December 19 was the due date for briefs in opposition to the petitions that had been filed in November with the California Supreme Court seeking the invalidation of Proposition 8, the ballot initiative measure that has added a different-sex definition of marriage to the California Constitution. (The several challenges, filed by individuals, organizations, and local governments, have been combined under the name *Strauss v. Horton.* ) Briefs were filed on behalf of the State of California, by the office of Attorney General Edmund G. Brown, Jr., and on behalf of the Official Proponents of Proposition 8 who have been granted Intervenor status by the Court by Kenneth W. Starr, dean of Pepperdine Law School, who is representing the Intervenors together with Andrew P. Pugno. The big surprise was that the Attorney General’s brief proposed a new theory for invalidating Proposition 8 that had not been articulated in the prior filings in the case: That Proposition 8 introduced an untenable tension into the State Constitution that could only be resolved by striking it down.

At the heart of Brown’s new argument was the contention that rights protected by Article I, Section 1 of the Constitution, including the right of individuals to marry without regard to the sex of their partner, are “inalienable” rights which can only be abridged or modified for compelling reasons when the California Supreme Court identifies them as “fundamental.” What was new was Brown’s contention that the constitutional provision authorizing amendments through the initiative and referendum process must be tempered to take account of the guarantee of inalienable rights, and that the Court’s earlier ruling in the *Marriage Cases,* 183 P3d 384 (Cal., May 15, 2008), had already determined that there were no compelling policy reasons to deny the right to marry to same-sex couples.

Starr’s brief for the Proponents provided what had been expected, denying the Petitioner’s contention that Proposition 8 was a constitutional revision that could not be enacted through the ordinary initiative process. He contended, and thus capable of being proposed and enacted through the ordinary initiative and referendum process authorized by the state constitution, Starr buttressed his argument with a close reading of the case law that the California Supreme Court has generated over almost a century in considering post-election challenges to Initiative Amendments. Starr also argued that the measure did not violate the separation of powers, drawing analogies from past Propositions that had amended the State Constitution by making substantive changes that effectively overruled the Court’s interpretation of the Constitution on particular contentious issues, including some involving rights protected under Article I, Section 1.

In his only point deemed newsworthy by the press, Starr argued that by the plain language of Proposition 8 and the way it was described in the ballot pamphlet, it was clear that no same-sex marriage was valid or recognized in California effective November 5, regardless whether it was performed validly elsewhere or was one of the same-sex marriages performed in California during the months prior to the vote. The question whether the approximately 18,000 same-sex marriages performed from June to November would continue to be valid and recognized in California was one of the questions put to the parties by the Court. Starr emphasized that the ballot pamphlet clearly indicated that no same-sex marriage would be valid or recognized in California, no matter where or when it was performed, foreclosing any argument that the Proponents had misrepresented their intent on this point or tried to hide the ball.

Brown’s brief essentially agreed with Starr in responding to two out of the three questions posed by the Court: whether Prop 8 was a revision or an amendment and whether Prop 8 violated separation of powers. Reviewing the same case law that received minute attention in Starr’s brief, Brown concluded that if the Court’s prior cases on this question were the basis for analysis, Prop 8 would be considered an amendment, not a revision. The court could only deem Prop 8 to be a revision by striking it out in a new direction that would involve disavowing some of its prior cases on the issue.

In all the challenges raising this question, the court had invalidated only two Initiative Amendments as being revisions. One was a lengthy Proposition that was intended to repeal and replace substantial portions of the Constitution and in the process also to substantially reorganize the structure of the state government. That was an easy case for finding a revision that could not be effectuated by a simple initiative. The other case, reacting to liberal California Supreme Court rulings on criminal procedure, sought to limit the Court’s ability to construe the State Constitution by providing that it could not be interpreted to provide greater rights to criminal defendants than were afforded by the federal constitution, thus in effect transferring from the California Supreme Court to the U.S. Supreme Court the power to authoritatively construe the California Constitution’s provisions affecting the rights of criminal defendants. It is not hard to see how this would be found to be a revision, in the sense that it was a substantial reduction of the power of the state judiciary to deal with an extensive range of frequently-litigated issues.

In every other case, challenges to initiative amendments have been rejected, even though many of those cases involved reversing the California Supreme Court’s decisions on questions of fundamental constitutional rights. Most notably, the court has rejected challenges to initiative amendments that banned affirmative action and that reinstated the death penalty. It also upheld an initiative that heavily abridged the taxing power of local governments, which one would have thought a fundamental structural change that would have been deemed a revision. Starr argued that it was not plausible to contend that placing a particular definition of marriage in the Constitution was a forbidden revision when these prior amendments had been upheld.

Starr had drawn support from the California Supreme Court’s pronouncements that the revisionary nature of an Initiative Amendment must be clear on its face in order for it to be held a revision. It is not clear from Proposition 8’s language that it is intended to do anything other than to define marriage in California in a particular way, Starr argued, and Brown basically agreed with him. A particular quote from an old California case that had been heavily relied upon by the Petitioners was diminished by Starr as a dictum from a case that predated the 1911 revision of the initiative process that had established the authority of the voters to initiate constitutional amendments.

The separation of powers point also drew agreement from the two responding briefs, both concluding that the Supreme Court’s past cases upholding Initiative Amendments that overruled Supreme Court rulings construing the
State Constitution would not support the argument that effectively overruling the court’s May 2008 decision in the Marriage Cases was a breach of separation of powers. The voters have rebuffed the Supreme Court’s reading of the Constitution in matters involving fundamental rights several times, Starr and Brown agreed, and the court has never seen that as itself a basis for striking down such an Amendment.

Starr and Brown parted company, however, on the question whether Prop 8 would invalidate same-sex marriages performed prior to its enactment. Starr rested on the plain language and the ballot description, which made clear, in his view, that no same-sex marriage would be valid or recognized in California from the date of enactment forward. This did not mean that the marriages in question were invalid when they were performed, and Starr contended that the various subsidiary questions that might be raised as a result of Prop 8 for example, how to deal with property rights of couples who married over the summer and acquired real property or entered into contracts in the status of married couples should be dealt with on a case by case basis as the need arose. Presumably, a court could decide in a particular case that because a couple was validly married when they made a contract or acquired some real property or engaged in some other activity having legal consequences, they should be dealt with for the limited purpose of a particular lawsuit as being married. However, Starr did not provide examples, and it is unclear how a court could reconcile giving such a marriage legal effect in a particular dispute with the language of the marriage amendment.

Brown argued, to the contrary, that it was not clear on the face of Proposition 8 that it was intended to have retroactive effect, and that California courts had customarily applied a presumption against retroactive application of a new measure unless it is clear that retroactivity was intended. He dismissed the significance of the statement in the ballot pamphlet that Prop 8 was intended to render invalid and unrecognized same-sex marriages wherever and whenever performed, arguing that it did not communicate to voters with sufficient clarity that by approving Prop 8 they were effectively dissolving the thousands of marriages that had been performed since the Supreme Court’s marriage decision.

Brown argued that Prop 8 could not affect what the law was prior to its enactment because the California Supreme Court’s ruling in the Marriage Cases was the law of California until November 5, thus those marriages were legal when they were performed, and the proponents of Prop 8 had not unequivocally stated that undoing those marriages was part of what was intended.

Brown also argued that applying Prop 8 to prior marriages would “raise significant issues under the United States Constitution,” and so it should be interpreted to avoid raising those issues. This is a well-established strategy in constitutional law, and courts will frequently adopt a narrow construction of a new statute or other state-level measure if by doing so they can avoid raising federal constitutional questions. He implied, for example, that “retroactive” application might be found to impair “vested property rights without due process of law,” and would overturn the “settled expectations of couples who entered into these marriages in reliance on the holding in Marriage Cases.” Retroactive application might also be held to impair contract obligations, something states are forbidden from doing under the Contracts Clause of the federal Constitution.

Brown drew a distinction with the marriages performed in San Francisco early in 2004 that were then held invalid by the court. Those marriages, he said, were contracted at a time when it was uncertain whether the city of San Francisco had the authority to perform them and the Supreme Court had not yet spoken on the merits of the constitutional claim to marriage equality. By contrast, the marriages at issue now were performed after the Supreme Court had spoken, and were clearly legal at the time, so people could justifiably rely upon their continued validity. (The easiest rejoinder to that point is that the Prop 8 petitioning was actually concluded prior to the Court’s Marriage Cases decision, and the measure was certified for the ballot before the decision went into effect, so every couple married with the knowledge that Prop 8 was on the ballot in November. In that circumstance, reliance on the continuing validity of their marriages, especially when this very question was being widely discussed in the press, would not have been quite so strongly justified as Brown implies.)

In any event, the really newsworthy part of Brown’s brief was his additional point, that Prop 8 should be invalidated “even if it is deemed to amend the Constitution because it abrogates fundamental rights protected by Article I without a compelling interest.” Brown pointed out that Article I, Section 1 of the California Constitution protects those rights considered by the constitutional framers who attended the 19th century state constitutional conventions to be “inalienable” rights. An inalienable right is one that by definition cannot be taken away from the individual by government, and cannot be abridged without some compelling justification. Brown focused on the 19th century rhetoric, grounded in ideas of “natural law,” that fundamental rights are the natural possessions of all people, not bestowed by constitutions, and that the purpose of provisions such as Article I, Section 1, is to protect such rights that antedate the constitution from intrusion by the government. While it is true that the Constitution authorizes the Initiative Amendment process, Brown found a tension between the power to amend and the protection of inalienable rights. “In reconciling these separate constitutional provisions,” says the brief, “Respondent concludes that the initiative power could never have been intended to give the voters an unfettered prerogative to amend the Constitution for the purpose of depriving a disfavored group of rights determined by the Supreme Court to be part of fundamental human liberty.”

Here the court’s stirring rhetoric in the Marriage Cases opinion comes into play, because the court treated the right to marry, without regard to gender or sexual orientation, as a fundamental right. Brown insisted that this case was not really about the amendment-revision distinction, but rather about the more fundamental question: “Is the initiative-amendment power wholly unfettered by the California Constitution’s protection of the People’s fundamental right to life, liberty, and privacy?” He argued that Article I, Section 1 “enjoys a privileged status in the plan of the Constitutional Conventions as the essential safeguard of individual freedom,” and that the records of those conventions that had drafted the Constitution showed that these rights were intended to be “inalienable,” a word that takes its resonance from the Declaration of Independence of 1776.

“The rights recognized as inalienable’ by the framers in 1849 and 1879 were so designated because it was generally believed as a matter of political philosophy that a constitution is not the source of these rights. The rights antedate the constitution as inherent in human nature, and the constitution is the covenant by which Society secures those inherent freedoms to itself. These rights were not surrendered in the social compact,” Brown argued.

This is an intriguing argument. It suggests that there are certain rights so fixed by natural law that even a constitutional convention process in which all the niceties of due process are preserved could not effectively amend the Constitution to override them, at least without a strong countervailing policy reason behind it. As such, there is a certain irony to this argument being made in what is, in substance, a gay rights case, since the religiously-inspired groups and individuals who reflexively oppose gay rights claims frequently do so, in essence, from their view that homosexuality is “unnatural” and contrary to God’s law. Certainly, this was a prime motivation behind the organized Catholic, Mormon, and Evangelical church support for the Prop 8 campaign.

Brown argues that in fact the California Constitution goes further than the U.S. Constitution in acknowledging the primacy of fundamental, inalienable rights. Recall that the federal Constitution drafted in 1787 said little about rights. The Bill of Rights adopted in 1791 went further, although it imposed restrictions only on the fed-
eral government. When the California Constitution was drafted in 1849, the people of California were in advance of the federal government in embodying in the very first article of their Constitution a guarantee of fundamental, inalienable rights to life, liberty and property. Brown acknowledged that the 1849 framers were not thinking of same-sex marriage when they spoke of liberty, but argued that "the scope of liberty interests evolves over time as determined by the Supreme Court," and that historical support for the argument that the right to marry is a fundamental right dates back in California constitutional law at least to the Perez case of the 1940s, that struck down the state’s miscegenation law. “As this Court had done in Perez,” he continued, “the Court in In re Marriage Cases held that the civil right to marry is not a right limited by Nineteenth Century notions about the nature of that institution, and the Court extended the right as a liberty interest to include same-sex couples.” Thus, an 18th century concept of Natural Law trumps the initiative process, itself a product of the early 20th century Progressive Movement. History moves in interesting cycles.

If a right is seen as inalienable, then it cannot be taken away by the government. This is a necessary corollary of the concept that there are some natural rights that precede government and that it is, in fact, the duty of government to protect such rights from abridgment by contemporary political forces. While those rights are not absolute courts have upheld government’s ability to condition or abridge rights in compelling circumstances the general presumption is that such rights prevail. Brown argued that the framers of the California Constitution specified those inalienable rights in Article I, Section 1, “to act as a check on legislative excesses. Given that protective purpose, the framers (and the People) would not have endowed the Legislature with the power to eliminate a judicially recognized fundamental liberty interest through constitutional amendment passed by popular vote at least not without a compelling reason for doing so.” And, apparently, in Brown’s view, the fact that a majority of voters want to eliminate the right is not in itself a “compelling reason.” Brown argued that when the constitution was changed to extend the amending process to voter initiative, there was no intent to give the voters power to do what could not be done under the preceding procedures: eliminate fundamental rights through amendments.

Brown argued that the Supreme Court should harmonize the fundamental rights jurisprudence of Article I with the amendment power placed in Article XVIII by finding that rights identified in Article I may only be altered by amendment when there is a compelling reason to do so, since otherwise Article I “would be stripped of all meaning…. The Court should give expression to the guarantees secured by Article I, section 1, by evaluating whether the proposed initiative-amendment sufficiently furthers the public health, safety, or welfare. Mere majority support alone for the measure does not suffice.”

Brown pointed out that in this case, in addition to the fundamental right at stake, the amendment sought to eliminate the right for a “suspect class.” In the Marriage Cases, the court had decided that the arguments made in support of Prop 22, the initiative that enacted a different-sex definition of marriage in statutory form in 2000, were not sufficiently compelling to justify abrogating the right of same-sex couples to marry. Brown argued that since Prop 8 sought to put the identical language in the Constitution, the identical analysis should apply, and Proposition 8 “should be stricken as inconsistent with the guarantees of individual liberty safeguarded by article I, section 1 of the Constitution.”

This is a bravura move by Brown. Whether the court will embrace it is a question of some moment, since it would mark a new jurisprudential wrinkle in the law of constitutional amendments. Direct precedent for such an argument is lacking, at least in federal Constitutional Law. While the Brown brief cites various cases for specific points of its argument, it does not cite any case that supports the entire theory that the amendment process, either federal or state, is constrained by the identification of fundamental, inalienable rights in the Constitution itself, in combination with the “legislative history” showing that the framers of the document considered such rights to be nature-bestowed and inalienable, in the sense articulated by Thomas Jefferson and approved by the Continental Congress when it adopted the Declaration of Independence in 1776. In some ways, it is a startling use of the concept of original intent of a type that is calculated to infuriate many of those who identify themselves with that school of constitutional interpretation, such as U.S. Supreme Court Justice Antonin Scalia. One wonders what impact it will have on the California Supreme Court, which now occupies the political-jurisprudential hot seat of deciding the fate of Proposition 8, the result of one of the most expensive initiative battles in history. A.S.L.

**LESBIAN/GAY LEGAL NEWS**

**Iowa Supreme Court Hears Arguments in Same-Sex Marriage Case**

The Iowa Supreme Court’s oral arguments in *Varnum v. Brien*, the case brought by Lambda Legal on behalf of six same-sex couples seeking marriage licenses in Polk County, Iowa, were held on December 9. An attorney for defendant Polk County Recorder Brien, Roger J. Kuhle, argued for the appellant Polk County Recorder, seeking to reverse the decision of the Polk County trial judge, who had ruled that same-sex couples have a constitutional right to marry in Iowa. See *Varnum v. Brien*, 2007 WL 2468667 (Iowa Dist. Ct., Polk Co., August 30, 2007). Dennis Johnson, an Iowa attorney appearing as a cooperating attorney for Lambda Legal, argued on behalf of the respondents, defending the decision of the trial court.

The court’s opinion is expected sometime in the spring. In an unusual preface to the argument, Chief Justice Marcia Ternus explained the court’s procedures, mainly for the benefit of the webcast audience. She did not mention any time limit for the court to make its decision, indicating that opinion drafts circulate until one captures the support of a majority of the court, so the process can be rather open-ended.

The Supreme Court had actually taken review on two questions: 1 — Whether the existing law defining marriage as solely between a man and a woman is constitutional under the Iowa state constitution, and, 2 — Whether the trial judge erred by excluding from evidence some affidavits that Polk County had offered as expert testimony.

The trial judge had granted Lambda Legal’s motion for summary judgment against a trial, based on the paper record and oral arguments, but without considering the proffered affidavits as part of the evidentiary record. The affidavits, according to how they were described by Dennis Johnson during the oral argument before the high court, were submitted by individuals who are not experts in psychology or sociology, in support of the state’s argument that the optimal home for raising children is one that includes a parent of each sex. In defending the trial judge’s decision to exclude these affidavits, Johnson argued that they were merely statements of opinion by people without relevant expertise, and that there was no abuse of discretion by the trial judge in excluding them. Johnson also noted that many, many amicus briefs were filed by national organizations on both sides of the issues in this case, so the trial judge and the Supreme Court are not deprived of any information relevant to making this decision. Johnson argued that the inclusion of these affidavits would not have changed the outcome in any event, as respondents argued that even if one hypothesizes that there is an optimal family constellation for raising children, household
that does not provide a logical basis for excluding same-sex couples from getting married, and providing the benefits of marriage to children being raised by them.

After hearing the argument (which was web-cast live), this writer is cautiously optimistic about an outcome favoring the plaintiffs. As litigation over the right of same-sex couples to marry has proceeded from Vermont onwards, a momentum and a record has been built up of arguments concerning same-sex marriage. The positions are staked out and just about any argument that can be made on either side of the issue has been made. Over the past few years, there have been wins and losses, but whether a case is a “win” or a “loss” (depending how one defines those terms with respect to a decision such as New Jersey), almost all the opinions have come from sharply divided courts, usually by a one vote margin. In any one of these cases, there now seems to be one of three outcomes: (1) a ruling by a sharply divided court that the plaintiffs have failed to establish a constitutional right to marry; (2) a ruling by a unanimous or near-unanimous court that excluding same-sex couples from the rights of marriage is unconstitutional, but by a divided court that it is not necessary to provide marriage to cure the violation; or (3) that the state constitution requires that same-sex couples be allowed to marry, and civil unions or domestic partnerships, no matter how loaded up with rights, cannot provide true equality. After hearing the argument, this writer believes the court is likely to opt for either the second or third outcome.

The Iowa Supreme Court has 7 members. The only woman on the court is Chief Justice Terus, who asked few questions, most prominently at one point implicitly questioning the logic of Kuhle’s argument during his rebuttal. All the other members are Caucasian males. In other words, this is probably among the less diverse state supreme courts in terms of gender and race, but that may be a fair reflection of the legal profession in Iowa from which the judges are drawn. This writer has no real familiarity with the court’s track record, other than the claims of the attorneys in this case, particularly Johnson for plaintiffs, that Iowa has been in the forefront of defining constitutional rights in advance of the US Supreme Court. That is certainly true in the case of gay rights, where the Iowa Supreme Court found state constitutional protection for private, consensual adult sex two generations before the US Supreme Court, back in the 1970s.

So the only way to “read” the court with respect to this case is to observe the questioning and back-and-forth between the justices and the attorneys. On that basis, this writer is cautiously optimistic that a majority of the court may rule to uphold the trial court in favor of same-sex marriage. That is based in part on the quality of the arguments. Kuhle did his best to try to be persuasive but could not really get beyond the basic illogic and speculative nature of his argument, while Johnson did an excellent job of making an affirmative argument, using Iowa precedents, to bolster the claim that the Iowa constitution should be construed to confer the same right to marry on same-sex couples that is already enjoyed by opposite sex couples. It doesn’t hurt that Johnson pointed out that the very opening of the Iowa constitution contains a guarantee of freedom and equality to all Iowans.

The most active questioners on the bench were Justices Appel, Streit and Cady. Less active were Baker, Hecht and Wiggins. But all asked some questions. The most active questioners seemed to be dubious about Kuhle’s arguments.

A key difference between this case and the recent winning cases in California and Connecticut is that the procreation issue was pretty much off the table in California and Connecticut, because those states had already legislatively adopted a “separate but equal” status for same-sex couples that conferred all parental rights and responsibilities that marriage would confer, so the state could hardly argue in either case that marriage had to be reserved for different-sex couples in order to “channel” heterosexual reproduction into traditional marriage. The argument is illogical on its face, but has been accepted by quite a few state courts, including, shamefully, the abysmally reasoned decision by the New York Court of Appeals in Hernandez v. Robles, 821 N.Y.S.2d 770 (N.Y. July 6, 2006). Kuhle tried to make this argument a centerpiece of his case, since Iowa has not adopted anything like a civil union law. Johnson called him out on it by observing that Iowa has gone a long way down the road of recognizing the parental qualifications of gay people, allowing gay couples to be foster and adoptive parents and having decreed that sexual orientation is not a factor in custody and visitation disputes. Thus, as a matter of public policy, Iowa already considers sexual orientation irrelevant to parenting, and is happy to place children who need a home with same-sex couples. If the state has a strong policy interest in making sure that children have parental role models of both sexes, it has a strange way of showing it.

Kuhle’s argument is not primarily a sexual orientation argument, however. It is more akin to the argument accepted by the Florida Supreme Court and the 11th Circuit in past cases upholding Florida’s ban on gay people adopting children. This is the argument that the optimal family in which to raise children is one headed by a different-sex couple because children benefit in their psychological development by having a parental role model from each sex, and are deprived by having parental role models of only one sex. Blathering politicians refer to “studies” supporting this assertion — of which there are no such credible studies in any reputable peer-reviewed journal in a relevant discipline — but the Florida cases are at least moderately up-front in admitting that they are adopting this view based not on studies but rather on “common sense” — which of course means nothing more than the personal opinions of the judges based on whatever biases and stereotypes they carry around in their heads.

The argument was made by Kuhle (and echoed by at least one of the justices) that parenting by same-sex couples hasn’t been around long enough to know whether children will turn out alright. That’s poppycock. Same-sex couples have been jointly parenting children for decades. There are plenty of middle-aged men and women walking around today who grew up in households headed by same-sex couples. At this late date, it is bizarre to assert as a matter of “common sense” that there is some systematic psychological deprivation resulting in sex role or gender identity crises for children raised in such households, when there is no evidence that such has occurred. Johnson refuted this argument, as did amicus briefs on file with the court.

One of the most persistent questioners, Justice Brent Appel, got to the heart of the political question before the court: whether it is appropriate for the court to constitutionalize this issue rather than leave it to the political process to play out. He referred to this as the Glucksberg problem, referencing the U.S. Supreme Court’s assisted-suicide case, in which that court expressed great caution about the courts recognizing “new” constitutional rights about issues that are the subject of intensive political debate with sharp divisions in the electorate. Some academic critics of Roe v. Wade, criticize the constitutionalizing of the abortion decision, pointing out that it has “poisoned” the Supreme Court judicial confirmation process by making abortion a litmus test for Supreme Court nominees among interest groups on both sides of the question. And Appel also referred to a concept that has been advanced by various legal scholars, perhaps most prominently Cass Sunstein (formerly of Univ. of Chicago, now at Harvard), of judicial “minimalism” — by which it is argued that courts should avoid making decisions that go beyond incremental change, leaving major policy changes to the political process. In this case, Appel noted that respondents had identified hundreds of statutes and policies that are affected by the right to marry, and asked whether a decision that could affect hundreds of statutes would make ruling in favor of same-sex marriage “too big a move?”

Johnson handled these questions very persuasively, pointing out that Glucksberg was concerned with framing the question before the court at the appropriate level of specificity, that Iowa has already taken the process of adopting gender-neutral statutes very far, such that
changing the marriage law to allow same-sex marriages would not require much in the way of adjustments to Iowa law. He emphasized that the plaintiffs in this case sought to be admitted to the existing institution of marriage, not to redefine or change it regarding any of its legal incidents. This also served to answer the minimalism point. Johnson’s main theme, thrust home several times during his argument, was that the case is not about same-sex marriage, but rather about whether the right to marry as such, a long-established and venerable right, is accessible to all Iowans, regardless of their sex or sexual orientation. He argued several times that in evaluating rights claims, the court has never premised the existence of the right on the identity of those claiming it, and that traditional exclusion of a particular group from enjoying a right that is otherwise freely available to everyone else has never been accepted as a justification for continuing the exclusion.

Kuhle’s major theme, which he came back to repeatedly, was the speculation that if the state were to “promote” same-sex marriages, thus “decoupling” marriage from procreation, sometime down the line, perhaps twenty or more years in the future, different sex couples would feel less inclined to marry because the state would have signaled that marriage was not deemed important or necessary as a component of procreation. This would lead, in his argument, to an erosion of the traditional marital family as the central institution of society, and, he argued, was a compelling concern of the state. This is rank speculation, of course, as there is no way of proving that opening up marriage to same-sex couples will have any effect on the decision-making of different-sex couples about whether to marry. There is no credible evidence that opening up marriage to same-sex couples in the Netherlands or Canada, where same-sex marriage has now been available for several years, has had any demonstrable effect on marriage rates of different-sex couples. (Some same-sex marriage opponents try to make much of declining marriage rates in the Scandinavian countries, where same-sex unions have been legal for the longest period of time, but those countries have created parallel institutions, not marriage, and have opened them up to different-sex couples, so the dynamic is quite different.) Kuhle finesse the point by arguing that the effect may not be discernable for many years. Johnson comes back by pointing out that in its constitutional jurisprudence the Iowa court has rejected basing constitutional decisions on speculation that is not rooted in demonstrable fact.

There was some troubling back and forth about the burden of proof in the case. Johnson conceded that if the court decides this is a rational basis case, the burden is on the plaintiffs to show the irrationality of the existing policy, and he got into some argument with a few of the justices about whether there was evidence in the record going to this question. Johnson insisted that the plaintiffs could meet their burden by showing the illogic of the defendant’s arguments, thus leaving no rational explanation in place for the continued exclusion of gay people. He confidently asserted that the record contained no evidence that would justify the ban. (Kuhle argued that there is no “ban,” because gay men can marry women and lesbians can marry men. Sandra Day O’Connor disposed of the analogous argument with respect to the Texas sodomy law quite effectively in her concurring opinion in Lawrence v. Texas, ridiculing the state’s argument that the Homosexual Conduct Act did not discriminate against gay people because it also forbade sodomy between heterosexuals of the same sex.)

Justice Mark Cady posed the question to Johnson whether civil unions would suffice to remedy any potential constitutional inequality. This question was not posed to Kuhle, and he never mentioned the issue of civil unions as an alternative either in his direct argument or his rebuttal. Johnson insisted that civil unions would be inadequate, pointing to the well-established social meaning of marriage, and that civil unions would impose a mark of second class citizenship. He drew a very effective analogy to Brown v. Board of Education, in which Chief Justice Earl Warren wrote that providing separate but equal schools did not satisfy the equal protection requirement of the 14th Amendment because of the signal of inferiority that it sent to black school children, causing hurt to their “hearts and minds” that was unlikely to be remedied. Lack of equal respect is a real harm, Johnson argued, and only full marriage equality would suffice. A.S.L.

Westchester Marriage Recognition Order Upheld by Judicial Sleight-of-Hand


In his Executive Order No. 3 of 2006, Spano directed all the departments, boards, agencies and commissions of government in Westchester County “to recognize same sex marriages lawfully entered into outside the State of New York in the same manner as they currently recognize opposite sex marriages for the purposes of extending and administering all rights and benefits belonging to these couples, to the maximum extent allowed by law.” The plaintiffs, taxpayers provided counsel by Alliance Defense Fund, argued that the order was illegal and beyond the powers of the County Executive. Lambda Legal intervened in the case on behalf of spouses Michael Sabatino and Robert Voorheis, who had been married out of state and reside in Westchester County, and thus stood to benefit from the Order and to suffer harm if it was overturned.

On April 16, 2007, Westchester County Supreme Court Justice Joan B. Lefkowitz rejected the challenge to the Executive Order, in a detailed, substantive opinion concluding that New York marriage recognition principles supported the recognition of lawfully contracted out-of-state same sex marriages, because the recognized grounds for refusing such recognition did not exist. See 836 N.Y.S.2d 813. Justice Lefkowitz’s analysis was later vindicated when an appellate panel in Western New York endorsed the same reasoning early in 2008 in Martinez v. Monroe Community College, 50 App.Div.3d 189 (4th Dept. 2008), a case involving the college’s refusal to recognize the Canadian same-sex marriage of one of its employees. Monroe County’s premature attempt to appeal that ruling was rejected by the Court of Appeals.

The Westchester County plaintiffs appealed the dismissal of their case, raising the same arguments, this time in the face of mounting authority from cases around the state endorsing marriage recognition.

The 2nd Department decision issued on December 30 ducks the analytical issue by focusing on the last seven words of Spano’s Executive Order: “to the maximum extent allowed by law.” The panel reasoned that Spano’s Order could not be illegal because the Order, “by its terms,” “can never require recognition of such a marriage where it would be outside the law to do so.” Because the County Executive’s job is to “see that the laws of the state, pertaining to the affairs and government of the county, are executed and enforced within the County,” it was clearly legal for him to order all units of county government to recognize same sex marriages “to the maximum extent allowed by law.”

In other words, the panel treated Spano’s opinion as if it was agnostic on the question whether New York law requires recognition of such marriages, and was merely exhorting the agencies under his control to do their duty and apply the law. According to this reading, the only substantive position Spano was taking was that same-sex marriages should be treated the same as different-sex marriages to the maximum extent possible under existing law.

Having rested its ruling on this sleight-of-hand, the panel refrained from delving into the details of New York marriage recognition law, merely asserting that an Order by the County Executive that agencies comply with the law
was clearly legal. This, of course, disingenuously speaks as if Spano had broken no new ground, while in fact his clear intent was to adopt a particular, possibly controversial, point of view as to what the law is. But no damage is really done, since the panel’s avoidance of the substantive issue means that the law remains what it was, as articulated by the 4th Department in the Martinez case. This decision does not create a split between the appellate divisions, so Martinez remains a statewide precedent for now.

The panel also held, without any real explanation and contrary to Justice Lefkowitz, that the plaintiffs had no standing to invoke the Municipal Home Rule Law to argue that the Order was beyond Spano’s power to issue, because they had not shown “some personal interest in the dispute beyond that of any taxpayer.” Totally lacking an analysis, the panel just asserted: “They have not done so.”

Consequently, the panel affirmed Justice Lefkowitz’s order dismissing the case, without itself appearing to take any substantive position on the underlying legal question of marriage recognition! A.S.L.

5th Circuit Denies Review of Gay Indonesian’s Asylum Claim

The U.S. Court of Appeals for the 5th Circuit has rejected a gay Indonesian man’s claim that the Board of Immigration Appeals (BIA) unfairly rejected his motion to remand his case to an immigration judge (IJ) to consider new evidence of his homosexuality, in Setianto v. Mukasey, 2008 WL 5068623 (5th Circuit, Dec. 1, 2008).

The petitioner had applied for asylum, withholding of removal, and protection under the Convention Against Torture before an IJ on grounds other than his homosexuality. His claims were denied, and the BIA affirmed the IJ’s decision. The petitioner filed a motion with the BIA to remand his case, demanding that an IJ consider new and material evidence that he is homosexual and would be persecuted if returned to Indonesia. When the petitioner’s motion was denied by the BIA, he filed a petition for review with the 5th Circuit.

Writing for the panel, Circuit Judge Patrick Bryan C. Johnson explained that a motion to remand in order to let him introduce new evidence, Judge Higginbotham agreed that the cultural taboos and lack of knowledge explained why the petitioner failed to present evidence of his homosexuality at the hearing, but did not prove that the evidence was unavailable at the time of the hearing, which he posited as the correct standard for determining the motion.

Judge Higginbotham also refused to consider the petitioner’s claim that he himself did not know he was homosexual until after his hearing with the IJ, because the petitioner had not raised this claim prior to his reply brief in support of his petition to the 5th Circuit. Accordingly, the petition was denied, and the petitioner will not have the opportunity to present his claim for asylum based on sexual orientation.

Two Gay Jamaicans Lose Bids for Asylum and Withholding of Removal in the United States


In the former case, Paul Rangolan had obtained lawful permanent resident status in the United States in July 1987. However, in December 1998, an immigration judge ordered his removal from the United States because Rangolan had been adjudicated an aggravated felon. Three months later, Rangolan illegally reentered the United States and in June 2004, Rangolan was arrested and convicted of using, carrying, and possessing a firearm during a drug trafficking offense and of illegal reentry following removal for conviction of an aggravated felony.

After serving his criminal sentence, Rangolan expressed his fear of persecution or torture in Jamaica on account of his sexual orientation. At his hearing before an Immigration Judge, Rangolan testified that neighbors threatened both him and his brother because they suspected he was gay. Rangolan further stated that “he returned to the United States shortly after an incident in which a crowd, yelling homosexual slurs, chased him and a friend, hit the friend on the head with a brick, and cut Rangolan with a broken bottle.” Rangolan’s sister also testified that neighbors killed Rangolan’s brother in a broken bottle. Rangolan’s sister also testified that neighbors killed Rangolan’s brother in a broken bottle.

The IJ found Rangolan eligible for deferment of removal under the Convention Against Torture (CAT), reasoning that it was more likely than not that Rangolan would be subject to imprisonment and torture for homosexual acts if deported to Jamaica. The Fourth Circuit noted that in reaching this conclusion, the IJ “cited the State Department’s 2005 Country Report on Human Rights Practices in Jamaica, which noted that public demonstrations of physical intimacy between men was a crime punishable by imprisonment in Jamaica, that there had been a number of incidents of civilian violence against homosexuals that year, and that reports of physical abuse of homosexual prisoners continued.”

However, upon appeal, the BIA reversed the IJ, and ordered that Rangolan be removed. The basis for the BIA’s holding was that the IJ’s conclusion that Rangolan would be tortured in Jamaica was “based on a series of unsupported suppositions” and that Rangolan had otherwise failed to demonstrate that he would suffer torture in Jamaica by or at the acquiescence of the government.

After some lengthy procedural history in which Rangolan appealed to the Fourth Circuit as well as the Supreme Court, Rangolan remained unsuccessful. The Fourth Circuit’s December 3 decision came as a result of Rangolan’s motion for review of the BIA’s denial of his motion to reopen his petition as untimely. The substance of Rangolan’s motion was based in part upon a recent unpublished BIA decision issued December 18, 2007, in which the BIA held that a homosexual Jamaican alien was eligible for statutory withholding of removal because of his sexual orientation.

The government opposed Rangolan’s instant motion, arguing that 8 U.S.C. sec. 1252(a)(2)(C) (2006) deprived the Fourth Circuit of jurisdiction to review Rangolan’s petition. The Circuit Court rejected the government’s argument, on the basis that it has jurisdiction to review any final order of removal contained in 8 U.S.C. sec. 1252(a)(1). Nonetheless, the court rejected the substance of Rangolan’s petition in one sentence by stating: “In the case at hand, Rangolan presents no constitutional or legal question. Therefore, Rangolan’s petition for review is DISMISSED.” Rangolan’s attempt to reopen his petition in light of the favorable BIA holding was unavailing because Rangolan had not raised a statutory or constitutional error that would thereby trigger the Fourth Circuit’s power to review the case.

In the second case, Conroy Gardner, also a Jamaican citizen present in the United States, had been convicted in April 2007 of aggravated battery with a deadly weapon. Gardner petitioned for review of the denial of his applications for asylum and withholding of removal. The IJ, BIA and the Eleventh Circuit all held that Gardner was ineligible for asylum because he had been convicted of an aggravated felony and was not entitled to deferral of removal because he had not proved that he would be tortured either by the government of Jamaica or with its acquiescence. The court’s opinion is
light on facts, but the court noted that “Gardner presented evidence that Jamaican citizens discriminate against and even inflict violence on homosexuals.”

Gardner also argued that he had been denied due process at his hearing before the IJ because the IJ did not follow procedural rules, did not confirm that Gardner was aware of his right to appointed counsel, and failed to conduct a hearing to determine whether his conviction for aggravated battery was a particularly serious crime. The Fourth Circuit rejected these arguments because he could not demonstrate that any prejudice as a result of the alleged errors would have changed the outcome of the hearing. *Eric J. Wursthorn.*

**9th Circuit Denies En Banc Review of Witt Over Dissents**

In May of 2008, a panel of the U.S. Court of Appeals for the 9th Circuit reversed a lower court’s dismissal of a substantive due process claim against “Don’t Ask Don’t Tell” and imposed a standard of heightened scrutiny on remand in an as-applied challenge raised by Major Marga ret Witt. The government moved the 9th Circuit for rehearing or rehearing en banc. Early last month, the motion to rehear was denied, furthering the possibility of a circuit split and eventual grant of certiorari to the Supreme Court for final determination of the constitutionality of “Don’t Ask Don’t Tell.” *Witt v. Department of Air Force*, 2008 WL 5101565 (Dec 4, 2008). Accompanying the order denying the motion were three dissenting opinions penned by Judge O’Scannlain, Judge Kleinfeld, and Chief Judge Kozinski.

Major Witt entered the Air Force in 1987 and began an illustrious career, earning many medals and appearing in Air Force recruitment materials. During six years of her service, Witt shared her heart and home with a civilian woman, but she never told any member of the armed services that she was a lesbian. In 2004, after the relationship had ended, an investigation was initiated into rumors concerning Witt’s sexuality. Witt was formally advised of the investigation when she was less than a year away from being eligible for a full Air Force retirement pension. Witt was eventually separated from service in 2007, receiving an honorable discharge.

Judge O’Scannlain dissented, chiding the panel below for its use of *Lawrence v. Texas* to overcome prior decisions holding that DADT is unconstitutional. Most of Judge O’Scannlain’s dissent argued that *Lawrence* was inapplicable to the case. *Lawrence* specifically dealt with a criminal statute that regulated private activity, DADT, on the other hand, is not a criminal statute and only regulates public activity in the military, thus deserving special deference by the courts, he argued. Further, the Supreme Court in *Lawrence* was explicit in issuing a decision that only reached the criminalization of private actions.

Even if *Lawrence* applied, Judge O’Sca nnlain continued, the Supreme Court did not create a new fundamental right such that the panel could impose a fact specific test under a heightened scrutiny analysis. Judge O’Scannlain pointed to other courts throughout the country that agree with this line of reasoning. As *Lawrence* itself did not announce a new right, the panel below must have elevated the right in question itself without any guidance from a higher court and in the face of the deference owed to Congress’s decisions regarding military policy. A rehearing en banc would allow the Ninth Circuit to correct the panel’s mistake.

Judge Kleinfeld went farther than Judge O’S cannlain’s dissent, arguing that even if *Law rence* applied in civil contexts and created a new fundamental right deserving heightened scrutiny, the deference owed to Congress and the President regarding military affairs would still force a dismissal of Witt’s claims. In *Goldman v. Weinberger*, the Supreme Court held that the military’s policy of forbidding the wearing of headgear, including a yarmulke by an Orthodox rabbi, did not offend the constitutional protection of free exercise of religion. Judge Kleinfeld believes that the deference highlighted in *Goldman*, which was also cited in the legislative history of DADT, applies with equal force, if not more so, to legislation prohibiting homosexuality in the military, a potentially far more disruptive issue than the wearing of a yarmulke.

Judge Kozinski, authoring the final dissent, refrained from discussing the merits of the case and taking a stance on the panel’s decision. Rather, Judge Kozinski acknowledges the “exceptionally difficult and fraught area of the law” surrounding DADT. Because this case involves a matter of “exceptional importance,” Judge Kozinski argued that the decision should be heard en banc to give the matter the full attention it deserves and to prevent the final decision from being “easily dismissed as [an] outlier[].” Judge Kozinski also pointed out that the additional time required to hear the case en banc would give the political branches time to revisit DADT in light of accumulated experiences since the law’s enactment. *Chris Benecke*

**Louisiana Must Issue New Birth Certificate for Child Adopted by Gay Couple**

Lambda Legal won a ruling from U.S. District Court Judge Jay C. Zainey (E.D.La.), requiring Louisiana officials to issue a new birth certificate for a Louisiana-born child who was adopted in a New York State court by a gay male couple from San Diego. *Adar v. Smith*, Civil Case No. 07–6541 (December 22, 2008).

The court’s opinion does not provide many human interest details about the case, other than to note that the two men, Oren Adar and Mickey Ray Smith, jointly adopted the child in Ulster County, New York, and currently live in San Diego. Because the child was born in Shreveport, Louisiana, the fathers applied to Louisiana authorities to obtain a new birth certificate with the child’s new surname, identifying the two men as the child’s legal parents. They alleged that the refusal of Louisiana officials to issue the certificate has already caused problems for them in getting the child included as a beneficiary of an employee-based group health insurance plan.

Relying on an advisory opinion from the Attorney General of Louisiana, who appears to have allowed politics to interfere with objective legal research in forming an opinion, the State Registrar refused to issue the certificate. The purported basis for the objection was that Louisiana does not allow unmarried couples to adopt children, so it would violate the public policy of the state to issue a birth certificate showing two men as the parents of this child.

Judge Zainey pointed out that the state’s position violates the plain language of its own statute governing the issue. Louisiana’s statute on out-of-state adoptions specifies that state officials are to issue a new birth certificate for any Louisiana-born child who is adopted out of state, upon being presented with official documentation of the adoption. The new certificate is supposed to list the adoptive parent or parents, and to be issued under the adoptive name of the adoptee. The statute does not refer to any exceptions.

The Attorney General argued that other statutes that would make this adoption impossible in Louisiana provided a basis to refuse to issue the certificate, but Judge Zainey disagreed. He pointed out that although there have been cases where states have been upheld in refusing to give effect to statutes from other jurisdictions on grounds of public policy, there is no recognized public policy exception for lawful judgments by the courts of other states. U.S. Supreme Court decisions were summoned in support of this point, as well as the important recent ruling in *Finstuen v. Crutcher*, 496 E3d 1139, 1153 (10th Cir. 2007), which although not binding on Judge Zainey, was nonetheless held to be an instructive precedent. In *Finstuen*, the federal appeals court invalidated an Oklahoma statute that banned the state from recognizing out-of-state adoptions by unmarried couples.

Given their determined opposition, it seems likely that the Louisiana officials will appeal
Unconstitutional Sodomy Law Alive and Well in Alabama, According to Appellate Court

On January 3, 2008, five years after the Supreme Court’s decision in Lawrence v. Texas, a trial court in Alabama modified a man’s alimony obligation owed to his former wife, due to her cohabitation in an “illegal relationship with a member of the same sex.” On appeal, Judge Moore of the Alabama Court of Civil Appeals found that Alabama’s sodomy law has not been declared unconstitutional by any court despite the fact that the United States Supreme Court has declared a similarly worded Texas statute unconstitutional. J.L.M. v. S.A.K., 2008 WL 5265051 (Ala. Civ. App., Dec. 19, 2008).

In J.L.M. v. S.A.K., the parties were divorced in 2006, at which time the former husband was required to pay the former wife $1,000 per month in alimony. Several months later, the former husband filed a petition to terminate his alimony obligation based in part on the fact that the former wife was involved in an “immoral sexual” lesbian relationship with L.B. This relationship was apparently a “motivating factor” in causing the divorce.

In a hearing before the trial court, the former wife testified that she and L.B. were in an exclusive “life partnership.” Although they were not legally married in any jurisdiction, the women had exchanged rings and shared a home and a joint checking account. Based on these findings, the trial court granted the former husband’s motion to terminate his alimony obligation. The trial court held that, “[i]f the [former wife] is not cohabiting in an illegal relationship with a member of the same sex, alimony shall continue.”

On February 19, 2008, the trial court conducted a second hearing in which the former wife testified that she received an anonymous letter in November 2007 advising her that her relationship with L.B. was illegal. Based on that letter, L.B. moved out of state. However, the women maintained a committed, long-distance relationship. Upon learning that the women were no longer cohabiting, the trial court reinstated the former husband’s alimony obligation.

On appeal, the former husband argued that his alimony obligation should have been terminated due to the former wife’s criminal and immoral union contrary to the public policy of the state. Judge Moore found this public policy argument inapplicable, because alimony may be terminated if the former spouse cohabits with or marries a member of the opposite sex. Judge Moore noted that it is up to the legislature, not the judiciary, to amend the statute to include same-sex cohabitation. Additionally, the court found that, if the legislature intended for alimony to be overcome by the immoral/illegal conduct of the recipient, the legislature must provide for such a change.

The appellate court ultimately got it right, holding that “[t]he alimony payments are payable to the former wife based on her need for financial support … not as income earmarked to facilitate her homosexual lifestyle.” Thus, the court rejected the former husband’s argument that he was somehow being forced to aid and abet the former wife’s criminal lifestyle. However, the decision is clouded by the court’s unwillingness to expressly acknowledge the precedent of Lawrence v. Texas as applicable to the Alabama sodomy law and to declare the Alabama sodomy law unconstitutional as applied to the private sexual conduct of consenting adults. Ruth Uselton

Minnesota Appeals Court ReJECTS Craig Challenge to Conviction and Disorderly Conduct Statute

The Minnesota Court of Appeals has rejected an attempt by Senator Larry Craig (R-Idaho) to withdraw his guilty plea to a disorderly conduct charge arising from his arrest on June 11, 2007, at the Minneapolis-St. Paul International Airport. An undercover police officer claimed that Craig solicited him for sexual activity in an airport restroom, by signaling to him from an adjacent stall, and had invaded his privacy by staring at him through the crack along a stall door. Craig v. State of Minnesota, 2008 WL 5136170 (Dec. 9, 2008) (not officially published).

Upon his arrest, Craig identified himself to Sergeant David Karinsia, the undercover officer, as a United States Senator, and later pled guilty to a disorderly conduct charge through the mail rather than appear personally at a hearing. Craig hoped the matter would not become public, but word got to the press and the situation blew up in his face. At first he announced he would resign his Senate seat, then decided to serve out the remainder of his term but not stand for re-election.

Craig also initiated a proceeding to withdraw his guilty plea, arguing that the conduct in which he engaged was inoffensive and, possibly, constitutionally protected as freedom of speech. The ACLU of Minnesota filed an amicus brief, supporting Craig’s constitutional claim by arguing that the statute is facially overbroad. The trial court rejected both arguments, refusing to allow Craig to withdraw his guilty plea.

Writing for the Court of Appeals, Chief Judge Edward Toussaint, Jr., rejected Craig’s argument that his guilty plea should be considered invalid because the trial court did not have a detailed picture of the facts on the basis of his written guilty plea when judge accepted the guilty plea. In that written plea, Craig had stated: “I did the following: Engaged in conduct which I knew or should have known tended to arouse alarm or resentment or others, which conduct was physical (versus verbal) in nature.” In effect, Craig had merely paraphrased the disorderly conduct statute without detailing his own conduct.

The court rejected his argument, pointing out that the trial judge also had the complaint and the arresting officer’s statement, which went into explicit detail about Craig’s conduct. Further rejecting Craig’s argument that there was no evidence that the trial judge had actually consulted the complaint and the officer’s statement, the court pointed out that a written transcript is made of all court proceedings, and Craig could have ordered a transcript to support his argument about what the trial judge did or did not consider, but had failed to do so. The court found no abuse of discretion by the trial judge in refusing to allow Craig to withdraw his guilty plea.

Furthermore, and devastating to Craig’s cause, Judge Toussaint rejected the claim that the factual basis for his guilty plea was inadequate because there was no acknowledgment that Sgt. Karinsia “had at least partially invited appellant’s conduct by means of his own conduct.” Toussaint rejected the implication that Craig was entrapped on this occasion. “Entrapment exists only where the criminal intent originates in the enforcement officials of the government rather than in the mind of the accused,” he wrote, quoting State v. Grilli, 304 Minn. 80 (1975). “Here, the complaint clearly indicates that the criminal intent originated in the mind of appellant, not in the officer.”

On the more important issue of the constitutionality of police using disorderly conduct statutes to arrest gay men engaged in restroom cruising activity, Craig and the ACLU were pursuing different courses. Craig, a politically conservative married man who claims he is not gay or bisexual despite the publication of interviews with men who claim to have had restroom sexual encounters with him in the past, argued that the application of the statute to his particular conduct violates First Amendment free speech rights, but he was not attacking the constitutionality of the statute as such. The ACLU,
The court did not agree with either argument. The ACLU’s overbreadth argument suggested that expressive conduct should be treated the same as speech, but the court pointed out that the Supreme Court has recognized more leeway for the government to deal with potentially disruptive conduct than with speech. Furthermore, the court found, as a practical matter, that the statute had sufficient clarity to avoid the ACLU’s argument that it was too vague to meet the constitutional requirement of informing the public what conduct was prohibited.

As to Craig’s attack on the application of the statute to him, the court found that the state has a legitimate interest in protecting user of public restrooms from unwanted invasions of their own privacy. “The conduct charged here occurred in a place in which the ordinary citizen might feel most eager to avoid unwanted communication,” wrote Toussaint. “Thus, there is a strong governmental interest in proscribing this type of unsolicited, communicative conduct. Moreover, in general the state may regulate conduct that is invasive of the privacy of another. We believe that appellant’s conduct was invasive of the privacy of another and may properly be prohibited as disorderly conduct.”

Craig had argued that the First Amendment protects any expressive conduct that falls short of “fighting words,” a term used by the courts to describe speech that is likely to provoke a violent response. Disagreeing, the court said that the government also had a legitimate interest in protecting the privacy of others, especially those who might be considered a “captivating audience” of the speaker’s message. “A person using a restroom stall is such a captivating audience with substantial privacy interests that would be intolerably invaded even by communications less potentially offensive than sexual solicitations,” wrote Toussaint. “Thus, even if appellant’s foot-tapping and the movement of his foot towards the undercover officer’s stall are considered speech, they would be intrusive speech directed at a captive audience, and the government may prohibit them.”

Craig released a statement to the press announcing that he still maintains his innocence and is looking into the possibility of appealing this ruling to the Minnesota Supreme Court. He still insists that “nothing criminal or improper occurred at the Minneapolis airport,” according to a December 10 report in the Idaho Statesman. A.S.L.

California Court of Appeal Upholds Punishment for Fire Captains’ Homophobic Comments to Subordinates

In Murrieta v. Civil Service Commission, 2008 W.L. 5235164 (Dec. 17, 2008) (not officially reported), the California Second District Court of Appeal rejected an appeal by two Los Angeles County Firefighters punished for making derogatory comments about a Fire Captain, Fred Farley, concerning his sexuality and conduct. The case largely turned on the standard of review of agency decisions, but is an encouraging sign that courts increasingly refuse to approve of homophobic remarks in workplaces and among public employees.

In October 2002, appellants Javier Murrieta and Michael Ponder were employed as fire captains for the LA County Fire Department. During a morning lineup of subordinates, each participated in a discussion about another Department fire captain’s sexual orientation and conduct. A Notice of Reduction was sent to Murrieta, and a Notice of Suspension sent to Ponder. Each outlined a number of reasons for their punishment, including the discussion of Farley’s sexual orientation. Based on their misconduct as supervisors and their subsequent interference with the investigation of the incident, Murrieta’s rank was reduced to fire specialist, and Ponder was suspended for 12 days.

After an administrative hearing, the LA County Civil Service Commission reduced Ponder’s suspension to 3 days, and sustained the demotion of Murrieta. The Commission rejected Appellant’s arguments that the investigation was retaliation for their protected activities, and that their punishment was disparate to that of others who engaged in similar behavior. However, the Commission found that some of the allegations, such as calling Farley a “fag,” could not be substantiated, and that the discussion at the lineup only pertained to Farley’s alleged unique behaviors rather than his sexual orientation.

Murrieta seems to have been demoted largely for his misconduct in discussing and interfering with the investigation. The court found that in addition to derogatory comments about Farley, Murrieta tried to influence the testimony of his subordinates about the incident, retaliated against a subordinate who “had a lot to say” to investigators, and then lied when asked if he had approached anyone about the investigation.

Ponder’s misconduct was less severe, as reflected by his relatively lenient punishment. Aside from the inappropriate discussion of Farley, he told a story about Farley waking up new recruits with a hotdog while naked, and, in an obvious effort to create a uniform account of the lineup told crew members that their testimonies would be completed as a group prior to their submission to the investigating agency.

The court determined that although the trial court misapplied a statute in articulating its standard of review, its deference to the Commission’s penalty holding was correct. The Court of Appeals then moved to its own standard of review. In review of penalties, the court disturbs an agency opinion only if there has been a manifest abuse of discretion, which the court did not find here.

The court found that Murrieta engaged in serious misconduct as a supervisor, and based on prior documented misconduct including falsifying records and using racial epithets, the Commission and trial court could have appropriately found that he was unable to continue as a supervisor.

Ponder’s punishment was also appropriate, according to the court. With no prior record of misconduct, his discussion of Farley and his statement that the Inquiry responses would be completed together warranted a 3–day suspension.

Appellants raised a number of other issues, including violation of due process and charges of disparate treatment. The court dismissed these, as the due process claim was not raised in a timely manner, nor was there any requirement that similar behaviors be punished similarly by an administrative agency.

Affirming the judgment, the Court of Appeals granted a win to anti-discrimination and anti-homophobia efforts, especially in a public employment context. Stephen E. Woods

NJ Civil Rights Division Finds Probable Cause in Ocean Grove Civil Unions Dispute

J. Frank Vespa-Papaleo, Director of the New Jersey Division of Civil Rights, issued a Finding of Probable Cause in Bernstein v. Ocean Grove Camp Meeting Association, DHCR
Docket No. PN34XB–03008, on December 29, concluding the Division’s investigation of a public accommodations discrimination complaint filed by Harriet Bernstein and Luisa Paster against the Ocean Grove Camp Meeting Association, which had refused to allow them to rent the Boardwalk Pavilion in Ocean Grove for their civil union ceremony. The probable cause finding terminates the investigative part of the case, signaling that the matter is appropriate for a public hearing, the next stage of the administrative process in enforcement of the New Jersey Law Against Discrimination.

In addition to banning sexual orientation and gender identity discrimination, the New Jersey Law also specifically forbids discrimination against civil union couples by entities that provide goods and services to the public. The investigation showed that until this controversy arose, the Ocean Grove Camp Meeting Association, which owns all the land in the town of Ocean Grove, had allowed couples to rent the Boardwalk Pavilion for their wedding ceremonies, without regard for religious affiliation or even the religious nature of the ceremony being planned. Within days of the Bernstein-Paster application, the Association adopted a defense posture of discontinuing its policy of renting the pavilion for wedding ceremonies, although some ceremonies that had previously been booked were still held.

A few days after the Bernstein-Paster application was rejected, another couple, Janice Moore and Emily Sonnessa, also applied to hold their civil union ceremony at the pavilion. They were told that the pavilion was no longer available for private ceremonies, and filed their own discrimination complaint. Along with the Bernstein-Paster case, the Division issued a No Probable Cause finding in the Moore-Sonnessa case, on the conclusion that since the pavilion is no longer being rented for any wedding ceremonies, there is no discrimination in refusing to rent it for a civil union ceremony.

Responding to the Bernstein-Paster complaint, the Association, a non-profit “ministry organization” that describes itself as “rooted in Methodist heritage,” argued that as a religious association its property should be exempt from the requirements of the Law Against Discrimination, and that failing to exempt it would violate its First Amendment rights of freedom of association and free exercise of religion.

Director Vespa-Papaleo rejected both of these contentions. Significantly, the Association had enjoyed a special real property tax exemption for the pavilion that is provided by the state for properties that are open to the public as places of public accommodation. As part of that exemption process, the Association had certified that when the pavilion was not being used for the Association’s own religiously-based programs, it would be open to the public on “an equal basis,” which explains the practice of not inquiring into the religious nature of wedding ceremonies that were held in the pavilion.

This same certification and established practice of inviting the general public to use the pavilion was found by the Division to support the conclusion that it was a place of public accommodation, and it is well established that religious ownership of a place of public accommodation does not exempt the place from the anti-discrimination law.

The more significant question was whether the decision could be squared with the First Amendment precedents created by the U.S. Supreme Court in two gay-related cases, Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995), Boy Scouts of America v. Dale, 530 U.S. 640 (2000). In Hurley, the Court held that First Amendment rights of the organizers of a St. Patrick’s Day parade in Boston must prevail over the non-discrimination rights of a gay Irish group that wanted to march with its own banner in the parade. In Dale, the Court held that New Jersey’s interest in eradicating anti-gay discrimination had to bow to the expressive association rights of the Boy Scouts of America, which was privileged to deny a troop leadership position to an openly gay man.

In both of these cases, the crux of the case was the right of the organization to control the nature and content of its message. The Court found that a parade is a quintessentially expressive exercise, and the organizers have a right to decide whether inclusion of a particular group would dilute or contradict their message. The Court relied on the parade case in its ruling in the Boy Scouts case, finding that the Scouts was an expressive association, formed to inculcate certain values, and that requiring it to refrain from sexual orientation discrimination would improperly intrude on its own control of its message.

The Division found these precedents distinguishable from the Ocean Grove case, finding that the pavilion’s non-religious uses were not intended to send any particular message, and that the Association had voluntarily characterized itself as a public accommodation open to all without discrimination when it sought the property tax exemption.

“The Boardwalk Pavilion is not primarily used to convey a message,” wrote Vespa-Papaleo. “As described above, the Pavilion is put to a variety of uses, and they are not bound by the underlying conveyance of a united message. All members of the public are invited to travel through the pavilion, whether to rest, eat ice cream, engage in private conversation, or to pray.” He also found that holding a civil union ceremony with invited guests “itself conveys no message and is not expressive association.”

ACLU Challenges New Arkansas Ban on Unmarried Couples Being Foster or Adoptive Parents

The Arkansas Civil Liberties Union Foundation in collaboration with the ACLU LGBT Rights Project filed suit on December 30 to prevent implementation of Act 1, a statute enacted by initiative vote in Arkansas on November 4, which by its terms would become prospectively effective on January 1, 2009, disqualifying any applicant to be a foster or adoptive parent who is cohabiting with another person, regardless of sex, in an unmarried status. Cole v. State of Arkansas, No. CV 2008–14284 (Ark. Cir. Ct., Pulaski County).

The suit was brought on behalf of a diverse group of unmarried and married couples, claiming a variety of federal and state due process and equal protection violations on behalf
of themselves and their children, as well as alleging that the initiative materials were materially misleading to voters in not explicitly stating that the referendum would effectively repeal an existing law that bans discrimination on the basis of marital status in the foster/adoptive process.

The heart of the complaint lies in the detailed factual recitations about how the statute will interfere with the contingency planning of families who seek to appoint relatives (in many cases grandparents) who happen to be living in non-marital relationships with either different-sex or same-sex partners to be adoptive parents in the event that a family emergency makes it impossible for the children’s parents to serve in that role. The complaint also demonstrates the irrationality of the policy, in light of its interference in a system that is short of qualified foster and adoptive parents for children needing placement and in light of its over and under-inclusiveness. For example, the policy does not prevent placements with single parents, or even with unmarried individuals who are involved in long-standing sexual relationships with non-marital partners, so long as they don’t cohabit.

The history of the situation casts light on the irrationality. In 2006, the Arkansas Supreme Court invalidated a regulation that barred gay people from serving as foster parents, on the ground that the regulation contradicted statutory policy governing the foster care system by disqualifying people based on their sexual orientation, even if they might be found fully qualified to serve as foster parents in a system where there is a shortage of qualified foster parents. Since the statutory policy is to serve the best interests of children who are wards of the statute, the court found that categorically disqualifying a group of potentially qualified foster parents was contrary to the goals of the statute, and thus an invalid regulation whose adoption violated the separation of powers. See Department of Human Services and Child Welfare Agency Review Board v. Howard, 238 S.W.3d 1 (Ark. June 29, 2006).

The reaction of anti-gay forces in Arkansas to the Howard decision was to push the state to adopt a new regulation barring all unmarried cohabiting couples (to avoid the charge of anti-gay discrimination), and to propose a statute by initiative that would repeal an existing statute must communicate this fact to voters. The Arkansas Foster Parent Support Act provides that foster parents should be “free from discrimination based on marital status,” Ark. Code Ann. Sec. 9–28–903(3). Since Act 1 mandates discrimination against unmarried cohabiting couples, says the complaint, it is “incompatible” with the anti-discrimination provision, and thus has the effect of repealing it as a later enactment. But the ballot title never mentioned anything about Section 903(3), and neither did any of the propaganda distributed by the proponents of the measure, so the voters were not informed that they were being asked to repeal an existing statute, making the proposal misleading, yet another ground to declare it invalidly enacted.

The Little Rock law firm of Williams & Anderson PLC represent the plaintiffs on behalf of the Arkansas CLU, with Sullivan & Cromwell’s New York office working on the case as cooperating attorneys with the national ACLU’s LGBT Rights Project. A.S.L.

Federal Civil Litigation Notes

9th Circuit — The 9th Circuit has denied en banc review to a panel decision holding that plaintiffs had standing to sue the City of San Diego for leasing public parkland to the local unit of the Boy Scouts of America. Barnes-Wallace v. City of San Diego, 530 F.3d 776 (9th Cir. 2008), petition for en banc review denied, Dec. 31, 2008. In a “vigorous” dissent joined by five other judges, Circuit Judge O’Scannlain criticized the panel for opening up a rift in federal standing law by adopting an extreme version of psychological offense as an injury for purposes of standing. In this case, O’Scannlain observed, the plaintiffs, parents who claim to have refrained from using various areas in Balboa Park because of the Scouts lease and that organization’s exclusionary policies towards gay people, atheists and agnostics, assert only potential psychological injury as a basis for personal standing to challenge the city’s lease with the Scouts. The introductory paragraph of his dissenting opinion captures the essence of it: “Today, our court promulgates an astonishing new rule of law for the nine Western States. Henceforth, a plaintiff who claims to feel offended by the mere thought of associating with people who hold different views has suffered a legally cognizable injury-in-fact. No other circuit has embraced this remarkable innovation, which contradicts nearly three decades of the Supreme Court’s standing jurisprudence. In practical effect, the three-judge panel majority’s unprecedented theory creates a new legal landscape in which almost anyone who is almost offended by almost anything has standing to air his or her displeasure in court. I must respectfully, but vigorously, dissent from our failure to rehear this case en banc.”

Colorado — U.S. District Judge Christine M. Arguello has accepted a recommendation by Magistrate Judge Craig B. Shaffer to dismiss an 8th and 14th Amendment pro se complaint by a gay inmate currently housed a the U.S. Penitentiary in Terre Haute, Indiana, but in the legal custody of the Colorado Department of Corrections. Howard v. Jaramillo, 2008 WL 5381469 (D. Colo., Dec. 22, 2008) (not officially published). The essence of Howard’s claim was that prison officials did not take adequate steps to relieve his anxieties about the possibility of being attacked by anti-gay prison gang members until he received an actual death threat, at which point they transferred him. He also complained that they rejected some of his requests as to cell-mates based on a prison policy against placing inmates of different races into a double-bunk cell, which he claimed violated his equal protection rights. The court concluded that until there was a credible threat against Howard, he was not harmed by the actions or inactions of prison officials in response to his complaints about potential harm. The court also noted that there was precedent upholding decisions by prisoners to avoid mixed-race cell assignments where needed to diffuse racial tensions in an institution.

Mississippi — A public hospital did not violate the constitutional rights of an at-will nurse who was discharged after she appeared in the part of a lesbian in an independently-produced film that involved murder and sadomasochism. Freeman v. Magnolia Regional Health Center, 2008 WL 4999188 (N.D.Miss., Nov. 19, 2008) (not officially published). Granting summary judgment to the hospital, Senior District Judge Davidson found that the hospital’s concern was that a coffee mug bearing the name and logo of the hospital and belonging to the plaintiff appeared in the film as the possession of the lesbian murderer she portrayed. The hospital was concerned about viewers of the film associating it with the hospital, in light of the themes of the film. The hospital’s concern was magnified by the fact that the evil husband who abuses his wife in the film is a doctor. The film was shown
only once, at a screening to which the plaintiff (whose husband was the filmmaker) invited co-workers, one of whom reported back at the hospital about the presence of the “Magnolia mug” on the screen. Judge Davidson rejected Tonya Freeman’s attempt to invoke constitutional free speech and due process protection in this case. Freeman argued that the film, which she claimed addressed issues of domestic violence, concerned a matter of public interest. Davidson was not convinced, and the court’s description of the plot of this film is priceless.

That’s really the main reason for mentioning the case here.

New York — Another gay pro se employment discrimination plaintiff bites the dust. The mythology persists in the gay community that federal law bans sexual orientation discrimination in the workplace. Not so, as Garry Rissman discovered on December 12, when U.S. District Judge Denny Chin dismissed his Title VII claim against the Homeland Security Department for sexual orientation discrimination, and his 5th Amendment equal protection claim on statute of limitations grounds. Rissman v. Chertoff, 2008 WL 5191394 (S.D.N.Y., Dec. 12, 2008). Rissman, a white, Jewish, gay 48 year old man was working for the Transportation Security Administration at LaGuardia Airport from September 1, 2002, to July 27, 2004. He claims he suffered discrimination on account of his race, religion, age, sexual orientation, and perceived sexual orientation, and was denied equal protection. After noting that the sexual orientation claim under Title VII must be dismissed for lack of jurisdiction, Judge Chin found that Rissman’s complaint included a “litany of facts regarding his mistreatment by co-workers and supervisors” as well as unjustified reprisals, but “he does not allege any facts establishing that this mistreatment was prompted by animus toward him because of his race, religion, or age.” Therefore, all his Title VII claims were dismissed. As to the equal protection claim, Rissman filed his complaint in August 2008, more than three years after he stopped working at TSA, beyond the expiration of the relevant statute of limitations, so that claim was dismissed as time-barred, as was a supplementary state law defamation claim against a TSA supervisor. A.S.L.

State Civil Litigation Notes

California — On remand from the state Supreme Court with orders to reconsider the case in light of its recent decision about judicial review of parole denials by the governor, the California 3rd District Court of Appeal reaffirmed its conclusion that Clarence Burden, who shot and killed his wife in 1983 after discovering that she was involved in a lesbian affair with a coworker, should be released on parole. In re Clarence Burden, 2008 WL 5195569 (Dec. 12, 2008). Twice the parole board had determined that Burden, who pled guilty to second degree murder and was serving an inderterminant term of 15 years to life, should be released on parole, based on its conclusion that he no longer posed a serious risk of harm to others, and both times, the governor, first Gov. Davis and more recently Gov. Schwarzenegger, had reversed the board’s determination, based on the “grave” nature of the conviction offense. According to the factual record described by Judge Hull for the court, Burd an had become despondent over the collapse of his marriage and learning that his wife was having a lesbian affair, and had acquired a handgun with the intention of committing suicide. He arranged a meeting with his wife to discuss bills and when she got to their home, got into the car parked in front and sat with her smoking and talking. “She eventually threw her wedding ring on the dashboard and he did the same. She refused to discuss their marriage problems or her new lover. At one point, the victim said, ‘What are you going to do, kill me?’” Burdan pulled out the handgun and he grab bed it with both hands and started screaming. As they struggled over the gun, it went off. Bur dan said he did not now how many times the gun went off but later learned it had been five times. He said he then put the gun to his own head and pulled the trigger. However, it did not go off.” He was trying to reload the gun to “finish the job” on himself when a neighbor who was a police officer attracted by the noise grabbed the gun from him through the car window. The parole board noted that he had no prior criminal record, had formed reasonable stable relations with others, had taken advantage of rehabilitation and education programs in prison, had no major infractions, and had a number of employable skills. The board also found that “significant stress in Burdan’s life due to marital problems” mitigated the murder offense to some extent. The court decided that there was no real support in the record for the governor’s conclusion that Burdan was too big a risk for parole.

California — Former California State University at Fresno volleyball coach Lindy Vivas won a settlement of her discrimination lawsuit against the University that will cost the defendants about $7.6 million. A jury had sided with Vivas on her claim that the university failed to renew her contract in 2004 because of her perceived sexual orientation and her advocacy for women’s sports programs, introducing a federal Title IX retaliation component into the case. Under the settlement, Vivas gets a cash payment of about $2.1 million and an annuity paying almost $6,000 a month for thirty years, beginning January 15, 2009. Her two lawyers will receive annuities paying a bit over $7,000 per month for twenty years, beginning January 15, 2010. The total payout, given the costs of the annuities and the cash payment, comes to about $7.6 million. As a result of the settlement, the University will abandon its appeal of the trial decision, Fresno Bee, Dec. 16.

Maryland — The Maryland Court of Appeals has issued a lengthy decision in Doe v. Montgomery County Board of Elections, 2008 WL 5263655 (Dec. 19, 2008), explaining the ruling it issued on September 9 to keep off the ballot a referendum seeking to overturn a Montgomery County law adding gender identity to the county’s non-discrimination law. The Circuit Court had ruled that the measure would go on the ballot, even though it did not have sufficient signatures under state law, due to procedural errors by the plaintiffs in bringing their action to block it. The 4-3 ruling focuses on technical issues of procedure rather than on any substantive issue of law relating to the subject matter of the referendum.

Oregon — The Oregon Court of Appeals affirmed a ruling by Multnomah County Circuit Judge Janice R. Wilson that an employer unlawfully retaliated against a lesbian employee by discharging her after the employee complained about discriminatory treatment of her girlfriend by the girlfriend’s supervisor. Wilmoth v. Ann Sacks Tile and Stone, Inc., 2008 WL 5071886 (Dec. 3, 2008). Judge Wilson had found that after Stephanie Wilmoth complained to the HR manager about the way the supervisor was treating her girlfriend and intimidated that a discrimination lawsuit might follow, the HR manager began an investigation of Wilmoth, focused on her supposed abuse of access to confidential information to which she had access as an administrative assistant to the company’s president. Wilson found that Wilmoth had convincingly established that she was treated differently from other employees who had made unauthorized disclosures of confidential information within the company. Although a Portland trial jury found in favor of the company on Wilmoth’s discrimination claims, the retaliation claim was tried to the court. Wilson issued an injunction against the company, made a damages award, and also awarded attorney fees to Wilmoth. The court of appeals found that the record supported Wilson’s retaliation decision, rejecting the company’s claim that it was inconsistent with the jury verdict. (After all, it seems the heart of Wilmoth’s case was not that she was discharged because she was gay, but rather that she was discharged because she complained about discrimination against her girlfriend.) Many of the company’s objections on appeal were rejected because of procedural faults in not asserting various objections in a timely manner.

Mary Johnson was fired by Covenant Health care Systems. She claims she was terminated due to her age and sexual orientation, and filed a complaint with the state civil rights agency. An ALJ ruled against her, and the Review Commission affirmed. She then sought judicial review pro se, but failed to comply with the service requirements and decided to grant herself additional time to brief the case without securing an additional extension of time from the court. Naturally, she suffered dismissal by the trial judge, and the Court of Appeals was unsympathetic. “Johnson’s specific reasons for failing to prosecute her action in 2007 include her minimal financial resources, her transportation problems, and her need to expend a lot of effort on preserving her belongings. These difficulties may well have impeded Johnson’s progress,” wrote the court. “Nonetheless, in her final letter to the circuit court, Johnson did not suggest that any of her time was engaged in researching or writing her brief… The record reflects a reasonable basis for the circuit court’s finding that Johnson failed to attend to her legal obligations and that her request for an indefinite delay was unjustified.” The court found no abuse of discretion by the trial judge in dismissing the case. A.S.L.

**Territorial Litigation Note**

**Virgin Islands** — Chief Judge Gomez of the District Court of the Virgin Islands has refused to dismiss an intentional infliction of emotional distress count that was filed by Rage Nino as part of a sexual orientation discrimination case against The Jewelry Exchange, Inc., and one of its supervisory personnel, Wendy Tarapani. Nino v. Jewelry Exchange, 2008 WL 5272520 (D. Virgin Islands, Dec. 16, 2008). The complaint alleges that Tarapani “frequently and repeatedly ridiculed Nino for not (in his appearance and manner) fitting the masculine and male stereotype.” Nino claims Tarapani verbally abused him when he asked for his paycheck and that after agreeing to assist him with immigration papers, refused to sign the papers for many months, which delayed Nino’s ability to go out of the country to visit his family. He further alleged that Tarapani rejected all of his attempts to complain about harassment. “With respect to Tarapani,” wrote the judge, “Nino has alleged more than mere insults or indignities. Viewed in the light most favorable to Nino, the complaint describes a continuous pattern of harassment and retaliatory behavior on the part of Tarapani. That alleged conduct is sufficiently objectionable that reasonable people may differ as to whether it is extreme or outrageous in light of community standards.” Consequently, the court refused to dismiss the emotional distress claim against Tarapani. In addition, the court found the record inconclusive on whether Tarapani’s conduct should be imputed to the employer, so Gomez also refused to dismiss the emotional distress claim against the company. These rulings are quite unusual, since most courts have backed away from allowing intentional infliction of emotional distress claims in the context of employment discrimination litigation. A.S.L.

**Criminal Litigation Notes**

**Military** — The U.S. Navy-Marine Corps Court of Criminal Appeals found that even though a military court martial judge had made anti-gay comments off-the-record after the trial, charges that the appellant received an unfair trial at his court martial for “indecent acts” in violation of Article 134 of the UCMJ were unsubstantiated, as a review of the record showed, according to Judge Stolasz, that “the military judge was fair and even-handed during the trial, with no hostility directed toward the appellant. We find the military judge’s post-trial comments, standing alone, do not suggest he held such deep-seated and unequivocal antagonism towards the appellant as to make fair judgment impossible.” U.S. v. Hayes, 2008 WL 5183724 (N.M. Ct. Crim.App., Dec. 11, 2008) (not officially published).

**Federal** — New Jersey — U.S. District Judge Katharine S. Hayden decided that the federal sentencing guideline recommendation made no sense in the case of David Grober, who had pled guilty to several charges involving child pornography, and sentenced Grober to the mandatory minimum specified by the relevant federal criminal statutes of 5 years in prison. U.S. v. Grober, 2008 WL 5395768 (D.N.J., Dec. 22, 2008). Under the guidelines, Grober would be subject to up to 20 years in prison, and federal prosecutors were asking for the maximum in this case, even though Grober saved them the trouble of a trial by pleading guilty and was a first-time offender who was not engaged in commercial distribution of the child pornography. Summarizing her problem with sentencing in this case, Judge Hayden wrote: The ultimate question in terms of punishing him is: When is enough enough?"

**California** — Oakland jurors convicted Bruce Shaw of first degree murder on December 9, after hearing evidence that Shaw shot Sirron Croskey because he thought that Croskey had touched him in a sexually suggestive manner. Shaw was separately convicted of a gun offense, and is facing a potential sentence of 50 years to life when he is sentenced by Alameda County Superior Court Judge Joan Cartwright on February 11. Hayward Daily Review, Dec. 11.

**Florida** — Some are just luckier than others … For Larry Craig, it was the end of a highflying career as an influential U.S. Senator, who has been waging a losing struggle to get his guilty plea withdrawn (see above). For Mike Shallow, a Daytona Beach, Florida, City Commissioner, a sympathetic judicial ear was found and Volusia County Judge Dawn Fields dismissed a two-count misdemeanor case stemming from Shallow’s apprehension by undercover police while allegedly masturbating in a public restroom stall. Judge Fields said she relied on an appellate ruling from the 1990s finding that a closed restroom stall is a private place. She rejected the prosecutor’s argument that Shallow’s behavior was in “plain view,” finding that Shallow was behind walls and a door “of sufficient height to prevent someone standing outside from observing a person seated on a toilet,” according to a report in the Daytona News-Journal, Dec. 17. Shallow was one of nine men arrested in an undercover sting operation at the men’s restroom in the Sears store at Volusia Mall. “The officer’s peeking at him without any probable cause to think he was committing a crime was an unlawful search and seizure under the Fourth Amendment of the Federal Constitution,” Judge Fields wrote. Shallow denies that he was masturbating. Proceeding as if he was, however, Field asserted, “However disturbing the defendant’s actions may have been, the act of masturbation in the stall of a public restroom is not a crime, provided it is not done in public view. And neither are the sounds of masturbation.” Interesting. We predict a great future for the Sears men’s room in Volusia Mall as a locus for male sexual release…. A.S.L. @H2 = Legislative Administrative Notes

**Federal** — New regulations for implementation of the Family and Medical Leave Act adopted by the Bush Administration in November and scheduled to take effect on January 16 may have adverse consequences for transgender workers, according to a bulletin issued by the National Center for Transgender Equality on December 11. Under the guise of cracking down on fraudulent abuse of sick leave policies, the regulations require a degree of disclosure from employees seeking medical leave that will essentially require transgender employees to reveal their gender identity issues to employers in order to secure needed leave. The NCTE called on those concerned with transgender law policy to lobby the incoming Obama Administration to withdraw these regulations, and to lobby Congress to revise the FMLA to address concerns about medical confidentiality.

**Arizona** — Phoenix — On December 17, the Phoenix City Council voted unanimously to establish a domestic-partnership registry, becoming the second city in Arizona, after Tucson, to do so. Although the only official right accompanying domestic partnership status in Phoenix will be visitation in health care facilities, the registry will provide an opportunity for couples to get official certificates documenting their relationship, which can be useful in dealing with
landlords, employers, and public accommodations seeking proof of a relationship as a prerequisite to particular services or benefits. Arizona Republic, Dec. 18.

New Jersey — On December 10, the New Jersey Civil Union Review Commission, which was established by the legislature when it enacted the state’s civil union law with a mandate to report back on how the law is working and whether it fulfills the equality requirements established by the New Jersey Supreme Court under Lewis v. Harris, issued its final report, titled “The Legal, Medical, Economic & Social Consequences of New Jersey’s Civil Union Law.” The report, describing testimony presented at hearings the Commission held around the state as well as other evidence, concluded that the Civil Union Law has not fulfilled the court’s mandate, and recommended that the state legislature to make civil marriage available to same-sex couples. The report was unanimous. The reaction of the governor and legislative leaders was generally positive, and there was hope that the legislature might enact implementing legislation during 2009.

Michigan — The Kalamazoo City Commissioners voted on December 1 to add sexual orientation and gender identity to the city’s anti-discrimination ordinance, covering employment, housing and public accommodations.

Ohio — The Columbus City Council voted 6–0 to add gender identity to the city’s anti-discrimination ordinance, which has covered sexual orientation since 1992. Other new categories also approved were age, disability, family status and military status. According to a bulletin from Human Rights Campaign (Dec. 16), this makes Columbus the 6th Ohio municipality to ban gender identity discrimination. Of course, Ohio is in the 6th Circuit, where federal courts now hold that gender identity discrimination is sex discrimination forbidden under Title VII of the U.S. Civil Rights Act of 1964.

Pennsylvania — On December 22, the Harrisburg City Council voted unanimously to approve the Life Partner Registry Bill, under which same-sex partners and unmarried different-sex partners can register their partnership with the city and obtain an official certification. Although the registration does not itself carry any benefits, it will serve as proof of partnership for all dealings with the city, and may be used with private businesses that voluntarily extend benefits or entitlements to domestic partners. A.S.L.

Law & Society Notes

Obama Administration Transition — LGBT political commentators expressed disappointment that President-Elect Barack Obama did not designate any openly LGBT people as cabinet secretaries or the equivalent, although a few had been prominently mentioned as candidates for such positions. As of the end of December, the most prominent openly gay appointee to be announced was Nancy Sutley, a Los Angeles Deputy Mayor, who was selected to be the director of the White House Council on Environmental Quality. Sutley has extensive experience in environmental policy in federal, state and local government, having served most prominently as California’s Deputy Secretary for Policy and Intergovernmental Relations in the state’s environmental agency. Sutley had supported N.Y. Senator Hillary Clinton’s presidential campaign, serving as campaign chair for the LGBT steering committee in California.

The Same-Sex Marriage Passport Problem — Under the Defense of Marriage Act (DOMA), the federal government is forbidden from according any legal significance to a same-sex marriage. So, what if a same-sex couple marries and they decide to use only one surname? Will the U.S. State Department’s Passport Office issue a new passport showing the married name, if the marriage is a nullity in the eyes of the federal government? Karen Briefer-Gose confronted this problem after her marriage to her partner Kathi Gose in California immediately upon the state supreme court’s marriage decision going into effect in June. She submitted an application to have her passport reissued showing her new surname, but the State Department refused. She wrote to Senator Barbara Boxer seeking assistance. Boxer wrote back stating she could do nothing, but a staff member attached to the letter a State Department briefing paper about passport procedures. Briefer-Gose carefully studied the paper and discovered a loophole. One can have listed in a passport additional names in a section stating “the bearer is also known as...” and listing aliases. Briefer-Gose reapplied to have her passport amended to add her married name, which now appears on page 26 of her new passport as an alias. This might seem unimportant, but consider the difficulty that all of her state-issued identification will show her married name, but her passport shows her maiden name. Possible complications? If the passport also lists her alias, at least the complications may be reduced. Bakersfield Californian, Dec. 11.

One wonders, in light of this story, whether the passage of Proposition 8 in California requires those who married prior to the vote to revert to their non-marital names? Yet another complex issue without the editorial and photographs of two male students holding hands. The principal of the high school felt that distribution of the issue would be disruptive. The newspaper, supported solely by paid advertising, was eventually given $500 by the school to print a substitute issue without the editorial and photograph. The students retained a lawyer and are seeking a confrontation at the school board meeting. They felt that their inclusion of a disclaimer in the newspaper stating that the opinions expressed in the paper are those of the writers and not of the school district should have taken care of matters. Lawyers for “both sides” rest their arguments on the Supreme Court’s 1988 Hazelwood School District case, which said that students have First Amendment free speech rights at school that would have to be balanced with the educational mission of the school, giving administrators the right to abridge student speech when necessary to prevent disruption of the academic program. The student scribes contend that distributing their paper would not have been disruptive. Myrtle Beach Sun News, Dec. 18.

New York STATE — Continuing to work out the consequences of prior decisions that New York will recognize same-sex marriages contracted elsewhere, the New York State Health Department announced on December 12 that it had agreed that when children are born in New York State to a married same-sex couple, the birth
negative reporting for have gotten them dismissed by a judge. Investi
duction and paid small fines, even though
men, trying to make the entire matter "go away"
shutter the establishments. As is frequently the
by the city to close down such establishment,
prostitution arrests of male customers leaving
hattan had been making totally implausible
December 3 that city police officials in Man-
ment editor from a major newspaper or televi-
the story. Perhaps it is necessary for a promi-
spite the egregiousness of the police conduct
were middle-aged tourists as to whom the pros-
Osborne revealed that many of those arrested
the company of the Vatican and numerous Islamic
states, some of which still maintain the death
for consensual homosexual conduct.

The Roman Catholic Church explained in a statement by Archbishop Celestino Migliore
that the Church supports efforts to end anti-gay violence, but can’t sign on to a non-
discrimination principle as written in the Dec-
laration, claiming that “the categories sexual
orientation' and gender identity' used in the
text find no recognition or clear and agreed
definition in international law,” so their adop-
tion would create “serious uncertainty” and en-
forcement problems. Migliore did state that the
Church “continues to advocate that every sign of
unjust discrimination towards homosexual
persons should be avoided and urges States to
do away with criminal penalties against them.”

In the event, the world press reported the De-
cember 10 event in the General Assembly
when the Declaration was presented on behalf of
more than 60 member state, as an historic oc-
casion, the first time a call for an end to anti-gay
laws and policies had been placed before the
world body. The text of the Declaration, which
can be found on the website of the International
Lesbian and Gay Association, asserts that the
principle of non-discrimination embodied in
international human rights law applies equally
to everybody regardless of sexual orientation or
gender identity, and expresses concern and
condemnation towards oppression of sexual mi-
norities, and urges all states to bring their poli-
cies into conformance with this international
human rights standard.

Australia — Justice Michael Kirby, a mem-
er of Australia’s highest appellate court, will
be retiring in February 2009, just short of his
years on the bench, the lack of pension rights
for his long-time partner, Johan Van Vloten, has
been a major issue for Kirby, who said he would
retire if his partner was secure. The recent
enactment by the national government conferring
a wide array of legal rights on same-sex part-
tners seems to have satisfied his concern, lead-
ing to his announcement of early retirement,
even though it did not amount to civil marriage
for same-sex couples.

Australia — A Brisbane District Court jury
convicted Amanda Louise Thompson, a mar-
rried public school teacher, on charges of main-
taining a sexual relationship with a female stu-
dent who was under 16. The student ultimately
turned against Thompson around her 16th
birthday when she began dating a boy, and she
subsequently gave a statement to police follow-
ing an investigation of Thompson’s conduct.
The court imposed a 7–1/2 year prison sen-
tence, and Thompson will be barred from teaching or taking any other job working with
children upon her release. Courier Mail, Dec.

Australia — A Cairns District Court judge.
William Everson, ordered Daniel Leigh Proud,
23, to pay almost $40,000 (Australian) in dam-
gages to Gary Michael Jamieson, 53, a gay man
Proud assaulted causing permanent injuries.
According to a report in the Courier Mail of
Dec. 17, "The court was told Proud repeatedly
kicked and punched Jamieson after he made
amorous advances toward him during a fire-
works display on the Cairns Esplanade in the
early hours of January 1, 2008." Proud was
sentenced to prison for his conduct, then sued
for damages by Jamieson. Proud had told police
that Jamieson was “hitting” on him sexually
during the New Year celebrations and that he
"got up and snapped." Judge Everson rejected
the argument that Jamieson brought the attack
on himself, accepted the description of physi-
cal injuries proffered by the plaintiff, but did
not accept medical evidence suggesting that
Jamieson also suffered from post-traumatic
stress disorders as a result of the attack.

Cyprus — The Supreme Court is considering
the case of a gay Cypriot who married another
man in Canada in 2006, but whose partner has
been denied permanent residence in Cyprus on
grounds that Cyprus does not permit same-sex
marriages. The head of the Anti-Racism and
Discrimination Authority, Eliana Nicolaou,
published a criticism of the government’s posi-
tion in the case. The Migration Department is
allowing the man’s partner to remain in the
country for now as a “visitor,” but in a status
that denies him the right to undertake any em-
ployment, which has posed a severe economic
harmful on the couple. Nicolaou suggested
that the government’s position is inconsistent
with European human rights law, Courier Mail,
Dec. 19.
Hungary — The Constitutional Court declared unconstitutional a law that would have allowed unmarried couples, both different-sex and same-sex, to register their relationships and get many of the rights accorded to married couples. Surprisingly, it was not the creation of a registered partnership for same-sex couples that aroused the Court’s ire, but rather the creation of a civil alternative to marriage for different-sex couples. The Court found that Hungary’s constitution obliges the state to protect the institution of marriage, and creating this alternative for different-sex couples undermines marriage. The Court indicated in dicta that a law allowing only same-sex couples to register would not raise this constitutional concern, and political leaders quickly announced that they would consider passing such a law soon.

Russia — It was reported that the Moscow City Court has rejected another attempt by gay rights advocates to challenge Moscow Mayor Yuri Luzhkov’s refusal to allow a gay pride parade to take place in the Russian capital city. The lead Pride organizer, Nikolai Alekseev, is seeking review of the Moscow City Court’s repeated refusal to order the mayor to allow the parade to take place. The challenge will be brought to the European Court of Human Rights, according to news reports.

Spain — The Murcia High Court has imposed a suspension on Family Court Judge Ferrin Calamita for the judge’s “malicious” attempt to stop a lesbian from adopting her partner’s daughter. The judge was ordered to pay 6,000 euros compensation to the aggrieved couple, according to a Dec. 24 report in the English-language edition of El Pais. The court wrote that the judge’s “decisions and attitudes lead us to conclude that he was trying to delay resolving the case as long as possible, either because he expected an appeal [against legalization of adoptions by gays] to succeed or because he thought the couple would lose interest.” The court concluded that the judge “acted out of a homophobic compulsion, one that should have consequences.”

South Africa — The African Press Association report that Judge Edwin Cameron, an openly gay, openly HIV+ jurist, has been appointed to the Constitutional Court, the highest court in South Africa, by President Kgalema Motlanthe. The appointment, announced Dec. 31, was effective Jan. 1, 2009, to fill an existing vacancy.

Turkey — The Supreme Court reversed a lower court decision that had allowed city officials to order the dissolution of a Turkish gay rights group, Istanbul LGBTI Solidarity Association. City officials claimed the group was unlawful, immoral and contrary to family values approved by the state.

Uganda — The BBC reported on December 23 about a rare victory for gay rights in central Africa, as a Ugandan trial judge, Stella Arach-Amoko, after seventeen months’ deliberation ruled that the government must compensate two lesbians for police actions in violation of their civil rights. According to the lawsuit brought by the women, police burst into the house of one of the women and arrested both of them on suspicion of being lesbians. Sodomy is illegal in Uganda, but evidently the law recognizes the distinction between conduct and status, at least in this instance, and upholds the right of individuals to be of harassment for being gay. The amount awarded is minor, about $7,000, but the principle is important. The plaintiffs are Yvonne Oyoo and Victor Juliet Mukasa.

United Kingdom — The Court of Appeal reversed decisions by an employment tribunal and the Employment Appeal Tribunal, and ruled that a heterosexual man who had been subjected to anti-gay harassment by coworkers had been sexually harassed and was entitled to a remedy. According to press reports, Stephen English was repeatedly called a “faggot” by coworkers at a Portsmouth company where he worked as a salesman after the coworkers discovered that he had been educated at a boarding school and had once lived in Brighton, facts which they apparently believed marked him as gay. (Will this be news to those inhabitants of Brighton who attended boarding schools?) The Court of Appeal said harassment of a homophobic nature violates the law regardless whether the harasser knows or believes that the victim is gay. Wrote Lord Justice Sedley: “The incessant mockery — banter trivialises it — created a degrading and hostile working environment and it did so on the grounds of sexual orientation.” Daily Telegraph, Dec. 20.

United Kingdom — An Employment Appeal Tribunal, reversing the decision of the employment tribunal, ruled that municipal officials in Islington did not commit unlawful discrimina-

AIDS & RELATED LEGAL NOTES

Nomenclature: CDC Ends Distinction Between HIV Infection and AIDS

Reflecting accumulating knowledge about HIV infection and its manifestations and treatment, the U.S. Centers for Disease Control and Prevention (CDC) has published a notice in the Morbidity and Mortality Weekly Report (MMWR — Dec. 4) titled “Revised Surveillance Case Definitions for HIV Infection Among Adults, Adolescents, and Children Aged Months and for HIV Infection and AIDS Among Children Aged 18 Months to years United States, 2008.” The revised surveillance definition merges statistics previously collected separately for HIV infection and for AIDS, which had been defined by certain symptoms denoting a particular stage of the de-
development of HIV infection. The CDC recommended that surveillance by the states also use the new definitions, while cautioning that it did not intend this action to be a guide for clinical diagnosis. “Public health surveillance data are used primarily for monitoring the HIV epidemic and for planning on a population level,” wrote the agency, “not for making clinical decisions for individual patients.” Thus, for public health purposes, including of course the allocation of funding and the determination of measures to take, the CDC now feels that distinguishing between HIV infection and AIDS is not useful. One wonders how this change may play out in litigation, since some statutes speak in terms of AIDS and some judicial opinions have distinguished between HIV infection and AIDS in deciding whether somebody has a legally-recognize disability or is entitled to a particular benefit or accommodation. A.S.L.

**AIDS Litigation Notes**

**Federal — 8th Circuit** — The ADA Amendments of 2008 may relegate this case to irrelevant relic status. A brief per curiam opinion upholds a decision from the Eastern District of Arkansas rejected a disability discrimination claim from an HIV+ federal employee on the ground that he had not proven that he had a disability within the meaning of the Rehabilitation Act. Harmon v. Department of Veterans Affairs, 2008 WL 5067756 (9th Cir. Dec. 4, 2008). Plaintiff Harmon claimed that after a new supervisor learned about his HIV/AIDS status, he received inferior treatment, leading to an internal complaint that he was persuaded to withdraw after being reassigned to a different supervisor. He was discharged after engaging in an altercation with another person attending a work-related seminar that had resulted in complaints to his employer. He claimed disability discrimination and retaliation, the district court granting summary judgment to the employer on all claims. The trial court found, inter alia, that “Harmon was not disabled under the Rehabilitation Act because he failed to raise a genuine issue of material fact as to whether his HIV/AIDS status substantially limited a major life activity or whether the Department regarded him as being disabled.” The court also found that Harmon presented no evidence from which a jury could conclude that the Department’s state reason for discharging him the unpleasant seminar altercation was pretextual.

**Federal — Pennsylvania** — In Robinson v. GEO Corporation, 2008 WL 5215967 (E.D. Pa., Dec. 12, 2008), the court granted summary judgment to individual named defendants and the corporation that contracted with George W. Hill Correctional Facility to provide health care services in a pro se HIV+ prisoner case alleging violation of 8th Amendment violations due to alleged violation of confidentiality rights and sporadic gaps in provision of medicines. District Judge Rufe found that the plaintiff could not hold GEO liable for a constitutional violation without showing that it had established policies that violated constitutional rights, rejecting an argument for vicarious liability, and reached a similar conclusion regarding supervisory personnel who were not shown to have established policies that discriminated against the HIV+ inmate.

**Federal — South Carolina** — U.S. District Judge Terry L. Wooten accepted a recommendation from Magistrate Judge Thomas E. Rogers, III, dismissing a pro se complaint brought by an HIV+ detainee at Greenwood County Correctional Center alleging that his treatment regarding housing within the facility violates his constitutional rights. Werts v. Greenwood County Detention Center, 2008 WL 5378251 (D.S.C., Dec. 23, 2008) (not officially published). Detainee Werts protested that he had been placed in single cells and frequently moved around, allegedly for the purpose of “isolating” him from the rest of the inmate population because he is HIV+. Magistrate Rogers pointed out that numerous federal appeals courts have issued rulings finding that a detention facility has a legitimate penological interest in identifying and segregating HIV+ inmates to protect them and the other inmates, and found no basis to depart from these precedents in Werts’ case.

**Pennsylvania** — On December 16, Judge Chester Muroski of Luzerne County Court of Common Pleas imposed a prison sentence of between 4 years 3 months and 8 years 6 months on Shawn Shannon “Nicole” Quinones, an HIV+ transsexual former inmate of the Dallas State Correctional Institution, for spitting on a corrections officer. A jury had convicted Quinones on a charge of assault by a prisoner, aggravated harassment by a prisoner, and recklessly endangering another person. A fellow inmate, Anthony Gray, had previously been found guilty of aggravated harassment by a prisoner for the same offense, and was awaiting sentencing later in December. Prosecutors charged that the two men, who claimed they were lovers, were upset that guards would not put them in adjacent cells. At trial, the prosecutor charged them with wanting to run the prison their way… Of course, there is no documentation that HIV has ever been spread by spitting. Both men continue to serve sentences on other crimes, Quinones for a 1997 robbery conviction and Gray who is serving a lengthy sentence for a third-degree murder conviction. Wilkes-Barre Times Leader, Dec. 17. A.S.L.

**Social Security Disability Cases**

**New Jersey** — In Knox v. Astrue, 2008 WL 5136672 (D.N.J., Dec. 9, 2008), the ALJ had found that plaintiff was disabled from doing his job but had enough residual capacity to perform other jobs that were available in the national economy. In rejecting his appeal of the ruling, District Judge Chesler focused on advocacy deficiencies in the plaintiff’s brief, indicating that he had failed to make any sort of argument in support of his position, merely listing scraps of medical evidence as if its relevance to the points he was trying to make were self-evident. The judge’s exasperation shines through. The Commissioner’s decision was found to be based on substantial evidence and affirmed.

**Washington State** — In Malos v. Astrue, 2008 WL 5068600 (E.D.Wash., Nov. 21, 2008), a U.S. Magistrate affirmed the administrative decision to deny disability benefits in an HIV-related case. Medical evidence indicated that the plaintiff was doing excellently on his HIV meds, and the court found that the ALJ’s credibility determinations, resolved against the plaintiff, were supported by the record, even though the ALJ rejected the treating physician’s opinion about the plaintiff’s incapacity to perform gainful employment. A.S.L.

**Veterans Administration Proposes Dropping Written Consent Requirement for HIV Testing**

On Dec. 29, the Veterans Affairs Department published in the Federal Register a proposal to change the VA’s rules on HIV testing, so that advanced written informed consent and counseling not be required before HIV testing is offered to patients in VA facilities, 73 FR 79428. The statement accompanying the proposal indicates that the statutory requirement for pretest counseling and written consent was repealed by Congress recently, but that did not automatically repeal the existing regulations. VA argues that the counseling-written consent requirement was undermining efforts to provide timely treatment to HIV+ veterans, because it had the tendency to delay testing, with the result that many of those who eventually test positive are not identified until a symptomatic stage of their HIV infection, complicating the treatment process. Written comments may be submitted through http://www.Regulations.gov; by mail or hand-delivery to Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to “RIN 2900–AN20.” The deadline for comments is January 28, 2009. A.S.L.
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Kaminsar, Yale, Can Glucksberg Survive Lawrence? Another Look at the End of Life and Personal Autonomy, 24 Issues L. & Med. 95 (Fall 2008).


Larson, Jacob, It’s About Time. Or Is It?: Iowa District Court’s Invalidation of Iowa’s Mini-DOMA, 12 J. Gender Race & Just. 153 (Fall 2008).


Love, Brittany, Today’s Inconsistencies, Tomorrow’s Problems: An In-Depth Consideration of the Challenges Facing School Administrators in Regulating Student Speech, 35 Southern Univ. L. Rev. 611 (Spring 2008).


Plass, Stephen, Exploring the Limits of Executive Civil Rights Policymaking, 61 Okla. L. Rev. 155 (Spring 2008).


Schmieder, Alison M., Best Interests and Parental Presumptions: Bringing Same-Sex Custody Agreements Beyond Preclusion by the Federal Defense of Marriage Act, 17 Wm. & Mary Bill of Rts. J. 293 (Oct. 2008).

Secunda, Paul M., Whither the Pickering Rights of Federal Employees?, 79 U. Colo. L. Rev. 1101 (2008) (demonstrates that current method for federal employees to seek vindication of their free speech rights under Pickering by pursuing claims through the Merit Systems Protection Board has been totally unsuccessful).


Tuskey, John, And They Became One Flesh: One Catholic’s Response to Victor Romero’s “Other” Christian Perspective on Lawrence v. Texas, 35 Southern Univ. L. Rev. 631 (Spring 2008).


Yeh, Jinn-Rong, and Wen-Chen Chang, The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions, 27 Penn St. Int’l L. Rev. 89 (Summer 2008).


Specially Noted:

Newsweek, a weekly newsmagazine, jumped directly into the “culture wars” surrounding same-sex marriage and gay parenting with a pair of articles (one a cover story) published in its December 15 issue. Our Mutual Joy: Opponents of Gay Marriage Often Cite Scripture. But What the Bible teaches about love argues for the other side, by Lisa Miller, and Mrs. Kramer vs. Mrs. Kramer: It’s an old story parents split and fight for custody. But when both are women, and one says she is no longer gay, it gets complicated, by Lorraine Ali, generated considerable reader response, provoking a Letter from the Editor taking a firmly pro-gay line. Ms. Miller’s article strongly contended that religious opponents of same-sex marriage are relying on non-credible, selective interpretations of Biblical sources, and Ms. Ali’s article views the Miller-Jenkins interstate custody/visititation dispute (Vermont vs. Virginia) with full sympathy for the non-biological mom, Janet Jenkins.
AIDS & RELATED LEGAL ISSUES:


EDITOR’S NOTE:

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