye's credibility that was based on perceived truthfulness, not upon sexual orientation."

Judge Coleman then considered the second juror's comments about "girlie friends," and found that while it is "degradatory and suggestive of prejudice," those statements, "without more, do[] not support an inference that the declarant or other jurors were unable to evaluate the evidence fairly." He noted the distinction between words that possibly signify prejudice and those that provide evidence that the declarant prejudged the issue due to bias. The court asserted that the comments about "what 'girlie friends' do" were indistinguishable from comments from a juror "with a disapproving opinion on unmarried heterosexual couples opining that the plaintiff did not stop at a stop sign because he or she was in a hurry to get home to do whatever it is that 'unmarried couples' do." * * * The court also characterized the comments as "inhering" in the verdict, and therefore inadmissible to impeach the verdict. Judge Coleman asserted that "the mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors' intentions and beliefs are all factors inhering in the verdict itself, and averments concerning them are inadmissible." Judge Coleman summarily dismissed the two jurors' comments about Frye's sexual orientation as "inhering in the verdict" and refused to "use[] the jurors' thought processes to impeach the verdict." * * * Apparently ignoring the risk of homophobia in the jury box, Judge Coleman insisted that "innumerable situations could be imagined where an opinion is communicated about a particular group of individuals that is not based upon evidence presented at trial. However, as long as the opinion does not affect the declarant's ability to fairly judge the evidence, a new trial should not be granted." It is unclear whether the court's analysis was influenced by the initial vote in favor of Jack; Judge Coleman dismissed the jurors' confusion about the hung jury option with one sentence. [This article was written by Sharon McGowan.]

September 1998: PENNSYLVANIA SUPREME COURT HOLDS SEX-CHANGE OPERATION NEED NOT PRECEDE LEGAL NAME CHANGE: The Supreme Court of Pennsylvania ruled that a trial court abused its discretion by denying a pre-operative transsexual's name change petition absent a factual basis for doing so. In the *Matter of Robert Henry McIntyre*, 1998 WL 407203 (July 21). Fifty-three year old appellant Robert McIntyre, described in the opinion as "struggling with personal gender identity issues since" age ten, began dressing and holding herself out to the community as a woman, Katherine McIntyre, in 1991. McIntyre holds her apartment, bank and credit accounts, and membership in local organizations as Katherine; and is undergoing hormonal therapy and psychotherapy in preparation for gender-reassignment surgery. * * * Prerequisite to gender-reassignment surgery is that candidates undergo the "real-life test" whereby they live for a minimum of one year in all aspects of life in the gender they are to become. McIntyre established at trial that she was unable to satisfy this requirement because her employer will [*528] not recognize her as female until it receives legal recognition of her name change. The trial court first blocked McIntyre's petition on the technical ground that she failed to present testimony addressing the statutory requirement that she be free of judgments. McIntyre obtained reconsideration and proved herself judgment free; at which point the trial court (citing a 1978 precedent) held that it would not grant legal name change until after gender-reassignment surgery on the theory that the name change would deceive the public. * * * Justice Zappala's opinion for the Supreme Court acknowledges the trial court's discretion to deny name changes upon lawful objection or if the petitioner seeks to defraud the public, but clarifies the purpose of the change of name statute as preventing fraud by petitioners attempting to avoid financial obligations. Justice Nigro's concurrence gives examples of non-financial fraud that the statute seeks to prevent, which are also inapplicable.

cable to McIntyre. As it was undisputed that McIntyre was not seeking to evade debts or judgments or commit fraud, the Supreme Court granted the petition, stating "details surrounding Appellant's quest for sex-reassignment surgery are not a matter of governmental concern." Pennsylvania joins New Jersey in this view, quoting a Superior Court opinion stating "... judges should be chary about interfering with a person's choice of a first name ... we perceive that the judge was concerned about a male assuming a female identity in mannerism and dress. That is an accomplished fact in this case, a matter which is of no concern to the judiciary, and which has no bearing upon the outcome of a simple name change application." * * * A footnote reveals that Justice Saylor, who did not participate in the McIntyre decision, opined in a 1997 dissent that a transsexual name change be granted only on completion of surgery. The 1997 decision required proof of petitioners' permanent commitment to living as members of the desired gender before granting the change. [*Matter of Robert Henry McIntyre*, 715 A.2d 400 (Pa. 1998). This article was written by Mark Major.]

October 1998: SECOND CIRCUIT REJECTS CHALLENGE TO MILITARY POLICY: The U.S. Court of Appeals for the 2nd Circuit has rejected a constitutional challenge to the "don't ask, don't tell" policy governing military service by lesbians and gay men. The September 23 ruling in *Able v. United States*, 1998 WL 647142, was decided by a unanimous three-judge panel, reversing a ruling by U.S. District Judge Eugene Nickerson. * * * The current military policy was enacted in 1993 as an amendment to the annual defense appropriations bill, in response to a public debate generated by President Bill Clinton's promise to end the ban on gay military service. 10 U.S.C. sec. 654(b) provides, in essence, that lesbians and gay men may serve in the military only so long as the military can maintain the fiction that they are not present. If they engage in any conduct or speech that identifies them as being lesbian or gay, the military will presume that they either are engaging in forbidden homosexual conduct or have a propensity to engage in such conduct, and they will be discharged unless they can prove that they do not have such a propensity. (By contrast, heterosexual military members who engage in same-sex sexual activity may be subject to penalties under the Uniform Code of Military Justice, which bans all "sodomy" regardless of the gender of participants, but are not subject to discharge for engaging in such activity if they can prove that they are not, in fact, gay.) * * * This case was planned as a challenge to the constitutionality of the military policy by Lambda Legal Defense & Education Fund and the Lesbian & Gay Rights Project of the American Civil Liberties Union. Lambda's Legal Director, Beatrice Dohrn, appeared as [*529] lead attorney in the case, and was joined by Lambda's Ruth Harlow and ACLU Project Director Matthew Coles. Six military members, some active duty and some reserve, agreed to serve as co-plaintiffs, representing all the services, and the nominal defendants are Secretary of Defense William Cohen and Secretary of Transportation Rodney Slater. (The Coast Guard, which maintains a policy identical to the Defense Department, comes under the jurisdiction of DOT.) * * * The action was filed in the U.S. District Court for the Eastern District of New York, and was assigned to Judge Eugene H. Nickerson, who has twice ruled the policy unconstitutional. The first time, Nickerson found the requirement that individuals be discharged if they identified themselves as gay to violate the First Amendment's protection for freedom of speech. On appeal, a 2nd Circuit panel reversed, finding that this part of the policy was a rational way of effectuating Congress's intent to discharge any member with a propensity to engage in homosexual conduct. However, the 2nd Circuit then remanded the case, in light of the Supreme Court's equal protection ruling in *Romer v. Evans*, 116 S.Ct. 1620 (1996), for a determination of whether the military policy as a whole violates the equal protection component of the Due Process Clause of the 5th Amendment. * * * Judge Nickerson subsequently found the policy violative of equal protection, subjecting it to rational basis review and determining that the government had no rational basis for excluding lesbians and gay men from serving on the same basis as heterosexuals. Nickerson found that the only plausible rationale offered by the government was the claim that the morale and unit cohesion of non-gay service members would be undermined by allowing openly gay members to serve, and that this rationale was impermissible since it was grounded in the presumed biases of non-gay service members. * * * Reversing Nickerson's ruling in an opinion by Judge John J. Walker, Jr., the court essentially concluded that the question whether to exclude openly lesbian and gay people from serving in the military was not subject to any serious judicial review. Relying on a series of Supreme Court decisions directing the federal courts to grant great deference to the opinions of military officials on issues within their sphere of expertise, Walker found that there was little scope for judicial review of Congress's decision to enact this policy following extensive hearings and detailed findings based on the testimony of military leaders. * * * "In the military setting," wrote Walker, "constitutionally-mandated deference to military assessments and judgments gives the judiciary far less scope to scrutinize the reasons, legitimate on their face, that the military has advanced to justify its actions. Moreover, in this case the military's justifications are based on factors which are unique to military life. The military argues that the prohibition on homosexual conduct is necessary for military effectiveness because it maintains unit cohesion, reduces sexual tension and promotes personal privacy. These concerns distinguish the military from civilian life and go directly to the military's need to foster 'instinctive obedience, unity, commitment, and esprit de corps.'" * * * Since, under the limited rational basis review available for military policy decisions, the policy would enjoy a "strong presumption of validity, ... we will not substitute our judgment for that of Congress," Walker concluded. Without expressly passing on

the detailed record compiled by the plaintiffs to expose the fatuous nature of the government's arguments in support of the policy, Walker focused solely on the testimony of military leaders in support of the policy - testimony that was faithfully parroted by Congressional staffers in their draft of the policy findings enacted as part of the statute. Having already found that [*530] the policy provisions mandating discharge for declarations of homosexuality did not offend the 1st Amendment, the court now added its finding that under the highly deferential rational basis review afforded military policies, the underlying ban on homosexual conduct is constitutional as well, and thus reversed Nickerson's ruling. * * * The possibility of taking this case further appears slim. The three-judge panel that decided this appeal represents an ideological cross-section of the circuit court (the judges were appointees of Lyndon Johnson, Richard Nixon, and George Bush), and it seems unlikely that a petition for en banc review would spark a rehearing. In any event, it seems most unlikely that the Supreme Court will grant certiorari in a challenge to the military policy so long as there is unanimity among the courts of appeals in upholding the policy, so a petition for rehearing en banc would appear to be the logical next step if taking this case to the Supreme Court is the plaintiffs' goal. This case was planned as the vehicle to bring the issue before the Court, and a careful trial record was compiled for just that purpose, but the strategy necessarily relied on the possibility that the 2nd Circuit would uphold Judge Nickerson and create the circuit split necessary to precipitate Supreme Court review. * * * Joining the government in defending the policy was the Family Research Council, an anti-gay organization, which filed an amicus brief. Amicus support for the plaintiffs came from the Servicemembers Legal Defense Network, as well as a coalition of professional associations representing institutions of higher education, and the Association of the Bar of the City of New York. A.S.L. [*Able v. United States*, 155 F.3d 628 (2d. Cir. 1998).]

December 1998: GEORGIA SUPREME COURT DUMPS SODOMY LAW; FINDS STATE PRIVACY VIOLATION: The Georgia Supreme Court ruled on Nov. 23 that the state's felony sodomy law, *OCGA sec. 16-6-2(a)*, which authorized up to 20 years of imprisonment for anybody convicted of engaging in oral or anal sex regardless of consent, violates the Georgia constitutional right of privacy. *Powell v. State*, 1998 WL 804568. The statute that the court struck down is the same one that was upheld by the U.S. Supreme Court in its infamous decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). Although the ruling came in a heterosexual sodomy case, the invalidation of the statute, which does not distinguish between heterosexual and homosexual conduct, appears total. * * * This new challenge to the Georgia sodomy law arose from the prosecution of Anthony San Juan Powell, who was charged with rape and aggravated sodomy against his wife's 17-year old niece. Powell testified that their sexual activity, which included cunnilingus, was consensual. At the conclusion of the trial, the judge charged the jury that even if they believed Powell's testimony, they could convict him of consensual sodomy under Georgia criminal law. The jury convicted Powell of consensual sodomy, and he appealed. * * * The opinion for the court by Chief Justice Robert Benham based the decision on a little-known ruling, *Pavesich v. New England Life Insurance Co.*, 50 S.E. 68 (Ga. 1905), which was described as the first decision by a state high court to find a constitutional right of privacy to be implied by a general guarantee of due process of law. In that case, the Georgia court held that a man had a claim for invasion of privacy under the state constitution against a life insurance company that had used his photograph in a newspaper advertisement without his permission. * * * In the course of its 1905 decision, the court used sweeping rhetoric to describe a fundamental right of privacy embedded in the guarantee of due process of law in the state's constitution. Tracing the right of privacy back to ancient Roman law, the court described [*531] this liberty interest as "embracing the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common good." Furthermore, said the 1905 court, this includes "the right to live as one will, so long as that will does not interfere with the rights of another or of the public," and the "right to be let alone so long as one was not interfering with the rights of other individuals or of the public." In more recent years, Georgia courts had developed this right to include, for example, the right of a state prisoner to refuse food and medical treatment, see *Zant v. Prevatte*, 286 S.E.2d 715 (Ga. 1982); *State v. McAfee*, 385 S.E.2d 651 (Ga. 1989). * * * Given this past history, and the accepted principle that state constitutions may provide greater protection for individual rights than the federal constitution provides, Benham observed that the Georgia Supreme Court clearly has a tradition of affording greater protection to individual privacy than does the U.S. Supreme Court, making the *Hardwick* decision irrelevant to the court's determination of this case. * * * Benham declared that "it is clear that consensual sexual behavior between adults in private is covered by the principles espoused in *Pavesich* since such behavior between adults in private is recognized as a private matter by 'any person whose intellect is in a normal condition...' ", quoting from the *Pavesich* decision. "We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than consensual, private, adult sexual activity," wrote Benham, then citing recent decisions striking down sodomy laws in Montana, Tennessee, and Texas. (The Texas court of appeals decision was subsequently reversed on procedural grounds by the Texas Supreme Court.) * * * After determining that private adult sex is covered by the right of privacy, the court had to decide whether the state's legitimate interests outweighed the individual's rights. Here, Benham

observed that the state's legitimate interest is in protecting the public against offensive public conduct, and protecting individuals against unwanted activity. After producing a long list of other laws specifically enacted to achieve these goals, Benham concluded that ultimately the only role left for the sodomy law is interfering with the private consensual activities of adults, which is not a legitimate state interest. * * * Countering the argument of lone dissenting judge George H. Carley that the state has a right to criminalize conduct deemed immoral by the majority, Benham argued that "it is not the prerogative of members of the judiciary to based decisions on their personal notions of morality," and that the fact that a particular law is enacted in pursuit of the legislature's moral judgments does not remove that law from scrutiny under the constitution. "While many believe that acts of sodomy, even those involving consenting adults, are morally reprehensible," Benham commented, "this repugnance alone does not create a compelling justification for state regulation of the activity... We agree with our fellow jurists [in Tennessee, Kentucky and Pennsylvania] that legislative enactments setting 'social morality' are not exempt from judicial review testing their constitutional mettle." * * * In a concurring opinion, Justice Leah Sears, a frequent champion for lesbian and gay rights on the Georgia Supreme Court in recent years, saluted the court's decision as "clearheaded and courageous." Taking on the dissent, Sears argued that "simply because something is beyond the pale of 'majoritarian morality' does not place it beyond the scope of constitutional protection. To allow the moral indignation of a majority (or, even worse, a loud and/or radical minority) to justify criminalizing private consensual conduct would be a strike against freedoms [*532] paid for and preserved by our forefathers. Majority opinion should never dictate a free society's willingness to battle for the protection of its citizens' liberties. To allow such a thing would, in and of itself, be an immoral and insulting affront to our constitutional democracy." * * * In his dissent, Justice Carley accused the majority of misinterpreting Pavesich and undermining democratic government in Georgia by striking down a criminal law that dated back to English common law colonial days. Carley argued, in effect, that longstanding criminal laws are not subject to judicial review, and can only be removed by legislative repeal. He noted that the majority of sodomy laws that have been removed from the books since the 1960's were removed through legislative repeal rather than judicial invalidation, and argued that the court should have allowed the legislative process to run its course in Georgia. Carley also argued that the rationale of the court's opinion would invalidate all criminal laws that regulate private consensual conduct, including incest, adultery, and private drug use. * * * There is a certain irony to the court's decision, since in recent years this court has ducked several opportunities to rule directly on the constitutionality of the sodomy law. In fact, just a few years ago, in *Christenson v. State*, 468 S.E.2d 188 (Ga. 1996), a plurality of the court had issued language finding the law constitutional in a case where a majority voted to reject the constitutional challenge on the ground that the conduct in question (a solicitation to engage in sodomy) took place in public. (In his decision, Chief Justice Benham cited the solicitation law in his list of statutes regulating public conduct. A challenge to the constitutionality of punishing somebody for soliciting lawful conduct may be next on the list for Georgia civil libertarians.) * * * Even more ironically, a year ago the U.S. Supreme Court refused to review a federal appellate decision that had upheld the right of the Georgia attorney general, then Michael Bowers, to withdraw a job in his office from Robin Shahar, an openly lesbian attorney, at least in part because Bowers argued that his duties to uphold Georgia's sodomy law made it impossible for him to employ an openly-lesbian attorney who had a rabbi perform a commitment ceremony for her and her partner. *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir.), cert. denied, 118 S.Ct. 693 (1997). * * * On the other hand, some recent decisions involving gay and lesbian family law issues, including *City of Atlanta v. Moran*, 492 S.E.2d 193 (Ga., Nov. 3, 1997) (upholding domestic partner benefits for Atlanta municipal employees), had signalled some receptivity by the court to gay rights arguments, so the opinion was not a total surprise to legal observers, although the scope of the victory and the decisiveness of the vote were unexpected. * * * Although the case involved heterosexual sodomy, the Georgia statute did not distinguish between homosexual and heterosexual acts, and several gay rights groups, including Lambda Legal Defense & Education Fund and the ACLU Lesbian and Gay Rights Project, had filed briefs urging the court to invalidate the law. A.S.L. [*Powell v. State*, 510 S.E.2d 18 (Ga. Nov. 23, 1998).]

January 1999: OREGON APPEALS COURT GIVES UNPRECEDENTED DOMESTIC PARTNERSHIP VICTORY TO GAY LITIGANTS: In one fell swoop, the lesbian and gay community in Oregon has won a triple victory with a unanimous December 9 decision by the Oregon Court of Appeals in *Tanner v. Oregon Health Sciences University*, 1998 WL 869976. Ruling on the defendants's appeal of a 1996 trial court decision that ordered the Oregon Health Sciences University to provide health and life insurance benefits to the same-sex domestic partners of its employees, the appeals court found that failure to award such benefits would violate [*533] the state constitution's equal protection provision, Art. I, sec. 20, the first time an appellate court has issued such a ruling on the merits. The court implicitly held that such benefits are mandated for all public employees in Oregon, not just state employees. * * * The court also held that anti-gay discrimination is covered as "sex discrimination" under the state's civil rights law, ORS 659.030(1)(b), thus giving activists an unexpected victory that they have been unable to win in the legislature. This is the first time a state appellate court has interpreted a state civil rights law banning sex discrimination to cover discrimi-

nation on the basis of sexual orientation. * * * Finally, and perhaps most historically, for the first time a state appellate court has ruled that gay people are a "suspect class" for purposes of ruling on discrimination claims against the state government, potentially setting the stage for a lawsuit seeking same-sex marriage licenses. * * * The case arose out of the refusal of the University, at that time a state agency, to extend benefits to the lesbian partners of three women employed on its staff. The women and their partners, Christine Tanner, Barbara Limandri, Regina Phillips, Lisa Chickadonz, Terrie Lyons, and Kathleen Grogan, sued under the state civil rights law and the state constitution. In a historic decision, Multnomah County Circuit Court Judge Stephen L. Gallagher ruled in *August 1996, 1996 WL 585547*, that the failure to provide these benefits violated both the state civil rights law and the constitutional provision, and ordered the state to extend group insurance benefits to unmarried domestic partners of its gay employees. * * * The state appealed the ruling, but also complied by adopting a domestic partner benefit plan for state employees that went into effect last June. Also, while the case was pending, the legislature reorganized the state's higher education system and transformed the University from a state agency to a public corporation, thus casting potential doubt on the trial court's ruling. * * * On appeal, however, the court concluded that the University remained subject to constitutional suit as a government employer. This was significant on two counts. First, only government employers can be sued for constitutional violations. Second, due to the preemptive effect of the federal Employee Retirement Income Security Act, a state court lawsuit may not be brought against a private sector employer to seeking domestic partnership benefits. * * * Analyzing the discrimination claim under Oregon's Civil Rights Law, which prohibits employment discrimination on the basis of sex, Judge Landau's opinion focused on a key phrase that does not appear in most federal or state civil rights laws. In addition to banning discrimination based on the sex of an employee, the Oregon law also bans discrimination based on the sex "of any other person with whom the individual associates." Taking up a suggestion that the Oregon Supreme Court made in a 1988 case, *ACLU v. Roberts, 752 P.2d 1215*, Landau concluded that this phrase outlaws discrimination on the basis of sexual orientation, since logically such discrimination is based on the sex of the person or persons with whom the employee might have a sexual relationship. * * * However, another provision of the civil rights law, ORS 659.028, pertaining to employee benefits, prevented the court from basing its decision on this statute. This provision states that it is not unlawful for an employer to "observe the terms of a bona fide employee benefit plan, such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this chapter." The court found that the University's insurance programs are bona fide employee benefit plans, and that there was no evidence that the University had adopted them specifically to discriminate against gay people, so they could [*534] not be considered a "subterfuge to evade the purposes" of the civil rights law. (In effect, the court ruled that in the area of employee benefits, only intentional discrimination is covered by the statute.) * * * But all was not lost, because there was still the constitutional claim. Here again, the unique phrasing of Oregon's laws was crucial to the court's decision. Unlike the federal equal protection clause or the equivalent provisions of most state constitutions, which broadly state that the government may not deprive any individual of equal protection of the laws, Oregon's provision states: "No law shall be passed granting to any citizen or class of citizens privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." * * * The court first had to determine whether gay people constitute a "class of citizens," then whether the insurance plans constituted class-based discrimination, and finally whether such discrimination was constitutionally justified. Determining the strictness of judicial review to be applied to these question was a crucial first step, and here the court made a very significant ruling. * * * Under Oregon constitutional law, discrimination against a "suspect class" is "subject to a more demanding level of scrutiny." Judge Landau found that suspect classes are "distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice," and that "if a law or government action fails to offer privileges and immunities to members of such a class on equal terms, the law or action is inherently suspect and... may be upheld only if the failure to make the privileges or immunities available to that class can be justified by genuine differences between the disparately treated class and those to whom the privileges and immunities are granted." * * * Landau stated that "we have no difficulty concluding that plaintiffs are members of a suspect class. Sexual orientation, like gender, race, alienage, and religious affiliation is widely regarded as defining a distinct, socially-recognized group of citizens, and certainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice." Further, "we must determine whether the fact that the domestic partners of homosexual OHSU employees cannot obtain insurance benefits can be justified by their homosexuality. The parties have suggested no such justification, and we can envision none." * * * The University's defense was that it was distinguishing among employees based on marital status, rather than on sex or sexual orientation, and that marital status discrimination has not been held to violate the Oregon constitution. However, here the court pointed out another significant difference between federal and state constitutional law. The U.S. Supreme Court has ruled that the federal equal protection clause only outlaws intentional discrimination. By contrast, the Oregon courts have accepted the theory that apparently neutral policies may violate the guarantee of equal protection if they have the actual effect of discriminating. * * * "OHSU has taken action with no apparent intention to treat

disparately members of any true class of citizens," wrote Landau. "Nevertheless, its actions have the undeniable effect of doing just that... What is relevant is the extent to which privileges or immunities are not made available to all citizens on equal terms." Because gay people cannot marry their partners to qualify for these benefits, then "the benefits are not made available on equal terms. They are made available on terms that, for gay and lesbian couples, are a legal impossibility." * * * Interestingly, this analysis brings directly into question the refusal of Oregon to issue marriage licenses to same-sex couples. In a footnote, Judge Landau commented that the parties had not raised the issue of a constitutional [*535] challenge to the ban against same-sex marriage, and so the court would not address that issue. But the logic of the constitutional ruling suggests that such a challenge might succeed, at least in front of this three-judge intermediate appellate panel. * * * Thus, the end result of the court's ruling is three-fold: First, same-sex partners of public employees in Oregon are entitled to participate in employee benefits programs on the same basis as legal spouses of public employees. Second, apart from the issue of employee benefits, all employers in Oregon, whether public or private, are prohibited from discriminating on the basis of sexual orientation. Third, state and local governments in Oregon may not discriminate in any respect against gay people unless they have a truly compelling justification, setting the stage for potentially interesting developments not only in the area of marriage but potentially in other state policies as well. * * * State officials expressed uncertainty about whether to appeal this ruling to the state's highest court, especially since the state had voluntarily extended eligibility for benefits to same-sex partners of state employees in response to the trial court's ruling, but it would not be surprising if local government officials were to pressure the state to appeal. Some Republican state legislators outlined a strategy to place several questions on the state ballot for a May referendum seeking to overturn this decision, to require citizen referenda on all gay rights measures, and to reserve to local government bodies the right to decide whether to adopt domestic partnership benefits plans (Portland Oregonian, Dec. 19). * * * The six lesbian plaintiffs were represented by Oregon attorney Carl G. Kiss. The ACLU of Oregon and Lambda Legal Defense Fund filed an amicus brief in support of their claim, as did the Oregon Public Employees Union. A.S.L. [*Tanner v. Oregon Health Sciences University*, 971 P.2d 435 (Or. Ct. App. 1998), award of attorney fees, 980 P.2d 186, 161 Or. App. 129 (Ore. App., June 16, 1999)]. The state decided not to appeal, and issued regulations extending domestic partnership benefits to state employees.]

March 1999: MISSISSIPPI SUPREME COURT REJECTS CUSTODY MODIFICATION PETITION FROM GAY DAD: On Feb. 4, the Supreme Court of Mississippi affirmed the findings of a Chancery Court denying the application of a gay father for modification of a custody and visitation order in effect with regard to his son. *Weigand v. Houghton*, 1999 WL 47748. David Weigand had filed a petition for modification of the custody order with respect to his son alleging a serious change in circumstances supporting his application. * * * David and Machel Houghton were divorced in 1987 in Kansas. Originally, they had joint custody of their minor child, but in 1988 the custody arrangement was modified giving Machel residential custody of the minor when David moved to California. Machel subsequently remarried and currently resides in Mississippi with her husband, Jeff Houghton, and the minor child. Jeff is a convicted felon who had been arrested for hitting Machel in the face in the presence of the minor child. In another incident, Jeff was intoxicated and knocked out the window of a car being driven by Machel, also in the presence of the minor child. At one point, Machel, Jeff and the minor child were evicted from their apartment due to Jeff's violent behavior. Evidence presented at trial indicated that Jeff has a heavy drinker who often mixed alcohol with prescription pain medicine. Jeff did not work due to a disability and Machel worked two jobs to support the family. * * * David, on the other hand, owns his own home in California with his life partner, Wayne Fields. David admitted to being in a homosexual relationship and admitted having engaged in anal and oral [*536] sex with his life partner, but stated that this did not take place in the presence of the minor child during visitation. Evidence adduced at trial showed that David was a property manager earning about \$ 40,000 per year. David and Wayne were in a monogamous relationship for in excess of eight years. Evidence also showed that David had made every effort to provide for the minor child. David bought the child a personal computer and software to encourage the child to enhance his writing skills. David also arranged for an 800 number so that the child could reach him anytime he wished. Moreover, David had offered to pay for the child to go to private schools and he had spent a great deal of time investigating schools in Mississippi and California which could provide the child the best education. * * * The child, who was fourteen at the time of trial, expressed no preference for which parent he wished to live with. The child did state to the Chancery Court that he was embarrassed when David and Wayne showed affection for each other. * * * Judge James L. Roberts, writing for the Supreme Court, held that the decision of the Chancellor could not be disturbed unless there was a clear showing that he abused his discretion. The Court then went on to summarize the Chancellor's decision. The Chancellor found that the minor child exhibited no preference as to with which parent he wished to reside. The factor weighed in favor of maintaining the status quo. The Chancellor did find that Machel's employment responsibilities hindered her relationship with the child and that David's work was more conducive to a good relationship with the child. Both parents were found to have great love and affection for the child. With regard to the incidents of domestic violence in Machel's home, the Chancellor found

this weighed in favor of awarding custody to David. * * * However, the Chancellor was most troubled by the moral fitness of the parents. The Chancellor spent many pages of the decision discussing the fact that David was openly gay and had admitted to violations of Mississippi's sodomy laws. Interestingly, as pointed out in a strong dissent by Justice McRae, no inquiry was ever made into whether Machel had violated those same laws which apply equally to heterosexuals and homosexuals. Lastly, the Chancellor emphasized the fact that Machel had enrolled the child in religious training, finding that this training weighed heavily in favor of Machel maintaining custody. * * * Based on these findings, the Chancery Court denied David's application to obtain residential custody of the child and entered an order indicating that Wayne could not be present during David's visits with the child. * * * Justice Roberts found no reason to disturb the Chancery Court's decision as to custody, but the court found that the Chancery Court abused its discretion by putting limitations on David's visitation. Justice McRae wrote a lengthy dissent in which he pointed out that much of the Chancery Court's reasoning was based upon David's homosexuality. The dissent found it outrageous that the court could find that the child was better off living in an explosive environment with a stepfather who was a convicted felon, wife beater, drinker, drug-taker, adulterer and child-threatener as opposed to the stable environment provided for by the father. The dissent strongly argued that David's homosexuality was the only reason the Chancery Court refused to alter the custody arrangement. The dissent also argued that the decision was so afoul of the best interests of this child as to violate the Fourteenth Amendment. * * * David Weigand was represented by the American Civil Liberties Union and volunteer attorneys Robert McDuff and Alison Steiner. In response to the decision, David Ingebretsen, Executive Director of the ACLU of Mississippi, said that he was pleased that the court overturned the [*537] visitation restrictions. "But," he added, "I am perplexed that they decided that the public violent outbursts of the stepfather were preferable to his natural father's private relationship with his partner." * * * In light of the dissent's comments about a possible constitutional violation, thought is being given to attempting a U.S. Supreme Court appeal. [*Weigand v. Houghton*, 730 So.2d 581 (Miss. 1999)]. This article was written by Todd V. Lamb.]

May 1999: 2ND CIRCUIT RECOGNIZES RIGHT TO PRIVACY IN PRISONER'S TRANSEXUAL AND HIV STATUS: In *Powell v. Schriver*, 1999 WL 223434 (2d Cir., April 2), the U.S. Court of Appeals for the 2nd Circuit held that prisoners have a right to privacy concerning their status as a transsexual and their HIV status. * * * Dana Kimberly Devilla filed suit in the U.S. District Court for the Western District of New York under 42 U.S.C. sec. 1983, alleging that the defendants had violated her constitutional right to privacy, deprived her of her constitutional rights to life, liberty, due process of law and equal protection as guaranteed by the 5th and 14th Amendments, and inflicted cruel and unusual punishment in violation of the 8th Amendment, in addition to several state law causes of action. * * * On December 31, 1991, Correction Officers Lynch and Crowley were escorting Devilla to Albion's medical facility when Lynch told Crowley, in the presence of other staff members and inmates, that Devilla had had a sex change and that she was HIV+. Devilla alleged that, as a result of Lynch's comment, her HIV status and her status as a transsexual became known throughout the prison and that she thereafter became the target of harassment by guards and prisoners. In April of 1995, Devilla died and her executor, the Reverend Wayne Powell, was substituted as plaintiff. During the course of the trial, the district court dismissed several of Devilla's claims, including her 8th Amendment claim, on the ground of qualified immunity. As a result, only two questions were put to the jury: (1) whether Lynch's comment violated either Devilla's constitutional right to privacy or the state statute protecting the confidentiality of HIV status; and (2) whether Warden Schriver had violated Devilla's constitutional right to privacy by failing to properly train Lynch. * * * After two days of deliberations, the jury returned a verdict in favor of Lynch but against Schriver, awarding Devilla \$ 5,000 in compensatory damages and \$ 25,000 in punitive damages. After the verdict, Schriver filed a motion asking that the verdict against her be set aside on the grounds that (1) she was protected by the doctrine of qualified immunity and (2) the verdict was inconsistent with the verdict in Lynch's favor. This motion was granted by the district court, and an amended judgment was entered in favor of all defendants. * * * On appeal, the 2nd Circuit, in an opinion by Circuit Judge Jacobs, affirmed the judgment in Schriver's favor on the ground that Schriver was protected by qualified immunity, but vacated the judgment and remanded for further proceedings on Devilla's 8th Amendment claim. * * * In affirming the judgment for Schriver on the privacy claim, however, the court recognized that prisoners do have a constitutional right to privacy concerning their HIV status and their status as transsexuals. The court began by examining its earlier opinion in *Doe v. City of New York*, 15 F.3d 264 (2d Cir. 1994), in which it held: "Individuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition." The question for the court was whether this holding was broad enough to cover prisoners and transsexual status. * * * In holding that the right to privacy did encompass one's identity as a transsexual, Judge Jacobs explained that this interest in privacy, "like the privacy interest of persons who are HIV positive, [*538] is particularly compelling. Like HIV status, ... transsexualism is the unusual condition that is likely to provoke both an intense desire to preserve one's medical confidentiality as well as hostility and intolerance from others." * * * The court next addressed whether the right to privacy in one's HIV status established in *Doe* extended to the context of prisons. Because "inmates 'retain[] those [constitutional] rights that are not

inconsistent with [their] status as ... prisoners or with the legitimate penological objectives of the corrections system[.] ... it follows that prison officials can impinge on that right [to privacy in one's HIV status] only to the extent that their actions are 'reasonably related to legitimate penological interest.'" * * * While the court acknowledged that there are circumstances in which disclosure of an inmate's HIV status would further such legitimate penological objectives, "the gratuitous disclosure of an inmate's confidential medical information as humor or gossip ... is not reasonably related to a legitimate penological interest[.]" Therefore, the court held that Lynch's disclosure violated Devilla's constitutional right to privacy. Similarly, the court concluded that disclosure of Devilla's transsexualism was also not related to such legitimate interests. * * * After holding that Lynch's comments violated Devilla's constitutional right to privacy, however, the court held that the verdict in Schriver's favor should be affirmed under the doctrine of qualified immunity because at the time of Lynch's disclosure, "the right of a prisoner to maintain the privacy of medical information was not clearly established." * * * Finally, the court reversed the district court's dismissal of Devilla's 8th Amendment claim on the ground of qualified immunity. "By December of 1991, a reasonable prison official would have known that under the Eighth Amendment he could not remain deliberately indifferent to the possibility that one of his charges might suffer violence at the hands of fellow inmates... In our view, it was as obvious in 1991 as it is now that under certain circumstances the disclosure of an inmate's HIV-positive status and - perhaps more so - her transsexualism could place that inmate in harm's way." The court asserted, however, that its remand of this claim did not express a view as to whether Devilla stated a valid 8th Amendment claim or whether defendants were entitled to qualified immunity on some other ground. [*Powell v. Schriver*, 175 F.3d 107 (2d Cir. 1999)]. This article was written by Courtney Joslin.]

Summer 1999: MASSACHUSETTS HIGH COURT RECOGNIZES GAY FAMILIES: In two decisions issued in recent weeks, the Supreme Judicial Court of Massachusetts has recognized the reality of lesbian and gay families, although only one of the decisions had a favorable outcome on the merits. In *E.N.O. v. L.M.M.*, 429 Mass. 824, 1999 WL 430460 (June 29), the court ruled 5-2 that a probate judge had jurisdiction to issue a temporary visitation order on behalf of a lesbian co-parent who had initiated an action for joint custody of the child she had been raising with her former partner. However, in *Connors v. City of Boston*, 1999 WL 500031 (July 8), the court unanimously concluded that a state law on public employee benefits preempted the effort by Boston Mayor Thomas Menino to extend health benefits to the domestic partners of city employees by executive order. * * * The opinion in *E.N.O.* by Justice Abrams treats the decision to allow a same-sex co-parent to sue for custody and visitation as almost routine, a stance that drew an infuriated dissenting opinion by Justice Fried (who retired from the court with the issuance of this opinion). Although Massachusetts domestic relations laws do not specifically authorize a legally unrelated third party to seek custody of or visitation with a child, the court held [*539] that the legislature has given the Probate Court equity jurisdiction, and in family law matters this should be exercised in the best interest of the child. * * * "The Probate Court's equity jurisdiction is broad," wrote Abrams, "extending to the right to authorize visitation with a child. This is because the Probate Court's equity jurisdiction encompasses 'the persons and estates of infants'" (quoting *Gardner v. Rothman*, 345 N.E.2d 370 (Mass. 1976), where the court allowed the father of an illegitimate child to seek visitation despite the lack of specific statutory authorization). "The court's duty as *parens patriae* necessitates that its equitable powers extend to protecting the best interests of children in actions before the court, even if the Legislature has not determined what the best interests require in a particular situation." * * * The case involved a couple who had "shared a committed, monogamous relationship for thirteen years," during which they executed documents seeking to formalize their relationship. They were living in Maryland when they decided to become parents through the insemination of L.M.M. E.N.O. participated fully throughout the pregnancy, attending birthing workshops and so forth, and attending the insemination sessions and participating in making medical decisions. The women made a written contract that specified that if they broke up in the future, E.N.O. would continue to have parental rights towards their child. L.M.M.'s pregnancy during 1994 was "complicated." When the son was born in 1995, E.N.O. acted as L.M.M.'s birthing coach and cut the umbilical cord. The hospital staff treated E.N.O. as a mother of the child, and birth announcements were sent out in both of the women's names. E.N.O. assumed most of the responsibility for supporting the family during the months following the child's birth, and as L.M.M. experienced medical difficulties, E.N.O. also assumed primary caregiver responsibility for the child for some time. * * * The family moved to Massachusetts in September 1997, and in April 1998 E.N.O. contacted an attorney to explore a joint adoption proceeding so that both would be legal mothers. Shortly after this, their relationship deteriorated and they separated in May. L.M.M. then denied E.N.O. any further access to the child, and E.N.O. initiated this litigation, obtaining a temporary visitation order from the Probate Judge which was reversed by the Court of Appeal. * * * Turning to the issue of "best interest of the child," Abrams noted that the Probate Judge "emphasized the plaintiff's role as a parent of the child. It is our opinion that he was correct to consider the child's nontraditional family. A child may be a member of a nontraditional family in which he is parented by a legal parent and a *de facto* parent. A *de facto* parent is one who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The *de facto* parent resides with the child and, with the consent and encouragement of the legal parent, performs

a share of caretaking functions at least as great as the legal parent... The de facto parent shapes the child's daily routine, addresses his developmental needs, disciplines the child, provides for his education and medical care, and serves as a moral guide. * * * "The recognition of de facto parents is in accord with notions of the modern family," Abrams continued. "An increasing number of same gender couples, like the plaintiff and the defendant, are deciding to have children. It is to be expected that children of nontraditional families, like other children, form parent relationships with both parents, whether those parents are legal or de facto... Thus, the best interests calculus must include an examination of the child's relationship with both his legal and de facto parent." * * * Abrams then summarized the factors to which a court should look in determining [*540] whether somebody is a de facto parent who should be considered a viable candidate for custody or visitation rights, including whether there was a substantial parent-child relationship, whether the candidate had assumed a formal role in the child's life evidenced by legal documents, whether the legal parent had treated the candidate as a parent of her child in the past, whether they had lived together for some time as a family, and whether the candidate had demonstrated an interest in continuing the relationship with the child. * * * Abrams rejected the argument, recently accepted in a Florida case, *Kazmierczak v. Query*, 1999 WL 415215 (Fla.App., 4th Dist., June 23), that recognizing a lesbian co-parent as a de facto parent entitled to contest custody and visitation would improperly restrict the legal parent's fundamental right, as a fit parent, to custody of her child, founded on a liberty interest in the 14th Amendment (and the due process clause of the state constitution) that has been recognized by the U.S. Supreme Court in *Stanley v. Illinois*, 405 U.S. 645 (1972), and the Massachusetts Supreme Judicial Court in *Opinion of the Justices*, 691 N.E.2d 911 (Mass. 1998). Abrams insisted that such rights are not "absolute," and that the court "must balance the defendant's interest in protecting her custody of her child with the child's interest in maintaining her relationship with the child's de facto parent. The intrusion on the defendant's interest is minimal. What tips the scale is the child's best interests." * * * Distinguishing this case from cases where a putative father brings a paternity suit that threatens to disrupt a family unit, Abrams said, "The family that must be accorded respect in this case is the family formed by the plaintiff, the defendant, and the child. The defendant's parental rights do not extend to the extinguishment of the child's relationship with the plaintiff... The child's interest in maintaining his filial ties with the plaintiff counters the defendant's custodial interest... The only family the child has ever known has splintered. The child 'is entitled to be protected from the trauma caused by the disruption' of his relationship with the plaintiff" (citation omitted). * * * Having noted that the Probate Court's decision was consistent with the recommendation of the Law Guardian appointed to represent the child's interest, the court reversed the court of appeals and reinstated the Probate Court's temporary visitation order, pending a final disposition on the merits of the case. * * * In dissenting, Justice Fried characterized what the court had done as "judicial lawmaking," insisting that L.M.M., as a fit legal mother, had the right to determine who would associate with her son. "The probate judge's order in this case was wholly without warrant in statute, precedent, or any known legal principle," Fried remarked, "and yet the majority of this court has upheld it. As such, the opinion the court delivers today is a remarkable example of judicial lawmaking. It greatly expands the courts' equity jurisdiction with respect to the welfare of children and adopts the hitherto unrecognized principle of de facto parenthood as a sole basis for ordering visitation. Even while expanding judicial authority and making an addition to the common law, the court speaks as though its decision were nothing extraordinary. In light of the denigration of parental rights and the judicial infringement on the province of the Legislature effected by the court's decision, all without an acknowledgment of the novelty of that decision, I must respectfully dissent." Fried was particularly critical of the court's mentioning of the contract that two women had made, guaranteeing E.N.O. continued parental status in the case of a split-up, since such agreements have traditionally been held to be unenforceable. In a footnote, the court rejected Fried's criticism, saying it was not enforcing that contract but rather treating it as evidence of the women's intentions [*541] in creating their family unit. * * * The court's decision was foreshadowed by its ruling in *Youmans v. Ramos*, 711 N.E.2d 165 (Mass. June 22, 1999), in which it upheld continued visitation rights for a child's maternal aunt against the wishes of the child's father, based on the broad equitable powers of the probate court. The issue of same-sex co-parent rights to visitation or custody after a couple splits up has sharply divided the appellate courts of the states, but support for the view embraced in this case by the Massachusetts Supreme Judicial Court is growing. * * * Fried came closer to getting his way in the second decision, *Connors v. City of Boston*. (According to a note to the decision, Fried participated in the deliberations, but had resigned from the court by the time the opinion was finalized.) The mayor and city council of Boston were poised to extend benefits eligibility to domestic partners of city employees, but doubts were raised about their ability to do so without specific state legislative authorization. State legislative leaders also had some doubts about the propriety of doing this, and an advisory opinion from the court eventuated in 1998, *Opinions of the Justices*, 427 Mass. 1211, in which six members of the court concluded that the legislature could delegate to the city of Boston the authority to define domestic partnership for the purpose of extending such benefits. The legislature passed a bill for this purpose, but Governor Paul Celluci, a Republican, vetoed the bill, voicing his concern that including unmarried opposite-sex couples as domestic partners, as the city planned to do, would undermine the state's interest in promoting marriage. * * * With the city coun-

cil stymied from acting, Mayor Menino went ahead on his own, issuing an executive order extending the benefits. A group of taxpayers, led by plaintiff Dennis Connors, then filed suit, claiming that the mayor and city lacked authority to extend such benefits. A superior court judge agreed with the plaintiffs, and issued an order to stop the law from going into effect. The case was certified to the Supreme Judicial Court to consider whether the mayor's executive order is inconsistent with state law and thus a violation of the city's home rule powers. * * * In agreeing with the plaintiffs, the court adopted a rather strict reading of the statutory language, concluding, in an opinion by Justice Margaret Marshall, that the legislature had indeed intended to authorize local governments to extend benefits eligibility only to the legal spouses and dependent children of municipal employees, and that this was the exclusive source of authority for cities to provide benefits to anyone other than their own employees. * * * The opinion is given over largely to the arcana of local government legislative authority. However, towards the end of the opinion, Justice Marshall notes that the benefits legislation was enacted at a time when family structures were quite different from the present, leaving the suggestion that the legislature should revisit this issue. "When the Legislature enacted G.L. c. 32B in 1955, c. 760, it defined the term 'dependents' in a manner consistent with the then-prevalent view of persons for whom the beneficiary (the employee) likely had an obligation to provide support, and who reasonably could be viewed as relying on the beneficiary for support... We recognize that the category of covered dependents of city employees, as defined by the Legislature in 1955 and 1960, no longer fully reflects all household members for whom city employees are likely to have continuing obligations to provide support. A 'family' may no longer be constituted simply of a wage-earning father, his dependent wife, and the couple's children. We also recognize that the categories of household members who may rely on a wage earner for support have broadened over time ... * * * "Adjustments in the legislation to reflect these new [*542] social and economic realities must come from the Legislature, whether it does so by expanding the statutory definition of 'dependent' or by authorizing governmental units to define for themselves the term 'dependent.' Our decision is mandated only because, in the context of group health insurance provided by governmental units for their employees, the Legislature has defined precisely the scope of the term dependent to exclude all but spouses, unmarried children under nineteen years of age, and older children in limited circumstances... Had the mayor sought to extend group health insurance benefits to other categories of household member beyond those defined by the Legislature, our conclusion would be the same. We recognize that some household members of some of Boston's employees may be without a critical social necessity, health insurance. That is a reality that must be addressed by the Legislature." * * * Ultimately, the decision has greater reach than the city of Boston, since four other municipalities in the state have previously extended eligibility for benefits to domestic partners of their employees, and the validity of whose programs is now thrown into doubt by this decision. Since no appeal is possible, an attempt to work out an agreement between the governor and the legislature over an appropriate legislative resolution is next on the agenda for proponents of domestic partnership coverage. * * * The city's defense of its benefits program was carried on by David Mills and Assistant Attorney General Robert L. Quinn, Jr., with amicus support from Jennifer Levi and Mary L. Bonauto of Gay & Lesbian Advocates & Defenders on behalf of a group of lesbian and gay city employees whose benefits were affected by the outcome. In E.N.O., the plaintiff was represented by E. Oliver of Boston and Mary Bonauto of GLAD; while Elaine M. Epstein and Gary Owen Todd represented the defendant and Bettina Borders represented the child's interests. A.S.L. [*E.N.O. v. L.M.M.*, 711 N.E.2d 886, 429 Mass. 824 (Mass. 1999).]

TEXAS APPEALS COURT RULES A MAN CAN NEVER BECOME A WOMAN; REJECTS WRONGFUL DEATH ACTION BY TRANSEXUAL WIDOW: A three-judge panel of the Texas Court of Appeals, sitting in San Antonio, has rejected a claim by a male-to-female transsexual that she has standing to sue for the wrongful death of her husband. *Littleton v. Prange*, 1999 WL 972986 (Oct. 27). In an opinion cruelly dismissive of the rights of transgendered persons to be able to function in the gender they experience as genuine, Chief Justice Phil Hardberger stated, "There are some things we cannot will into being. They just are." * * * The ruling affirmed a decision by Bexar County District Judge Frank Montalvo to grant summary judgment to Dr. Mark Prange, who accompanied his motion with a copy of the original birth certificate of the plaintiff, Mrs. Christie Lee Littleton, who was born Lee Cavazos, Jr., in 1952. Ms. Littleton began to experience her reality as female in early childhood, and by the time she was 17 was searching for a doctor to perform sex reassignment surgery for her. She enrolled in a program at the University of Texas Health Science Center that culminated in her sex reassignment procedure, legally changing her name in 1977 to Christie Lee Cavazos, and undergoing surgical procedures between November 1979 and February 1980. Doctors involved in her treatment offered affidavit testimony that she was a "true transsexual" whose gender dysphoria could only be resolved by living as a woman. * * * In 1989, Christie married Jonathon Mark Littleton in Kentucky. Jonathon was fully aware of her background. The marriage lasted seven years until Jonathon's death, allegedly due to the negligence of Dr. Prange. Christie brought an action under the [*543] Texas Wrongful Death Act, which authorizes a surviving spouse to seek compensation for the injury caused by the death of their spouse. Dr. Prange opposed the case by arguing that because Christie was born as a man, she could not be legally married to Jonathon and thus was not a surviving spouse qualified to bring a

wrongful death action. * * * In his opinion for the majority of the panel, Justice Hardberger reviewed the history of litigation over the status of transsexuals in England and the U.S., and concluded that, apart from a 1976 New Jersey decision, *M.T. v. J.T.*, 355 A.2d 204 (1976), there was no support in U.S. law for the proposition that a post-operative transsexual has legally accomplished a change of sex. Hardberger also emphasized the strong opposition in Texas to same-sex marriage, noting a recently-enacted statute specifically rejecting any recognition of same-sex marriages, and also cited the federal Defense of Marriage Act, which purports to relieve the states of any constitutional obligation to recognize same-sex marriages performed in other jurisdictions (although, curiously, Hardberger did no more than mention DOMA, avoiding any real analysis of its application to this case or possible constitutional flaws). * * * Expressing aversion to letting a Texas jury try to determine as a matter of fact whether Christie is a man or a woman, Hardberger insisted that the issue could be decided on summary judgment as a matter of law based on uncontested facts. This seems strange, since Christie's sex is a highly contested fact in the case. But for Hardberger, genetics is destiny, unalterably so. Based on the facts submitted by the parties, Hardberger concluded that Christie is a transsexual, and that through surgery "a transsexual male can be made to look like a woman, including female genitalia and breasts," but that the internal organs remain male and the male chromosomes are not changed by the surgery or other treatment. "Biologically, a post-operative female transsexual is still a male." Concluded Hardberger, "Some physicians would consider Christie a female; other physicians would consider her still a male. Her female anatomy, however, is all man-made. The body that Christie inhabits is a male body in all aspects other than what the physicians have supplied." * * * Hardberger refused to accord any significance to the fact that Christie had applied for and received a court order "correcting" her birth certificate to show her female name and gender, finding that her original birth certificate was correct when it was issued. "The trial court that granted the petition to amend the birth certificate necessarily construed the term 'inaccurate' to relate to the present, and having been presented with the uncontroverted affidavit of an expert stating that Christie is a female, the trial court deemed this satisfactory to prove an inaccuracy. However, the trial court's role in considering the petition was a ministerial one. It involved no fact-finding or consideration of the deeper public policy concerns presented... The facts contained in the original birth certificate were true and accurate, and the words contained in the amended certificate are not binding on this court." * * * Concluded Hardberger, "We hold, as a matter of law, that Christie Littleton is a male. As a male, Christie cannot be married to another male. Her marriage to Jonathon was invalid, and she cannot bring a cause of action as his surviving spouse." * * * In a brief concurrence, Justice Karen Angelini premised her vote on the lack of legislative guidelines for dealing with transsexuals. * * * Dissenting, Justice Alma L. Lopez argued that Christie's original birth certificate was no longer a valid document upon which the court could premise any factual conclusion. Lopez insisted that Christie had introduced sufficient "controverting evidence that indicated she [*544] was female" to create a contested issue of material fact, thus precluding a summary judgment. According to Lopez, the absence of any controlling law in the jurisdiction argued in favor of holding a real trial, and not granting summary judgment and attempting to rule on difficult factual questions as a matter of law. "Under the rules of civil procedure," she wrote, "a document that has been replaced by an amended document is considered a nullity... Under this authority, an amended instrument changes the original and is substituted for the original. Although a birth certificate is not a legal pleading, the document is an official state document... . In this case, Christie's amended birth certificate replaced her original birth certificate... . As a result, summary judgment was issued based on a nullified document. How then can the majority conclude that Christie is a male? If Christie's evidence that she was female was satisfactory enough for the trial court to issue an order to amend her original birth certificate to change both her name and her gender, why is it not satisfactory enough to raise a genuine question of material fact on a motion for summary judgment." * * * The opinions are perhaps most notable for their complete avoidance of discussing the precise issue that was really before the court: how to construe the wrongful death act in order to effectuate its purpose of compensating a surviving spouse for the loss of her life partner? In this case, what should really matter is Christie's gender as she lived her life, and not her genetic sex. Christie lived as Jonathon's wife, with the legal sanction of the state of Kentucky, for seven years. As such, she was exactly the sort of person intended to be allowed a cause of action for the loss of a spouse. There are many state court decisions around the country acknowledging surviving spouse-type claims on behalf of persons who, it was determined, were in marriages that were legally defective, but the defects of the marriages were held in many instances not to overcome the strong policy reasons for allowing the claim. The court's failure to entertain any sort of sophisticated distinction between sex and gender role produced a decision that seems inconsistent with purposes of the wrongful death statute. A.S.L.[*Littleton v. Prange*, 9 S.W.3d 223 (Tex. App., San Antonio, 1999).]

December 1999: SOUTH AFRICA CONSTITUTIONAL COURT RECOGNIZES SAME-SEX COUPLES FOR IMMIGRATION PURPOSES: In an unanimous ruling issued Dec. 2 in *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs*, Case CCT 10/99, the Constitutional Court of South Africa decided that the country's immigration law had to be changed in order to recognize same-sex couples as having essentially the same immigration rights as legal spouses. The ruling was based on provisions of the South African constitution that ban sexual orientation

and marital status discrimination (section 9) and that guarantee human dignity to all residents of the country (section 10). * * * In an opinion for the Court, Justice Laurie Ackermann relied heavily on precedents from Canada, the United Kingdom, and New York in determining that same-sex couples could form families that were entitled to equal treatment under the law. Ackermann prominently cited the decision by the New York Court of Appeals in *Braschi v. Stahl Associates Company*, 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (N.Y. 1989), a tenants rights case, as an example of judicial recognition of same-sex couples as families. * * * The case was brought by the National Coalition for Gay and Lesbian Equality, six non-South Africans who are partners with South Africans, their six partners, and the Commission for Gender Equality. The National Coalition had actually been successful at first in getting "waivers" of the normal immigration rules for several gay applicants, [*545] but as the number of requests for such applications increased, the Ministry of Home Affairs determined that it was not plausible any longer to treat same-sex couples as presenting "special circumstances," the ground under which the immigration law gives the Ministry authority to waive normal requirements, and refused to process any more or to renew the one-year waivers it had issued, thus leading to this lawsuit. * * * Justice Ackermann's summary of his holding says it all, quite concisely: "Section 25(5) of the Aliens Control Act 96 of 1991, by omitting to confer on persons, who are partners in permanent same-sex life partnerships, the benefits it extends to spouses, unfairly discriminates, on the grounds of their sexual orientation and marital status, against partners in such same-sex partnerships who are permanently and lawfully resident in the Republic [of South Africa]. Such unfair discrimination limits the equality rights of such partners guaranteed to them by section 9 of the Constitution and their right to dignity under section 10. This limitation is not reasonable or justifiable in an open and democratic society based on human dignity, equality and freedom and accordingly does not satisfy the requirements of section 36(1) of the Constitution. This omission in section 25(5) of the Act is therefore inconsistent with the Constitution. * * * "It would not be an appropriate remedy to declare the whole of section 25(5) invalid. Instead, it would be appropriate to read in, after the word 'spouse' in the section, the words 'or partner, in a permanent same-sex life partnership.' The reading in of these words comes into effect from the making of the order in this judgment." * * * This summary follows a lengthy discussion of how the legal status of families has been evolving in South Africa and abroad, quoting extensively from Canadian Supreme Court decisions in particular, and an analysis that rejects the government's contention that immigration rights should be limited to legal spouses as a way of "protecting" the family. * * * Perhaps most interesting is Ackermann's treatment of the issue of procreation as it relates to family recognition. The government, as governments elsewhere have done, had argued that limiting family recognition to opposite-sex couples was justified by the connection between marriage, procreation, and the raising of children. After observing that "nothing prevents a gay or a lesbian couple, one of whom has so adopted a child, from treating such child in all ways, other than strictly legally, as their child," Ackermann stated: * * * "From a legal and constitutional point of view procreative potential is not a defining characteristic of conjugal relationships. Such a view would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence such relationship or become so at any time thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations. It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. I would even hold it to be demeaning of a couple who voluntarily decide not to have children or sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy." * * * As to the argument that same-sex partners are so distinguishable from opposite-sex spouses that no equality violation arises from their differential treatment, Ackermann concluded that same-sex partners "are capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefitting from family life which is not distinguishable in any significant respect from that of heterosexual spouses." * * * Ackermann's opinion is significant [*546] not only for finding that the immigration law unconstitutionally discriminates on grounds of sexual orientation and marital status, but also for breaking new ground in South African constitutional law by adopting the process of "reading in" to cure a constitutional defect. This is not a process used by U.S. courts, but it has been repeatedly used by the Supreme Court of Canada in its decisions dealing with gay rights issues, most notably in "reading in" a ban on sexual orientation discrimination as part of the Canadian Charter of Rights. As is customary in countries that are part of the English Commonwealth, the South African court freely cites and relies on decisions by the highest courts of other Commonwealth nations, including Canada. * * * Ackermann pointed out that when a statute is found unconstitutional, the court has an option to strike it down in its entirety, or, if the unconstitutional feature is severable from the rest, to strike that feature down and preserve the rest. Why not, he asked, also include in the court's remedial arsenal the possibility of revising the faulty provision so as to cure its constitutional defect? The lower court had refrained from doing this, shying away from performing a legislative function, at least in part because of the difficulty of deciding upon the precise language to describe those couples that would be entitled to immigration recognition. But Ackermann was not daunted by the problem, writing that it was enough to read in a recognition for permanent same-sex partnerships, accompanied by a judicial explanation of the factors to be considered

in determining whether any particular partnership qualified. If this left ambiguities, the legislature could surely follow along with a more detailed definition, so long as it did not impose limitations or conditions that offended the constitutional equality requirement. * * * Although a decision by the South African Constitutional Court has no legal effect in the U.S., the stirring language of Ackermann's ruling, especially in its discussion of how refusal to accord recognition to same-sex families in the context of immigration undermines the human dignity of gay people, will undoubtedly contribute to the growing consensus in the international human rights community that same-sex partners are entitled to the same treatment as spouses for an increasing range of benefits and rights. As the U.S. participates as a treaty partner with countries that have adopted more advanced views of gay rights, there may come a time when such developments prove influential with American legislatures and courts. At least one can hope... A.S.L.

January 2000: VERMONT SUPREME COURT RULES SAME-SEX COUPLES ENTITLED TO EQUAL TREATMENT; MANDATES LEGISLATIVE CHANGE WITHOUT SET TIMETABLE: In a unanimous ruling, the Vermont Supreme Court has ordered the state legislature to extend to same-sex couples the benefits and protections that are currently offered exclusively to married heterosexual *Vermonters*. *Baker v. State of Vermont*, 1999 WL 1211709 (Dec. 20). The landmark victory is a fitting culmination to a decade that has seen a drastic surge in public debate and political activity concerning the legal status of same-sex relationships - in local, state and national arenas and in all three branches of government. It perhaps also alleviates some of the disappointment stemming from the Hawaii Supreme Court's order, issued eleven days before the Vermont decision, which dismissed the only other pending same-sex marriage case in the country. * * * Vermont's five Supreme Court justices concluded that since the state's marriage statute implicitly permits only opposite-gender couples to marry, it violates the "Common Benefits Clause" of Vermont's constitution: "That government is, or ought to be, instituted [*547] for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or set of persons who are a part only of that community." (Ch. 1, Art. 7) The court's decision was not based on federal law or the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution, and therefore cannot be appealed to the United States Supreme Court. * * * "The legal benefits and protections flowing from a marriage license are of such significance that any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned," announced Chief Justice Jeffrey Amestoy in the majority opinion adopted by three of the justices. The court professed little difficulty ruling that in the case of same-sex couples, not only did the arguments advanced by the State fail to overcome this burden of proof, but they also undermined Vermont's existing public policy concerning family relations. * * * For example, the State argued that denying marriage benefits to same-sex couples was justified in order to "further the link between procreation and child rearing," and to promote a permanent commitment between couples for the security of their children. Yet Vermont already permits same-sex couples to adopt and rear children who are born through assisted-reproductive techniques. Vermont was also one of the first states to permit same-sex second-parent adoptions. In light of these laws, and recent studies cited by the court which showed that a growing number of children are being born to and raised by same-sex couples, the Chief Justice concluded that "if anything, the exclusion of same sex couples from the legal protections incident to marriage exposes their children to the precise risks that the State argues marriage laws are designed to secure against." * * * The court also noted that many of the benefits of marriage, including intestacy rights, standing to commence wrongful death or loss of consortium actions, evidentiary privilege for marital communications, homestead rights, spousal support, and hospital visitation rights, are not dependent on whether a couple has children. As the majority opinion noted, these collective benefits, protections, and obligations are indicative of the fact that marriage is premised on more than the desire to raise a family: "The extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nothing less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity." * * * Notwithstanding the court's unanimous conclusion that the state's marriage statute is unconstitutional, the court did not direct Vermont to immediately begin issuing marriage licenses to same-sex couples. Instead, four out of five of the justices chose to leave the ultimate decision to the legislature, who must now determine how to effectuate the court's ruling requiring substantive equality among heterosexual and homosexual couples. According to the court, the legislature could forego legalizing same-sex marriage as long as same-sex couples are offered the same benefits as married couples. Chief Justice Amestoy justified the court's limited remedy by contending that "a sudden change in the marriage laws or the statutory benefits traditionally incidental to marriage may have disruptive and unforeseen consequences." Early reports in the *New York Times* and the *Boston Globe* indicated that Vermont Governor Howard Dean (D) favors creating a domestic partnership system in lieu of same-sex marriage; Dean expressed discomfort with the concept of same-sex marriage, and suggested that his discomfort was widely shared. * * * Justice Denise Johnson dissented from [*548] the "novel" and "truncated" remedy fashioned by the court, accusing the majority of hypocrisy. "Within a few pages of rejecting the State's doomsday speculations as a basis for

upholding the constitutionality of discriminatory classification, the majority relies upon those very same speculations to deny plaintiffs the relief to which they are entitled as a result of the discrimination," she argued. Justice Johnson would enjoin the state from denying marriage licenses to same-sex couples. * * * The plaintiffs are represented by Beth Robinson and Susan M. Murray of Langrock, Sperry & Wool, a Middlebury, Vermont, law firm, and Mary Bonauto of Gay & Lesbian Advocates & Defenders, a Boston-based public interest law firm. Amicus briefs were filed by more than fifteen organizations, including Lambda Legal Defense and Education Fund, Vermont Coalition for Lesbian and Gay Rights and P-FLAG. [This part of the article was written by Ian Chesir-Teran.]

Additional notes by Arthur S. Leonard: The Vermont Supreme Court's decision in *Baker* appears to be the first by a court of last resort in any jurisdiction to hold on the merits that same-sex couples are entitled to the same rights and benefits as married opposite-sex couples, although decisions by Hungary's Constitutional Court to allow same-sex couples to be treated the same as common-law spouses and recent decisions by the highest courts in South Africa, Canada, and Britain have come close to this point. In South Africa, the Constitutional Court ruled that the nation's constitutional commitment against discrimination on grounds of sexual orientation required the immigration laws to be changed so as to accord equality between committed same-sex couples and married opposite-sex couples; the Law Committee of the House of Lords, Britain's highest appeals court, recently ruled that a same-sex couple should be treated as family members for purposes of tenant regulations; and the Canadian Supreme Court ruled last summer that same-sex couples should be treated as equivalent to married couples under an Ontario law on spousal support obligations. * * * In his opinion for the Vermont court, Chief Justice Amestoy speculated that the legislature might look to the legislative domestic partnership schemes adopted in the Scandinavian countries, or to the original, broadly-conceived domestic partnership proposal presented to the Hawaii Senate during its deliberations over responses to the Baehr ruling, as models for compliance, while noting that those schemes fell short of full equality. Indeed, it is hard to know how the Vermont legislature could meet the court's mandate of providing full equality through a domestic partnership statute, without providing expressly that same-sex couples who qualify and register must be treated precisely the same as opposite-sex couples for every benefit, right, and obligation of state law. Even then, of course, full equality would not have been achieved, since only conferral of the right to marry itself would likely have extra-territorial consequences. There is no direct precedent, for example, for opining on whether a neighboring state would recognize a Vermont registered partnership if, for example, the couple were traveling out-of-state and encountered some situation in which their marital status would be crucial. Even married same-sexers would be likely to confront obstacles to recognition of their relationships, not least the 1996 federal Defense of Marriage Act and some 29 state-analogue statutes, but at least as lawfully married couples they would have clear legal standing to challenge those obstacles. Consequently, a strong argument might be made that only by conferring the right to marry would the Vermont legislature clearly meet the equality mandate set down by the court. * * * The Vermont Supreme Court retained jurisdiction [*549] of the case, and Amestoy's opinion suggested that should the legislature opt for a domestic partnership scheme, or should the legislature fail to act in a timely fashion, the court stood ready to hear arguments that it should mandate the right to marry as a remedy. As to the likelihood that this will result in a delay sufficient to produce a constitutional amendment overruling the decision, Vermont's constitution is not nearly so easy to amend as Hawaii's. A proposed amendment would have to be approved by two successive legislatures with a legislative election intervening before it could be placed on the ballot, so the earliest such an amendment could be presented to the people for ratification would be many years in the future. Amestoy's opinion said that the current statute could remain in effect "for a reasonable period of time" to give the legislature a chance to act. One speculates that a "reasonable period" would not go beyond the electoral life of one legislature. * * * There is another point of interest surrounding the decision, although it is a point mainly of concern to devotees of constitutional theory. In his opinion for the court, Chief Justice Amestoy departed from past Vermont precedents, in which the court had closely followed the jurisprudence of the U.S. Supreme Court under the Equal Protection requirements of the 14th and 5th Amendments. Beginning in the 1930's, the Supreme Court constructed a methodology based on different levels of judicial review depending upon the characteristics upon which discrimination was based and the significance of the rights as to which discrimination was alleged. In the three-tiered structure that emerged, discrimination involving "suspect classifications," such as race, or concerning "fundamental rights," such as the right to vote, was reviewed under a "strict scrutiny" standard that was usually fatal to the challenged statute or rule, placing the burden on the government to show a compelling interest that could only be achieved by following the challenged policy. Discrimination involving non-suspect classifications or interests that were not seen as fundamental received deferential "rational basis" review, under which the challenged statute or rule would survive if the court could hypothesize any plausible rationalization for it. An intermediate standard appeared to be applied in cases involving sex discrimination, where the court held that "heightened scrutiny" was appropriate and the government had to come up with a convincing justification of the need to classify people based on their sex to achieve an important purpose. * * * Some members of the Supreme Court have questioned the logic of this three-tiered approach, arguing that all discriminatory treatment should be

subject to careful review under the Equal Protection requirement, and in recent years the Court has seemed to develop a more flexible approach, particularly in considering discrimination based on classifications that have not been determined by the Court to be suspect, such as sexual orientation in *Romer v. Evans* (1996). In his opinion, after observing that state supreme courts are not bound to follow U.S. Supreme Court methodology in construing their state constitutions, Amestoy contended that the Vermont court had departed in the past from strict adherence to the three-tiered approach, and that in Vermont all equal protection challenges should be evaluated by a flexible, fact-based analysis that takes into account the weight of interests affected on both sides of the issue. * * * Amestoy's analysis persuaded two of his colleagues, but produced concurring opinions following different paths by Justices John Dooley and Denise Johnson. Justice Dooley expressed grave concerns about Amestoy's approach, suggesting that the departure from precedent might undermine the perceived legitimacy of the court's conclusion (with which he heartily agreed). For [*550] Dooley, the case could be dealt with straightforwardly by finding that sexual orientation is a suspect classification for purposes of the Vermont Common Benefits clause, and that the state's articulated justifications for reserving marriage for opposite-sex couples fail to withstand strict scrutiny. * * * Justice Johnson's opinion was both a concurrence and a dissent, but she concurred only with the majority's conclusion on the merits, not with its methodology. She preferred to follow the lead taken by the Hawaii Supreme Court, which had determined that so long as a person's sex was used by the state as a basis to grant or deny marriage rights, the marriage law was imposing a sex classification, and that sex classifications are "suspect" for purposes of equal protection analysis. From there, her analysis was similar to Justice Dooley's, finding that the state's rationale for its policy failed the strict scrutiny review. Johnson departed from Dooley and Amestoy in finding that the only remedy would be to order the state to let same-sex couples have marriage licenses on the same basis as opposite-sex couples. In defending its existing policy, the state had argued that one justification was to avoid the disruption and uproar that granting same-sex marriages might cause; Amestoy had dismissed this as a rationale in his ruling on the merits, but had then invoked the same argument in his ruling on the remedy - thus, Johnson's denunciation of the majority for hypocrisy on this point. * * * No matter how this eventually turns out, lesbians, gay men and bisexuals should long remember the names of the five Vermont Justices who unanimously agreed in their historic ruling of December 20, 1999, that same-sex couples should be entitled to all the rights and benefits that are routinely accorded to opposite-sex couples in our society through the legal status of marriage. They hereby join the Lesbian and Gay Legal Rights Hall of Fame. (Is any Lesbian and Gay Community Center ready to establish such an institution?) They are: Jeffrey L. Amestoy, Chief Justice, and Associate Justices Denise R. Johnson, John A. Dooley, James L. Morse, and Marilyn S. Skoglund. A.S.L. [*Baker v. State of Vermont*, 744 A.2d 864 (Vt. 1999).]

March 2000: CALIFORNIA APPEALS COURT DISALLOWS SEXUAL ORIENTATION DISCRIMINATION IN JURY SELECTION: In a case of first impression, a California appellate court has ruled that prosecutors cannot exercise peremptory challenges to excuse lesbians and gay men from criminal jury pools solely because of the prospective juror's sexual orientation. *People v. Garcia*, 92 Cal. Rptr. 2d 339, 2000 WL 116213 (4th Dist., Div. 3, Jan 31), order denying rehearing and correcting opinion, 2000 WL 199682 (Feb. 22). The panel of three judges concluded unanimously that criminal defendants have the constitutional right to have cases tried before an impartial jury that "represents a cross-section of the community," including lesbians and gay men. The court based its holding on the Sixth Amendment of the United States Constitution and Article I, Section 16 of the California Constitution. * * * Cano Garcia was charged with what the court labeled "a garden variety" burglary. During jury selection, it became known that two members of the jury panel were lesbians. Defense counsel challenged the prosecutor's decision to exercise peremptory challenges to excuse both jurors, arguing that the prosecutor had engaged in unlawful group bias. Orange County Superior Court Judge Corey Cramin denied the defendant's motion, finding that "sexual preference is not a cognizable group... I don't think that your sexual preference specifically relates to them sharing a common perspective or common social or psychological outlook on human events." The California Court of Appeal disagreed. * * * Writing for the [*551] court, Judge Bedsworth traced the history of two distinct constitutional limitations on the use of peremptory challenges. The first and more well-known of the two, which prohibits individuals from being excused from both criminal and civil juries on the basis of race and gender, is based on the Equal Protection Clause of the Fourteenth Amendment and the United States Supreme Court's decisions in *Batson v. Kentucky*, 476 U.S. 79 (1986), and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). Regrettably, the panel balked at the opportunity to extend these cases to sexual orientation discrimination. Bedsworth explained almost apologetically that classifications based on race and gender require heightened judicial scrutiny in Equal Protection cases, whereas classifications based on sexual orientation do not, "so it has not yet been established whether such [heightened] scrutiny is a sine qua non of Batson error or merely a common characteristic." The panel chose not to decide the issue one way or another. * * * Instead, the appellate court fashioned a truncated remedy that applies only in criminal cases, based on the Supreme Court's 1975 decision in *Taylor v. Louisiana*, 419 U.S. 522. The Taylor court held for the first time that by excluding women from a criminal jury venire, prosecutors had violated a defendant's implicit Sixth Amendment right to be tried by a "representative cross-section" of the

community. In 1978, the California Supreme Court adopted the holding in Taylor and, on state constitutional grounds, broadened the scope of prohibited group bias to include "race, ethnicity, gender or 'similar' group bias." The court here ruled that sexual orientation discrimination during criminal jury selections flouts the Sixth Amendment and California's constitution. * * * Garcia first had to demonstrate to the court that lesbians and gay men "share a common perspective arising from their life experience in the group." The panel found little difficulty concluding that this test had been satisfied. Using bold if not controversial language, Judge Bedsworth explained that lesbians and gay men "share a history of persecution comparable to that blacks and women share... It cannot seriously be argued in this era of 'don't ask, don't tell' that homosexuals do not have a common perspective." * * * The Attorney General challenged the defendant's position that lesbians and gay men constitute a legally cognizable group: "What common perspective is, or was, shared by Representative Jim Kolbe (R-Ariz.), RuPaul, poet William Alexander Percy, Truman Capote, and Ellen DeGeneres?" The court dismissed this rhetorical question, noting that "they share the common perspective of having spent their lives in a sexual minority, either exposed to or fearful of persecution and discrimination." The Attorney General's argument also proved too much, Bedsworth noted, since the same diversity is found among African Americans and women, yet jurors cannot be excluded on the basis of race and gender. * * * The court also agreed with Garcia's counsel that no other members of the community are capable of adequately representing the perspective of lesbians and gay men. "We cannot think of anyone who shares the perspective of the homosexual community," Bedsworth wrote. "Outside of racial and religious minorities, we can think of no group which has suffered such pernicious and sustained hostility, and such immediate and severe opprobrium as homosexuals." * * * Since the record on appeal did not indicate explicitly why the prosecution had excused the two lesbian jurors, the panel remanded the case and directed the trial court to hold a hearing on the issue. Whatever the outcome of that hearing, criminal defense attorneys may now have a new basis to help ensure that lesbian, gay and straight defendants alike are judged by a jury that more fully reflects their community. [*552] Mr. Garcia was represented by Michael Satris. [*People of California v. Garcia*, 92 Cal. Rptr. 2d 339, 77 Cal. App. 4th 1269 (4th Dist., Div. 3, 2000). This article was written by Ian Chesir-Teran.]

March 2000: WASHINGTON STATE APPEALS COURT REVERSES SUMMARY JUDGMENT AWARDING INTESTATE MAN'S ESTATE TO HIS SAME-SEX DOMESTIC PARTNER: In an opinion by Judge Bridgewater, the Washington Court of Appeals reversed the award of summary judgment to plaintiff Frank Vasquez, who claimed that he was entitled to inherit the whole of the estate of Robert Awrey Schwerzler, a gay man who was his domestic partner and who died intestate. *Vasquez v. Hawthorne*, 2000 WL 146805 (Wash. App. Div. 2, Feb. 11). * * * Vasquez and Schwerzler lived together for approximately 16 years, and according to Vasquez were life partners. When Schwerzler died, he left an estate that included the house they both lived in, a life insurance policy, two cars and a checking account. Vasquez filed a claim against the estate, arguing that he and the deceased had been life partners in a "meretricious relationship", and therefore he was entitled under Washington precedents to a share of the community property. Hawthorne, the appointed personal representative of the intestate's estate, denied Vasquez's claim on the ground that, as a matter of law, a same-sex relationship cannot be "meretricious." The trial court agreed with Vasquez and awarded almost the entire estate in a partial summary judgment. The Appeals Court disagreed with the trial court's ruling. * * * According to Judge Bridgewater, under Washington's common law a "meretricious relationship" is defined as "a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist." Determination of whether any particular relationship is meretricious is to be made by the court on a case-by-case basis. The Washington Supreme Court has ruled that courts may apply community property laws by analogy to a lawful marriage in order to determine ownership at the end of a meretricious relationship, on a just and equitable basis. *In re Marriage of Lindsey*, 101 Wash. 2d 299, 678 P. 2d 328 (1984). Since meretricious relationships are not legally the same as marriage, Washington courts limit the distribution of property to whatever would have been characterized as community property had the parties been legally married. * * * Bridgewater refused to extend the protections of the common law to include same-sex partners. He found that Vasquez' and Schwerzler's relationship was not quasi-marital or sufficiently similar to a marriage to warrant treating it as a marriage for purposes of dividing the property, because two people of the same sex cannot legally marry. Furthermore, he stated that "we find no precedent for applying the marital concepts, either rights or protections, to same-sex relationships; all of the reported cases concerning meretricious relationships have been between men and women, and community property law clearly applies only to opposite-sex relationships." In a footnote, he stated that Washington statute RCW 26.16.030 defines community property as property acquired after marriage by either husband or wife or both. In finding no legal basis to extend the rights and protections of marriage to same-sex relationships, he noted that it was up to the legislature to do that, and Vasquez might still have a chance to prevail in court by basing his claim on the existence of a constructive trust and implied partnership. * * * Vasquez is represented by Terry James Barnett of Tacoma, and the estate is represented by Ross Edwin Taylor, also of Tacoma. [*Vasquez v. Hawthorne*, 994 P.2d 240 (Wash. Ct. App., Div. 2, 2000). This article was written by Elaine Chapnik.]

[*553] April 2000: TRANSGENDER BREAKTHROUGH: 9TH CIRCUIT PANEL FINDS PROTECTION UNDER FEDERAL LAW: In a little-noted case with great potential significance, a panel of the U.S. Court of Appeals for the 9th Circuit has found that federal sex discrimination laws should be interpreted to ban discrimination or bias-motivated violence based on gender identity. Ruling on an interlocutory appeal of a denial of summary judgment in *Schwenk v. Hartford*, 2000 WL 224349 (Feb. 29), the panel held that Douglas "Crystal" Schwenk is entitled to pursue her 8th Amendment claim under 42 U.S.C. sec. 1983 against Washington state prison guard Robert Mitchell, although qualified immunity bars her suit under the Gender-Motivated Violence Act of 1994 due to the unprecedented nature of the court's holding under that statute. * * * Schwenk, who self-identifies as female and grooms and dresses accordingly, was incarcerated in an all-male state prison in Walla Walla, Washington, subject to the authority of guard Robert Mitchell beginning in September 1994. According to Schwenk's complaint, Mitchell is an aggressive sexual harasser who repeatedly importuned Schwenk for sexual favors, including oral sex, which she repeatedly rebuffed, culminating in an attempted anal rape in her cell accompanied by threats to transfer her into a situation where she would be more vulnerable to sexual attack by other prisoners. Schwenk presented evidence of severe emotional distress resulting from Mitchell's actions. She sued under 42 U.S.C. sec. 1983, alleging cruel and unusual punishment and naming as defendants various prison officials in addition to Mitchell. After she was assigned counsel, her complaint was amended to add a count under the Gender-Motivated Violence Act (GMVA), a provision of the 1994 Violence Against Women Act that specifically outlaws gender-motivated violence. * * * Mitchell moved for summary judgment after discovery, claiming qualified immunity under both legal theories. (The other defendants were dismissed from the case by the district court prior to discovery.) He claimed there was no established federal constitutional or statutory protection for transsexuals, and thus as a public employee he enjoyed qualified immunity against all of Schwenk's claims. District Judge Robert H. Whaley (E.D.Wash.) rejected Mitchell's arguments and denied the motion for summary judgment, and Mitchell took an interlocutory appeal, a procedural device that is available in qualified immunity cases. * * * Writing for a panel that included Judges Betty B. Fletcher and Sidney R. Thomas, Circuit Judge Stephen Reinhardt found the qualified immunity argument to be without merit on the 8th Amendment claim, but reversed as to the GMVA claim. * * * Reinhardt cited a 1992 Supreme Court decision, *Hudson v. McMillan*, 503 U.S. 1, for the proposition that "when prison officials maliciously and sadistically use force to cause harm contemporary standards of decency are always violated." Further, in 1994, the Supreme Court ruled in *Farmer v. Brennan*, 511 U.S. 825, a case involving a transgendered prison inmate: "Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" In *Farmer*, the claim was that prison officials exhibited deliberate indifference to the danger in which they placed the inmate in light of the likelihood that she would be subjected to sexual assault by fellow prisoners. Reinhardt found plenty of support in lower federal court cases extending these Supreme Court precedents to find that where "guards themselves are responsible for the rape and sexual abuse of inmates, qualified immunity offers no shield." Concluded Reinhardt, "To the extent that Mitchell argues that the law is clearly established that a prison guard may be liable for allowing someone else to sexually assault an inmate, [*554] but not for an assault that he himself commits, his position, both legally and as a matter of common sense, is absurd. In light of pre-existing Eighth Amendment law, a reasonable prison guard simply could not have believed that he could with impunity enter the cell of a prisoner (transsexual or otherwise), unzip his pants, expose himself, demand oral sex, and then, after being refused, grab the prisoner, push her up against the bars of the cell, and grind his naked penis into her buttocks." * * * Reinhardt rejected Mitchell's contention that Schwenk's description of the incident could be characterized as mere same-sex harassment not amounting to a constitutional violation. Observing that "the point of qualified immunity is to allow officials to take action 'with independence and without fear of consequences,'" Reinhardt contended that "there is, however, no societal interest in allowing prison guards to rape (or attempt to rape) inmates 'with independence' or 'without fear of consequences.'" * * * Turning to the GMVA claim, Reinhardt faced Mitchell's argument that because the GMVA was enacted as a provision within the Violence Against Women Act (VAWA), which is currently being reviewed for constitutionality by the Supreme Court after having been declared unconstitutional by the 4th Circuit in *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820 (4th Cir.) (en banc), cert. granted, 120 S.Ct. 11 (1999), he should be entitled to qualified immunity on several grounds: that VAWA only prevents violence against women, and not same-sex violence involving men; that there is no existing case law from which a reasonable person would conclude that his actions had violated the GMVA, and that because of the 4th Circuit's ruling on constitutionality and the consequent uncertain validity of the statute, public officials should be held qualifiedly immune from any charges under the statute. * * * On the first argument, Reinhardt found that both the language and the legislative history of the GMVA clearly refuted Mitchell's contentions. The statute by its terms protects all people, not just women, from gender-motivated violence, and the legislative history even includes an explicit reference by a sponsor of the bill to same-sex prison rape as a type of violence that would be covered by the GMVA. The more difficult problem for Schwenk in this case is the lack of prior case law specifically construing the GMVA to extend to violence against transsexuals motivated

by their gender identity as opposed to their anatomical sex. Here is where Reinhardt's opinion definitely breaks new ground. * * * Mitchell argued that an attack due to Schwenk's transsexuality is not motivated by gender, pointing to numerous cases rejecting claims of sex discrimination by transsexuals under Title VII of the Civil Rights Act of 1964, including a prior 9th Circuit opinion. Reinhardt found in the legislative history an assertion that "Congress intended proof of gender motivation under the GMVA to proceed in the same way that proof of discrimination on the basis of sex or race is shown under Title VII," but that the cases Mitchell cites all predated the crucial Supreme Court decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In *Price Waterhouse*, the Supreme Court accepted as a sex discrimination claim the contention that discrimination against somebody for failing to comply with stereotypical views of gender role is, in fact, discrimination on the basis of sex. While the pre-*Price Waterhouse* federal cases had sharply distinguished between sex and gender, Reinhardt found those cases to have been "overruled by the logic and language of *Price Waterhouse*." Under *Price Waterhouse*, according to Reinhardt, "sex' under Title VII encompasses both sex - that is, the biological differences between men and women - and gender. Discrimination because one fails to act in the way expected of a [*555] man or woman is forbidden under Title VII. Accordingly, the argument that the GMVA parallels Title VII and applies only to sex is in part right and in part wrong. The GMVA does parallel Title VII. However, both statutes prohibit discrimination based on gender as well as sex. Indeed, for purposes of these two acts, the terms 'sex' and 'gender' have become interchangeable." * * * In this case, Reinhardt found that Schwenk's allegations in her complaint and in testimony offered in opposition to the motion for summary judgment "tends to show that Mitchell's actions were motivated, at least in part, by Schwenk's gender - in this case, by her assumption of a feminine rather than a typically masculine appearance or demeanor. Accordingly, we conclude that Schwenk's assertion that the attack occurred because of gender easily survives summary judgment." The court also found, based on the Supreme Court's approach in other sex discrimination cases, that the GMVA's requirement that gender-based animus be alleged was also met in this case, finding that "animus, for purposes of the GMVA, is not necessarily overt hostility; it may in some instances even involve expressed or believed affection." But in this case, where the allegations include attempted rape, gender-based animus could be presumed. * * * The problem for Schwenk, however, is that Mitchell would enjoy qualified immunity from the GMVA claim unless the law on this point was "clearly established" at the time of Mitchell's alleged assault. Since this opinion is the first expressly to embrace the proposition that a sexual assault on a transsexual would be covered by the GMVA, the court concluded that Mitchell would be entitled to immunity in this case. (But the court rejected the proposition that because the GMVA, and the VAWA within which it is embedded, have not yet been held constitutional by the Supreme Court, they cannot be considered to be a source of clearly-established law. Indeed, the court went so far as to say that prior judicial decisions are not necessary to a determination of "clearly established law" where statutory language clearly applies. The problem was that it was not clear from the face of the statute that violence motivated by the victim's gender identity would be construed as gender-motivated violence, without the additional analysis flowing from *Hopkins* and applying it to overrule the past transgender cases under Title VII.) Consequently, the court reversed the district court's denial of summary judgment on the GMVA claim. * * * The potential significance of this decision under the GMVA (and by express extension, Title VII), is enormous, but on the other hand its precedential value might prove short-lived. If Mitchell petitions for rehearing en banc, this ruling by a notably liberal panel of the 9th Circuit might fall at the circuit level, and if Mitchell attempts to take the case to the Supreme Court, its ultimate survival might be even more questionable. It is unlikely that Congress, when considering the GMVA, contemplated that the statute would be used to mean that federal law outlaws anti-transgender violence, as such, and it is uncertain that the Supreme Court plurality that produced the *Hopkins* decision contemplated that it would be used as a basis to extend protection against gender-identity discrimination under Title VII. (Significantly, the author of that plurality opinion, Justice William Brennan, is gone from the Court.) On the other hand, in its recent decision in *Oncale v. Sundowner*, the Supreme Court held, per Justice Scalia, that Title VII could be extended to cover situations not contemplated by Congress, such as same-sex harassment, so long as the language and logic of the statute itself extends to those situations. So the lack of express consideration of transgender issues by Congress would not necessarily be dispositive of the current interpretation of the GMVA [*556] (assuming it survives constitutional review) or Title VII. Predicting how this might develop is a difficult task. * * * But there is no doubt that, at least for the moment, transgendered people are protected within the 9th Circuit from gender-motivated violence under the GMVA and, arguably, from gender identity discrimination under Title VII of the Civil Rights Act of 1964. This puts them a major step ahead of the lesbian and gay rights movement, which still faces an uphill vote to obtain favorable congressional action on the Employment Non-Discrimination Act (ENDA). Transgender rights activists have been pushing hard to have ENDA extended to include gender identity. ENDA congressional sponsors and some of the gay rights lobbying groups have been resisting the call, contending that the addition of gender identity would sink ENDA. It will be interesting to see how this debate plays out in light of *Schwenk v. Hartford*. A.S.L. [*Schwenck v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).]

May 2000: VERMONT ENACTS CIVIL UNION LAW FOR SAME-SEX PARTNERS: By a vote of 79-68 on April 25, the Vermont House of Representatives approved the version of the Civil Union Bill, H.B. 847, that had been approved the previous week by the state Senate, 19-11, after some minor amendments were made, and Governor Howard Dean signed the measure into law the next day, April 26. The signing ceremony was held privately in Dean's office, amidst speculation that public unhappiness with the new law may result in major changes in the composition of Vermont's legislature in November, as well as imperiling Dean's own re-election chances. * * * The most significant change from the bill that had previously passed the House was to move up the effective date for some parts of the bill (including the date on which couples can begin to apply for civil union licenses) to July 1, from the previously approved date of September 1, and to add a religious exemption and stronger language affirming that marriage in Vermont is reserved for opposite-sex couples. Provisions related to insurance and taxes will not take effect until January 1, 2001, to give the state time to secure the necessary coverage and to simplify the implementation of the tax measures by having them coincide with the calendar year, which is the tax year for most individual taxpayers. * * * Significantly, the Senate had rejected proposals to limit eligibility for civil union ceremonies to couples of whom at least one was a Vermont resident, dismissing the argument that allowing out-of-state couples to become civilly united would create conflicts with laws of other states. The Senate had also rejected a proposal to send the issue of civil unions to a referendum, or to submit a constitutional amendment to voters overturning the Vermont Supreme Court's ruling in *Baker v. State of Vermont*, 744 A.2d 864 (Vt. Sup. Ct. 1999), which was the catalyst for enactment of the law. * * * With this enactment, Vermont becomes the first state to offer anything comparable to the registered partnerships that are available to same-sex couples in the Scandinavian countries, sometimes mistakenly referred to as same-sex marriage. Although the states of California and Hawaii have enacted legislation under which same-sex couples can achieve a recognized status through registration, and many counties and municipalities have adopted domestic partnership ordinances with registration features, only the Vermont law attempts to provide for registered couples all of the rights and responsibilities that the state confers on married couples. As such, it might provide a useful legislative model for other jurisdictions that are hesitant about opening up the institution of marriage to same-sex couples but that recognize the serious inequities suffered by same-sex couples who are deprived [*557] of a similar legal status. * * * Although the bill does not afford access to marriage to same-sex couples, it provides virtually all of the rights and responsibilities of marriage under state law. However, by avoiding labeling the result marriage, the state has deprived couples who are civilly united from being able to argue that other states are required to recognize their status under the settled principles of comity that states follow in recognizing out-of-state marriages, although there is nothing to stop civilly-united couples from attempting to gain recognition of their new status in other states by arguing that comity should apply to this situation. Also, the state has avoided giving such couples automatic standing to challenge the federal Defense of Marriage Act, which provides that for purposes of federal law only opposite-sex couple marriages will be recognized. *New York Times*, April 26 & 27. * * * In addition, because of federal employment benefits law preemption, the state could not order private employers to treat civilly-united couples as spouses for purposes of employment benefit plans. However, there is no legal reason why Vermont employers cannot decide to do so voluntarily, or through collective bargaining with unions representing their employees. * * * As soon as the new law was signed, some local town clerks (who will have the initial role of processing applications for licenses) vowed civil disobedience, stating that they would not in good conscience administer this program. It is clear, based on votes at several dozen town meetings in recent months, that the Vermont legislature was well out in front of the views of many state residents in approving the bill, so the next steps remain unclear. *Boston Globe*, April 28. A.S.L.

Summer 2000: SUPREME COURT RULES FOR BOY SCOUTS IN GAY MEMBERSHIP DISPUTE: Ruling 5-4 in *Boy Scouts of America v. Dale*, 2000 WL 826941 (June 28), the U.S. Supreme Court held that the New Jersey Supreme Court's application of the state's public accommodation law to require the Boy Scouts of America (BSA) to reinstate openly-gay Jim Dale (described in the Court's opinion as an "avowed homosexual and gay rights activist") as an adult member and scout leader violates the BSA's First Amendment right of expressive association. The majority opinion, by Chief Justice William Rehnquist, apparently an avowed heterosexual, asserted that requiring the reinstatement of Dale would be improperly forcing the BSA to articulate a message that homosexuality is acceptable for its members. In dissent, Justice John Paul Stevens argued that the record supported no such conclusion, and that the First Amendment was not even implicated in the case. * * * Dale joined the Scouts as an 8-year old, working his way up through the ranks to attain the distinction of an Eagle Scout, the organization's highest rank for a youth member. After turning 18, Dale applied to be an adult member, and was assigned as assistant scoutmaster to his New Jersey troop. Meanwhile, Dale enrolled at Rutgers University, finally accepted his sexual orientation and joined the Lesbian/Gay Alliance, becoming co-president in 1990. After a local newspaper printed an article about Dale's participation in a seminar on problems of gay teens and identified him as co-president of the gay alliance, Dale received a letter from the local Scout council dismissing him from the organization. Responding to his follow-up inquiry, Monmouth Council Executive James Kay told

him that the Scouts "specifically forbid membership to homosexuals." In 1991, New Jersey's gay rights law went into effect. Dale filed a lawsuit, asserting that he was being denied participation by a place of public accommodation on the basis of his sexual orientation. * * * The state trial judge granted the Scouts' motion for summary judgment, finding [*558] that the organization is not a place of public accommodation under the statute and, alternatively, that the Scouts are entitled to discriminate in membership based on a First Amendment right of freedom of association. The Appellate Division of the Superior Court reversed, finding that the law applies to the Scouts and rejecting the First Amendment defense, although one judge partially dissented, finding that the organization should be entitled to select its leaders without court interference. The New Jersey Supreme Court unanimously affirmed in 1999, and the Scouts petitioned for certiorari, raising the First Amendment defense as the only federal issue in the case. * * * Chief Justice Rehnquist's opinion, which was joined by Justices Scalia, Thomas, Kennedy and O'Connor, rather extraordinarily held that the Court must defer to the Scouts' determination of two factual issues vital to the case: that the organization is engaged in an "expressive association" that includes the expression of disapproval of homosexuality, and that compliance with New Jersey's public accommodation law in Dale's case would significantly burden that expressive association. The New Jersey Supreme Court had unanimously ruled against the Scouts on both points, finding that the BSA's publicly articulated policies did not include any coherent anti-gay message or purpose, and thus that the organization's right of expressive association would not be burdened by the court's order to reinstate Mr. Dale as an assistant scoutmaster. * * * On behalf of the Court, Rehnquist took the view that so long as the BSA's position appeared to be genuinely held and found some support in the record, it would not be appropriate for the Court to substitute its own finding as to what the organization's expressive purpose is. The BSA argued that part of its expressive function is to signal to its members that homosexuality is unacceptable, and that although none of the organization's publications mention homosexuality, this message could be derived from the Scout Oath's injunction to be "morally straight" and the Scout law's command to be "clean in word and deed." Further, the BSA advanced a "role model" theory, arguing that having an openly-gay scoutmaster would present a role model to Boy Scout troop members contradictory to the desired message. * * * Further, Rehnquist accepted the BSA's argument that accepting Dale, an openly-gay person who was the co-president of a gay student organization, as a scoutmaster would significantly burden the organization's expressive association, embracing without any real analysis or explanation the "contradictory role model" theory. * * * Finally, without any substantive discussion of the state's justification for burdening expressive association, Rehnquist conclusorily stated that any interests New Jersey sought to advance through its enactment and application of the public accommodations law were outweighed by the significant burden on BSA's expressive association. * * * Writing for himself and Justices David Souter, Ruth Bader Ginsburg and Stephen Breyer, Justice John Paul Stevens argued that the Court had adopted an "astounding view of the law" when it held that the BSA was entitled to judicial deference on the issue of defining its expressive association and determining the degree of burden placed upon it by the state. Stevens argued that this approach would severely undermine the application of public accommodation laws by giving a free pass to potential sham expressive associational claims. In this case, he pointed out, at the time Dale was dismissed, the BSA had not publicly articulated any position with respect to homosexuality, and had never sought to instruct its members as to any view of this issue. The sole documentation of BSA policy prior to 1991 was an internal memorandum sent in 1978 by the top scout official to the members of [*559] the executive board, and, as Stevens noted, even that document indicated an understanding that if states began to outlaw sexual orientation discrimination, the organization would have to adjust its employment policies accordingly. * * * Stevens found that the documentary record totally supported the New Jersey Supreme Court's conclusion that far from being a central or unified part of the BSA's expressive purposes, homosexuality was an invisible issue in the organization, as to which all overt expression seems to have been carefully avoided. Under the circumstances, it was hard to conclude that the BSA's expressive association would be burdened in any way by having an openly gay man serve as a scoutmaster. * * * Stevens was particularly critical of the majority's implicit embrace of the idea that an openly-gay person is a virtual political billboard, whose message could be found to be forced on anyone required to associate with him. "The only apparent explanation for the majority's holding, then, is that homosexuals are simply so different from the rest of society that their presence alone - unlike any other individual's - should be singled out for special First Amendment treatment. Under the majority's reasoning, an openly gay male is irreversibly affixed with the label 'homosexual.' That label, even though unseen, communicates a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his ostracism. Though unintended, reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority." Stevens described as "mind-boggling" the idea that an organization could be considered to endorse every political position taken by any of its members, pointing out that the Scouts' million-plus adult members must have a wide variety of views on controversial social issues. * * * Stevens concluded his dissent with a summary of societal change in attitudes towards homosexuality. which is very pleasant to read but whose relevance to the legal analysis is unclear. Indeed, this last section prompted Justice Souter to write a brief separate dis-

sent, joined by Justices Breyer and Ginsburg, observing that societal attitudes, while interesting, were not dispositive of the issues before the Court, and that Souter and his colleagues had joined the dissent because they agreed with Stevens that the BSA failed to show that their expressive association was being burdened by the application of the public accommodations law. In his opinion for the Court, Rehnquist acknowledged that social attitudes towards homosexuality have moved towards greater acceptance and toleration, but contended that First Amendment values are all the more importantly implicated to protect those who seek to express their disagreement with societal trends. * * * Dale was represented in the case by Lambda Legal Defense Fund, whose Senior Staff Attorney Evan Wolfson argued the case at all levels of the litigation. Lambda's cooperating attorney co-counsel in the case was Allyson W. Haynes of Cleary Gottlieb Steen & Hamilton. A wide range of organizations joined together to file sixteen amicus briefs in support of Dale's case (including the Girl Scouts of America and the 4-H Clubs, the nation's other leading youth organizations, while opponents had filed 21 amicus briefs in support of the Boy Scouts. * * * The long term significance of this case is unclear. Although the Court upheld the BSA's First Amendment claims, Rehnquist's opinion strained to distinguish this case from the growing body of cases rejecting such claims by other membership organizations, and emphasized Dale's own activism in justifying the contention that his presence as an assistant scoutmaster would force an unwanted message on the organization. Stevens noted that this is the first case in which the Court has upheld a constitutional defense by a membership organization [*560] against the application of a public accommodations statute or ordinance. On the other hand, the Court's articulation of a "deference" policy in reviewing the factual assertions of the BSA, if followed indiscriminately by lower courts, could seriously undermine the enforcement of anti-discrimination laws in a wide range of circumstances. And the case does perpetuate the notion of gay people as walking billboards whose very presence sends messages, giving rise to potential First Amendment claims by who knows how many discrimination law defendants. * * * Media reaction to the opinion was divided, but many media outlets editorialized that even if the decision was correct, the Court had carefully avoided expressing any support for the BSA's discriminatory policy, and many argued that having won their legal point, the BSA should now revisit the matter and abandon its policy. * * * The BSA's policy has had one ironic impact: Boy Scout Troop 73 in Matawan, N.J., the troop for which Dale was briefly assistant scoutmaster, is no more. Why? A shortage of adult leaders is one of the reasons given for the decision to disband the troop. (See J. Gold, "Troop is gone, but Scouts cheer court ruling," Milwaukee Journal Sentinel (Associated Press Story), July 2.) It sounds very much like the BSA policy is cutting off the organization's nose to spite its face. A.S.L. [*Boy Scouts of America v. Dale*, 120 S.Ct. 2446 (2000) .]

September 2000: NINTH CIRCUIT AWARDS ASYLUM TO GAY MEXICAN; FINDS SEXUALITY

IMMUTABLE: Producing an opinion that marks a historic breakthrough in U.S. asylum law as it relates to gay people, a unanimous panel of the U.S. Court of Appeals for the 9th Circuit ruled on Aug. 24 that a gay Mexican man with a female sexual identity who was subjected to persecution in his home country should be granted asylum as a refugee in the *United States. Hernandez-Montiel v. Immigration and Naturalization Service*, 2000 WL 1199531. The opinion for the panel by Circuit Judge A. Wallace Tashima held (for the first time by a circuit court of appeals) that sexual orientation is an immutable characteristic, citing an extraordinary range of academic and theoretical writing for this proposition, and also that sexual identity is an immutable characteristic, thus supporting the conclusion that gay men with a female sexual identity constitute a "particular social group" within the meaning of asylum law. * * * According to Tashima's opinion, both the Immigration Judge (IJ) and the Board of Immigration Appeals (BIA) found Hernandez-Montiel to be a credible witness, and that he had been subjected to persecution in the past (including being assaulted and raped by policemen and seriously wounded by a ban of young "macho" toughs after being expelled from his home by his family) and would likely be persecuted in the future if forced to return to Mexico. However, both the IJ and the BIA concluded that he was not a member of a particular social group that was subjected to persecution as such, characterizing the group to which he belongs as "homosexual males who wish to dress as a woman," and finding that the desire to dress as a woman is not an "immutable characteristic." * * * The court found that the IJ and the BIA had mischaracterized Hernandez-Montiel, concluding that having a female sexual identity is an immutable characteristic and is different from a mere preference regarding how to dress. The court held that a particular social group is "one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it." * * * Wrote Tashima, "Sexual orientation and sexual identity are immutable; they are so fundamental to [*561] one's identity that a person should not be required to abandon them. Many social and behavioral scientists 'generally believe that sexual orientation is set in place at an early age.' The American Psychological Association has condemned as unethical the attempted 'conversion' of gays and lesbians. Further, the American Psychiatric Association and the American Psychological Association have removed 'homosexuality' from their lists of mental disorders. Sexual identity is inherent to one's very identity as a person. Sexual identity goes beyond sexual conduct and manifests itself outwardly, often through dress and appearance." (Removed from this series of sentences are intervening citations of books and articles as documentation.) * * *

Tashima also noted that in 1990, the BIA had ruled in the Toboso-Alfonso case (*20 I & N Dec. 819*), that "sexual orientation can be the basis for establishing a 'particular social group' for asylum purposes." The problem the BIA had in this case was that the applicant's evidence did not show that gay men in general were subjected to persecution in Mexico; his evidence focused on the experience of himself as a gay man with a female sexual identity, a subgroup of gay men, and the BIA found that subgroup to be defined by a dress preference, not by an immutable characteristic. The court disagreed with BIA, relying heavily on the expert testimony offered at the immigration hearing by San Diego State University Professor Thomas M. Davies, Jr., an acknowledged expert on Latin American history and culture. Davies vividly described the travails suffered by gay men with female sexual identities in Latin American society, and also provided detailed testimony about the distinctive sexual and social identity of this group, which the court found persuasive in reviewing the hearing record. Wrote Tashima, "Professor Davies did not testify that homosexual males are persecuted simply because they may dress as females or because they engage in homosexual acts. Rather, gay men with female sexual identities are singled out for persecution because they are perceived to assume the stereotypical 'female,' i.e., passive, role in gay relationships. Gay men with female sexual identities outwardly manifest their identities through characteristics traditionally associated with women, such as feminine dress, long hair and fingernails. Gay men with female sexual identities in Mexico are a 'small, readily identifiable group.' Their female sexual identities unite this group of gay men, and their sexual identities are so fundamental to their human identities that they should not be required to change them. We therefore conclude as a matter of law that the 'particular social group' in this case is comprised of gay men with female sexual identities in Mexico." * * * Having so concluded, the court found that the hearing record fully supported Hernandez-Montiel's contention that he is a member of this group, and that the group is targeted for severe persecution within Mexican society. "Professor Davies testified that gay men with female sexual identities are recognized in Mexico as a distinct and readily identifiable group and are persecuted for their membership in that group. He testified that the police attack and even rape men with female sexual identities." Tashima went on to discuss rape is a method of persecution, and severely criticized the BIA for its handling of this aspect of the case, finding that the BIA apparently sought to blame the victim, having stated that Hernandez-Montiel's "mistreatment arose from his conduct... thus the rape by the policemen, and the attack by a mob of gay bashers are not necessarily persecution..." * * *

* It appears that the BIA was referring to his manner of dress and presentation as provocative misconduct, but Tashima found this to be pretty outrageous, writing: "The 'you asked for it' excuse for rape is offensive [*562] to this court and has been discounted by courts and commentators alike." Tashima concluded that Hernandez-Montiel had established past persecution, thus raising a presumption that he would be persecuted in the future if returned to Mexico, and that the INS had presented no evidence to rebut this presumption. Tashima was also scornful about the BIA's characterization of Hernandez-Montiel as dressing like a "male prostitute," finding there was no record testimony on this subject at all. * *

* Thus, the court concluded that Hernandez-Montiel is entitled to withholding of deportation and a grant of asylum status, allowing him to remain in the U.S., having concluded that the BIA's decision "is fatally flawed as a matter of law and is not supported by substantial evidence." * * *

In a comment that was widely quoted in the general press, Tashima wrote: "This case is about sexual identity, not fashion. Geovanni is not simply a transvestite 'who dresses in clothing of the opposite sex for psychological reasons.' American Heritage Dictionary 1289 (2d Coll. Ed.) (1985). Rather, Geovanni manifests his sexual orientation by adopting gendered traits characteristically associated with women." * * *

Judge Tashima was appointed to the 9th Circuit by President Clinton. The other members of the panel were Melvin Brunetti, appointed by President Reagan, and District Judge William Schwarzer, sitting by designation, appointed by President Ford, so this was not some far-out, left-wing panel, but actually a cross-section of ideological representation on the circuit. (Judge Brunetti, apparently uncomfortable with some of the wide-ranging dicta in Judge Tashima's opinion, concurred in the result with a separate opinion of one paragraph's length, merely stating his agreement that Prof. Davies' evidence "supports the legal conclusion that in Mexico, gay men who have female sexual identities constitute a particular social group for asylum purposes" and that the testimony by both Hernandez-Montiel and Davies established the other elements necessary to support the asylum and withholding of deportation claims. * * *

Hernandez-Montiel is represented pro bono by Robert S. Gerber of Sheppard, Mullin, Richter & Hampton, a San Diego law firm, with amicus assistance from Lambda Legal Defense & Education Fund, the National Center for Lesbian Rights, and the ACLU Lesbian and Gay Rights Project, as well as the International Lesbian and Gay Human Rights Commission. A.S.L.

September 2000: EUROPEAN COURT OF HUMAN RIGHTS FINDS PRIVACY RIGHT TO GROUP SEX: On July 31, in *A.D.T. v. United Kingdom*, Application No. 35765/97, a seven-judge Chamber of the European Court of Human Rights held that the conviction of a gay man for engaging in consensual, non-sado-masochistic, sexual activity (oral sex and mutual masturbation) with four other adult men in his own home violated Article 8 (right to respect for private life) of the European Convention on Human Rights. The applicant had hosted a sex party in his home and made a video of it, which police found while searching his home with a warrant. He was convicted of "gross indecency" between men, contrary to sec. 13 of the Sexual Offences Act 1956 (England and Wales), and given a conditional discharge

for two years. The sexual activity would have been legal under the Sexual Offences Act 1967 (England and Wales) but for sec. 1(2)(a): "An act which would otherwise be treated ... as being done in private shall not be so treated if done - (a) when more than two persons take part or are present ... " * * * Relying on obiter dicta in *Laskey v. United Kingdom* (1997) (which involved a video of group sado-masochistic sexual activity in a private home), the U.K. Government argued that the number of individuals present and the video recording [*563] took the sexual activity outside the scope of "private life." The Court disagreed, finding no "likelihood of the contents of the tapes being rendered public." The Court also held that the mere existence of the criminal legislation interfered with the applicant's right to respect for his private life under Article 8(1). Thus, even in the absence of a prosecution, he would have had standing to challenge the law under the Convention, as a group-sex enthusiast fearing prosecution. * * * The U.K. Government then argued under Article 8(2) that the interference was "necessary for the protection of morals or the rights or freedoms of others." There was a distinction between "intimate, private and therefore acceptable homosexual activity (between two men), and group, potentially public and therefore unacceptable homosexual activity (between more than two men)"; "the possibility of [group] activities being publicised is inevitable ... all the more where the activities are video taped," the U.K. government argued. The Court agreed that "at some point, sexual activities can be carried on in such a manner that State interference may be justified, either as not amounting to an interference with the [Article 8(1)] right ..., or ... for the protection of ... health or morals." But the applicant's activities "were with a restricted number of friends in circumstances in which it was most unlikely that others would become aware of what was going on," and the prosecution was "for the activities themselves, ... not for the recording, or for any risk of it entering the public domain." The Court concluded that, "given ... the absence of any public health considerations and the purely private nature of the behaviour ..., the reasons submitted for the maintenance in force of legislation criminalising homosexual acts between men in private ... are not sufficient to justify the legislation and the prosecution." * * * The Court declined to consider the question of discrimination under Article 14, in that group sexual activity between women or between men and women (as long as there are no sexual acts between two men) is legal in England and Wales. This would have been a far easier basis on which to decide the case, and would have postponed the question of an Article 8 right to engage in group sexual activity. However, following its practice of avoiding Article 14 whenever possible, the Court boldly continued down the road that U.S. Supreme Court Justice Byron White refused to take in *Bowers v. Hardwick* in 1986. Having already found an Article 8 right to private, consensual, adult sexual activity in *Dudgeon v. United Kingdom* in 1981, and excluded sado-masochistic sexual activity (causing injuries that are more than "trifling or transient") in *Laskey*, the Court extended the right to group sexual activity, or at least to groups of three to five. The Court reserved the right to draw a line somewhere between five and U.S. Supreme Court Justice Scalia's example in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) ("60,000 fully consenting adults crowded into the Hoosierdome to display their genitals to one another"). "Public health considerations" might be invoked in the context of a sauna or backroom, let alone a covered football stadium. * * * The "exception to the privacy exception" in the U.K. legislation is now effectively unenforceable, although its formal removal from the statute book will not take place until at least a year or two after the next elections (not expected before May 2001). The amendment required by the Convention will probably be included in a comprehensive reform of sexual offences legislation recommended in the Home Office's Sex Offences Review Team's consultation paper, published on July 26 (<http://www.homeoffice.gov.uk/new.htm>, views sought by March 31, 2001). Setting the Boundaries: Reforming the law on sex offences recommends the repeal of several offences in the Sexual [*564] Offences Act 1956: buggery (sec. 12) and gross indecency between men (sec. 13) (which appear under the heading "Unnatural Offences"), as well as assault with intent to commit buggery (sec. 16) and solicitation by men in a public place for an immoral purpose (sec. 32). The Review Team concluded that the criminal law "should not treat people differently on the basis of their sexual orientation. Consensual sexual activity between adults in private that causes no harm to themselves or others should not be criminal." As for "inappropriate sexual behaviour in public places, including public toilets," they recommended "a new [sex and sexual orientation neutral] public order offence to enable the law to deal with sexual behaviour that a person knew or should have known was likely to cause distress, alarm or offence to others in a public place." [This article was written by Robert Wintemute.]

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