MARYLAND TRIAL COURT RULES FOR SAME-SEX MARRIAGE

A Baltimore trial judge ruled in favor of an ACLU lawsuit seeking same-sex marriage in Maryland in *Deane v. Conaway*, 2006 WL 148145 (January 20, 2006) (not officially published in A.2d). The ruling by Circuit Judge M. Brooke Murdock found that Family Law Section 2–201, banning same-sex marriages, violates the Equal Rights Amendment of the Maryland Constitution, which forbids the state from discriminating on the basis of sex.

ACLU filed the lawsuit in 2004 on behalf of nineteen Marylanders, some of them couples who had been denied marriage licenses by county clerks. ACLU staff attorney Ken Choe argued on the motion for summary judgment on behalf of the plaintiffs. Judge Murdock's decision granted the plaintiffs' motion for summary judgment, while deny a summary judgment motion by the state.

The plaintiffs argued that the ban on same-sex marriage violates the state constitution on several different theories, but Judge Murdock focused on one, that the statutory definition of marriage creates a classification based on sex or gender. Under the Maryland Constitution, sex classifications are subject to strict scrutiny by the courts, which means that the state bears the burden of showing the classification is necessary to achieving a compelling governmental interest and is narrowly tailored to achieve that interest without unnecessarily violating constitutional rights.

Before applying strict scrutiny, Judge Murdock had to counter the argument, which has been accepted by courts in some other states, that the same-sex marriage ban is not sex discrimination at all. The argument goes that because men and women are equally prohibited from marrying persons of their own sex, there is no discrimination, but rather equal application of the law. If that is the case, then the statute is presumptively constitutional, and the plaintiffs have the burden of showing that there is no rational justification for it. This kind of reasoning was decisively rejected by the U.S. Supreme Court in 1967 when it struck down Virginia's law against interracial marriage, but some courts have refused to see the analogy between race and sex classifications.

Murdock, however, found the analogy fully applicable. "This Court finds that the equal application theory fails as a matter of law," she wrote, "because it is inherently illogical as a matter of fact. It is inaccurate and overly abstract to describe section 2–201 as equally prohibiting men and women from marrying members of their own sex. Section 2–201 bars a man from marrying a male partner when a woman would enjoy the right to marry that same male partner. As compared to the woman, the man is disadvantaged solely because of his sex. In the opinion of the Court, Family Law Section 2–201 discriminates on its face based on gender."

Murdock's conclusion was bolstered by some Maryland appellate rulings that had rejected the equal application theory in other contexts, including *Burning Tree Club, Inc. V. Bainum*, 501 A.2d 817 (1985), a Court of Appeals decision that struck down a provision of state law providing tax benefits to a male-only-membership country club.

Focusing strict scrutiny on the marriage ban, Murdock wrote, "There is no apparent compelling state interest in a statutory prohibition of same-sex marriage discriminating, on the basis of sex, against those individuals whose gender is identical to their intended spouses. Indeed, this Court is unable to even find that the prohibition of same-sex marriage rationally relates to a legitimate state interest." The state, confident that the court would not subject the statute to strict scrutiny, had failed to suggest a compelling interest. Apparently basing its strategy on recent mid-level appellate rulings rejecting marriage claims in Indiana and New Jersey, the state argued that the law was rational, and that the court should refrain from intervening in a public policy issue that should be decided by the political branches of the government. Murdock was having none of this, however, pointing out that in a strict scrutiny case, the burden is on the state to justify the statute.

Turning to the state's rationality arguments, Murdock found them all unavailing. The state's primary argument, which had proven successful in New Jersey and Indiana, was that the state has a legitimate interest in promoting "the traditional family unit" and "encouraging procreation and child-rearing within this traditional unit." "The Court concludes that the prohibition of same-sex marriage is not rationally related to the state interest in the rearing of biological children by married, opposite-sex parents," responded Murdock. "Indeed, the prevention of same-sex marriages is wholly unconnected to promoting the rearing of children by married, opposite-sex parents." Murdock noted that the Massachusetts Supreme Judicial Court had reached the same conclusion in 2003 in *Goodridge*, 798 N.E.2d 941.

She also rejected the claim that the state could prefer traditional families as a better vehicle for child-rearing, because, she said, such a conclusion must rest on "rational speculation," and she found nothing rational about the bare conclusion in the absence of any evidence.

Murdock also rejected the argument that banning same-sex marriage was necessary to preserve "federal and interstate definitional uniformity," another old chestnut that governments have been trotting out in support of marriage bans. "Under Defendants' analysis," she wrote, "a denial of right, invalid under the Maryland Constitution, would be validated in Maryland when another state acted identically, engaging in conduct that would have been unconstitutional in Maryland except for the very fact of the other state's action." This, she found in agreement with the plaintiffs, is contrary to our federal system, under which states are free to have differing legal approaches to policy issues.

Murdock rejected the argument that the limited recognition of same-sex partners already afforded under a few state laws was sufficient to meet the equality requirement. "If these ancillary statutes make a married couple and a non-married couple essentially equivalent with respect to the effects of marriage," she observed, "there simply is no rational reason to prevent the marriage."

She noted that arguments based on tradition are ruled out by the U.S. Supreme Court's 2003 decision in *Lawrence v. Texas*, 539 U.S. 558, which had rejected tradition and legislative moral judgments as grounds for criminalizing gay sex. "Although tradition and societal values are important," she wrote, "they cannot be given so much weight that they alone will justify a discriminatory statutory classification. When tradition is the guise under which prejudice or animosity hides, it is not a legitimate state interest… Similarly, epxressing moral disapproval of a class is not sufficient to sustain a classification where there is no other legitimate state interest." Since the court found no rational basis for the exclusion, however, Judge

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Murdock saw no need to speculate about whether actual anti-gay prejudice motivated the Maryland legislature to adopt its particular definition of marriage when the issue was before it thirty years ago.

The judge rejected as "separate but equal" and thus unconstitutional the argument that civil unions should suffice for same-sex couples, and pointed out that the plaintiffs were not seeking that kind of relief. "The Court is not unaware of the dramatic impact of its ruling," she wrote, "but it must not shy away from deciding significant legal issues when fairly presented to it for judicial determination."

While granting the plaintiffs' motion for summary judgement, Murdock wrote, "because of the nature of this action, and the logistical ramifications that may affect the Clerks' Offices across the State of Maryland as a result of the Court's decision, the operation of this Court's order is stayed pending any appeal."

Of course, the state will appeal. The bigger question is whether the political branches of the state government will attempt to intervene by proposing a constitutional amendment to the people for ratification, and whether that could plausibly occur before an appeal is decided. In at least two prior instances, in Hawaii and Alaska, trial court rulings in favor of same-sex marriage were ultimately lost by the enactment of state constitutional amendments while the state supreme courts dallied in considering the state's appeal of those decisions. Early press reports indicated that a direct appeal to the state's highest court, the Court of Appeals, may be possible in this case. A bill was introduced in the legislature seeking a broad anti-gay marriage amendment, which was the subject of a raucous public hearing in Annapolis on Jan. 31. Fancy maneuvers by Democratic leaders saved the day, at least temporarily, when an amendment that seemed likely to receive approval on the House floor was sent back to the House Judiciary Committee, where a poison pill amendment was added (to approve civil unions for the state), thus ensuring that the Republicans would all vote against it, and the measure was buried for now. The state's Republican governor, Robert Ehrlich, an opponent of same-sex marriage, called on the legislature to give the measure thorough consideration. A.S.L.

LESBIAN/GAY LEGAL NEWS

Washington State Bans Sexual Orientation & Gender Identity Discrimination

The state legislature approved a bill amending the state's anti-discrimination statute to add "sexual orientation" to the list of prohibited reasons for discrimination in employment, public accommodations, and real estate, banking and insurance transactions. The statutory definition of "sexual orientation" includes "gender identity or expression," making the statutory protection inclusive of transgender persons.

The measure passed the House by a substantial margin, but barely squeaked by in the Senate, picking up one Republican vote but losing two Democrats in the almost evenly divided chamber. Governor Christine Gregoire, a supporter of the bill, announced upon final passage on January 27 that she planned to holding a signing ceremony on Tuesday, January 31.

According to a press release from one of the national gay political organizations, current population estimates would support the conclusion that 48% of the American population will be living in states (plus the District of Columbia) in which state law outlaws sexual orientation discrimination when (or if) the law goes into effect. Enactment would make Washington the 17th state to ban sexual orientation discrimination, and the seventh to ban discrimination based on gender identity or expression (or some equivalent thereof).

All is not sanguine in Washington, however, where opponents of the measure vowed to seek a voter initiative to repeal the law. The Washington Supreme Court, which heard arguments in two same-sex marriage cases last March, was widely believed to have held up on releasing an opinion until after the final legislative action on the bill. (The chief justice had stated earlier in January that the court expected to issue a ruling within the 60 day legislative session.) A.S.L.

10th Circuit Reverses Pre-Trial Injunction in Sex-Reporting Case

A divided 10th Circuit panel ruled on January 27 that the district court in Wichita erred in preliminarily enjoining enforcement of a Kansas sex-reporting statute in cases involving consensual underage sex. *Aid for Women v. Foulston*, 2006 WL 218185. According to the majority of the 3–judge panel, since underage sex is illegal, the participants have no constitutional informational privacy rights that would be abridged by requiring teachers, doctors, nurses, social workers and other licensed professionals to report such activity to the state when it comes to their attention.

The ruling came just days before the trial began on January 30 in federal district court in Wichita before District Judge J. Thomas Marten. The appeals court stayed the effect of its ruling for two weeks, essentially allowing the injunction to stay in effect during the trial.

Kansas penal statutes set a firm age of consent of 16 for almost all sexual activity, regardless of whether it is consensual. If 15 year-olds engage in any sexual activity with each other, they are breaking the law. Presumably, any 15 year old girl showing up pregnant at a clinic has broken the law, and any 15 year old boy asking a counselor about contraception is planning to break the law.

Another Kansas statute, Sec. 38–1522, provides that any of a list of specified licensed professionals who has "reason to suspect that a child has been injured as a result of physical, mental or emotional abuse or neglect or sexual abuse" must promptly report the matter to the state. Before 2003, the state followed a 1992 advisory opinion by former Attorney General Stephan, essentially taking the position that the reporting requirement did not necessarily extend to every case of a pregnant teen or to consensual sex between underage teens, since it applied only to cases of injury. Stephan opined that not every instance of underage sex results in an injury. Clearly, the statute was mainly concerned with detecting physical, mental or sexual abuse of children by adults.

However, in 2003, the current Attorney General, a right-wing anti-abortion crusader named Phill Kline, issued a new opinion, taking the view that underage sex is always harmful and thus the reporting requirement applies to any underage sexual activity, regardless of consent. This means, for example, that any time a girl under 16 years old seeks counseling from a teacher, or health care from a licensed professional in connection with a pregnancy, the reporting requirement is triggered.

Shortly after Kline issued his opinion, the Center for Reproductive Rights sued on behalf of Aid for Women and a group of Kansas health care professionals, claiming that any reporting requirement for consensual sex would violate the constitutional privacy rights of Kansas teens. The plaintiffs sought a pretrial injunction against enforcement of the reporting policy in consensual cases, and the trial judge, finding a likely constitutional privacy violation, granted the injunction, 327 F.Supp.2d 1273 (D. Kan. 2004).

Two elderly Reagan appointees to the 10th Circuit Court of Appeals, David Ebel and John Carbone Porfilio, voted to reverse, finding that people who engage in illegal activity have no privacy right regarding that information, even though they agreed that generally teens do have a limited right to privacy under the constitution. Since Kansas outlaws sex for people under age 16, that ends the case, as far as they are concerned. Stating an alternative ground for their ruling, they contended that any privacy rights the teens might have would be outweighed by the state's interest in enforcing its criminal laws.

Dissenting, District Judge Judith C. Herrera (sitting by designation), who was appointed to the District Court in New Mexico a few years ago by President George W. Bush, argued that the informational privacy rights of the underage teens are not automatically overcome by making their consensual sexual activities a crime. She asserted that a balancing of rights was necessary, taking into account the plaintiffs' argument that depriving teens of the ability to gain confidential counseling and care from their teachers, social workers or health care professionals could prove more harmful than depriving the state of the information, especially if it deters the kids from seeking competent advice and health care.

The appeals court's ruling concerns the preliminary injunction. The trial provides an opportunity for full arguments on the merits of the case, which may eventually be appealed to a different panel of 10th Circuit judges that would not be bound by this preliminary ruling. The plaintiffs will present expert testimony to dispute Kline's assertion that consensual teen sex is necessarily injurious to the participants. A.S.L.

Florida Appeals Court Rejects Co-Parent Claim on State Constitutional Grounds

The Florida 1st District Court of Appeal ruled that the state constitutional right of privacy requires rejection of Mary L. Wakeman's lawsuit seeking visitation with the two children she had been raising with her former domestic partner, Den Dixon. The ruling in *Wakeman v. Dixon*, 2006 Westlaw 162748 (January 24, 2006), is yet another heartbreaker in the ongoing struggle to get the courts to accept the reality of non-traditional families.

This one is even more serious than some others, however, because the *per curiam* opinon by a three-judge panel premises its ruling on the state constitution's right of privacy, holding that a birth parent has a state constitutional right to prevail against child visitation claims by a "third party," and concluding that despite the co-parenting agreement and the clear evidence that these women jointly planned to conceive and raise their children, the co-parent is not a "parent" for purposes of the constitutional analysis. (In similar rulings from other states, the holdings were premised on statutory interpretation alone. The significance of a constitutional ruling is to insulate the result from legislative reform.)

"The Florida Supreme Court has held that, under the privacy provision in the Florida Constitution, a third party, even a grandparent, cannot be granted by statute the right to visitation with minor children, because, absent evidence of a demonstrable harm to the child, such a grant unconstitutionally interferes with a natural parent's privacy right to rear his or her child," wrote the court, citing *Beagle v. Beagle*, 678 So.2d 1271 (Fla. 1996).

The court then invoked the 1994 precedent of *Taylor v. Kennedy*, 649 So.2d 270, a decision by the 5th District appeal court, which had rejected an attempt by the birth mother's boyfriend, who was not the biological father of the child, to seek visitation based on the existence of a parental relationship, and the 2002 precedent of *Lamaritata v. Lucas*, 823 So.2d 316, a 2nd District ruling rejecting a visitation claim by a sperm donor. And, more on point, the court looked to its own 1995 ruling in *Music v. Rachford*, 654 So.2d 1234, like the current case a dispute between lesbian co-parents, in which the court premised its ruling on statutory interpretation, the case pre-dating the Florida Supreme Court's ruling in *Beagle*.

The court of appeal noted that the trial court had found that Wakeman and a guardian ad litem appointed to represent the children's interest had "made a compelling argument that it is in the best interests of the children to enforce the co-parenting agreements," but the trial court ruled that it was bound by Florida statutory and decisional law to reject the claim for visitation, even in the face of a written parenting agreement. This is particular frustrating because, by the court's account, these women did everything they could in the way of careful planning to protect their family, including signing a co-parenting agreement that specifically confers parental rights on Wakeman and filing a domestic partnership declaration in order that the children could be covered under Wakeman's health insurance plan. Unfortunately, in Florida it is impossible for Wakeman to have adopted the children, due to the categorical ban on gay people adopting chidren that the state and federal courts have repeatedly upheld as "rational."

Judge William A. Van Nortwick, Jr., wrote a special concurring opinion, pointing out how the existing Florida law works to the detriment of children being raised in non-traditional families. "I am concerned," wrote the judge, "that when these households dissolve, Florida law ignores the needs of those children. I write to urge the Florida Legislature to address the needs of the children born into or raised in these non-traditional households when a break-up occurs."

Van Nortwick cited census data showing the significant numbers of American households with children that are now headed by same-sex couples, and the widespread use of "assisted reproduction" enabling lesbian couples to have children. "Florida law does not protect the interests of the child produced by assisted reproduction where the child is born into a non-traditional family. It is undisputed in the research that the dissolution of a household with children can have adverse effects on those children," wrote Van Nortwick.

"Even though one might lament the growth of the number of non-traditional households with children, lamentations do not address the reality facing the child," he wrote. While acknowledging the constitutional basis for the court's decision, Van Nortwick also wrote, "The Supreme Court has also recognized, however, that 'if circumstances present themselves that question the safety of the minor child, any concerned party may seek the initiation of proceedings to protect the well-being of the child. See Schilling v. Wood, 532 So.2d 12 (Fla. 4th DCA 1998)(recognizing third party's right to initiate dependency proceedings under chapter 39).' Richardson, 766 So.2d at 1043. When a non-traditional household breaks up, it should not require a dependency proceeding to protect the well-being of the child."

Will Van Nortwick's pragmatic arguments be wasted on the Republican-controlled Florida legislature and Governor Jeb Bush? Both have obstinately defended the state's ban on gay people adopting children, having defended it successfully before the U.S. Court of Appeals for the 11th Circuit based on absurd arguments about role-modeling and child development that were belied by the state's own policy of placing foster children with gay parents. The legislature is busy "defending marriage" against gay people. What is the likelihood it will take the time to defend the rights of children to maintain contact with their de facto parents in the event a co-parent relationship breaks down? Florida legislators seem more concerned with making political points by gay-bashing than with addressing the best interests of Florida children seeking adoption or being raised by same-sex couples. A.S.L.

Porn Industry Wins Partial Relief From New Federal Regulations

In a decidedly-mixed New Year's message for the pornography industry, U.S. District Judge Walker D. Miller of Colorado issued a preliminary injunction on December 28 in *Free Speech Coalition v. Gonzales*, 2005 WL 3556193, barring enforcement of certain portions of recently-adopted Bush Administration anti-porn regulations that could have caused widespread removal of sexually-oriented visual materials from the Internet. At the same time, however, Miller cast serious doubt on First Amendment claims made by the Free Speech Coalition — a porn industry association — while refusing preliminary relief against enforcement of other parts of the regulations.

Despite all the bluster by members of Congress and Bush Administration officials about the necessity to crack down on the porn industry in order to prevent the sexual exploitation of children, there has never been significant enforcement activity under the particular statute at issue in this case, a record-keeping provision

of the 1988 Child Protection and Obscenity Enforcement Act, which was intended to deter the production of child pornography by requiring the "producers" of sexually-explicit materials to maintain documentation files on all the performers with proof of age. The record-keeping requirement is backed up by criminal penalties for non-compliance.

During the George H.W. Bush Administration, the Justice Department adopted expansive regulations that redefined "producers" to include not only those described in the statute as persons or businesses who actually contracted with actors to appear in sexually-explicit materials, but also anybody who "reissued" or otherwise published such materials. The expanded definition, under the designation "secondary producers," threatened to impose the record-keeping requirements on just about anyone who published sexually-oriented material, regardless of whether they had actually produced the stuff in the first place.

In 1998, the 10th Circuit ruled in *Sundance Assoc., Inc. v. Reno*, 139 F.3d 804, that this expanded regulation was an improper attempt to expand the reach of the statute through administrative action, and no attempt has been made to enforce the record-keeping requirements against the so-called secondary producers. However, Congress subsequently amended the statute to toughen various compliance requirements (see 18 U.S.C. sec. 2257), prompting the George W. Bush Administration to issue new regulations last spring imposing much more wide-ranging compliance requirements, which led to the present lawsuit.

Despite the 1998 *Sundance* ruling, the 2005 Bush Administration regulations retain the "secondary producer" provisions. The added regulations that were seen as most aggressive by the porn industry made the documentation requirements much stiffer, required that every item of sexually-explicit material be labeled with a street address where the records were located and available for inspection by any member of the public as well as federal compliance inspectors, required that the real names of all actors be part of these records, thus defeating the attempt by many porn actors to protect their privacy by using pseudonyms, and required all producers, whether primary or secondary, to maintain copies of all depictions available for inspection as well as lists of all URL's on the internet where their productions could be found.

In addition and a big issue for producers who use foreign performers who make porn while visiting in the U.S. on tourist visas, including many gay porn producers there was a requirement that the identification be a copy of a U.S. or state government document, such as a passport, American driver's license, or other American governmental document such as a Homeland Security Department green card authorizing a foreign citizen to work in the U.S. (documents that would be unavailable for foreign nationals here officially just as tourists), so long as the images were made in the U.S. (Foreign ID's are alright for materials produced overseas.)

The Free Speech Coalition filed suit in the federal court in Denver seeking to halt enforcement of the new regulations, and requested a preliminary injunction to prevent enforcement while the lawsuit was in progress. The Justice Department quickly agreed not to attempt to enforce the regulations until Judge Miller ruled on the request for a preliminary injunction, at least against the members of the Free Speech Coalition, which includes many porn industry producers large and small.

Miller's ruling deals a sharp blow to the Bush Administration's attempt to rid the Internet of porn, since it holds that the plaintiffs have shown a high likelihood of success on the merits of their claim that the attempt to impose the record-keeping requirements on secondary producers is an improper expansion of the statute. Actually, Judge Miller found that he was bound by *Sundance v. Reno* to find the application of the regulations to so-called "secondary producers" to be invalid, rejecting the government's argument that since Congress had amended the statute after the 10th Circuit's ruling without addressing this issue, it had essentially rejected the 10th Circuit's interpretation of the statute. Miller also accepted the plaintiffs' argument that the record-keeping requirements are unduly burdensome for operators of live chat-room websites, where performers may engage in sexual activity on a live webcam while interacting with customers of the website, and that the requirement to keep exhaustive lists of all URLs is impossible to comply with and thus unenforceable.

On the other hand, Miller's ruling dealt a major setback to the industry in rejecting First Amendment claims against the operation of the regulations on primary producers. The judge dismissed as insubstantial the argument that compliance costs were so steep that many porn producers would basically be put out of business, or that the privacy interests of porn performers must take priority over the government's compelling interest in preventing the production and distribution of child pornography. Miller found that the regulations were content-neutral, a conclusion that strains logic, and refused to subject them to the strict scrutiny under which content-based regulation of speech is usually declared unconstitutional.

Refusing to enjoin the enforcement of the regulations against primary producers, Miller still left open the possibility that the industry might prevail after a full trial on the merits. The standard for issuing preliminary relief is a clear showing of likely success on the merits after trial as well as irreparable injury if enforcement of the regulations is not stayed for the duration of the litigation. However, Miller's ruling clearly signaled that it will be difficult for the industry to prevail on its argument that the exacting documentation and record-keeping requirements impose an unconstitutional burden.

An article from Adult Video News posted on the Free Speech Coalition's website after the opinion was announced proclaimed a partial victory for the industry, but observed, "On the whole, this is a good decision by Judge Miller, but it seems likely that both plaintiff and defense attorneys will find issues therein that they will want to appeal." By the end of January, the Free Speech Coalition had filed its appeal to the 10th Circuit, arguing that Miller erred in finding the regulations content-neutral, and contending that the regulations had to be reviewed using the strict scrutiny approach. A.S.L.

Military Appeals Court Reverses Sodomy Conviction

In a rare move, a unanimous three-judge panel of the U.S. Navy-Marine Corps Court of Criminal Appeals reversed a sodomy court martial conviction in *United States v. Humphreys*, 2005 WL 3591140 (Dec. 29, 2005) (unpublished opinion). Ruling on an appeal by John J. Humphreys, a Navy Aviation Machinist's Mate Airman, the court found that the constitutional liberty interest that the Supreme Court described in *Lawrence v. Texas* (2003) precluded prosecuting Humphreys for his consensual anal sex with a female companion in a Navy barracks bedroom.

The ruling in an opinion by Senior Judge Greg Carver, marks an unusual departure from other sodomy cases decided by military appeals courts over the past two years. It was clear after the Supreme Court's ruling in *Lawrence* that the military would have to confront the question whether Article 125 of the Uniform Code of Military Justice, which makes sodomy a military crime, could continue to be applied.

In *U.S. v. Marcum*, 60 M.J. 198 (Court of Appeals for the Armed Forces 2004), the court ruled that *Lawrence* required special consideration of constitutional concerns in military sodomy cases. The *Marcum* ruling devised a three-part test to determine whether military defendants couuld be prosecuted for sodomy: first, whether the type of conduct charged fell within the range of conduct found protected in *Lawrence*; second, whether any of the exceptions mentioned by the Supreme Court in *Lawrence* might apply, such as involvement of minors, public conduct, or conduct involving force or coercion; and, third, whether there were particular considerations arising from the military environment that made it appropriate to apply criminal sanctions in the particular case.

In subsequent sodomy appeals in the military courts, almost every conviction has been upheld, either because the actions involved adultery or minors or concerned sexual interactions between military members of different ranks, such that the court considered the conduct to threaten good order or morale within the particular military unit.

Humphreys' case, however, struck the Navy-Marine Corps appeals court as failing to raise any of these issues. Humphreys and the woman "victim," a Navy member of similar rank, were on a date. They went back to Humphreys' barracks quarters, where his male roommate was present. After a time, the roommate left and Humphreys and his date engaged in rough sex, during which Humphreys bit her on the arm and neck and tied her down and entered from the rear, desisting when she complained that it hurt. After getting dressed, they went out again and continued to socialize for the evening.

Humphreys was later charged with a variety of offenses involving various other individuals, and apparently during the course of the investigations this woman was questioned and recounted the events of that evening. Military authorities decided to prosecute Humphreys for rape and sodomy in connection with this event, but the court martial jury rejected the rape charge, finding the woman was a willing participant, and convicted on the sodomy charge, as to which consent is not a defense under Article 125. Humphreys was also convicted on a variety of other charges not related to this incident.

The government argued on appeal that Humphreys' case failed on all three tests set out in *Marcum*, but the court rejected each of the arguments. Although in some of the prior cases the courts have placed significance on the fact that the conduct took place on a military base or ship, in this case the court did not consider that significant, as it was in a private bedroom in a barracks, and the court found no evidence that the Navy has a general rule against sexual activity in private bedrooms in a barracks. Judge Carver also found that as the court martial had acquitted on the rape charge, there was no basis for purposes of this appeal of finding the conduct other than consensual, and since both parties were of the same rank, there was no coercion issue.

Finally, Judge Carver could not find any special circumstances arising from the military environment that would justify the prosecution. "We will not speculate about the impact on morale within the unit," wrote Carver. "Other than the testimony of YNSN JMB's co-worker, who counseled YNSN JMB about having visible 'hickeys' on her neck, the record is sparse at best regarding how many people knew of the appellant's brief relationship with YNSN JMB, let alone the intimate details of it. There is no evidence that the appellant bragged about the act of sodomy, or that anyone learned of it until YNSN JMB came forward with her allegations several months after the incident. There is no evidence that YNSN JMB was unable to do her job, or of any other significant impact on the unit's mission or readiness... Such an exception would render *Lawrence* essentially inapplicable to service members, which is not a result consistent with *Marcum*."

As in most prior military sodomy appeals, *Humphreys* involves a heterosexual incident, although unlike the others it involves anal as opposed to oral sex. There is nothing in the court's opinion to suggest that the same considerations would not lead to the same result in a gay sex case, although of course gay sexual conduct would lead to discharge under the "don't ask, don't tell" policy. Perhaps, however, a military court might distinguish a homosexual case from *Humphreys* on the ground that Congress has declared that homosexuality is incompatible with good morale and order in the military.

Humphreys' convictions on the other charges against him were upheld, but the court ruled that the sodomy conviction arising from this particular incident had to be quashed. However, the court determined that the sentence imposed on Humphreys for all the acts charged against him, confinement for 12 months, forfeiture of all pay and allowances during confinement, and reduction in pay grade, was not excessive under the circumstances.

The government could appeal this decision, but it seems unlikely, since the original sentence was affirmed and the officially unpublished decision, although available to researchers, does not serve as precedent for other cases. A.S.L.

Looking at Gay Sex On-Line Sparks 20 Year Prison Term

A man who had 74 images of gay men engaged in sexual activity on his laptop was sent to prison for twenty years by a Texas court for violating the terms of his community supervision stemming from his plea to child abuse charges, and the Texas Court of Appeals rejected his appeal. *Lozano v. State of Texas*, 2006 WL 166364 (Jan. 25, 2006) (not officially published).

In 1995 Lozano faced four charges of indecent conduct with boys, to which he pled no contest in exchange for the prosecutor's agreement not to oppose his application for deferred adjudication. The trial court granted the application, placing Lozano under court supervision for ten years. In 1998, the terms of his superivision were modified to provide that he could not "possess, access, or view sexually oriented (explicit) material of children or adults" and that he would have to make his computer available for inspection at any time. In March 2004, his probation officer required him to bring in his laptop for inspection, and 74 images of men engaged in sex with each other were found. His deferred adjudication was vacated, and he was sentenced to four concurrent twenty-year terms in prison, the sentence he would originally have received had not his application for deferred adjudication been granted.

Lozano argued on appeal that whatever the state of the law was in 1995 or 1998, by 2004 the Supreme Court had found gay sex to be constitutionally protected, and thus it violated his rights to attach any adverse consequences to his private viewing of gay adult sexual depictions on his computer. The appeals court, in an opinion by Justice Sarah B. Duncan, rejected this argument, pointing out that the 20 year sentence was for child molestation, and that he had agreed as a condition of deferred adjudication to meet certain conditions in order to avoid the original jail sentence. "Lozano was not sentenced for possessing pictures; rather, he was sentenced for committing indecency with a child," Duncan wrote. By the same token, there was no 8th Amendment violation, since Lozano was not sentence to 20 years for looking at picture, but rather for molesting four boys, and nobody was disputing that the 20 year sentence was appropriate for that. A.S.L.

Three Gay Asylum Applicants Strike Out in the 2nd Circuit

The U.S. Court of Appeals for the 2nd Circuit recently bowed to the realities of its overtaxed docket and joined other circuits in generally abandoning oral argument in political asylum cases, setting up a special summary docket under which panels of the circuit will evaluate appeals from the Board of Immigration Appeals on paper and require argument only in exceptional cases. Recent fruits of the new process include *Joaquin-Porras v. Gonzales*, 2006 WL 120331 (Jan. 18, 2006) (substituting for decision previously issued on Dec. 8, 2005, 2005 WL 3315284), *Li v. Gonzalez*, 2006 WL 166345 (Jan. 23, 2006), and *Ni v. United States Attorney General*, 2005 WL 3344804 (Dec. 9, 2005). In these cases, the Board of Immigration Appeals refused to overturn decisions by Immigration Judges, rejecting attempts to remain in the United States by non-citizen applicants who alleged that they would encounter extreme oppression were they required to return to their countries of origin. A fourth case joined this line-up late in January, *Norzai v. Gonzales*, 2006 WL 189989 (2nd Cir., Jan. 25, 2006) (not officially published), although the court's summary order is so abbreviated that it does not even mention underlying facts or Adam Norzai's country of origin.

In *Ni*, the Immigration Judge (IJ) had concluded that the Chinese applicant was gay, even though he did not mention his sexual orienta-

tion in his 1992 asylum application or his 1997 interview with an asylum officer, due to his reluctance to disclose his sexual orientation to the U.S. government. The problem is that Ni had also not revealed facts crucial to establish a reasonable fear of persecution, either in 1992 and 1997 or in a 2000 supplemental statement filed in support of his application. Ni now claims that "he was detained and beaten by government officers and mistreated by the dean of his school for being gay," but the IJ refused to credit this testimony since it was not raised earlier in the case, and the IJ was unwilling to rely entirely on country condition reports produced by the State Department as a basis to conclude that a gay man would face serious oppression if required to return to China, even if he had "outed" himself as gay in the American asylum process. When Ni appealed to the Board of Immigration Appeals (BIA), that body noted in its affirmance of the IJ decision a statement by the State Department that the government of China was becoming "somewhat more tolerant" of gay men than in the past. The court's summary order affirming the BIA ruling also noted that all the evidence Ni submitted in support of his asylum claim was rather old and thus did not take account of more recent, alleged liberalizing tendencies on gay issues in China.

Li also involved an asylum claim by a gay man from China. The summary order issued by the 2nd Circuit does not disclose much in the way of factual allegations, merely relating that Li "alleged he feared persecution in China because he is a homosexual." The Immigration Judge concluded Li was not credible and that he missed the one-year filing deadline, but the court's opinion does not discuss the reasons for these conclusions, merely observing that "Li's brief does not point to any error in either of these determinations and he has therefore waived these issues." The court also observed that Li was raising a claim under the convention against torture for the first time on appeal, which can't be done under the established procedures. The opinion, which will not be officially published, lists Mark T. Kenmore of Buffalo, N.Y., as Li's counsel on the appeal.

In *Joaquin-Porras*, the court confronted a case where the applicant had entered into a U.S. marriage while working in Ithaca, New York, which the IJ found to be a sham marriage for the purpose of gaining U.S. citizenship. Mr. Porras, a native of Costa Rica, was "found out" when Immigration officials sought to verify the legitimacy of his marriage. Like Mr. Ni, Porras did not make anything of his sexual orientation until rather late in the process, now asserting that he failed to disclose it earlier out of fear of adverse consequences for his employment. Porras did offer some evidentiary basis for fear of oppression if he was required to return to Costa Rica, but ran into credibility problems similar to Mr. Ni's, exacerbated by the sham marriage and his admission that he had been untruthful in the past.

The initial 2nd Circuit opinion in *Joaquin-Porras* was replaced a month after being issued by a virtually identical opinion in which one paragraph was modified in its characterization of the review of the BIA decision, presumably reflecting the 2nd Circuit's adoption of summary proceedings in light of the docket situation and the BIA's virtual abdication of careful case-by-case adjudication. (Under the Bush Administration, the Justice Department and subsequently Department of Homeland Security have apparently responded to the overwhelming numbers of asylum cases by adopting a virtual rubber stamp of IJ decisions by the BIA, a situation that Congress seems content to allow despite its violation of statutory requirements and elementary principles of due process.)

Both cases illustrate a common problem in gay asylum cases, apart from the short time limits that frequently trip up applicants. That is, some gay people arriving in the U.S. who might have valid asylum claims have not taken any steps prior to arriving here to determine what they would have to do to obtain political asylum based on their sexual orientation in the U.S., and may even attempt to activate the process without necessary knowledge of what is possible and of the documentation that will be required. In some cases, their situation may be complicated by lack of competent legal counsel in the early stages of their cases. In both of these 2nd Circuit cases, one suspects, despite the sketchy nature of the court's opinions, that the individuals involved might have been eligible for asylum but lost their cases due to ignorance of the process or following poor advice at early stages. (This comment is not intended to reflect on the professional competence of the attorneys handling their appeals, who may have been stuck attempting to overcome insuperable odds due to the mishandling of earlier stages of the process by the pro se applicants or less informed counsel at earlier stages.)

In *Norzai*, the petitioner was seeking review of a BIA order denying his motion to reopen its decision affirming an IJ's ruling that denied Norzai's application for withholding of removal under the Convention Against Torture. Sparing readers of the opinion any description of the allegations underlying the petition, the court merely concluded that BIA had cured any problem about having initially failed to consider Norzai's argument that he had not raised the issue of his homosexuality earlier in the proceedings for psychological reasons by considering and dismissing it in the context of his motion to reconsider. This opinion vividly demonstrates how the new summary procedures of the 2nd Circuit undermine the salutory function that full written opinions serve in making it possible for the public to be informed about whether the asylum process is being fairly administered. A.S.L.

California Appeals Court Addresses Continuing Disputes in *Sharon S.* Litigation

The California Court of Appeals for the Fourth District affirmed a lower court's judgment in a bitter and much litigated child custody and support dispute between a now separated lesbian couple. *Annette F. v. Sharon S.*, 2006 WL 45887 (Cal.App.4th Dist.) January 10, 2006. In this matter, Sharon is Zachary's birth mother and Annette is the adoptive mother through a second parent adoption. This is a follow-up to the important California Supreme Court ruling in *Sharon S. V. Superior Court*, 31 Cal. 4th 417, 73 P.3d 554 (Cal. 2003), which determined that second-parent adoptions are valid under California's Family Code. Sharon was appealing the trial court's computation of her income used in determining the child support award that Annette pays, and the court's ruling on the "timeshare" custody order.

The court imputed to Sharon a monthly after-tax income of $5,985, which Sharon argues is too high because the court abused its discretion by including payments from her parents as income. Sharon states there is not substantial evidence to support the court's inclusion of the money her parents gave her as income. Sharon is also appealing the "timeshare" order that required Zachary to spend every other weekend with Annette during the school year from Friday after school until he returns to school the following Tuesday morning. Sharon argues this schedule violates her First Amendment right to free exercise of religion with her son, whom she is raising as a Jew, because it interferes with her weekly observance of the Sabbath from Friday evening to Saturday evening.

With regard to the child support calculation, the appeals court concluded that the trial court did not abuse its discretion under Section 4058 of the Family Code by calculating Sharon's imputed income to include payments her parents made on her behalf. Furthermore, the court explains that substantial evidence exists to support their conclusion. The court reviewed Sharon's income and expense declaration in determining her imputed income under section 4058. As a result, the court found that $5,985 was the correct figure because her parents' payments, which made up a shortfall between her income and her expenses, were income. The court continued to say that at the very least the income from her parents would be considered employment-related fringe benefits, since Sharon was an employee of her father's company. Further evidence supporting the court's conclusion is the Tax Code definition of gross income, which is income from whatever source derived, including fringe benefits from employ-

ment. As a result, Annette must pay $809 a month to Sharon for Zachary. The court points out that the state of California has a strong public policy in favor of including unearned sources of income so as to provide adequate child support.

In examining the time-share arrangement, the court focused on what was in Zachary's best interests. Zachary's counsel, Terry Chucas, proposed a schedule at trial that the court adopted called "Terry Chucas Option One." Under that arrangement, Annette shall have alternate weekend visitation with Zachary during the school year with weekend visitation starting after school on Friday and ending on his return to school Tuesday morning. However, if Annette happens to be late by more than one hour to pick up Zachary, then her weekend visit will not start until Saturday evening at 7:30 PM. Additionally, the weekend schedule shall not interfere with Zachary being with Sharon on specified Jewish holidays.

The court decided that the "Terry Chucas Option One" was in Zachary's best interest and fair to both Sharon and Annette. Also, the court declared that the issue of religious practice and the determination of which religion is to be practiced is not a decision for the court.

As for Sharon's free exercise constitutional claim, the court concluded that Sharon forfeited her constitutional claim by failing to raise it while at the trial court. Even if she had not forfeited that claim, the court still would have affirmed the judgment.

In sum, the record in this case shows that in making its decision the court showed sensitivity to Sharon's constitutional rights and the rights of the parties, but most importantly ruled in favor of Zachary's best interests. Hopefully, Sharon and Annette can work together to act like the court, and to make Zachary's best interests their priority. *Tara Scavo*

California Domestic Partnership Law Survives Another Challenge

A second attempt by the Campaign for California Families to have the state's domestic partnership law declared invalid has failed. In *Campaign for California Families v. Schwarzenegger*, 2006 WL 205118, a unanimous unpublished ruling issued on January 27, a three-judge panel of the 3rd District Court of Appeal stated the same conclusion it had reached last year in *Knight v. Superior Court*, 128 Cal. App. 4th 14 (2005), in considering a similar challenge to an earlier version of the domestic partnership law: that the state Defense of Marriage Act, passed by the voters in 2002 as Proposition 22, has nothing to do with domestic partnership.

Legislative proponents of legal recognition for same-sex partners in California have proceeded along parallel tracks. The more conservative approach, championed first in the 1990s, was to enact a minimalist domestic partnership registration law and then to pass a series of amendments strengthening the law until it provided all the state law benefits that pertain to marriage. The bolder track was to propose a law opening up marriage to same-sex partners.

Both tracks achieved success in the legislature. The last set of amendments to the Domestic Partner Rights and Responsibilities Act went into effect in January 2005, effectively extending to registered same-sex partners the same state law rights and responsibilities that legally married spouses have. Reflecting this commitment to equality, the legislature then narrowly passed the pending same-sex marriage bill during 2005, only to have it vetoed by Governor Arnold Schwarzenegger, who said the pending lawsuits seeking marriage under the state constitution should be allowed to run their course in light of the passage of Proposition 22.

The Campaign for California Families, plaintiffs in the new case, had challenged an earlier version of the Domestic Partnership law, resulting last year's *Knight* decision, which ruled that the state DOMA did only two things. First, it prohibited same-sex marriages in California. Second, it prohibited the recognition of same-sex marriages that were performed out of state. The court pointed out that unlike DOMAs passed in some other states, the California version had not gone further to prohibit civil unions or domestic partnerships, and thus the legislature was not constrained from passing the partnership law.

Coming back for a second try, Campaign argued that the latest version of the law, by equating the rights of marriage and partnership, had crossed the line and attempted to repeal what the voters had enacted. Justice Scotland, writing for the court, rejected this argument. Restating the court's conclusions from last year's decision, Scotland wrote, "Furthermore, in light of the numerous differences between domestic partnerships and marriages with respect to (1) the rights conferred on the relationships, (2) the mechanism for forming and terminating the relationships, and (3) the legal recognition of the relationships by other states, we concluded 'the Legislature has not created a "marriage" by another name or granted domestic partners a status equivalent to married spouses.' Rather, the Legislature made a policy decision to grant many of the rights associated with marriage to same-sex couples to encourage them to register as domestic partners."

Scotland concluded that the state supreme court's decision last year in *Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824 (2005), upholding a discrimination claim for a lesbian couple denied spousal membership at a country club, did not change the situation in favor of the plaintiffs in this case, as they argued, but rather confirmed that Proposition 22 did not stand in the way of legislation protecting same-sex partners from discrimination. A.S.L.

IRS Denies Tax Deduction for Gender-Change Expenses

The Office of Chief Counsel of the Internal Revenue Service has ruled in a staff memorandum that expenses associated with a transsexual taxpayer's gender-reassignment surgery are not deductible as medical expenses under Section 213 of the Internal Revenue Code. The memo, dated October 14, 2005, was released to the public with the name(s) of the taxpayer redacted on January 20, 2006, and the full text reported in *Tax Notes Today* on January 23, 2006 TNT 14–12. The chief counsel was responding to a request for advice on how to handle an actual taxpayer's case, which was posed by a branch office of the IRS.

According to the ruling, the taxpayer's case was under consideration by the Office of Appeals after IRS staff had denied the deduction. The opinion states that the taxpayer, born male, "had gender issues dating back to childhood." During Year 1 of the period under discussion in the memo, the taxpayer sought psychotherapy for his condition, and was diagnosed as meeting the criteria for gender identity disorder (GID). During Year 2, the taxpayer began hormone therapy under the care of an endocrinologist. In Year 5, preparatory to gender reassignment, the taxpayer began living full-time as a woman and obtained a legal name change. In July of Year 6, a social worker applying prevailing medical standards recommended that the taxpayer received gender reassignment surgery (GRS). The taxpayer met with a doctor expert in the area, who found the GID to be "profound" and, after considering and dismissing less invasive treatments, opined that "the taxpayer was in need of GRS." The taxpayer complied with all the preparatory requirements for sex reassignment surgery, and had the operation in October of Year 6. The taxpayer sought to deduct expenses associated with the treatment and procedures to the extent they exceeded the statutory exclusion of 7.5% of gross income, but the deduction was disallowed by IRS.

Analyzing the situation, the memo notes that Section 213 of the Code, which governs such deductions, defines "medical care" as amounts paid for "the diagnosis, cure, mitigation, treatment or prevention of disease, or for the purpose of affecting any structure or function of the body." Treasury regulations interpreting the Code provide that deductions for expenditures for medical care "will be confined strictly to expenses incurred primarily for the prevention or alleviation of a physical or mental defect or illness." Expenditures that are generally beneficial for health but not related to a specific medical condition are not allowed as deductions. Section 213(d)(9)(A) of the Code specifically

provides that "medical care" does not include cosmetic surgery or other similar procedures, unless necessary to "ameliorate a deformity arising from, or directly related to, a congenital abnormality, a personal injury resulting from an accident or trauma, or a disfiguring disease," and subsection (B) of the same section relates cosmetic surgery as having to do with improving a patient's appearance in a way that does not meaningfully promote the proper function of the body or treat illness or disease.

Section 213(d)(9)(A) and (B) were enacted by Congress in response to perceived abuses of the tax code by people who were deducting expenses for purely elective cosmetic surgery that was in no sense medically necessary, such as nose jobs and face lifts. The IRS memo reviews legislative history, with a particular focus on a Senate Report addressing this issue, and making clear that only surgery that was necessary to correct a medical condition should be deductible.

"From the material submitted the taxpayer has not satisfactorily demonstrated that the expenses incurred for the taxpayer's GRS fit within the strict boundaries discussed above," opines the IRS. "There is nothing to substantiate that these expenses were incurred to promote the proper function of the taxpayer's body and only incidentally affect the taxpayer's appearance. The expenses also were not incurred for treatment of a disfiguring condition arising from a congenital abnormality, personal injury, or disease (such as reconstructive surgery following the removal of a malignancy)."

IRS described as "controversial" the question whether GRS is "a treatment for an illness or disease." To date there is no case law, regulation, or revenue ruling deciding this question in the tax context. "In light of the Congressional emphasis on denying a deduction for procedures relating to appearance in all but a few circumstances and the controversy surrounding whether GRS is a treatment for an illness or disease, the materials submitted do not support a deduction. Only an unequivocal expression of Congressional intent that expenses of this type qualify under section 213 would justify the allowance of the deduction in this case. Otherwise, it would seem we would be moving beyond the generally accepted boundaries that define this type of deduction."

Although the memo does not designate anybody as its author, being issued generally under the auspices of the Office of Chief Counsel of IRS, it does state that questions concerning the memo should be directed to Dan Cassano at 202–622–7900.

In reviewing this opinion, we were surprised to find no discussion of the case law concerning coverage for GRS under public benefit programs such as Medicare and Medicaid or other private medical insurance contracts. While the results in those cases are mixed, there are precedents supporting an assertion that GRS is a medically necessary procedure for persons diagnosed with profound GID, which might have been considered by IRS. A.S.L.

Montana Supreme Court Rejects Procedural Challenge to County Domestic Partnership Benefits Plan

According to his dissent in *Jones v. County of Missoula*, 2006 WL 44340 (Mont., 2006), Justice James C. Nelson implies that the majority forgot about constitutional guarantees of due process when it rejected a procedural challenge to a domestic partnership benefits plan that had been adopted by the Missoula County Commission. Chris Jones and Tei Nash, two active church-goers resident in the county, were upset by the commission's action, contending that they were not given proper notice of the meeting where this determination was made. After losing in the lower court, the Supreme Court of Montana granted their appeal, and subsequently affirmed the lower court's decision to grant summary judgment in favor the Missoula County in a plurality decision.

According to the Montana Public Meeting Act (MCA §§ 2–3–101), Missoula County has established (but not published) policies for putting citizens on notice of public meetings "to encourage public participation in county business." The rules involve posting notices in various places and send a copy by email to a local newspaper. Individuals who request notice of particular meetings receive it, as do persons entitled by statute to receive notice (presumably certain public officials).

Chris Jones and Tei Nash heard from a fellow church member that the County Commissioners were considering granting health insurance benefits to domestic partners. Jones and Nash attended a regularly scheduled March 12, 2004, commission meeting and openly objected "to including domestic partners in the Missoula County Employee Benefits Program." On March 14, 2003, *The Missoulian* printed a story stating that the "County Commissioners were considering extending benefits to domestic partners of county employees and that the commissioners were likely to make a decision on the issue in April." On April 2, 2003, an agenda for the April 3, 2003 meeting was posted on the bulletin board and e-mailed to *The Missoulian* as required by the notice rules. The agenda listed a discussion of domestic partner benefits as a potential amendment to the Missoula County Employee Benefits Plan. At the April 3 meeting, the commissioners decided to add domestic partners to the benefits plan.

Jones and Nash filed suit on May 1, 2003, alleging that the county failed to give them proper notice of the vote, thereby depriving them of their constitutional right to participate in the operation of government. They sought to have the commission's decision voided.

On May 24, 2004, the District Court granted the County's summary judgment motion. Nash and Jones appealed to the Supreme Court of Montana, which had to determine whether the action in question was of "significant public interest" such that public notice was required, as well as whether the notice given was sufficient to meet the requirements, and whether the commission's decision had to be voided due to lack of notice.

In a split decision, the court affirmed the District Court. Justice Warner wrote the plurality opinion, to which three justices concurred. Justice Nelson wrote a concurrence and dissent, to which two justices joined. Fundamentally, the reasoning of both opinions is very distinct.

Nash and Jones argued that "simply posting a meeting agenda on a county bulletin board 24 hours prior to a meeting is insufficient because such a procedure requires the whole city of Missoula to crowd into the hall to inspect the bulletin board each afternoon, and the notice failed to 'flag' domestic partner benefits as an issue of significant public interest."

As to whether the decision to extend dependent health care benefits to domestic partners of county employees is an issue of significant public interest, all seven justices were unanimous in finding in the affirmative. Consequently, Warner wrote, "notice and an opportunity for public participation were required." Partial dissenter Nelson agreed with the court's treatment of this issue. The court invoked *Snetsinger v. Montana University System*, 325 Mont. 148 (2004), in which University employees and their same-sex partners sued for a declaratory judgment that the policy against dependent health insurance coverage for partners violated the state constitution, to support the point that the subject matter was of significant public interest.

Justices Warner and Nelson fundamentally differed, however, on how they interpreted the sacnty factual record in the case, decided on motion with only one affidavit supporting the motion papers. The only point on which Nelson dissented was as to the plurality's holding that Missoula County gave sufficient notice. It seems to be a matter of opinion, and some crafty incorporation of constitutional protections, that support both opinions regarding this gray area.

The court's treatment of the facts relevant to the second issue were particularly troublesome, in light of the skimpy record. Both the plurality and dissenting opinions made equally strong arguments as to whether Nash and Jones received sufficient notice so that they were provided the opportunity to participate in the operation of government. Their arguments are not persuasive because they involve speculation and interpretation of what might have hap-

pened rather than an accurate review of the record.

Warner found that a newspaper article alluding to the possibility that the Commission would issue a final determination on this matter sometime in April, along with the agenda for the April 3 meeting that was publicly posted 24 hours in advance of the meeting, were sufficient notice. He noted that this was the same procedure used to post notices of all regular weekly meetings and that the standard is that county commissioners must provide notice that is adequate to ensure the public has the opportunity to participate in the decision-making process. Warner speculated that Nash and Jones should have requested "that they be given notice of any further discussions or action" after they appeared at a meeting to register their opposition. Warner wrote, "[i]n no way did the commissioners 'hide the ball' as suggested by the dissent."

Nelson argued that this matter should be viewed in light of the constitution and its explicit protections for a right of public participation and knowledge of what the commission was doing. The plaintiffs clearly pled the infringement of these rights by the Missoula Commission. Furthermore, the legislative intent of the pertinent statute, §2–3–102, MCA (2001), as suggested by Nelson, was to insure that the fundamental right to participate and the fundamental right to know would be protected from arbitrary legislative acts by governmental entities. Neither Warner nor Nelson straightforwardly stated their answers to the fundamental question in the case, of whether Nash and Jones had successfully alleged an infringement of constitutional rights. Sec. 2–3–102(1), MCA, defines "agency" as "any board, bureau, commission, department, authority, or officer of the state or local government authorized by law to make rules, determine contested cases, or enter into contracts ...." Sec. 2–3–103(2), MCA (2001), provides: "The governor shall insure that each board, bureau, commission, department, authority, agency, or officer of the state adopts coordinated rules for its programs, which guidelines shall provide policies and procedures to facilitate public participation in those programs, consistent with subsection (1) of this section. These guidelines shall be adopted as rules and published in a manner which may be provided to a member of the public upon request."

Nash and Jones argued that because Missoula County failed to comply with the statute, which required the county to adopt guidelines in the form of rules and publish them so that they could be provided to the public upon request, the decision to provide dependent health care benefits to domestic partners of county employees was not lawful. Justice Warner wrote, "[i]t is clear from the plain language of sec. 2–3–103(2), MCA (2001), that the provisions of this subsection only apply to state agencies. The subsection reads 'that each agency *of the state*' shall adopt coordinated rules." Justice Nelson wrote in dissent, "Are County Commissioners bound by the provisions of the participation statutes? The answer is clearly, yes." However, a few pages later, he concluded, "I agree with the Court's analysis of sec. 2–3–103(2), MCA." Is Justice Nelson confused?

In any event, despite the puzzling flaws in both opinions, the end result is to reject the challenge to the Missoula County domestic partnership policy. *Eric Wursthorn*

Florida, Oklahoma Supreme Courts Ban Discrimination by Judges

The Supreme Courts of Florida and Oklahoma have approved new codes of judicial conduct that require judges to refrain from sexual orientation discrimination. *In re: Amendment to Code of Judicial Conduct — American Bar Association's Model Code of Judicial Conduct*, 2006 WL 20522 (Fla. Sup. Ct., Jan. 5, 2006); *In re Application of the Oklahoma Bar Association to Amend the Code of Judicial Conduct*, 2006 WL 121985, 2006 OK 2 (Okla. Sup. Ct., Jan. 17, 2006).

Both rulings stem from the American Bar Association's recent approval of new model rules of judicial conduct that incorporate the requirement that judges not only refrain from various forms of discrimination in the discharge of their duties, but also imposing on judges the responsibility to require lawyers appearing in proceedings before them from refraining in discriminatory conduct as well, including "manifesting, by words or conduct, bias or prejudice based upon" inter alia "sexual orientation." The non-discrimination requirement is expounded under Canon 3, "A Judge should perform the duties of judicial office impartially and diligently." Proponents of the non-discrimination principle were unsuccessful, however, in getting the model code to require judges to avoid membership or association with organizations that discriminate in their membership policies on the basis of sexual orientation. A.S.L.

Federal Civil Litigation Notes

California — A federal magistrate in the Eastern District of California concluded in a December 15 ruling that a former prison inmate who is transgendered can maintain a civil rights action for harassment and discrimination against prison officials without having complied with the exhaustion requirements of the Prison Litigation Reform Act, because she waited until after her release to file suit. *Painter v. Baca*, 2005 WL 3453785 (E.D. Calif., Dec. 15, 2005) (not officially published). Most prisoner litigation comes to grief on the shoals of the exhaustion requirements, which require prisoners to file internal grievances and pursue them through a time-consuming appellate process before they can bring their constitutional claims to federal court. In this case, Lee Painter claimed to have suffered harassment and discrimination based on her transgender status while incarcerated in two California prisons. The defendants moved to dismiss, claiming Painter had not pursued internal grievance mechanisms. But Magistrate Beck recommended that the federal court deny the motion, pointing out that the exhaustion requirement, by its terms, applies to lawsuits by prisoners. "Defendants have provided no authority for the application of section 1997e [the exhaustion requirement] to a prisoner who was released prior to filing suit and therefore plaintiff's failure to comply with the mandatory exhaustion requirement… does not require dismissal of this action," Beck concluded.

California — Federal Magistrate O'Neill recommended denying a motion for preliminary injunctive relief requested by state prisoner Eric Johnson, who alleges that he is transgendered and would be at risk of harm if his single cell status were to be changed. *Johnson v. Alameida*, 2005 WL 3439918 (E.D. Calif., Dec. 15, 2005) (not officially published). Magistrate O'Neill characterized this allegation as "purely speculative," and opined that "speculative injury… does not constitute irreparable harm," so the standard for injunctive relief is not met. This is not to prejudge the outcome of Johnson's case on the merits, only to note that Magistrate O'Neill found that Johnson had not provided any evidence in support of his assertion in support of the motion for preliminary relief.

Massachusetts — Michael LeBeau and David Martin have filed a diversity action in the federal district court against Ocean State Jobbers, Inc., claiming they were harassed and discriminated against based on their sexual orientation. The couple had filed a discrimination complaint with the Massachusetts Commission Against Discrimination (MCAD), which had discrimination under a state law banning sexual orientation discrimination, but then removed their case to the federal court. Martin worked at the defendant's East Springfield store; he alleges that he encountered harassment and discrimination after informing the employer that he and his partner were getting married and inquired about the possibility of health coverage for his partner. Martin claims he was called "fag" and "queer" by management officials, and his application for family health coverage was denied after he reported his marriage. LeBeau, who also worked at the store, was subsequently terminated on ground he alleges were fabricated. The suit brings vari-

ous state statutory and common law claims. *The Republican*, Springfield, Jan. 17.

Ohio In *Lister v. Defense Logistics Agency*, 2006 WL 162534 (S.D. Ohio, Jan. 20, 2006), District Judge Sargus ruled that a DLA employee could maintain an action claiming that his First and Fifth Amendment rights were violated when the agency refused to let him post a flyer on a bulletin board that is generally open to employee flyers and announcements. Gary Lister's flyer, which he says was based on his "sincere religious beliefs," cautioned fellow employees that by donating to the Combined Federal Campaign, a charitable solicitation administered by the government, their money "may go to support abortion on demand, abortion for teens, sexual promiscuity, the homosexual agenda and New Age mysticism." Lister received a memo from an agency official telling him that he could not post his flyer "on the basis that employees are not to engage in personal religious or ideological campaigning during work hours." In moving to dismiss the complaint, the government argued that Lister's could not file a First Amendment claim for what was logically within the realm of Title VII's ban on religious discrimination, and, as to Title VII, his complaint had failed to state a claim of religious discrimination. While Judge Sargus agreed that the requirements of a Title VII claim had not been met, Sargus disagreed with the first argument, finding that the possibility of Title VII protection did not preclude a constitutional claim, finding that the free speech claim was "distinct from Plaintiff's claim for employment discrimination."

Tennessee — In *Doe v. Fults*, 2006 WL 156764 (M.D. Tenn., Nashville Div., Jan. 20, 2006), Magistrate Brown ruled against a claim by the mother of a male high school student that the school district should be held liable under 24 U.S.C. sec. 1983 as a result of her 15–year-old son's sexual molestation by a male teacher at the school. (The principal case is against the teacher, with the school district named as a co-defendant. The Jan. 20 ruling concerned cross-motions for summary judgment by the plaintiff and the school district.) The court found that the school district's knowledge that the defendant-teacher was gay, had been conducting a sexual relationship with a 19–year-old college student, and had accessed sexually-explicit gay materials on his school computer, did not provide a basis for imposing constitutional liability on the school, which had no knowledge that the teacher was sexually involved with any students at the school. Having found no basis for federal jurisdiction on the claim, the court dismissed without prejudice supplementary state law claims against the school.

Utah — In *Heideman v. South Salt Lake City*, 2006 WL 245160 (Feb. 2, 2006), the U.S. Court of Appeals for the 10th Circuit rejected a constitutional challenge to a South Salt Lake City ordinance banning nudity in adult businesses. The city argued that nude entertainment in such establishments could exacerbate the HIV crisis by promoting promiscuity on the premises. The argument sounds bizarre when you read it in the court's unsigned opinion, but evidently the worthy judges of the 10th Circuit found it credible.

Wisconsin — Lambda Legal and the ACLU have jointly filed suit in the U.S. District Court of the Eastern District of Wisconsin on behalf two transgender women who are challenging the validity of a recently-enacted Wisconsin statute that forbids the prison system from providing hormone therapy for transgender inmates. *Sundstrom v. Frank*, Case No. 06–C–112 (filed Jan. 24, 2006; order issued Jan. 27, 2006). The plaintiffs, Kari Sundstrom and Andrea Fields, are serving state prison terms and had been on hormone therapy for many years. In anticipation of the effective date of Wis. Stat. Sec. 302.386(5m) of January 24, their hormone dosages were reduced on January 12, and they began to experience adverse side-effects. They were told that the plan was to reduce dosage further so they would be totally off hormone therapy by mid-March. They sought pre-trial relief, which was granted on Jan. 25 by District Judge C.N. Clevert, Jr., ordering the prison to continue hormone therapy for the plaintiffs pending an adjudication on the merits. (Clevert noted that another federal district judge had also ordered preliminary relief in a case brought by a Wisconsin inmate, *Konitzer v. Bartow*, No. 03–C–717.) Federal courts have recognized that gender identity disorder is a serious medical condition, and failure to provide any treatment would violate the 8th Amendment rights of transgender prisoners by subjecting them to cruel and unusual punishment. The question in this case would be whether provision of psychotherapy would be sufficient treatment to satisfy the constitutional requirements, and whether forced withdrawal from hormone therapy would inflict a cruel and unusual punishment on the plaintiffs. Judge Clevert set a hearing date in August.

State Civil Litigation Notes

California — The *San Jose Mercury News* reported on Dec. 20 that Santa Clara County Superior Court Judge Mary Jo Levinger had ruled that the city of San Jose could not offer benefits to same-sex partners of its employees based solely on their legal marriage in some other jurisdiction. Thus, San Jose same-sex couples who go to Canada to marry and then return to San Jose would still have to file California domestic partner registration certificates in order to obtain benefits. The Proposition 22 Legal Defense & Education Fund and former city council member Larry Pegram had brought the suit to have declared unconstitutional a local law purporting to recognize the marriages of same-sex partners contracted validly in other jurisdictions. As a practical matter, the expansion of the California Domestic Partnership Act last year makes the controversy moot, since employees can get the benefits by filing the certificate.

Colorado — In 2003, the Colorado Spring City Council revoked a previously adopted domestic partnership policy. Two lesbian couples filed suit, claiming that the revocation violated their rights by offering benefits to heterosexual married couples but not to same-sex couples. The *Colorado Springs Gazette* reported on Jan. 6 that Colorado 4th District Judge Richard Hall had ruled against their claim, and that the court was not in a position to judge whether the revocation was undertaken for impermissible discriminatory reasons. "Such an effort would be a slippery slope," he wrote in an unpublished order quoted by the newspaper. "Legislators at all levels are faced with policy choices on many difficult, and highly contentious, questions." Hall relied on a prior Colorado ruling rejecting a claim for domestic partnership benefits for same-sex couples; that case had relied on the argument that similarly-situated unmarried heterosexual couples were also denied benefits, so there was no unequal treatment of similarly situated people. An attorney for the couples indicated their intent to appeal the ruling.

Louisiana — A divided panel of the 4th Circuit Louisiana Court of Appeal ruled on Dec. 14 in *Ralph v. City of New Orleans*, 2005 WL 3701498, that an action brought by a group of taxpayers challenging the constitutionality of the city's domestic partnership ordinance had to be dismissed. Even though the unanimous panel found that the allegations of the complaint stated a potentially valid cause of action premised on conflict between the local ordinance and Louisiana state constitutional provisions, two members of the panel concluded that the plaintiffs as taxpayers lacked standing to pursue the litigation because the measure did not affect them as individuals. Referring to prior Louisiana precedents on standing, Judge Terri F. Love wrote for the majority, "absent a showing by plaintiffs that they possess a real and actual interest vested in their assertions that the public fisc is affected by the actions of the City and the Council, we find that plaintiffs have not established the minimal requisite interest, and therefore lack the requisite interest sufficient to afford him a right of action." Dissenting, Judge Patricia Rivet Murray pointed out that the city had conceded that some taxpayer funds would go for benefits for domestic partners, and thus the public fisc was affected. However, the majority seized upon the city's assertion that the effect was de minimis and would not require increasing taxes, and that the operation of the partnership registry program

was revenue-neutral because of the fees that registrants had to pay to support its operation.

Massachusetts — The Mass. Supreme Judicial Court unanimously affirmed a jury verdict finding that Dr. Francisco S. Pardo was not the victim of sexual orientation discrimination at the hands of his department head, Dr. Herman D. Suit, at Mass. General Hospital. *Pardo v. General Hospital Corporation*, 2006 WL 168373 (Jan. 26, 2006). Suit had been Pardo's mentor, promoting him and securing a faculty appointment for him at Harvard Medical School. But Pardo fell out of favor after he told Suit that he was gay and that his partner was suffering from HIV. Pardo based his discrimination claim largely on the sequence of events, but the hospital was able to convince the jury that Suit was not motivated by anti-gay animus. The hospital employs many gay staffers, and in this particular case there was considerable evidence that the declining quality of Pardo's work was the cause of the actions eventually taken against him. On appeal, Pardo argued that he was improperly deprived of discovery of medical peer review files, but the court found that a Massachusetts statute provided an evidentiary privilege for such files on the facts of this case. Furthermore, the court rejected Pardo's argument that the trial judge improperly admitted in evidence various letters to Suit from other doctors complaining about Pardo's work. The court found that the letters were introduced not for the truth of their contents but to support the hospital's contention that Suit's actions were motivated by concerns about Pardo's work. Finally, the court rejected Pardo's argument that the jury was not properly instructed on his retaliation claim, based on actions taken against him after he filed his initial discrimination charged with the Mass. Commission Against Discrimination. The decision for the S.J.C. was written by Chief Justice Margaret Marshall, author of the *Goodridge* marriage decision.

Massachusetts — After Secretary of State William Galvin sent to the legislature a proposed amendment to ban same-sex marriages and block the state from allowing civil unions, Gay and Lesbian Advocates and Defenders (GLAD) filed suit in state court, arguing that even if the amendment had received the required number of valid signatures (a matter that is heavily contested in light of people having come forward to say they were tricked into signing the petitions by misrepresentations by the canvassers), it was invalid under state constitutional limitations on subjects for initiatives. According to GLAD's suit, the public is not entitled to vote to overrule constitutional decisions of the Supreme Judicial Court, which would be the practical effect of voting on this proposed amendment. GLAD claims the state attorney general, Thomas Reilly, erred in ruling that the measure was not barred. If the GLAD suit is unsuccessful, the amendment would be placed on the ballot if it has the support of at least 25% of the legislators in two successive legislatures, a general election intervening. Thus, the earliest this could be on the ballot is 2008. *Reuters*, Jan. 3.

New York — In *South Pierre Associations v. Mankowitz*, NYLJ, 1/18/06, p. 20, col. 1, New York City Civil Court Judge Timmie Erin Elsner ruled that the surviving life partner of a gay tenant was entitled to succeed to the tenancy, despite having forged his deceased partner's name on the first renewal lease after his death. Stanley Mankowitz, who goes by Stanley Mann, met Kurt Freisinger in 1977, and as their relationship developed, Mankowitz moved into Freisinger's apartment in 1980. They lived together as a couple until Freisinger's death in 1989. According to the opinion, the men were a "closeted" couple, in the sense that they did not come out to members of each other's birth families for various reasons. Indeed, Mankowitz avoided visiting Freisinger in the hospital during his final illness at times when Freisinger's sister would be there, and the sister was listed as next-of-kin on the death certificate and made all the funeral arrangements. (Mankowitz did not attend the funeral.) The landlord's agents were aware that the two men were living together. At the time of Freisinger's death, the New York Court of Appeals had just issued its decision in *Braschi v. Stahl Associates Co.*, 74 N.Y.2d 201 (1989), which applied only to rent controlled apartments. It was not until sometime later that state administrators adopted regulations applying *Braschi* to all rent-regulated apartments and providing an administrative mechanism for applying the decision's recognition fo same-sex partners as family members. When Mankowitz consulted an attorney about his rights after Freisinger's death, he says that the attorney told him to hide the death from the landlord as long as possible, which is why he signed renewal leases with Freisinger's name and used money orders to pay the rent. The court determined that Mankowitz met his burden of showing emotional and financial interdependence, and thus was entitle to the renewal leases, and that his deception had thus not prejudiced the landlord. Consequently, the court dismissed the landlord's holdover proceeding seeking to reclaim possession of the apartment.

Cherokee Nation — The Judicial Appeals Tribunal of the Cherokee Nation ruled on Dec. 22, that members of the tribal council lacked standing to seek a court order invalidating the marriage of a same-sex couple. The Tribunal rejected the argument that the council members had standing because letting the marriage stand would injure the "reputation" of the Cherokee Nation. This was the second time that the Tribunal rejected attempts by dissident tribal leaders to challenge the marriage of Cherokee citizens Kathy Reynolds and Dawn McKinley, according to a Jan. 3 press release from the National Center for Lesbian Rights.

Criminal Litigation Notes

Federal — Military — In *U.S. v. McClelland*, 2006 WL 228927 (U.S. Navy-Marine Corps Ct. Crim. App., Jan 24, 2006) (unpublished decision), the court rejected the argument that under *Lawrence v. Texas* a military psychiatrist who had the unfortunate tendency of instigating sexual affairs with the wives of military personnel could not get his sodomy convictions in connection with those affairs overturned based on *Lawrence v. Texas*. Although all of the incidents of anal sex and almost all of the incidents of oral sex were consensual and took place off the military base, the court found that the defendant was abusing his position as a psychiatrist and officer in the circumstances, undermining the consensual nature of the activity. Furthermore, having any kind of sexual contact with the legal spouses of military members presented a "good order" issue of a significant magnitude.

California — Michael Magidson and Jose Merel, convicted of the 2004 murder of Gwen Araujo, a transgender teen born as Eddie Araujo Jr., were both sentenced to terms of 15 years to life. A third defendant, Jason Cazares, who pleaded no contest to a manslaughter charge, was sentenced to six years. *New York Times*, Jan. 28.

California — The 2nd District Court of Appeal has rejected an attempt by convicted murderer Jeffrey Marshall Alsborg to get a retrial, finding that L.A. County Superior Court Judge Bob Bowers, Jr., did not err in rejecting Alsbog's request to appoint new medical experts to assist his public defender in preparing a motion for that purpose. *People v. Alsborg*, 2006 WL 147544 (Jan. 20, 2006) (not officially published). Alsborg was convicted of second degree murder in the death of his older same-sex lover, allegedly during a bout of "rough sex" after an evening of drinking. At Alsborg's trial, the Deputy Medical Examiner, testifying on behalf of the prosecution, stated under cross-examination that Alexander Campbell's death could have resulted from accidental asphyxiation during rough sex, to which he might be particularly vulnerable due to a heart condition and alcohol consumption. The state's theory was that Alsborg, then in his mid–30s, killed Campbell, twice Alsborg's age and a well-fixed retired mortgage banker-widower, for his money. Judge Bowers had bifurcated the hearing on motion for retrial, consistent with the U.S. Supreme Court's *Strickland* precedent for determining whether a criminal defendant had been deprived of his constitutional right of counsel due to ineffective representation. The first part of the hearing is concerned with whether there was ineffective representation, and Bowers determined there had not been, ob-

viating the need to appoint experts to assist in litigation the second part to examine whether competent counsel would have made a difference to the outcome. Alsborg was critical of his trial counsel's strategic decisions about presentation of expert witnesses. The court found that trial counsel's decision to go with cross-examination of the medical examiner rather than providing an independent expert was within the realm of acceptable representation, inasmuch as the medical examiner testified that the defense theory was consistent with the medical evidence. Clearly, the trial verdict turned on other considerations, including the credibility of Mr. Alsborg.

Kansas — Did a lawyer provide ineffective assistance of counsel to a man accused of statutory rape when the lawyer failed to argue during the principal case and its appeal that the statutory rape statute was unconstitutional as a violation of due process and/or equal protection? The Kansas Court of Appeals engaged in a lengthy, convoluted analysis of this question in its per curiam decision in *Crooks v. State of Kansas*, 2006 WL 90104 (Jan. 13, 2006) (not designated for official publication). Jerry P. Crooks was charged with getting a young teenage girl pregnant, in violation of the statutory rape law forbidding adults from having sex with persons under 16; the offense being a serious felony because in this case the girl was under 14. Crooks' defense at the trial conducted in 2001 was that he and the girl were in a common law marriage. The defense was rejected and he was convicted and given a lengthy prison sentence, but he appealed. Having lost a direct appeal, he mounted a collateral challenge to his conviction, seizing upon the U.S. Supreme Court's decision in *Lawrence v. Texas* to argue that the statutory rape law was an unconstitutional abridgement of liberty in the case of consensual sex. He lost that argument as well. The Court of Appeals found that failure of his appellate counsel to challenge the constitutionality of the statutory rape law did result in ineffective assistance, the remedy for which was that the Court of Appeals decided to address the merits of the argument. It concluded that even though the Kansas Supreme Court has, in *State v. Limon*, 122 P.3d 22 (2005), apparently concluded that equal protection concerns did apply to the age of consent laws, to the extent of determining that the state's Romeo & Juliet Law must be construed to be gender-neutral, it nonetheless had reaffirmed the concept that the state may criminalize sex between adults and minors. Consequently, Crooks' constitutional argument was without merit and ultimately the failure of his appellate counsel to have raised this issue on direct appeal was not a fatal flaw. The 25 year sentence was reaffirmed.

New Jersey — On Jan. 27, Richard W. Rogers III, having been convicted of the murders and dismemberment of two men he picked up at a gay bar in New York City, the Townhouse, was sentenced by Superior Court Judge James N. Citta in Toms River to two consecutive life sentences. *New York Times*, Jan. 28.

New York — Nassau County Court Judge Alan L. Honorof ruled that a spousal privilege against testimony was not relevant in litigation involving a gay male couple, because the pending indictment alleges that the two men were co-conspirators in a scheme to defraud the school district that employed one of the men. Because the state statute concerning spousal privilege does not apply to cases where it is alleged that the spouses were conspirators to commit a crime, Judge Honorof found it unnecessary to decide the novel question whether spousal privilege would apply to same-sex domestic partners. Consequently, ex-Roslyn School Superintendet Frank Tassone will be required to testify in the trial of his partner, Stephen Signorelli. *New York Law Journal*, Jan. 12, 2006, page 1. In light of the ruling, the case was resolved with a plea bargain.

Ohio — Yet another Ohio court has rejected the argument that the 2004 enactment of the Marriage Protection Amendment means that domestic violence laws cannot be applied against unmarried cohabitants. In *State v. Nixon*, 2006 WL 52251, 2006–Ohio–72 (Ohio Ct. App., 9th Dist., Jan. 11, 2006), Judge Reader, following the view of several courts elsewhere in the state concluded that "the legal status of marriage" with which the amendment was concerned had no direct application to the domestic violence law, which was concerned with violence in the home, regardless whether cohabitants were married to each other. Attaching particular criminal penalties to domestic violence did not create any legal status akin to marriage for unmarried persons, according to the court.

Oklahoma — Affirming a manslaughter conviction, the Court of Criminal Appeals of Oklahoma rejected an argument on appeal that it had been improper for the trial judge sua sponte to instruct the jury on manslaughter when the indictment charged only intentional homicide. *McHam v. State of Oklahoma*, 2005 OK CR 28, 2005 WL 3455193 (Dec. 14, 2005). At trial, the defendant, Ray McHam, conceded causing the death of the male victim, but argued he should be acquitted on grounds of self-defense, claiming that the victim had come at him with a knife under circumstances that he interpreted at the time as a sexual advance. Given the testimony, the trial judge instructed on manslaughter, and the jury convicted on that ground. McHam argued on appeal that he was on trial only for murder, with a burden of the state to prove intent to kill, and that instructing the jury on manslaughter unfairly prejudiced him since the prosecution obviously had failed to convince the jury that the necessary intent existed for a conviction of intentional homicide. But the court of criminal appeals found that despite the lack of a request for a manslaughter instruction from either prosecution or defense (and indeed, the defense's opposition to such an instruction), it was within the proper discretion of the judge to instruct consistent with the evidence presented.

Wisconsin — Denying a petition for habeas corpus, Magistrate Goodstein of the U.S. District Court for the Eastern District of Wisconsin rejected a claim by a convicted murderer that his trial lawyer's performance was constitutionally deficient because of failure to pursue a homosexual panic or latent homosexuality defense. *Bodoh v. Bertrand*, 2005 WL 3435081 (Dec. 12, 2005). The judge noted that at trial there was expert psychological testimony, and that Bodoh's counsel did ask the psychologist "if there was any basis to believe that Bodoh had lost self-control from a psychological aspect at the time of the murder," which elicited a negative response. "Defense counsel is not required to engage in 'expert shopping' until he finds a psychologist who is willing to support the defense," Goodstein asserted.

Legislative Notes

Colorado — Proponents of a state constitutional amendment to ban same-sex marriage have decided on a minimalist approach, conceding that they would not be troubled by civil unions or domestic partnerships for same-sex couples. The version of the amendment that is supported by the misnamed Coloradans for Marriage states, "Only a union of one man and one woman shall be valid or recognized as a marriage in this state," essentially the same as California Proposition 22, enacted in 2002 and twice construed by a California appellate court as raising no bar to the validity of that state's expansive domestic partnership law. In another wrinkle, some of the amendment proponents have also proposed a "reciprocal beneficiaries" law under which cohabiting persons will have certain limited rights pertaining to property ownership, decision-making over funerals and organ donations, and coverage as family members under insurance policies. Other legislatures planned to introduce a domestic partnership bill that would cover a broader ranger of rights for those who registered as partners. But most traction was gained by a proposal to amend Colorado's discrimination law to recognize sexual orientation and gender identity as prohibited grounds for discrimination. A prior bill on this subject was approved by the legislature but vetoed last year by Gov. Bill Owens, who expressed concern that it would expose businesses to increased lawsuits. (Only if they discriminate, of course...) On Feb. 1, the Senate Business Committee approved S.B. 1, after a low-key hearing staged to avoid undue public

attention and comment. *Denver Rocky Mountain News*, Feb. 1.

District of Columbia — The City Council approved a wide-ranging domestic partnership ordinance, the Domestic Partnership Equality Act of 2005, that would give registered partners a wide range of benefits and obligations under the District's laws. Enactments by the District's council are subject to a 30–day review period by Congress, which can override District legislation by passing a federal law, which must be approved by both houses of Congress and signed by the president. In the past, however, anti-gay federal legislators have succeeded in blocking some District measures by adding amendments to appropriations bills prohibiting the District government from spending money to effectuate particular District laws. This device was used for many years by Congress to block domestic partnership health benefits for district employees. The D.C. measure is open to same-sex couples, opposite-sex couples, and even blood relatives who live together but could not marry. *Gay City News*, Jan. 12.

Florida — At the beginning of February, just days after the deadline of submitting signatures in support of a proposed ballot measure to add a ban on same-sex marriage to the state constitution, state officials indicated that their on-going count showed the petitioners were far short of the necessary numbers. Although the numbers were not final, because petitions had been turned in at various clerks offices around the state, it appeared that proponents would fall short of the 611,009 valid signatures from registered voters that would be needed to qualify for the general election in November 2006. *Associated Press*, Feb. 2.

Palm Beach County, Florida — The County Commissioners voted unanimously on Jan. 10 to approve an ordinance that allows unmarried partners regardless of sex to register as domestic partners and have various local law rights that have been accorded to married couples, such as visiting rights at health care, correctional and juvenile detention facilities, making health care decisions for incapacitated partners, make funeral decisions and be designated as a pre-need guardian. The measure was to take effect Jan. 21. *365Gay.com*, Jan. 10.

Georgia — A House subcommittee voted on Feb. 1 in support of a bill that would require parents to authorize which school clubs and organizations their children could join. The measure was inspired by legislators' desire to strike out against gay-straight alliances in the public schools of the state, by making it more difficult for students to join them. The chief sponsor of the measure, Bobby Reese, a Republican from Sugar Hill, denied homophobia, insisting this was a matter of parental rights. *Atlanta Constitution*, Feb. 2.

Idaho — The House Majority Leader, Lawrence Denney, a Republican, has introduced HJR 2, a proposal to amend the state constitution to ban same-sex marriage. A Similar proposal was approved in the previous session of the House, but achieved an inadequate majority in the Senate to be placed on the ballot, so Denney is back for a second try. The text of the proposed amendment is: "A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state." This appears intended to rule out all forms of legal recognition of same-sex partners, not just marriage.

Illinois — At the end of January, Illinois legislators introduced bills that would propose an anti-gay marriage amendment to the state constitution and that would adopt a public policy against recognizing civil unions, domestic partnerships, or "other similar same sex relationships" in the state. See IL SJRCA 70 and IL HR 869.

Urbana/Champaign, Illinois — The Champaign County Board voted 18–7 on Jan. 26 to approve a policy that would provide domestic partner benefits for county employees. The policy would take effect on December 21. It does not apply to unionized county employees, since this is a topic subject to collective bargaining. However, the county plans to offer the benefits as part of its opening proposals when most county labor agreements expire in the fall. *Urbana/Champaign News-Gazette*, Jan. 27.

Indianapolis, Indiana — On Dec. 22, 2005, Indianapolis Mayor Bart Peterson signed into law Proposal No. 622, 2005, known as the Human Rights Ordinance, which adds sexual orientation and gender identity to the prohibited grounds for discrimination in the city of Indianapolis and Marion County, Indiana. The measure was passed by the City Council on December 19. BNA *Daily Labor Report*, 1/6/06.

New Jersey — While the pending same-sex marriage case awaited oral argument before the N.J. Supreme Court in February, state legislators took action to broaden the scope of the domestic partnership law, passing two bills by overwhelming margins, which were then signed by outgoing governor Richard Codey. S–2083/A–3429 gives registered domestic partners the same rights in intestacy as are accorded married couples, and gives surviving domestic partners authority to make funeral arrangements. This one passed the Assembly 67–6 and the Senate by unanimous vote. S–2167, closing a loophole left in the domestic partners law, authorizes local government bodies and public institutions whose employees do not participate in the state employee health plan to adopt their own domestic partnership health benefits policies. This bill passed the Assembly 63–7 and also enjoyed unanimous approval in the Senate. In case the effort for full marriage rights fails, the alternative legislative strategy that was successfully followed in California seems on track in New Jersey. (In California, passage of a simple domestic partnership bill carrying few substantive rights was followed by several rounds of amendments, ultimately extending to domestic partners virtually all of the state-law rights of married couples.)

New Jersey — Toward the end of January, the Ocean County freeholders bowed to overwhelming public pressure (and the advice of the country Republican organization) and decided to vote to allow same-sex domestic partners of county employees to inherit death benefits on the same basis that marital partners do. This decision was made after seven other county governments, reacting to the very sympathetic story of Laurel Hester, a dying county employee whose partner faced eviction from her home if she did not inherit the benefits, had approved measures to recognize domestic partners for purposes of health and welfare benefits: Bergen, Camden, Hudson, Mercer, Orange, Union and Monmouth counties. *Philadelphia Inquirer* (Jan. 20); New Jersey Record, (Jan. 22). Passaic County freeholders also voted unanimously on January 18 to extend health and dental benefits to domestic partners of their employees. *Herald News*, Jan. 20.

New York — State Assembly members Richard Brodsky and Deborah Glick introduced a bill seeking to add an express right of privacy to the state constitution. In order to be considered by the voters, the proposal would have to be approved by the legislature twice, an election intervening. They asserted that the amendment was needed to secure rights that are being eroded by the federal government, particularly in the area of access to abortion and confidentiality of personal information. *New York Law Journal*, Jan. 19.

Pennsylvania — State Representative Scott Boyd, a Republican, has introduced H.B. 2381, a measure intended to ban same-sex marriages in the state. The bill, which immediately spark considerable media commentary, proposes the following text: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this Commonwealth, and neither the Commonwealth nor any of its political subdivisions shall create or recognize a legal status identical or substantially equivalent to that of marriage for unmarried individuals." This proposal is apparently intended to rule out civil unions or domestic partners, and it is uncertain what effect it would have on existing domestic partnership benefits plans in some municipalities.

Rhode Island — Although powerful legislative leaders are opposed to same-sex marriage, a group of Rhode Island legislators has introduced a bill to open up marriage to same-sex couples. House sponsor Arthur Handy, a Democrat, told the *Providence Journal* (Jan. 25), "I hope we get passage this year, but I'm re-

alistic." He pointed out that 23 of the 75 House members are co-sponsors, a slight increase from last year's version of the bill.

Austin, Texas — More than ten years ago the Austin City Council voted for a domestic partner benefits program for city employees, but a referendum led by church groups resulted in repeal of the policy by a 62 percent vote. Last year, Texans approved an amendment to the state constitution banning same-sex marriage, which passed with about 75 percent of the vote. But Travis County, in which Austin is located, overwhelmingly voted against the amendment, leading several members of the City Council to propose that Austin once again take up the idea of domestic partnership benefits. Because of the prior vote, a new ballot measure would be needed, repealing the prior measure which bans such benefit plans. Four of the seven Council members have indicated support for domestic partnership benefits, although it is uncertain whether the same majority would vote to put the issue on the ballot this May. *Associated Press*, Feb. 1, 2006.

Utah — State Rep. LaVar Christensen, a Republican, outraged that a Utah court has ordered that a woman fighting for visitation with her former same-sex partner's biological daughter has been awarded temporary visitation rights while the case is pending, has introduced legislation giving biological parents a veto over visitation rights. H.B.148, according to Christensen, is not aimed at gay people, per se, but would apply to any situation where a person seeks visitation against the will of a biological parent. *Deseret Morning News*, Feb. 2. • • • And Senator Chris Buttars has introduced S.B. 97, which directs school boards and administrators to "limit or deny" student clubs that encourage criminal or delinquent conduct, promote bigotry, or involve human sexuality. Buttars says his goal is to get rid of the 14 gay-straight alliances that now exist in Utah high schools, on the ground that these organizations are being used to make teenagers gay. The bill also requires parental permission before students can join school clubs, and requires that clubs have faculty advisors. *Salt Lake Tribune*, Feb. 2.

Virginia — Virginia legislators approved a ballot measure to enact a state constitutional amendment against any form of legal recognition for unmarried partners, similar to a statute that had previously been passed. The proposed text states: "That only a union between one man and one woman may be a married valid in or recognied by this Commonwealth and its political subdivisions. This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage." Critics of the proposal have argued that it could deprive Virginia courts of jurisdiction to enforce any agreements between unmarried partners, and could be very harmful to the interests of children being raised by unmarried partners, as well as to their parents. But the legislators who voted for it are not concerned about that, since the best interest of children is irrelevant to them when it comes to the crucial task of preserving heterosexual marital privilege in the Commonwealth of Virginia.

Law & Society Notes

United Nations — In a shocking capitulation to religious fundamentalism, the United States joined with Arab states at the U.N. in voting to deny consultative status to the International Lesbian and Gay Association as well as a Danish LGBT group. Iran had introduced the resolution, in which the U.S. was joined by Cuba, Sudan, and Zimbabwe, among others, and opposed by many of our political and military allies. A coalition of forty groups, both gay and non-gay, sent a joint letter to Secretary of State Condoleeza Rice calling for some explanation for the U.S. vote. The *New York Times* (Jan. 27) reported the justification offered by Deputy Assistant Secretary of State Mark P. Lagon, the the U.S. was opposed to ILGA having any formal status at the U.N. because in the past the North American Man-Boy Love Association had been an ILGA affiliate (until ILGA severed those ties due to the ensuing political controversy). According to Lagon, ILGA is persona non grata because it "openly condoned pedophilia." Lagon denied that the U.S. was opposed in general to allowing gay rights organizations to participate in U.N. activities.

President's State of the Union — Delivering his annual State of the Union address to Congress on January 31, the President made oblique reference to the same-sex marriage issue by asserting that "many Americans" are "concerned about unethical conduct by public officials, and discouraged by activist courts that try to redefine marriage." Human Rights Campaign, noting the implication that judges who rule in favor of same-sex marriage are somehow engaging in unethical conduct, cried fowl. On the other hand, the President did not explicitly call for passage of a Federal Marriage Amendment, as he had done in prior such addresses, and he made significant acknowledgment of the persisting challenges of the AIDS crisis, stating: "More than a million Americans live with HIV, and half of all AIDS cases occur among African-Americans. We will also lead a nationwide effort, working closely with African-American churches and faith-based groups, to deliver rapid HIV tests to millions, end the stigma of AIDS and come closer to the day when there are no new infections in America." No comment on the likely effectiveness of channeling federal AIDS prevention efforts primarily through "faith-based groups" as opposed to "reality-based groups," in light of the Administration's usual rejection of the latter in favor of the former.

LGBT Elected Officials — The Gay & Lesbian Victory Fund reports the following achievements during January 2006: Christine Quinn was elected Speaker of the New York City Council; Ken Reeves was re-elected mayor of Cambridge, MA; Gina Genovese was elected Mayor of Long Hill, N.J., the first openly-gay person to be elected a mayor in that state; Jim Roth was re-elected to chair the Oklahoma County Commission; Paula Aboud was appointed to fill a vacancy in the Arizona State Senate; Elena Guajardo was chosen to serve as Mayor Pro Tem of San Antonio, Texas; Jon Cooper was elected Majority Leader of the Suffolk County, N.Y., legislature.

Virginia — Bowing to higher authority, the Virginia Division of Vital Records has agreed to issue a gender-neutral birth certificate showing both mothers of an adoptive son. This responds to a Virginia Supreme Court ruling in favor of the parents, out-of-staters who had adopted an infant from Virginia and then sought to have a birth certificate showing both parents. After the Supreme Court said both parents should be listed, the Division issued a certificate listing one as the father and the other as the mother; they protested and the Division backed down, offering the gender-neutral form. The Education and Health Committee of the state Senate narrowly rejected a proposed bill seeking to overrule the Supreme Court's interpretation of the statute. *365Gay.com*, Jan. 19.

University of Toledo, Ohio, DP benefits — The University of Toledo Board of Trustees voted 5–2 to approve a health contract for its union-represented employees that includes coverage for domestic partnership benefits (regardless of the genders of employees and their partners). The Jan. 30 voted followed ratification of the proposed agreements by the union members. *Toledo Blade*, Ohio, Jan. 31, 2006.

Military Porn Stars? — The Defense Department is studying allegations that a group of paratroopers from the 82nd Airborne Division of the Army have been appearing on a gay porn website, and the soldiers in question have been moved out of their regular barracks as the investigation proceeds, according to Division Spokeswoman Major Amy Hannah. No charged have yet been filed against the paratroopers, but military policy would mandate a discharge if any of them have engaged in same-sex sexual activity. The name of the webside is reportedly www.activeduty.com, but access to the site became highly restricted when this story ap-

peared in newspapers, limited to persons who were already "members" of the site.

Transsexual Hollywood — In the wake of an Oscar nomination for Felicity Huffman for her portrayal of a transgender person in *Transamerica*, plans were announced for a new film on the life of April Ashley, born George Jamieson in 1935 and the U.K.'s first person to undergo gender reassignment surgery, way back in 1960. Ashley made her legal mark as a party in *Matter of Corbett*, in which the British courts rejected legal recognition for gender reassginment in the context of a divorce proceeding. (Ashley married Honorable Arthur Corbett, later Lord Rowallen, who sued her for divorce in a case that set a precedent in the UK that was not changed until the passage of legislation on gender recognition in 2004. *Corbett* continues to be cited, unfortunately, by some American courts who oppose recognizing a person's desired gender identity as legally significant.) A Feb. 2 article in *The Independent* detailing Ashley's life makes exciting and entertaining reading, in light of the varied career she has experienced.

International Notes

Argentina — Phyllis Randolph Frye, a member of the Houston law firm of Nechman, Simioneaux & Frye, and a leading authority on transgender law, reports that an Argentine court has for the first time ruled that a transgender person who has undergone sex-reassignment surgery may seek legal recognition in her desired gender. The main issue here is obtaining new national identity documents that are crucial to functioning in society, that would correctly identify the individual with respect to her name and gender.

Austria — Sitting as the Administrative High Court, the Constitutional Court of Austria has ruled that the government must delete from manually maintained police records all those pertaining to convictions under the repealed Art. 209, the penal code provision involving gay sex. Ever since the repeal in August 2002, gay rights advocates have been pushing for deletion and destruction of criminal records of persons prosecuted under this provision, but have met continued resistance from the government. Dr. Helmut Graupner, counsel for the applicants seeking to have their police records destroyed, commented: "The judgments of the Constitutional Court and the Administrative High Court are milestones in the rehabilitation of victims of Article 209." • • • The District Court of Neusiedl has refused to allow a second-parent adoption, and the case is being appealed to the Regional Court of Eisenstadt.

Britain — Although Britain now outlaws sexual orientation discrimination in the workplace, a recent poll showed that about half of all gay people are too frightened of adverse consequences to be openly gay in the workplace. *Independent on Sunday*, Jan. 29. • • • The government has announced plans to introduce legislation to protect transgender persons from discrimination in the provision of goods and services. At the same time, the law would prohibit religious discrimination as well. Equality Minister Meg Munn stated, "We are committed to ensuring transsexual people are protected against discrimination in the areas of goods, facilities and services. Work is already under way, within the context of the discrimination law review, to ensure transsexual people gain the legal protection we all agree should be available." No firm date was set for the introduction of the legislation. *The Argus.co.uk*, Jan. 19. • • • The Advocate General has opined that under Britain's recently-enacted gender recognition law, a male to female transsexual should be considered a woman for purposes of eligibility to apply for a pension. State pensions are available for women at age 60; Sarah Richards, a transsexual applied but was turned away on the ground that as a man she could not qualify until age 65. Advocate General Jacobs has stated that this violates EU law. *ThisisTheNorthEast.co.uk*, Jan. 17. • • • The Royal Navy is making a great effort to get gay people to enlist in the ranks, according to a Feb. 2 report in the *Evening Standard*, which said that Vice Admiral Adrian Johns, Second Sea Lord and Commander-in-Chief of the Naval Home Command, would be a keynote speaker for a conference being staged by Stonewall, the nation's gay rights advocacy group, a the Queen Elizabeth II Conference Centre in Westminster. Last year, Stonewall representatives were invited to speak to an assembly of top warship officers about recruiting and looking after the needs of gay staff. What a difference an ocean makes.....

Canada — The Conservative Party won a plurality of the seats in Canada's House of Commons in national voting on January 23, 124 seats, thus entitling it to form the new government. However, the Conservatives will need the cooperation of other parties to pass legislation, which will prove difficult on a variety of issues, including Prime Minister elect Stephen Harper's expressed hope of repealing the same-sex marriage law that was enacted by the prior Parliament. The three other parties, the Liberals (103 seats), the New Democratic Party (29 seats, a substantial increase from the last election), and the Bloc Quebecois (51 seats), were all supportive of the same-sex marriage law, although the Liberals fractured somewhat on the final vote and cabinet members were voting under party discipline. Anticipating the possibility of a Conservative win, some same-sex couples in Canada accelerated marriage plans, relying on Harper's pledge that any repeal law he pushed through would respect the validity of existing marriages and not be made retroactive. Any law Harper might put through could be delayed in the Senate, solidly Liberal, and would be subject to judicial review by the solidly Liberal appellate bench, which has already, in several provinces, ruled that the Charter of Rights required opening up marriage to same-sex partners. Opinion polls taken in the days following the election showed an overwhelming majority of voters opposed to reopening the marriage issue. Even Conservative voters seemed to feel that as much as they had opposed same-sex marriage, it would be too complicated now to undo it after so many couples have married, and it is preferable just to move on and make the best of things, as a poll of Conservative voters in the Toronto metropolitan area revealed. A head count of legislators conducted by the *Globe and Mail* predicted that such a vote would be "tight," as they could not assign a clear majority in support of retaining the new law but there were many new members whose views were not definitely known (including the many New Democratic Party members, who might be expected to support same-sex marriage based on the way their party voted on the bill last time around). *Globe and Mail*, Feb. 1.

Canada — British Columbia — The British Columbia Human Rights Tribunal has determined that a hearing is warranted on a complaint of religious and sexual orientation discrimination from Peter Hayes, a self-identified pagan who engages in S&M activities, who was denied a permit to work as a licensed chauffeur by the Vancouver Police Department. Hayes says he was told that his permit application was denied because the police believed that he posed an "extreme risk of recruiting passengers-customers into my cult during my working hours." Hayes said that a member of the police force, Kevin Barker, told him that he was viewed as a member of a "sex cult" and that his sexual leanings towards a master-slave relationship were the main reason he was denied the permit. Writing in support of a finding that hearing was warranted, Tribunal member Lindsay Lyster said, "To take a more restrictive approach would have the effect of denying those complainants whose complaints may push at the borders of the code." Oh, Canada!

Czech Republic — The upper chamber of the Czech Parliament, the Senate, voted on January 26 to establish a system for registered partners to have inheritance and health care rights similar to those granted to married couples. The measure is now pending before President Vaclav Klaus. The Senate vote was 45–14 with six abstentions. Representatives of several Christian churches had called upon the Senate to reject the measure, stating that it would "weaken family life and cause chaos in values, mainly in the young generation." *Associated Press*, Jan. 26.

European Parliament — By a vote of 468–149, the European Parliament approved a

resolution on Jan. 19 stating that any European country that refuses to extend legal recognition to same-sex partners is "homophobic." There were 41 abstentions. The resolution has no legal effect. *Zenit News Agency*, Italy, Jan. 21.

Ireland — A committee representing all political parties in the Republic of Ireland has recommended establishing some form of legal recognition for same-sex partners other than marriage. Niall Crowley, head of the Equality Authority that enforces an agreement under which the Republic promises to recognize the same individual rights that citizens of Northern Ireland enjoy, has commented that with the advent of civil partnerships in the U.K., Ireland is obliged to enact something similar. *GCN*, Ireland, Jan. 23. • • • The government announced imminent introduction of a bill that would authorize issuing new passports to post-operative transsexuals, showing their preferred gender. *Mirror*, Jan. 26.

Israel — In the forthcoming national election in Israel, the Meretz Party, a left party with a pronounced civil rights agenda, has indicated that it will include support for same-sex marriage in its list of campaign issues. Meretz is already on record in support of civil marriage, which is not now available in Israel, where religious bodies determine who can marry. *Ha'aretz*, Israel, Jan. 24.

Israel — Yishai Schlissel was convicted of attempted murder on Jan. 31 for stabbing three participants in the Jerusalem gay pride march last summer. During the interrogation following his arrest, Schlissel told police, "I came to murder on behalf of God. We can't have such abominations in the country." In announcing their verdict, the judges wrote, "The accused displayed extreme fanatical behavior and made up his mind not to let the parade end in peace at any cost. He had no tolerance, not even minimal, toward the people who attended the parade because his worldview rejects any compromise. The accused was fully conscious and ready to pay a heavy personal price for his acts." The prosecutors had asked for a ten year prison sentence. Sentencing will take place at a later date. *Jerusalem Post*, Feb. 1.

Latvia — President Dr. Vaira Vike-Freiberga has signed into law a constitutional amendment approved by the parliament that defines marriage in Latvia as only between one man and one woman. Latvia thus becomes the only country in Europe to constitutionalize an exclusively heterosexual definition of marriage. Gay rights activists in Riga had collected more than 2,000 signatures through an on-line petition asking the president not to sign the measure. *UK Gay News*, Dec. 21.

Malaysia — Former Deputy Prime Minister Anwar Ibrahim is suing his former boss, retired Prime Minister Tun Dr. Mahathir Mohamad, for public statements referring to Ibrahim as "gay" and a "sodomizer." Mohamad had used such allegations to depose Ibrahim for office and have him imprisoned, but Ibrahim's prison sentence was eventually overturned, freeing him to bring suit. *Straits Times*, Jan. 28, 2006.

Mexico — Police have apprehended a man suspected of killing four gay men as part of a vendetta to eliminate gay people from society. According to an Associated Press report on Jan. 27, Raul Osiel Marroquin, who was arrested on Jan. 23, stated, "I snuffed out four homosexuals that in some way were affecting society." He told reporters that if given the chance he would resume killing gay people, but would "refine" his methods to reduce the chances of being apprehended. Police said that Marroquin would torture his victims before killing them by hanging or choking. He is also accused of having kidnaped two gay men for significant ransoms.

Nigeria — Various press sources reported that the Nigerian government has decided to propose legislation criminalizing consensual sodomy and making it a crime for people to attempt to enter into a same-sex marriage. The measure would also outlaw all associations of lesbian and gay people, as part of the government's plan to support the position of Anglican Archbishop Peter Akinola, a leader in the drive to split the global Anglican Communion over the issue of ordination of an openly gay bishop in New Hampshire.

Portugal — Helena Paixao and Teresa Pires, having been denied a marriage license, have stated their intent to begin a lawsuit challenging Portugal's failure to open up marriage to same-sex partners. Their lawyer said that the 1975 Constitution, which bans sex discrimination, will be the basis for a claim that the denial of the license was unconstitutional. Portugal does provide limited rights for same-sex couples at present, but the government, currently led by the Socialists, has disavowed any intention to emulate their Spanish neighbors and legislate for same-sex marriage. *365Gay.com*, Feb. 2.

Scotland — Out in the very conservative Western Isles of Scotland, the local folks just don't go for the civil partnerships for same-sex couples that are now legal throughout the U.K. So they voted against having local officials perform the ceremonies. Individuals can register their unions at the local registry offices, but government officials will not perform any ceremonies in connection therewith. *LifeSiteNews.com*, Jan. 10.

AIDS & RELATED LEGAL NOTES

N.Y. First Department Adopts 6–Month Limit on Emotional Distress Claims for Exposure to HIV

A person who is exposed to HIV in a manner that can cause actual transmission of the disease (e.g., pricking by an infected needle; sexual penetration), but who shows no signs of the disease and tests negative for HIV, may claim damages for negligently inflicted "AIDS panic" or other emotional distress; however, damages are available only up to six months following exposure, according to the New York Appellate Division, 1st Department. After six months, a court-imposed "statute" of limitations applies. *Ornstein v. New York City Health and Hospitals Corp.*, 806 N.Y.S.2d 566 (Jan. 3, 2006). A claim for post-traumatic stress disorder and emotional distress is not separate and distinct from a claim for AIDS phobia, which is subject to the six-month limitation, said the court, in an opinion by Justice George D. Marlow.

Helen Ornstein is a nurse whose finger was punctured by an HIV-infected needle that had been left on a patient's mattress at Bellevue Hospital, operated by the New York City Health and Hospitals Corporation (HHS). Ms. Ornstein was helping to turn the patient over when the needle penetrated her double layer of gloves, and entered her thumb. After the incident, she tested negative for HIV continuously for at least a year, but suffered a great deal of emotional distress, evidenced by frequent visits to a psychiatrist, usage of Valium and Prozac, eligibility for stress-related workers' compensation, panic attacks, sleeplessness, and the need to switch to an administrative job. She was required to take a high dosage of anti-HIV drugs because it was discovered that the AIDS patient had stopped taking medications and was very infectious.

Ornstein brought suit eight months after her exposure to HIV. NYC HHS moved to dismiss the case based on a court-imposed six-month limitation period. New York County Supreme Court Justice Sheila Abdus-Salaam denied the motion, but a five-judge panel of the Appellate Division reversed the Supreme Court in a 4–to–1 decision, and granted the motion to dismiss. Associate Justice James M. Catterson dissented.

The court's main reason for rejecting the lawsuit is the possibility of spurious claims. New York recognizes a cause of action for negligent infliction of emotional distress. Such a claim must be premised on a breach of a duty owed to the plaintiff that unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for her own safety. *Sheila C. v. Povich*, 11 A.D.3d 120, 781 N.Y.S.2d 342 (1st Dep't 2004). However, according to the court, the state recognizes an objective standard for determining whether a plaintiff who has not tested HIV+ has actually been exposed to HIV. Sci-

entific evidence cited by the court puts the point in time at which one is reasonably sure (to be precise, 95% sure) that one has not become infected with HIV at six months. Therefore, says the court, any claim beyond six months for injuries sustained by one's initial fear of AIDS are, as a matter of law, unreasonable. Quoting the Appellate Division, 2nd Department in *Brown v. New York City Health and Hospitals Corp.*, 648 N.Y.S.2d 880 (1996), Justice Marlow states that a plaintiff's initial, reasonable fear of contracting AIDS becomes unreasonable if more than six months have passed since exposure, and the plaintiff continues to test negative for HIV antibodies. Ornstein tried to draw a distinction between a case for AIDS phobia brought earlier than six months, and one for negligently inflicted emotional trauma, which may be brought after six months, but the court, seeking an objective standard, would not allow it. The court held that emotional distress damages must be based on the fears experienced by a reasonable and well-informed person during the "window of anxiety" during which such person would experience continuing emotional distress. This is an objective standard. The two different causes of action posited by Ornstein, and seemingly supported by the Third Department in *Fosby v. Albany Mem. Hosp.*, 252 A.D.2d 606, 675 N.Y.S.2d 231 (3d Dep't 1998), are, in reality, one cause of action. Just as the cause of action for AIDS phobia is restricted to six months after exposure, so must be the cause of action for emotional damages stemming from the same incident.

The court distinguishes the cases by noting that claims beyond the six-month period in *Fosby* were allowed because there were "special circumstances." The circumstance in *Fosby* was the refusal by the hospital to test the needle that pricked the plaintiff's skin, causing the plaintiff to remain in a state of ignorance about the presence of HIV for an extended period, beyond six months. No such circumstance exists here, as Bellevue fully cooperated with the plaintiff in discovering the status of the infected needle.

Thus, the court applied the reasonable person standard for negligent infliction of emotional distress caused by exposure to HIV. Reasonableness must be determined by medical evidence, and a 95% certainty of the lack of HIV means that one should be reasonably certain that one does not have HIV. Damages after that point are not available if HIV is not discovered.

Justice Catterson, in his dissent, would allow a jury to find the hospital liable for emotional distress whenever such negligently inflicted distress occurs. The fact that a reasonable person would not, according to the majority, feel such anguish after six months of negative tests is irrelevant to the actual anguish felt by particular individuals. Justice Catterson cites the seminal New York negligent infliction case, *Ferrara v. Galluchio*, 5 N.Y.2d 16, 176 N.Y.S.2d 996 (1958), which opined that freedom from mental disturbance is a protected interest. "The only valid objection against recovery for mental injury is the danger of vexatious suits and fictitious claims," but "it is entirely possible to allow recovery only upon satisfactory evidence and deny it when there is nothing to corroborate the claim, or to look for some guarantee of genuineness in the circumstances of the case. The problem is one of adequate proof, and it is not necessary to deny a remedy in all cases because some claims may be false." Justice Catterson lists numerous indicia that Ornstein suffered enormous emotional damage, which could tend to work against any contention that her claim is spurious.

Further, there is no existing law in New York that limits recovery for AIDS phobia to six months, said Catterson. An objective standard for subjective fears is impossible. The court "impose[s] an artificial uniformity of mental insult in order to foreclose mental injury claims and thereby limit recovery. It now allows a court to determine as a matter of law, the precise moment in time when a plaintiff's emotional distress is no longer compensable, and therefore, when it must cease." The fact that medical evidence indicates that 95% of HIV-infection cases are verifiable within six months means that five percent may miss detection. The five percent chance that a person directly exposed to AIDS may have undetected HIV is deemed unreasonable, noted the Justice, yet many reasonable people might suffer great anxiety when informed of such odds.

The six-month rule should be rendered meaningless, according to Justice Catterson. The "window of anxiety" approach reflects the majority's anxiety over the potential for limitless abuse. However, "the argument from mere expediency cannot commend itself to a Court of Justice resulting in the denial of a logical legal right and remedy in all cases because in some a fictitious injury may be charged as a real one." *Battalla v. State of New York*, 10 N.Y.2d 237, 240–241, 219 N.Y.S.2d 34, 37, 176 N.E.2d 729 (1961), citing *Green v. T.A. Shoemaker & Co.*, 111 Md. 69, 73 A. 688, 692 (1909). *Alan J. Jacobs*

HIV+ Pilot Caught in Deception, Prosecuted for Lying on FAA Forms

U.S. District Judge Vaughn R. Walker denied a motion to suppress evidence obtained by the federal Department of Transportation (DOT) from Social Security disability medical files being used in the prosecution of an HIV+ man, finding that in this specific case there is no constitutional privacy protection for such information. *United States v. Cooper*, 2005 WL 3555713 (N.D. Calif., Dec. 28, 2005). The ruling came despite evidence that the Social Security Administration (SSA) may have violated the federal Privacy Act by sharing the information with DOT investigators.

Judge Walker rejected a motion to suppress evidence filed by Stanmore Cooper, a 63–year-old San Francisco man being prosecuted for having filed medical forms with the Federal Aviation Administration (FAA) that failed to disclose his HIV status, which came to light as a result of an information-sharing project undertaken jointly by the FAA and the SSA called "Operation Safe Pilot," part of the post–9/11 war on terror.

The investigative arms of DOT and SSA decided to try to identify pilots who may have obtained their licenses from the FAA using fake social security numbers, in the hope of identifying more suspected terrorists. DOT sent SSA a list of all licensed pilots with their social security numbers, and Social Security officials checked their records to verify the numbers. While checking files, SSA officials discovered that Cooper had received disability benefits for HIV-related illness, and so informed the FAA. The FAA then found that Cooper had never indicated any disability on the medical forms that pilots are required to file every other year.

According to Cooper, he obtained a private pilot license in 1964. He was diagnosed with HIV in 1985, when the antibody test first became available. At the time, FAA was not issuing medical certificates to HIV+ individuals, so Cooper did not renew his medical certificate, allowing his active pilot license to lapse.

By 1995, Cooper's health deteriorated sufficiently that he obtained disability benefits from the SSA, but the new protease drug treatments that soon became available restored his health, allowing him to terminate the disability benefits and resume working. In 1998, Cooper learned that the FAA was willing to issue medical certificates to "qualified HIV-infected persons," but was unable to find any guidance about how to establish his qualifications and, fearing that he might be found disqualified, applied for a medical certificate without disclosing his HIV status.

Although Cooper learned the criteria for qualification by 2000 and determined that he was qualified, he was concerned that if he disclosed his HIV-status on his 2000 form, he might suffer "punitive repercussions" for having failed to disclose it in 1998, so he renewed his medical certificates in 2000, 2002, and 2004 without disclosing his HIV status. The medical form asks questions designed to elicit information about all diagnosed medical conditions.

Cooper is one of 40 pilots being prosecuted for violating a federal statute against making false statements under oath to the government, all uncovered as a result of the joint DOT-SSA

operation as having failed to disclose medical conditions. This is a prime example of the government using information obtained as part of the search for terrorists for collateral prosecutions having nothing to do with national security, a concern repeatedly raised by civil liberties critics of Bush administration policies.

In his motion to suppress the evidence from the SSA files, Cooper argued that release of the information to DOT without his permission violated a federal statute, the Privacy Act, which provides that when government files contain personal information about individuals, the information cannot be released without the written consent of the individual, with certain specified exceptions that do not apply to this case. After extensive analysis, Judge Walker concluded that Cooper might be correct that it was a Privacy Act violation to release the records to DOT, but found that this did not necessarily mean that the evidence should be suppressed in the context of a criminal prosecution for making false statements under oath.

The Privacy Act specifies that a violation can be redressed by a damage action against the offending agency, but does not specifically say that information improperly released may not be used as evidence in a federal law enforcement proceeding, and courts are reluctant to find an implied exclusionary rule for relevant evidence.

Walker concluded that an exclusionary rule would only apply in this case if failure to exclude the evidence would violate Cooper's constitutional right of privacy under the Fourth Amendment, which protects private information and papers against government scrutiny. But the Fourth Amendment protection would be triggered only if Cooper had given the SSA information about his HIV status under the reasonable expectation, as generally understood by society, that it would not be disclosed to other federal agencies for law enforcement purposes.

Walker found that when Cooper applied for disability benefits, he submitted medical information on a form that indicated a variety of reasons for which the information might be shared with other government agencies. Therefore, Walker was unwilling to treat the expectation of strict confidentiality as reasonable, even though an SSA brochure promised exactly that.

Walker was also unwilling to credit Cooper's argument that he thought the federal Privacy Act ensured that his medical information could not be shared without his authorization, and he totally rejected any reliance by Cooper on a statement that appeared on a government Web site purporting to establish especially strict confidentiality treatment for HIV-related information under the rubric of "HIV exceptionalism" for public health purposes.

In effect, Walker held, when a citizen provides information to the government in order to qualify for a benefit, it is unreasonable for that person to believe that the information could not be used against him in a federal criminal proceeding, even if that proceeding had no logical relationship to the reason for which the information was submitted. A.S.L.

1st Circuit Finds No Damage Remedy for ADA Title III Violations

The U.S. Court of Appeals for the 1st Circuit has joined several other circuit courts in concluding that no damage remedy is available in private suits for violation of Title III (public accommodations) of the Americans With Disabilities Act. The court affirmed the dismissal of a pending claim by the estate of a gay, HIV+ man who alleged unlawful discrimination. *Goodwin v. C.N.J.*, 2006 WL 216695 (Jan. 30, 2006).

Gary Lunnin was an independent carpet installer who sought work from various vendors of commercial and residential carpeting, among them C.N.J., which has a retail store in Whitman, Massachusetts. Lunnin claimed that C.N.J.'s management and staff subjected him to discriminatory treatment due to his HIV infection and sexual orientation. His response was to stop applying to C.N.J. for work and to file a complaint with the Massachusetts Commission Against Discrimination, but he withdrew his MCAD complaint and filed a federal suit under the ADA, Titles I and III. His Title I action was dismissed, as it applies to employment discrimination and he was never an employee of C.N.J., merely an independent contractor.

But Lunnin sought to proceed on his Title III claim, asserting he suffered discrimination by a public accommodation, and seeking compensatory and punitive damages, an injunction and attorneys fees. The district court found that the warehouse where Lunnin claimed to have been discriminated against was not a public accommodation within the meaning of Title III, that Title III did not authorize a damage award, and that any claim for injunctive relief was moot because Lunnin had indicated in a deposition that he no longer desired to do business with C.N.J. Lunnin had also asserted state law discrimination claims, which were dismissed by the trial court without prejudice. Lunnin appealed, but died before the appeal could be decided, and his executor was substituted as plaintiff.

In light of Lunnin's death, said the 1st Circuit in an opinion by Judge Selya, any claim for injunctive relief was moot. The court decided to avoid the difficult question of whether an independent contractor can sue for discrimination in public accommodations when he was not a "customer" of the defendant by instead focusing on the damages question. If damages are not available for a Title III violation, then there would be no claim for relief. As to this, the court noted that Title III incorporates by reference the remedial scheme of Title II of the Civil Rights Act of 1964, also governing discrimination in public accommodations, and that Title II by its terms affords only forward-looking injunctive relief, not compensatory economic relief. The court also noted that several other circuits have taken the position that private discrimination claims under Title III are limited to injunctive relief. As to an eleventh-hour attempt by the executrix to turn this into a retaliation case under Title V, the court held that a new statutory theory could not first be raised on appeal, and was waived by not being raised first before the trial court. The court also concluded that no award of attorneys fees need be made, when there was no viable claim for relief under the statute. A.S.L.

Federal Court Finds Constitutional Violation in Intrusive Audits of AIDS Services Program

Raising constitutional objections to an intrusive auditing procedure pushed by the Bush Administration to "crack down" on alleged fraud in AIDS benefits programs, U.S. District Judge B. Lynn Winmill has granted summary judgment to one such program on its claim that requiring unfettered access to unredacted client medical files by state auditors violates the federal constitutional privacy rights of the program's clients. *Idaho AIDS Foundation, Inc. v. Idaho Housing & Finance Association*, Case No. CV–04–155–S-BL-W (U.S. Dist.Ct., Idaho, January 11, 2006). The ACLU represents the Idaho AIDS Foundation, Inc. (IAF) in its suit against the state agency.

Shortly after the Bush Administration took office, the Department of Housing and Urban Development (HUD), which administers the program called Housing Opportunities for Persons With AIDS (HOPWA), threatened state agencies with a cutoff of federal funds if they did not undertake audits of the community-based programs receiving HOPWA grant money. The grant money flows through state agencies such as the defendant in this case, IHFA, which are responsible with contracting for the services and providing reimbursements for approved services with federal grant money. IHFA then demanded unfettered access to IAF's client files for auditing purposes. IAF protested that the files contained much personal and confidential client information, more than was necessary for auditing purposes, and sought to limit access to redacted files to protect individual client identity, with some arrangement to get clients to sign releases so that unredacted files could be made available in the future. IHFA declined to accept such restrictions, arguing that it was mandated to see unredacted files by HUD.

The court found that precedents supported IAF's claim that unfettered access to the files, in the absence of adequate internal controls at

IHFA to secure the confidentiality of the information, would violate the privacy rights of program clients with respect to their medical information. The court also found that IHFA's refusal to continue performing its reimbursement function under the contract after IAF refused to allow access to the files was a breach of contract. As to both these rulings, the court found that further proceedings would be necessary to devise a remedy.

However, the court was less supportive of IAF's discrimination claims, finding that IHFA's actions were motivated by demands from HUD, and thus lacked the discriminatory intent necessary for a traditional discrimination claim under either HOPWA or the Fair Housing Act or the Americans With Disabilities Act. The court found that IAF still might have a viable discriminatory impact claim under the Fair Housing Act, however, refusing to grant summary judgment to either side on that claim. The court did conclude that it would be appropriate going forward in the case to join HUD as a co-defendant, a step that the court had rejected earlier in the case but now found appropriate in light of the evidence presented on HUD's role in requiring IHFA to demand the file access. A.S.L.

AIDS Litigation Notes

Federal — Court of Claims — The court of claims dismissed all the plaintiff's claims in *Duncan v. United States*, 2006 WL 44173 (Jan. 5, 2006) (not officially reported), finding no jurisdiction to consider the former military officer's argument that failure by the Army to notify him properly of his positive HIV status had resulted in delay of treatment causing him to advance to stage 6 of HIV infection. Johnny Duncan was tested in 1999, but claims he was not actually informed of his positive result until he was hospitalized in 2003. The major issue in his case was denial of promotion, which he attributed to his HIV infection but the Army attributed to his failure to complete the training program required for his promotion. (As a result of not being promoted twice, he was processed for discharge, but when he sought disability benefits based on his HIV infection from the Army, he was told that his HIV was not service-related and so did not qualify him for benefits.) The court found that all of Duncan's claims were either non-justiciable, beyond the scope of the court's authority, or without merit.

Federal — Sixth Circuit — Ohio — Jane Burris, who has never tested HIV+, sued Columbus, Ohio, police officer Richard Thorpe, the Columbus Police Department, and the City of Columbus, alleging that her constitutional rights were violated because she engaged in consensual sexual intercourse with Officer Thorpe at a time he knew he was HIV+ but did not disclose this to her. *Burris v. Thorpe*, 2006 WL 45267 (Jan. 9, 2006)(not officially published). The 6th Circuit panel upheld the district court's grant of summary judgment to the defendants, totally rejecting the idea that the city could be held liable on any constitutional theory for torts arising from consensual sexual activity by police officers. In a brief concurrence, Circuit Judge Merritt wrote, "In a legal world in which frivolous lawsuits are so frequent that judges have become inured to them and treat them as though they were serious cases, this one takes the cake. I have reviewed many frivolous cases in my years on the bench, but I suppose it is the voluntary sexual element that makes it seem the most ludicrous one that I can remember. Counsel for Ms. Burris, Jeffrey Moore of Columbus, obviously is unable to distinguish between a case that has no possibility of success and one based on a hope and a prayer. We will wait to see how the City Attorney's Office thinks that costs should be handled."

Federal — California — Denying a defense motion for summary judgment in a pro se prisoner treatment case, U.S. Magistrate Beck (E.D. Cal.) found that Mark Lee Stinson had alleged sufficient facts to maintain his 8th Amendment claim of cruel and unusual punishment by denial of prescribed ice by prison staff. *Stinson v. Galaza*, 2006 WL 224391 (Jan. 30, 2006). According to the complaint, Stinson's HIV-related medications caused severe dehydration, so his prison doctor prescribed that he be provided with ice to alleviate the side effects of the medication. Although he had a written order from the doctor, he was denied ice at various times by prison staff. Stinson claimed that this denial resulted in dehydration and other physical side effects. At first his complaint was dismissed, but he appealed and achieved an unusual reversal from the 9th Circuit in an unpublished decision. On remand the case was assigned to Magistrate Beck. In a new summary judgment motion, the prison authorities argued that because denial of ice to Stinson had was not causally related to any worsening in his HIV-related condition, there was no valid 8th Amendment claim, and furthermore that they should enjoy qualified immunity. Magistrate Beck rejected both of these arguments, finding essentially irrelevant the expert medical testimony of a doctor supporting the prison staff's arguments, because it did not address the issue of Stinson's side effects.

Federal — Illinois — U.S. District Judge Castillo found in *Allen v. Barnhart*, 2006 WL 91312 (N.D.Ill., Jan. 12, 2006), that a social security judge had prematurely ruled against a social security disability claim by the plaintiff, a person living with HIV infection. The plaintiff presented a variety of physical problems unrelated to HIV, and also testified that the drugs he was taking for his HIV infection and related peripheral neuropathy made him weak and drowsy. His own doctor testified that his ability to perform daily living activities had been reduced to 20–50% of capacity. The social security judge found that Allen suffered "severe" impairments but "not severe enough" to qualify for disability benefits, relying on a vocational expert who testified that a person with Allen's ability could find light work in the American economy. Judge Castillo found that the judge's decision failed to take proper account of the testimony by the plaintiff's doctor, failed to consider recent evidence of plaintiff's medical condition, and failure to explain why his severe impairments were "not severe enough" to qualify him for benefits.

Federal — Texas — U.S. Magistrate Robert Pitman has recommended that summary judgment be granted in favor of Blue Cross and Blue Shield of Texas in a case where the plaintiff alleges that a job offer to him was revoked because BCBS inferred he was HIV+ as a result of learning he was gay and had taken a leave from his prior employer pursuant to the Family and Medical Leave Act. *Gonnering v. Blue Cross and Blue Shield of Texas*, 2006 WL 220822 (W.D.Tex., Austin Div., Jan. 27, 2006). An employment specialist from Emerald Resource Group offered to assist Gonnering in finding employment, made the introduction to BCBS and secured him a job offer. He submitted to a drug test as required by the terms of the offer. In response to the employment specialists request as to his last date of prior employment, he commented that he had been on FMLA leave when his employment ended and asked that this not be revealed to BCBS. But the specialist did reveal it to BCBS, as well, avers Gonnering, as the fact that he was gay. Subsequently the job offer was revoked. Gonnering alleges a violation of the Americans with Disabilities Act based on perceived disability, as well as various state law tort claims. Magistrate Pitman found all the state law tort claims inapplicable, and as to the central ADA claim, concluded that the complaint was constructed entirely on his speculation as to the motivation for the withdrawal of the offer. He could provide no direct evidence that BCBS actually thought he was HIV+, or that the employment specialist had made any such comment to them. Were Gonnering afforded the opportunity to conduct discovery, he might turn up such evidence, but that possibility is not discussed in the magistrate's report.

California — In *People v. Ulrey*, 2005 WL 3475683 (Dec. 20, 2005) (not officially reported), the California Court of Appeal, 3rd District, held that the trial court had properly ordered HIV testing for a man who pled guilty to lewd conduct with a minor. The defendant was charged with penetrating the vagina of his girlfriend's five-year-old daughter about ten times over the course of three weeks. At least once, he did this after having masturbated, so that se-

men may have been on his hand. The matter came to light when the child experienced bleeding from her vagina. The defendant received a substantial prison sentence in response to his guilty plea, but complained that imposition of the HIV test violated the plea agreement by imposing "more punishment." The court of appeal, in a decision by Judge Davis, found that the circumstances justified the testing order, since "a person of ordinary care and prudence could entertain an honest and strong belief that defendant transferred his semen to the victim's vagina." As to the argument that imposing an HIV test violated the plea agreement, Judge Davis observed, "Nothing in the defendant's plea agreement expressly or impliedly promised him that he would not be subject to an AIDS test. Nor could the agreement lawfully have made such a promise. As we have explained, the testing is mandatory where, as here, it is supported by probable cause."

Montana — The Montana Supreme Court affirmed the defense verdict in *Howard v. St. James Community Hospital*, 2006 WL 225998, 2006 MT 23 (Jan. 31, 2006), finding that the defendant hospital did not violate the state's AIDS Prevention Act by unilaterally testing the blood of Allen Howard for HIV without obtaining consent either from him or his girlfriend. Howard was in the hospital for emergency treatment because of unexplained brain seizures. Two different women presented themselves at various times as being his "girlfriend." At a certain point, emergency doctors suspected the seizures might be a complication from HIV infection an decided to test Howard for diagnostic purposes. According to all credible evidence, at the time Howard did not possess the mental awareness to provide informed consent for the testing. The law requires informed consent from the person being tested or his/her spouse or significant other. The hospital did not regard either of the women as Howard's significant other, and went ahead with the testing (which proved negative) without consulting them. After the fact, Howard sued for violation of his rights under the Act and lost. Justice W. William Leaphart, writing for the court, agreed with the trial judge that no violate of the Act occurred here, due to the confusion about who was Howard's significant other and the emergency nature of the testing, which any event turned out negative, thus helpfully ruling out a potential cause of Howard's condition.

Texas — The Court of Appeals of Texas in Dallas ruled in *New Times, Inc. v. Doe*, 2006 WL 164628 (Jan. 24, 2006), that a state HIV confidentiality law was not violated when a newspaper published an investigative report about alleged financial wrongdoing at a church in which it stated that the plaintiff was HIV+. The plaintiff, a volunteer accompanist for a church-related choral group called "Positive Voices," whose members were collectively identified as an HIV+ singing group in church promotional literature, was of interest in the story because of allegations that the church had improperly placed him on its health insurance plan, although the plan was limited to employees and he was not an employee. The reporter in question did not contact the church or the plaintiff to determine whether he was HIV+, and had no direct knowledge of any HIV test result. In a hyper-literal interpretation of the statute, Justice Whittington found that the statute is concerned with requiring persons who have access to HIV test results to keep those results confidential. Since the reporter had no access to any HIV test results, the statute was deemed irrelevant to the publication of this information in the *Dallas Observer*. The trial court had taken an expansive view of the statute and denied defendant's motion for summary judgment. The court of appeals reversed. The plaintiff had originally also filed invasion of privacy and intentional infliction of emotional distress claims, but omitted those causes of action from an amended complaint.

AIDS Policy Notes

Dr. Thomas R. Frieden, New York City's Health Commissioner, has called for a rethinking of certain aspects of the public health approach to AIDS in New York, with a greater emphasis on testing and aggressive outreach for early treatment. Citing data that more than a thousand New Yorkers last year first learned that they were HIV+ when they were diagnosed with an HIV-related opportunistic infection signifying "full blown AIDS," Frieden contends that existing state laws on informed consent and confidentiality have posed barriers to an effect public health strategy to combat further spread of HIV and effective treatment of those infected. In proposals presented Feb. 1 to the New York State AIDS Advisory Council, Frieden contended that existing state policy on informed consent and pre-test counseling served to discourage people from submitting to HIV testing, and that restrictions on the use of data collected for epidemiological purposes have prevented an effective strategy for getting treatment to infected people. His proposals drew immediate defensive opposition from those who are emotionally and ideologically invested in the current legislative regime, enacted in response to fervent lobbying by AIDS activists, mostly from the gay community, in the 1980s. Frieden's recommendations reflect the changing face of the epidemic in New York, where more than 80% of reported new infections are among people of color, and African-American women are among those most at risk (by contrast to the mid–1980s, when the epidemic appeared to be mostly among gay white men).

International AIDS Notes

Botswana The Associated Press reported on Jan. 29 that the introduction of routine HIV testing in all points of contact between individuals and the health care system had been adopted in Botswana as part of the nation's public health strategy to combat the further spread of HIV infection. Studies showed that many HIV+ Botswanans had no idea they were infected. As a result of the new policy, doctors now speculate that more than a third of the nation's population knows whether it is infected with HIV.

Britain — The *Daily Telegraph* reported on Jan. 27 that more than 7,750 people were diagnosed HIV+ last year in Britain, an increase of almost 500 over the number diagnosed in 2004. The Health Protection Agency attributed the increase mainly to a rise in cases among gay men.

China — A joint assessment of the prevalence of HIV in China undertaken by the Ministry of Health, UNAIDS and the World Health Organization has estimated that approximately 650,000 people are living with HIV in China, up about 70,000 from 2004. This number is significantly lower than many experts had estimated, but the government and the international agencies asserted that it was based on more reliable data than past estimates. The international organizations warned against complacency, pointing out that the estimate of new cases during 2005 showed that the infection is spreading and requires urgent public health measures. *South China Morning Post*, Jan. 26.

South Africa — HIV-tainted blood supplies used for transfusions have been a significant cause of the HIV epidemic in South Africa. From 1999 to 2005, the country maintained a policy sharply restricting collection of blood from black donors, and a study has shown that the result has been a steep decline in the amount of infected blood donated. The policy remains controversial, however, in a country that is constitutionally dedicated to racial equality. South Africa has also followed the U.S. in barring blood donations by sexually active gay men, which is also controversial because transfusion and heterosexually-transmitted HIV far outweigh gay sex as risk factors in South Africa. There is continued debate over the appropriateness of these policies. *New Zealand Herald*, Feb. 4.

PUBLICATIONS NOTED & ANNOUNCEMENTS

LESBIAN & GAY & RELATED LEGAL ISSUES:

Adams, Laura S., *Privileging the Privileged? Child Well-Being as a Justification for State Support of Marriage*, 42 San Diego L. Rev. 881 (2005).

Adkins, Jason A., *Meet Me at the (West Coast) Hotel: The Lochner Era and the Demise of Roe v. Wade*, 90 Minn. L. Rev. 500 (Dec. 2005).

Alexander, Larry, *Introduction*, 42 San Diego L. Rev. 821 (2005) (Symposium on The Meaning of Marriage).

Arneson, Richard, *The Meaning of Marriage: State Efforts to Facilitate Friendship, Love, and Childbearing*, 42 San Diego L. Rev. 979 (2005).

Balkin, Jack M., *How Social Movements Change (Or Fail to Change) the Constitution: The Case of the New Departure*, 39 Suffolk U. L. Rev. 27 (2005).

Bix, Brian H., *Everything I Know About Marriage I Learned From Law Professors*, 42 San Diego L. Rev. 823 (2005). Responsive article by Robert F. Nagel, 42 San Diego L. Rev. 835 (2005).

Brown, Daniel C., *Stop Loss: Illegal Conscription in America?*, 54 Am. Univ. L. Rev. 1595 (Aug. 2005) (critiquing military policy of suspending certain discharge rules during periods of staffing shortages).

Calhoun, Cheshire, *Who's Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy*, 42 San Diego L. Rev. 1023 (2005).

Carbone, June, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 La. L. Rev. 1295 (Summer 2005).

Chau, Hope N., *Challenges and Solutions for Public Employers: Maintaining Work Environments Free of Harassment and Discrimination by Non-Employees*, 93 Cal. L. Rev. 1455 (Oct. 2005).

Colorado, Christopher, *Tying the Braid of Second-Parent Adoptions Where Due Process Meets Equal Protection*, 74 Fordham L. Rev. 1425 (Dec. 2005).

Deakin, Michelle Bates, *Gay Marriage Real Life: Ten Stories of Love and Family* (Skinner House 2006).

Dimino, Michael Richard, Sr., *Counter-Majoritarian Power and Judges' Political Speech*, 58 Fla. L. Rev. 53 (January 2006).

Eleventh Circuit: Survey of Recent Decisions, 35 Cumb. L. Rev. 727 (2004–5) (includes summary of *Williams v. Attorney General of Alabama*, the notorious sex-toys case).

Elsenheimer, Aric G., *Agency and Liability in Sexual Harassment Law: Toward a Broader Definition of Tangible Employment Actions*, 54 Am. Univ. L. Rev. 1635 (Aug. 2005).

Galston, William A., *Sexuality and the "System of Liberty": Comment on Stolzenberg*, 42 San Diego L. Rev. 975 (2005) (see Stolzenberg, below).

Gasper, Joseph T., II, *The Road Not Taken: Decriminalizing Private Consensual Sodomy in the Military*, 49 How. L. J. 139 (Fall 2005).

Gerstmann, Evan, *We Are the World? What United States Courts Can and Should Learn From the Law and Politics of Other Western Nations*, 1 J. Int'l L. & Int'l Rel. 279 (Winter 2004/Spring 2005).

Ginsburg, Ruth Bader, *áA Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication*, 2005 Cambridge L.J. 575 (Nov. 2005).

Glensy, Rex D., *Quasi-Global Social Norms*, 38 Conn. L. Rev. 79 (Fall 2005).

Goldberg-Hiller, Jonathan, *Canada Is a Blue State: Global Jurisprudence and Domestic Consciousness in American Gay Rights Discourse*, 1 J. Int'l L. & Int'l Rel. 261 (Winter 2005/Spring 2005).

Greenberg, Julie A., and Marybeth Herald, *You Can't Take It With You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 Wash. L. Rev. 819 (Nov. 2005).

Heintz, Adam Jackson, and Rita M. Melendez, *Intimate Partner Violence and HIV/STD Risk Among Lesbian, Gay, Bisexual, and Transgender Individuals*, 21 J. Interpersonal Violence, Issue 2 (online journal — 2006 WLNR 1540709).

Heriot, Gail, *Traditionalism and Rationalism in the Courts*, 42 San Diego L. Rev. 1105 (2005) (response to Wax, below).

Huhn, Wilson, *Ohio Issue 1 is Unconstitutional*, 28 N.C. Cent. L.J. 1 (2005).

Hutchinson, Emily R., *Solomon's Choice: The Spending Clause and First Amendment Rights in* Forum for Academic & Institutional Rights v. Rumsfeld, 80 Wash. L. Rev. 943 (Nov. 2005).

Keller, Joseph, *Sovereignty vs. Internationalism and Where United States Court Should Find International Law*, 24 Penn St. Int'l L. Rev. 353 (Fall 2005).

Kelly, Michael B., *Who Knows?*, 42 San Diego L. Rev. 841 (2005) (symposium on The Meaning of Marriage).

Kennedy, Randall, *Marriage and the Struggle for Gay, Lesbian, and Black Liberation*, 2005 Utah L. Rev. 781.

Khosrowpour, Alaleh T., *Questioning the Constitutionality of Content-Based Restrictions on Internet Speech: A Casenote on Ashcroft v. American Civil Liberties Union*, 27 Whittier L. Rev. 265 (Fall 2005).

Kramer, Zachary A., *Some Preliminary Thoughts on Title VII's Intersexions*, 7 Georgetown J. Gender & L. 31 (2006).

Kruse, Katherine R., *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 Minn. L. Rev. 389 (Dec. 2005).

Levinson, Sanford, *Thinking About Polygamy*, 42 San Diego L. Rev. 1049 (2005) (response to Calhoun, above).

Lupu, Ira, and Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DePaul L. Rev. 1 (Fall 2005).

Magarian, Gregory P., *Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech*, 90 Minn. L. Rev. 247 (Dec. 2005).

McGough, Lucy S., *Introduction: The Past as Prologue*, 54 Emory L.J. 1219 (Summer 2005) (Symposium: Families in the 21st Century: Changing Dynamics, Institutions and Policies).

McKaskle, Paul L., *The European Court of Human Rights: What It Is, How It Works, and Its Future*, 40 U.S.F. L. Rev. 1 (Fall 2005).

Model Assisted Reproductive Technology Act, 9 J. Gender Race & Just. 55 (Fall 2005) (Symposium: Creating Life? Examining the Legal, Ethical and Medical Issues of Assisted Reproductive Technologies).

Monagas, Enrique A., *California's Assembly Bill 205, The Domestic Partner Rights and Responsibilities Act of 2003: Is Domestic Partner Legislation Compromising the Campaign for Marriage Equality?*, 17 Hastings Women's L.J. 39 (Winter 2006).

Nappen, Louis P., *Why Segregated Schools for Gay Students May Pass a 'Separate But Equal' Analysis but Fail Other Issues and Concerns*, 12 Wm. & Mary J. Women & L. 101 (Fall 2005).

Nelkin, Dana, *Tradition and the Law: A Response to Wax*, 42 San Diego L. Rev. 1111 (2005) (see Wax, below).

Norrie, Kenneth McK., *Marriage and Civil Partnership for Same-Sex Couples: The International Imperative*, 1 J. Int'l L. & Int'l Rel. 249 (Winter 2004/Spring 2005).

Ouellette, Alicia, et al., *Lessons Across the Pond: Assisted Reproductive Technology in the United Kingdom and the United States*, 31 Am. J. L. & Med. 419 (2005).

Pasfield, Justin R., *Confronting America's Ambivalence Towards Same-Sex Marriage: A Legal and Policy Perspective*, 108 W. Va. L. Rev. 267 (Fall 2005).

Perry, Michael, *Why the Federal Marriage Amendment is Not Only Not Necessary, But a Bad Idea: A Response to Christopher Wolfe*, 42 San Diego L. Rev. 925 (2005) (see Wolfe, below).

Radbord, Joanna, and Martha McCarthy, *Marriage (P)reference — Equality, Dignity and*

Individual Voices, 17 Nat'l J. Const. L. (Canada) 213 (2004).

Reynoso, Julissa, *The Impact of Identity Politics and Public Sector Reform on Organizing and the Practice of Democracy*, 37 Colum. Hum. Rts. L. Rev. 149 (Fall 2005).

Richards, David A.J., *The Case for Gay Rights: From Bowers to Lawrence and Beyond* (Lawrence, KS: University of Kansas Press, 2005) (one of the earliest academic writers on gay rights and the law provides his analysis of the current state of the law and future directions).

Richards, Janet Radcliffe, *Metaphysics for the Marriage Debate*, 42 San Diego L. Rev. 1125 (2005)

Rickless, Samuel C., *Polygamy and Same-Sex Marriage: A Response to Calhoun*, 42 San Diego L. Rev. 1043 (2005) (see Calhoun, above).

Rosati, Connie S., *What is the "Meaning" of "Marriage"?*, 42 San Diego L. Rev. 1003 (2005).

Samar, Vincent J., *Justifying the Use of International Human Rights Principles in American Constitutional Law*, 37 Colum. Hum. Rts. L. Rev. 1 (Fall 2005).

Schmitt, Steven Wallace, *Financial Challenges Facing the Gay and Lesbian Community*, 32 Westchester Bar J. No. 2, 29 (Fall/Winter 2005).

Schwarzschild, Maimon, *Marriage, Pluralism, and Change: A Response to Professor Wax*, 42 San Diego L. Rev. 1115 (2005) (see Wax, below).

Shih, Daniel Jeffrey, *Don't Ask for the Tuition Back: The U.S. Military's Recoupment Standard in Gay Statement Cases*, 7 Georgetown J. Gender & L. 59 (2006).

Shoaf, Rachel E., *Two Mothers and Their Child: A Look at the Uncertain Status of Nonbiological Lesbian Mothers Under Contemporary Law*, 12 Wm. & Mary J. Women & L. 267 (Fall 2005).

Shoenberger, Allen E., *Messages From Strasbourg: Lessons for American Courts From the Highest Volume Human Rights court in the World The European Court of Human Rights*, 27 Whittier L. Rev. 357 (Winter 2005).

Siegel, Stephen A., *Justice Holmes,* Buck v. Bell, *and the History of Equal Protection*, 90 Minn. L. Rev. 106 (Nov. 2005).

Snadowsky, Daria, *The Best Little Whorehouse Is Not in Texas: How Nevada's Prostitution Laws Serve Public Policy, and How Those Laws May be Improved*, 6 Nev. L.J. 217 (Fall 2005).

Spindelman, Marc, *Homosexuality's Horizon*, 54 Emory L.J. 1361 (Summer 2005).

Stein, Marc, Boutilier *and the U.S. Supreme Court's Sexual Revolution*, 23 L. & History Rev. 491 (Fall 2005) (*Boutilier* was the case in which the Supreme Court rejected constitutional challenges to the anti-gay immigration policies embodied in the 1954 U.S. Immigration & Nationality Act).

Stolzenberg, Nomi Maya, *Liberals and Libertines: The Marriage Question in the Liberal Political Imagination*, 42 San Diego L. Rev. 949 (2005).

Strasser, Mark, *Monogamy, Licentiousness, Desuetude and Mere Tolerance: The Multiple Misinterpretations of Lawrence v. Texas*, 15 S. Cal. Rev. L. & Women's Stud. 95 (Fall 2005).

Sullivan, Marbree D., *The Thought Police: Doling Out Punishment for Thinking About Criminal Behavior in John Doe v. City of Lafayette*, 40 New Eng. L. Rev. 263 (Fall 2005).

Thomas, David L, Jr., *Same-Sex Marriage: The Power of a Definition*, 4 Appalachian J. L. 109 (Spring 2005).

Tofilon, Joseph L., *Masters of Discrimination: Augusta National Golf Club, Freedom of Association, and Gender Equality in Golf*, 9 J. Gender, Race & Justice 189 (Fall 2005).

Wax, Amy L., *The Conservative's Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 San Diego L. Rev. 1059 (2005).

Weiner, Courtney, *Sex Education: Recognizing Anti-Gay Harassment as Sex Discrimination Under Title VII and Title IX*, 37 Colum. Hum. Rts. L. Rev. 189 (Fall 2005).

Whitehead, Roy, Jr., and Walter Block, *The Boy Scouts, Freedom of Association, and the Right to Discriminate: A Legal, Philosophical, and Economic Analysis*, 29 Okla. City U. L. Rev. 851 (Fall 2004).

Wilson, Robin Fretwell, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42 San Diego L. Rev. 847 (2005).

Wolfe, Christopher, *Why the Federal Marriage Amendment is Necessary*, 42 San Diego L. Rev. 895 (2005).

Young, Sean, *Does "Reparative" Therapy Really Constitute Child Abuse?: A Closer Look*, 6 Yale J. Health Pol'y, L. & Ethics 163 (Winter 2006).

Yuracko, Kimberly A., *Does Marriage Make People Good or do Good People Marry?*, 42 San Diego L. Rev. 889 (2005).

Zwolinski, Matt, *Natural Law and Evolutionary Conservatism: Comments on Janet Radcliffe Richards*, 42 San Diego L. Rev. 1143 (2005) (see Richards, above).

Specially Noted:

Symposium on The Meaning of Marriage, 42 San Diego L. Rev. No. 3 (Aug-Sep. 2005). Some articles from this symposium were noted last month, but we found that our listing of articles was incomplete, so we are putting references to all the articles in this month's listings. • • • Sixth Annual Review of Gender and Sexuality Law, 6 Georgetown J. Gender & L. No. 3 (2005).

AIDS & RELATED LEGAL ISSUES:

De Cock, Kevin M., Rebecca Bunnell, and Jonathan Mermin, *Unfinished Business Expanding HIV Testing in Developing Countries*, 354 New Eng. J. Med. No. 5, at 440 (Feb. 2, 2006).

Lanier, Mark M., and Eugene A. Paoline, III, *Expressed Needs and Behavioral Risk Factors of HIV-Positive Inmates*, 49 Int'l J. Offender Therapy & Comp. Criminology 561 (Oct. 2005).

Oberman, Michelle, *Sex, Lies, and the Duty to Disclose*, 47 Ariz. L. Rev. 871 (Winter 2005).

Organista, Kurt C., and Ai Kubo, *Pilot Survey of HIV Risk and Contextual Problems and Issues in Mexican/Latino Migrant Day Laborers*, 7 J. Immigrant Health 269 (Oct. 2005).

Oriel, Jennifer, *Sexual Pleasure as a Human Right: Harmful or Helpful to Women in the Context of HIV/AIDS?*, 28 Women's Studies Int'l Forum 392 (Sept-Oct. 2005).

van der Westhuizen, Janis, *Arms Over AIDS in South Africa: Why the Boys Had to Have Their Toys*, 30 Alternatives (Global, Local, Political) 275 (July-Sept. 2005).

Specially Noted:

Vol. 8, No. 2 of *Health and Human Rights: An International Journal* (2005), included a symposium titled "Roundtable on Scaling Up HIV Testing," with several articles considering the ethical and practical issues associated with adjusting policies and practices in order to increase the number of people being tested for HIV. The issue also features articles on public health and treatment issues surrounding AIDS.

EDITOR'S NOTE:

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