

SUPREME COURT GRANTS REVIEW OF TEXAS SODOMY CASE; WILL CONFRONT QUESTION OF OVERRULING BOWERS V. HARDWICK

Granting a petition filed by Lambda Legal Defense Fund, the U.S. Supreme Court announced on December 2 that it will review the Texas Court of Appeals decision in *Lawrence v. State of Texas*, 41 S.W.3d 349 (Tex. Ct. App. 14th Dist., March 15, 2001), which concerns a constitutional challenge to the Texas sodomy law. The announcement immediately transformed the Court's current term into potentially the most significant for gay rights in the 21st century.

The grant of review is unusual, because it is rare for the Supreme Court to grant review in a gay rights case where the lower court decision went against the gay litigants. In this case, the Texas Court of Appeals ruled that the state's "Homosexual Conduct Law," Penal Code sec. 21.06, which makes it a misdemeanor for persons of the same sex to have anal or oral sex with each other, does not violate either the U.S. Constitution or the Texas constitution. The Supreme Court will consider only the federal constitutional issue.

The grant of review is also unusual in that the Court agreed to take on all three questions presented by Lambda, including specifically whether the Court should overrule its decision in *Bowers v. Hardwick*, 478 U.S. 186, the 1986 decision that rejected a constitutional privacy challenge to Georgia's sodomy law. (The Georgia law was subsequently declared unconstitutional under the state constitution by the Georgia Supreme Court.) The other two questions raised in Lambda's petition are whether the petitioners' convictions under the sodomy law violate the Equal Protection Clause or the right of liberty and privacy which the Court has found in past cases to arise under the Due Process Clause.

The case began on September 17, 1998, when a false report of a "weapons disturbance" led police officers to the home of John Lawrence. The officers found no weapons disturbance, but they did find Lawrence having sex with Tyron Garner, and arrested the two for violating the Homosexual Conduct Law. They were held overnight in jail, and ultimately each fined \$200 after pleading no contest when the trial court refused to hold the law unconstitutional. They appealed their convictions up

through the Texas court system, briefly winning a victory when a three-judge panel of the court of appeals voted 2-1 that the statute violates the state constitution. But that victory was quashed by the full bench of the court of appeals, and the state's highest criminal appeals court refused to take their appeal.

Lawrence and Garner have been represented from early in the case by Lambda Legal Defense, with local counsel Mitchell Katine of Houston. Participating on the Supreme Court appeal is the Washington, D.C., law firm of Jenner & Block, which is donating its resources, a crucial contribution for taking a case to the Supreme Court. Lambda's Legal Director, Ruth Harlow, is the lead counsel for the case.

The Texas sodomy law has probably been declared unconstitutional more times than any other, but somehow it always has seemed to spring back to life. In 1969, a gay man in Dallas, Alvin Buchanan, who had been arrested for public restroom sex, brought a federal lawsuit seeking a declaration that the sodomy law at that time a felony sodomy law authorizing a 2-15 year prison term for anybody convicted of engaging in oral or anal sex, regardless of their gender was an unconstitutional violation of the right of privacy. In those days, such a lawsuit called for the convening of a special three-judge federal district court, and Buchanan lucked out, drawing a relatively liberal trio of federal judges. They voted unanimously to find the statute unconstitutional, using privacy doctrines that had recently been developed by the Supreme Court in cases involving contraception to prevent pregnancy and private possession of pornography. But the state appealed, and while the case was pending before the U.S. Supreme Court, other legal developments led the Court to vacate the Buchanan decision on procedural grounds. *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D.Tex. 1970), vacated and remanded sub nom *Wade v. Buchanan* and *Buchanan v. Wade*, 401 U.S. 989 (1971).

Meanwhile, Texas legislators, reacting to the possibility that their sodomy law might ultimately be held unconstitutional, replaced it with a more modern law (as part of a general penal law reform) that totally decriminalized anal or oral sex for opposite-sex partners, and re-

duced the penalty for violation to a misdemeanor with a fine of up to \$200 (no jail time) for any unlucky same-sex couple who happened to get caught having sex.

This, of course, rendered Alvin Buchanan's lawsuit moot, since the law he was challenging had been repealed, and the case faded away. The issue did not disappear, however, because the mere existence of a sodomy law on the books provides a basis for state discrimination against gay people and for potential harassment by law enforcement.

A new organization, the Texas Human Rights Foundation, took up the struggle, first seeking legislative repeal of the sodomy law and then, when several attempts failed, filing a new lawsuit. Donald Baker, president of the Foundation, became the plaintiff in the lawsuit, filed in federal district court in Dallas. Luckily, the case was assigned to Jerry Buchmeyer, an unusually liberal federal district judge for Texas, who ruled on August 17, 1982, that the sodomy law violated both the right to privacy and equal protection of the law. Unfortunately, his decision was reversed on appeal by the U.S. Court of Appeals for the 5th Circuit. The Texas Human Rights Foundation appealed this ruling to the Supreme Court, at around the same time that the Court was dealing with *Bowers v. Hardwick*. The Court held up ruling on the Texas appeal to focus first on the Georgia case. After issuing the decision upholding the Georgia sodomy law, the Court announced that it would not review the Texas case. *Baker v. Wade*, 553 F. Supp. 1121 (N.D.Tex. 1982), app. dismissed, 743 F.2d 236 (5th Cir. 1984), rev'd en banc, 769 F.2d 289 (5th Cir. 1985), cert. denied, 478 U.S. 1022 (1986).

But lesbian and gay Texans would not give up the struggle. Twice during the 1990s the Texas courts faced new challenges to the sodomy law. In one case, a lesbian who sought to be a Dallas police officer, and was rejected on the ground that as a lesbian she was a "criminal," sued to have the sodomy law invalidated. In another case, the Foundation filed a new action in state court seeking a declaration that the law was unconstitutional. Both cases initially succeeded before the state court of appeals, but ultimately neither resulted in invalidating the law, because the state's supreme court concluded that the law could only be challenged in the context of a criminal proceeding culminating in the state's court of criminal appeals. *State v. Morales*, 369 S.W.2d 941 (Tex. 1994).

When Lawrence and Garner were arrested, the setting appeared ideal for a new constitutional challenge, since this was an actual criminal proceeding, with a conviction that could be appealed, directly presenting the constitutional

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

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

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

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issues to the state's criminal courts. Furthermore, there appeared to be no factual complications: two consenting adults were having sex in the privacy of one of their homes. No public sex or solicitation was involved. No minors were involved. No prostitution was involved.

While these Texas sodomy challenges were being played out during the 1990s and on into the new century, gay rights groups in other states were busy seeking repeal or judicial invalidation of sodomy laws. Although there were some setbacks, including repeated negative decisions from the Louisiana courts, there were many more successes. Sodomy laws were legislatively repealed in Arizona, Nevada, Rhode Island and the District of Columbia. Courts invalidated sodomy laws or rendered them practically unenforceable against private sex between consenting adults in Kentucky, Tennessee, Maryland, Minnesota, Massachusetts, Montana, Georgia, and Arkansas.

While about half the states maintained statutes that banned either all anal or oral sex or all same-sex intercourse when *Bowers v. Hardwick* was decided in 1986, by the time the Supreme Court decided to grant review in the Texas case on December 2, only 13 states still maintained such criminal penalties on the active statute books, and of those, only Texas, Kansas, Missouri and Oklahoma penalize same-sex conduct while allowing opposite-sex couples to engage in the same conduct. (The Kansas and Missouri statutes are currently being challenged in the courts in cases involving actual prosecutions.) All anal or oral sex remains criminal in Idaho, Utah, Louisiana, Mississippi, Alabama, Florida, South Carolina, North Carolina, and Virginia.

The Texas case arrives at the Supreme Court at a crucial time. The present Court includes four justices who seem most likely to vote to find the Texas law unconstitutional: Bill Clinton's two appointees, Ruth Bader Ginsburg and Stephen Breyer, the first George Bush's appointee, David Souter, and John Paul Stevens, the Gerald Ford appointee who wrote a dissenting opinion in the Georgia case in 1986. These four are generally considered the moderate wing of the court, and can usually be found voting in support of civil rights causes, affirmative action, and privacy claims.

Three members of the Court are generally considered unlikely to support any gay rights claim. Chief Justice William Rehnquist, appointed to the Court by Richard Nixon and elevated to the center seat by Ronald Reagan, voted in the majority in the Georgia case and has always voted against gay rights claims, most notably in *Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S.Ct. 2446 (2000), where he wrote the Court's opinion holding that the Boy Scouts have a constitutional right to exclude gay people from membership. Way back in 1977, in a case involving a claim for university

recognition by a gay student group, Rehnquist, dissenting from the court's refusal to review a pro-gay lower court decision, likened homosexuality to measles and said the state had a right to quarantine such contagious conduct by suppressing meetings of homosexuals on state college campuses. *Ratchford v. Gay Lib*, 434 U.S. 1080 (1977). A vote by the Chief Justice to strike down the Texas law would be a major surprise.

Similarly unlikely would be pro-gay votes from Antonin Scalia, appointed to the Court by Ronald Reagan and widely-rumored to be a potential future chief justice if William Rehnquist retires during the next two years. Scalia heartily approves of the ability of states to discriminate against gay people, and clearly endorses the Georgia sodomy law ruling, most notably in his impassioned dissenting opinion *Romer v. Evans*, 517 U.S. 620 (1996), in which the Court struck down the anti-gay Amendment 2 from Colorado. Justice Clarence Thomas is also unlikely to cast a vote against the Texas law. An appointee of the first President Bush, he has routinely agreed with Scalia and Rehnquist in every gay rights case that has come before the Court over the past decade, although he's never actually written an opinion in a gay rights case.

That leaves the two swing voters in the middle, Sandra Day O'Connor and Anthony Kennedy, who could go either way on this case. Both appointees of Ronald Reagan, and both frequently allied with their more conservative colleagues, O'Connor and Kennedy have on occasion sided with the moderate wing, most notably in *Planned Parenthood v. Casey*, 505 U.S. 2791 (1992), in which they collaborated with Justice Souter on an opinion reaffirming the right of women to choose to have an abortion during the early stages of pregnancy. In that case, Kennedy, O'Connor and Souter recognized that the Due Process Clause of the 14th Amendment protects women's rights in this connection, but they never characterized the right involved as a right of privacy. Instead, they emphasized that the personal autonomy involved in controlling one's own body was an aspect of liberty, which is expressly protected by the Due Process Clause. In so doing, they included language about personal choice and autonomy that should prove quite helpful to Lawrence and Garner in their challenge of the Texas law.

In addition, for those reading tea leaves, Justice Kennedy wrote, and Justice O'Connor joined, the Court's opinion in *Romer v. Evans*. Although O'Connor joined the majority opinion upholding the Georgia sodomy law in 1986, and was also in the majority (together with Kennedy) in the *Boy Scouts* case, it appears that her views in that case do not preclude accepting a gay rights argument in an equal protection case, and the Texas sodomy case, by focusing on a law that prohibits gay people from engaging in the

same conduct that is allowed for non-gay people, presents a clear equal protection issue.

Justice Kennedy was appointed to the Court in 1987, replacing the man who cast the deciding vote in the 1986 sodomy case, Lewis F. Powell, Jr. Gay rights groups looking at Kennedy's prior record as a judge on the U.S. Court of Appeals for the 9th Circuit noted that he had written an opinion upholding the discharge of some gay sailors, but that in the course of that opinion he had expressed sympathy for the view that sodomy laws raise serious constitutional concerns. *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981). His opinion for the Court in *Romer v. Evans* left many observers puzzled, for the opinion never addresses *Bowers v. Hardwick*. Although Kennedy sided with the Boy Scouts against James Dale, there is some hope that he will find the equal protection claim in the Texas case to be a logical extension of ideas he endorsed in *Romer*.

A crucial concern now is that all of the moderate justices remain on the court through the argument and decision of this case, in light of President Bush's announced intention to appoint people similar to Scalia and Thomas if given the chance. Particular concern focuses on Justice Stevens, the oldest of the sitting justices and the only one now on the Court who voted in 1986 to find the Georgia sodomy law unconstitutional, remain on the Court through the scheduled argument in April and decision of the case in May or June. Stevens has given no indication of intending to retire, and is apparently in good health. If he finds himself in the majority, Stevens will have the authority to designate the author of the opinion striking down the law. It would be poetic justice, indeed, were he to be in a position to write an opinion vindicating the views he expressed in 1986. A.S.L.

LESBIAN/GAY LEGAL NEWS

New York State Bans Sexual Orientation Discrimination

On December 17, the New York State Senate voted 34-26 to approve the Sexual Orientation Non-Discrimination Act (SONDA), a measure that had been pending in the state legislature for 31 years, and that had repeatedly been approved by the State Assembly over the past decade. Within hours of the vote, Governor George Pataki (Rep.) signed the bill into law. It will take effect on January 16, 2003.

The law amends the state's Human Rights, Civil Rights and Education Laws to insert the term "sexual orientation" into every list of prohibited grounds of discrimination contained in those laws. Thus, in the Human Rights Law, which is codified as New York Executive Law

Sections 291–296–a, the law bans discrimination on account of sexual orientation in employment, housing, public accommodations, and credit. In New York Civil Rights Law sec. 40–c, the law bans discrimination in civil rights or any harassment in the exercise of civil rights by any person, firm, corporation, institution or government body. In the New York Education Law, sec. 313, the law bans discrimination in educational opportunity by non-sectarian educational institutions that are tax-exempt.

Passage of the law makes New York the 13th state to enact a law banning sexual orientation discrimination. New York's law is broader than most in extending the ban to general civil rights protection, and the provisions of New York's Human Rights Law are generally recognized as being broader in effect than the comparable laws in most other states. On the other hand, it is narrower than the laws of Minnesota and Rhode Island in not expressly banning discrimination based on gender expression or identity, and the omission of express protection for transgendered persons became a major issue prior to passage. Introducing a note of suspense into the process, State Senator Thomas Duane, a Democrat representing a district on the West Side of Manhattan, had introduced an alternative bill that included such protection, but his attempt to substitute it for the main bill drew no Republican votes in the Senate and only 19 votes from Democrats. Had the Duane bill passed, the overall measure would have died for the session unless the Assembly agreed to reconvene and pass it, an event widely seen as unlikely. (There was some argument that the proposed amendment was unnecessary because transgendered persons could claim protection under existing provisions of the law, including disability and sex, but New York case law at the state level is scanty. A recent New Jersey appellate decision did find protection against discrimination under a similar statutory scheme, however, in

Although a majority of New York residents were already covered to some degree by municipal or county laws banning sexual orientation discrimination, passage of the statewide law was seen as most needed in those parts of the state, primarily rural and more conservative, where such laws were lacking. In addition, some of the county and local laws lacked any significant enforcement mechanism. By contrast, the state law authorizes, alternatively, proceedings before the State Division of Human Rights or direct suit in the State Supreme Court on charges of discrimination. (The administrative alternative is avoided by many due to the delays inherent in dealing with the understaffed administrative agency, an issue that gay rights advocates are expected to press in the next legislative session.) A.S.L.

Louisiana Appeals Court Holds That Sodomy Law Does Not Violate State Constitution

As reported last month, the Louisiana 4th Circuit Court of Appeal ruled on Nov. 20 that La. R.S. 14:89, the state's Crime Against Nature Statute, is constitutional. The court's opinion was not yet available when our December issue went to press, but is now available as *Louisiana Electorate of Gays and Lesbians, Inc. v. State of Louisiana*, 2002 WL 31667973, but the dissenting opinion of Judge Charles R. Jones has not yet become available.

This long-running case, which has been before the state's supreme court several times, was now before the court of appeals on the non-privacy constitutional claims. The trial judge, Carolyn Gill-Jefferson of Orleans Parish Civil District Court, had ruled that the statute violates the state constitutional right of privacy, but did not violate any other constitutional provisions. Her decision on privacy had been vacated by the state supreme court in light of its opinion in *State v. Smith*, 766 So. 2d 501 (2000), which had rejected a privacy challenge to the statute brought by a man who was convicted of engaging in "crime against nature" with a woman to whom he was not married. The supreme court had then sent the case back to the court of appeals to deal with the plaintiffs' appeal of Judge Jefferson's refusal to find any other constitutional violation.

Much of the opinion by Judge David S. Gorbaty is taken up with rejecting plaintiff's assignments of error concerning evidence excluded or admitted by Judge Jefferson during the trial. In effect, she rejected their attempt to make the trial a wide-ranging inquiry on the history and effect of sodomy laws on gay people. Her insistent position throughout the trial was that the law criminalizes specific acts, regardless of the gender of the participants, and any particular impact that the law has on gay people was viewed as irrelevant. For Judge Jefferson, the case was resolutely focused on privacy and nothing else. Among other things, she excluded an attempt to introduce testimony from a state legislator, Edwin Murray, who would have testified to statements by other legislators that any attempt to repeal the sodomy law would fail "for anti-gay reasons." She also rejected arguments that the existence of the law put gay people at a political disadvantage, making comments based on reports in the local gay newspaper in New Orleans about gay political demonstrations and the like.

Finally coming to address the plaintiffs' argument that the sodomy law discriminates against gays, Judge Gorbaty quoted extensively from the state supreme court's decision in an earlier sodomy law challenge, *State v. Baxley*, 656 So. 2d 973 (1995), in which the court found that on the face of the statute there is no "legislative classification." "To the contrary,"

wrote the *Baxley* court, "the statute, on its face, is neutral. It applies equally to all individuals — male, female, heterosexual and homosexual. The statute punishes *conduct* — solicitation with the intent to engage in oral sex or anal sex for compensation." (Baxley was being prosecuted on a charge of having offered an undercover cop money to engage in oral sex.) "The statute does not single out gay men or lesbians for punishment." The *Baxley* court did indicate that a facially neutral statute could be challenged as discriminatory when it was shown that the legislature enacted it with discriminatory intent, but that no such evidence had been introduced in that case.

Wrote Gorbaty, "Likewise, in the trial of this case, discriminatory purpose by the lawmaking body was not proven." Gorbaty asserted that Rep. Murray's testimony would have been insufficient to this point, since he was only planning to testify about comments of individual legislators concerning possible repeal of the law. Gorbaty insisted that the relevant evidence would have to show the intent of the legislative body that enacted the law.

Gorbaty also upheld Jefferson's finding that the sodomy law had not inhibited lesbian and gay political activity, and that the penalty provided was not unconstitutionally severe, noting that it was less than imposed in some other states, although greater than others. Gorbaty also rejected the idea that the statute could be attacked as a bill of attainder, pointing out that measures, outlawed in the U.S. Constitution, are statutes that specifically impose punishment on named individuals without a trial, which the sodomy clearly does not do.

Further appeal to the Louisiana Supreme Court is possible. As noted above, a dissenting opinion is still due from Judge Jones. A.S.L.

Canadian Supreme Court Finds Exclusion of Gay Books Unlawful

The Supreme Court of Canada ruled on Dec. 20 that a local school board in British Columbia violated the law by refusing to approve three books depicting same-sex couples raising children for use as supplementary reading in kindergarten and first grade classes. *Chamberlain v. Board of Trustees of School District No. 36 (Surrey)*, 2002 SCC 86, File No. 28654, highlights the commitment to equality and respect for family diversity that has come to characterize public education in many parts of Canada.

The Court was interpreting the British Columbia School Act, which states that the purpose of the school system "is to enable all learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and prosperous and sustainable economy." The Act sets up a system by which there is an approved list of books to be

used in the schools, but teachers can request approval of supplementary materials. The ministry of education has issued guidelines to govern curricular planning that include a section on "gender equity" that states that "all students have the right to a learning environment that is gender equitable," and that this "incorporates a consideration of social class, culture, ethnicity, religion, sexual orientation and age."

The case arose in December 1996 when James Chamberlain, a kindergarten teacher, asked for approval of three books for use in his class, all of which depicted same-sex partners raising children. His principal had instructed him that he could not use the books unless they were approved by the elected School Board. On April 10, 1997, after much debate, the Board adopted a resolution, later quashed, that rejected the use of resources that a group of gay teachers had sought to donate to the schools. Then the superintendent of schools passed on, without recommendation, Chamberlain's request for approval of the three books. The ensuing board discussion focused on the potential controversy among parents whose own religious and moral views disapproved of homosexuality and same-sex parents raising children, and the desire to avoid such controversy, and paid no attention to the mandates of the education law on tolerance, respect, inclusion and diversity. The board passed a resolution disapproving the use of the books.

Chamberlain brought the matter to court. The British Columbia Supreme Court quashed the Board's resolution, finding it offended the Schools Act. The Canadian Court of Appeal set aside this decision, finding the board had acted within its jurisdiction. The Supreme Court sided with the British Columbia court in a lengthy decision by Chief Justice McLachlin, which held that the Board's decision was unreasonable in light of the policies expressed by the Schools Act.

McLachlin pointed out three errors in the Board's decision. First, it violated the principle that curricular decisions in the schools were supposed to be based on principles of secularism and tolerance, and not to cater to the religious views of some parents at the expense of others. Second, the Board's decision failed to consider the needs of same-sex families to have their kindergarten-age children receive appropriate instruction about their families' place in Canadian society. Third, the decision ignored the criteria for selecting curriculum specified in the School Act, where the curriculum states "that children at the K-1 level should be able to discuss their family models, whatever these may be, and that all children should be made aware of the diversity of family models that exist in our society."

"The Board did not consider this objective," wrote McLachlin. "Indeed, the Superintendent, whose views appear to have guided the

Board, took the view that unless the curriculum expressly required that same-sex parented families should be discussed, the Board need not inquire into the relevance or suitability of the books as learning resources. This was an erroneous interpretation of the School Act and the Ministerial Orders, as well as of the Board's own general regulation on selection criteria."

The Court also rejected the Board's argument that such materials were not age-appropriate for kindergartners. "Tolerance is always age-appropriate," insisted McLachlin. A.S.L.

California Supreme Court Rejects Parole for Rosenkrantz

In an important decision setting the standards for evaluating a refusal by California's governor to approve a recommendation for parole by the Board of Prison Terms, the California Supreme Court announced Dec. 16 that it would uphold Gov. Gray Davis's refusal to allow Robert Rosenkrantz out on parole. *In re Robert Rosenkrantz*, 2002 WL 31802385.

Rosenkrantz, a gay man, was convicted of second degree murder in 1986. The murder itself occurred on June 28, 1985, when Rosenkrantz was 18 years old and had just graduated from high school. Rosenkrantz had already figured out that he was gay, but was trying to keep the fact secret from his family, because he anticipated their disapproval. However, he had managed to make contact with other gay people, and his conduct aroused the suspicions of his younger brother, Joey, then 16, and Joey's friend Steven Redman, then 17.

Joey learned by eavesdropping on Robert's telephone conversations that he and a male friend would be meeting at a beach house owned by the Rosenkrantz family on the evening of the high school graduation. Joey and Steven went out to the beach house to "investigate," and came upon a party scene where Robert and another man were in a bedroom of the house. Joey and Steven broke into the house and an altercation ensued, during which Robert threatened to kill them if they told his father that he was gay. Robert's father ended up on the scene after a call from Joey, and concluded Robert was gay due to remarks made by Steven.

Robert ended up sleeping in his car for the next week, trying to get Joey and Steven to tell his father that he was not gay and they were mistaken. He purchased an UZI, practiced at a shooting range, and staked out Steven's home after Steven refused to recant in some phone calls initiated by Robert. Finally Robert confronted Steven personally with the gun, and when Steven refused to agree to recant his story, shot him ten times. Robert then fled with the UZI and did not surrender to police for several weeks.

A jury convicted him of second-degree murder, evidently concluding that the prosecution had not proved beyond a reasonable doubt that he had planned the confrontation with Steven to be a murder, but that he had intentionally killed Redman in the course of their confrontation. He was sentenced to 15 years to life in prison. According to his petition for parole, Robert has been a model prisoner, has reconciled with his family, has accepted responsibility for what he did, and has almost completed all the requirements for a bachelors degree.

Rosenkrantz first applied for parole in 1994, setting off a chain of rulings and appeals and reconsiderations much too lengthy to describe here. Ultimately, however, this final appeal to the California Supreme Court came down to the question whether Governor Davis, by rejecting the most recent decision of the Board to allow Rosenkrantz out on parole, violated Rosenkrantz's right to due process of law under the Constitution.

In 1988, two years after Rosenkrantz's conviction, an amendment to the California constitution took away the unreviewable discretion of the Board to grant parole, giving the governor the right to reject or modify a parole decision. Part of Rosenkrantz's argument to the Supreme Court was that the governor should have no role to play in his case because he was convicted at a time when the Board's discretion was not subject to review by the governor. A majority of the Court, in an opinion by Chief Justice Ronald George, quickly rejected this argument, finding a large body of precedent to support the view that the relevant time for confronting this issue is when a prisoner petitions for parole, not when he was sentenced.

Two members of the court, Justices Chin and Kennard, disagreed, dissenting on this point and arguing that the Board's approval of the parole petition should be considered final.

More significantly, however, the Court found, contrary to Governor Davis's argument, that his decision whether to approve, modify or disapprove a grant of parole by the Board, is subject to judicial review. Davis had been arguing that the constitutional amendment essentially gave him unreviewable authority to make a final determination on parole, but the court concluded that this would violate the amendment, since it has been held to require the governor to make an individualized assessment of each case. This clearly implies that the governor may not adopt a uniform policy against approving parole for particular crimes, and that there must be at least some evidence in the factual record to support the conclusions upon which the governor relies in making his decision.

These rulings were significant in the case of Rosenkrantz, who had argued that Davis has unconstitutionally adopted a policy of blanket refusal to parole anybody convicted of murder. Davis has denied adopting such a blanket pol-

icy, and has actually agreed to parole two women who were convicted of murder for killing their wife-battering husbands. More to the point, however, Davis issued a twelve-page decision in Rosenkrantz's cases that includes a detailed analysis of the facts (some disputed by Rosenkrantz), which the court found provided sufficient evidentiary support for enough of Davis's conclusions to warrant letting the parole refusal stand.

Davis concluded that the evidence would have supported a first-degree murder verdict, and that Rosenkrantz was lucky that the jury convicted him only on second-degree murder, resulting in a shorter minimum length to his sentence. Davis emphasized that Robert shot Steven ten times, including several shots to the head late in the sequence, that he went on the lam for several weeks, during which he boasted of his exploit and had himself photographed flaunting the UZI. He continued to carry the UZI and hundreds of rounds of ammunition during his wanderings. Rosenkrantz's statements about the crime exhibited, in Davis's view, a lack of full acceptance of responsibility and continuing to blame the victim for his own death. Davis specifically found that whatever trauma Robert experienced from Steven's actions did not justify the extreme response, and that Robert's whole course of behavior suggested he presented a serious risk to society due to his willingness to resort to violence as a solution to a traumatic situation.

The court did find that Davis's conclusion that Rosenkrantz had lied about various aspects of the case in order to build sympathy for his parole petition was not supported by any evidence, but found that Davis's other conclusions were sufficient to justify his final statement that Rosenkrantz had not served enough prison time in light of the nature of the crime.

The case has become a cause celebre in the California gay community, but at this point it seems unlikely that Rosenkrantz can expect to win parole without serving some substantial additional time. Despite political pressure on Davis to change his view of this case, he has stood firm throughout and appears unlikely to back down any time soon. A.S.L.

California Appeals Court Sustains Restraining Order Against Homophobic Neighbor

A California Court of Appeal panel has upheld the validity of a civil restraining order that was issued against a Santa Rosa woman for harassing her neighbors with homophobic epithets and other menacing conduct. *Quick v. Bond*, 2002 WL 31689723 (Dec. 2). The unanimous panel concluded that "although the behavior in this case may not seem terribly egregious," the evidence presented to the trial court was sufficient to establish that defendant Susan Bond had engaged in willful harassment.

Bond lives on a cul-de-sac in a house adjacent to a gay couple, Patrick Quick and Tony Tam. In June 2001, Quick, Tam and two of Bond's other neighbors petitioned the court for an injunction against Bond, including a personal-conduct and stay-away order, based on complaints that Bond routinely harassed and annoyed them with escalating verbal abuse. Bond was accused of instigating fights with her neighbors on a regular basis and using "profane and homophobic remarks." According to the plaintiffs, on one occasion Bond referred to Tam as a "Chinaman," "a piece of shit," "a gay guy" and a "monkey." In response to the petition, Bond maintained that the plaintiffs provoked all of the alleged incidents of harassment.

The court held a hearing in September but continued the matter until December pending a ruling. During the ensuing months, Bond's conduct continued unabated, and the plaintiffs filed supplemental declarations detailing the ongoing abusive behavior. Ultimately, the court ordered that Bond stay 25 yards away from the plaintiffs and their residences for a year. (As to one neighbor whose property abutted Bond's directly, the court narrowed the scope of the restraining order to 5 yards after Bond filed a motion for reconsideration.)

On appeal, Bond argued that the facts presented to the trial court did not rise to the level of willful harassment, and that it was improper as a matter of law to have issued a restraining order against her. Writing for the unanimous appellate panel, Judge Ruvolo disagreed, concluding that each element of harassment under section 527.6 of California's Code of Civil Procedure had been satisfied. (Harassment is defined as "unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose." Under the statute, "the course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff.") Bond referred to her encounters with her neighbors as mere "unpleasantries," taking the position that the plaintiffs had not demonstrated they actually had suffered emotional distress. The court rejected this argument out of hand, noting that the plaintiffs had all presented evidence, credited by the court below, that they believed their personal safety to be threatened, feared further escalation of Bond's harassment, and were afraid to go outside of their homes if any member of the Bond family was present.

The court expressly rejected Bond's argument that the restraining order interfered with her purported federal and state constitutional right to "enjoy her property," but ruled that

Bond could not be enjoined from calling the police about the plaintiffs' own alleged conduct.

Cases like this one offer a reminder to practitioners that where harassing and homophobic conduct is pervasive and sufficiently egregious, and actually interferes with a client's day-to-day living, civil protection orders may offer some legal protection and respite. *Ian Chesir-Teran*

Scouts Lose Suit Against Berkeley to Keep Free Marina Privileges

In an unpublished opinion, a California Court of Appeal upheld enforcement of a policy, enacted by the city of Berkeley in 1997, which forbids the city from subsidizing the activities of private groups that discriminate based, inter alia, on sexual orientation or religion. The Sea Scouts, a group chartered by the Boy Scouts of America (BSA), argued that enforcement of the policy violated their First Amendment and equal protection rights, and also violated contractual rights. *Evans v. City of Berkeley*, 2002 WL 31648768 (Cal.App. 1 Dist., Nov. 25).

Berkeley Marina rents berths to the public for a fee. In 1945, the city council granted a subsidy to the Sea Scouts in the form of the free use of a berth and mooring facilities for seven boats at the marina, revocable on thirty days notice. A later resolution expanded the free facilities provided to the Scouts. In May 1998, Berkeley notified the Sea Scouts that, pursuant to the 1997 resolution, their free rental would be discontinued unless they expressly abandoned any policy of discriminating against non-heterosexual people or atheists. The Scouts would still be able to rent facilities at the marina. The Scouts counter-offered a "don't ask, don't tell" policy, stated that they would obey any laws actually forbidding them from engaging in any illegal discrimination, and claimed that past scouting participants who were atheists or "had presumably not been heterosexuals" were not discriminated against. However, the Scouts could not agree to Berkeley's nondiscrimination policy without facing revocation of their BSA charter. The Sea Scouts would then lose the favorable rates they were able to obtain, through the BSA, on marine insurance coverage.

The Scouts, bolstered by amicus briefs from the Pacific Legal Foundation and the Pacific Justice Institute, brought suit alleging infringement of their rights to free speech and free association, and breach of contract. As the city did not attempt to order the Scouts to cease discrimination, nor seek to deny access to a public forum or public benefits, the court held these arguments without merit. Under both California and federal precedents, Judge Stevens wrote, "it has uniformly and repeatedly been held permissible to condition a public subsidy on compliance with nondiscrimination policies." One

of many examples cited was the decision in Bob Jones University's 1983 suit for tax subsidies. The Scouts claimed that their equal protection rights were violated, but the court found that the Scouts are not similarly situated to other non-profit groups, which agree to comply with Berkeley's policy and therefore qualify for the subsidy. Rather, they were treated the same as other private parties who rent marina space and need not agree to comply with the nondiscrimination policy.

Contractual and estoppel claims against the city were similarly found to be without merit. One wonders if the \$433 per month rental, now paid to the marina, that the Sea Scouts would save by agreeing not to discriminate, less the added cost of market-priced marine insurance, would make leaving the BSA the economic decision. *Mark Major*

Connecticut Court Rules for Same-Sex Parental Visitation Right

In what may be the first case to consider the impact on second-parent visitation rights in Connecticut since the state's Supreme Court cut back on visitation rights of "third parties" in *Roth v. Weston*, 259 Conn. 202 (2002), Judge Joseph W. Doherty of the Superior Court ruled that Nancy Lavoie is entitled to a visitation schedule with the two children she was raising with her former partner prior to their break-up. *Lavoie v. MacIntyre*, 2002 WL 318299064 (Conn. Super. Ct., Nov. 26, 2002) (not officially published).

The case presents a typical scenario for such disputes. The women were partners for several years and had two children conceived through donor insemination. Because Lavoie's ability to have children had been surgically eliminated prior to the women's relationship, after Lavoie bore two children in a prior relationship, MacIntyre was the birth mother for both. Lavoie participated fully in planning for the pregnancies, assisting, and participating at all relevant steps, and birth announcements issued for the children identified both women as parents. They shared child-raising responsibilities. After the relationship split up, there was at first an agreed-upon visitation schedule, but after six months MacIntyre started curtailing Lavoie's visitation, ultimately shutting her out entirely. Lavoie filed suit seeking a court-ordered visitation schedule.

Prior to *Roth*, this could have been an easy case, since the relevant Connecticut statute authorizes any person to seek visitation who can show that it would be in the best interest of the child. But in *Roth* the state supreme court substantially cut back on the statute's interpretation in order to avoid constitutional questions raised by the Supreme Court's decision in *Granville v. Troxel*, 530 U.S. 57 (2000), in which the Court struck down a state of Washington

statute that made visitation rights relatively freely available to third parties, even over the protests of parents. Reinterpreting the Connecticut law, the *Roth* court found that only those in quasi-parental relationships with children could seek visitation, and then only if it could be shown that the children would be harmed by the absence of such visitation. The court also required that these things be shown by clear and convincing evidence, the highest standard of proof in a civil case.

Judge Doherty found that these requirements were met, as they typically would be in cases of this sort. "There is no doubt," he wrote, "that the plaintiff, Lavoie, had and has a 'parent-like' relationships with each of the two children and that she has acted in a parental type of capacity to these children..." He also recited the expert testimony offered by a child psychologist that denial of visitation would cause "significant and substantial psychological damage to the children," who had bonded with Lavoie as one of their parents. The court's family relations officer also testified and filed a written report indicating that the loss of Lavoie in the children's lives could have a "traumatizing effect" on them. MacIntyre offered "no credible evidence" about why Lavoie should be denied visitation. Judge Doherty found that MacIntyre was angered at the termination of the relationship and was denying visitation in order to punish Lavoie. "That, in and of itself," he wrote, "constitutes an abuse of the children."

Doherty found that these conclusions were all supported by clear and convincing evidence. "The facts of this case are very unique and equally compelling," he wrote. "The plaintiff is a party who has all but given birth to these children, literally, and has given birth to them vicariously, as indicated by the unrefuted facts concerning her involvement with the children before, during and after their births. She is held out and perceived by family, friends, professionals and especially the children themselves as being their parent. No credible evidence was offered to establish that the denial of visits was necessary, warranted or in any way done in the best interests of the children."

Doherty concluded that the visitation schedule proposed by the family relations officer in her report should be adopted, with a slight modification involving upcoming Thanksgiving arrangements shortly after the opinion was to be issued. He also indicated that the parties, including the guardian ad litem appointed to represent the children's interests, were free to mutually agree to modifications in the schedule.

Nancy Lavoie is represented by the firm of Murphy Murphy & Nugent of New Haven. David Ball of Danbury represents MacIntyre. The guardian ad litem is Dale Galbo of Newton. A.S.L.

Court Upholds Peremptory Challenge to Gay Potential Juror

A prosecutor's use of a preemptory challenge against a juror who appeared to be gay did not violate a criminal defendant's constitutional rights, according to a panel of the California Court of Appeal, ruling in *People v. Payne*, 2002 WL 31732695 (Dec. 6, 2002).

Darvon Theon Payne was found guilty of five counts of attempted murder with an enhancing allegation that the crime had been committed for the benefit of a criminal street gang. In addition, Payne was found guilty of street terrorism with enhancement for use of a firearm. On appeal, Payne challenged the verdict, alleging, among other things, that the prosecutor improperly used his preemptory challenges to remove prospective jurors solely for a presumed bias based upon membership in an identifiable group. During voir dire, Payne raised objections to two of the prosecutor's preemptory challenges. The first involved a man who appeared to be gay. The second involved an African-American woman.

When objecting to a preemptory challenge based upon bias, the defendant must make a prima facie showing of purposeful discrimination on the part of the prosecutor. Once this prima facie case is made, the burden shifts to the prosecutor to establish a valid, nondiscriminatory reason for challenging the juror. With respect to the two challenged jurors at issue here, Payne made a prima facie showing of bias on the part of the prosecutor. However, the court below found that the prosecutor justified his challenges with nondiscriminatory reasons.

With respect to the juror who appeared to be gay, the prosecutor explained that he was concerned about the juror's "flamboyant" appearance. The juror appeared in court with a pierced lip, pierced ears and a sleeveless shirt. The prosecutor also stated that he had spoken with the potential juror's sister (who, coincidentally, worked in the district attorney's office) and learned that he was a social worker who had been involved in the Shanti Project in San Francisco. The potential juror worked in the AIDS area, counseling young men on prevention of transmission. Most of the people the potential juror worked with were approximately 20 years old, the same age as Payne. Most of the people the potential juror worked with were underprivileged and at a higher risk of getting into trouble with the criminal justice system.

The trial court overruled the objection to the preemptory challenge of the gay juror and the Court of Appeal affirmed. In California, it is well-settled that a prosecutor does not violate the defendant's constitutional rights by challenging a juror who works as a social worker and who, by virtue of his job, may be unsympathetic to the prosecutor's case. However, in this instance, Payne argued that the prosecutor's

statements actually reflected a impermissible stereotyping of gay men and therefore violated his constitutional rights. *United States v. Bishop*, 959 F.2d 820 (9th Cir. 1992). However, unlike *Bishop*, in which the prosecutor had challenged an African American juror based upon the community in which she lived, the court found the present situation distinguishable. Here, the prosecutor stated a neutral reason for his challenge, the potential juror's work as a social worker with young, underprivileged men. The prosecutor's comments did not necessarily apply to all gay men. Based on this, the Court of Appeals affirmed the decision of the court below.

Similarly, the prosecutor's challenge to the African American woman was found to be non-biased because the woman had children who were 15 and 19, lived in an area notorious for gangs, and indicated that she knew nothing about gang activity. The prosecutor opined, and the court agreed, that the juror's lack of knowledge about gangs was inconsistent with being a mother of children, 15 and 19, living in an area known for gangs. The court found it was reasonable to infer from the circumstances that the potential juror may have been pressured by her community to make statements that were not necessarily true in order to get on the jury. Payne's other challenges to the verdict including prosecutorial misconduct and misapplication of the three-year enhancement for crimes committed for the benefit of street gangs, were found to be equally unpersuasive by the court. The verdict was affirmed. *Todd V. Lamb*

Scouts Can Recruit in Oregon Schools — For Now

The Court of Appeals of Oregon rejected a mother's challenge to a public school district's practice of facilitating Boy Scouts of America (BSA) recruiting activities on school property during and after school hours, concluding that such practice didn't violate constitutional and statutory prohibitions against governmental establishment of religion. *Powell v. Bunn*, 2002 WL 31761255 (Or.App., Dec. 11, 2002).

When Nancy Powell's son was in first grade, his teacher gave him a flyer advising "Get in on the fun. You can join now!" and depicting boys playing sports, camping, practicing archery, flying kites and making crafts. A month later, a lunch-hour presentation in his school cafeteria interested Remington Powell enough to take home a wristband advising him to "Come Join Cub Scout Pack 16" at the school that evening. On investigation however, Nancy Powell learned that her son, an atheist, was not eligible for BSA membership, which requires a belief in God and an Oath to honor one's duty to God. A "Declaration of Religious Principle" in BSA bylaws calls for "recognition of God as the ruling and leading power in the universe and the grateful acknowledgement of His favors and blessings," and a Religious Emblems Program

allows a scout to distinguish his uniform with one of fifteen symbolic badges.

Powell pursued an administrative remedy, complaining to the public schools superintendent about the perceived violation of an Oregon statute that would deny funding to a school district which "sponsors, financially supports, or is actively involved with religious activity." The superintendent declined a hearing, concluding that there was no substantial basis to believe that the district was impermissibly involved with religious activity. Powell then sought judicial review, and an injunction to prevent the district from allowing BSA recruitment on school grounds. On summary judgement, The Multnomah County Circuit Court rejected Powell's allegation that the district's practice of allowing such recruitment violates the Oregon Constitution's prohibition against establishment of religion. Powell has since had her son transferred to a school where the BSA has not actively recruited.

The Court of Appeals first resolved the question of Powell's standing to challenge the school district's policy, citing the principle that a taxpayer has a sufficient interest or injury-in-fact to challenge governmental expenditures on establishment of religion grounds, apart from Powell's "special burden to avoid" interference with her right to raise her son free of religion.

Then the court, in agreement with the district, found itself bound by the 1976 *Eugene Sand & Gravel* case to use the U.S. Supreme Court's test from *Lemon v. Kurtzman* to determine the constitutionality of government action under Oregon's equivalent of the First Amendment Establishment Clause. Powell alleged that the appropriate test was articulated by the Oregon Supreme Court in a 1992 case, *Priest v. Pearce*. The court noted that the Oregon Supreme Court had expressed its willingness to reexamine its holdings in prior cases where the Priest interpretative methodology was not used, "but the fact that the Supreme Court is free to revisit its own precedents ... does not mean that we may do so ... the Supreme Court has never overruled *Eugene Sand & Gravel*." The court then decided that the district's policy satisfied all three *Lemon* prongs: the secular purpose of community group enrichment of the students, the advancement of religion as a merely secondary effect, and no excessive government entanglement because no "day-to-day relationship." In conducting its analysis, the court focused on the economic extent of the school's support of the BSA, not considering the apparent endorsement enjoyed by the BSA recruitment message due to its presentation within the school environment, a platform which mandates student attention. The court was also unimpressed by the BSA's characterization of itself in other litigation as a religious organization.

It is unclear whether Nancy Powell could obtain a different result on appeal. If applied, the Priest methodology calls for analysis of the text, historical circumstances, and any case law germane to the constitutional clauses. In any event, no amici are noted in the opinion; presumably the cost of this litigation has been borne by Nancy Powell. (Compare "Legislative Notes" for Oregon, this publication, Nov. 2002.) *Mark Major*

Minnesota Appeals Court Rips Another Hole in Protection Against Discrimination

The Minnesota Court of Appeals ruled in *Doe v. City of Minneapolis*, 2002 WL 31819236 (Dec. 17) (not officially published) that public officials and, vicariously, the government itself, is immune from suit under the state's Human Rights Act for discrimination that is not wilful or malicious. The ruling in effect excused the Minneapolis Police Department from accommodating the needs of a transgendered employee.

The John Doe plaintiff was hired by the Department as an openly transgendered person, genetic female to male, who was in the midst of treatment to effect the gender change. Doe's treating professionals recommended that he live as a male, including that others refer to him using male pronouns and that he use male restrooms and shower facilities.

Doe and his lawyer initiated discussions with the police department to work out these accommodations, but after many meetings and internal consultations, and advice of counsel to the police department, the department decided it was unable to make the requested restroom accommodation, and Doe resigned in March 2000, claiming that he had been constructively discharged when he was assigned to a shift in which no unisex bathroom was available and he was not permitted to use the men's room. Doe filed suit under the state human rights act, which specifically covers sexual orientation and disability, and defines sexual orientation as including situations where people encounter discrimination due to their gender identity. The City of Minneapolis, the named defendant in the case, moved to dismiss on grounds of "vicarious immunity."

Under established principles of Minnesota law, state officials performing discretionary functions calling for policy judgments are generally immune from suit when they are acting in good faith. The city argued that if the police department personnel who made these decisions were immune, then the city itself should be immune, since its only liability would be vicarious. (That is, generally employers are held liable for the unlawful conduct of their employees, when the employees are acting on the employer's business.)

The trial judge in Minneapolis denied the city's motion, concluding that if the law was violated, then somebody had to be liable, and if the officers were immune, then the city would be liable. The court of appeals disagreed, finding that the reasoning behind the doctrine of vicarious liability supported extending immunity to the city in cases where the decision makers had not acted wilfully or maliciously. The court noted that there were numerous consultations, and the department sought legal advice before taking any action.

In this case, the legal advice, which was subsequently confirmed by the state supreme court's decision in *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001), was that an employer is not required to allow a genetic female to use a men's room, or vice versa, despite their transgendered status. The court also noted that the officials making decisions about Doe's requests had to take into account a city ordinance in Minneapolis making it a violation of the law "for one to use a restroom designated for a particular sex, when one is not of that sex."

"Thus, in making their decisions," wrote Judge Klaphake for the court of appeals, "city officials attempted to ascertain and understand Doe's rights and the state of the law. There is no evidence that they willfully or maliciously trampled on those rights. In light of their extended consideration of the issues and the uncertainty of the law, we conclude that city officials did not engage in willful or malicious acts. We cannot conclude that their treatment of Doe was so at variance with expected conduct that discrimination was the probable explanation." A.S.L.

2nd Circuit Approves Denial of Benefits for Sex-Change Procedures

Finding that an employee benefits plan administrator had a sufficient basis to conclude that gender-reassignment surgery is merely "cosmetic" and not "medically necessary," a unanimous three-judge panel of the U.S. Court of Appeals for the Second Circuit upheld the refusal of an employee benefits plan to cover the costs of such procedures. *Mario v. P & C Food Markets, Inc.*, 2002 WL 31845877 (Dec. 20, 2002).

Born female in 1955, Margo Mario began working for P & C Food Markets in 1992 as a supervising pharmacist. Beginning in the mid-1990s, Mario, who had been diagnosed as having gender dysphoria, decided to begin the process of transforming from female to male. Mario advised P & C of this decision, and was given permission to begin dressing as male and presenting himself as male at work, using the name Marc Mario. Mario began hormone therapy, and underwent two surgeries in support of his transformation, a bilateral mastectomy in September 1996 and a hysterectomy in October 1997.

P & C has a self-insured employee health plan. Mario sought reimbursement from the plan for his hormone therapy and mastectomy. The plan provides coverage only for "medically necessary" treatments. P & C's plan administrator concluded, after some investigation of the issue, that medical treatment for gender dysphoria (hormone therapy, surgery) was elective, not mandated, and thus not covered by the plan. Mario's claims were denied, and he was advised that any future claims for services or procedures related to the gender-reassignment would also be denied.

Mario sued in the U.S. District Court for the Western District of New York, alleging violations of the Employment Retirement Income Security Act (ERISA), the federal law governing employee benefits programs, as well as Title VII of the Civil Rights Act, which forbids sex discrimination, and New York laws forbidding discrimination against persons with disabilities. In the district court, the case was first assigned to a magistrate judge, who found that under ERISA there could be only limited review of the benefits plan's decision, which must be upheld unless it was found to be "arbitrary and capricious." The magistrate concluded that the plan administrator had gathered information from doctors, medical institutions, and insurance carriers that supported the conclusion that gender reassignment surgery was not medically necessary. The magistrate judge also concluded that there was no valid claim under Title VII, which does not apply to discrimination on account of gender dysphoria or transsexualism, and that the circumstances of this case did not give rise to any inference of discrimination. The federal district judge approved the magistrate's decision, and Mario appealed.

Writing for the appellate panel, Judge Guido Calabresi found that it was not so clear cut that the arbitrary and capricious standard was the appropriate one to follow in this case, but nonetheless found that the plan administrator's decision would survive even more demanding levels of judicial review. In this case, Calabresi found that the plan administrator had presented the magistrate with "sufficient evidence to show that a treatment is not medically necessary in the usual case," so it was up to Mario to show that he was unusual in requiring this procedure.

Wrote Calabresi: "The record established that the plan administrator, Bernadette Barber, conducted a meaningful investigation into whether Mario's medical claims were eligible for coverage under the Plan. Ms. Barber's investigation included research on the issue of transsexualism, inquiry into the policies of other employers and insurance carriers concerning coverage of gender reassignment procedures, consultation with medical centers having specialized knowledge of transsexualism and sexual reassignment surgeries, and

consultation with medical personnel." One doctor was noted in particular, Dr. Ivan Fras, who opined, according to the court, that "the surgical removal of healthy organs, for no purpose other than gender dysphoria, would fall into the category of cosmetic surgery and would therefore not be 'medically necessary.'" Ms. Barber concluded based on her research that there was "substantial disagreement" in the medical community about whether gender dysphoria was a "legitimate illness" and "uncertainty as to the efficacy of reassignment surgery." Finding that Mario had not come forth with any evidence that his case differed in a relevant way from the "ordinary one," Judge Calabresi opined that the plan administrator's determination was final.

As to the Title VII claim, Judge Calabresi noted the doubts about whether transsexuals are covered under Title VII, and sounded a skeptical note about Mario's argument that he was a victim of gender stereotyping, in that the employer was denying him coverage for operations that would be covered for women. But Calabresi based the rejection of the Title VII claim on the conclusion that no inference of discrimination was raised by the facts, not least because P & C had offered a legitimate, non-discriminatory reason for rejecting the benefits claim: its conclusion that the procedures involved were not medically necessary. That such a decision would be issued today seems odd, in light of the many recent developments signaling a growing acceptance of the reality of transsexualism, not least the recent European Court of Human Rights decision that has compelled the British government to introduce legislation recognizing sex-changes and allowing transgendered persons to marry. Even in the United States, the Medicaid program in many jurisdictions (sometimes in response to litigation) has begun to cover sex-reassignment surgery, under a statute that limits coverage to medically necessary procedures. This ruling seems out of step with current developments in the legal treatment of transsexuals. A.S.L.

6th Circuit Tosses Gynecologist's Free-Exercise Challenge to Local Rights Laws

In an unpublished decision, a panel of the Sixth Circuit Court of Appeals rejected an appeal from a gynecologist who opposed a Louisville ordinance banning sexual orientation and gender identity employment discrimination, while vacating the lower court's ruling. The district court was ordered to dismiss the case without prejudice for lack of jurisdiction, rather than on the merits. *Hyman v. City of Louisville*, 2002 WL 31780201 (Dec. 9, 2002).

Dr. J. Barrett Hyman practices in Louisville in a two-doctor partnership. Hyman asserted that his religious beliefs would not allow him to hire "people who actively promote or are in-

involved in sexual relationships outside of marriage” because “sexual intimacy is reserved, by God, for a marital relationship between a man and a woman.” His medical partner opposed asking applicants about their sexual orientation. In 1999, the City of Louisville and Jefferson County passed separate ordinances outlawing employment discrimination on the basis of sexual orientation and gender identity. Both ordinances also cover job advertisements. Hyman filed suits against both ordinances on September 13, 1999, claiming violations of his free exercise of religion, federal Due Process and equal protection. When he filed the suits, Hyman did not claim that he had tried to hire or advertise for jobs since the ordinances went into effect. After Hyman and the municipalities moved for summary judgment, Hyman sought to file an affidavit claiming that in September 2000, he interviewed applicants and questioned them regarding their sexual orientation. He also claimed the Louisville Courier Journal rejected an ad as discriminatory which sought “Pro-Life and Traditional Pro-Family” applicants.

On March 21, 2001, U.S. District Judge Charles R. Simpson III, on the basis of Hyman’s affidavit, ruled “that because of the immediacy of the Hobson’s Choice Hyman faced either violate the ordinances and face almost certain prosecution, or violate his religious beliefs Hyman had standing to bring his action under the Declaratory Judgment Act.” The court then rejected his claims on their merits. The appeals court reviewed only whether Hyman had standing to sue. The City of Louisville argued that Hyman did not.

The appeals court, in an opinion by Circuit Judge Batchelder, found that “even if no party had raised the issue, we would nevertheless have a duty to ensure that this case is properly before the federal courts” and that the duty was “not waivable.” The appeals court found that Hyman had the burden to show he had standing at the time that the lawsuit was filed. The appeals court had “no opinion about whether Hyman’s actions place him under imminent threat of sanction by the Louisville Human Rights Commission,” but found that “as the affidavit makes plain, these actions were undertaken by Hyman one year after this lawsuit was filed.” Judge Batchelder wrote that Hyman’s views were “known in the community” and that “he did not have any real expectation that he would have any homosexual applicants for employment in the future,” undercutting an immediate need for a determination as to the constitutionality of the statute’s application to him.

An American Civil Liberties Union press release noted that the Clinton administration filed an amicus brief opposing Hyman’s appeal and that this was the first time that the U.S. Department of Justice “actively supported a local law barring discrimination against lesbian, gay,

bisexual and transgender people.” *Daniel R Schaffer*

Imputation of Homosexuality Still Per Se Defamatory in Texas

As long as “homosexual sodomy” is a crime in Texas, it seems, it will be per se defamatory to falsely call somebody a “queer” in that state. Or that, at least, seems to be the current attitude of the Texas Court of Appeals, San Antonio Division, as articulated in *Thomas v. Bynum*, 2002 WL 31829509 (not designated for publication), released on Dec. 18.

Dan Thomas, a state inmate, alleges that William Bynum, a corrections officer, slandered him by calling him a “queer” within earshot of other inmates. Thomas claims that Bynum was retaliating against him for filing grievances against Bynum. Thomas also asserts that after he complained about Bynum slandering him this way, Bynum retaliated by filing false disciplinary charges against Thomas. He also asserts that Billy Reese, the shift lieutenant, never investigated Thomas’s complaints against Bynum, and then imposed disciplinary sanctions against Thomas without letting Thomas appear at a hearing to contest the charges.

Thomas sued Bynum in his individual capacity for slander, intentional infliction of emotional distress, fraud, and violations of Thomas’s constitutional rights, and sued Reese in his official capacity for violation of constitutional rights, seeking monetary damages and equitable relief. Both corrections officers moved for summary judgement, claiming Thomas had no evidence for his claims and that, anyway, both were immune from suit. Thomas had filed affidavits in support of his complaints, in which he set out with particularity the alleged slander and other charges against Bynum. The trial court granted summary judgment for defendants on all claims.

Writing for the court of appeals, Justice Karen Angelini found that the trial court erred by accepting Bynum’s argument that Thomas failed to show any actual damages as a result of being called “queer,” normally a requirement for an ordinary claim of slander. Angelini quoted a prior Texas ruling, *Head v. Newton*, 596 S.W.2d 209 (Tex.Civ.App.-Houston 1980, no writ), in which the court stated that “the statement that someone was a ‘queer’ is slanderous per se because it imputes the crime of sodomy.” If a statement is slanderous per se, the plaintiff is not required to allege actual damages to state a cause of action. She also noted a more recent federal appellate ruling, *Plumley v. Landmark Chevrolet, Inc.*, 122 F.3d 308 (5th Cir. 1997), which held to the same effect about the use of the word “faggot.”

“By filing his affidavit stating that Bynum called him a queer,” wrote Angelini, “Thomas has produced summary judgment evidence

raising an issue of material fact regarding the element of slander that requires a statement be either defamatory in itself or result in actual damages. The trial court erred in granting summary judgment for Bynum on the slander claim.” The court of appeals also held that the emotional distress claim was improperly dismissed, because Bynum’s motion never directly addressed it, raising only the alleged defect in the slander claim, and that Bynum had not presented any evidence in support of his immunity claim, on which he would bear the burden of production, so it cannot be decided on summary judgment. However, the court held that the fraud and constitutional claims could not validly be asserted by Thomas in this litigation, and sustained summary judgment as to those claims, as well as the claims against Reese. A.S.L.

Former Lesbian Partner Awarded Partial Custody and Visitation Must Pay Child Support

In a unanimous decision finding that the responsibility to pay child support goes along with the right to custody and visitation, a three-judge panel of the Superior Court of Pennsylvania ruled in *L.S.K. v. H.A.N.*, 2002 WL 31819231 (Dec. 17), that a lesbian co-parent who lives in Pennsylvania must make regular child support payments to her former partner, who now lives in California. Throughout the court’s opinion, the women are referred to by their initials, in order to preserve the confidentiality of the children. The decision marks a logical extension of a previous ruling awarding H.A.N. partial custody and visitation rights.

The two women lived together as a couple from the mid 1980s until 1997. They conceived a child through donor insemination in 1990, with H.A.N. participating in the planning, attending at the birth, and taking care of the newborn when L.S.K. returned to her job. When they decided to have more children, they intended for H.A.N. to bear the next one, but she could not conceive due to medical problems, and ultimately L.S.K. was again inseminated and bore quadruplets! H.A.N. served as the primary caregiver until the couple broke up and L.S.K. subsequently moved with the children to California as a result of a job transfer.

When H.A.N. filed suit for custody and visitation rights, L.S.K. responded with a countersuit seeking child support. After the trial court awarded partial custody and visitation rights to H.A.N., it determined that it was only fair to require H.A.N. to contribute to the support of the children, a decision with which the Superior Court concurred. The courts relied on “equitable estoppel,” holding that because H.A.N. sought to assert rights as a parent to custody and visitation, she could not then deny the parental obligation to support the children. “We recognize this is a matter which is better ad-

dressed by the legislature than the courts," wrote Judge Orié Melvin. "However, in the absence of legislative mandates, the courts must construct a fair, workable and responsible basis for the protection of children, aside from whatever rights the adults may have *vis a vis* each other."

In this case, the court found, "equity mandates that H.A.N. cannot maintain the status of *in loco parentis* to pursue an action as to the children, alleging she has acquired rights in relation to them, and at the same time deny any obligation for support merely because there was no agreement to do so. Although statutory law does not create a legal relationship, applying equitable principles we find that in order to protect the best interest of the children involved, both parties are to be responsible for the emotional and financial needs of the children."

The court also rejected H.A.N.'s argument that since she was not a legal parent, the official state guidelines on child support should not apply to her case. The court pointed out that by their own terms, the official child support guidelines apply to anybody who has legal child support obligations, and as a person who has been awarded partial custody and visitation rights, H.A.N. is such an individual.

This decision is only the latest in a recent explosion of gay family decisions by the Pennsylvania appellate courts that represent an extraordinary turnaround from prior case law. Most significantly, the Pennsylvania Supreme Court recently held that same-sex partners could adopt a child, embracing a creative interpretation of the state's adoption law. That decision no doubt signaled to the intermediate appellate court, the Superior Court, that it was to take a more realistic approach to gay family issues than it had been following in earlier decisions. A.S.L.

Federal Judge Dismissed First Amendment Suit Against Library That Excluded Gay Newspaper

Judge B. Avant Edenfield of the federal district court in Statesboro, Georgia, ruled that a library could eliminate the free literature table in its lobby in response to patron complaints about the inclusion of a local gay newspaper among the free materials. *Gay Guardian Newspaper v. Ohoopée Regional Library System*, 2002 WL 31778780 (S.D. Ga. Nov. 19, 2002). In rejecting the newspaper's First Amendment challenge to the library's change in policy, the court avoided any discussion of the chilling effect of the "heckler's veto," refused even to consider the possibility that libraries are different from other types of government buildings, and characterized patrons as a captive audience whom the library was entitled to protect from disturbing and/or disruptive messages.

The Ohoopée Regional Library System (Library) permitted *The Gay Guardian* (Guard-

ian), a local gay newspaper, to be distributed along with other free publications from a table in the lobby of the Vidalia-Toombs County library. After some patrons complained, however, the Library restricted the table to government and library-generated materials. Although the change had been instigated by patron complaints, the Library insisted that its change in policy was designed to ensure that "no [non-governmental] group, organization, or individual would be singled out or treated differently." Notwithstanding the Library's protestations of neutrality, Ronald Marcus, editor of the *Guardian*, brought suit under 42 USC 1983 and sought a preliminary injunction, claiming that the Library was "unconstitutionally censoring *The Gay Guardian* even at the expense of squelching other, non-gay speakers."

While suggesting that the case presented four issues, the district court indicated that it would only reach the question of whether a library could close down a content-neutral forum solely to avoid disruption and litigation, even assuming that the decision was motivated by a desire to censor a particular viewpoint. Although making its view clear with regard to the other three issues (1) whether a library can exercise its own tastes and preferences, as well as those of the community, when deciding what information to acquire/accept; (2) whether a library can decide to reject or refuse to distribute materials that it previously acquired or accepted; and (3) whether an individual who had previously distributed material via the library's lobby display table could enjoin the library from removing that materials — over the course of its analysis, the court did not explicitly answer these questions.

Judge Edenfield began the opinion by analogizing libraries to tents in an intellectual desert: "Various camels nose under it, but when an unwanted camel enters, some object. Told he can't exclude any camel, the tent operator simply folds the tent barring all. When the unwanted camel complains, the operator replies that all are being treated equally, and besides, there are plenty of other tents in the desert." The moral of this story, in the court's view, is that the *Guardian* has no cause for complaint because there are other fora where it can be distributed, including the expansive "tent" of the Internet.

Almost immediately, however, the court's attempt to convey a sense of neutrality gave way to expression of hostility toward the gay publication. "[F]ew patrons," Edenfield observed, "would expect XXX-rated or even non-obscene yet explicitly erotic magazines to be the first thing that they or their children see when entering their community library's lobby." While admitting that the *Guardian* "cannot be equated with those publications," the court insisted that the controlling question was essentially the same in either case may a library relocate or re-

move material that some within the community find objectionable?

Interestingly, the court never even mentioned, let alone grappled with, the problem of the "heckler's veto." Instead, the court noted without reservation that a library clearly has the right to remove materials that are likely to incite civil disturbances, especially "in a world where fanatical terrorism can spontaneously erupt virtually anywhere."

The court then relied on a number of cases involving the lobbies of other government buildings, including courthouses, to support its conclusion that the Library had the right to limit First Amendment activity within its building a limited public forum in order to promote non-viewpoint specific goals, such as maintaining order. The court suggested that a library "might want to treat its front lobby different from other areas for the simple reason that most patrons enter through the lobby and thus are a captive audience." Therefore, just as other government buildings tended to include only non-controversial or "defanged" artwork in their lobbies, a library was entitled to maintain its entryway as a site free from political or social controversy.

As if these neutral principles were insufficient to support its ruling, the court then raised the specter of "little Tommy" picking up a NAMBLA pamphlet in the library lobby, and bringing it home to his parents. The court insisted that "few would expect librarians, having meandered into setting up a 'free-lit' lobby table and all the legal headaches a seemingly innocuous move such as that might produce, to have to spend their days fending off the putative majoritarian outcry" such an incident would cause.

Suggesting that the Library's policy change had more to do with censoring a disfavored publication than with preserving a peaceful atmosphere in the lobby, the *Guardian* noted that hard copies of the newspaper were not available anywhere else inside the building. The Library conceded this point, but insisted that librarians were available to help patrons find the publication on-line. The court refused, however, to consider the *Guardian's* argument that there was a meaningful distinction between paper distribution and internet access. The court avoided this issue by dismissing the argument as not properly raised.

The court was also unwilling to investigate the motives of the Library, and amazingly decided to cite the infamous post-segregation Mississippi pool closing case, *Palmer v. Thompson*, (which, it noted, "has never been formally overruled") for the proposition that the judiciary should be reluctant to speculate as to the motive of state actors when shutting down a forum. The court also distinguished a case, upon which the *Guardian* had heavily relied, in which the Pennsylvania House of Representa-

tives had closed its gallery to the public in order to prevent Act-Up from engaging in AIDS awareness activities while the legislature was in session. In that case, the court insisted, the policy change had the unconstitutional effect of preventing citizens from petitioning their representatives and making their views known to state lawmakers. Whereas the legislature is a place of political discussion and debate, a library, the court explained, is an institution that passively “serves up information and quietly disseminates ideas.” For these reasons, the court ruled that there is a “world of difference” between a legislative hall and a library, thus rendering the Act-Up case inapposite.

Finally, the court summarily dismissed the *Guardian*'s due process and equal protection claims as insufficiently presented. The court also rejected any state law claims as not fully developed. In its conclusion, the court insisted that it was offering no opinion regarding the authority of libraries to prevent patrons from reading whatever they wanted or the ability of patrons or information providers to compel a library to carry certain materials. Finding that the *Guardian* had not demonstrated a likelihood of success on the merits with regard to its First Amendment claim, the court denied the request for a preliminary injunction.

The ACLU of Georgia represents the *Guardian* in its lawsuit against the Library. *Sharon McGowan*

Among the small army of lawyers listed as representing the defendants is J. Franklin Edenfield of the Swainsboro lawfirm Carlton & Edenfield. One suspects he knows the judge... A.S.L.

Civil Litigation Notes

California — Sharon Smith, the domestic partner of the late Diane Whipple, who was mauled to death by a pair of dogs kept by their neighbors, Marjorie Knoller and Robert Noel, and Diane's mother, Penny Whipple-Kelly, have settled their lawsuits against Rudolph Koppl and Marina Green Properties, the landlord who was alleged to have negligently allowed Knoller and Noel to keep these vicious dogs in their residential apartment building. The amount of the settlement was not disclosed. The lawsuit had established a new precedent when the trial judge ruled last year that Smith had standing to sue for the death of her partner. (The case also inspired legislation allowing registered same-sex partners to bring wrongful death actions.) The amount of the settlement was not disclosed. Noel and Knoller were convicted in March 2002 of involuntary manslaughter and keeping a mischievous dog that killed a person, and Knoller was also convicted of second degree murder. They are both serving prison terms, and the wrongful death suits against them will continue. Their convictions are being ap-

pealed, as is the judge's decision to rejected a murder verdict by the jury. *Contra Costa Times*, Dec. 21. Smith is represented by Michael Cardoza and Heller Ehrman White & McAuliffe; Whipple-Kelly is represented by Ronald H. Rouda. National Center for Lesbian Rights is working with the attorneys on the case.

California — The National Center for Lesbian Rights and the ACLU of Southern California have filed suit on behalf of Ashly Massey, 15, against Banning Unified School District and several district employees in the U.S. District Court in Riverside, California, alleging that the school district violated Ashly's right to equal protection of the laws by expelling her from gym class for being a lesbian. As incredible as this sounds, it appears that Ashley, who came out at age 13 while her family was living in a different town, was asked by a fellow student whether she was gay, and when she admitted it, the gym teacher threw her out of class. She was required to sit in the principal's office while the rest of her classmates had gym. The school refused to back down when her mother confronted administrators. The family has since moved again and Ashley is now attending high school in a different community. *Los Angeles Times*, Dec. 18, 2002.

California — In *Valdez v. Clayton Industries, Inc.*, 2002 WL 31769424 (Cal. Ct. App., 2nd Dist., Dec. 11, 2002) (not officially published), the court revisited a same-sex harassment case that it originally decided more than a year ago, when it had reversed a summary judgment, finding the plaintiff was entitled to present his case. In the meantime, the Supreme Court granted review on August 8, 2001, and then on May 1, 2002, remanded for reconsideration in light of its decision in *Richards v. CH2M Hill, Inc.*, 26 Cal.4th 798 (2002), in which it clarified the approach for California courts to take in determining whether claims of continuing violations of the law are time-barred. Applying the *Richards* test, the court found that Mr. Valdez's same-sex harassment claim was time-barred, because he filed his charges more than a year after the time when his claim accrued. However, the court found that his retaliatory discharge claim could still be litigated, since he sued just less than a year after the discharge took place.

Massachusetts — In *Greene v. New England Deaconess Association, Inc.*, 2002 WL 31677209 (Oct. 15, 2002) (not officially published), Associate Justice Thomas P. Billings of the Massachusetts Superior Court refused to grant summary judgment to the employer on two disparate treatment claims brought by Sylvia Greene, who claims she was discriminated against and subjected to retaliatory discharge based on her sex and perceived sexual orientation. The employer claimed it had discharged Greene because of serious charges that she had sexually harassed other female employees.

Greene counters that she was retaliated against because she reported sexual harassment by male supervisors against female employees, and that she was discriminated against because she was perceived to be a lesbian. Justice Billings found that Greene made out a prima facie case on her disparate treatment claims, but not on the retaliation claim, as to which he granted judgment for the defendant.

Montana — Helena District Judge Thomas Honzel has ruled that the refusal of the Montana University System to provide health insurance coverage for same-sex partners of employees does not violate the constitution. Rejecting claims by Carol Snetsinger and Carla Grayson seeking coverage for their same-sex partners, Judge Honzel found that the system's use of “marital status” as the basis for determining coverage is a “reasonable and objective standard.” “The court is aware that in other parts of the country governmental bodies have extended insurance coverage to domestic partners and the same could be done in Montana,” wrote Honzel, “but that is a decision for the Legislature or the governing body, not the court.” ACLU attorney Beth Brennehan, representing the plaintiffs, announced that an appeal to the state supreme court would be filed. The state's Human Rights Commission has also rejected a challenge to the policy. *Billings Gazette*, Nov. 27.

New Jersey — The Sussex County Superior Court has granted a motion to move a property dispute between former lesbian partners from the General Equity part of the Chancery Division to the Family Part, recognizing that the claims in the case arise “out of a family or family-type relationship” as required by Rule 4:3-1, which governs the divisions of the state Superior Court. The dispute in *Stafford v. Weiss*, SSX-C-14-02 (orders filed Nov. 8, 2002) concerns a couple who lived together from 1989 until May 2001, and who bought real property in 1993. When the relationship ended, the plaintiff moved out of the house and, when the women couldn't agree as to its disposition, or as to rights in a pension account maintained by the plaintiff, she brought suit in the General Equity part of the Chancery Division. Judge Kenneth C. MacKenzie found that there was no New Jersey precedent concerning whether “same sex partners may bring a cause of action sounding in divorce for equitable distribution of the assets of the parties,” and concluded: “The proper Court for determining if same-sex palimony actions may be maintained is the Family Part.” After noting the women's “long-term intimate involvement; shared assets and bank accounts, ... common residence,” “Jointly contributed to household expenses; and were recognized as a couple in the community,” the court said that “at the least” this was “a family-type relationship.” The court also refused to grant summary judgment to the plaintiff on the

merits of the case, finding that discovery and fact-finding were necessary. Plaintiff is represented by Theresa A. Markham of Emmons and Markham, while Defendant is represented by Debra E. Guston of Guston & Guston, who is a former president of LeGaL.

New York — A New York Supreme Court jury found for Garrett Rosso in his lawsuit against the Roxy, a popular Chelsea nightclub, and various others, on charges that Rosso was assaulted and that the Roxy discriminated against him because he is gay, during a June 1990 incident at the club. According to evidence introduced at trial by Rosso's attorney, LeGaL member Steven A. Rosen, when Rosso complained that a busboy had poured drinks on him while he was chatting with a friend and called them "faggots," he was severely beaten by Roxy employee Derek Vazquez, that other Roxy employees joined in, kicking him while he lay bleeding on the floor and taunting him with anti-gay epithets. It was also charged that Roxy staff refused any assistance to Mr. Rosso and that he only escaped from the situation with assistance from the police, sustaining permanent injuries. The jury awarded Rosso \$475,000 in compensatory damages and \$250,000 in punitive damages, having found a violation of the NY City Human Rights Law. Reflecting the many years that have passed since the incident, Supreme Court Justice Richard B. Lowe III awarded Rosso nearly \$300,000 in interest on the damage award, and also awarded over \$104,000 in attorneys fees and costs. According to attorney Rosen, neither the club nor its owner has taken any responsibility for what happened or to pay any portion of the judgment, which has yet to be enforced against them. This account is based on a press release distributed by Mr. Rosen.

New York — In two virtually identical cases of surviving gay partners seeking Workers Compensation benefits in the tragic work-related deaths of their partners, different administrative judges of the New York State Workers Compensation Board rendered different decisions. Ruling on a claim by Larry Courtney, whose partner, Eugene Clark, perished in the World Trade Center on Sept. 11, 2001, the Board granted survivor's benefits. Ruling on the claim by William Valentine, whose partner, Joseph Lopes, was a flight attendant who died in the crash of an American Airlines flight on takeoff from Kennedy Airport on Nov. 12, 2001, the Board denied benefits. The only real difference between the two cases is that a special measure was passed by the state legislature authorizing survivors benefits for unmarried partners of victims of the Sept. 11 terrorist attacks. Lesbian and gay lobbying groups have been urging the state to expand the entitlement to all Workers Compensation claims, not just those related to 9/11/2001, and are hopeful, in light of passage of the Sexual Orientation Non-Discrimination Act, that something can be done

to end this anomaly in the law. Meanwhile, Lambda Legal Defense, which represents both claimants, will be appealing the ruling on Valentine's claim. *Gay City News*

Ohio — In a surprise move, the Ohio Supreme Court has revised the decision previously published in the case of *In re Bonfield*. In the first decision, published at 773 N.E.2d 507 and issued on August 28, the court, ruling on the status of a same-sex co-parent under a state law concerning shared parenting rights, had commented that "second parent adoption is not available in Ohio" and that adoption of the children by the co-parent was "not a viable option." This language was not strictly necessary to decide the case, and in fact the Ohio Supreme Court has not previously ruled on the question whether a same-sex co-parent can adopt a child. At the request of the appellants, the court granted a motion to delete the offending paragraph. Some have read into this an openness by the court to considering the issue in a future case. At the least, the action removes language that lower courts might rely upon to rule out the possibility of such adoptions under current law. The newly revised opinion is reported at 2002 WL 31746493 (Dec. 13). A.S.L.

Criminal Litigation Notes

California — On Dec. 13, Jose Antonio Merel, Michael William Magidson and Jason Michael Cazares, all charged in the beating and strangulation death of Gwen Araujo, a transgendered teenager, pled not guilty in Alameda County Superior Court. Jaron Chase Nabors, who had led police to Araujo's body and was also charged with murder, pled not guilty in October. According to a report in the *San Francisco Chronicle* on Dec. 14, "Araujo was beaten and strangled at a party on Oct. 3," according to police. "The body, clad in the dress Araujo wore at the party and with hands and feet tied, was found two weeks later in a shallow grave in the Sierra foothills." Media coverage of the murder has produced a sensation in the Bay Area, leading to significant public debate about the adequacy of legal protection for transgendered people.

Massachusetts — The Appeals Court of Massachusetts ruled on Nov. 27 in *Commonwealth v. Frazier*, 2002 WL 31686231, that a district judge in Springfield erred in granting a motion for a new trial by Thomas Frazier, who had previously pled guilty to two counts of assault with intent to intimidate a person because of such person's sexual orientation. During the hearing at which the guilty plea was entered, Frazier admitted to an incident at Independence House in Springfield where he accosted two women and used profane language directed to their sexual orientation. But in moving for a new trial, he alleged that a videotape might be available of the event. The trial judge granted the motion, even

though defense counsel informed the judge that he did not have a copy of the videotape, did not know where it was or whether defendant had it or could obtain it, and was not even sure what it would show. Wrote the appellate court, "There was no evidence presented to the judge by affidavit as to the contents of the videotape. Further, there were no affidavits from the new witnesses as to their proposed testimony. Such affidavits are required in regard to the motion for a new trial." Thus, when the motion was made based upon no evidence at all, the trial judge clearly abused his discretion in granting it. The original sentence of two years in prison, to serve 127 days and the balance suspended, will stand.

Missouri — Police arrests of men accused of having consensual sex in the back of an eastern Missouri adult video store have resulted in the latest challenge to the Missouri sodomy law. An appeals court in western Missouri has already ruled that the law as most recently reworded no longer applies to consensual adult activity, but that ruling is not binding in the rest of the state. Prosecutors charged the men with sexual misconduct, but did not file charges against a woman who was also involved, since the sexual misconduct law applies only to same-sex conduct. The ACLU is representing four of the men, who are refusing to plead guilty and have moved to dismiss the case on grounds of the unconstitutionality of the statute, arguing Equal Protection. *Kansas City Star*, Dec. 16.

Ohio — Addressing what appears to be a frequently litigated issue in Ohio, undoubtedly due to customary police practices there, the Court of Appeals of Ohio, 7th District, in Jefferson County, affirmed the conviction of James J. Henry for public indecency in violation of R.C. 2907.09(A)(3). *State of Ohio v. Henry*, 2002 WL 31859460 (Dec. 18, 2002). Henry's grievous offense was masturbating in a public restroom at around 10:00 pm while nobody was present, but while a police surveillance camera was running, trained at the public area of the restroom. The restroom, located in a rest area at the junction of State Routes 213 and 7, had been the subject of complaints to police about sexual activity, vandalism and theft, so they installed a video camera that ran during the night. At trial, Henry moved to suppress the videotape, claiming a violation of the right of privacy, but the court denied the motion. On appeal, Henry argued his conviction violated due process and privacy. Nobody was present when he was masturbating, and nobody was offended, he argued. Rejecting these arguments, the court found that the "public area" of a men's room (as opposed to the stalls) is not a place where one has a reasonable expectation of privacy, thus the videotaping was not a "search" and 4th Amendment concerns do not apply. Furthermore, the statute on its face does not require that anybody be offended, merely that the de-

fendant have been engaging in sexual activity by which somebody could be offended if they saw it. The opinion by Judge DeGenaro drew a somewhat pained concurrence from Judge Vukovich, agreeing with the legal analysis but expressing unhappiness about the police practice. After characterizing the police practice of installing such videocameras without posting any warning to users of the facilities as “repugnant,” Vukovich wrote: “If a restroom appears empty, a person may reasonably act differently than they would if other people were present. As I am unable to ignore the cas law set forth by my colleagues, I concur in their opinion. However, I do so with reservations and could easily come to a different conclusion with any change in the facts presented in the appeal.”

Pennsylvania — In an assertion of state court independence of the U.S. Supreme Court, the Pennsylvania Supreme Court ruled in *Pap's A.M. v. City of Erie*, 2002 WL 31846311 (Dec. 19, 2002), that a city ordinance banning all public nudity violates the freedom of expression under art. I, sec. 7 of the Pennsylvania Constitution. The decision was rendered on remand from the U.S. Supreme Court, which had ruled in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), that it did not offend the First Amendment of the U.S. Constitution for the city to enact and enforce such a ban against Pap's, an establishment that featured nude female dancers. The U.S. Supreme Court's decision had itself been a reversal, by 5–4, of a prior Pennsylvania Supreme Court decision that held the ordinance unconstitutional on First Amendment grounds. In the new decision on remand, the Pennsylvania court, disagreeing with the U.S. Supreme Court, found that the ordinance, at least as applied to an establishment such as Pap's, was a content-based regulation of speech requiring strict scrutiny judicial review, and that the city had failed to present evidence that would justify the ban. One member of the court, Justice Saylor, dissented, arguing that the court should have adopted Justice Souter's approach articulated in his separate opinion, concurring in part and dissenting in part, in the Supreme Court's decision of the case, which would require a remand to develop the record further. A.S.L.

Legislative Notes

National — The American Law Institute made headlines worldwide on December 1 with the release of a report recommending sweeping changes in domestic relations law that would include significant legal recognition of same-sex partnerships and eliminate sexual orientation as a factor in disputed child custody and visitation cases. The recommendations propose, for example, that laws be changed to entitle domestic partners, whether same-sex or opposite-sex, to the same rights on the break-up

of a relationship as spouses have. *New York Times*, Dec. 1.

California — San Jose — The San Jose City Council voted unanimously on Nov. 26 to add gender identity to the list of prohibited grounds for discrimination within the city, reacting to recent media coverage of an anti-transsexual hate crime, a murder, in Newark, California. The city's law was amended long ago to place sexual orientation on the list.

Colorado — Colorado Springs — The City Council in Colorado Springs gave final approval on Dec. 10 to a plan to offer health benefits to same-sex partners of city employees, by a vote of 5–4. To be eligible, employees must show that they and their partners are financially dependent on each other, using documentation such as a joint mortgage or checking account. According to an *Associated Press* report published in the *Rocky Mountain News* on Dec. 12, the other Colorado jurisdictions that provide such benefits are Aspen, Boulder, Denver, Glendale and Summit County.

Florida — Collier County — Bucking the recent trend in Florida local government, Collier County's five commissioners voted unanimously to reject a proposed ordinance banning sexual orientation discrimination in the county at a meeting on Dec. 17. Five other cities or counties have passed such measures this year, including St. Petersburg, earlier in the year, and Orlando, on December 2. *Sun Sentinel*, Dec. 3 & 18.

Maine — Bangor — Opponents of the sexual orientation discrimination ordinance enacted on Sept. 24, 2001, proved unable to find sufficient petition signers to force a referendum. When the deadline for signatures expired on Dec. 18, the opponents were 200 signatures short, according to City Solicitor Norman Heitmann. Under governing law, petitioners needed to get 20 percent of the number of Bangor residents who voted in the gubernatorial election this past November, or 2,274 signers, and all signers had to be registered voters who reside in Bangor.

Maryland — Baltimore — On Nov. 25 the Baltimore City Council passed a bill outlawing discrimination on the basis of gender identity or expression, thus extending protection against discrimination to transgendered persons in the city. The bill was passed without debate and, according to the *Baltimore Sun* (Nov. 26) made Baltimore the nation's 53rd locality or state to expressly prohibit such discrimination. Earlier in 2002, Boston, Philadelphia and New York City had all passed similar measures.

Massachusetts — Legislative maneuvers last summer that led to an adjournment without consideration of a proposed constitutional amendment banning same-sex marriage, led to litigation and great controversy over whether the legislature had acted properly. An opinion by the Massachusetts Supreme Judicial Court

made clear that if the legislature was to take up the matter this year, it would only be by summons of the governor, since the legislature had adjourned for the year. Acting Governor Jane M. Swift, a Republican who ended up withdrawing her candidacy in favor of the eventual winner, Mitt Romney, indicated no inclination to call for a special session of the legislature devoted to this issue, and it appeared the matter would die for now. Under governing rules, it could not be raised again until at least 2006. Meanwhile, a lawsuit is pending challenging the failure of Massachusetts to allow same-sex partners to marry. *Boston Herald*, Dec. 24.

Michigan — Ingham County Ingham County Commissioners voted on Dec. 10 to extend health benefits to same-sex domestic partners of some county employees. A strict party line vote on the issue split 10–3. The benefits will go to non-union employees and to assistant prosecuting attorneys, whose collective bargaining agreement entitles them to the same benefits as are afforded non-union employees of the county. The Commission cannot extend the benefits to unionized employees without negotiation with their unions. *Lansing State Journal*, Dec. 11.

Minnesota — Minneapolis — On Dec. 13, the Minneapolis city council voted 8–4 in favor of an ordinance that will require most businesses with city contracts of more than \$100,000 to provide domestic partnership benefits to their employees. Mayor R.T. Rybak indicated that he would sign the measure. Contractors are being given one year to come into compliance with the ordinance. Both same-sex and opposite-sex partners will be covered. Last year, the city took 150 bids and proposals for contracts worth more than \$100,000. The ordinance provides several categories of exemptions, including development contracts, faith-based organizations, and businesses with fewer than 22 employees. *Minneapolis Star Tribune*, Dec. 14.

New York — Rockland County — The Clarkstown Board of Education has adopted a policy of making health insurance coverage available to unmarried domestic partners of district employees, the first school district in Rockland County, N.Y., to do so. A school board resolution in support of the benefits plan was approved at a Nov. 14 meeting by a vote of 4–2 with one abstention. Administrators had checked with other school districts around the state that offer such benefits, mainly on Long Island, and discovered that in each district only a handful of employees had signed up for the benefit, making it a very affordable way to send a signal of inclusiveness to all lesbian and gay employees. *Journal News*, Nov. 24.

Pennsylvania — On Dec. 3, Gov. Mark Schweiker signed into law a bill recently passed in the state House that adds “actual or perceived sexual orientation and gender or

gender identity” to the state’s Ethnic Intimidation Law. The law enhances penalties of crimes found to have been motivated by bias on the basis of any of the listed grounds. The amended law took effect immediately. This was reported to be the first statewide law in Pennsylvania to provide any kind of recognition or protection for sexual minorities in the state. *Harrisburg Patriot*, Dec. 4. A.S.L.

Law & Society Notes

California — California Chief Justice Ronald M. George announced on Dec. 20 that the Supreme Court would consider whether state judges should be ethically barred from belonging to the Boy Scouts of America because of the organization’s anti-gay membership policies. George made the announcement after meeting with leaders of the San Francisco bar to discuss their request for an amendment to the California Code of Judicial Ethics to that effect. At present, Canon 2C prohibits judges from belonging to groups that practice “invidious discrimination on the basis of race, sex, religion, national origin or sexual orientation,” but exempts “nonprofit youth organizations” from the ban. Earlier in 2002, the judges of the San Francisco Superior Court adopted their own ban on membership in any Scout chapters that had not publicly disavowed the national organization’s policy on gays. *Los Angeles Times*, Dec. 21.

Illinois — On Dec. 13, Illinois Chief Justice Mary Ann G. McMorrow appeared at a seminar hosted by the Illinois State Bar Association’s new Sexual Orientation and Gender Identity Committee, which awarded a certificate of appreciation to McMorrow for the Supreme Court’s adoption last year of amendments to the Rules of Judicial Conduct and Rules of Professional Conduct to ban sexual orientation discrimination in the legal profession and the justice system in Illinois. The Chief Justice stated that she had wanted to make those changes for several years. “Discrimination against gays and lesbians is offensive, and I want to emphasize that very strongly,” she said. *Chicago Daily Law Bulletin*, Dec. 16.

Illinois — Chicago — On Dec. 19, Mayor Richard Daley nominated Tom Tunney, an openly-gay man, to fill a vacancy representing the 44th Ward in the City Council. The nomination is subject to approval by the Council at a meeting on Jan. 16, which Tunney is expected to receive, at which time he will become the first openly gay alderman in Chicago history. However, the honor may be short-lived, as he will have to run in a special election on Feb. 25, in which he is expected to be opposed by several candidates including Rick Ingram, an openly-gay lawyer. *Chicago Tribune*, Dec. 20.

Kentucky — Northeastern Kentucky is aflame with controversy over a gay students

group that has been meeting at Boyd County High School. The student group was formed in October, and on October 28 the county’s school-based council, a parent-teacher organization, gave it formal approval to meet at the high school. This set off a wave of protests led by Rev. Tim York, pastor of the Heritage Temple Free Will Baptist Church in Cannonsburg and president of the Boyd County Ministerial Association. The protests led to hundred of students boycotting classes and picketing against the gay student group. Having been advised that under federal law it would have to ban all extra-curricular student groups from meeting at the school if it wished to stop meetings by the gay group without forfeiting federal financial assistance, the county school board unanimously voted on Dec. 16 to ban all extracurricular clubs, but its decision may not be implemented without the approval of the council, which debated the issue for two hours on Dec. 17 without reaching a conclusion. *Louisville Courier-Journal*, Dec. 18.

Maryland — The Lockheed Corporation, based in Bethesda, Maryland, has changed its employment policies to include a ban on sexual orientation discrimination, and will begin offering domestic partnership benefits sometime next year. The policy change was announced in a Nov. 21 memo sent to all 120,000 Lockheed employees globally. Other changes to the policy made at the same time will add marital status, family structure, and ancestry to the list of prohibited grounds for discrimination. The move came in response to a shareholder resolution that had been introduced by Swarthmore College, which did not win enough votes for passage but secured sufficient support to make the college eligible to bring it up again at the next annual meeting. Three days after Swarthmore’s socially responsible investing committee notified Lockheed management that they would be refiling the proposal, Lockheed made its announcement of the new policy. Lockheed is one of the nation’s leading defense contractors. *Rocky Mountain News*, Dec. 4. The irony of this story, of course, is that there was a time not too long ago when employment of gay people by defense contractors was virtually forbidden under federal policies that routinely denied the necessary security clearances to gay people.

Mississippi — The Mississippi Commission on Judicial Performance issued a recommendation on Dec. 20 that the state supreme court reprimand and fine Justice Court Judge Connie Glenn Wilkerson for comments Wilkerson made in a letter published in the *George County Times*, a weekly newspaper in Lucedale, MS. Commenting on the recent passage of domestic partnership legislation in California, Judge Wilkerson wrote: “In my opinion, gays and lesbians should be put in some type of mental institute instead of having a law like this passed for them.” Soon after the letter was published

on March 28, Lambda Legal Defense Fund filed a complaint with the Judicial Performance Commission on behalf of Equality Mississippi, the state-wide gay rights organization. Prior to the publication of Wilkerson’s remarks, the Mississippi Supreme Court had amended the state’s Code of Judicial Conduct to call on judges to avoid “expressions of bias or prejudice,” including demeaning remarks based on “sexual orientation.” This was reportedly the first time the Judicial Commission has ever recommended sanctioning a judge for anti-gay bias. *Biloxi Sun Herald*, Dec. 21.

Pennsylvania — Geisinger Health Systems, based in Danville, Pennsylvania, announced that it will offer health benefits to domestic partners of its 8,000 employees, effective Jan. 1. The company adopted the plan in response to numerous employee requests, and hopes that the new policy will make it more competitive as it recruits new professional employees in the health care field. *Associated Press*, Dec. 8.

Tennessee — Can the leopard really change its spots? The *Associated Press* reported on Dec. 5 that the Board of Directors of the Cracker Barrel restaurant chain had voted to add “sexual orientation” to the corporation’s anti-discrimination policy. Cracker Barrel became notorious in the early 1990’s for issuing a policy memorandum requiring all local restaurant managers to purge their establishments of gay employees on the ground that their lifestyle was incompatible with the company’s family image, and then for resisting a stockholder initiative led by the pension funds of several major cities (including New York) to overturn the policy. Although the company later rescinded the policy, it did not reinstate the discharge workers. Perhaps that’s the next step, after adopting a domestic partnership benefits plan? After all, the company does want to cultivate a pro-family image...

Virginia — Fairfax County School Board — The Fairfax County School Board, deadlocked after considerable debate about a proposal to adopt a sexual orientation non-discrimination policy, decided to seek a legal opinion as to its authority to do so from the state’s attorney general. Mistake! On Nov. 8, Attorney General Jerry W. Kilgore issued an opinion letter, taking the view that since sexual orientation is not covered under state anti-discrimination law, the School Board lacks authority to adopt such a policy. This was surprising news in Alexandria and Arlington, where the school boards had previously adopted such policies without a peep from the AG’s office. Although neither of these boards was likely to repeal their policies, the opinion, if correct, certain casts doubt on enforceability. Virginia is particularly noted for having a strong preemption doctrine barring localities from legislating beyond the bounds of state laws in areas such as civil rights. *Washington Post*, Nov. 28, 2002. A.S.L.

Other International Notes

Argentina — On Dec. 13, the city of Buenos Aires passed legislation to recognize some rights for same-sex partners through the establishment of civil unions. According to a Dec. 14 report on Gay.com, the measure provides pension benefits and guarantees partner hospital visits. The law will also cover insurance policies and health benefits to employees of the city government. Buenos Aires is reportedly the first major city in Latin America to pass such a law. The vote in the municipal legislature was 29–10.

Belgium — On Nov. 28, the Belgian Senate voted 46–15 in favor of opening up marriage to same-sex partners. The measure still needs to win approval in the lower house before it can become law. The Belgian bill is less far-reaching than the same-sex marriage law passed in Netherlands, because it would not extend to same-sex partners the right to adopt children jointly. However, it goes a step beyond the Dutch bill by not requiring that either of the partners actually be Belgian citizens. When he first launched this legislative proposal last year, Belgian Prime Minister Guy Verhofstadt said, “Mentalities have changed. There is no longer any reason not to open marriage to people of the same sex.” *365Gay.com*, Nov. 29.

Canada — In *Attorney General of Nova Scotia v. Susan Walsh and Wayne Bona*, 2002 SCC 83, File No. 28179 (Dec. 19), the Canadian Supreme Court rejected the argument that Canadian constitutional equality rights are violated by denying unmarried heterosexual couples the status of “spouses” under the Matrimonial Property Act (MPA). The case arose from a dispute about property division upon the break-up of the ten year relationship between Walsh and Bona, who had lived together and had two children, owning a home as joint tenants. After the break-up, Bona sought to retain their house and surrounding property. Walsh took the children and sought money for their support. When the parties couldn’t work out their differences, Walsh sought a declaration that under the MPA she was entitled to the presumption that there be an equal division of the property between them.

Walsh’s claim was rejected by the trial judge, whose decision was then set aside on appeal, and the case went up to the Supreme Court. Recent Canadian decisions have found that because same-sex couples were not given the right to marry, their constitutional rights were violated by not treating them as spouses for purposes of Canadian family law, and the government responded at both state and federal levels by setting up registered partnership schemes that extend to registered partners many of the rights of marital partners, including recognition as spouses under the MPA. The Act sets up a presumption that assets be divided equally

upon the termination of a relationship, putting the burden on the party who is seeking some different ratio of distribution to prove that it would be equitable.

The Supreme Court’s opinion in this case sided with the trial judge in this case, finding that excluding unmarried cohabiting opposite-sex couples from this presumption was not discriminatory and did not affect “the dignity of these persons.” Writing for the Court, Justice Bastarache insisted that unregistered, unmarried partners who were otherwise capable of conferring legal status on their relationship but had chosen not to do so were clearly distinguishable in a relevant way from the couples to whom they were being compared in this analysis. They had not undertaken the obligations of joint responsibility in the financial realm, when they had an opportunity to do so. Thus it was appropriate not to treat property acquired during their relationship as presumptively subject to equal division.

The opinion is carefully written to have no reference or consequence for same-sex couples, who as yet have no choice to marry, although they do have the right to register and be treated the same as married couples for purposes of the MPA.

The carefulness of the opinion seems clearly calculated to avoid prejudging a question that will soon come before the Court: whether exclusion of same-sex partners from the right to marriage violates Canadian constitutional equality requirements.

Canada — Alberta — In what was described as a “shot in the arm” for Alberta’s gay and lesbian community,” the state’s Human Rights Commission ruled recently that Alberta Health, provider of health insurance coverage to public employees in Alberta, must treat same-sex couples and their children the same as recognized common-law couples and their children. The decision, which has the same weight as a ruling by the Court of Queen’s Bench, requires Alberta Health to give coverage to same-sex couples and their children, to change the definition of “common law spouse” in its regulations, and to reimburse complainants in the case for health insurance premiums they had incurred to provide coverage for their partners and children. One complainant identified in a news report in the *Calgary Sun* on Dec. 6 is Carrie Neilson, a City of Calgary employee who sought coverage for her partner, Jane Oxenbury.

Israel — A 7-member panel of the Israel High Court of Justice ruled on Dec. 23 that single women are not entitled to make use of surrogacy procedures to have children. As interpreted by the court in a lengthy opinion, surrogacy is only lawfully available to opposite-sex partners, where the man’s sperm is used to conceive a child to be carried by a surrogate for the woman. In this case, an organi-

zation called Mishpaha Hadasha (New Family) was arguing that a single woman who had a hysterectomy but who had preserved several ova prior to her operation should be entitled to try to have a child by having her ova inseminated with donor semen and then implanted in a surrogate for gestation. The court accepted the government’s argument that the law was adopted after a thorough study and consultation with experts. The court accepted the charge that the resulting law is discriminatory against single women, but found it did not violate Israel’s Basic law on Human Dignity and Freedom. The opinion mentioned that same-sex partners also are not entitled to use surrogacy arrangements to have children. *Ha’aretz*, Dec. 24.

Korea — The Incheon District Court has given permission for Harisu, a transgendered entertainer, to legally become a woman, taking a new, more feminine name of Lee Kyong-eum. “Considering that Ha has been socially recognized as female after her transgender operation, it is appropriate that we regard Ha physically as a woman,” said the court, noting that the decision was given to protect her dignity as guaranteed by the nation’s constitution. *Korea Times*, Dec. 14.

New Zealand — Labour MP Russell Fairbrother, of Napier, has drafted a Civil Union Bill to put the issue of allowing unmarried partners to obtain an equivalent legal status to marriage before the NZ Parliament. *Christchurch Press*, Dec. 6. A.S.L.

Switzerland — The governing cabinet has proposed a civil union law to make national the rights that have already been extended to same-sex partners by the municipalities of Zurich and Geneva. The law would give same-sex partners the same rights of inheritance and social security as are now enjoyed by married opposite-sex couples. Zurich, Switzerland’s most populous state, approved such a proposal by referendum last September. *AP World Politics*, Nov. 29.

United Kingdom — The government of Prime Minister Tony Blair announced plans to introduce legislation creating legally-recognized civil partnerships for same-sex couples. The government insisted that this would not amount to “gay marriage,” and made clear that it may be a year or more before the proposal is reduced to acceptable legislative drafts for parliamentary approval. Although details were scanty, there was an indication that the proposals would include inheritance rights, next-of-kin status, and recognition in situations where same-sex partners now encounter discrimination due to the lack of legal status for their relationships, such as hospital visitation and exclusion by blood relatives from funerals. *The Independent*, Dec. 6; *New York Times*, Dec. 7. ••• Under plans announced on Dec. 13, the U.K. will move to comply with a recent Euro-

pean Court of Human Rights ruling on legal recognition for transgendered individuals. The government proposed to set up a regulatory authority to approve applications from transgendered people seeking official recognition of their sex change for purposes of documentation, marriage, and so forth. Applicant will need to submit medical evidence, but will not be required to have undergone surgery in order to register in a new sex, provided they have lived

successfully for at least two years in their desired sex. New birth certificates will be issued to those whose applications are approved, but their old birth certificates will also remain on file as an original birth record, although not routinely accessible to members of the public. *The Independent* — London, Dec. 14. A.S.L.

Professional Notes

Dr. Monica Casper, PhD, a medical sociologist and biomedical ethicist, has been selected to become the new executive director of the Intersex Society of North America, succeeding founding executive director Cheryl Chase. ISNA is an advocacy and educational organization seeking to change the attitudes of the medical profession, the legal profession and society at large towards persons born with intersexual conditions (genital abnormalities). For more information about ISNA, visit its website at www.isna.org.

AIDS & RELATED LEGAL NOTES

California Appeals Court Upholds Injunction Against AIDS Activists

Some members of the San Francisco chapter of ACT-UP believe that HIV does not cause AIDS, and that the drugs used to treat HIV and AIDS cause unnecessary deformity, suffering and death. ACT-UP/SF frequently engages in confrontational activities against organizations that promote standard drug therapies to control HIV and AIDS. Such activities, sometimes involving physical assault combined with threatening speech, led two organizations to obtain injunctions preventing specified members of ACT-UP/SF from intentionally coming within 100 yards of employees of the organizations. A California appellate court upheld these injunctions, but declined to award attorney fees. *Project Inform v. Swindell*, 2002 WL 31677174 (Cal. App. 1st Dist. Nov. 27, 2002); *San Francisco AIDS Foundation v. Best*, 2002 WL 31677132 (Cal. App. 1st Dist. Nov. 27, 2002).

Starting in 1995, several members of ACT-UP/SF repeatedly engaged in confrontational activities aimed at organizations that promoted the treatment of HIV and AIDS with such drugs as AZT and protease inhibitors. Two such target organizations were Project Inform and the San Francisco AIDS Foundation (SFAF). On April 17, 2000, ACT-UP/SF members disrupted a community forum sponsored by Project Inform by forcing their way into the meeting, marching up the center aisle, waving signs, shouting, throwing large hard pills toward the front of the room, hitting people with the pills, spitting in the face of a Project Inform employee, and pushing another employee so that she fell on the floor. The actions caused people in the audience to duck and put their hands over their heads for fear of injury.

On October 23, 2000, ACT-UP/SF members went to the offices of the San Francisco AIDS Foundation demanding to see its director, Pat Christen. When Ms. Christen would not see them, one activist tried to force his way past the reception room. When he was blocked, he sat down and refused to move while other ACT-UP

members occupied the reception area and tossed SFAF literature around the room. One activist pounded a bicycle seat against a glass window, and others vandalized the waiting area; another scratched the face of a security guard, causing visible scars. Other similar demonstrations occurred between April and October 2000, and were often accompanied by threatening phone calls to the officers of the organizations, publication of personal attacks against those officers, and other means of delivering a strong message to the "AIDS establishment."

Both organizations obtained injunctions to keep ACT-UP members away from their employees. The injunctions issued under California's Workplace Violence Safety Act (WVSA), which states that any employer whose employee has suffered unlawful violence or a credible threat of violence can seek an injunction on his or her behalf prohibiting further unlawful violence or threats. The injunctions issued under the WVSA prevented five named ACT-UP/SF members from coming within 100 yards of 24 employees of Project Inform, their residences, or their workplaces, including events or programs sponsored by Project Inform, or where employees of Project Inform were formal participants. Six members of ACT-UP were prohibited from coming within 100 yards of 5 employees of SFAF, or their residences or workplaces. The ACT-UP/SF activists challenged the injunctions on a variety of grounds involving interpretation of statutory language, all of which were rejected by the court. They further alleged that individual members of ACT-UP could not be held jointly liable for actions of other members; the courts found that they could.

ACT-UP contended that injunctions were not the proper remedy. For the injunctions to be valid, there must be a reasonable probability that the unlawful violence and threats of violence will be repeated if the injunctions do not issue. The court found that, based on prior conduct of the ACT-UP members, there was such a probability. ACT-UP also raised constitutional

objections under the free speech clause of the First Amendment. The activists alleged that evidence used to support the grant of injunctions consisted of constitutionally protected speech, such as the use of stinging language, satirical cartoons, and newspaper articles that criticized the mainstream organizations' messages and policies. The court pointed out that violence and threats of violence fall outside the protection of the First Amendment because they coerce by unlawful conduct, rather than persuade by expression. Thus, they play no part in the marketplace of ideas. *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1122, 929 P2d 596, 60 Cal. Rptr. 2d 277 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 774 (1994).

Even statements fully protected by the First Amendment may nevertheless be admissible to show that other statements could reasonably be understood as threats of physical harm, said the court. And even if a constitutionally protected expression was taken to be a threat, other evidence independently supported the injunction. The activists' course of conduct did not constitute protected speech but rather was comprised of violence and credible threats of violence, as the court interpreted the record. The court further held that the injunction did not burden more protected speech than was necessary to achieve its goal, nor was it unconstitutionally vague or violative of the constitutional right to travel. The fact that the activists would only violate the injunctions if they intentionally or knowingly come within 100 yards of the employees protects the activists from unwittingly engaging in proscribed activities.

Project Inform moved for an award of attorney fees. These may be granted under California law if (1) the plaintiff's action results in the enforcement of an important right affecting the public interest; (2) a significant benefit is conferred on the general public or a large class of persons; and (3) the necessity and financial burden of private enforcement make the award of attorney fees appropriate. California Code of Civil Procedure § 1021.5. Organizations

awarded attorney fees have included women's health organizations that acted to enjoin militant anti-abortion protestors, *Planned Parenthood v. Aakhus*, 14 Cal. App. 4th 162, 17 Cal. Rptr. 2d 510 (2d Dist. 1993); *Feminist Women's Health Center v. Blythe*, 32 Cal. App. 4th 1641, 39 Cal. Rptr. 2d 189 (3d Dist. 1995); and a union that acted to enjoin a public employer from conducting random drug tests. *Edgerton v. State Personnel Bd.*, 83 Cal. App. 4th 1350, 100 Cal. Rptr. 2d 491 (1st Dist. 2000). The appellate court found no reason to upset the trial court's denial of attorney fees. The denial was based on the fact that the petitioner did not allege any injury to the First Amendment rights of its employees or those of the public, and it did not seek an injunction against harassment, violence, or threats of violence aimed at its patrons attempting to access information or services provided by Project Inform. The threats were only aimed at the employees of Project Inform; thus, the situation was not analogous to that in *Aakhus* and *Blythe*, where clients of the organizations were endangered. The benefit conferred by obtaining the injunctions was limited to a small group of employees protected by the injunctions, accord to the court, which asserted that no benefit was conferred upon the general public or a large class of persons. Hence, attorney fees were not called for under the Code of Civil Procedure. *Alan J. Jacobs*

AIDS Litigation Notes

Federal — *New York* — Southern District Magistrate Peck ruled in *Alvarez v. Barnhardt*, 2002 WL 31663570 (Nov. 26, 2002), that judgment on the pleadings should be granted to the defendant Commissioner of Social Security on Ramon Alvarez's claim for social security disability benefits. Alvarez, who was diagnosed HIV+ in 1997 while being treated for pneumonia, has been sick off and on since then with a variety of ailments and back pain. He applied for disability benefits in September 1999 after he had stopped working in his stockroom job because of inability to do the lifting involved. The opinion recites in details the findings of a succession of doctors and medical consultants, suggesting that Alvarez has experienced numerous problems since his diagnosis, but is capable of getting around, sitting, standing, and lifting light weights. An Administrative Law Judge had concluded that Alvarez, who is taking AIDS medication, is capable of performing sedentary work, and concluded that he was not sufficiently disabled to be eligible for disability benefits. Magistrate Peck found that Alvarez, who is representing himself pro se, had not produced any relevant evidence that would put in question the correctness of this conclusion, and ruled for the government.

California — In a unanimous ruling issued on Dec. 9, the California Supreme Court held

that a search warrant could be issued requiring HIV testing of a man accused of sexually abusing two girls based on the victims' mother's affidavit, which stated based on "the best of her knowledge and belief" that the defendant had engaged in sexual misconduct with her daughters. *Humphrey v. Appellate Division of Superior Court*, 2002 WL 31740518. Mother's knowledge was based on what police and medical personnel told her that her daughters had told to them. Ruling on the defendant's argument that this was insufficient to meet 4th Amendment probable cause standards for issuing a search warrant, the court of appeal had ruled for the defendant, holding that "absent express statutory authorization, affidavits could not assert facts on information and belief unless they were 'incapable of positive averment.'" Reversing this ruling in an opinion by Justice Brown, the Supreme Court took the position that this should be treated as any other criminal case, showing that search warrants are regularly issued in such cases based on "information and belief" affidavits, and that the court of appeal had incorrectly relied on civil cases in which a higher standard is required. In this case, the testing serves not a general interest in law enforcement but rather a special need concerning public health and danger to the victims, for which a "less stringent" test of the affidavit is customary. Also ruling on an alternative argument by the defendant, that the victims' statements should not be credited because the girls were not reliable informants, the court asserted that the victim of a crime is a presumptively reliable informant.

California — Mainly affirming a dismissal ruling in a case involving a man's claims against his employer, a drug company, arising from his involvement in treatment with an experimental drug, the California Court of Appeal did revive one aspect of the case: the man's claim of breach of his right of privacy when progress reports on the administration of the drug to him were relayed back to the employer without disguising his identity, leading to co-workers allegedly learning for the first time of his HIV+ status and Crohn's disease. The court concluded that this claim was not ready for judgment on the pleadings due to some unresolved factual issues. *West v. Oxo Chemie, Inc.*, 2002 WL 31716540 (Cal. Ct. app., First Dist., Div. 5, Dec. 4, 2002) (not officially published).

Massachusetts — Ruling in *Commonwealth v. Landry*, 2002 WL 31720886 (Dec. 6), the Massachusetts Supreme Judicial Court found that individuals who are participating in lawfully authorized needle-exchange programs in particular cities may not be arrested and charged with violating local laws on possession of unprescribed hypodermic works when they travel outside those cities to other parts of the state. The legislature authorized the Health De-

partment to implement needle exchange programs in towns that gave local approval; as a result of this approach, there is a geographical patchwork of jurisdictions having such programs and those that decided to reject them. The city of Lynn took the position that when a Cambridge resident, Maria Landry, who was a participant in Cambridge's program carried her equipment into Lynn, the Lynn police could arrest and charge her, and that her identity card as a program participant need not be respected as exempting her from Lynn's local laws on possession. The court rejected this interpretation of the law, in a unanimous ruling with opinion by Justice Cowin, who wrote: "An interpretation of sec. 27(f) that discourages program participation by effectively limiting where a participant may legally possess needles would certainly hinder, and might well defeat, the department's attempts to deal with the problem."

New York — In *Carman v. Abter*, 2002 WL 31839193, 2002 N.Y. Slip Op. 09557, the Appellate Division, First Department, the Appellate Division revived a malpractice suit brought by Ella Carman, a nurse employed by an unidentified Medical Center, against a doctor who was retained as an infectious disease consultant by the Center, while affirming dismissal of charges against the Center and its medical staff as barred by the Workers Compensation Law. Ms. Carman alleged that she contracted HIV in a needle-stick accident while drawing blood from a Center dialysis patient. Carman immediately reported the accident to the administrative director, who told her to see Dr. Ma, who examined her and referred her to Dr. Abter. Carman alleges that negligence in responding to her accident resulted in her seroconversion. The trial judge had found the entire suit barred by Worker's Compensation, but the appellate court deemed Dr. Abter's independent contractor status sufficient to revive the claim against him.

Texas — The Texas Court of Appeals in Austin affirmed the conviction of Ronald Hutchins in the murder of P.L., an HIV+ woman with whom he had a sexual relationship. *Hutchins v. State of Texas*, 2002 WL 31769017 (Dec. 12, 2002) (designated "No publication"). Hutchins was claiming self-defense, insisting that an argument sparked by his learning that P.L. was HIV positive had gotten out of control. P.L. was found by police barely alive on the floor of her apartment, suffering from numerous stab wounds; she died from a stab wound to her heart. The jury evidently did not believe Hutchins' self-defense claim, and the court concluded that the evidence presented at trial was legally sufficient to support the jury's verdict. Among other things, the appeals court found that the trial judge did not err in excluding P.L.'s medical records, finding that there was plenty of testimony about P.L.'s HIV status in the record. A.S.L.

PUBLICATIONS NOTED

LESBIAN & GAY & RELATED LEGAL ISSUES:

Brugger, Winfried, *Ban on or Protection of Hate Speech? Some Observations on German and American Law*, 17 *Tulane European & Civil L. Forum* 1 (2002).

Duncan, William C., "The Mere Allusion to Gender": *Answering the Charge that Marriage is Sex Discrimination*, 46 *St. Louis U. L. J.* 963 (Fall 2002) (opponent of same-sex marriage replies to argument that denying marriage to same-sex partners is sex discrimination).

Goldfarb, Sally F., *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 *Fordham L. Rev.* 57 (Oct. 2002).

Hermer, Laura, *Paradigms Revisited: Intersex Children, Bioethics & Law*, 11 *Annals of Health Law* 195 (2002).

Linton, Paul Benjamin, *Same-Sex "Marriage" Under State Equal Rights Amendments*, 46 *St. Louis U. L. J.* 909 (Fall 2002).

Student Articles:

Anglin, Howard, *The Potential Liability of Federal Law-Enforcement Agents Engaged in Undercover Child Pornography Investigations*, 77 *N.Y.U. L. Rev.* 1090 (Oct. 2002).

Mothershead, Kyle F., *How the "Equal Opportunity" Sexual Harasser Discriminates on the Basis of Gender Under Title VII*, 55 *Vanderbilt L. Rev.* 1205 (May 2002).

AIDS & RELATED LEGAL ISSUES:

Lewin, Simon, and Ilan Lewin, *Torture and Ill-Treatment Based on Sexual Identity: The Roles and Responsibilities of Health Professionals and Their Institutions*, 6 *Health & Hum. Rts.* 161 (2002).

Maluwa, Miriam, Peter Aggleton, and Richard Parker, *HIV- and AIDS-Related Stigma, Discrimination, and Human Rights*, 6 *Health & Hum. Rts.* 1 (2002).

Waysdorf, Susan L., *The Aging of the AIDS Epidemic: Emerging Legal and Public Health Issues for Elderly Persons Living with HIV/AIDS*, 10 *Elder L. J.* 47 (2002).

Student Articles:

Markey, Elizabeth Keadle, *The ADA's Last Stand? Standing and the Americans With Disabilities Act*, 71 *Fordham L. Rev.* 185 (Oct. 2002).

Olender, Catherine, *Capping AIDS Benefits: Does Title III of the ADA Regulate the Content of*

Insurance Policies?, 28 *Am. J. L. & Med.* 107 (2002).

Specially Noted:

In the Nov/Dec 2002 issue of *Foreign Affairs*, Vol. 81, No. 6, Nicholas Eberstadt has a rather gloomy article titled "The Future of AIDS," which focuses on the predicted shift in the center of gravity of the epidemic over the coming decades from Africa to Eurasia. Eberstadt observes that the major powers in that area could be taking important steps now to prevent a catastrophe, but are not doing so.

EDITOR'S NOTE:

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