SOUTH AFRICA CONSTITUTIONAL COURT SAYS SAME-SEX COUPLES CAN MARRY BUT DELAYS REMEDY FOR PARLIAMENTARY CONSIDERATION

In a unanimous ruling issued on December 1, South Africa's highest court ruled that the continued exclusion of same-sex couples from being able to marry violated two provisions of the South African Constitution, the requirement of equality before the law (Section 9(1)) and the ban on sexual orientation discrimination by the government (Section 9(3)). A sweeping decision by Justice Albie Sachs in *Minister of Home Affairs v. Fourie*, Case CCT 60/04, treated the issue in this case as a logical step after a series of rulings by the Court striking down various forms of unequal treatment of gay people in South Africa.

The Court was actually ruling on two different cases joined for decision. One, brought originally by a lesbian couple, Marie Adriaana Fourie and Cecilia Johanna Bonthuys, in the Pretoria High Court, had ultimately produced a decision by the Supreme Court of Appeals finding the existing common law definition of marriage unconstitutional but suggesting a rather convoluted and limited remedy, in the form of allowing religious authorities who approved of same-sex marriage to perform such ceremonies that could be recognized by the state. The other case, brought by the Lesbian and Gay Equality Project in the Johannesburg High Court, had not yet proceeded to trial, but advanced the more ambitious claim that the Marriage Act itself was unconstitutional for excluding same-sex couples. The Court granted an extraordinary petition to consider this case in connection with the other, as long as both parties had appealed the earlier decision.

Although the Court was unanimous in finding the constitutional violation, it was not unanimous as to the remedy. Writing for all but one member of the Court, Justice Sachs found it would be appropriate to suspend the effect of the Court's ruling for one year to allow the Parliament to adopt appropriate legislation. This ruling reflected recent activity by the South African Law Revision Commission (SALRC), which is working on a comprehensive report and set of legislative recommendations to deal with same-sex marriage. According to Justice Sachs, the SALRC is poised to issue its recommendations to the Parliament, and the legislators should be able to complete their work within a year. However, Justice Sachs made clear that if Parliament failed to act, the Court's ruling would automatically go into effect, requiring government officials to allow same-sex couples to marry under existing law by "reading in" to the Marriage Act appropriate language suggested by the Court.

One member disagreed with this approach. Justice Kate O'Regan argued that successful litigants are entitled to relief if it is within the authority of the Court to give it. Since the current common law definition of marriage in South Africa is judge-made law, she argued, the Court could change it by simply modifying the definition to be gender-neutral. While she acknowledged that the SALRC had come up with several different proposals for Parliament to consider, they all fell within a narrow range.

To go through Justice Sachs' opinion for the Court in detail would consume more space than we could possibly devote. His decision is available for downloading from the Court's website in pdf format, and runs over 100 pages. Once he has disposed of the procedural history of the case and a discussion of the various procedural issues involved in the consolidation of two cases that were at different stages in the litigation process and begins to address the merits, almost every page has language one would want to quote for its eloquence and perceptiveness. A few selections must suffice here.

Justice Sachs devotes substantial attention to summarizing the Court's prior gay rights decisions, each in itself momentous, striking down the sodomy law, requiring the government to recognize same-sex partners for immigration purposes, allowing for joint adoption of children by same-sex partners, and requiring access to pension rights for partners of public servants, for example. What they all had in common was a growing recognition that the equality and non-discrimination guarantees in the South African Constitution clearly required treating gay people as full citizens with the full panoply of rights enjoyed by all citizens.

"This court has thus in five consecutive decisions highlighted at least four unambiguous features of the context in which the prohibition against unfair discrimination on grounds of sexual orientation must be analysed," he wrote. "The first is that South Africa has a multitude of family formations that are evolving rapidly as our society develops, so that it is inappropriate to entrench any particular form as the only socially and legally acceptable one.

"The second is the existence of an imperative constitutional need to acknowledge the long history in our country and abroad of marginalisation and persecution of gays and lesbians, that is, of persons who had the same general characteristics as the rest of the population, save for the fact that their sexual orientation was such that they expressed erotic desire and affinity for individuals of their own sex, and were socially defined as homosexual.

"The third is that although a number of breakthroughs have been made in particular areas, there is no comprehensive legal regulation of the family law rights of gays and lesbians.

"Finally, our Constitution represents a radical rupture with a past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all. Small gestures in favour of equality, however meaningful, are not enough… A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are.

"To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society.

"The issue goes well beyond assumptions of heterosexual exclusivity, a source of contention in the present case. The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological

LESBIAN/GAY LAW NOTES **December 2005**

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Circulation: Daniel R Schaffer, LEGALGNY, 799 Broadway, Rm. 340, NYC 10003. 212–353–9118; e-mail: le_gal@earthlink.net. Inquire for rates.

LeGaL Homepage: Http://www.le-gal.org **Law Notes on Internet:** http://www.qrd.org/qrd/www/usa/legal/lgln

 ISSN 8755–9021

characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans comes in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and sociocultural), affirms the right to be different, and celebrates the diversity of the nation.

"Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting."

There is much more, in a similar vein. In the course of his opinion, Justice Sachs addresses each of the issues usually raised against same-sex marriage and provides thoughtful, well-reasoned rejoinders. In particular, he notes that under the Constitution no religious body will be forced to perform any ceremonies that it finds contrary to its own theological requirements, but that the Court must be concerned only with secular arguments, and cannot allow religious disapproval to affect how the government deals with its citizens.

In terms of the options available for Parliament, Sachs noted in some detail one of the proposals of the SALRC, which would be to enact a new Reformed Marriage Act under which couples regardless of gender could marry, while leaving in place the existing law, retitled as the Conventional Marriage Act, which opposite-sex couples could select if they wished to use the more traditional formulation of marriage vows (which would be gender-neutral under the Reformed Act). Sachs emphasized that the proposal did not create a "separate but equal" regime, since all marriages, regardless under which Act they were performed, would be treated as identical by the state for all legal purposes.

But it was left to Parliament to decide which course to follow, so long as it produces a result consistent with the Court's opinion within one year.

In her partial dissent, Justice O'Regan argued, "It is true that there is a choice for the legislature to make, but on the reasoning of the majority judgment, there is not a wide range of options. If as Sachs J correctly concludes, it is not appropriate to deny gays and lesbians the right to the same status as heterosexual couples, the consequence is that, whatever the legislative choice, it is a narrow one which will affect either directly or indirectly all marriages. The choice as to how to regulate these relationships will always lie with Parliament and will be unaffected by any relief we might grant in this case. In my view, this Court should develop the common-law rule as suggested by the majority in the Supreme Court of Appeal, and at the same time read in words to section 30 of the [Marriage] Act that would with immediate effect permit gays and lesbians to be married by civil marriage officers (and such religious marriage officers as consider such marriages not to fall outside the tenets of their religion)."

The government reacted rather positively to the opinion on December 1, indicating it would turn promptly to studying the legislative alternatives available under the court's ruling, although some opponents of the result urged consideration of a constitutional amendment to overrule the decision before it could go into effect.

It is worth noting that the decision by the Supreme Court of Appeal had been written by that court's only openly gay member, Justice Edwin Cameron, who sat as a temporary member of the Constitutional Court during 1999 and who has also made history by being the only openly-HIV+ person, so far, to sit as a judge of any nation's highest court. Justice Cameron's ability to frame a remedy in that case had been limited by the theories argued by the lesbian couple, who refrained from mounting a full-scale constitutional challenge against the marriage statute, focusing the whole case on an argument for common law development.

The women who brought the first case were represented by P. Oosthuizen and T. Kathri, assisted by M. Van den Berg Attorneys. Counsel for the Lesbian and Gay Equality Project and associated individual plaintiffs were D.I. Berger and F. Kathree, with Nicholls, Cambanis and Associates. Various amici were allowed to present arguments on behalf of same-sex marriage opponents, including the local Roman Catholic establishment. A.S.L.

LESBIAN/GAY LEGAL NEWS

Washington Supreme Court Says Lesbian Co-Parent Can Sue for Parental Rights

The lesbian former partner of a woman who, while the couple was still together, conceived a child through artificial insemination, has standing to sue for parental rights, held the Washington Supreme Court in a 7–to–2 decision, *In re Parentage of L.B.*, 122 P.3d 161 (Wash. Nov. 3, 2005). In an opinion by Justice Bobbe J. Bridge, the majority of the court stated that common law supplements the Uniform Parentage Act, which does not limit parentage only to those relationships specified in the act. However, until the plaintiff establishes that she is in fact a co-parent, she cannot be afforded the rights of a parent, such as visitation, because Washington's third-party visitation statute is unconstitutional.

Sue Ellen Carvin and Page Britain had lived together as a couple for five years when they decided to have a child. Britain received a known donor's semen, and delivered a girl, L.B., on May 10, 1995. Both women had parental roles in L.B's upbringing. In 2001, Carvin and Britain broke up, and Britain sought to deny any parental rights to Carvin. The trial court agreed with the birth mother's position, but the appellate court modified this holding and remanded the case. 121 Wash. App. 460, 89 P.3d 271 (Div. 1 2004). The Washington Supreme Court affirms Division 1's decision in part, and reverses it in part.

The Supreme Court found that the Legislature never intended to deny the courts equitable power to adjudicate relationships between parents and children. At equity, Washington's common law recognizes the status of de facto parents and grants them standing to petition for a determination of their rights and responsibilities as parents. However, until a petitioner establishes parental rights, she cannot be granted visitation rights under Washington's third-party visitation statute, Rev. Code Wash. 26.10.160(3), which had been held unconstitutionally to interfere with a mother's fundamental liberty interest in *Troxel v. Granville*, 530 U.S. 57 (2000).

In order to find a right to de facto parentage, the court needed to determine that the common law recognizes such parentage, and that the Legislature had not superseded the common law. Washington recognizes common law, according to the majority, and common law may address gaps in statutes. Washington courts have always invoked a common law responsibility to respond to the needs of children and families. In that light, the state courts have recognized that an individual not biologically or legally related to a child may nevertheless be considered a child's "psychological parent." Unique circumstances may warrant unique custody decrees, and the court cited cases in which a stepparent who had not adopted a child and an aunt have been held "psychological parents" with parental rights.

Washington recognizes that individuals may comprise a legally cognizable family through means other than biological or adoptive. State statutes do not inhibit the court from applying the common law in such instances, asserted the Supreme Court. As evidence, the court cited (1)

the legislature's emphasis on the "best interests of the child" and on a child-centered approach to resolving custody and visitation disputes; (2) the legislature's proclamation that the marital status of a child's parents has no bearing on the child's rights to a legally cognizable relationship with the parents, Rev. Code Wash. 26.26.106; (3) the legislature's commitment to the principle that sex and gender roles do not serve as a proper basis for distinction between parenting parties; and (4) the recognized role of the judicial branch in resolving family law disputes, especially when the legislative enactments speak to an issue incompletely.

The Uniform Parentage Act, when considered in the broader context of Washington's familial statutory scheme, is intended to supplement and clarify parentage actions and not to supplant the common law equity powers of trial courts as to parentage, visitation, child custody, and support. Since this was an issue of first impression in Washington, the majority looked to other states with similar statutes, and found that several states had specifically recognized a woman's lesbian partner as a de facto parent under the common law, emphasizing Wisconsin and Massachusetts, but also citing cases from Pennsylvania, Indiana, Colorado, and New Mexico. An Ohio court stated that a same-sex partner is not entitled to the benefit of statutes clearly inapplicable to such a familial arrangement, but that courts do have jurisdiction over petitions for shared custody, which are not preempted by statute. *In re Bonfield*, 97 Ohio St. 3d 387, 780 N.E.2d 241 (2002).

The court concluded, therefore, that, under the common law of Washington, a same-sex partner has standing to prove that she is a de facto parent. A de facto parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise; however, she is not entitled to such privileges as a matter of right, but only as determined to be in the best interests of the child. To establish standing as a de facto parent, the court will require that the petitioner meet a set of criteria: (1) the natural or legal parent must have consented to and fostered the parent-like relationship; (2) the petitioner and the child must have lived together in the same household; (3) the petitioner must have assumed the obligations of parenthood without expectation of financial compensation; (4) the petitioner must have been in a parental role for a length of time sufficient to establish with the child a bonded, dependent relationship, parental in nature; and (5) the petitioner must be an adult who has fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life. If de facto parentage exists under these criteria, the de facto parent may petition for the corresponding rights and obligations of parenthood, held the court.

The court conceded that the biological parent has a fundamental liberty interest in the care, custody and control of her child, *In re Custody of Smith*, 137 Wash. 2d 1, 969 P.2d 21 (1998), *aff'd on other grounds sub nom. Troxel v. Granville*, 530 U.S. 57 (2000) (mother's paternal grandparents have no right to visitation; violation of mother's liberty interest), but that right is not any greater than the interest of the de facto parent. While such an interest may be asserted against a party who is not a parent (including a grandparent), it cannot be asserted against a co-parent, stated the court.

Carvin alternatively sought visitation under the third-party visitation statute, Rev. Code Wash. 26.10.160(3), invalidated in *Troxel v. Granville*. The court held that, since the statute is invalid, it cannot be used as a means of gaining third-party visitation rights. Harm to the child must be demonstrated to order visitation over the objection of a fit parent.

Justice James M. Johnson wrote the dissenting opinion for the two-member minority, emphasizing the best interests of "poor little L.B.," as Johnson referred to the child. The biological mother has a fundamental right to make decisions for the child, and the court must presume that she acts in the child's best interest. This is the straightforward analysis required, according to the dissent. Therefore, the result reached by the majority is unconstitutional under a *Troxel* analysis.

Rather than support L.B., wrote Johnson, Carvin has chosen to engage in costly litigation, "causing agonizing stress on little L.B." Johnson characterizes Carvin as a "nonparent, " rather than a de facto parent. The Uniform Parentage Act, as read by Johnson, unambiguously defines a mother-child relationship, Rev. Code Wash. 26.26.101, and does not include de facto parentage. "The statute's extensive detail and forethought is evidence that the legislature included relationships that it intended to include and excluded all other relationships." The Legislature's "failure to speak" is not an invitation for the court to add further definitions; this violates the courts' rules of statutory construction. Johnson presents evidence that it was the Legislature's intent not to create de facto parentage. The court merely bent the law to fit "these facts and current notions of political correctness," stated the minority. *Alan J. Jacobs*

Indiana High Court Says Lesbian Co-Parent Can Sue for Custody

Comparing her case to that of a step-parent, the Indiana Supreme Court ruled in *King v. S.B.*, 2005 WL 3118053 (Nov. 23), that a lesbian co-parent could seek a judicial declaration of parental rights toward the child she was raising with her former partner. The ruling in Dawn King's action seeking to be reunited with her child reversed a trial court decision to dismiss the case, but disagreed with the rationale previously adopted by the state's court of appeals in handling the case.

King and Stephanie Benham lived together as a couple for several years before deciding to have a child. King's brother donated the semen to conceive the child in 1998, and Benham gave birth to A.B. in 1999. The women raised the child together until 2002 when their relationship ended. King continued to contributed child support and see the child for another year and a half, until Benham cut off visitation and refused further child support payments in mid–2003.

At the time the women split up, King had a petition pending to adopt the child as a co-parent, but the petition was withdrawn when Benham revoked her consent. Instead, King filed a new lawsuit seeking a declaration of her parental rights. She argued that the women had jointly planned to have the child and that she had been a full participant through the process, providing emotional and financial support and jointly raising the child.

Monroe County Circuit Judge Kenneth Todd granted Benham's motion to dismiss the, finding no legal basis for King's petition. The state's court of appeals reversed, finding that the women's original agreement to be co-parents and jointly raise the child could provide a basis for King to claim parental rights, invoking the concept of estoppel in reliance on a prior decision involving a heterosexual couple. The Supreme Court vacated the court of appeals decision, and premised its ruling on a different theory.

Writing for the court, Justice Frank Sullivan, Jr., pointed out that a motion to dismiss should not be granted unless there is absolutely no basis on which the plaintiff could prevail, and concluded that in this case King had a potentially plausible argument by reference to *In re Guardianship of B.H.*, 770 N.E.2d 283 (Ind. 2002), in which the court ruled that a stepfather who had been appointed guardian of children on the death of their mother could seek to make that status permanent, despite the objection of the children's biological father, if a trial court found such a resolution to be in the child's best interest.

From this ruling, Justice Sullivan drew the lesson that "Indiana courts have authority to determine 'whether to place a child with a person other than the natural parent,' which we hold necessarily includes the authority to determine whether such a person has the rights and obligations of a parent." Sullivan also said that the trial court's determination of the best interest of the child in such a situation merited "deference." Therefore, "at least some of the relief sought in this case falls within that which _B.H._ grants persons other than natural parents to seek and Indiana trial courts, where appropriate, discretion to award." Since some of

the relief that Dawn King sought in this case could be within the power of the trial court to grant to her, her case should not have been dismissed outright.

However, the court failed to take the next step and specify exactly how the trial court was to balance Benham's parental rights with whatever rights King was asserting. Instead, the court returned the case to the Monroe Circuit Court without any substantive instructions other than to revoke its grant of dismissal and allow the case to proceed.

This drew an anguished dissenting opinion from Justice Brent E. Dickson, who argued that the court's decision was inconsistent with the state's adoption laws by virtually allowing a non-parent to circumvent the adoption procedures established by statute by the simple device of filing a declaratory judgment lawsuit seeking a declaration of parental rights. While acknowledging that the courts have power to change judge-made rules in light of changing social conditions, Dickson argued that the court did not have power to alter statutory policy.

Indeed, in a footnote, Dickson stated disagreement with two Indiana court of appeals decisions allowing co-parents to adopt children. Neither of those cases had been appealed to the Indiana Supreme Court, and they have stood until now as authorizing such adoptions by a creative interpretation of the adoption statutes. While Dickson's statement of disapproval in his dissenting opinion does not affect their continued authority, it at least raises a worrying cloud that might draw legislative attention.

Furthermore, Dickson argued, the case threatened to open a Pandora's box, allowing anybody with a potential claim of parental rights to run into court. He insisted that the court was improperly intruding in legislative prerogatives, and, furthermore, overriding the will of the people of Indiana, who have not been shown to support legal recognition of same-sex couples. Dickson noted that the state enacted a ban on same-sex marriage years ago, and that the legislature has recently approved a resolution to put a constitutional ban on same-sex marriage on the ballot. In these circumstances, he objected to the court making a ruling that could be construed as giving legal effect to same-sex unions.

King is represented by Sean Lemieux, an Indiana lawyer who formerly headed the Indiana Civil Liberties Union's gay rights project, with amicus brief support from the ICLU as well as Lambda Legal. A.S.L.

Federal Claims Court Rejects Challenge to "Don't Ask, Don't Tell"

In *Loomis v. United States*, 2005 WL 2995372 (Fed. Cl. Nov. 7, 2005), Judge Eric G. Bruggink of the Federal Claims Court, reviewing two decisions of the Army Board for the Correction of Military Records (ABCMR) in a military pay case, determined that Lieutenant Colonel Loren Stephen Loomis had a right to suspend his elimination proceedings while his request for retirement in lieu of elimination was being processed and remanding to the Secretary of the Army for a determination of retirement benefits; that his procedural and constitutional rights were not violated in either the discharge hearing or in the characterization of his discharge, that ample evidence existed to support the finding of conduct unbecoming, and that he violated the "Don't Ask, Don't Tell" (DADT) policy; and subsequently, that the Army's DADT policy was not unconstitutional.

Loomis, formerly a Lieutenant Colonel (LTC) in the U.S. Army, joined the Regular Army in 1967 and was commissioned in 1969. He then served in the Army Reserve on active duty and completed a tour in Vietnam. Subsequently, he was awarded the Purple Heart and the Bronze Star Medal and was released from active duty in 1972. He continued serving in the Army Reserve on non-active duty until he voluntarily returned to active guard/reserve status in 1983. He remained on active status until the Army initiated involuntary elimination proceedings against him on August 19, 1996, based on homosexual conduct and conduct unbecoming an officer.

On August 2, 1996, Loomis's home was set on fire. Military Police apprehended a 19–year-old Private First Class (PFC), who at first denied involvement, but later recanted his earlier statements and admitted to breaking into the Loomis home and setting the fire. The PFC signed a statement declaring that he set the fire to destroy pictures and video of himself taken by Loomis, showing him naked in various poses. He claimed that he met Loomis on base while walking back to the barracks from a movie sometime in March 1995. Loomis offered him a ride, which ended up at Loomis's home to show the PFC his amateur photography collection. At some point after arriving, Loomis began taking pictures and video of the PFC, first fully clothed, then unclothed in various poses, athletic and others involving "S&M" outfits. After touching the PFC's genitals and unsuccessfully offering him a back massage, eventually, Loomis took the soldier back to the barracks. The PFC claimed that only then did he realize the gravity of what had happened and begin to fear what Loomis would do with the photos and videotape. The PFC subsequently received two letters from Loomis to which he did not respond.

In September 1995, the PFC met Loomis again at Loomis's home, allegedly in an attempt to get back the photographs and video. The PFC stated that this was the first time he learned that Loomis was a military officer. The PFC alleged that sexual contact between himself and Loomis took place during this second meeting. He claimed that he allowed the contact fearing what Loomis would do with the photographs. The court determined that their encounter eventually became much more serious and clearly violated the Army's regulations regarding homosexual acts. Loomis massaged and touched the soldier and eventually tried to achieve sexual penetration. Although there was no penetration, the balance of Loomis's actions clearly violated the military's DADT policy. Afterwards, Loomis drove the PFC back to his barracks.

The PFC stated that he continued to despair over the photos and video. He returned to Loomis's home on the night of August 2, 1996, and broke in, seeking to retrieve the pictures. After failing to locate them, he set fire to Loomis's home in an attempt to destroy them.

Local officials also investigated the fire. The local fire marshal, after responding to the fire at Loomis's home, collected a videotape from Loomis's video camera on the chance that it contained evidence of the arsonist's identity. After reviewing the tape, however, he determined that it did not contain images of the arsonist. It showed Loomis engaged in homosexual acts with two men who appeared to be soldiers. The tape was later given to CID agents.

In an affidavit accompanying a letter that Loomis filed with one of his appeals to the BOR, he stated that the PFC visited his home three times, not two; that he made it clear to the PFC during their first encounter that the photography was nude and that Loomis was homosexual; and that the PFC was an active participant who dressed up and noticeably used cologne in the second visit.

As a result of the PFC's statements and the videotape, elimination proceedings were initiated against Loomis. A Board of Inquiry (BOI) recommended that Loomis be discharged for homosexual conduct and conduct unbecoming an officer. The BOI also recommended that Loomis's discharge be characterized as Under Other Than Honorable Conditions (UOTHC) based on a finding that Loomis's homosexual acts involved "force, coercion, or intimidation," an aggravating factor under Army regulations. After exhausting further appeals, Loomis was discharged from the Army UOTHC.

Because Army regulations permit a solider to request retirement once elimination proceedings are commenced, Loomis did so in various forms on several instances, but was denied. After his discharge, Loomis filed an appeal to the ABCMR on May 14, 1999. On September 20, 2000, at ABCMR's recommendation, the Secretary of the Army upheld Loomis's elimination. The board reasoned: "While [the PFC] may not have been his subordinate … [Loomis] was a senior commissioned officer and a leader and [the PFC] was a junior soldier.... [E]ven if

the relationship had been heterosexual, the acts and military status of the participants would have constituted sufficient misconduct to justify elimination." Nevertheless, the board upgraded Loomis's discharge to General, Under Honorable Conditions, because the record lacked any of the aggravating factors necessary to justify a discharge UOTHC. As a result, the Army directed that Loomis be transferred to the Retired Reserve, making him eligible for a reserve retirement at age 60. Loomis had also challenged the Army's denial of regular retirement benefits, but the board rejected this challenge, as well as upholding the Army's decision to deny Loomis's May 1997 request for retirement in lieu of elimination. Loomis filed a second ABCMR appeal on May 23, 2003, requesting 11 days of active service credit, which he claimed would have made him eligible for a regular retirement prior to his separation from the Army, but board denied his request.

The first part of the Court of Claims opinion deals with this issue of the early retirement request, and concludes that the military courts erred in their handling of this, requiring a remand for reconsideration of whether Loomis should be allowed to retire with his military pension.

The most interesting portion of the case rises from the court's determination of the issues related to Loomis' discharge. Loomis argued that his discharge should have been characterized as honorable; that he did not receive a fair and impartial hearing before the BOI because three members who stated that they personally disagreed with homosexual conduct and felt that homosexuals should be eliminated from the military were permitted to participate in his elimination hearing; that the BOI unlawfully admitted and considered videotape evidence because the videotape was seized without a warrant in violation of the Fourth Amendment and it should have been prohibited from admission under the exclusionary rule; that the ABCMR erroneously found that the BOI considered all relevant retention factors; that the Army's punishment of sodomy is unconstitutional in light of *Lawrence v. Texas*, 539 U.S. 558 (2003); and that the Army's DADT policy violated due process and equal protection.

Considering Loomis' discharge characterization, the court determined that the matter was nonjusticiable and found that no tests or standards existed by which to compare ABCMR's decision on the merits, except for the regulations which limit the military's discretion in such matters. Because Loomis was found to have engaged in misconduct under definitions promulgated by Army regulations by way of homosexual conduct and conduct unbecoming an officer, the court determined that the ABCMR was well within its discretion to characterize Loomis's discharge as less than honorable. As for Loomis' fair and impartial hearing claim, the court determined that there was a rebuttable presumption that military officials, such as officers serving on boards of inquiry, "discharge their duties correctly, lawfully, and in good faith." In order to show bias, Loomis had to show "a deep-seated favoritism or antagonism that would make fair judgment impossible." Examples of this bias could be shown where remarks during the course of trial "reveal an opinion that derives from an extrajudicial source." Loomis did not meet his burden because the facts were largely uncontested, and to the extent that there were any contested facts, they were resolved in Loomis's favor because the ABCMR reversed the BOI's determination that force, coercion, or intimidation was present and upgraded his discharge to General, Under Honorable Conditions. The court also determined that admissibility of the videotape and lack of consideration of retention factors was harmless error in light of the fact that substantial evidence existed supporting Loomis' homosexuality.

The court determined that Loomis's challenge to Article 125 of the Uniform Code of Military justice, the military's sodomy prohibition, on grounds that criminal punishment for sodomy was overruled by the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), was justiciable and held that the Army failed to provide evidence of custom that would support its contention that the relationship between Loomis and the PFC, whether heterosexual or homosexual, would otherwise have been unacceptable. However, the court found that the fact that Loomis, a military officer, solicited someone he clearly or should have known to be a junior enlisted soldier to violate a Federal statute, namely the DADT policy codified at 10 U.S.C. sec. 654, was sufficient to justify the ABCMR's finding that Loomis engaged in conduct unbecoming an officer.

Loomis also challenged both article 125 and DADT on substantive due process grounds and DADT also on equal protection grounds. He argued that the Supreme Court recognized a fundamental right to same-sex intimate conduct and that this right was infringed both by his discharge and the Board's characterization of his service because both were based on article 125 and DADT. The court found that the Supreme Court's decision in *Lawrence* searched for a legitimate state interest, as required by rational basis review, and therefore did not hold that sodomy was a fundamental right and would not presume such a right existed without explicit Supreme Court instruction.

Loomis alternatively argued that even if the Court failed to recognize homosexual conduct as a fundamental right, article 125 still fails even rational basis review because he contended that the Army's purposes for article 125 are to enforce morality and private biases, which are not legitimate state interests. The Court then noted and followed with approval the U.S. Court of Appeals for the Armed Forces case *United States v. Marcum*, 60 M.J. 198, 205 (2004) (developing an as-applied approach to challenges of article 125). In Marcum, the court held the following: "This as-applied analysis requires consideration of three questions. First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*? Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest?

The court in *Marcum* also instructed that when evaluating such situations, "the nuance of military life is significant." After presuming that the first question was within the protected liberty interest, the court found that the Supreme Court specifically excepted from its holding conduct involving "persons who might be injured or coerced or who are situation in relationships where consent might not be easily refused." Conjoining those two rules, the Court disregarded the ABCMR's finding that there was no evidence of coercion and held that as applied to Loomis, "the nature of the relationship between Loomis and the PFC, while not directly within a chain of command, is such that consent might not easily be refused and thus it [was] outside of the liberty interest protected by *Lawrence*."

In reference to Loomis' substantive due process challenge to DADT, the court also used rational basis review and chose to examine DADT "on its face." Defendant proffered three justifications for DADT: promoting unit cohesion, reducing sexual tension, and protecting privacy. Defendant argued that these three justifications found their support in the congressional findings upon which DADT was based. After reciting the standard military litany on DADT and following <MIWoodward v. United States, 871 F.2d 1068, 1074 (Fed. Cir. 1989) (holding that military's policy on homosexual conduct is consistent with the equal protection clause), as controlling precedent, the court held that DADT was rationally related to the end of achieving military success.

Loomis' equal protection clause challenge to DADT included many of the same arguments, but also cited *Romer v. Evans*, 517 U.S. 260 (1996), *City of Cleburne v. Cleburne Living Center*, and *Palmore v. Sidoti*, 466 U.S. 429 (1984). Based on the same reasoning underlying its substantive due process holding, the court found that the military's policy on homosexual conduct was similarly consistent with the equal protection clause. In applying the rational basis standard, the Court concluded that the classification contained in DADT was ra-

tionally related to the government's interest in promoting unit cohesion and reducing sexual tension. Although Loomis argued that other circuits which held that DADT survived rational basis review when subjected to an equal protection challenge relied on the overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), the court was not persuaded because it incredulously reasoned that these cases also applied rational basis review. The Court went further to distinguish *Cleburne* by determining that no legitimate interest was found to single out the mentally retarded and *Palmore* by simply stating that DADT did not give effect to private biases but rather sought "in the most logical and least burdensome way possible, to ensure that sexual tension is minimized in order to promote the unit cohesion necessary for military success." The Court also distinguished the Supreme Court's holding in *Romer* by stating that DADT's effect is not so discontinuous from the goal of reducing sexual tension and promoting unit cohesion that it is inexplicable by anything but animus toward homosexuals.

In short, the court used Congress and the military deference to support the military's anti-sodomy statute and DADT policy, glossing over anything that might have given support to Loomis' contentions that the two violated substantive due process and equal protection, i.e., historical bias and changing social mores across Europe and Canada towards homosexuals that the Supreme Court mentioned as a consideration for its ruling in *Lawrence*. Loomis, far from being an innocent figure, failed to persuade the reluctant court to follow *Lawrence* and depart from the antiquated holding in *Bowers*. *Leo L. Wong*

Virginia Appeals Court Rejects Facial Challenge to Sodomy Law Despite *Lawrence v. Texas* Ruling

The Virginia Court of Appeals rebuffed facial challenges to the Commonwealth's sodomy law, notwithstanding the U.S. Supreme Court's decision in *Lawrence v. Texas*. In two similar cases, involving convictions for solicitation of sodomy in a public restroom, the Court of Appeals ruled that because the sodomy law was constitutional as applied to the facts in those cases, the defendants lacked standing to bring a facial constitutional challenge to the law. The court also ruled that Virginia's scheme of public sex laws, which provide disparately harsh punishments for sodomy, does not violate the Equal Protection Clause. Finally, the court rejected the defendants' argument that the solicitation law was facially invalid under the First Amendment because it chilled constitutionally protected speech. *Tjan v. Commonwealth*, 2005 WL 2977778 (Nov. 8, 2005), and *Singson v. Commonwealth*, 2005 WL 2977779 (Nov. 8, 2005).

In March 2003, Joel Singson and Andy Tjan were each arrested after soliciting oral sex from undercover police officers in a public restroom of a mall in Virginia Beach. At the preliminary hearing, the defendants disputed whether they intended to have sex in public or in a private location, but the trial judge found credible the police officers' testimony that the men proposed sex in the mall's restroom. The defendants then moved to dismiss the indictment, on the ground that Virginia's sodomy law was no longer enforceable after the Supreme Court's decision in *Lawrence*. The trial court denied the motion, finding that "the restrooms within stores open to the public are not within the zone of privacy as contemplated by the Supreme Court." The men both entered conditional guilty pleas, preserving their right to challenge the validity of Virginia's sodomy law. [While the case was pending before the Court of Appeals, the Virginia Supreme Court ruled that Virginia's fornication statute was no longer valid in the wake of *Lawrence*. *Martin v. Ziherl*, 269 Va. 35 (2005).]

In a pair of decisions authored by Judge Humphreys, the Court of Appeals ruled that because the defendants were being punished for sexual conduct in public, they lacked standing to challenge the facial validity of Virginia's sodomy law on the ground that the law, on its face, encompasses private acts of sodomy as well. In the lead decision, *Singson*, the court rejected the defendants' argument that the language in *Lawrence* renouncing the U.S. Supreme Court's prior decision in *Bowers v. Hardwick* as wrong at the moment it was decided rendered all sodomy laws throughout the land invalid. Noting that *Bowers* only involved an as-applied challenge of Georgia's sodomy law in private settings, the court reasoned that *Lawrence*'s overruling of *Bowers* likewise only covered "the right of an individual to conduct intimate relationships in the intimacy of his or her own home." Therefore, wrote Judge Humphreys, "to the extent that [Virginia's sodomy law] prohibits individuals from engaging in *public* acts of sodomy, the statute survives constitutional scrutiny under the Due Process Clause."

The defendants also argued that the solicitation law was unconstitutional because, to the extent that the sodomy law still purported to criminalize private acts of sodomy, constitutionally protected speech — i.e., solicitation of constitutionally protected acts of private sodomy — was either proscribed directly or would be unconstitutionally chilled. First, the Court resisted the notion that a prohibition on solicitation of sexual acts was a restriction on speech at all. Because "[s]olicitation of a sexual act is not communicative speech, but rather, nonexpressive conduct," the court explained, "to the extent that an individual may be held criminally liable for soliciting a violation of [Virginia's sodomy law], it is not the individual's speech that is being prohibited — rather, 'speech is merely the vehicle through which the solicitation occurs.'"

Turning next to the question of whether the solicitation law chills constitutionally protected speech, the court first grappled with the question of whether speech soliciting an act of sodomy is even protected by the First Amendment. The court first noted that, after *Lawrence*, solicitation of private sodomy can no longer be considered "incitement" to "commit a crime." The court then commented that while some forms of solicitation might be considered obscene, such statements in general were not presumptively obscene. As a result, in a rather grudging concession, the court stated that it "cannot conclude that speech proposing a private act of sodomy entirely lacks First Amendment protection."

Under the overbreadth doctrine, however, laws will only be rendered invalid if they chill a "substantial amount of protected speech." Returning to their characterization of solicitation laws as prohibiting non-expressive conduct rather than speech, the court reiterated that the overbreadth problem "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." In light of the numerous constitutional applications of the soliciation law — i.e., solicitations of "nonconsensual sodomy, incestual sodomy, sodomy with a minor, commiting sodomy in exchange for money, and engaging in acts of bestiality," — the court refused to strike down the solicitation law based on "the incidental, hypothetical effect of the statute on speech requesting an act of private, consensual sodomy."

In *Tjan*, the court rejected the additional argument that the sodomy law was void for vagueness because of the difficulty in distinguishing between "public" and "private" acts of sodomy. Tjan's case — involving a restroom of a public mall — clearly fell on the "public" side of the line, and therefore, the court was unwilling to strike down the law as vague based on the fact that some future fact pattern might present a more difficult case.

The court also rejected Tjan's argument that the sodomy law violated the Equal Protection Clause. First, Judge Humphreys noted that the law was neutral on its face with respect to heterosexual and homosexual acts of sodomy, and insisted that Tjan had not presented any evidence to support a claim of discriminatory enforcement of the law against gay people. Tjan also argued that the structure of Virginia's laws criminalizing public sex constituted an Equal Protection violation. Specifically, Tjan pointed out that no law directly prohibits public heterosexual intercourse, and that other laws that might punish public acts of sex are misdemeanors. Only public sodomy is punished as a felony in Virginia. The court, however, was not troubled by the Virginia legislature's decision to single out one type of sexual act for harsher punishment than others. Citing a case relied upon by neither party, the court observed that,

in *Branche v. Commonwealth*, 25 Va. App. 480 (1997), it found no problem with the fact that solicitation of oral sodomy for money by females was a misdemeanor offense, whereas the same act by a male was a felony. Notwithstanding that the U.S. Supreme Court rejected the identical argument in *Lawrence*, the court asserted that disparate punishment was appropriate because "the two groups of individuals proscribed by the statute are not engaged in the same activity." In support of this discussion, the court cited the Kansas Court of Appeals decision in *Limon*, which had ruled that the state could penalize sex by same-sex teenagers more harshly than sex by different-sex couples without violating the Constitution because, for among other reasons, the law was penalizing "different" acts differently. The Kansas Supreme Court has since overruled that decision and ordered that Kansas' Romeo and Juliet law, which provides lesser penalties for statutory rape claims involving teenage couples, must apply equally to gay and straight teens.

Finally, the court rejected Singson's Eighth Amendment argument that the punishment was cruel and unusual on the ground that the argument was not raised and preserved in the proceedings below.

Judge Kelsey and Senior Judge Overton joined Judge Humphrey's decision for the Court. Greg Nevins from Lambda Legal argued on behalf of both defendants before the Virginia Court of Appeals. Although the defendants plan to seek review from the Virginia Supreme Court, the appeal is discretionary. *Sharon McGowan*

Supreme Court Refuses to Consider Trans Discrimination Issue Under Title VII

Does Title VII of the Civil Rights Act of 1964, which bans employment discrimination on the basis of sex, extend to the case of a firefighter transitioning from male to female? Federal courts had long been reluctant to find that Title VII forbids discrimination on the basis of gender identity, several circuit appeals courts having decisively rejected the idea over the past several decades, but a few years ago the 6th Circuit, noting a trend in the federal courts to recognize claims under Title VII on behalf of persons who suffered discrimination on account of their gender non-conformity, stuck its collective neck out and opined that discrimination against transsexuals was, analytically speaking, discrimination on account of gender non-conformity. See, *Smith v. City of Salem, Ohio*, 369 F.3d 912, superseded, 378 F.3d 566 (6th Cir. 2004) (rehearing denied en banc).

A panel of the circuit reiterated this holding earlier this year in *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (rehearing denied en banc). Unlike the municipal defendant in *Smith*, Salem, Ohio, the City of Cincinnati decided to seek Supreme Court review, arguing that the 6th Circuit's approach was inconsistent with a significant body of prior case law from other circuits, but on November 7, the Supreme Court announced without comment that the petition for certiorari was denied. *Cincinnati v. Barnes*, No. 05–292, 2005 WL 2922504, 74 USLW 3131.

This leaves the law in a very interesting situation. Federal courts continue to reiterate that Title VII does not forbid discrimination on account of sexual orientation, but there is a growing recognition among federal judges that the sexual stereotyping that accompanies both anti-gay and anti-transgender discrimination can be actionable, especially in the context of harassment or overt discrimination (such as refusal to hire or promote, or a decision to discharge). A member of a sexual minority, whether gay, bisexual, or transgender, who presents a plausible claim of discrimination on account of gender non-conformity can survive a motion to dismiss in a Title VII sex discrimination case, although the case will surely be lost if the plaintiff, at deposition or on the witness stand at trial, testifies that they were fired (or whatever) because they are gay. Under the logic of the 6th Circuit's decision, however, transsexualism is seen as the quintessential gender non-conforming behavior, so a plaintiff would apparently not damage her case and indeed might strengthen it by testifying they were fired (or whatever) because they are transgender. (On the other hand, Congress explicitly legislated in the Americans with Disabilities Act [ADA] that homosexuality or transsexualism may not be considered disabilities under that statute, thus precluding protection from discrimination on that ground under that statute.)

Perhaps the Supreme Court's certiorari denial signals to Congress that it is about time to rationalize the law under Title VII by adding a clarification that discrimination on account of sex can be defined to include discrimination on account of sexual orientation or gender identity, since it appears that the Supreme Court is not overly concerned that Title VII is being used to address anti-trans discrimination as well as same-sex harassment cases (pursuant to *Oncale v. Sundowner Offshore*, 523 U.S. 75 (1998). A.S.L.

Oregon Judge Rejects Marriage Amendment Challenge

Basic Rights Oregon, a gay rights organization formed to support the battle to win same-sex marriage in that state, challenged the constitutional amendment adopted by voters a year ago as Measure 36 on the general election ballot. On November 4, Marion County Circuit Judge Joseph C. Guimond released a letter to the attorneys for the parties, announcing that he would grant summary judgment in favor of the state. *Martinez v. Kulongoski*, 2005 WL 3047355 (not officially published).

The amendment, which passed with 57 percent of the vote, the narrowest margin of any of those enacted last year, is a simple ban on same-sex marriages that does not contain the extra language found in some other states' amendments about incidents of marriage or equivalent statuses.

The challengers had argued three different legal theories against the amendment. They claimed first that it actually affected so many different aspects of the constitution that it should be considered a revision of the constitution rather than a mere amendment. Under Oregon law, the constitution may not be substantially revised through a voter-initiated ballot measure. Their second argument, feeding off the first, was that because the amendment had the effect of amending at least eleven different provisions of the state constitution, it violated the requirement that voters get to vote separately on each such change. Finally, their third argument was that as phrased the amendment was merely a statement of policy rather than a binding law or amendment.

Judge Guimond first held that the challengers' last argument was precluded by the ruling earlier this year in *Li v. Oregon*, 338 Or. 376 (April 14, 2005), which held that the passage of the amendment had essentially rendered moot a lawsuit then pending in the state courts seeking the right of same-sex couples to marry. A trial judge had ruled that same-sex couples were entitled to equal marriage rights under the state constitution as it existed before the passage of Measure 36. Thus, clearly the Oregon Supreme Court has already held that Measure 36 had amended the state constitution to prohibit same-sex marriages.

Turning to the first argument, Guimond noted that "no court has conclusively defined the difference between an 'amendment' and a 'revision,'" but that in a prior ruling the Oregon Court of Appeals had stated that an amendment "may have a 'ripple effect' on other provisions of the constitution." Thus, the issue is not whether a particular amendment has many ramifications, but rather whether it actually consists of a "thorough overhauling of the present constitution."

Guimond also pointed out that in a prior case, *Lowe v. Keisling*, 130 Or. App. 1 (1995), the Oregon Court of Appeals had rejected a similar argument in considering an earlier proposed version of the anti-marriage amendment that was much more wide-ranging than Measure 36, since it would have effectively banned domestic partnership benefits or any kind of marital status for same-sex partners. Since decisions by the court of appeals are binding precedents over the circuit court, and Guimond was unpersuaded by attempts to distinguish be-

tween the two ballot measures, this argument was also rejected.

The "separate vote" argument was perhaps the most plausible of the three. It is based on a state constitutional provision, Article XVII, that says "when two or more amendments shall be submitted in the manner [provided] to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately." This was intended to prevent situations where voters might be trapped into accepting two distinct new constitutional provisions with a single vote, even though voters might want to approve one and reject the other.

According to a prior decision of the Oregon Supreme Court, *Armatta v. Kitzhaver*, 327 Or. 250 (1998), the "proper inquiry" on this issue is "to determine whether, if adopted, the proposal would make two or more changes to the constitution that are substantive and that are not closely related." The challengers in this case argued that the ripple effects from the same-sex marriage ban had enough different ramifications on other constitutional provisions as to violate the separate vote rule. For example, the amendment not only substantively bans marriage, but also effectively carves out an important subject matter from the legislature's authority to pass laws on domestic relations, introduces an exception to the state constitution's requirements of due process and equal protection of the laws, and might be said to impair contract obligations by withholding recognition of same-sex marriages validly contracted elsewhere. (In any advisory opinion issued in 2004, the state attorney general had opined that same-sex couples might be entitled to marry as a function of some of these other constitutional provisions.)

However, Judge Guimond found that these ripple effects were natural consequences of introducing a substantive ban on same-sex marriage into the constitution, and did not generate a requirement for separate votes. "In this court's opinion," he wrote, "these changes made by Measure 36 are closely related and do not run afoul of the separate-vote requirement… The constitutional provisions that are affected by Measure 36 are diverse; the privileges and immunities clause is in no way related to the clause prohibiting the impairment of contracts and neither is directly related to an amendment that denies same-sex couples the right to marry. It is unquestionable, however, that these changes made to the constitution by Measure 36 are closely related, in that they are the same in each case — each portion of the constitution is amended to take away from same-sex couples the right to have a civil marriage even if that marriage is recognized by another jurisdiction."

Beth Allen, an attorney for Basic Rights Oregon, immediately announced that the group would appeal Judge Guimond's ruling. "Today's decision is but the beginning of a long journey," she told *The Oregonian*, the state's leading daily newspaper. Another newspaper, the *Salem Statesman Journal*, printed the full text of Guimond's letter on November 5. A.S.L.

New York Court Finds Salvation Army Answerable for Discrimination

A New York State trial judge ruled on November 16 that the religious exemptions in the New York State and City Human Rights Laws would not necessarily block a discrimination and retaliation lawsuit against the Salvation Army by a gay Jewish social worker who was hired after September 11, 2001, to work on World Trade Center relief and then was abruptly discharged in January 2002 after complaining about harassment by his supervisor. *Logan v. Salvation Army*, 2005 WL 3076308 (N.Y. Supreme Ct., N.Y. County). According to Justice Richard F. Braun, the "narrow" exemption provided for religious organizations does not give them permission to engage in discriminatory conduct of the type alleged by the plaintiff.

Zachary Logan began working for the Salvation Army as a senior caseworker in connection with World Trade Center Disaster Relief in October 2001. He claims that Michelle Pallak, his supervisor, subjected him to hostility due to his religion and sexual orientation. Logan charges that Pallak undermined him in his job and treated him differently from heterosexual employees. In mid-December, he claims that she said to him, "I wonder how the officers would feel if they knew they had a Jewish fag working for them." Logan reported the abusive behavior to the Salvation Army's Human Resources Representative, but claims that the harassment continued. When Logan met with the Human Resources Representative expecting an opportunity to present his concerns, instead he was reprimanded for complaining, and terminated the following week. Logan claims that after he was fired Pallak commented to his former coworkers that she hoped Logan "did not play the gay card."

Logan's lawsuit asserted six different legal claims: sexual orientation discrimination and religious discrimination under the state and city human rights laws, and retaliation under each of those laws. The Salvation Army, in a rush to dispose of the case, filed a motion seeking immediate summary judgment against Logan on the ground that it was immune from the law. Justice Braun pointed out that this was premature, and that at this point the motion should be treated as a motion to dismiss the case for failure to assert a valid legal claim.

Braun accepted the Salvation Army's argument that because the sexual orientation discrimination provisions of the state law did not go into effect until January 2003, a year after Logan was discharged, he could not sue on that basis. However, he denied the motion to dismiss as to the five other legal claims.

The state human rights law states that it shall not be "construed to bar any religious or denominational institution or organization, or any organization operated for charitable or education purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting employment … or giving preference to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained." The city law has a similar provision with slightly different wording.

The Salvation Army, a Christian organization which has been accepted in prior lawsuits as a religious organization for purposes of the law, claimed that these religious exemption provisions relieve it of any responsibility not to discriminate against individuals who are Jewish or gay. Justice Braun sharply disagreed, relying on a decision by New York's highest court, *Scheiber v. St. John's University*, 84 N.Y.2d 120 (1994). In that case, the Catholic university discharged a long-serving Jewish administrator, who then brought religious discrimination charges against the University. The University, while denying that it had discriminated, alternatively argued that it was protected from liability by the exemptions in the law for religious organizations. The trial and intermediate appeals courts dismissed the case. Writing for all the members of the court who participated (some St. Johns' alumni on the bench recused themselves), Chief Judge Judith Kaye found that the exemption was narrow, and dismissal would not be appropriate because there was a factual question whether Mr. Scheiber was terminated to promote the religious principles of the institution or whether there was some other discriminatory motivation.

"The exemption does not license a religious employer to engage in wholesale discrimination," wrote Judge Kaye in *Scheiber*. "Discrimination is unlawful, whether committed by a religious or any other employer. Nor does [the statute] empower a religious organization simply to discriminate against persons on the basis of religion. Rather, the exemption operates to exclude from the definition of 'discrimination' exercise of a preference in hiring for persons of the same faith where that action is calculated by the institution to effectuate its religious mission. A religious employer may not discriminate against an individual for reasons having nothing to do with the free exercise of religion and then invoke the exemption as a shield against its unlawful conduct."

Explaining his refusal to dismiss Logan's claims against the Salvation Army, Justice Braun expanded on Judge Kaye's rationale from *Scheiber*. After acknowledging the exis-

tence of the religious exemptions in the two laws, he wrote, "However, those limited exemptions for religious organizations are a far cry from letting them harass their employees and treat the employees in an odiously discriminatory manner during their employment, and to use derogatory expressions toward the employees."

Braun rejected the Salvation Army's reliance on the much more broadly worded religious exemption under Title VII of the federal Civil Rights Act. "Contrary to the defendant's argument that Federal case law should be looked to here," he wrote, "our Court of Appeals has spoken: religious organizations, just like other employers, may not discriminate unlawfully against their employees, and the limited exemptions [in the state and local laws] do not allow religious organizations to discriminate beyond the permitted exemptions."

Justice Braun was striking out on new ground as far as the sexual orientation discrimination claim is concerned, however, noting the recent federal court decision in *Lown v. Salvation Army*, 2005 WL 2415978 (S.D.N.Y., 2005), which dismissed sexual orientation discrimination claims against the Salvation Army, but not retaliation claims. A.S.L.

Is "Outing" a Violation of a Student's Right of Privacy? Maybe, Says Federal Court in California

U.S. District Judge James V. Selna has ruled that "outing" a lesbian teen to her parents may be a constitutional violation when done by a public employee. Ruling on motions to dismiss in *C.N. v. Wolf*, Case No. SACV 05–868 JVS (U.S.Dist.Ct., C.D.Cal., Nov. 28, 2005), Selna refused to dismiss a claim that Garden Grove high school principal Ben Wolf violated the constitutional privacy rights of Charlene Nguon, then a junior at the school, when he called her mother to express concern that Ms. Nguon was being physically affectionate with another woman at the school.

Wolf actually went further than that, imposing several suspensions on Ms. Nguon and in effect forcing her to transfer to another school, an action that was rescinded over the summer after pressure from the ACLU, which is representing her in her lawsuit. Since the school refused to rescind disciplinary notations on her record, however, which have been used to disqualify the top student from membership in the school's national honor society chapter, a lawsuit was filed on Oct. 14 against the school district, principal Wolf, and various other district and high school officials.

Much of Judge Selna's ruling on the defendants' motion to dismiss deals with the complicated thicket of sovereign immunity and state statutes that limits causes of action and remedies against government entities and public officials. When all is done, the remaining claims are only against certain named defendants and the remaining available remedies are pared down somewhat from those claimed in the complaint. But the lawsuit still lives on several theories.

One key ruling is that individual defendants are not entitled to qualified immunity, because at this point it is reasonably well established that sexual orientation discrimination raises equal protection issues, and Ms. Nguon has alleged that she was singled out for discipline as a lesbian, claiming that opposite-sex student couples engaging in similar demonstrative conduct of a sexual nature with each other have not been suspended or disciplined. (The defendants deny these allegations, but that is irrelevant for the ruling on the motion to dismiss, of course, which merely tests the plaintiff's legal theories and does not address the ultimate merits of the claim.)

Additionally, the court ruled that defendants were not entitled to the special immunity for official discretionary acts protected under California statutory law. Judge Selva's careful analysis of prior cases showed that the protection for discretionary acts by officials has not invariably been applied to discrimination cases. Such immunity is reserved for policy-making decisions by officials, not for discriminatory application of established policies.

As to the privacy claim, the defendants argued that Ms. Nguon could not mount a privacy claim because she had openly engaged in affectionate conduct with her same-sex friend at school, thus effectively going public and forfeiting any claim to privacy. Judge Selva rejected that argument for purposes of the motion. He cited a 1994 California Supreme Court case, *Hill v. National Collegiate Athletic Association*, 7 Cal. 4th 1, that identified a three-part analysis for privacy claims under the state constitution: "A plaintiff must allege (1) a legally protected privacy interest, (2) a reasonable expectation of privacy, (3) a serious invasion of the privacy interest." Selva did not engaged in any extended discussion, but merely asserted that at this stage of the litigation Ms. Nguon had put forward sufficient allegations on all three points.

"C.N. satisfies the first prong of the *Hill* test, she has sufficiently alleged that she has a legally protected privacy interest in information about her sexual orientation. With respect to the second prong of the *Hill* test, Plaintiffs contend, and the Court agrees, that C.N. has alleged a reasonable expectation of privacy, because 'the fact that an event is now wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of information." *U.S. Dep't of Justice v. Reports Comm. For Freedom of Press*, 489 U.S. 749, 770 (1989). Finally, with respect to the third prong of the *Hill* test, the Court finds that C.N. has alleged a serious invasion of her privacy interest by Wolf when he disclosed her sexual orientation to her mother."

Although the court ultimately ruled that the school district as an entity has to be dismissed from the case for various technical reasons, various claims remain against individual defendants, and most importantly against the school principal, including claims for punitive damages for an intentional violation of constitutional rights, so one suspects that a serious attempt at settlement may result from this ruling on the motion to dismiss.

The "outing" actually had a happy result, however, in that after some initial angst Charlene Nguon's parents have turned out to be very supportive of her rights. The ACLU, in a press release announcing the ruling, quoted her mother, Crystal Chhun: "I am very glad that the judge agreed Charlene can continue to stand up for her rights. I love and fully support Charlene, but that's not the case for every gay student out there. The person to decide when and how to talk with our family about her sexual orientation should have been my daughter, not the principal." A.S.L.

Gay Colombian Strikes Out on Asylum Appeal in 11th Circuit

A unanimous three-judge panel of the 11th Circuit U.S. Court of Appeals rejected Luis Fabriciano Rico's appeal from a denial of his asylum petition in *Rico v. United States*, 2005 WL 3078589 (Nov. 18, 2005) (not officially published). Rico, a citizen of Colombia, had asserted both political and social grounds, but the court found no basis to set aside a determination by an Immigration Judge that Rico's claims lacked credibility. It appears from the court's *per curiam* opinion that some of the credibility problems resulted from Rico's lack of legal representation at the beginning of his asylum application process. The opinion is short on details, however, so it is difficult to draw conclusions from it.

According to Rico, he was subjected to persecution in Colombia, and has a well-founded fear of future persecution on two grounds. First, he had been affiliated with a Colombian group called Movement Leaders in Action (LEA), affiliated with the Colombian Liberal Party, as a result of which he claims to have received death threats aimed at him, his family, and his same-sex partner in the United States. His second ground was based on being HIV+ and gay, which he claimed subjected him to harassment, violence, and denial of appropriate medical treatment in Colombia.

The problem with his case begins with his first asylum petition, which he filed on his own, and which only discussed his LEA membership and alluded to threats without spelling out the details. Ten months later, he filed a second petition, this time with assistance of counsel, which

focused entirely on his sexual orientation and medical status and did not even mention his LEA membership. The court reports, "Rico's counsel stated that Rico was seeking asylum on 'different grounds' and was submitting a 'whole new application.'" Rico also asserted that his partner Juan Carlos Rodriguez had been granted asylum in the U.S. based both on his participation in LEA and his gay status.

The court reports Rico's claim that he didn't mention being gay or HIV+ in his first petition because he was not aware that these could be grounds for asylum and he was afraid the Immigration Judge might be biased against him for being gay. This sounds credible to anybody familiar with the reality of these asylum cases, but to the court it sounded dubious. As is frequently the case, the court focused on discrepancies in the details between the two asylum petitions and the testimony presented at the hearing before the Immigration Judge to conclude that it should defer to the Judge's conclusion that Rico's claims lacked credibility.

It was particularly harmful to his claim that he actually visited Colombia a few times while his asylum case was pending, apparently due to concern about the well-being of the young daughter he left behind when he fled the country after the Revolutionary Armed Forces of Columbia (FARC) allegedly threatened him with death and tried to demand a "war tax" on his farm in 1995. Rico claims that FARC assassinated his nephew, who was in charge of running the farm, in 1996, and that another one of Rico's friends who was in LEA and also a gay rights group to which Rico belonged, Oasis, was murdered in 2000.

The asylum process is full of traps for the unwary, especially foreign nationals who try to navigate the system without the assistance of experienced attorneys who know the grounds on which asylum claims can be brought. Despite the existence of plenty of evidence about the dangers faced by openly-gay people in Colombia, the court rejected Rico's case, and also denied any relief under the Convention Against Torture or other procedural grounds for delaying deportation. A.S.L.

Federal Civil Litigation Notes

9th Circuit — A 9th Circuit panel ruled on November 2 that a group of parents could not maintain any federal constitutional claims against a school district in connection with a survey of their elementary-school-age-children concerning sexual matters. *Fields v. Palmdale School District*, 2005 WL 2861946. The school undertook a survey to determine psychological barriers to learning. Included in the survey questions posed to public elementary school students were topics such as the frequency of "thinking about having sex" and "thinking about touching other peoples' private parts." The parents were outraged that their children would be asked their questions and filed a double-barrel suit in fedearl court, asserting federal and state constitutional privacy claims. The district court found no federal cause of action, and dismissed the state claims without prejudice. "We agree," wrote Judge Stephen Reinhardt for the panel, "and hold that there is no fundamental right of parents to be the exclusive provider of information regarding sexual matters to their children, either independent of their right to direct the upbringing and education of their children or encompassed by it. We also hold that parents have no due process or privacy right to override the determinations of public schools as to the information to which their children will be exposed while enrolled as students. Finally, we hold that the defendants' actions were rationally related to a legitimate state purpose."

9th Circuit — A 9th Circuit panel ruled in *Loya-Loya v. Gonzales*, 2005 WL 3020011 (Nov. 10, 2005) (not officially published), that the Board of Immigration Appeals had abused its discretion by refusing to address on the merits arguments by two gay Mexican asylum petitioners that the Immigration Judge had wrongly refused to consider updated information about the situation of gay people in Mexico. The BIA essentially follows a "procedure" of rubberstamping Immigration Judge decisions without substantive review, regardless of the merits or the issues raised, resulting in a flood of appeals to the circuit courts of cases that might in some instances have received relief at the BIA level back in the days when the BIA behaved like a proper administrative tribunal. Many of the circuit courts have adopted their own summary proceeding processes to dispose of the backlog of appeals. The 9th Circuit, in particular, has caught the BIA out on several recent occasions in ignoring meritorious asylum claims from gay petitioners from Latin America. This may be just one more instance.

5th Circuit — A summary per curiam disposition by the 5th Circuit in *Praylor v. Texas Dept. Of Criminal Justice*, 2005 WL 3058199 (Nov. 15, 2005), noting holdings from other circuits rejecting the claim that denial of hormone treatment to a self-proclaimed transgender prisoner who was not already on hormones prior to incarceration is not a violation of the 8th Amendment, held that on the facts presented the Texas prison system did not violate Joshua Praylor's constitutional rights by denying hormone therapy. Testimony showed that the prison did have a treatment plan for newly-proclaimed transsexual prisoners, thus the system could not be found to have exhibited deliberate indifference to a known serious medical condition.

3rd Circuit — A 3rd Circuit panel rejected a constitutional and statutory challenge by some students and parents to a survey administered to junior and senior high school students in the Ridgewood, New Jersey, schools in the fall of 1999. *C.N. v. Ridgewood Board of Education*, 2005 WL 3211647 (Dec. 1, 2005). The survey, designed to be voluntary and anonymous, incurred student and parental ire by inquiring in such topics as drug use, dating behavior, and sexual feelings and conduct. The court found, affirming a decision by District Judge Linares (D.N.J.), that there was no constitutional ground for parents to challenge the policy, in line with some recent decisions in other courts. The main interest attaching to this particular ruling is that Circuit Judge Samuel Alito, a nominee for the Supreme Court as this was being written, was a member of the unanimous panel, although he did not write the decision.

California — Granting judgement for the government, Chief District Judge Walker ruled in *Banks v. Hennessey*, 2005 WL 3157476 (N.D. Cal., Nov. 23, 2005)(not officially published), that a self-described "transgender/transsexual" San Francisco County jail inmate was not entitled to injunctive relief against prison officials who had refused to place him in a vulnerable housing unit known as SXI. Banks was in jail for several years awaiting trial on rape charges. Subsequent to the incidents giving rise to this lawsuit, he was convicted and transferred to a state prison. Judge Walker agreed with the Sheriff, the defendant in this case, that the transfer mooted the case. In addition, Walker agreed with the argument that Banks' case had to be dismissed because he failed to file an internal appeal of the decision to deny his request. A federal statute requires prisoners to exhaust all internal administrative remedies before filing federal suits concerning prison conditions. Finally, Walker alternatively ruled that on the merits there appeared to be no 14th Amendment violation here. The Sheriff said that somebody charged with a violent sex offense would not be placed in the vulnerable housing unit unless he was himself sexually assaulted in prison, out of fear of endangering the vulnerable individuals in the unit by his presence. Furthermore, when Banks sought the placement, he was already residing in administrative segregation in order to protect him from the general jail population, so there was no evidence the jailers were indifferent to his safety.

Colorado — The ACLU of Colorado announced on Nov. 22 that a settlement has been reached in a federal lawsuit against the Colorado Springs School District No. 11, filed on behalf of the Palmer High School Gay-Straight Alliance in 2003. The school board has approved a settlement under which the GSA will, as required by the Federal Equal Access Act, be accorded the same status as all other student organizations at the school. The school had originally designated the GSA as an "independent student group" to identify it as not having the same approval and support as other stu-

dent groups. The GSA sued, arguing that this two-tier status violated the Equal Access Act.

Minnesota — A man who was employed by a national company (headquartered in Minnesota) as a sales person working in the region comprising District of Columbia, Maryland, parts of Virginia and West Virginia, and who was residing in Maryland, had signed a non-competition agreement while employed with the company in exchange for stock options. He was discharged, the company says for cause, but he maintains in a separate administrative discrimination filing, wrongfully based on his sexual orientation. The company claims that since being terminated he has solicited customers of the company on behalf of a new employer in violation of his non-competition agreement, and has filed an action to enforce the agreement in Minnesota. (The agreement, by its terms, is governed by Minnesota law and states that an enforcement action may be brought in state or federal courts in Minnesota.) The employee filed several motions seeking to get rid of the case or have it consolidated with his proposed discrimination case when it is filed in Maryland. District Judge Frank ruled in *Universal Hospital Services v. Hoff*, 2005 WL 3159677 (D. Minn., Nov. 28, 2005), denying all of defendant Hoff's pretrial motions. On the issue of consolidating the case with his contemplated employment discrimination case in Maryland, Judge Frank observed that there is no lawsuit yet on file concerning the alleged discrimination, merely administrative charges filed by Hoff. Frank rejected the argument that Hoff was not amenable to jurisdiction in Minnesota, or that conducting the case there would be inappropriate in terms of venue, noting that the company has several Minnesota-based witnesses and that despite his arguments, Hoff has not identified any Maryland-resident witnesses who would have to testify. (Indeed, Hoff now resides in Florida.) Implicit in Hoff's motions was the notion, not articulated anywhere in the opinion, that the non-compete clause should not be enforced against him because he was unlawfully terminated due to his sexual orientation. The court does not mention or address this contention.

Wisconsin — The dispute between the city of Madison, Wisconsin, and the Rev. Ralph Ovadal over his attempt to communicate disapproval of homosexuality through the exhibition of signs and banners on a pedestrian overpass near the Verona Road exit on the Beltline Highway will not die. Police officers forced Ovadal to take down his signs and banners with a threat of arrest, claiming they were creating a safety hazard. Ovadal sued to vindicate his 1st Amendment rights, claiming the city had a policy of suppressing politically controversial speech. The city claimed there was no policy, just an ad hoc determination by police officers that this particular display was creating a safety hazard by distracting the attention of drivers on the Highway. On remand from a decision by the 7th Circuit, *Ovadal v. City of Madison*, 416 F.3d 531 (2005), District Judge John Shabaz ruled on Nov. 22, 2005 WL 3118691 (W.D.Wis.), that the case was not suitable for summary judgment, because "There is a genuine issue of fact as to whether the defendants prohibited plaintiff's signs and banners because a traffic hazard was created by opposition to the message or solely by the plaintiff's presence regardless of his message. This factual issue will be resolved at trial." If the ban was not content-neutral, said Shabaz, "the city would have to prove that the rule that no protests may take place on overpasses when those protests cause a traffic hazard is necessary to serve a compelling state interest and that the rule is narrowly drawn to achieve that purpose." In addition to refusing to grant the city's summary judgment motion, Shabaz ruled that the individual policy officers were not yet entitled to summary judgment on grounds of qualified immunity. A.S.L.

State Civil Litigation Notes

California — The ACLU has announced a positive development in the pending lawsuit brought by student editors of The Kernal, an award winning student newspaper at East Bakersfield High School, opposing censorship of a series of articles about sexual orientation by school administrators. The series was supposed to run in the paper last May, but was stopped by administrators. Students sued in Kern County Superior Court with the assistance of the ACLU of Southern California, the GSA Network and the law firm of Milbank Tweed Hadley and McCloy, which is headquartered in New York. The court had refused an emergency order last spring, stating that it could not rule without giving the school district an opportunity to present its reasons for blocking the publication. In October, under pressure of the lawsuit, the school principal relented and informed the editorial board members that the articles could appear in the November issue. The editorial board members indicated that they would persist in the law suit, seeking a court order clarifying their free speech rights, according to an ACLU news release issued on Nov. 4.

Georgia — Fulton County Superior Court approved a judgment and consent decree between he city of Atlanta and Druid Hills Golf Club, under which the city agrees to refrain from attempting to enforce its public accommodations law with respect to sexual orientation against the club. When a gay couple who were denied membership complained to the city human relations commission, which found unlawful discrimination, the city sought to fine the club in court, but the state legislature then passed a statute forbidding enforcement of the city's ordinance against private clubs, so the result of the city lawsuit was foreordained. The settlement left open the question of whether the city's public accommodations ordinance is enforceable against any private business in a sexual orientation case, since the Georgia legislature is apparently strongly committed to protecting the right of Georgians to discriminate against their LGBT neighbors. *Atlanta Journal-Constitution*, Nov. 6.

Ohio — In a dispute over primary custody and visitation schedules between ex-spouses, a father and a lesbian mother, the Ohio Court of Appeals, 6th District, rejected the attempt by the father to make an issue out of the mother's "lesbian lifestyle" as part of the dispute. *Sheridan v. Sheridan*, 2005 WL 3008911 (Nov. 10, 2005). The father sought primary custody, but the trial court decided to continue with the parties' shared parenting plan, although shifting the visitation schedule so that during the school year the child would reside with the father, but spend all the long-holiday weekends with the mother, and then split the summer evenly between the two parents, with one weekend visitation to the other parent during each half of the summer. Both parties were unhappy with aspects of this approach. A major part of the father's argument was that the mother's move from Ohio to the South Side of Chicago presented a dangerous environment for the 6–year-old boy, in light of the reported murder rate for the neighborhood and its "transitional" character. The trial judge rejected this, based on his personal knowledge of that neighborhood from riding through it frequently. The appeals court said this reliance on personal "knowledge" outside the record was improper. On the other hand, in pursuit of his argument that best interest of the child favored placement with him, the father argued that shared parenting would not work because the parents are "diabolically opposed as to the raising of their child," partly due to the mother's lesbian lifestyle. (Get that man a thesaurus, quick....) Without discussing the argument, the court rejected it as without merit, and ultimately affirmed most aspects of the trial court's ruling, although it found it inappropriate to assign visitation on all the long holiday weekends to one parent. Ultimately, the father came out of the proceeding better off than the mother, but it does not seem to have had anything to do with her sexual orientation or living arrangements. A.S.L.

Criminal Litigation Notes

Military — In what has become a routine evasion of the holding in *Lawrence v. Texas*, the U.S. Navy-Marine Corps Court of Criminal Appeals rejected a challenge to a prosecution of consensual (heterosexual) sodomy in *U.S. v. Tate*, 2005 WL 3111979 (Nov. 21, 2005) (not officially

published). While conceding that consensual sodomy between adults would be protected by the liberty identified by the Supreme Court in *Lawrence*, the court followed the precedent of *U.S. v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004), under which sodomy between military members of different ranks remains criminal because deemed inimical to good order and morale.

Military — The U.S. Navy-Marine Corps Court of Criminal Appeals ruled on Nov. 29 in *U.S. v. Orellana*, 2005 WL 3211844, that the Supreme Court's ruling in *Lawrence v. Texas* does not bar a prosecution for adultery under the Uniform Code of Military Justice. "Even assuming arguendo that the appellant's adulterous activity is within the *Lawrence* liberty interest and does not otherwise meet any exception specifically listed in *Lawrence*," wrote Judge Diaz for the court, "we nonetheless conclude that there are additional factors in this case that weigh against constitutional protection. We have already found that the appellant's conduct was both prejudicial to good order and discipline and service discrediting. That alone is sufficient to remove the conduct from the protection of the Constitution. Moreover, the military has a particular interest in promoting the preservation of marriages within its ranks. Because military families are often required to endure extended separations from a spouse due to operational commitments, commanders have a unique responsibility to ensure that the morale of their deployed personnel (and that of the spouses left behind) is not adversely affected by concerns over the integrity of their marriages."

California — In *People v. Roman*, 2005 WL 3194491 (Cal. Ct. App., 2nd Dist., Nov. 30, 2005) (not officially published), the court found that an HIV+ man convicted of kidnapping and committing various sexual offense against one teenager and one young man, both mentally impaired, was entitled to a new trial on some of the charges due to errors by the trial judge in instructing the jury on various aspects of the case, including kidnapping and consent issues. There was testimony from the defendant's doctor that he had been told he was HIV+ prior to the time when he committed the offenses, his alleged modus operandus being to lure young men into his car, take them home, tie them to his bed and then have his way with them sexually. There was conflicting testimony about whether he used condoms during these adventures, and the degree of force he might have used to induce young men to get into his car.

California — The *Contra Costa Times* reported on Nov. 18 that Tanda Rucker, described as "a former Berkeley High School basketball star who was once named the state's top prep player," had pled no contest to 18 felony charges "for having unlawful sexual relationships with high school girls she met while coaching in Alameda." Rucker will be sentenced in February.

Kansas — There were news reports that Kansas authorities are not content with the prison service of Matthew Limon, even though the state Supreme Court ruled that he was entitled to the shortened prison term specified in the state's Romeo and Juliet Law. Limon was released to the custody of family members, virtually under house arrest, while prosecutors decided whether to charge him anew under a different statute. The disgraceful handling of this case, which involves consensual activity of a non-violent nature involving teenage boys relatively close in age, shows the continuing social stigma suffered by LGBT people in Kansas, despite an apparently enlightened Supreme Court opinion (coming on the appeals of an astonishing reassertion by the Court of Appeals, in the teeth of a remand from the U.S. Supreme Court, that there was nothing wrong with discriminating against gay people in order to express the moral disapproval of the majority).

Massachusetts — U.S. District Judge Ponsor substantially adopted a magistrate's recommendation that a gay man who is serving a life sentence for murder should receive a writ of habeas corpus because the state suppressed potentially exculpatory evidence (an autopsy report of the victim) at the time of his trial. *Healy v. Spencer*, 2005 WL 3008659 (D. Mass., Nov. 8, 2005). The prosecutor made much of the defendant's homosexuality and his living arrangements with a same-sex partner, and did much to suggest to the jury that the murder had a "homosexual" aspect to it, in order to get the defendant convicted on circumstantial evidence. The defendant, who admitted he was in the victim's apartment earlier on the night of the murder, claimed to have gone out to some gay bars that night and returned home early in the morning, but to have lied about his subsequent evening activities to police in order to protect the privacy of his partner, who was "closeted." This all took place in 1980, at a time when the Massachusetts sodomy law was still on the books (although its continued vitality had been compromised by a ruling of the Supreme Judicial Court challenging a different statute) and when same-sex couples were much less open than they are now about living together in relationships. In any event, the magistrate concluded that the suppression of the autopsy report, which found no evidence that the victim had engaged in sexual activity on the night of the murder, had been prejudicial to Healy's defense (especially since the prosecutor had argued strenuously that it was a sexually-related murder), and that even though there might be enough circumstantial evidence to support the jury's verdict, this prejudice suggested the need for a new trial. Added to this was evidence that at least one juror's participation had been tainted by living with a law student who may have discussed aspects of the case with him, as to which Healy's habeas petition sought an evidentiary hearing. Healy has served almost a quarter-century of his life sentence, but may now get a new day in court. Judge Ponsor released a long, detailed opinion setting forth all aspects of the case, which makes fascinating reading.

New York — Can a gay man accused of embezzlement invoke spousal privilege to prevent his domestic partner from testifying against his interest in the case? This novel question faces Acting Nassau County Supreme Court Justice Alan Honoroff, as he considers a motion by Stephen Signorelli to bar testimony against him by Frank Tassone. Tassone was formerly the superintendent of schools in Roslyn, and has pled guilty to charges of embezzlement involving an alleged scheme to channel district funds to of Signorell's business. The two men registered as New York City domestic partners in April 2002, and had a religious commitment ceremony in February 2001. According to Signorelli, they have lived together as a couple for 33 years, and continue to reside in the same apartment on the Upper East Side of Manhattan. Tassone has disputed the nature of their relationship, and there have been news reports about Tassone being romantically interested in other men. In any event, Tassone's ultimate sentencing depends on his cooperation with prosecutors, who expect him to testify at Signorelli's trial. *Newsday*, Nov. 23; *New York Times*, Nov. 29.

New York — Judge Barbara G. Zambelli rejected a suppression motion in *People v. Chumbley*, 2005 WL 3107297 (N.Y. Westchester Co. Ct., Nov. 18, 2005) (not officially published), in which Helen Chumbley, a lesbian, stands accused of the Christmas Eve 2004 murder of her domestic partner. Police officers received a tip that there had been a shooting at 30 Sunlight Hill in Yonkers. When they arrived at the house, inner doors were open in front and back. When the officers received no response to their calling out, they went in expecting to find a gunshot victim. Instead they found Chumbley, lying on the floor crying, they testified, and she informed them of the location of the body and the murder weapon. She was arrested, taken to the police station, given Miranda warnings, and signed a waiver but then decided not to talk without a lawyer, although she did make at least one incriminating statement voluntarily. Police obtained a search warrant early Christmas morning (awaking a judge in the wee hours) and then retrieved the gun, the victim's eyeglasses and the body and took film of the interior and exterior of the house. The court found that all searches and seizures were good under the circumstances.

Texas — Iin the course of appealing his capital murder conviction and automatic life sentence, Charles Michael Whitmire, Jr., asserted

prosecutorial conduct during the trial when a question was posed concerning a possible homosexual relationship between Whitmire and the victim. *Whitmire v. State of Texas*, 2005 WL 3071464 (Tex. Ct. App., 14th Dist., Nov. 17, 2005). The court found that although the prosecutor had violated the trial court's ruling on a motion in limine to exclude any mention of homosexuality, this was a harmless error, as there was some relevance, the homosexuality aspect was not introduced as improper character testimony to suggest that it played a role in the murder, and in the view of the court its probative value outweighed possible prejudice. The court emphasized that there was only one question, the defendant firmly denied the allegation, and the questioning moved on to other topics.

Washington State — In *State v. Clinkenbeard*, 2005 WL 3164814 (Wash. App., Div. 3, Nov. 29, 2005), the court of appeals dealt with the argument that the conviction of a 62–year-old male school bus driver for having a sexual relationship with an 18–year-old female student, under a state law forbidding sexual relations between school employees and students, would have to be set aside due to *Lawrence v. Texas*. In the case, Clinkenbeard was alleged to have begun romancing the student, a passenger on his bus route, when she was only 12, but didn't cross the line of initiating sexual contact until the student had reached age 18. Clinkenbeard argued that he could not be prosecuted for engaging in consensual sexual activity with an adult, even if the adult was a student, and thus the statute was unconstitutionally overbroad. (Also, both Clinkenbeard and the student denied that there was sexual intercourse in their relationship.) The court was unwilling to grant a facial challenge to the statute, since the statute would clearly be constitutional as applied to sexual activity involving minors. In an as-applied challenge, the court also rejected Clinkenbeard's constitutional argument, finding the state had sufficient justification to want to prevent sexual relationships between school staff members and students to overcome the incidental restrictions on individual liberty or equal protection. (There is an interesting discussion of standard of review, however. Although the court joins many in finding that *Lawrence* is not a "fundamental rights" decision, it does suggest that in the context of equal protection, there may be some heightened scrutiny involved when sexual activity is at issue.) However, all was not lost for Clinkenbeard, whose appeal prevailed on the showing that he was convicted in violation of evidentiary rules. Both he and the "victim" denied that there was actual sexual intercourse between them, and the only evidence of guilt offered, once all the testimony was analyzed, was hearsay evidence admitted in the form of impeachment. (Third parties testified that the "victim" told them there had been sex, and this was used to impeach her own testimony.) The court concluded that without the impeachment testimony, there was insufficient direct evidence of guilt on the record to sustain the conviction. Furthermore, said the court, "A defendant whose conviction is reversed due to insufficient evidence cannot be retried. Therefore, we reverse Mr. Clinkenbeard's conviction with prejudice." A.S.L.

Legislative Notes

Referenda — On November 8, Texas voters overwhelmingly approved a state constitutional amendment that bans same-sex marriages and goes further in language sufficiently ambiguous that litigation will be necessary to sort out its meaning. About three-quarters of the voters supported the amendment. Texas is the 19th state to adopt a constitutional amendment addressing the marriage topic. By contrast, on the same day Maine voters rejected, by a comfortable margin, a proposal to repeal a recently-enacted law banning discrimination on the basis of sexual orientation or gender identity. This was the third time an attempt by the legislature to ban sexual orientation discrimination had been put to Maine voters, but it was the first time the measure survived the vote. What was particularly interesting was that the addition of gender identity as part of the non-discrimination package did not appear to have adversely affected the outcome of the vote. We believe this may be the first time that a ban on gender identity discrimination has been put to a state-wide vote. The legislation's effect had been stayed pending the vote, so now it is free to go into effect, with the result that all of New England has now embraced a policy of banning sexual orientation discrimination. Now human rights activists can take the next steps in remaining New England states to propose adding gender identity to their civil rights laws.

Hennepin County, Minnesota — The Hennepin County Board voted on Nov. 1 to expand eligibility for long-term care and life insurance to include domestic partners of county employees. Dependent benefits are optional and paid for by the employee, so the main point is eligibility to participate at group rates.

Mercer County, New Jersey — The Mercer County freeholders voted unanimously to extend health and pension benefits to same-sex partners of county employees during November, according to a Nov. 29 report in the *Daily Princetonian*, which also reported that the student government organization at Princeton was debating whether to file a brief supporting the same-sex marriage case pending before the New Jersey Supreme Court, *Lewis v. Harris*. Some who support same-sex marriage nonetheless argued that the student government should focus on campus issues and not take a position on a politically divisive controversy. Mercer County employees who want to take advantage of the benefits plan need to undergo the registration process for domestic partners established by the state legislature last year. A.S.L.

Law & Society Notes

2005 Off-Year Election Results — The Lesbian and Gay Victory Fund reported several successful election results by openly-gay candidates during off-year general elections in November. In Ohio, Mary Jo Hudson retained her seat on the Columbus city council. Joe Santiago was elected to the Cleveland City Council, Nickie Antonio won a race for a Lakewood, OH, City Council seat, and Joe Lacey won a seat on the Dayton, OH, school board. In Pennsylvania, Dan Miller won a seat on the Harrisburg City Council. In Texas, Sue Lovell advances to a run-off vote in December for a seat on the Houston City Council. These were among the most notable of numerous wins, which can bee found detailed on the Victory Fund's website, victoryfund.org.

Arizona — The only openly-gay Republican member of the U.S. Congress has announced his retirement. Rep. Jim Kolbe of Arizona announced that he will not seek a 12th term in the House of Representatives, stating he wants to find "new avenues of service" and spend more time in Arizona. Apart from his belated emergence as a gay rights supporter, after defensively "coming out" before rumors of his sexual orientation were published in the gay press, Kolbe was best known in Congress as a strong proponent of free trade agreements. He was re-elected in 2004 with 61 percent of the vote in his Tucson-area district. *Albany Times Union*, Nov. 24.

California — Having been rebuffed by the voters on his numerous ballot proposals and suffered very low public approval ratings, Governor Arnold Schwarzenegger has apparently decided to follow the trail blazed by his wife, Maria Shriver, and hire an openly gay Democrat to be his chief of staff. *Mrs.* Schwarzenegger had hired Daniel Zingale, a veteran of both gay rights movement positions and executive positions in California state government under the governor's predecessor, Gray Davis, to be her chief of staff several months ago. Now, the governor has designated Susan P. Kennedy, an openly-lesbian Democrat with ties to the former Davis administration at the highest level (as Cabinet secretary) to be his chief of staff. Schwarzenegger asserted that Kennedy had in fact supported all of his ballot initiatives and had agreed that she could do the job of implementing his policy decisions. Conservative Republicans in the state cried foul, and there were warnings that confidential political conversations that would normally include the governor's top aides would not be held because of Kennedy's liberal, Democratic ties. (She is reputedly pro-choice on abortion as well as being

supportive of same-sex marriage.) It will be interesting to watch this situation develop, as openly gay politicos run the offices of the Republican governor and his "first lady." *LA Times*, Nov. 30.

Florida — Trustees of the University of Florida at Gainesville voted 12–1 on Dec. 2 to adopt a domestic partnership benefits plan for employees. The dissenter, a major donor to the university, predicted there would be sharp alumni protest if trustees tapped the University's financial resources to pay for the benefits, which will be available for all unmarried partners, not just same-sex partners. Given the famous homophobia of the Republican-controlled legislature, there could be retaliation in public funding. (The action makes the university the only one in Florida providing such benefits.) *New York Blade News*, Dec. 2.

Georgia — Mercer University, which has longstanding ties with the Georgia Baptist Convention, learned that the Convention had voted to sever ties with the University. The Convention was upset that Mercer tolerates gay and lesbian members of its community. Trying to stem the loss of affiliation, the school's Triangle Symposium, a gay support group, announced that it would disband. The college had received about $2.4 million in financial assistance from the Baptist Convention in recent years. In response to an inquiry from the Baptist Press, the university's president had said that the gay support group did not have official university sponsorship but had a right to exist on campus. This evidently was too tolerant for the Convention's leadership, which seems allied in interest with the Iranian government (see below) in its attitude towards sexual minorities.

Indiana — Indianapolis — On November 4, Indianapolis Mayor Bart Peterson replaced a former executive order banning sexual orientation discrimination with a new order covering both sexual orientation and gender identity. Peterson said the change was to bring city policy in line with state policy adopted by Governor Joe Kernan and kept in place by the new Republican Governor, Mitch Daniels. Peterson said he wanted the city's policy to be more expansive as debate continued on a proposal to extend the protection against discrimination into the private sector by a proposed ordinance. The ordinance was defeated in April but is expected to be brought back again if some additional council members will announce their support. *Indystar.com*, Nov. 8. The full text of the order is available on the Mayor's website.

New Hampshire — On Dec. 1, the special commission established to explore the issue of legal recognition for same-sex partners released its report to the legislature. The full text is available on-line. The conservative majority absolutely rejected the contention that recognition of same-sex partners is a civil rights issue because, they concluded, sexual orientation is a matter of choice, not a genetic predisposition. (How they know this with such certainty is unknown, especially since much accumulated scientific evidence points in the opposite direction.) Evidently choice in such matters does not strike the majority as worthy of protection from majority preferences. In any event, the report suggested that if New Hampshire wants to avoid having same-sex marriage imposed upon it through the notoriously radical judiciary, they had better adopt a state constitutional amendment defining marriage traditionally. The majority did concede that it might be appropriate for the legislature to authorize some isolated rights for same-sex couples. A minority report takes a contrasting view. *Associated Press* reports from Nov. 23 and Dec. 1.

Georgetown University Benefits Policy — In a rare move among Roman Catholic educational institutions, Georgetown University has announced the adoption of a domestic partnership benefits policy for partners of faculty and staff, effective January 1. To avoid using existing politically charged terminology, the President's Executive Council invented a new term, "legally domiciled adults." Employees eligible for benefits may choose a coverage plan for themselves and either a spouse of an LDA, who must be either someone "with whom the person has a close personal relationship and is financially interdependent, or a dependent blood relative such as an elderly parent or grown child." The LDA must live with the employee and not be eligible for group health coverage through other means. *InsideHigherEd.com*, Nov. 8. A.S.L.

Professional Notes

The *St. Louis Post Dispatch* reported on Nov. 16 about the formation of Lawyers for Equality, a new gay lawyers association in that city. Jason Hall, president of the group, announced that its incorporation had been approved and it was awaiting a tax status determination from the Internal Revenue Service. Hall is an associate in the St. Louis office of the national law firm, Bryan Cave LLP. He was praised by the firm's director of professional resources, based in the New York office, for taking a leadership role in getting the local gay lawyers organized in St. Louis. "Diversity is one of our firm's core values," said Betsy Bousquette. The article quoted D'Arcy Kemnitz, executive director of the National Lesbian & Gay Law Association, to the effect that NLGLA now has twenty local affiliates and that at least a dozen new gay legal associations, including the St. Louis group, are in process of formation. In a side-bar to the article, the newspaper reported data gathered by the National Association for Law Placement, based on demographic data reported by law firms, that openly gay, lesbian, bisexual and transsexual lawyers account for about one percent of the lawyers and summer associates reported by law firms and legal offices for NALP's 2004–5 Directory of Legal Employers, but reporting is considered to be very incomplete. Two-thirds of the firms reporting having at least one openly LGBT lawyer were located in one of four cities: New York, Washington, Los Angeles and San Francisco. The data also showed that openly gay lawyers were more often reported by large than small firms.

The Miami *Express Gay News* reported on Nov. 4 that the National Gay & Lesbian Task Force has honored Miami attorney Richard C. Milstein with its 2005 Humanitarian Award for outstanding contributions to the LGBT community of southern Florida. Milstein, a New York native, and his partner, Eric Hankin, are noted as philanthropists and volunteers in the community. Milstein has served on the Dade Cultural Affairs Council and has been chair of the Gay Cultural Alliance, and has been helpful with pro bono assistance to many of the areas non-profit organizations. A.S.L.

International Notes

Roman Catholic Church — After considerable media discussion of leaked drafts, the Vatican finally released the official policy statement of the Roman Catholic Church on November 29, announcing Church policy concerning homosexuality and admission to seminaries for candidates to the priesthood. (Despite many careless headlines, the Vatican statement does not directly address the issue of incumbent priests.) According to the text, the Church will not admit to a seminary or ordain "those who practice homosexuality, present deep-seated homosexual tendencies or support the so-called 'gay culture.'" On its face, this would seem to rule out anybody whose sexual orientation, as such, is homosexual or bisexual in nature, despite any commitment to celibacy, by its reference to "deep-seated homosexual tendencies." Certainly, anybody who self-identifies as "gay" would be excluded by the last part of the formulation. The document goes on to say that candidates who have experienced "homosexual tendencies" that were "transitory" could be ordained, provided that they had "overcome" such "tendencies" at least three years prior to ordination. It is unclear what to make of this, in terms of figuring out the beliefs about human sexuality underlying it. Some comments by Church officials suggest an acceptance by some church leaders of the proposition that sexual orientation is a non-voluntary phenomenon, deeply rooted in personal identity with perhaps a genetic and/or biological basis; if so, one wonders how a person is to "overcome" such "tendencies" short of some sort of "therapy," although there is considerable controversy over whether any therapy exists that can reliably change an individual's sexual orientation. This may reflect a view that sexual orientation is

something more fluid that can evolve during a person's life, and that such evolution can be helped along in some way not described. Perhaps it suggests a "don't ask don't tell" policy under which celibate gays can be priests so long as they conform their conduct to avoid letting anybody else know of their sexual orientation, but that seems unlikely, since the context for issuing this statement was an attempt, according to some, to root out a "gay culture" that is prevalent at some seminaries, where estimates run that half or more of all candidates (and currently serving priests) may have a homosexual orientation. Some were predicting that this policy would exacerbate the existing shortage of priests so long as the Church continues to insist on celibacy; others insisted that the policy statement was really nothing new, although it might lead to stricter enforcement of existing policies. Only time will tell, of course. Cardinal Zenon Grocholewski, head of the Congregation for Catholic Education, the department that formally issued the document, insisted that the policy was pragmatically concerned with job qualifications. "It's not discrimination, for example," he said, "if one does not admit a person who suffers from vertigo to a school for astronauts." This assumes, of course, that somebody with a homosexual orientation is incapable of providing acceptable service as a priest and abiding by the same celibacy oath taken by heterosexual priests, due to something about the nature of homosexuality as compared to heterosexuality. If that assumption is correct, then perhaps there is some objective justification for the policy, which was suggested by data (admittedly incomplete) about the proportion of victims of sexual abuse by priests who are male. But reasoning from such data is tricky, as long as nobody how many gay priests there are. (Compiled from various news sources, including the Nov. 30 issues of the *New York Times*, *San Francisco Chronicle* and *Washington Post*.) Cardinl Grocholewski's letter transmitting the official statement also suggested that it would be logical as well to disqualify homosexual priests from serving on the staff of seminaries, which set off a successive round of discussion about whether the Vatican was out to rid the church of incumbent homosexual priests as well.

Australia — The government of Australia's Capitol Territory (ACT) announced it would propose a civil union act for residents of the territory, according to a Dec. 3 report in 365Gay.com. But the Federal Senate overwhelmingly rejected an attempt by Green Party Senator Kerry Nettle to get approval of a resolution congratulating television news personality Geoff Field on his "wedding" with Jason Kerr. The resolution would also have called on the Federal Government to end "unfairness" against same sex couples. *Courier Mail*, Dec. 1.

Belgium — The Belgian Chamber of Representatives, the lower house of the Parliament, voted on Dec. 1 to grant same-sex couples equal rights in adoption. The legislators voted 77–62 in favor of the bill, which goes to the Senate for final approval, where the vote is expected to take place in March. *Advocate.com*, Dec. 2. Same-sex couples are already entitled to marry in Belgium, but are not yet authorized to adopt children jointly. (The Netherlands similarly adopted same-sex marriage without extending adoption rights, and then took the additional step shortly after the marriage law went into effect.)

Canada — The Labor government was defeated in a confidence vote on Nov. 28. Prime Minister Paul Martin scheduled new national elections for Jan. 23. Stephen Harper, leader of the Conservatives, announced that if the Conservatives head the next government, they will propose a new vote in Parliament on the issue of whether to repeal the recently enacted law authorizing same-sex marriages throughout Canada. Since the law had passed by a comfortable margin with support from Labor, NDP, Bloc Quebecois and even some Conservative members, few thought that such a vote would lead to repeal, but the Labor leaders had exerted party discipline over cabinet members on the vote, and Harper contended that in free vote the Parliament might want to reconsider. This led to editorial condemnation throughout Canada, in light of evidence that there had been no discernible social disruption as a result of the same-sex marriage law going into effect in the handful of provinces where marriage had not already been opened up through judicial decisions. (Before the statute passed, more than three-quarters of the population were already residing in provinces where same-sex couples could marry.) Perhaps the most interesting recent development, the election of openly-gay Andre Boisclair as leader of the Bloc Quebecois, sets up an interesting battle for the Parliamentary seats in Quebec, especially in light of his call for a new independence vote in the province.

Canada — British Columbia Human Rights Tribunal — The Tribunal ruled in *Smith v. Knights of Columbus*, 2005 BHRT 544 (Nov. 29, 2005), that the Knights of Columbus in Port Coquitlam violated the human rights of complainants Deborah Chymyshyn and Tracey Smith, who had rented the Knights hall, usually used for bingo games, to hold their same-sex wedding celebration only to have the rental cancelled when the Knights realized it was for a same-sex ceremony. The Knights claimed that as a Catholic organization it had a free exercise of religion right to refuse to allow same-sex weddings in the hall. Maybe so, said the Tribunal, but exercising the right by cancelling the event after accepting a deposit and making no effort to find an alternative suitable space for the renters was a violation of human dignity. The two women are awarded $1,000 each in compensation for the injury to their human rights, as well as reimbursement for out-of-pocket expenses incurred by the cancellation. *CTV.ca*, Nov. 23. Local gay rights activists accused the Commission of cowardice for not finding the discrimination unlawful outright, and for making a puny damage award for an insult to dignity. The issue was politically charged, because this case had been held up by Conservatives as an example of how allowing same-sex marriage would result in oppression of religious believers.

Canada — The Ontario Human Rights Commission issued an interim ruling finding that the province had discriminated against three transsexual complainants by refusing to cover the costs of their sex reassignment surgery. The province had been covering such operations, but dropped sex reassignment from the approve list on Oct. 1, 1998, at a time when the three complainants were patients at the only clinic in Ontario, a Gender Identity Clinic in Toronto, that had an arrangement with the Ontario Health Insurance Plan to perform such procedures. At present, Ontario is the only Canadian province that has refused to cover these procedures under its public health insurance plan. The Commission has found that this constitutes disability discrimination. The complainants were identified as A.B., Martine Stonehouse, and Michelle Hogan. *Kitchener Record*, Nov. 14.

Iran — The *Independent* (UK) reported on Nov. 15 that two men accused of engaging in homosexual relations were hanged in Shahid Bahonar Square in the city of Gorgan. They were identified in news reports as Mokhtar N.and Ali A. News reports said both men had criminal records, but that it was made clear that the crime for which they were executed was "lavat," engaging in a homosexual relationship.

Irish Republic — The High Court will reconsider the case of Dr. Lydia Foy, a transsexual dentist who has demanded that she be issued a new birth certificate showing her desired sex. The Supreme Court decided that the High Court (trial court of general jurisdiction) should have the first crack at considering whether Ireland's ratification of the European Convention on Human Rights would require taking the requested action. *Irish Times*, Nov. 9.

Israel — The Be'er Sheva Family Court ruled on Nov. 15 that a lesbian woman can adopt her partner's child, who was conceived through donor insemination. Judge Pinhas Asulin reportedly based the judgment on testimony that two women functioned as a family unit, ruling that responsibility for the child should be shared by both parents because "they're a family without a doubt." The local ruling followed on a High

Court of Justice decision from last January. *Ynetnews, Israel*, Nov. 16.

Jamaica — The *New York Times* commented editorially on Nov. 30 about suggestions by Jamaican Health Minister John Junor and Deputy Education Minister Donald Rhodd that the nation should reconsider its sodomy laws, which are serving as obstacles to combating a local HIV epidemic. Human Rights Watch had previously issued a report on anti-gay bigotry in Jamaica that chillingly documented abuses in the law enforcement and medical systems.

Latvia — 73 members of the 100–person national legislature voted in favor of a change in the Latvian constitution that would define marriage as being between a man and a woman on December 1. Although a statute already prohibits same-sex marriage, opponents of letting gay couples marry were concerned that this could be changed by a simple legislative majority. Passage of the amendment followed controversy about a gay pride march that had been held in Riga, at first with government approval. Ultimately, religious leaders teamed up with the Prime Minister to support the proposed amendment. *UK Gay News*, Dec. 1.

Nigeria — The establishment of Sharia — Islamic Law — in Katsina Province, Nigeria, may have bitter consequences for sexual minorities there. A news report on-line indicated that two men alleged to be gay face a possible death penalty by stoning, having been charged by police with having engaged in sexual activity in a public toilet near the court in Katsina metropolis. They deny having engaged in sex and asked to be allowed to swear to this on the Koran. Since there is no direct evidence against them by an eye-witness, they may still be able to prevail, but it is up to the Sharia Court to decide. A decision was to be announced on Dec. 6.

Poland — There has been considerable unrest around gay issues in Poland recently, especially since the election of a new right-wing national government. After the city of Poznan banned the holding of a gay equality march in November, there were demonstrations in several cities, including a gathering of more than a thousand in Warsaw. The demonstrators were protesting, among other things, the arrest of persons who defied the ban in Poznan and marched anyway.

Sweden — Sweden's Supreme Court ruled on Nov. 29 that a trial court was wrong to convict Rev. Ake Green on charges of inciting hatred, based on a sermon the Rev. Green preached in 2003 labeling homosexuality as "a cancerous tumor" on society responsible for the spread of AIDS. According to a news report by way of South Africa, the court affirmed a ruling by ruling by an intermediate appellate court that affirmed the right of a minister to preach religious views, even if they were offensive to others, thus vacating a conviction and one-month prison sentence that had been imposed by a trial court. ••• Earlier in November, Archbishop K. G. Hammar, leader of the Lutheran Church in Sweden, announced that same-sex couples can have their partnerships blessed in the church, as the church's General Synod has approved a formal act of blessing during religious services for same-sex couples. Although a significant number of ministers have dissented, Archbishop Hammar said that having the blessing performed is entitlement of church minister, so if all the local pastors at a particular church object, a pastor from outside the church will have to be provided to perform the blessing there. *Radio Sweden*, Nov. 16.

United Arab Emirates — Responding to news reports that a dozen same-sex couples had been arrested at a social event described in the press as a gay wedding, and a statement by the Interior Ministry of the United Arab Emirates (a staunch U.S. military ally) that the men could be subjected to forced hormonal and psychological treatment to "cure" their alleged homosexuality, the U.S. Department of State issued a statement on Nov. 28, as follows: "The United States condemns the arrest of a dozen same-sex couples in the United Arab Emirates and a statement by the Interior Ministry spokesman that they will be subjected to government-ordered hormone and psychological treatment. The arrest of these individuals is part of a string of recent group arrests of homosexuals in the UAE. We call on the government of the United Arab Emirates to immediately stop any ordered hormone and psychological treatment and to comply with the standards of international law." [Distributed by the Bureau of International Information Programs, U.S. Department of State — usinfo.state.gov.]

United Kingdom — The Civil Partnership Act takes effect on December 5, and the first mainstream religious community to announce that it will perform same-sex marriage services for civil partners was Liberal Judaism, the British equivalent to the Reform Movement among U.S. Jews. Rabbi Alexandra Wright, senior rabbi at the Liberal Jewish Synagogue in London, announced whe would offer a new liturgy for anybody seeking to have a same-sex wedding in the synagogue. Rabbi Danny Rich, chief executive of Liberal Judaism, told the press: "We are not worried it will be controversial although we expect it may be. It is a matter of justice for us." *Times Online*, UK, Nov. 25. ••• Lady Hale, a member of the Law Committee in the House of Lords (and the only woman so far to hold that position), commenting on the Civil Partnership Act going into effect, stated that it would allow "a status which is marriage in almost all but name. Not all homosexuals are equally thrilled by this. If people want both the privileges and the responsibilities of marriage, I do not see why we should deny it to them." Lady Hale was delivering the 29th F.A. Mann lecture sponsored by the law firm Herbert Smith, and went on to elaborate her support for opening up marriage equally to same-sex couples and others, including single people who brought up children for other people. *News Telegraph*, Nov. 9.

United Kingdom — Sir Mark Potter, president of the High Court Family Division, will preside over a hearing of the petition by Celia Kitzinger and Sue Wilson seeking formal recognition in Britain of the marriage they contracted in Vancouver, British Columbia (Canada). The women were married in 2003. They assert that Britain's refusal to recognize their marriage violates Article 8 of the European Convention on Human rights, which requires respect for a person's private and family life, as well Article 12, which provides that "men and women of marriageable age have the right to marry," which they argue must be considered in connection with Article 14, which forbids sex discrimination. While acknowledging that during December it will become possible for same-sex couples in the U.K. to contract civil unions carrying almost all of the rights and responsibilities of marriage under British law, the women nonetheless assert that they should be entitled to recognition of their lawfully-contracted Canadian marriage. In a news release, they stated: "Civil partnerships are an important step forward for same-sex couples, but they are not enough. We want full equality in marriage." *Telegraph*, Nov. 29.

United Kingdom — The Human Fertilisation and Embryology Authority has ruled that fertility clinics may not discriminate against "non-traditional families" in the provision of fertility services. The government is preparing appropriate legislation to embody the non-discrimination principal in law. The Authority has also recommended a government crackdown on exploitive fees charged by some clinics. The Authority warned that refusing to provide assistance to lesbians seeking to become pregnant would conflict with the new Civil Partnership Act. The Authority stated: "There is no evidence to suggest that children face a risk of serious harm solely because they are raised in non-traditional family environments." *Evening Standard*, Nov. 24.

United Kingdom — An employment tribunal in Exeter awarded 25,000 pounds in damages to Marlene Davidson, a transsexual who was forced from her job by managers at Flybe, an airline company, after commencing her sex-change procedures. She was passed over for promotion five times despite good qualifications, and was forced to resign in 2003. The tribunal chairman criticised Flybe for failing to give Davidson sufficient support in the face of harassment. The company's personnel manager said that he had been "dumbfounded" to learn that Malcolm Davidson was undergoing a sex-change procedure. *Times*, Nov. 10. A.S.L.

AIDS & RELATED LEGAL NOTES

5th Circuit Reverses Downward Sentencing Departure for HIV+ Defendant

A unanimous panel of the U.S. Court of Appeals for the 5th Circuit reversed a decision by a federal district judge in Texas, who had ordered a significant downward departure from sentencing guidelines for an HIV+ defendant convicted of a drug offense. *U.S. v. Castillo*, 2005 WL 2885509 (Nov. 3, 2005). The opinion for the court by Chief Judge King reveals a rather dramatic confrontation between the prosecutor and the trial judge during the sentencing hearing that may have arisen from a misunderstanding on the part of one or both of the protagonists about the situation concerning information about the defendant's HIV status.

The defendant was apprehended by police while transporting heroin, and ultimately pled guilty in February 2003, while the mandatory sentencing guidelines were in effect, to an indictment on charges of conspiracy to distribute and aiding and abetting possession with intent to distribute one kilogram or more of heroin. There was no plea agreement and a sentencing hearing was to take place before the federal district judge. Defendant Castillo sought a postponement for preparation of a motion for a downward departure, which was granted. Calculations under the sentencing guidelines would have yielded a sentence in the range of 87–108 months. Castillo submitted under seal the information that he was HIV+ and had various physical ailments (as to which it was unclear whether they were related to his HIV status) and sought downward departure on two grounds: his HIV status, and his purported cooperation with law enforcement after he was apprehended.

At the sentencing hearing, the prosecutor opposed a downward departure on grounds of cooperation, arguing that Castillo had not provided anything of value to law enforcement. Turning to the health grounds, Castillo's lawyer and the judge discussed the motion for downward departure in general terms to avoid revealing in open court that Castillo was HIV+.

The prosecutor, who had just received this information shortly before the hearing and may not have realized that it was submitted under seal, responded to the argument by discussing the approach of other circuits to HIV-related cases. As soon as he started talking about HIV and AIDS, the judge cut him off and reacted angrily, charging the prosecutor with violating confidentiality rules and "maliciously" seeking to endanger Castillo, since other defendants (and potential residents of the same prison to which he would be sent) were present in the courtroom for their proceedings after this hearing. Despite attempts by the prosecutor to apologize and indicate his confusion (partly due to his past prosecutorial experiences in which the HIV-status of defendants was openly discussed in court), the judge remained angry, and ultimately ordered a substantial downward departure on two grounds: Castillo's HIV status, and the potential danger to him from extended incarceration in the system as the confidentiality of his HIV+ status had been "maliciously" breached by the prosecutor. When asked if he objected to the downward departure, the prosecutor made no objection, evidently considering it futile in light of the trial judge's continuing anger.

Castillo and the government both appealed the sentence. Castillo thought he should have gotten some downward departure for cooperation, but there was nothing on the record to support his claim. The government argued that the downward departure related to Castillo's HIV status was erroneous, and the court of appeals agreed.

For one thing, and in common with other federal circuits who have ruled on the question, being HIV+ is not by itself seen as a basis for downward departure in the absence of serious medical complications to the point of incapacitation or at least "full blown AIDS" according to the CDCP definition. It was clear from the record that Castillo did not appear to have such serious complications, and there was no indication that he had "full-blown AIDS."

For another, wrote Judge King, the record did not support the trial court's conclusion that the prosecutor acted maliciously in disclosing Castillo's HIV status during the sentencing hearing. The government argued in its appeal brief that, according to King's summary, "the public disclosure of Castillo's HIV-positive status would make him *less* likely to be the victim of a physical attack in prison because other inmates would want to avoid possible exposure to his bodily fluids. Regardless of whether the government's argument is correct, the fact remains that the record contains not a shred of evidence suggesting that the disclosure of Castillo's HIV-positive status would endanger his safety, and the district court never explained how it knew that the prosecutor's comments would lead to such danger. The district court also did not order the Bureau of Prisons to take any special security precuations with respect to Castillo's incarceration, which suggests that it was not overly concerned about his safety. Accordingly, because the district court's factual finding that the prosecutor endangered Castillo leaves us with a definite and firm conviction that a mistake has been made, it is clearly erroneous."

The court also indicated that there was nothing in the rules and procedures of the court that mandated excluding from discussion before the sentencing judge the details of the defendant's medical condition. King pointed out that if the trial judge was concerned about this, she could have held the sentencing hearing *in camera*. The court vacated the sentence and remanded for a new sentencing proceeding.

Unfortunately, the court of appeals' discussion of this issue failed to take into account the reasons why an HIV+ inmate might want to keep his condition confidential within the confines of a federal prison. The trial judge's instinctive reaction to the disclosure was that this would create a danger of physical attack, which the government disputed on appeal. But one suspects physical attack is not necessarily the main worry of an HIV+ prisoner; instead, shunning, isolation, and exclusion from normal prison activities might be high on his list of concerns. But none of this was discussed, because the trial judge never articulated these grounds, and the lack of discussion suggests that they were not discussed in the appellate briefs, either. A.S.L.

Maryland Appeals Court Revives HIV+ Father's Fight for Custody

The issue before the Maryland Court of Special Appeals in *B.G. v. M.R.*, 2005 WL 2979067 (Nov. 7, 2005), was whether a trial court properly granted custody of three children to their maternal grandmother, rather than to their HIV+ father, where there was no finding that the father was unfit to have custody. After a close ready of the findings of fact by the trial court, and with the benefit of a recent Maryland Court of Appeals decision requiring a finding that a natural parent was unfit before a determination can be made transferring custody to a third party, the court in this case reversed the trial court in a decision by Judge Mary Ellen Barbera, and remanded the matter for the trial court for reconsideration in light of the changed standard.

Initially, physical custody of the three children (now ages 10, 12 and 13) was alternated between the parents each week, after a 2000 divorce. The grandmother played an active role in raising them. The father took seriously ill, however, with infections which were later determined to be HIV-related. For a period of time in 2003, he was not in contact with the children, as he tended to his own health needs.

The mother then sought to obtain exclusive custody, and the father initially agreed to a consent decree to this effect, but later changed his mind and refused to sign the decree. Then the mother was murdered by her sister-in-law while residing in her brother's home before the custody matter could be resolved. The children

were at home at the time of the murder. The grandmother took physical custody of the children in the aftermath of the murder (the father not then being situated to do so), and sought sole legal custody of the children almost immediately.

The father, meanwhile, had recovered significantly, and found a living space with appropriate sleeping accommodations for the children. He opposed the grandmother's petition.

The trial judge made detailed findings of fact. The court specifically ruled that the father was *not* unfit to have custody of his children, giving "great weight" to an affidavit from the father's doctor that "it is her opinion that [father]'s HIV infection should not at this time have any medical effect on his ability to take care of his children." Nevertheless, the trial judge found "exceptional circumstances" warranting the grant of custody to the grandmother, sufficient to warrant the normal rebuttable presumption that a legal parent should have custody of her/his children. The trial judge enumerated numerous factors favoring granting custody to each party, and noted that the children had a close and positive relationship with both parties. Ultimately, the trial court that it was in the best interests of the children to grant custody to the grandmother.

The ground rules changed due to the issuance of *McDermott v. Dougherty*, 385 Md. 320 (Md. 2005), during the pendency of the appeal. Under *McDermott*, the "best interests" test may not be applied in determining custody for a third party applicant unless there is first a finding that the natural parent is unfit, or that "the natural parents by their conduct have waived or lost their 'constitutional protections,' or there is a finding of extraordinary, exceptional, or compelling circumstances that require the court to remove the child from the natural parents in order to protect the child from harm." *McDermott* emphasized this, continuing: "In only that context, then, after such preliminary findings are proved, may the custody of the child be based on a 'best interest' standard."

The court in this case found that this standard had not been met. The trial decision was vacated, and the matter was remanded to the trial court for a determination in light of *McDermott* and the instant decision. Costs of appeal were to be paid by the grandmother. *Steven Kolodny*

Pro Se Complainant Largely Survives Dismissal Motions in HIV Discrimination Case

Richard Earl Ruberg's HIV discrimination complaint survived enough of the dismissal motions in a Nov. 28 ruling to allow his case to proceed in *Ruberg v. Outdoor World Corporation*, 2005 WL 3159070 (M.D. Pa., Jones, J.).

Ruberg, a gay man, was hired to be general manager of Outdoor World at Timothy Lake, a resort, in February 2001. He alleges that beginning in Oct. 2003 his immediate supervisor, who had figured out that he was gay, continually criticized Ruberg for being gay and "implored him 'to be normal,'" according to Judge Jones's summary of the evidence. Ruberg alleges that his supervisor's comments caused him to feel "sacred, humiliated, embarrassed, denigrated, insulted and otherwise uncomfortable" and prevented him from performing his job without feeling discriminated against. Then in Dec. 2003 he was diagnosed HIV+, which he did not immediately disclose to his employer. He received a satisfactory annual review in Feb. 2004. When he needed medical treatment in July 2004 that necessitated reducing his hours, he disclosed this information with a doctor's note to the Human Resources director, who asked that the doctor complete a more detailed form. Although Ruberg asked the HR director to keep this confidential, she shared the information with his supervisor and the vice-president of the company. Not long thereafter, they found a pretext to fire him with a spurious charge of misconduct, according to his complaint.

Ruberg filed a pro se complaint with the Pennsylvania Human Relations Commission in Oct. 2004, claiming disability discrimination. When nothing happened with his charge, he filed a federal Title VII, ADA and Pennsylvania HRA complaint on August 1, 2005. Only in September did he receive a letter from the Commission dismissing his complaint. The federal suit named several individuals as well as the company as defendants. Motions to dismiss were filed by all defendants.

Judge Jones found that Title VII had nothing to do with the case, but that various exhaustion and procedural defenses were unavailing on the ADA and PHRA claims, although complaints against individual named defendants had to be dismissed since only the corporate employer could be held liable under these statutes. The opinion illustrates some of the perils of proceeding pro se in civil rights litigation, since some of the claims were obviously barred, and Title VII, as the court pointed out, has nothing to do with Ruberg's case. A.S.L.

AIDS Litigation Notes

District of Columbia — The D.C. Court of Appeals reversed a conviction of an HIV+ defendant for willfully failing to appear in court on a scheduled date in a case where it found that the prosecutor had mischaracterized the defendant's testimony on why he was not in court and the trial judge had wrongfully refused the defense attorney's request for a curative instruction. *Fearwell v. U.S.*, 2005 WL 3005741 (Nov. 10, 2005). Steven Fearwell was arrested on an assault charge, then released on condition that he return for a status hearing on a specified date. Fearwell did not show up on the specified date, and a bench warrant was issued for his arrest. Both Fearwell and his girlfriend, who lived with him, testified that he was too sick on that date to come to court, even though he appreciated that he had a duty to do so. Ironically, at his trial on the merits he was acquitted on the assault charge and convicted on the charge of willfully failing to show up for his status hearing, for which he was sentenced to 18 months. Under cross-examination, he rejected the prosecutor's suggestion that he "chose" not to come to court, firmly asserting that he was unable to come to court due to incapacitating illness on that date. The defense attorney asked the judge to instruct the jury that if it believed Fearwell's testimony it should find his absence was not willful, but the judge refused and gave a more generalized charge. When the prosecutor argued to the jury that Fearwell had testified that he chose not to come to court that day, the defense promptly moved for a curative instruction, but the trial judge said "I don't think the government unfairly mischaracterized the evidence" and refused to give such a charge. The court of appeals found this to be prejudicial and unfair to Fearwell, reversed the conviction, and remanded for a new trial on the bail-jumping charge.

Michigan — U.S. District Judge Omeara held that an HIV+ prisoner who was placed in administrative segregation after being found guilty of unspecified sexual misconduct in prison was not deprived of any constitutional rights. *Wilson v. Zader*, 2005 WL 3008593 (E.D. Mich., Nov. 9, 2005). David Wilson was placed in administrative segregation within the Southern Michigan Correctional Facility in Jackson, MI, from the date he was found guilty of sexual misconduct in prison on June 20, 1997, until his release from prison on September 1, 2000. He was "reincarcerated" on January 6, 2005, for reasons not specified in the court's opinion, and was promptly placed in administrative segregation against, leading to this pro se civil rights complaint. The court rejected that placement in administrative segregation violated Wilson's rights to due process, equal protection, or constituted cruel or unusual punishment. Relevant 6th Circuit case law was cited for the proposition that administrative segregation is not an "atypical and significant hardship" for an inmate. Wilson argued that because he would be ineligible for parole as long as he was held in administrative segregation, it was in effect a lengthening of the time he would have to serve, but the court dismissed this as a mere "collateral consequence" of being placed in administrative segregation, not rising to the level of a due process issue. Wilson's equal protection argument relied on his content that other inmates conducted of more serious misconduct were not put into administrative segregation. Judge Omeara, who perhaps was not

paying attention in law school, wrote that an equal protection claims requires a showing that the plaintiff is a member of a "protected class," and since Wilson is not a member of a "protected class," he cannot make an equal protection claim. Authority cited for this proposition, without explanation, is *McClesky v. Kemp*, 481 U.S. 279 (1987). Finally, Judge Omeara opined that being placed in administrative segregation does not deprive a prisoner of "the minimal civilized measure of life's necessities," citing *Rhodes v. Chapman*, 425 U.S. 337 (1981), and thus raised no 8th Amendment issues.

New York — The *NY Law Journal* reported on Nov. 22 that a settlement had been reached in an investigation by the New York State Law Department into the operations of Praxis Housing Initiative, a non-profit organization based in Manhattan chartered to provide housing for homeless people with HIV/AIDS. Under the settlement, three officials of the agency will pay $790,000 back to Praxis as a return of funds they allegedly used to build their own real estate portfolios in the guise of acquiring housing stock for use by the program.

Pennsylvania — District Judge Kosik denied a habeas corpus petition by an HIV+ state prisoner in *Tull v. Vaughn*, 2005 WL 3018742 (M.D. Pa., Nov. 10, 2005). Mark Tull, who was convicted of terroristic threats, reckless endangerment and disorderly conduct, was known by police officers to be HIV+ when he was apprehended in a drunk and disorderly condition. According to the court's description of the evidence, Tull was uncooperative with the police officers, spat at them, and threatened them and their families with HIV infection through various kinds of assaults in an obnoxious manner. In seeking habeas pro se, he raised a variety of dubious claims, including that he had been denied equal protection because, according to him, the police were inadequately trained to deal with HIV+ suspects. In another claim, Tull asserted that failure of the police to preserve samples of his saliva for lab analysis undermined his possible defense that a low volume of HIV in his saliva made it less likely he could transmit HIV through spitting. (Of course, there is no solid evidence that HIV can be transmitted by spitting, and the officers in this case have not tested positive for HIV since the incident, but that has not stopped courts from treating such incidents as the equivalent of deadly assaults.) A.S.L.

International AIDS Notes

As World AIDS Day Ceremonies were held in many countries, the latest statistics were quite sobering. According to a fact sheet published by Gay Men's Health Crisis in New York: At the end of 2005, an estimated 40.3 million people worldwide are living with HIV infection, among them about 10 million young people age 15–24. UNAIDS reports that almost 5 million people were newly infected with HIV during 2005, with young people accounting for about half of the new infections. Women account for 46% of those living with HIV worldwide, and for 57% of those living in sub-Saharan Africa. The number of deaths from AIDS-related causes during 2005 was estimated to be 3.1 million. The U.S. Centers for Disease Control and Prevention (CDCP) estimates about one million people are living with HIV infection in the U.S., of whom about one-third are unaware that they are infected. At present, the CDCP estimates that about half of all new HIV infections in the US are among persons younger than 25. The last full year for which data are available in the U.S. is 2004, during which 42,514 new cases of full-blown AIDS were reported to public health authorities. More than a quarter of those diagnosed with full-blown AIDS in the U.S. during 2004 were women, and almost half of those diagnosed were African-Americans. About half of the people living with AIDS in the U.S. reside in just four states: New York, California, Florida and Texas, and it is estimated that about half of the people in the U.S. who are living with HIV are not under the care of a physician for this condition. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

Fellowship Opportunities at the Williams Project

The Williams Project at the University of California Los Angeles Law School is accepting applications for several positions, including Education Coordinator, Sexual Orientation Law Teaching Fellow, and Sexual Orientation Public Policy Research Fellow. Those interested should promptly consult the Project's website for details: ucla.law.edu/williamsproj. Applications for the Coordinator position are due by Dec. 16.

LESBIAN & GAY & RELATED LEGAL ISSUES:

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