FEDERAL COURT ORDERS SCHOOL BOARD TO LET GAY/STRAIGHT ALLIANCE MEET

For the first time, a federal judge has ordered a public school board to allow a Gay/Straight Student Alliance to meet at a public high school. Ruling on Feb. 4 on the plaintiffs' motion for a preliminary injunction in *Colin v. Orange Unified School District Board of Education*, 2000 WL 194676 (U.S.Dist.Ct., C.D. Cal.), U.S. District Judge David O. Carter found that the plaintiff students had shown a high probability of success on the merits of their claim that the school board's refusal to allow a Gay/Straight Student Alliance to meet at El Modena High School violates the Equal Access Act, 20 U.S.C. sec. 4071, and that the equities strongly favored awarding a preliminary injunction.

The following week, the student organization met for the first time on campus (it had been meeting informally in a park across the street), and the school board held emergency sessions trying to determine what to do next after Judge Carter refused to stay his injunction pending appeal. The immediate response of the Board was to ban non-curricular clubs at the district's elementary and middle schools, to forestall any argument under the Equal Access Act that younger students should be allowed to form Gay/Straight Alliances, and to support a rule requiring written parental authorization for any high school student to participate in a non-curricular club at the high school. *Los Angeles Times*, Feb. 11 & 12.

The Equal Access Act was passed in 1984, mainly at the behest of members of Congress who sought to allow students who wanted to form religiously-oriented student groups to be able to meet and hold their activities on public school campuses. Because a law expressly requiring schools to allow such organizations to operate would raise serious Establishment Clause problems, however, the vehicle the legislators used was an Equal Protection-style requirement that if a school allows any non-curricular groups to meet on campus, it may not discriminate on the basis of the substantive concerns of the groups in question. Thus, the only way a school can exclude a religiously-oriented student group (or, for that matter, a gay-student group) from meeting, would be to ban all non-curricular clubs. (This is the route taken by the Salt Lake City school board in response to student attempts to form Gay/Straight Alliances in that city.)

When students Anthony Colin and Shannon MacMillan decided to form a Gay/Straight Alliance Club at El Modena High School, they submitted a mission statement for the club to the principal after getting a teacher to agree to be a faculty advisor. The principal had previously been advised by the Assistant Superintendent of schools that any attempt to start such a club in the district must be brought first to the board of education before it could be approved. (Orange Couty school administrators clearly had anticipated such a development, for there are functioning Gay/Staight Student Alliances at several high schools in neighboring school districts [see *Santa Rosa Press Democrat*, Feb. 14, reporting on such clubs at Fountain Valley High School and Los Alamitos High School] and the growth of such organizations has been explosive, especially since the Matthew Shepard murder and its attendant national media examination raised consciousness nationwide about the problems faced by gay students.)

The Orange County school board held a public forum to solicit opinions about whether it should allow the club to meet, but delayed taking a vote for so long that the students started this lawsuit, at first mainly to compel the board to act. On Dec. 7, 1999, the Board voted unanimously to ban what it considered a "sexually charged" club, and claimed that it would violate state education laws on sex education to allow a student club to discuss sexual issues. (Colin and MacMillan framed their mission statement to make clear that the purpose of the club was not to discuss sexuality, but rather to promote understanding for lesbian and gay students and to provide a forum for discussing their survival issues.) The Board's resolution also stated that it would not rule out approving a "tolerance club" if its mission statement "clearly states that sex, sexuality, [and] sex education... will not be the subject of discussion in club meetings."

A week later, the school superintendent and the high school principal pulled students interested in the formation of a GSA out of classes to discuss the possibility of forming a club along the lines apparently allowed by the Board's resolution, but the students rejected this proposal and determined to persist in their law suit.

Judge Carter began his legal analysis with a discussion of First Amendment principles applied to public school students, as background to his interpretation of the Equal Access Act, and quoted Justice Anthony Kennedy's observation, in *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226, 259, that "one of the consequences of the statute, as we now interpret it, is that clubs of a most controversial character might have access to the student life of high schools that in the past have given official recognition only to clubs of a more conventional kind." Carter commented, "Due to the First Amendment, Congress passed an 'Equal Access Act' when it wanted to permit religious speech on school campuses. It did not pass a 'Religious Speech Access Act' or an 'Access for All Student Except Gay Students Act' because to do so would be unconstitutional."

After surveying the range of non-curricular clubs at El Modena High School, Carter concluded that the school had established the kind of "limited open forum" that brings the provisions of the EAA into play. He also concluded that the GSA is a "non-curriculum related student group" of the type covered by the Act. This was a hotly disputed point in the litigation, with the School Board arguing that in light of state education law requirements covering sex education, any club concerned with aspects of human sexuality should be considered a curricular club, and thus not covered by the Act. At the hearing, the student organizers testified that the club was not intended for discussions about sex, but rather for discussions about homophobia. One student testified, "I want us to talk about the experiences that gay, lesbian and bisexual kids go through in their everyday lives such as harassment, coming out of the closet or telling people that they are gay: the fear and the emotions such as self-hatred or denial that a lot of kids go through and the harassment they get and how to deal with that."

The school board tried to counter this with the teacher's edition of a *Human Sexuality* text that some teachers were alleged to have used in preparing for the required Health courses, but the testimonial evidence did not suggest that all the teachers used it or that all the subjects in the book were presented in the class. "Plaintiffs amply demonstrated that the fact that El Modena had the Teacher's Edition of this book on a shelf in its media center did

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not mean that the subjects were necessarily taight in class." Indeed, based on all the evidence presented, Carter concluded that the subject matter the club proposed to discuss was not covered in the school's curriculum, and even if some of it were, that would not necessarily render the club curriculum-related, focusing on the Supreme Court's prior ruling that the term "non-curriculum related club" is "best interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school." Judge Carter found that the proposed GSA at El Modena met this standard; indeed, he found, "It takes a significant leap of imagination to believe that the same board that voted unanimously against permitting this group on campus has also included the subject matter of what Plaintiffs intend to discuss in the curriculum." But Carter went further, finding that whether the GSA would discuss subject matter that was also in the curriculum was not relevant to the ultimate merits of GSA's case, since the board's action in creating a "limited open forum" at the school would create an obligation to allow the GSA to meet in any event.

Carter also rejected the school board's argument that GSA was created and controlled by non-school persons. The board argued that formation of the GSA was prompted and controlled by the Gay Lesbian Straight Education Network, a national organization that has worked to improve conditions for lesbian and gay students by, among other things, providing support and advice for students who wish to form GSA's at their schools. In this case, the board's argument was credibly refuted by the students from El Modena, who said their first contact with GLSEN came after they were rebuffed in their attempts to start the local group. Carter also pointed out that the continuing contacts with GLSEN were not sufficient to run afoul of the EAA's provisions.

Carter also decisively rejected the school board's argument that it had complied with the Act by suggesting that the club could meet under an alternative name devoid of any sexual content under a mission statement that would preclude any discussion of sexuality. Carter found that these requirements would clearly violate the rights of the students, and further noted from public comments made by school board members that the board's action was clearly motivated by board members' beliefs about the contents of the speech that would take place at Club meetings. There was little doubt that the board's actions had denied "equal access" to the students who sought to form the GSA. Carter concluded, "If this Court were to allow the School Board to deny recognition to the Gay-Straight Alliance, it would be guilty of the current evil of 'judicial activism,' carving out an exception from the bench to the statute enacted by the politically accountable Congress. If this Court were to interpret the Equal Access Act differently than courts have in the past when applying the Act to Christian groups, it would be complicit in the discrimination against students who want to raise awareness about homophobia and discuss how to deal with harassment directed towards gay youth."

Clearly, here is a judge who "got it," early in the litigation. Reviewing the record to determine whether preliminary relief was merited, Carter concluded that any further delay in letting the GSA meet on campus would cause irreparable injury to the plaintiffs. "Plaintiffs have been injured not only by the Board's excessive delay, but also by the inability to effectively address the hardships they encounter at school every day," said Carter, reciting details from the students' testimony about specific instances of harassment. He also found that granting the injunction would be in the public interest, noting the recent passage of the California Student Safety and Violence Prevention Act of 2000, and the earlier passage of a penal code provision prohibiting hate crimes premised on the victim's sexual orientation. Noting the problems of teen suicide and anti-gay violence in schools, Carter concluded, "This injunction therefore is not just about student pursuit of ideas and tolerance of diverse viewpoints. As any concerned parent would understand, this case may involve the protection of life itself. Since the Gay-Straight Alliance seeks to end discrimination on the basis of sexual orientation, a preliminary injunction requiring the Board to recognize the club would be consistent with state public policy and in the public interest."

The School Board's actions following issuance of the injunction raise interesting questions about compliance, especially as the Board seemed disinclined to go the Salt Lake City route of banning all non-curricular clubs at El Modena, an action that would likely provoke significant student protests. Imposing a parental consent requirement for student participation in all non-curricular clubs would impose a special hardship on the GSA not faced by other clubs, and would probably deter closeted students from joining, thereby undercutting an important justification for such clubs: helping to save lives and prevent teen suicide by providing an accepting environment for students who are struggling to understand and accept their own sexuality. Carter's opinion on the preliminary injunction suggests that if he were called upon to rule on an application for further injunctive relief against the parental consent requirement, he would be open to an argument that this requirement violates the EAA and the 1st Amendment rights of the students involved.

Judge Carter, who was appointed to the federal bench by President Clinton in 1998 after lengthy service as a California state judge, is a Marine Corps veteran of the Vietnam War who won a purple heart and a bronze star, and had a career as a state prosecutor before becoming a judge.

The plaintiffs are represented by Lambda Legal Defense & Education Fund's Los Angeles office.

••• In the wake of national media attention on the Orange County ruling, the East Baton Rouge (Louisiana) Parish School Board seemed determined to provide the next battleground on this issue, voting Feb. 10 to reject a policy resolution that would have given all extra-curricular clubs, including chapters of a Gay-Straight Alliance, the right to meet on high school campuses. Martin Pfeiffer, a senior at McKinley High School, had requested permission to start such a group, which was denied by the school administration. An attorney for the school board drafted the proposed policy; prior to Pfeiffer's request, the board had no written policy and decisions about whether to allow particular groups to meet on campus where made on an ad hoc basis. Pfeiffer indicated that he would contact a lawyer to initiate a lawsuit if the board does not take up the issue again. Six members of the board voted in support of the proposed policy, but board rules require seven affirmative votes to enact a policy. *Baton Rouge Advocate*, Feb. 11. The *Baton Rouge Advocate* reported Feb. 24 that a group of ministers who oppose letting a GSA meet at McKinley High have asked the School Board to revisit the issue, and have suggested that the Board adopt a policy forbidding non-curricular student clubs from meeting during the school day. A.S.L.

LESBIAN/GAY LEGAL NEWS

California Appeals Court Disallows Sexual Orientation Discrimination in Jury Selection

In a case of first impression, a California appellate court has ruled that prosecutors cannot exercise peremptory challenges to excuse lesbians and gay men from criminal jury pools solely because of the prospective juror's sexual orientation. *People v. Garcia*, 92 Cal. Rptr. 2d 339, 2000 WL 116213 (4th Dist., Div. 3, Jan 31), order denying rehearing and correcting opinion, 2000 WL 199682 (Feb. 22). The panel of three judges concluded unanimously that criminal defendants have the constitutional right to have cases tried before an im-

partial jury that "represents a cross-section of the community," including lesbians and gay men. The court based its holding on the Sixth Amendment of the United States Constitution and Article I, Section 16 of the California Constitution.

Cano Garcia was charged with what the court labeled "a garden variety" burglary. During jury selection, it became known that two members of the jury panel were lesbians. Defense counsel challenged the prosecutor's decision to exercise peremptory challenges to excuse both jurors, arguing that the prosecutor had engaged in unlawful group bias. Orange County Superior Court Judge Corey Cramin denied the defendant's motion, finding that "sexual preference is not a cognizable group... I don't think that your sexual preference specifically relates to them sharing a common perspective or common social or psychological outlook on human events." The California Court of Appeal disagreed.

Writing for the court, Judge Bedsworth traced the history of two distinct constitutional limitations on the use of peremptory challenges. The first and more well-known of the two, which prohibits individuals from being excused from both criminal and civil juries on the basis of race and gender, is based on the Equal Protection Clause of the Fourteenth Amendment and the United States Supreme Court's decisions in *Batson v. Kentucky*, 476 U.S. 79 (1986), and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). Regrettably, the panel balked at the opportunity to extend these cases to sexual orientation discrimination. Bedsworth explained almost apologetically that classifications based on race and gender require heightened judicial scrutiny in Equal Protection cases, whereas classifications based on sexual orientation do not, "so it has not yet been established whether such [heightened] scrutiny is a sine qua non of Batson error or merely a common characteristic." The panel chose not to decide the issue one way or another.

Instead, the appellate court fashioned a truncated remedy that applies only in criminal cases, based on the Supreme Court's 1975 decision in *Taylor v. Louisiana*, 419 U.S. 522. The Taylor court held for the first time that by excluding women from a criminal jury venire, prosecutors had violated a defendant's implicit Sixth Amendment right to be tried by a "representative cross-section" of the community. In 1978, the California Supreme Court adopted the holding in *Taylor* and, on state constitutional grounds, broadened the scope of prohibited group bias to include "race, ethnicity, gender or 'similar' group bias." The court here ruled that sexual orientation discrimination during criminal jury selections flouts the Sixth Amendment and California's constitution.

Garcia first had to demonstrate to the court that lesbians and gay men "share a common perspective arising from their life experience in the group." The panel found little difficulty concluding that this test had been satisfied. Using bold if not controversial language, Judge Bedwworth explained that lesbians and gay men "share a history of persecution comparable to that blacks and women share...It cannot seriously be argued in this era of 'don't ask, don't tell' that homosexuals do not have a common perspective."

The Attorney General challenged the defendant's position that lesbians and gay men constitute a legally cognizable group: "What common perspective is, or was, shared by Representative Jim Kolbe (R-Ariz.), RuPaul, poet William Alexander Percy, Truman Capote, and Ellen DeGeneres?" The court dismissed this rhetorical question, noting that "they share the common perspective of having spent their lives in a sexual minority, either exposed to or fearful of persecution and discrimination." The Attorney General's argument also proved too much, Bedsworth noted, since the same diversity is found among African Americans and women, yet jurors cannot be excluded on the basis of race and gender.

The court also agreed with Garcia's counsel that no other members of the community are capable of adequately representing the perspective of lesbians and gay men. "We cannot think of anyone who shares the perspective of the homosexual community," Bedsworth wrote. "Outside of racial and religious minorities, we can think of no group which has suffered such pernicious and sustained hostility, and such immediate and severe opprobrium as homosexuals."

Since the record on appeal did not indicate explicitly why the prosecution had excused the two lesbian jurors, the panel remanded the case and directed the trial court to hold a hearing on the issue. Whatever the outcome of that hearing, criminal defense attorneys may now have a new basis to help ensure that lesbian, gay and straight defendants alike are judged by a jury that more fully reflects their community. Mr. Garcia was represented by Michael Satris. *Ian Chesir-Teran*

Washington State Appeals Court Reverses Summary Judgment Awarding Intestate Man's Estate to His Same-Sex Domestic Partner

In an opinion by Judge Bridgewater, the Washington Court of Appeals reversed the award of summary judgment to plaintiff Frank Vasquez, who claimed that he was entitled to inherit the whole of the estate of Robert Awrey Schwerzler, a gay man who was his domestic partner and who died intestate. *Vasquez v. Hawthorne*, 2000 WL 146805 (Wash. App. Div. 2, Feb. 11).

Vasquez and Schwerzler lived together for approximately 16 years, and according to Vasquez were life partners. When Schwerzler died, he left an estate that included the house they both lived in, a life insurance policy, two cars and a checking account. Vasquez filed a claim against the estate, arguing that he and the deceased had been life partners in a "meretricious relationship", and therefore he was entitled under Washington precedents to a share of the community property. Hawthorne, the appointed personal representative of the intestate's estate, denied Vasquez's claim on the ground that, as a matter of law, a same-sex relationship cannot be "meretricious." The trial court agreed with Vasquez and awarded almost the entire estate in a partial summary judgment. The Appeals Court disagreed with the trial court's ruling.

According to Judge Bridgewater, under Washington's common law a "meretricious relationship" is defined as "a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist." Determination of whether any particular relationship is meretricious is to be made by the court on a case-by-case basis. The Washington Supreme Court has ruled that courts may apply community property laws by analogy to a lawful marriage in order to determine ownership at the end of a meretricious relationship, on a just and equitable basis. *In re Marriage of Lindsey*, 101 Wash. 2d 299, 678 P. 2d 328 (1984). Since meretricious relationships are not legally the same as marriage, Washington courts limit the distribution of property to whatever would have been characterized as community property had the parties been legally married.

Bridgewater refused to extend the protections of the common law to include same-sex partners. He found that Vasquez' and Schwerzler's relationship was not quasi-marital or sufficiently similar to a marriage to warrant treating it as a marriage for purposes of dividing the property, because two people of the same sex cannot legally marry. Furthermore, he stated that "we find no precedent for applying the marital concepts, either rights or protections, to same-sex relationships; all of the reported cases concerning meretricious relationships have been between men and women, and community property law clearly applies only to opposite-sex relationships." In a footnote, he stated that Washington statute RCW 26.16.030 defines community property as property acquired after marriage by either husband or wife or both. In finding no legal basis to extend the rights and protections of marriage to same-sex relationships, he noted that it was up to the legislature to do

that, and Vasquez might still have a chance to prevail in court by basing his claim on the existence of a constructive trust and implied partnership.

Vasquez is represented by Terry James Barnett of Tacoma, and the estate is represented by Ross Edwin Taylor, also of Tacoma.*Elaine Chapnik*

Trial Court Erred in Barring Cross-Exam of Lesbian Activist's Motivations for Testifying

The U.S. Court of Appeals for the Seventh Circuit found that a district court erred when it refused to allow an attorney to impeach the credibility of a lesbian witness by suggesting that she was hostile to the defendant for breaking up her relationship and because the defendant had run on the same ticket with a candidate who held homophobic views. *United States v. Santos*, 2000 WL 36940 (7th Cir., Jan. 19). Judge Posner found that these errors, when considered in conjunction with a number of other incorrect evidentiary rulings, warranted granting the defendant a new trial.

Miriam Santos, the Treasurer of the City of Chicago, was convicted for a number of mail fraud and extortion violations, and sentenced to serve forty months in prison and to pay $50,000 in restitution. The 7th Circuit panel first considered her claim that she had been denied her right to counsel, because the trial court had refused to grant a continuance in order to avoid a conflict with another of Santos' attorney's trials. The panel found that the district court's decision was an abuse of discretion, but the error was not of the kind that would require automatic reversal of the trial. However, the panel did not engage in a lengthy analysis of the 6th Amendment issue, because they found that the combination of other errors demanded a new trial.

Among the many evidentiary rulings considered by the panel, Judge Posner addressed the refusal of the district court to permit Santos' lawyer to introduce through cross-examination that a government witness, Laurie Dittman, held a grudge against Santos because she had allegedly broken up Dittman's lesbian relationship by firing Dittman's lover, who had worked with them on the Illinois gubernatorial campaign. Santos' attorney had also wanted to impeach Dittman's credibility by alleging that Dittman was hostile to Santos because the gubernatorial candidate on the same ticket with Santos held anti-gay positions, but the district court disallowed this line of questioning as well. Judge Posner found these rulings to be in error, noting that "[o]bviously, he would have permitted this if Dittman were heterosexual." Posner noted that homosexuality still suffers from a public stigma among many Americans. However, in this case, he found that the usual interest in protecting the witness from "gratuitous embarrassment can have no weight … because Dittman is openly lesbian and a lesbian activist to boot," citing a Chicago newspaper article that identified Dittman as the executive director of IMPACT, a statewide gay and lesbian political action committee.

The government had maintained that Dittman's sole motive for testifying was "disgust" at Santos' behavior. The district judge had permitted the attorney to question Dittman about her grudge because of the firing of a campaign manager whom Dittman had recruited. According to Federal Rule of Evidence 403, a judge may exclude evidence if "he reasonably concludes that it is much more likely to distract than to enlighten the jurors, or to make the jury irrationally doubt the witness's truthfulness." While conceding that the Rule 403 issue was a closer question, Posner found that the judge had erred when he refused to allow Santos to offer evidence that would contradict Dittman's stated motivations. Posner insisted that "a grudge arising from the firing of an employee one had recruited is a far less plausible basis for inferring perjury than a grudge arising from the breaking up of one's marriage or an equivalent relationship."

As a result of this ruling, and several other findings of error, the panel reversed and remanded the trial court's decision. Posner also noted that Santos would now be able to have the attorney of her choice represent her, alleviating any practical concerns raised by the Sixth Amendment claims. *Sharon McGowan*

Child Molester's Sentence Subject of Controversy in Maine High Court

The length of the sentences received by two child molesters caused division among members of the Supreme Judicial Court of Maine in *State v. Sweet*, 2000 WL 101206 (Me.), 2000 ME 14 (Jan. 31, 2000).

In 1997, Richard Sweet and Paul Poulin pled guilty to multiple sexual assault crimes involving four male children. Sweet, 47, was sentenced to 40 years, Poulin, 32, to 65 years. Both appealed, challenging the use of the enhanced statutory range of 20 to 40 years for Class A charges of gross sexual assault, the imposition of consecutive sentences, and the length of the sentences in their entirety. The Supreme Court's decision affirms the result of a four step analysis performed by the sentencing court: determine a basic sentence based on the nature and seriousness of the offense; determine whether the crime falls within the higher tier of Class A sentences; examine the crime and mitigating and aggravating factors to establish an individualized maximum sentence; and set a final sentence determining how much of the sentence, if any, should be suspended and what circumstances and conditions of probation, if any, should be ordered.

The highest sentence available for a Class A crime may be either 20 or 40 years, depending on the nature of the crime and the defendant's criminal history. The defendants contend that the court erred in concluding that these were among the most heinous ways that a gross sexual assault can be committed because the conduct was nonviolent. The opinion counters that "they exposed their victims to an environment of sex, alcohol, and pornography ... boys ... at the cusp of sexual development ... may well have created greater long-term damage to their victims than a violent one-time assault could have done ... the young victims were subjected to ... a variety of physically intrusive sexual activities." Therefore the trial court did not abuse its discretion in attaching 30 and 35 year sentences to these crimes.

The court affirmed the imposition of consecutive sentences based on the facts that Sweet was on probation for prior child molestation, Poulin for burglary, and the involvement of multiple victims. Concluding that the total length of the sentences is not excessive, the opinion focused on the risk of recidivism highlighted by Sweet's prior convictions, Poulin's membership in the North American Man-Boy Love Association, Poulin's journal statement "I believe there is no such thing as a 'reformed boy lover'" and his lack of empathy with his victims.

Two of the six judges dissented, arguing that Poulin's total sentence was excessive and should be vacated. Judge Calkins, on review of reported gross sexual assault cases, found that the longest sentence before Poulin's was 40 years (though the opinion cites a unique 85–year sentence). The dissent opines that both defendants received de facto life sentences, given an average life expectancy of 73.8 years, noting that Maine's legislature has only sanctioned life sentences for murder with certain aggravating circumstances. The dissent summarized: "I fear that the affirmance of this sentence will substantially raise the bar of sentences generally." *Mark Major*

N.Y. Trial Court Denies Retroactive Effect to New Guidelines on Adult Businesses in NYC

In *City of New York v. Warehouse on the Block, Ltd.*, NYLJ, 2/1/00 (Supreme Ct., Queens Co.), Justice Lonschein ruled that revised N.Y. City Guidelines intended to deal with issues raised by the N.Y. Court of Appeals Dec. 20 decision in *City of N.Y. v. Les Hommes*, 1999 WL 1215136, cannot be applied retroactively in a pending proceeding.

In *Les Hommes*, the high court held that the City could not seek to close down a business establishment that was in compliance with

the guidelines specifying that an establishment that devoted less than 40 percent of its floor space to adult uses was not an adult establishment. The revised Guidelines, issued quickly without any opportunity for public comment, provide factors to consider in deciding whether attempts at compliance by a business establishment are merely a sham to allow continued operation of an adult business in an area zoned against such businesses.

The City had commenced proceedings to shut down Warehouse on the Block prior to the decision in *Les Hommes*, but urged the court to apply the new guidelines, even thought Warehouse on the Block appeared to be in technical compliance with the old guidelines.

In refusing the City's request, Lonschein commented, "To allow such retroactive effect would allow the City, at its pleasure, to render conforming establishments illegal, without giving the owners prior notice or an opportunity to come into compliance. The City has not cited any authority which would allow such a result, nor is the court aware of any. The City's position is tantamount to changing the rules after the game has been played." A.S.L.

Delaware Family Court Sharply Restrict's Gay Father's Visitation Rights

In a much-belatedly published opinion, the Delaware Family Court ruled in *Santiago J. v. Pamela J.*, 1999 WL 1456949 (Aug. 12, 1999), that a gay father's visitation rights with his two young children should be sharply restricted, primarily because of tensions between the father and the mother and the children's lack of emotional preparedness to interact with the father's partner.

The opinion by Judge Aida Waserstein contains a long factual narrative, setting out the full history of the relationship of the parties of the ongoing struggles concerning their children, exacerbated by the mother's strict Christian faith and enrollment of the children in a Christian school where they are taught that their father's lifestyle is wrong and that he will not be able to be with them in heaven as a result. The father is a pediatrician who now lives in Florida. Judge Waserstein found the issue of the children's schooling to be troubling, but noted that they appear to be thriving in their mother's home and well adjusted to their school situation. On the other hand, she recognized that it is important to maintain a relationship with their father and eventually to form at least a friendly relationship with their father's partner. Thus, Judge Waserstein reserved a final decision and issued an interim order, under which father's visitation will be taken place only in the geographical vicinity of the mother's home (Delaware and eastern Pennsylvania), except when the children join their father in visiting the paternal grandfather in Puerto Rico, which the judge encourages in order to preserve that family tie.

Concluding as she does that contact with the father's partner, if not properly prepared for, will be psychologically upsetting to the children, and sensitive to the argument that visitation in the father's home excluding the partner would essentially be evicting the partner from his home for periods of time, Judge Waserstein ruled that visitation shall not take place in the father's home in Florida, at least for now, but that the court will exercise continuing jurisdiction and various counselors will be required to report on progress towards being able properly to introduce the children to the partner so that visitation in the father's home can be authorized in the future.

Overall, the opinion sounds like a carefully reasoned approach to a difficult problem, provided, of course, that one can rely on the facts as reported (which is frequently not the case in situations involving gay parents). Santiago is represented by Ellen S. Meyer; Pamela, the children's mother, is represented by Felice Glennon-Kerr. A.S.L.

Homophobic Slurs by Both Parties Mark Sexual Harassment Litigation

Chief Judge McAvoy of the U.S. District Court for the Northern District of New York has denied summary judgment to the defendants in a sexual harassment suit, *Dyke v. McCleave*, 2000 WL 52520 (N.D.N.Y. Jan 14), in which it is alleged that both the harasser and the harassee used homophobic epithets against each other in the workplace. The plaintiff, Katrina Dyke, had complained of a pattern of repeated and intentional sexual harassment, in that her male office supervisor was constantly referring to her as "'a 'cunt,' 'slut,' 'whore,' 'lesbian,' 'dyke,' 'pig,' 'bitch,' 'mother-fucker,' 'stupid cunt,'" among other gender-based derogatory names. Her supervisor conceded that he addressed her with these terms, among others, but contended that she had called him a "cocksucker" and a "faggot," a charge which she denied. The decision turns on whether the plaintiff stated a cause of action as a matter of law (she did), and whether defendants stated sufficient defenses as a matter of law (they didn't). This is all a matter of the law of sexual harassment. There is no indication of the sexual orientation of any of the parties. This case is also noteworthy for its assembly of language one normally would not see in a federal decision, setting forth terms deemed to be derogatory to women in prior decisions. The interested reader is directed to Section II.C.2. of the decision. Given the tenor of the judge's decision, the defendants would be ill advised to seek a bench trial. *Steven Kolodny*

Litigation Notes

In *Matter of B.P. and A.P.*, 2000 WL 201569 (Feb. 15), the Montana Supreme Court upheld a lower court decision granting a petition by the Montana Department of Public Health and Human Services to take the minor children from the physical custody of their mother, as to whom it was alleged that she was mistreating the children in ways causing psychological injury. Part of the problem was that she was denigrating and turning the children against their father, her ex-husband, due to his homosexuality. There were many other complicating factors as well, and the father's homosexuality was not a major issue in the case, but the mother's actions with respect to it were an additional factor cited by Justice Karla M. Gray in her opinion upholding the lower court's ruling.

U.S. District Judge Joseph R. Goodwin (D.S.W.Va.) ruled Feb. 16 in *Chapman v. Flexys America* that a labor arbitrator's ruling would have to be denied enforcement due to homophobia by the arbitrator. James Chapman was sent home from work after a dispute with a supervisor, and, after a brief investigation, the company suspended him for 30 days. He grieved through his union and the case ended up in arbitration before Merle Hart. During the hearing, it came out that Chapman thought the supervisor was gay; Hart, commenting that during World War II he had worked for a U.S. Intelligence Agency and his job involved determining whether soldiers were gay and should be discharged, stated that if Chapman "thought his supervisor was 'a queer,' he would grant Chapman's grievance on that basis alone." The company refused to reinstate Chapman, who appealed for enforcement of the arbitrator's award. Ruled Judge Goodwin, Hart offered a "corrupt substitute" for justice in this case. "Here the arbitrator's conduct goes beyond bias into the realm of clear prejudice," wrote Goodwin. According to testimony by the company's attorney, the arbitrator called her after the hearing and said he was thinking of ordering reinstatement without an explanation, and that he would only reconsider if the company agreed to investigate the supervisor's "background." The company attorney asked the union and the arbitrator to agree that the arbitrator withdraw from the case, but both refused. *Charleston* Gazette (West Virginia), Feb. 17.

The *Capital Times* in Madison, Wisconsin, reported Feb. 22 that Dane County Circuit Judge Angela Bartell ruled in *Pritchard v. Madison School District* that the school district did not violate any law by agreeing with the teachers union to extend domestic part-

nership benefits eligibility to teachers in the district. The plaintiffs argued that under state law municipal employee benefits may only to employees, their legal spouses, and their dependent children. But Judge Bartell concluded that this statute authorizing benefits did not impose a limitation on a local government unit extending benefits eligibility further. According to Bartell, the legislature "wisely foreswore the micromanagement of local school systems in diverse areas of the state, and, rather, explicitly granted broad power to be exercised by local school boards in connection with the myriad of issues and complexity of operating indivudal local school districts." Further, Judge Bartell noted that state law gives the school district a duty to negotiate over wages with the union representing its teachers, and employee benefits are a form of wages. "It is not the role of this court to balance and determine the social and political policy considerations inherent in facilitating access to health insurance coverage for designated family partners and dependent children," she wrote. The issue was whether the policy adopted by the board meets the requirement to "promote the cause of education." That more than thirty district employees had filed for the benefits indicated to Bartell that "such coverage has value in recruiting and retaining teaching personnel and employees of the district, thereby promoting the cause of education and maintaining the operation of the district's educational program." Bartell suggested that if the plaintiffs are dissatisfied with this decision, they should address their concerns to the legislature or seek change through School Board elections.

A federal court jury in Manhattan found on Feb. 17 that the City of New York did not violate the 1st Amendment rights of the Irish Lesbian and Gay Organization by refusing ILGO a permit to hold its own parade on Fifth Avenue in New York City on Saint Patrick's Day. The City's attorneys argued that ILGO has been offered a variety of alternatives, including allowing it to march in other areas, and that the City's refusal to grant a permit for Fifth Avenue on that date (when the anti-gay Ancient Order of Hibernians holds its St. Patrick's Day Parade on 5th Avenue) was due to logistical concerns and not the content of ILGO's proposed parade. After the verdict, Judge John G. Koeltl urged the sides to negotiate over a permit before some other judge, but the City attorneys reportedly said there was little chance of that, according to a Feb. 18 report in the *New York Law Journal*.

A unanimous 9th Circuit panel upheld a decision by U.S. District Judge Manuel L. Real to applying the abstention doctrine announced in *Younger v. Harris*, 401 U.S. 37 (1971), to a sexual harassment claim brought by William Spearman against Desert Hospital in *Spearman v. Desert Hospital*, 2000 WL 60163 (Jan. 18) (unpublished disposition). Spearman alleged that he was sexually harassed based on his homosexual orientation, and filed identical suits in state and federal court. The hospital moved to dismiss the federal action, citing *Younger*. According to the brief per curiam panel decision, Spearman apparently misunderstood the preemption doctrine, thinking it applied only to pending criminal actions, but the panel noted that the Supreme Court has applied it to civil litigation as well, see, e.g., *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986). The court opined that having invoked the jurisdiction of the California courts, which could apply both state law and Title VII of the Civil Rights Act to his case, there was no need for duplicative federal litigation. (Indeed, it strikes us that this kind of claim stands a better chance of succeeding under California state law, which specifically bans sexual orientation discrimination in employment; federal courts remain split about the viability of a sexual orientation harassment claim under Title VII.)

The Louisiana Court of Appeals, 4th Cir., upheld a sentence of life imprisonment at hard labor for Mark A. Jenkins, convicted of murdering Rivet Hedderel, a gay man. *State v. Jenkins*, 1999 WL 1411320 (Dec. 29). Jenkins, who stabbed Hedderel 14 times during a confrontation in Hedderel's apartment, then stole Hedderel's wallet and car and attempted to use his credit card to make several purchases. Blood and hair samples and fingerprints placed Jenkins at the scene of the crime. Jenkins claimed that he stabbed Hedderel in self-defense when Hedderel drew a knife on him and tried to force him to have sex. The jury charge included an instruction on self-defense, and noted that nonconsensual anal intercourse is considered a violent crime under Louisiana law. Nonetheless, Jenkins claimed on appeal that the charge was insufficient to instruct the jury on his self-defense claim. The court rejected his appeal on this and other grounds.

Lambda Legal Defense Fund has announced the settlement of a discrimination complaint against the Washington Heights-Inwood (NY) Ambulatory Care Network, affiliated with New York Presbyterian Hospital. Shawn Smith, a neighborhood resident who sought treatment for allergies last year at the defendant's Broadway Clinic, complained that the doctor "repeatedly hounded" him about his sexual orientation, noted his sexual orientation on his medical chart in the space reserved for comment on ailments or diagnoses, and appeared to treat his sexual orientation as a health problem. Under the settlement of Smith's complaint filed with the N.Y.C. Human Rights Commission, he will receive $1,000 in compensation and the clinic will pledge to review with all personnel the proper method of taking and recording patient medical histories. Lambda Legal Defense Fund staff attorney Doni Gewirtzman represented Smith in negotiating the settlement. *Lambda Press Release*, Feb. 9.

Lambda Legal Defense Fund's challenge to the Arkansas sodomy law survived another hurdle when Circuit Court Judge David B. Bogard ruled Feb. 10 in *Bryant v. Picado*, No. 98–01233, that the state attorney general and the Pulaski County Prosecuting Attorney were appropriate defendants in the declaratory judgment case. The state has been using every possible procedural and technical device to prevent the courts from getting to the merits of the case, but have been rebuffed by several courts, including the state's Supreme Court (which found that the action had been filed in the wrong court, but then ordered that it be allowed to proceed after refiling in the correct court). *Lambda Press Release*, Feb. 11.

Labor Arbitrator Roberta Golick has ruled that the State of Connecticut must offer health benefits coverage to the same-sex partners of state employees. The Feb. 1 ruling on claim brought to arbitration by the unions representing Connecticut state employees will take effect unless a 2/3 majority of either house of the state legislature votes to overrule it. The Rowland administration had opposed the grievance on grounds of expense and vulnerability to abuse. The Senate Majority Leader, George Jepsen, predicted that no vote would be held on the issue. The unions argued that the measure was necessary to keep the state's employment policies competitive, noting that unionized state employees in neighboring New York and Massachusetts have such benefits, as do many private sector employees in large companies. BNA *Daily Labor Report* No. 24, 2/4/00; *New York Times*, Feb. 2; Hartford Courant, Feb. 2.

Lambda Legal Defense Fund filed a suit on Feb. 15 in New York Supreme Court, Kings County, charging that a Brooklyn landlord has a policy against renting apartments to gay couples in violation of New York City law. The complaint, filed on behalf of Gabriel Beaton and Philip Alberti, a young gay couple, charges that they were the first to respond to an apartment listing in the window of a real estate office, filled out an application and left a deposit with the broker, and then suffered cancellation of their lease-signing appointment when the landlord told the broker he was unwilling to rent to two men. The broker, who disagreed with the landlord's action, asked Beaton and Alberti not to take the landlord's homophobia as a reflection on her agency. The men brought their story to the Open Housing Center, which then used testers to confirm

that the landlord was rejecting all attempts by same-sex couples to rent the apartment. *Beaton v. Vinje Realty & F. J. Kazeroid Realty Group*. A.S.L.

Legislative Notes

National media attention focused on legislative hearings in Vermont on ways to comply with the state Supreme Court's ruling that the Equal Benefits clause of the state constitution requires equal treatment for same-sex couples with marital couples. It appeared likely that the legislature will enact some form of domestic partnership as a compromise between those who are pushing for same-sex marriage and those who oppose any legal recognition for gay couples, but it also seemed certain that the plaintiffs in the lawsuit would seek judicial review of whether such a law complied with the requirement s imposed by the court's decision. *New York Times*, Feb. 10. Meanwhile, a dozen state legislators have signed on to a resolution calling for impeachment of the entire state Supreme Court because of its ruling in the case; a resolution along similar lines was recently submitted to the legislature by a citizens group. *Associated Press*, Feb. 10. On Feb. 23, Vermont House leaders decided to delay voting on the domestic partnership proposal until after the legislature's upcoming weeklong break, during which legislators return to their districts to attend town meetings. This issue has been put on the agenda at many town meetings, and the leadership wants to give the members time to consult with their constituents on the issue. *Rutland Herald*, Feb. 24.

The Boulder, Colorado, City Council voted 9–0 on Feb. 1 to enact an ordinance banning employment discrimination on the basis of "gender variance." The intent is to protect transgendered persons from workplace discrimination. The ordinance allows employers to require "reasonably consistent gender presentation of workers," presumably meaning that a particular worker should not present as male or female at a whim. The ordinance specifically requires reasonable accommodations of "transitioned and transitioning transsexuals in locker rooms and shower facilities." The recommendation by the city's Human Relations Commission to pass this bill acknowledges that some employers may end up struggling to deal with bathroom issues, but recommended not addressing them specifically in the ordinance, rather "allowing social norms to sort themselves out." BNA *Daily Labor Report*, 2000 No. 23 (2/3/00); *Denver Post*, Feb. 2. • • • The *Wall Street Journal* reported on Feb. 2 that Vermont State Senator Dick McCormack has proposed legislation adding "gender identity" to Vermont's civil rights laws.

By the end of February, both houses of the Utah legislature had passed measures intended to prevent gay people from adopting children, although the different bills had yet to be reconciled. The Senate bill passed on a vote of 17–9 on Feb. 21. The measure bans adoptions by non-married couples. The House bill passed on Feb. 23 by a vote of 49–19, despite fervent opposition by openly-lesbian freshman legislator Rep. Jackie Biskupski. Opponents of the measure vowed a court fight if it is signed into law after the Senate concurs in the House version. *Deseret News*, Feb. 24 & Feb. 22. • • • A subcommittee of the Mississippi House voted Feb. 22 to approve a measure banning adoption of children by gay people. *Memphis Commercial Appeal*, Feb. 23. • • • At present, the only state that bans such adoptions by legislation is Florida. A New Hampshire legislative ban was recently repealed.

On Jan. 26, the Buffalo, N.Y., Board of Education amended its non-discrimination and Equal Employment Opportunity policies to include sexual orientation, and adopted a broad policy statement seeking to guarantee an "educational environment free of fear, and where differences among people, including race, creed, color, religion, marital status, national origin, gender, sexual orientation, age or disability be accepted and valued." *Press Release*, Empire State Pride Agenda.

Republican leaders in the Iowa legislature are urging Governor Tom Vilsack to rescind his executive orders banning discrimination on the basis of sexual orientation or gender identity, and are threatening to pass legislation overturning the orders if they are not rescinded. Vilsack has indicated he will veto any repeal legislation. *Des Moines Register*, Feb. 24.

The Tennessee State Senate has passed a hate crimes bill that includes sexual orientation in its enumerated categories, imposing enhanced penalties for bias-motivated crimes. The 23–9 vote on Feb. 23 moves the bill to the state House, where its fate is uncertain. *Memphis Commercial Appeal*, Feb. 24.

The Maine legislature's Judiciary Committee voted to approve a gay rights measure that exempts religiously-affiliated organizations from compliance and provides for a statewide referendum prior to enactment. The bill, written by Senator Joel Abromson (R.-Portland), arose from a compromise on the legislation negotiated with the Roman Catholic Diocese of Portland, which had been active in the statewide vote to repeal a prior gay rights law. Some proponents of a new law have agreed that it should be subject to referendum enactment, counting on the enhanced turnout in the presidential elections this fall to sweep the measure to victory. (The prior referendum vote was a special election that was held in horrendously bad weather, resulting in a turnout that was about half of what would be predicted for the next general elections.) *Bangor Daily News*, Feb. 24.

The Illinois House has approved a hate crimes bill that includes sexual orientation coverage by a 93–21 vote on Feb. 24. *Chicago Tribune*, Feb. 25.

Most of the attention on the Michigan primaries held late in February focused on the Republican presidential race, but there were also some local issues on the ballot, including a proposal in Ferndale to adopt a civil rights ordinance that would include sexual orientation. In a very close vote, the measure was defeated by 117 votes out of 4,700 cast. The measure was passed by the city council last September, but the lone dissenting council member led a petition drive to put a repeal measure on the ballot. Ferndale voters had rejected a similar measure in 1991. Proponents vowed to try again. *Detroit News*, Feb. 23.

U.S. Rep. Jerrold Nadler (D.-N.Y.) celebrated Valentine's Day by introducing a bill in the House of Representatives that would extend to same-sex couples the privileges that current U.S. immigration law extends to legal spouses. This would include sponsorship of a partner by a U.s. citizen for immigration as a spouse. Lavi Soloway, a LeGaL member who chairs the board of directors of the Lesbian & Gay Immigration Rights Task Force, observed that 13 countries now recognize same-sex partners for these purposes, including such major U.S. treaty partners as Canada, the United Kingdom, Australia and South Africa (as a result of a recent Constittuional Court ruling). LGIRTF organized simultaneous rallies in several large cities to celebrate introduction of the bill, which is expected to go nowhere in the current Republican-controlled Congress. *New York Daily News*, Feb. 14. A.S.L.

Law & Society Notes

A new Harris Poll reported Feb. 13 in the *Washington Times* found that 56% of respondents favored enactment of a law making sexual orientation discrimination unlawful. The Poll found the percentage favoring allowing lesbian couples to marry has increased since 1996 from 11% to 16%, with a similar increase in the slightly smaller percentage that favors allowing gay male couples to marry. The percentage believing that sexual orientation "is more dependent on the genes you are born with" has increased since 1995 from 29% to 35%.

During the March 7 primary elections in California, voters will also be called upon to vote on several ballot measures, including the controversial Proposition 22, an initiative authored by State Senator William Knight

(R.-Palmdale), a firm opponent of same-sex marriage (even for his gay son and his partner). The Democratic presidential candidates have announced their opposition to the Knight Initiative, as has Governor Gray Davis and most of the state's Democratic Party establishment, even though none of these individuals has gone on record in support of same-sex marriage. The position of opponents is that the Amendment is merely anti-gay symbolism, in light of the fact that California law already restricts marriage to opposite-sex couples, and no other state is now on the verge of doing otherwise. Senator McCain supports the initiative, and Governor George "Waffle" Bush says he will not comment on state affairs although he opposes same-sex marriage. Polls in the final weeks of February showed a bare majority of voters supporting the measure. *New York Times*, Feb. 25.

The U.S. Defense Department announced Feb. 1 that every member of the Armed Forces will undergo training during the year 2000 in an attempt to prevent anti-gay harassment in the ranks. Defense Secretary Cohen, reacting to adverse political fallout from the gay-bashing death of a gay soldier in Kentucky and the subsequent court-martial revelations arising from prosecution of the murderers, ordered the chiefs of all the services to come up with training programs, and instructed the civilian heads of each service to instruct their commanders, in writing, to be sure that such training takes place. *New York Times*, Feb. 2.

Citigroup, the nation's seventh largest business (according to *Fortune* Magazine), announced to its employees that it will offer domestic partner benefits, with enrollment beginning in May. According to a memo released by Citigroup's Human Resources Department, "We recognize that balancing work and family issues places financial, emotional and time demands on all of our employees. Our commitment to diversity and our competitive goal of becoming the employer of choice in the financial services industry require that we continually evaluate the range of benefits we offer our employees." Other major firms in financial services that offer such benefits, according to a press release by Human Rights Campaign, include American Express, Merrill Lynch, J.P. Morgan and Chase Manhattan.

National wire services reported Feb. 12 that a committee of the United Methodist Csmissinshurch investigating charges against 68 ministers who staged a lesbian couple's holy union ceremony has decided that no further action should be taken against the ministers, dismissing a formal complaint that had been filed by some conservative church officials. *Portland Oregonian*, Feb. 12. A.S.L.

Developments in European and U.K. Law

Council of Europe At its meeting of July 27–28, 1999, the Committee of Ministers of the 41–nation Council of Europe (not to be confused with the Council of Ministers of the 15–nation European Union) decided to transmit to the Parliamentary Assembly of the Council of Europe (not to be confused with the European Parliament of the European Union, which also holds its plenary sessions in Strasbourg) the text of Draft Protocol No. 12 to the European Convention on Human Rights. The Draft Protocol would supplement the existing non-discrimination Article of the Convention (14), which applies only to discrimination in relation to other Convention rights (making it resemble a "fundamental rights branch" of equal protection without a "suspect classifications branch"), by creating an independent right to be free from discrimination. The Draft Protocol (text and Draft Explanatory Report at http:// www.coe.fr/ cm/ dec/ 1999/ 677bis/ 42.htm) provides in Article 1 that: "1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1." The list of grounds is identical to that in Article 14. The Draft Protocol will be optional, in that each Member State will be free to decide whether or not to sign and ratify it.

On January 26, the Parliamentary Assembly adopted its Opinion No. 216 (2000) on Draft Protocol No. 12 (http:// stars.coe.fr/ ta00/ eopi216.htm). The Assembly "believes that the enumeration of grounds in Article 14 is, without being exhaustive, meant to list forms of discrimination which it regards as being especially odious. Consequently the ground 'sexual orientation' should be added [to the list of grounds in Draft Protocol No. 12]." The Assembly also recommended the addition of a statement that "men and women are equal before the law." The Opinion was based on the Report of the Committee on Legal Affairs and Human Rights (Doc. 8614; http:// stars.coe.fr/ doc/ doc00/ edoc8614.htm). The Report, prepared by Mr. Erik Jurgens, Netherlands, Socialist Group, states that "[c]learly the issue of discrimination because of sexual orientation has, since 1950, become accepted as being of the same magnitude as the grounds listed in the original text of Article 14," and that "lesbians and gay men are still victims of severe discrimination in some other European countries and only express recognition of 'sexual orientation' could protect them." The Report concludes that the grounds listed in Article 14 "have been selected because we have learnt to regard discrimination on these grounds to be the most insidious and obnoxious forms of discrimination. That is the reason why sexual orientation should now be added to the list." (For the debate and vote on the draft Opinion, see http:// stars.coe.fr/ verbatim/ 200001/ e/ 0001261500e.htm.) In adopting its Recommendation 924 (1981) on discrimination against homosexuals, the Assembly voted to delete a recommendation that sexual preference be added to Article 14. Opinion 216 (2000) therefore represents a historic advance.

On Feb. 9, the Committee of Ministers took note of the Opinion and decided to transmit it to the Steering Committee for Human Rights, for the Steering Committee to take account of it when finalizing Draft Protocol No. 12.

European Community This contributor erroneously reported at [2000] LGLN 12 that the European Community's proposed Directive banning sexual orientation discrimination in employment contains only one express exception for genuine occupational qualifications, and that the explanatory memorandum gives only one example: "For instance, it would be justified for an institution established for religious purposes to impose occupational requirements which are necessary for the fulfilment of the duties attached to the relevant post." The report was based on a draft of Oct. 25, 1999 which had (mistakenly?) been posted to the news web page of European Commission DGV on Nov. 26, 1999. A final draft of Nov. 25, 1999 was posted on Dec. 2, 1999 (see "Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation," http:// europa.eu.int/ comm/ dg05/ news_en.htm). This draft contains a new exception in Article 4(2): "Member States may provide that, in the case of public or private organisations which pursue directly and essentially the aim of ideological guidance in the field of religion or belief with respect to education, information and the expression of opinions, and for the particular occupational activities within those organisations which are directly and essentially related to that aim, a difference of treatment based on a relevant characteristic related to religion or belief shall not constitute discrimination where, by reason of the nature of these activities, the characteristic constitutes a genuine occupational qualification." The explanatory memorandum now reads: "It is evident that in organisations which promote certain religious values, certain jobs or occupations need to be performed by employees who share the relevant religious opinion. Article 4(2) allows these organisations to require occupational qualifications which are

necessary for the fulfilment of the duties attached to the relevant post." The limits on the application of this exception to lesbian, gay and bisexual employees are not at all clear.

U.K. The infamous Section 28 of the Local Government Act 1988 (which applies to England, Wales and Scotland, but not Northern Ireland) inserted a new s. 2A into the Local Government Act 1986: "(1) A local authority shall not — (a) intentionally promote homosexuality or publish material with the intention of promoting homosexuality; (b) promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship." On Feb. 7, by a vote of 210 to 165, the (legislative, not judicial) House of Lords rejected the U.K. Government's attempt to repeal Section 28 for England and Wales through a clause in the Local Government Bill. Instead, the Lords accepted an amendment moved by Baroness Young (who has led the campaigns to retain Section 28 and keep the unequal age of consent for male-male sexual activity) which substitutes for the proposed repeal an amendment to Section 28, stating that Section 28 shall not "prevent the headteacher or governing body of a maintained school, or a teacher employed by a maintained school, from taking steps to prevent any form of bullying." (For the debate, see http:// www.parliament.the-stationery-office.co.uk/ pa/ ld199697/ ldhansrd/ pdvn/ allddays.htm.) The House of Commons is expected to overturn the amendment and reinstate the repeal in April. If the House of Lords persists in voting to retain Section 28, the current Labour Government will probably be unable to repeal it until after the next election, expected in the spring of 2001. Repeal also depends on the Conservatives, who support Section 28, losing the next election. In Scotland, Section 28 comes within the jurisdiction of the new (unicameral) Scottish Parliament. The Scottish Executive plans to repeal Section 28 for Scotland through an Ethical Standards in Public Life Bill to be introduced soon (see http:// www.scottish.parliament.uk/ parl_bus/ legis.html). In a preliminary debate on the issue on Feb. 10, the vote was 88 to 17 in favour of repeal. But for the Scottish proposal, it is unlikely that the U.K. Government would have proposed repeal for England and Wales.

Canadian Bill Will Amend 68 Federal Statutes to Include Same-Sex Partners

On Feb. 11, the Modernization of Benefits and Obligations Act (Bill C–23) received its First Reading in the House of Commons of Canada's federal Parliament (see http:// www.parl.gc.ca/ 36/ main-e.htm, Parliamentary Business). The Bill will amend 68 federal statutes to extend benefits and obligations to same-sex couples on the same basis as common-law opposite-sex couples. The Department of Justice's press release (see http:// canada.justice.gc.ca/ en/ news/ index.html #news) notes that the Supreme Court of Canada "has made it clear that governments cannot limit benefits or obligations to opposite-sex common-law relationships." (See M. v. H., [1999] LGLN 85.) The federal Minister of Citizenship and Immigration, Elinor Caplan, said: "Canada has always been seen as a beacon of tolerance and fairness; the changes these amendments imply for our laws will reaffirm our status as one of the most progressive nations in the world." However, the press release concludes by stressing that "[t]he legislative changes will preserve the fundamental importance of marriage in Canadian society; the definition of marriage will not change." The Department of Justice's "Backgrounder" on the Bill adds that "[t]he Government of Canada has no intention of changing the legal definition of marriage. Although a few European countries have limited recognition of same-sex relationships, a clear distinction is maintained in the law between marriage and same-sex partnerships." (Under Canada's Constitution, the federal government has jurisdiction over capacity to marry and divorce, whereas provincial governments have jurisdiction over solemnization of marriage and most family law. Thus, only the federal Parliament could introduce legislation permitting same-sex marriage.)

The Bill uses a new federal concept of "common-law partner," defined as "in relation to an individual, ... a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year." For same-sex partners, inclusion in this definition represents a major advance. One benefit covered will be the "spouse's allowance" under the Old Age Security Act. In Egan v. Canada, [1995] 2 S.C.R. 513, the Supreme Court narrowly rejected a Charter claim of sexual orientation discrimination when the allowance was denied to the long-time (46 years plus) same-sex partner of James Egan. For unmarried opposite-sex partners, the Bill represents a symbolic demotion from spouse to common-law partner. They are currently included in the standard federal definition of spouse (unsuccessfully challenged in Egan): "in relation to any person, includes a person of the opposite sex who is living with that person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife." If the Bill is passed, same-sex partners will be common-law partners (along with unmarried opposite-sex partners) at the federal level, same-sex partners in Ontario (where unmarried opposite-sex partners remain spouses) (see [1999] LGLN 173), conjoints de fait or de facto spouses in Québec (along with unmarried opposite-sex partners), and spouses in British Columbia (along with unmarried opposite-sex partners). The governing parties responsible for the new legal recognition of same-sex partners, and accompanying terminology, are Liberal at the federal level, Conservative in Ontario, Parti Québecois (left of centre) in Québec, and New Democratic (left of centre) in British Columbia. It seems that only the political left in Canada is able to accept the symbolism of calling same-sex partners spouses. *Robert Wintemute*

Other International Notes

The federal agency charged with administering Canada's prisons announced it will be adopting a new policy allowing transgender prisoners to get sex reassignment procedures (but not including surgery) while incarcerated, in order to settle a human rights complaint by a transgender prisoner who was denied treatment. The new policy statement is being negotiated with the Canadian Human Rights Commission. *Winnipeg Free Press*, Feb. 16.

A government advisory body, the Dutch Committee for Equal Treatment, announced that three of the thirteen in vitro fertilization clinics in the Netherlands were violating the law by refusing their services to lesbian couples who want to have children through donor insemination. The committee's rulings are not legally binding, but are generally considered authoritative by judges in subsequent legal proceedings. *Chicago Tribune*, Feb. 14.

Ha'aretz, a daily newspaper in Israel, reported Feb. 22 that the High Court of Justice had criticized an Israeli population registry official for refusing to register a lesbian co-parent as the mother of her partner's son. The two women, who both have dual US-Israeli citizenship, had the child through donor insemination and then had the "non-biological" mother adopt the child in the U.S. When the couple presented the adoption papers to the Israel Interior Ministry's population registrar, the official on duty refused to register the second mother. The criticism apparently took place at an oral argument before the court, when Justice Dalia Dorner, responding to a government attorney's argument that the two mothers had no "legal status," stated: *What will happen if you register them? Will the computer explode?" *** In the same issue, Ha'aretz* reported on another case pending before the court, involving a gay soldier who was discharged from the armed forces. It appeared that the soldier had engaged in a sexual relationship with another soldier of lower rank and was discharged for this misconduct. The judges indicated during argument that they believed the discharge was not because

of sexuality but rather because of sexual activity in violation of regulations, and suggested that the case be withdrawn. Commented Justice Dorner, "An officer cannot have a sexual relationship with someone subordinate to him." A.S.L.

Professional Notes

Florida Governor Jeb Bush (R.) appointed Florida's first openly-gay circuit judge. According to a press release posted to the Queerlaw internet mailing list on Jan. 31, Victoria Sigler, a Miami-Dade County Judge, was promoted to the trial court of superior jurisdiction by the conservative Republican governor, who stated that she "has consistently demonstrated a high level of integrity, competence and impariality to the law throughout her career." A.S.L.

Lambda Legal Defense and Education Fund is looking for a new Supervising Attorney in its National Headquarters in New York. The Supervising Attorney will be responsible for supervising the work of several New York based staff attorneys, who handle all stages of litigation in Lambda's precedent setting cases, including assessing potential new matters, proposing and filing direct litigation, direct representation, amicus brief writing, and providing support and back-up to Lambda's network of cooperating attorneys, and others litigating matters of concern to lesbians and gay men. The Supervising Attorney will oversee case development and screening and may supervise some administrative components of Legal Department operations in the New York office. The Supervising Attorney, who will carry a small caseload, will report to and work closely with the Managing Attorney, and is expected to do some public speaking and media work. Some travel is required.

Applicants should have a minimum of six years legal experience (including extensive litigation experience); the ability to supervise attorneys with is critical. In addition, the successful applicant will have significant leadership skills, excellent speaking and writing abilities, and the ability to produce the highest caliber legal work in a civil rights practice. Working at Lambda requires a demonstrated awareness of and commitment to the concerns of lesbians, gay men, and people with HIV/AIDS, and a firm commitment to multiculturalism. Salary DOE with excellent benefits, including generous employer contribution to retirement account.

Send résumé, writing sample and cover letter to: Ruth Harlow, Managing Attorney, Lambda Legal Defense and Education Fund, 120 Wall Street, Suite 1500, New York, NY 10005–3904. People of color and people with disabilities are especially encouraged to apply. *Submitted by Lambda Legal Defense & Education Fund*

AIDS & RELATED LEGAL NOTES

Alabama HIV Prisoners' Suit Dealt Severe Blow By Res Judicata; Some Claims Survive Dismissal Motion, However

On Jan. 14, the US District Court for the Middle District of Alabama dismissed ADA and Eighth Amendment claims brought on behalf of HIV+ inmates against the Alabama corrections department and its commissioners, citing res judicata and failure to exhaust administrative remedies. *Edwards v. Alabama Department of Corrections*, 2000 WL 95682. Only an actionable case against the prison's contractual medical services provider survived. In a 16 page instructional decision, the court directs plaintiffs to a nearly identical Alabama case decided 10 years earlier whose similarities doomed their efforts.

Plaintiffs Paul D. Edwards and other HIV+ inmates filed this case on behalf of themselves and a class of all current and future HIV+ inmates in Alabama's state-run prisons to challenge the conditions of their confinement. Named defendants were the Alabama Department of Corrections (DOC), its former and present commissioners (commissioners) and Correctional Medical Services, Inc. (CMS), the prisons' contracted medical services provider. Plaintiffs alleged ADA and Eighth Amendment violations in that the prison segregates HIV+ inmates from the general inmate population and that the medical care of HIV+ inmates is so poor as to constitute cruel and unusual punishment. Readers may remember an identical case in Alabama in 1987 filed on behalf of that state's HIV+, *Onishea v Hopper*, 171 F.3d 1289 (11th Cir. 1999), cert. denied, 120 S.Ct. 931 (Jan. 18, 2000), wherein plaintiffs challenged the DOC practice of HIV+ inmate segregation, mandatory HIV testing of all inmates and the quality of medical care for HIV+ inmates based on the First, Fourth, Eighth and Fourteenth Amendments and the Rehabilitation Act of 1973. Ultimately, the plaintiffs lost; however, it is that case that lies at the very center of this controversy as the majority of defendants moved for dismissal claiming res judicata.

Judge Myron H. Thompson confined the res judicata exercise by examining only one step of the analysis: whether the causes of action in this case were identical to those in *Onishea*. There was no dispute that the other res judicata elements applied to the ADA and Eighth Amendment claims: final judgment on the merits of the first action, first action decided by a court of competent jurisdiction, and the parties to both suits are identical or in privity with each other. Directing the analysis to the ADA claim, the court granted defendants' motion to dismiss by finding that the only difference in the claims made by both suits was *Onishea* claimed Rehabilitation Act violations and this case ADA violations; statutes similar in nature enough as to find that the same cause of action existed. Explained Thompson, "[T]hus, on their face, the statutes seem to protect the same group of individuals and the same rights...the only difference [being] the kinds of defendants against whom these rights can be enforced." Turning to the Eighth Amendment claim, the court denied dismissal, finding that advances in medicine have occurred since the 1990 *Onishea* court rejected the Eighth Amendment claim — advances which, the court reasoned, bear directly on what levels of care are currently reasonable and thus on what constitutes cruel and unusual punishment.

Defendants further moved to dismiss on grounds that the DOC and the commissioners are protected by Eleventh Amendment immunity. The court agreed, ruling that the DOC is clearly protected by the Eleventh Amendment from all claims against it made a federal court and that the commissioners, in their official capacities, also enjoy Eleventh Amendment immunity but only up to the extent damages are sought. Thompson outlined the commissioners' immunity, stating that "[T]his ruling does not, however, apply equally to claims seeking equitable remedies from the defendants in their official capacities. The Eleventh Amendment does not insulate state officials acting in their official capacities form suit for prospective injunctive relief [and its costs] to remedy violations of federal constitutional law." Continuing their seemingly lucky streak, the commissioners found themselves further protected under the doctrine of qualified immunity (immunity from claims made in their individual, not official, capacities). The court found that although the commissioners were acting within the scope of their discretionary authority at the time of the alleged unconstitutional conduct, their actions did not violate "clearly established statutory or constitutional law." The court reasoned that in *Onishea*, the Eleventh Circuit had affirmed the district court holding that the care provided to HIV+ inmates in Alabama prisons did not offend the Eighth Amendment; therefore, the commissioners had every reason to believe that the medical services they provided were within constitutionally permissible limits.

Last but not least, the court denied Correctional Medical Services' motion to dismiss for failure to state a cause of action. It was uncontested that CMS's contractual relationship with the state gave them no similar immunity as DOC or its commissioners, but instead held them to the higher liability standard of a municipality. That notwithstanding, the court disagreed with CMS's assertion that the plaintiffs' allegations are so lacking as to fail to state a cause of action under this liability standard; i.e., that CMS itself directly caused the violation of their constitutional rights through the adoption of some official policy or practice. Thompson held that although plaintiffs did not provide specific evidence demonstrating that such policies exist or that such practices are so widespread and entrenched as to constitute official "customs," the allegations will nevertheless be construed liberally in their favor and be assumed as true allowing the suit against CMS to go forward.

In a rather anti-climatic conclusion after its cotton-gin-operation of rulings, the court dismissed, albeit this time without prejudice, the lone surviving Eighth Amendment claim (injunctive relief sought against the commissioners in their official capacities), holding that the plaintiffs did not exhaust all administrative claims under the Prisoner Litigation Reform Act. Nonetheless, the full relief sought against CMS remains actionable. *K. Jacob Ruppert*

Federal Court Dismisses Tort Claims in HIV Misdiagnosis Litigation

A federal court granted summary judgment in favor of all defendants in a case involving tort claims arising form a misdiagnosis of HIV+. *Goddard et al v. Protective Life Corporation*, 2000 WL 150854 (E.D.Va., Feb. 10).

On Dec. 8, 1997, Johnnie Goddard had blood drawn at his home and delivered to LabOne for testing as a requirement for extending his life insurance with Protective. Dr. Feist, who works for Protective, notified Goddard of an "indeterminate" HIV result as defined by Center for Disease Control criteria and that they "might require further clinical evaluation." Protective would not insure him. Goddard saw his personal physician, Dr. Kenneth W. Putland, the same day. Dr. Putland stated that he reviewed the HIV test and confirmed the result. Dr. Putland told Goddard that "there was no particular cause for alarm." The results were reported to the Medical Information Bureau (MIB) for listing as a "non-specific" code, which MIB claims does not indicate HIV status. MIB is an association of insurance companies which exchanges information to detect insurance fraud.

Goddard contended that Dr. Putland told him that Dr. Feist had said he was HIV+. Two days later a second, HIV test was reported as negative. Two later HIV tests also came back negative. Goddard then asked Protective to issue him the insurance he had earlier requested. Protective wanted to have Goddard retested six months from the initial test. Goddard also contacted, by letter, the MIB to have the non-specific code removed from his records. After notifying Protective of Goddard's letter, Protective received verification of the negative results and the MIB removed the non-specific code.

Goddard sued for negligence, intentional infliction of emotional distress and for defamation for the publication of the non-specific code with the MIB. Goddard claimed that LabOne negligently collected and tested the samples.

Judge Smith rejected these claims, finding that "just as this court has no basis for imposing a duty upon insurers to provide insurance to all eligible applicants, this court, likewise, has no basis for imposing upon an insurance company an obligation to exercise all due care to ensure that an applicant who may be insurable under the company's policies does, in fact, receive that insurance coverage."

Goddard claimed that he thought he was dying, experienced "great anxiety," and that his wife and children "became estranged" from him because "they felt betrayed and feared he might give them AIDS." Goddard alleged that he "cried almost continually... missed work, suffered loneliness" and drank. He said that his in-laws "ostracized" him. Goddard claimed that his family faced "humiliation" and fear of "being detected as an HIV-infected family." Goddard's wife, who works for a health care agency, feared that "she had contracted AIDS from a patient and it had spread to her husband." If this wasn't true, she said she faced "severe emotional injury" thinking that her husband had been unfaithful to her. Goddard claimed financial injury when the family separated and each spouse was maintaining a separate set of household expenses. Goddard's wife and children spent two weeks with her sister, who charged for water and electric expenses.

The court found that the Goddard "leapt to unfounded conclusions" in his belief that he was HIV+, and that if the claim were valid, it would be only for the two days between Dr. Feist's letter and the subsequent negative HIV test result could be compensated. The claim of defamation due to publication of the code in the MIB was rejected as the parties were "statutorily immunized" and a prima facie case for was not met. *Daniel R Schaffer*

AIDS Litigation Notes

A Georgia law that authorizes a tort cause of action for a person who is injured when another person breaches a legal duty for which there is no express statutory redress may not be used for a supplemental claim of a discrimination in federal court in an ADA case, ruled U.S. District Judge Story (N.D. Ga.) in *Cruet v. Emory University*, 2000 WL 151278 (Jan. 28). Cruet was discharged as a research specialist by the defendant University and filed a federal suit under the Rehabilitation Act and the ADA, claiming discrimination based on his HIV+ status and depression; Cruet appended a state law tort claim for breach of legal duty. In dismissing the state law claim, Judge Story found that the state law was intended for situations where there was no other available remedy under federal or state law, and found support for this conclusion in a prior case involving an HIV+ plaintiff, *Jairath v. Dyer*, 972 F.Supp. 1461 (N.D.Ga. 1997), vacated on other grounds, 154 F.3d 1280 (11th Cir. 1998).

The Merit Systems Protection Board, a federal panel that decides personnel issues within the federal civil service system, has ordered the reinstatement of an asylum officer who reportedly stated in a private conversation that INS policy favored Russian Jews over Haitians because Haitian immigrants were more susceptible to AIDS. The officer, Paul D. Moredock, also reportedly stated his belief that there could be a genetic link between HIV susceptibility and race. An employee who overheard the remark was offended and reported it, and Moredock was fired. The Board found that Moredock's 1st Amendment rights were violated by the discharge and ordered reinstatement with backpay, interest and benefits. According to the Board's administrative law judge, the agency failed to show how Moredock's remarks made him unfit to serve.*Moredock v. INS*, MSPB CB–1216–99–0019–T–1 (Feb. 2, 2000). Reported in *GovExec.com Daily Briefing*, Feb. 11, 2000.

Unless the court's opinion is hiding relevant facts, it is hard to understand why any litigation took place in *Perez v. Apfel*, 2000 WL 124818 (S.D.N.Y., Feb. 1), in which District Judge Buchwald upheld a denial of social security disability benefits to an otherwise healthy HIV+ man. According to the opinion, Victor Perez tested HIV+ in 1992 and a year later left his job as a security guard, since when he has not held any paying jobs (but has done some volunteer work). Perez was on and off various HIV-related medications over the intervening years, but has never had any significant HIV-related physical symptoms, although he suffered various degrees of depression following the murder of

his brother and the death of his partner of 8 years in 1995. However, over the years of many medical and psychological examinations, he was always found by doctors to be in good health and capable of working, even during the periods of depression. The most recent medical exam noted in the record found that Perez's depression had lifted since he began a relationship with a new partner. Since the standard for qualifying for disability benefits is inability to engage in gainful employment, Judge Buchwald found no basis for questioning the Social Security Administration's denial of benefits.

In *Hatgy v. Commissioner of the Social Security Administration*, 2000 WL 140467, U.S. Dsitrict Judge Jones (D. Ore., Jan. 10), found that the Social Security Administration's ALJ had failed to give adequate consideration to the claimant's testimony that fatigue generated by her HIV-related medications made her unable to work and thus eligible for supplemental seucrity income. The ALJ actually commented at the hearing on Jilanna Hatgy's claim that this was his first encounter with expert testimony involving protease cocktail treatment. Hatgy was diagnosed HIV+ in 1992 and has undergone a variety of treatments, most recently the protease cocktail, which has reduced her viral load. The medical testimony at her hearing indicated that her reported fatigue, which was testified to by her caretaker as well as by the claimant, might have some relation to the medication she was taking, but the ALJ avoided the issue in his ruling denying benefits. Judge Jones remanded the case for further consideration of the evidence of fatigue as a side effect of the medication.

In *Community Board 3 (Brooklyn) v. Giuliani*, NYLJ, 2/2/00, Justice Richard Braun of N.Y. Supreme Court, N.Y. County, rejected an attempt by a local community board to block a city project to create housing for persons with AIDS in the Bedford Stuyvesant neighborhood by helping to finance a private entity in rehabilitating and expanding some existing dilapidated housing structures, which would then be rented to a private agency. Braun found unavailing the plaintiffs' contention that the project had to be stopped for failure to comply with various environmental and land use requirements, concluding that the relevant environmental determinations had been made, and that the land use requirements cited by plaintiffs did not apply to a structure that would be owned and operated by private parties. A.S.L.

AIDS Law & Society Notes

An article published in the *Kansas City Star* and widely syndicated late in January raised a national media conversation about AIDS in the Roman Catholic priesthood. The article asserted that "hundreds of Roman Catholic priests across the United States have died of AIDS-related illnesses, and hundred more are living with HIV, the virus that causes the disease." The article reported that many dioceses now require applicants for the priesthood to take an HIV test, and, reporting on results of a large survey of priests, found that a majority felt the Church had fallen down by not providing early and effective sex education that might have prevented infection. (Of course, such education would have had to stress abstinence, as priests are forbidden to engage in sexual intercourse, much less anal or oral sex!) Of the approximately 800 priests who responded to the survey (about 3,000 survey forms were mailed out), 15 percent identified themselves as homosexual and 5 percent as bisexual. Seven of the respondents identified themselves as HIV+. The total number of Catholic priests in the U.S. is reported as approximately 46,000. A.S.L.

International AIDS Notes

A national conference on marriage law revision in Vietnam heard a proposal by a senior police official in Ho Chi Minh city that persons infected with HIV should be forbidden from marrying. The official told the conference: "The marriage law's objective is to protect our nation and race, therefore we must forbid those with HIV from marrying to stop the disease from spreading." HIV testing before marriage is compulsory in neighboring Cambodia, but not yet in Vietnam, where the government has been under fire from international bodies for its sometimes heavy-handed response to the mounting HIV epidemic. *South China Morning Post*, Feb. 22.

It's finally happened: a court has found by preponderance of the evidence that an HIV+ surgeon transmitted his infection to a patient during surgery, and has ordered a payment of damages in a civil suit. According to a brief news report in the *Birmingham Post* (Feb. 23), the French surgeon had been infected after operating on an HIV+ patient in 1983, and was convicted after expert testimony by Dr. Luc Montagnier, officially credited as co-discovered of HIV. The French court ordered a payment of the equivalent of 70,000 pounds to the victim, who had already collected a settlement of 50,000 pounds from the hospital where the operation took place.

Three Japanese men who worked as executives for Green Cross Corp. have been sentenced to prison in a tainted-blood scandal. They were accused of permitting the sale of unheated blood-clotting agents in the mid–1980's, at a time when such treatments were deemed unsafe by medical authorities, and pleaded guilty in 1997. The Osaka District Court imposed sentences ranging from 2 years to 16 months, but a spokesperson for a Japanese society of hemophilia sufferers argued that these sentences were unduly lax. *Chicago Tribune*, Feb. 25. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

Symposium Solicitation:

The Stanford Law & Policy Review is planning a symposium issue on current issues in gay rights, and is seeking article proposals. The deadline for submitting proposals is March 7. Just about any topic in lesbian and gay law is potentially acceptable, but they sent out an illustrative list that includes same-sex marriage, adoption of children, domestic partnership benefits, immutable characteristics and sexuality, gay teachers, Boy Scouts, sexual privacy, student group recognition and funding, etc. The topic proposals are all posed as policy questions to be debated. They are looking for article-essays of about 10–30 double-spaced manuscript pages, exclusive of footnotes. Those interested should contact the symposium editors: Anthony Laretto, Ramey Barnet, or Ty Clevenger (email anthony.laretto@stanford.edu; rbarnett@stanford.edu), 650–725–7297, Stanford Law School, Stanford, California 94305–8610.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Achampong, Francis, *The Evolution of Same-Sex Sexual Harassment Law: A Critical Examination of the Latest Developments in Workplace Sexual Harassment Litigation*, 73 St. John's L. Rev. 701 (Summer 1999).

Anders, Christopher E., and Rose A. Saxe, *Effect of a Statutory Religious Freedom Strict Scrutiny Standard on the Enforcement of State and Local Civil Rights Laws*, 21 Cardozo L. Rev. 663 (Dec. 1999).

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Bavis, Craig, Vriend v. Alberta, Law v. Canada, Ontaria v. M. and H.*: The Latest Steps on the Winding Path to Substantive Equality*, 37 Alberta L. Rev. 683 (Aug. 1999).

Bloom, Elise M., and Michelle E. Phillips, *Sexual Harassment and Sexual Favoritism in the "Gay Nineties"*, ch. 6 in *Sexual Harass-*

ment in the Workplace (S. Estreicher, ed., Kluwer Law Int'l, 1999).

Chambers, David L., and Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 Fam. L. Q. 523 (Fall 1999).

Chapman, Anna, and Gail Mason, *Women, Sexual Preference and Discrimination Law: A Case Study of the NSW Jurisdiction*, 21 Sydney L. Rev. 525 (Dec. 1999).

Coukos, Pam, *Deconstructing the Debate Over Gender and Hate Crimes Legislation*, 1 Georgetown J. Gender & L. 11 (Summer 1999) (part of symposium issue on Hate Crimes, Domestic Violence, and State Accountability).

Curley, Michael A., *Commentary on Leonard, Same-Sex Harassment*, ch. 7 in *Sexual Harassment in the Workplace* (S. Estreicher, ed., Kluwer Law Int'l, 1999) (response to article cited below).

Drobac, Jennifer A., *The* Oncale *Opinion: A Pansexual Response*, 30 McGeorge L. Rev. 1269 (1999).

Havel, Brian F., *The Constitution in an Era of Supranational Adjudication*, 78 N. Car. L. Rev. 257 (Jan. 2000).

Helfer, Laurence R., *Forum Shopping for Human Rights*, 148 U. Pa. L. Rev. 285 (Dec. 1999).

Joshi, Heather, Elizabeth C. Cooksey, Richard D. Wiggins, Andrew McCulloch, Georgia Verropoulou, and Lynda Clarke, *Diverse Family Living Situations and Child Development: A Multi-level Analysis Comparing Longitudinal Evidence from Britain and the United States*, 13 Int'l J. L. Pol. & the Family 292 (1999).

Lawrence, Frederick M., *The Case for a Federal Bias Crime Law*, 16 Nat'l Black L.J. 144 (1999).

Leonard, Arthur S., *Same-Sex Harassment, Sexual Favoritism and Title VII*, ch. 5 in *Sexual Harassment in the Workplace* (S. Estreicher, ed., Kluwer Law Int'l, 1999).

Olchowy, James R., *Inside McClung J.A.'s "Closet" in* Vriend v. Alberta*: The Indignity of Misrecognition, the Tool of Oppressive Privacy, and an Ideology of Equality*, 37 Alberta L. Rev. 648 (Aug. 1999).

Post, Robert, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 Cal. L. Rev. 1 (Jan. 2000).

Richards, David A. J., *Constitutional Legitimacy, the Principle of Free Speech, and the Politics of Identity*, 74 Chi-Kent L. Rev. 779 (1999).

Schrama, Wendy M., *Registered Partnership in The Netherlands*, 13 Int'l J. L. Pol. & the Family 315 (1999).

Stychin, Carl, Book Review of *Evan Gerstmann, The Constitutional Underclass: Gays, Lesbians, and the Failure of Class-Based Equal Protection*, 26 J. L. & Soc. (UK) 582 (Dec. 1999).

Weinstein, Alan C., *Zoning Restrictions on Location of Adult Businesses*, 31 Urban Lawyer 931 (Fall 1999).

Student Notes & Comments:

Comment, Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*: The Sixth Circuit Narrowly Construes* Romer v. Evans, 73 St. John's L. Rev. 951 (Summer 1999).

Walker, Scott L., *I'll Speak for Myself: Compulsory Speech and the Use of Student Fees at State Universities*, 52 Rutgers L. Rev. 341 (Fall 1999).

Whitney, Jennifer L., *When Something Wicked This Way Comes: Evolving Standards of Indecency* Thompson *and* Stanford *Revisited*, 46 Clev. St. L. Rev. 801 (1998).

Specially Noted:

Symposium, *State and Federal Religious Liberty Legislation: Is It Necessary? Is It Constitutional? Is It Good Policy?*, 21 Cardozo L. Rev. Nos. 2–3 (Dec. 1999) (includes article by Anders & Saxe, cited above, on the impact of proposed federal legislation on the enforcement of state and local gay rights laws).

AIDS & RELATED LEGAL ISSUES:

Alford, Helen Johnson, and W. Benjamin Broadwater, *The Americans With Disabilities Act and State Workers' Compensation Laws in the Hands of the Courts*, 50 F.I.C.C. Q. 133 (Fall 1999).

Befort, Stephen F., and Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissonance, the Supreme Court's Response, and the Future of Disability Discrimination Law*, 78 Ore. L. Rev. 27 (Spring 1999).

Cohen, Andrew M., *Black and White and Gray All Over: Recent Supreme Court Developments and the Determination of Who is "Disabled" Under the Americans With Disabilities Act*, 18 Am. Corp. Counsel Assoc. Docket No. 2, 60 (Feb. 2000).

Dalton, Harlon L., *Shaping Responsible Behavior: Lessons from the AIDS Front*, 56 Wash. & Lee L. Rev. 931 (Summer 1999).

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London, Andrew S., and Anne K. Driscoll, *Correlates of HIV/AIDS Knowledge Among U.S.-Born and Foreign-Born Hispanics in the United States*, 1 J. Immigrant Health 195 (Oct. 1999).

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Delgado-Stempniak, Dannae, *Seeking Asylum Status for HIV-Positive Aliens Based on Membership in a Persecuted Social Group: An Alternative to Overturning the United States' Exclusion of HIV-Positive Aliens from Immigration*, 24 So. Ill. U. L. J. 121 (Fall 1999).

Mack, David J., *Cleansing the System: A Fresh Approach to Liability for the Negligent or Fraudulent Transmission of Sexually Transmitted Diseases*, 30 U. Toledo L. Rev. 647 (Summer 1999).

Yamada, Ronald K., *Fraud, HIV and Unprotected Sex:* R. v. Cuerrier, 6 Southwestern J. L. & Trade in the Americas 157 (1999).

EDITOR'S NOTE:

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