

Sexual Orientation and the Law Bibliography 2006

This update contains articles, books and select government documents published between January 1, 2006 and October 31, 2006.

I. General Works on Sexual Orientation and the Law

Scope: Materials incorporating a broad range of topics; Suitable for a general overview of law-related perspectives on GLB issues

Books:

Sember, Brette McWhorter. GAY & LESBIAN RIGHTS: A GUIDE FOR GLBT SINGLES, COUPLES AND FAMILIES (Naperville, IL: Sphinx Pub., 2d ed. 2006).

Targeting the layperson in need, this useful volume includes a wide variety of information helpful for the evolving circumstances of the GLBT person and family. In addition to treating the issues one would expect of such a handbook (e.g., parenting, insurance, and financial topics), specialized chapters discuss “Name and Gender Changes” and—a real sign of the times—“Ending a Domestic Partnership.” One appendix provides answers to the frequently asked questions about the rights and benefits granted in the eight states that today legally recognize same-sex relationships, while another compiles by subject a reasonably extensive list of resources available to the community. The author maintains a website—www.BretteSember.com—which lists others of her titles that may also be of interest to the GLBT reader, including *The Complete Gay Divorce*.

II. Legal Status of Lesbians and Gay Men

A. General:

SCOPE/KEYWORDS: GENERAL HISTORICAL OVERVIEWS; BROAD THEORETICAL AND PHILOSOPHICAL STATEMENTS

Articles:

Gabilondo, José. *Asking the Straight Question: How to Come to Speech in Spite of Conceptual Liquidation as a Homosexual.* 21 WIS. WOMEN'S L.J. 1-45 (2006).

Gabilondo begins this discourse-grounded piece (that many readers will find to be opaquely abstract) with an extended fantasy narrative depicting the life of “Joe,” a secretly heterosexual male trying to exist in a “homonormative world” of gay supremacy. Joe’s tale allows the author to introduce the concept of “heterosexual interpellation.” Interpellation refers generally to “the notion that systems of ideas are the medium through which a person finds one’s sense of self and comes to recognize oneself as an emotionally and politically sentient subject.” In this context, “Heterosexual ideology interpellates gays through legal disabilities and other limits on freedom,” with the result that “insult is the main vehicle for” self-recognition by gays. Gabilondo pushes

for an “‘interpellative advocacy,’ a commitment to using crushed expectations—as reconstituted through libidinal rage—to further the ‘coming to speech’ of a sexual minority outside of the heterosexual matrix.

Hanna, Fadi. *Gay Self-Identification and the Right to Political Legibility*. 2006 WIS. L. REV. 75-134 (2006).

Protection is meaningless, the author tells us, “if we are restricted from acknowledging our particular membership within” the category: “If a light-skinned person of color does not speak, she may be presumed to be white.” The paradigmatic example of such self-identifying speech is the coming out of the GLBT person. The author inventively builds upon the foundation of linguistic philosopher J.L. Austin’s three speech functions: “‘persuasive,’ in attempting to affect the thoughts or feelings of the listener; ‘creative,’ in engendering a promise, a bet, or another social contract or obligation; and ‘descriptive,’ in stating a neutral or verifiable fact.” Hanna argues that gay self-identifying speech possesses all three of Austin’s functional dimensions. Devoting sections to each, she concludes that the third, descriptive function of coming out speech, is the least explored, and offers a firmer basis for courts to protect such speech, something they have not always been willing to do (e.g., *Rowland v. Mad River Local School District* [470 U.S. 1009 (1985)]).

Koh, Harold Hongju. *Standing Together*. 15 LAW & SEXUALITY 1-9 (2006).

This short piece is the text of the author’s words of acceptance of the 2005 Allies for Justice Award, cosponsored by the National Lesbian and Gay Law Association and the American Bar Association’s Section on Individual Rights and Responsibilities. Koh wrote an amicus in *Lawrence v. Texas* [539 U.S. 558 (2003)] on behalf of the former UN High Commissioner for Human Rights as well as other human rights groups. The brief urged the Supreme Court to look to privacy and equality precedents in foreign legal jurisdictions, advice the *Lawrence* Court has been severely criticized for adopting. His remarks recount this background to an important decision.

Schacter, Jane S. *Sexual Orientation, Social change, and the Courts*. 54 DRAKE L. REV. 861-893 (2006).

The author makes “two basic points in support of the idea that we should be attentive to, but should not overstate, the institutional dimensions of social change” on gay issues that courts are often accused of promoting. She first examines what exactly “social change” means in this context. If it “means moving the proverbial hearts and minds” of the public, then what she terms “law skepticism” is probably the most defensible position: “the sensibility that anti-discrimination laws cannot themselves change people’s attitudes about the groups such laws” protect. Schacter next inquires into “the significant variability in the realm of gay rights.” In her four-square analysis, both courts and legislatures have each produced both positive change and backlash, and thus it is simplistic to portray any specific relationship as predominating. Rather than seeking universal explanations, she proposes that our attention focus on learning whatever lessons can be gleaned from particular episodes. Transcript of symposium presenters discussing these issues follows the article.

Skow, Sarah K. *What Missouri “Shows Me” about Sexual Orientation Legislation.* 37 U. TOL. L. REV. 807-840 (2006).

Skow draws out the inherent tensions in Missouri law that, on the one hand, in 1999 included sexual orientation in its Hate Crimes Act, yet in 2004 passed a state constitutional amendment banning same-sex marriage. Besides the seeming general inconsistency concerning the state’s attitude toward GLBT persons, the author theorizes that the two taken together “may provide a basis for an Equal Protection challenge if the same-sex marriage prohibition amendments inspire the animus that hate crime statutes seek to prevent.”

B. Criminal Law:

Scope/Keywords: Juries and court procedures; Panic defenses; Provocation; Sodomy

C. Civil Law / Election Politics:

Scope/Keywords: Ballot measures and initiatives; Romer

D. Constitution:

1. General:

Scope/Keywords: Articles dealing broadly with constitutional issues

2. First Amendment:

Scope/Keywords: Free speech; Religion Clauses; Defamation; Hurley; Dale; Freedom of association

Knight, Dean R. *“I’m Not Gay—Not That There’s Anything Wrong with That!”: Are Unwanted Imputations of Gayness Defamatory?* 37 VICT. UNIV. OF WELLINGTON L. REV. 249-279 (2006).

Written from the legal perspective of the Anglo-Commonwealth jurisdictions, the author studies the argument that describing someone as gay or lesbian alone opens the speaker to defamation claims. Does “such an imputation tend to lower the reputation of a person in the estimation of ‘right-thinking’ members of society”? He finds that generally “there remains a reluctance on the part of the courts to definitively rule that the right-thinking person is now indifferent to imputations of gayness.”

Lucas, Michael. *On Gay Porn.* 18 YALE J. OF LAW & FEMINISM 299-302 (2006).

Lucas advocates in this extremely brief opinion piece from a symposium titled “Sex for Sale” that mainstream gay rights advocates avoid the one trait that uniquely distinguishes homosexuals from straight people: sex. They are thus inclined to adopt the majority interpretation of pornography as degrading to women (among other bad things). Contradicting this negative portrayal of pornography, Lucas suggests that gay male porn can serve functions that are useful to the gay community and even to wider society. This statement may be unique in the legal literature: Although possessed of a law degree from Russia, Lucas’ authority to speak on this subject flows from his own position as a successful gay porn star and entrepreneur.

White, Quinn. *Protecting Homosexual Rights: A Contradiction in First Amendment Jurisprudence.* 4 FIRST AMEND. L. REV. 377-402 (2006).

This writer maps out the tensions inherent within the First Amendment's protection of antigay hate speech, on the one hand, and, on the other of the expressive speech of LGBT persons themselves. He opines that these two threads are not independent: hate speech often occurs more frequently in response to expressive speech. The article concludes with the "normative proposal that expanded protection of LGBT expressive speech should lead to increased restrictions of homophobic hate speech."

3. Privacy, Equal Protection, Due Process:

Scope/Keywords: Lawrence; Heightened scrutiny; Race analogies; Outing

Government Documents:

Feder, Jody. HOMOSEXUALITY AND THE CONSTITUTION: A LEGAL ANALYSIS OF THE SUPREME COURT RULING IN *LAWRENCE V. TEXAS* (Washington, D.C.: Congressional Research Service, Library of Congress, 2005).

This very brief (ten pages) government study provides an overview of the Court's opinion in *Lawrence v. Texas* [539 U.S. 558 (2003)] and considers its impact on future suits about gay rights generally and same-sex marriage specifically. More extensive treatment of the latter topic can be found in the CRS report *Same-Sex Marriages: Legal Issues* (Alison M. Smith, last updated July 17, 2006, available at www.opencrs.com/document/RL31994/).

Articles:

Balog, Kari. *Equal Protection for Homosexuals: Why the Immutability Argument is Necessary and How it is Met.* 53 CLEVELAND ST. L. REV. 545-573 (2005-2006).

The author looks specifically at the immutability element of the test for suspect class protections under the Fourteenth Amendment, and how it might apply to homosexuals. Is sexual orientation an "immutable" trait, at least within the sense required by contemporary constitutional analysis? Balog believes the answer is Yes, and therefore, "assuming homosexuals are able to meet the remaining three *Frontiero* factors [history of purposeful discrimination, object of deep-seated prejudice, and politically powerless minority], homosexuality should be classified as a suspect classification and receive heightened review."

Ludwig, Erik K. *Protecting Laws Designed to Remedy Anti-Gay Discrimination from Equal Protection Challenges: The Desirability of Rational Basis Scrutiny.* 8 UNIV. OF PA. J. OF CONST. LAW 513-558 (2006).

This essay considers the constitutional issues raised by the establishment of institutions like the Harvey Milk High School in New York City. The school was established in 1985 to "target students that are being harassed in their community schools because of their actual or perceived sexual orientation or gender identity." Because it provides a benefit to the exclusion of other, similarly bullied students, it might be vulnerable to claims that its existence violates the Equal Protection Clause of the 14th Amendment. For years gay rights advocates have been pushing to

have homosexuality included among the suspect classes meriting heightened scrutiny, thus practically ensuring that laws excluding GLBT persons would fall. The author, however, believes that in the current climate of incremental social changes, “rational basis review may better serve the goals of gay rights advocates than would the application of heightened scrutiny [because] benign programs meant to remedy discrimination are far less likely to survive strict scrutiny than rational basis review.”

Strasser, Mark. *Lawrence, Mill, and Same-Sex Relationships: On Values, Valuing, and the Constitution.* 15 S. CAL. INTERDISC. L.J. 285-306 (2006).

Strasser intends this article as a corrective to those who interpret *Lawrence v. Texas* [539 U.S. 558 (2003)] as a simple incorporation of John Stuart Mill’s “harm principle.” ON LIBERTY’s harm principle states that “the only conduct for which an individual is appropriately subject to sanction by either the state or society is conduct which is ‘other-affecting;’ that which only affects himself is not appropriately subject to external punishment.” Strasser argues that viewing *Lawrence* as embodying this principle follows from both a “watered-down” understanding of the harm principle itself, and a narrow reading of *Lawrence* to justify the claim that the decision “incorporates this modified version.”

“It is inappropriate to characterize *Lawrence* as a straightforward incorporation of the harm principle both because in some respects it does more than the harm principle [by assigning positive value to GLBT relationships], and because in other respects it does less than the harm principle [by protecting fewer liberties than the harm principle requires, such as prostitution].”

The erroneous reduction of *Lawrence* to the harm principle reinforces but does not wholly account for subsequent decisions (*Lofton v. Secretary of Florida Department of Children and Family Services* [358 F.3d 804 (11th Cir. 2004)], *L.A.M. v. B.M.* [906 So.2d 942 (Ala. 2004)], *Kansas v. Limon*[83 P.3d 229 (Kan. Ct. App. 2004)]) that have disadvantaged GLBT persons “not because of a misreading of *Lawrence* as simply an incorporation of Mill’s harm principle into 14th Amendment jurisprudence, but because the courts have been making more serious and obvious mistakes in their interpretation of local and constitutional law.”

4. Full Faith and Credit/DOMA:

Articles:

Cox, Stanley E. *Nine Questions about Same-Sex Marriage Conflicts* 40 NEW ENG. L. REV. 361-408 (2006).

This eminently readable article articulates the conflict of laws issues raised by same-sex marriage. Included are discussions of the obligations of states to respect other states’ laws or judgments, and whether DOMA violates the Full Faith and Credit Clause.

Jenkins, Spencer J. *Till Congress Do Us Part: The Marriage Protection Act, Federal Court-Stripping, and Same-Sex Marriage.* 40 NEW ENG. L. REV. 619-661 (2006).

The Marriage Protection Act of 2004 (MPA), or House Bill 3313, would strip the federal courts of jurisdiction over same-sex marriage cases. This article provides some history of the MPA. It examines the federal courts’ powers of judicial review, and Congress’s power over the courts. It

concludes that attempts to curtail judicial review through the MPA would be unconstitutional. Equal protection, full faith and credit, and due process analyses are all discussed.

O'Connell, Annie. *“Legal Impediments to Marriage”*: *Massachusetts’ Marriage Evasion Statutes, Same-Sex Marriage, and Privileges and Immunities Under the United States Constitution.* 44 BRANDEIS L. J. 509-528 (2006).

Massachusetts General Law chapter 207, section 11, prohibits the issuance of marriage licenses to non-resident couples who reside in states where their marriages would be void. This article analyzes this “marriage evasion statute” as it applies to same-sex couples. It concludes that the statute violates the Privileges and Immunities Clause of the United States Constitution.

E. Foreign / International Law:

1. Other than U.S.A.:

Books:

Cretney, Stephen Michael. SAME SEX RELATIONSHIPS: FROM 'ODIOUS CRIME' TO 'GAY MARRIAGE.' (New York: Oxford University Press, 2006).

Based upon the author’s Clarendon Lectures in Law delivered in October 2005, this book analyzes the swift social changes from 1967, when the problem before the UK was whether to decriminalize homosexual conduct, to 2005, when Parliament passed the Civil Partnership Act that provided for the formal legal recognition of same-sex relationships. The first of three chapters sketches the Act’s historical background, and the second analyzes its specific provisions. The third chapter seeks to place these problems into a broader sociolegal context. As illustrated by prominent cases from other English language jurisdictions included in extensive appendices (comprising three-quarters of the book’s content), heretofore change on this front in the UK has been comparatively less driven by court decisions than by legislative enactments. With the recent creation in 2005 of a UK Supreme Court, however, this may change, raising new philosophical questions concerning the proper relationship between the judiciary, the legislature, and the executive branches of government.

Larocque, Sylvain. GAY MARRIAGE: THE STORY OF A CANADIAN SOCIAL REVOLUTION. (Toronto: J. Lorimer 2006).

With a forward by Martin Cauchon, the Canadian lawyer, politician and former Liberal Party of Canada cabinet minister who argued before the cabinet in favor of gay marriage, this book outlines the road to achieving same-sex marriage in Canada. It recounts the development of arguments, strategies and tactics used by both sides.

Reports:

Radford, Katy, & Jennifer Betts & Malcolm Ostermeyer. POLICING, ACCOUNTABILITY AND THE LESBIAN, GAY AND BISEXUAL COMMUNITY IN NORTHERN IRELAND. (Belfast: Institute for Conflict Research 2006).

This report is the result of a study conducted by the Institute for Conflict Research. It was commissioned by the Northern Ireland Policing Board (NIPB) and the Office of the Police Ombudsman for Northern Ireland (OPONI). Questionnaires, focus groups, small group

interviews and individual in-depth interviews were used to study 233 lesbians, gay men and bisexual's attitudes and experience with the police in Northern Ireland. The findings include statistics on contacts and perceptions of the police as well as recommendations on reporting, training, recruitment and outreach.

Articles:

Clark, Edward. *The Construction of Homosexuality in New Zealand Judicial Writing.* 37 VICT. U. WELLINGTON L. REV. 199-220 (2006).

New Zealand decriminalized homosexual intercourse in 1986, yet some judicial opinions in New Zealand still contain language that reinforces and repeats negative stereotypes about homosexuality. This article examines the effect this language has on rights claims made by homosexuals. It argues that such language undermines sexual rights claims made by gay New Zealanders.

Emerton, Robyn. *Respecting Privacy and Affirming Equality: The Dual Significance of Leung v. Secretary for Justice for Hong Kong's Gay Community.* 36 HONG KONG L. J. 143-170 (2006). *Leung v. Secretary for Justice* [HCAL 160/2004], Hong Kong's first gay rights case, declared the four provisions in the Crimes Ordinance involving homosexual conduct to be unconstitutional. This article calls for the affirmation of the court's original ruling which relies on an equality analysis. It also rejects the critique that the court should have used a privacy analysis. The Court's decision is analyzed in detail.

2. International Law / Human Rights:

Articles:

Kukura, Elizabeth. *Finding Family: Considering the Recognition of Same-Sex Families in International Human Rights Law and the European Court of Human Rights.* 13 NO. 2 HUM. RTS. BRIEF 17-20 (2006).

This brief article examines the treatment of same-sex partners and their families by the European Court of Human Rights (ECHR). It first lists the countries that have either legalized same-sex marriage or some other form of relationship recognition. It examines the ECHR's definition of family and its treatment of same-sex couples and argues that the ECHR should expand its definition of family to include same-sex families.

McReynolds, Anjuli Willis. *What International Experience Can Tell U.S. Courts about Same-Sex Marriage.* 53 UCLA L. REV. 1073-1105(2006).

Three approaches to applying international materials in judicial decision-making are identified and examined by this author. Each approach is explored in light of the decision in *Lawrence v. Texas* [539 U.S. 558 (2003)]. The author then considers which approach would be most useful in using comparative analysis in U.S. courts in same-sex marriage cases. Recent changes in the legal status of same-sex couples in other countries are surveyed.

3. Comparative:

Araiza, William D. *Foreign and International Law in Constitutional Gay Rights Litigation: What Claims, What Use, and Whose Law?* 32 WM. MITCHELL L. REV. 455-508 (2006).

This article examines the use of foreign and international law in the adjudication of U.S. constitutional claims in gay rights cases. It explores the distinction between structural provisions and individual rights provisions, and it argues that foreign law can be particularly useful in advancing individual rights claims. Both due process and equal protection claims are considered.

4. Immigration / Refugees:

Bromer, Zachary. *Boer-Sedano v. Gonzales: The Increasing Influence of HIV/AIDS Status on Asylum Claims Based on Homosexual Identity.* 15 LAW & SEXUALITY 163-173 (2006).

In the case of *Boer-Sedano v. Gonzales* [418 F.3d 1082 (9th Cir. 2005)] the ninth circuit ruled that a gay asylum seeker's HIV or AIDS status could make return to his country of origin unreasonable. This brief article examines the *Boer-Sedano* case and explores its significance for asylum seekers with HIV or AIDS.

Cerone, John. *"Dangerous Dicta": The Disposition of U.S. Courts Toward Recourse to International Standards in Gay Rights Adjudication.* 32 WM. MITCHELL L. REV. 543-557 (2006).

This article examines whether there is any international obligation on the United States, arising from international standards or treaties, which mandates the protection of lesbians and gay men from discrimination or the decriminalization of gay sexual conduct. The International Covenant on Civil and Political Rights (ICCPR) is discussed. The United States' reluctance to adhere to international human rights norms is also explored.

Morgan, Deborah A. *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases.* 15 LAW & SEXUALITY 135-161 (2006).

Drawing on a Critical Race Theory analysis, this article examines the role that racial and sexual stereotypes play in sexual orientation asylum cases. The asylum process is outlined, and the racism and homophobia inherent in the requirement of proving one's homosexuality are exposed. Suggestions on improving the asylum system are provided.

Pfitsch, Hollis V. *Homosexuality in Asylum and Constitutional Law: Rhetoric of Acts and Identity.* 15 LAW & SEXUALITY 59-89 (2006).

This article addresses the potential impact of *Lawrence v. Texas* [539 U.S. 558 (2003)] on asylum law. It refutes the assertion made by Professor Michael Scaperlanda, of the University of Oklahoma Law School, that the recent expansion of protections granted to gay asylum seekers will allow gay rights advocates to build a body of precedent useful in constitutional law contexts. The article asserts that lower courts' interpretations of *Lawrence* have not been helpful and could slow advances in asylum law.

Zaske, Amy K.R. *Love Knows No Borders—The Same-Sex Marriage Debate and Immigration Laws* 32 WM. MITCHELL L. REV. 625-653 (2006).

Zaske describes the history and current content of U.S. immigration laws which impact homosexuals. Zaske goes on to discuss the Permanent Partners Immigration Act [H.R. 3006, 109th Cong. (2005)]. A comparative analysis of immigration laws from other countries is included in Zaske's analysis of how PPIA may be implemented.

III. Discrimination

A. Private Employment

1. General:

Scope/Keywords: Wages and earnings; ENDA; Legal profession

Newman, Mari. *Workplace Discrimination on the Basis of Sexual Orientation or Gender Identity.* 35 COLO. LAW. 63-68 (2006).

Written as a guide for Colorado practitioners who represent gay, lesbian, bisexual or transgender clients, with workplace discrimination claims, this article presents legal strategies which may be used in support of such claims (not necessarily limited to Colorado). Strategies explored include gender non-conformance, Title VII retaliation, same-sex harassment, local non-discrimination ordinances, and wrongful discharge in violation of public policy. The article was presented by the Colorado Bar Association Labor and Employment Law Section.

Tulin, Edward L. *Where Everything Old is New Again—Enduring Episodic Discrimination Against Homosexual Persons.* 84 TEX. L. REV. 1587-1632 (2006).

An exploration of the history of discrimination against homosexuals, this article also warns of history's nature of repeating itself. The author begins with discrimination against homosexuals in the Progressive Era (1886-1915), then shifts to the Cold War Era (1946-1961), in which homosexuals faced "unprecedented discrimination in the name of national security." After laying the historical groundwork, the author demonstrates how all of the old arguments used to justify discrimination against homosexuals (particularly those of familial sanctity) have been revived. The author explains that we are witnessing this re-emergence of discrimination as a backlash in the wake of *Lawrence v. Texas*, and subsequent legal victories.

2. Harassment / Title VII:

Scope/Keywords: Oncale; Hopkins; Sexual orientation discrimination as sex discrimination; Bisexual loophole

Zylan, Yvonne. *Finding the Sex in Sexual Harassment: How Title VII and Tort Schemes Miss the Point of Same-Sex Hostile Environment Harassment.* 39 U. MICH. J.L. REFORM 391-431 (2006).

Arguing for a political (or social) solution to the issue of same-sex sexual harassment in the workplace, this author contends that courts are ill-equipped to understand the sexuality inherent in sexual harassment. Rather, the courts have gone out of their way to avoid arguments of

sexuality, relying instead on a “false binarism.” The author argues that “the courts’ inability to adequately theorize sexuality precludes an equitable approach to adjudication of sexual harassment claims.” The article begins with a review of sexual harassment law and traces its progression over the past quarter-century.

3. Benefits:

Scope/Keywords: Family Medical Leave Act; ERISA

Agnos, Dean. *Employee Benefits and the Paradox of Same-Sex Marriages and Equal Rights.* 8 U. PA. J. LAB. & EMP. L. 543-573 (2006).

Same-sex couples have won some victories at the state and local level, most notably in *Goodridge v. Dept. of Public Health* [798 N.E.2d 941 (Mass. 2003)] which granted marriage rights in Massachusetts. However, there are 1138 federal rights granted to married heterosexual couples that are still unavailable to same-sex couples. In light of this fact, this author advocates repealing the federal Defense of Marriage Act (DOMA), and passing legislation at the federal level which would make it illegal to discriminate against homosexuals in the workplace.

McClendon, Janice Kay. *A Small Step Forward in the Last Civil Rights Battle: Extending Benefits under Federally Regulated Employee Benefit Plans to Same-sex Couples.* 36 N.M. L. REV. 99-124 (2006).

Since the passage of the federal Defense of Marriage Act in 1996, same-sex couples have been excluded from federal benefits, even if their union is recognized by the state in which they live. This article advocates extending rights granted under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code to same-sex couples “where their respective states have legally recognized their relationship under civil marriage, civil union, or domestic partnership laws.”

4. School / Teachers:

For entries dealing with students, see Sect. V.

B. Public Employment

1. Military / Campus Recruitment:

Scope/Keywords: Campus recruitment; Solomon amendment; “Don’t Ask, Don’t Tell”; Steffan; Security clearances

Government Documents:

Walker, David M. *Differing Scope and Methodology in GAO and University of California Reports Account for Variations in Cost Estimates for Homosexual Conduct Policy.* Washington, D.C.: U.S. Government Accountability Office, 1-3 (2006).

How much money does it cost to replace homosexual service members who are separated under the military’s homosexual conduct policy? Two recent reports attempted to answer this question, and drew dramatically different conclusions. The Comptroller General of the United States, David M. Walker, prepared this report to explain the difference between the two reports. The

first report, released in 2005 by GAO, estimated the costs from 1994-2003 at \$190.5 million. The second report, released in 2006 by the University of California Blue Ribbon Commission, estimated costs for the same period at \$363.8 million. Mr. Walker explains that the Commission's estimate was larger because it included training costs for Marines, medical workers, and officers, and the cost of separation travel. Also, the Commission included infrastructure costs, which the GAO claims is a constant figure regardless of the number of enlistees who complete their contracts.

2. Non-Military:

Scope/Keywords: Public education; Universities; Federal and state government employees

Lobsinger, Eric J. *A National Model for Reconciling Equal Protection for Same-Sex Couples with State Marriage Amendments: Alaska Civil Liberties Union ex rel. Carter v. Alaska* 23 ALASKA L. REV. 117-138 (2006).

Alaska Civil Liberties Union ex. rel. Carter v. Alaska [122 P.3d 781 (Alaska, 2005)] struck down a provision which limited public employee benefits to spouses. *Carter* is significant because it was the first state court decision which extended public employee benefits to same-sex couples in a state with a marriage amendment. Lobsinger first explores the history of Alaskan laws pertaining to same-sex couples. He then analyzes whether *Carter* may act as a model for other states who must navigate between rights for same-sex couples and state DOMAs.

C. Hate Crimes

D. Housing / Sports

E. Other

SCOPE/KEYWORDS: ARTICLES ON THE LEGAL STATUS OF GLB PERSONS NOT OTHERWISE ASSIGNED

Lau, Holning. *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law.* 94 CAL. L. REV. 1271-1322 (2006).

Businesses which restrict their goods and/or services to same-sex couples do so on the basis of an "individualist paradigm." Under an individualist paradigm, this author suggests that a travel resort which restricts access to opposite-sex couples seems no more discriminatory than a store which sells only women's bras. This article advances a theory of couples' aggregate rights, and proposes a model public accommodations law to govern couple-oriented business establishments. The model law would prevent businesses, such as dating services and resorts, from distinguishing between same-sex and opposite-sex couples.

IV. Family Issues

A. General

SCOPE/KEYWORDS: HISTORICAL OVERVIEWS; BROAD THEORETICAL OR PHILOSOPHICAL STATEMENTS; 9/11 SURVIVING PARTNERS

Myers, Michael G. *Polygamist Eye for the Monogamist Guy: Homosexual Sodomy... Gay Marriage...Is Polygamy Next?* 42 HOUS. L. REV. 1451-1486 (2006).

While advocating a restricted judicial role and a narrow reading of constitutional mandates, Walker posits that the decision in *Lawrence v. Texas* [539 U.S. 558 (2003)] strengthens the claims of polygamists for constitutional protection. To bolster his argument, the author reviews the central polygamy case, *Reynolds v. United States* [98 U.S. 145 (1878)] and *Goodridge v. Department of Public Health* [798 N.E. 2d 941 (Mass. 2003)]. Walker informs readers in footnote 1 that he does not advocate polygamy.

B. Couples

1. General

Scope/Keywords: Historical overviews; Broad theoretical or philosophical statements; Taxes

Hay, Peter. *Recognition of Same-Sex Legal Relationships in the United States.* 54 AM. J. COMP. L. 257-279 (2006).

All the usual suspects in the same-sex marriage controversy are summarized: DOMA, constitutional amendments, full faith and credit, and conflict of laws. Although readers who are familiar with this area of law will find little new material, the article provides a fine introduction to the issues.

Howenstine, David W. *Beyond Rational Relations: The Constitutional Infirmities of Anti-Gay Partnership Laws Under the Equal Protection Clause.* 81 WASH. L. REV. 417-445 (2006).

Using equal protection analysis, the author of this comment hypothesizes that anti-gay partnership laws cannot survive rational basis review because their scope is too far-reaching. On the other hand, he suggests that anti-gay marriage laws may survive rational basis review because they are tailored to address concerns about family and children. *Romer v. Evans* [517 U.S. 620 (1996)] and *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati* [128 F.3d 289 (6th Cir. 1997)] receive special attention as the author attempts to draw the distinction.

2. Marriage

Scope/Keywords: Historical overviews; Broad theoretical or philosophical statements; Federal Marriage Amendment; Slippery slopes; For interstate recognition issues, see also II.D.4 Full Faith and Credit / DOMA

a. General

Symposia:

Same-Sex Marriage Symposium. 16 GEO. MASON U. CIV. RTS. L.J. 329-358 (2006).

This entry transcribes a debate between two Virginia State delegates who worked opposite each other in the effort to create a state constitutional amendment banning same-sex marriage. The two participants are Representative Addam Ebbin, the only openly gay legislator in Virginia, and Representative Bob Marshall, who authored the Virginia Affirmation of Marriage Act. The

Representatives heatedly debate whether same-sex marriage is a civil rights issue, whether same-sex marriage threatens heterosexual marriage, and whether gay persons should be allowed to adopt children. *Lawrence v. Texas* [539 U.S. 558 (2003)], and the book *After the Ball* also are discussed.

Ball, Carlos A. *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and its Aftermath* 14 WM. & MARY BILL RTS. J. 1493-1538 (2006).

The author compares the backlash against desegregation which occurred after *Brown v. Board of Education* [347 U.S. 483 (1954)], to attacks on gay rights following *Goodridge v. Dept. of Public Health* [798 N.E.2d 941 (Mass. 2003)]. The author concludes that while backlash cannot be avoided in significant civil rights advances, it can be overcome.

Cox, Stanley E. *Nine Questions about Same-Sex Marriage Conflicts* 40 NEW ENG. L. REV. 361-408 (2006).

This eminently readable article articulates the conflict of laws issues raised by same-sex marriage. Included are discussions of the obligations of states to respect other states' laws or judgments, and whether DOMA violates the Full Faith and Credit Clause.

Davis, Cynthia M. *"The Great Divorce" of Government and Marriage: Changing the Nature of the Gay Marriage Debate* 89 MARQ. L. REV. 795-818 (2006).

The same-sex marriage debate assumes that government should promote and define marriage. Davis argues for an alternative model where government would protect marriage-like relationships by enforcing private agreements. The article discusses the impact of governmental promotion of marriage, and the costs and benefits of moving to an alternative model.

Franke, Katherine M. *The Politics of Same-Sex Marriage Politics* 15 COLUM. J. GENDER & L. 236-248 (2006).

Why has the right to marry emerged as a top priority for the gay community? What are the costs of this choice? Franke shows how the focus on marriage limits our identity, excludes many of us, and distracts away from issues of greater concern, such as the militarization of foreign policy.

Lester, Toni. *Adam and Steve vs. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?* 14 AM. U. J. GENDER SOC. POL'Y & L. 253-311 (2006).

Lester first explores the debate within the gay community regarding whether marriage should be the focus of gay rights activism. To tease out an answer to the question presented in the title, Lester discusses the Tenth and Fourteenth Amendments, *Loving v. Virginia* [388 U.S. 1 (1967)], *Romer v. Evans* [517 U.S. 620 (1996)] and *Lawrence v. Texas* [539 U.S. 558 (2003)]. Lester analyzes the opinions of each current Justice for indicia of future rulings, and concludes that a same-sex marriage victory may occur in the Supreme Court.

Lobsinger, Eric J. *A National Model for Reconciling Equal Protection for Same-Sex Couples with State Marriage Amendments: Alaska Civil Liberties Union ex rel. Carter v. Alaska* 23 ALASKA L. REV. 117-138 (2006).

Alaska Civil Liberties Union ex rel. Carter v. Alaska [122 P.3d 781 (Alaska, 2005)] struck down a provision which limited public employee benefits to spouses. *Carter* is significant because it was the first state court decision which extended public employee benefits to same-sex couples

in a state with a marriage amendment. Lobsinger first explores the history of Alaskan laws pertaining to same-sex couples. He then analyzes whether *Carter* may act as a model for other states who must navigate between rights for same-sex couples and state DOMAs.

Miller, Brett C. *Same-Sex Marriage: An Examination of the Issues of Due Process and Equal Protection* 59 ARK. L. REV. 471-509 (2006).

The author explores the due process and equal protection analysis used by courts in same-sex marriage cases, and the effect of public attitudes on case outcome. The author concludes that courts are side-stepping constitutional principles to craft holdings which conform to public opinion.

Miller, Mark C. *Conflicts Between the Massachusetts Supreme Judicial Court and the Legislature: Campaign Finance Reform and Same-Sex Marriage* 4 PIERCE L. REV. 279- 316 (2006).

After examining the interaction between state supreme courts and legislatures, Miller turns his attention to Massachusetts. Miller explores the different institutional perspectives held by the court and legislature, and concludes that greater communication is needed between these two branches of government.

Pingree, Gregory C. *Rhetorical Holy War: Polygamy, Homosexuality, and the Paradox of Community and Autonomy.* 14 AMER. UNIV. J. OF GENDER, SOC. POL'Y & THE LAW 313-383 (2006).

Pingree delves extensively into the historical details of the cultural and legal furor surrounding Mormon polygamy that culminated in the decision of *Reynolds v. U.S.* [98 U.S. 145 (1878)]. He pays special attention to the rhetorical depiction of the practice, believing that the insights extracted from this study can productively inform other debates occurring at the same intersection of autonomy and community, not least that about same-sex marriage.

Williams, Norman R. *Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage* 154 U. PA. L. REV. 565-648 (2006).

Executive review is the ability of the President to interpret and enforce the Constitution; whether this power allows the President to refuse to enforce federal statutes is a matter of current debate. Williams examines executive review at the state and local level. This exhaustive article describes how state constitutions fragment executive authority, and analyzes the ways state courts respond to claims of executive review. The article focuses this discussion on the actions of state and local officials who issued marriage licenses to same-sex couples.

Zaske, Amy K.R. *Love Knows No Borders—The Same-Sex Marriage Debate and Immigration Laws* 32 WM. MITCHELL L. REV. 625-653 (2006).

Zaske describes the history and current content of U.S. immigration laws which impact homosexuals. Zaske goes on to discuss the Permanent Partners Immigration Act [H.R. 3006, 109th Cong. (2005)]. A comparative analysis of immigration laws from other countries is included in Zaske's analysis of how PPIA may be implemented.

b. Pro:

Scope/Keywords: Articles specifically advocating same-sex marriage (and not as the conclusion of an ostensibly objective discussion)

Books:

Eskridge, William N. & Darren R. Spedale. GAY MARRIAGE : FOR BETTER OR FOR WORSE? : WHAT WE'VE LEARNED FROM THE EVIDENCE. NY: Oxford University Press (2006).

Scandinavian countries have offered same-sex couples marriage-like registered domestic partnerships since the early 1990's. This book examines the implications of the experience in Scandinavia for the same-sex marriage debate in the United States. The book discusses the same-sex marriage debates in the United States and Scandinavia, lessons about the benefits of same-sex marriage as seen in Scandinavia, and whether data about Scandinavian marriage and registered partnerships supports arguments to limit marriage to heterosexual couples. Included are tables depicting gay-friendly state laws, and polls reflecting attitudes toward same-sex marriage. Appendices include the Danish Registered Partnership Act and related documents, and data about Scandinavia including: registered partnerships, marriage demographics, and households with children.

Articles:

Goldberg, Suzanne B. *A Historical Guide to the Future of Marriage for Same-Sex Couples* 15 COLUM. J. GENDER & L. 249-272 (2006).

This article includes a short essay and the brief filed by history and family law professors in the New York appellate case, *Hernandez v. Robles* [7 N.Y.3d 338 (2006)]. The essay posits that arguments against same-sex marriage rely upon an inaccurate history of marriage. The brief traces the history of marriage in New York State. Both the brief and the article show that marriage has not remained consistent over time, and has not always been connected to procreation.

Jacobi, Jeffrey S. *Two Spirits, Two Eras, Same Sex: For a Traditionalist Perspective on Native American Tribal Same-Sex Marriage Policy* 39 U. MICH. J.L. REFORM 823-850 (2006).

Many Native American tribal governments recently enacted legislation which prohibits same-sex marriage. Jacobi argues that such legislation conflicts with traditional tribal values, which tolerated homosexuality. Jacobi explores the recent case of two Cherokee women who married, and how various tribes treated "two-spirit" (homosexual) individuals before European contact. Jacobi concludes by arguing that for many tribes, same-sex unions reflect historical tradition.

Jacobi, Tonja. *Sharing the Love: The Political Power of Remedial Delay in Same-Sex Marriage Cases* 15 LAW & SEXUALITY 11-58 (2006).

While holding in favor of same-sex litigants, remedial relief was delayed by the courts in both *Goodridge v. Dept. of Public Health* [798 N.E.2d 941 (Mass. 2003)] and *Baker v. State* [744 A.2d 864 (Vt. 1999)]. This author examines the doctrinal and political reasons for this delay. The author also discusses whether *Goodridge* was responsible for the 2004 presidential election, and whether *Goodridge* caused a political backlash against gay rights.

Jois, Goutam U. *Marital Status as Property: Toward a New Jurisprudence for Gay Rights* 41 HARV. C.R.-C.L. L. REV. 509-551 (2006).

This article discusses the novel question of whether takings jurisprudence can apply to same-sex marriage. Jois argues that marital status should be protected as a property interest, and applies the elements of a takings claim to cases where same-sex marriages were legalized or performed. States discussed include Massachusetts, Oregon, California, New Mexico, New York, and Maryland.

Zapotocny, Emily. *My Two Moms: California's Supreme Court Decision in K.M. v. E.G. and Why Gay Marriage Offers the Best Protection for Same-Sex Families* 21 WIS. WOMEN'S L.J. 111-131 (2006).

In *K.M. v. E.G.* [117 P.3d673 (Cal. 2005)], the California Supreme Court held that a lesbian who had donated her eggs to her partner and had helped raise the resulting children had legal parentage claims. Zapotocny explores this and other cases involving same-sex unions and the custody of children. The article includes a discussion of California surrogacy law, and an exploration of legal doctrines which may protect same-sex parents.

c. Con:

Articles:

Allen, Douglas W. *An Economic Assessment of Same-Sex Marriage Laws.* 29 HARV. J.L. & PUB. POL'Y 949-980 (2006).

Can marriage be altered to accommodate same-sex couples and also remain a robust institution for heterosexuals? The author answers this question with an emphatic “no.” The author describes marriage as an institution which effectively regulates procreation, and argues that altering marriage for same-sex couples will create loopholes which can be exploited by selfish heterosexual husbands and wives.

3. Civil Unions /Domestic Partnerships

4. Dissolution of Relationships

C. Parenting

1. General

Scope/Keywords: Historical overviews; Broad theoretical or philosophical statements

Articles:

Family Law – Same-Sex Couples' Parental Rights and Obligations – California Supreme Court Holds Child Support Provisions of Its Uniform Parentage Act Applicable to Same-Sex Couples. – Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005). 119 HARV. L. REV. 1614-1621 (2006).

The California Supreme Court recently decided that the Uniform Parentage Act (UPA) encompassed the circumstances of a former lesbian couple who had conceived a child through alternative insemination. The unnamed author suggests that the court should have declined to extend the UPA as this would have alerted the legislature that the UPA needs reformation to address current family structures.

Appleton, Susan Frelich. *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era.* 86 B. U. L. REV. 227-294 (2006).

This discussion of “the presumption of legitimacy” in parenting cases reveals tensions between some feminist theorists and gay rights advocates. The author suggests an approach to parentage cases that emphasizes genetics and gestation as central to recognition of gender equality. In particular, she examines how a biological emphasis may lead to different treatment for heterosexual and lesbian couples, in opposition to gay male couples, who seek legal recognition as parents of a child.

Blair, Caroline P. *It’s More Than a One-Night Stand: Why a Promise to Parent Should Obligate a Former Lesbian Partner to Pay Child Support in the Absence of a Statutory Requirement.* 39 SUFFOLK U. L. REV. 465-487 (2006).

In many states, family law has not responded quickly to accommodate the various permutations of the modern American family. Lesbian and gay families, in particular, are affected by the slow evolution of family law. Some courts, nonetheless, have upheld child support obligations of parents in same-sex families under equitable principles. Similarly, the American Law Institute supports impositions of child support via “parents by estoppel.” The author of this article provides an overview of the topic and supplies an array of recommendations for courts considering the issues.

Forman, Deborah L. *Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle for Parental Equality.* 40 FAM. L. Q. 23-49 (2006).

This rich legal history of same-sex parenting in America is punctuated by detailed analysis of significant cases from around the country. A traditional approach is presented in *Nancy S. v. Michele G.* [279 Cal. Rptr. 212 (Ct. App. 1991)], while a third-party treatment of same-sex coparents appears in five cases: *In Re Olivia H.* [101 Cal. Rptr. 2d 364 (Ct. App. 2000)]; *In Re E.L.M.C.* [100 P.3d 546 (Colo. Ct. App. 2004)]; *In Re H.S.H.-K.* [533 N.W. 2d 419 (Wis. 1995)]; *E.N.O. v. L.M.M.* [711 N.E. 2d 886 (Mass. 1999)]; and *T.B. v. L.R.M.* [786 A.2d 913 (Pa. 2001)]. Judicial recognition of same-sex coparenthood occurs in two analyzed cases: *V.C. v. M.J.B.* [748 A.2d 539(N.J. 2000)] and *In Re L.B.* [122 P.3d 161 (Wash. 2005)]. Assisted reproduction cases involving same-sex parents include: *Rubano v. DiCenzo* [759 A.2d 959 (R.I. 2000)] and *Elisa B. v. Superior Court* [117 P.3d 660 (Cal. 2005)]. Enforcement of child support obligations in alternative insemination circumstances is discussed in *Kristine H. v. Lisa R.* [117 P.3d 690 (Cal. 2005)]. In addition to these listed cases, which are discussed in detail, several related cases

receive passing attention. The article will be especially valuable to attorneys and researchers seeking citations and legal arguments.

Hopkins, Michael L. *“What Is Sauce for the Gander is Sauce for the Goose:” Enforcing Child Support on Former Same-Sex Partners Who Create a Child Through Artificial Insemination.* 25 ST. LOUIS U. PUB. L. REV. 219-245 (2006).

Former partners of lesbians who choose to become parents through alternative insemination may be required to provide child support under varying legal theories, including estoppel and conflicts with public policy. Scenarios are presented through close examination of four court opinions: *Elisa B. v. Superior Court* [117 P. 3d 660 (Cal. 2005)]; *Kristine H. v. Lisa Ann R.* [117 P.3d 690 (Cal. 2005)]; *L.S.K. v. H.A.N.* [813 A.2d 827 (Pa. Super. Ct. 2002)]; and *T.F. v. B.L.* [813 N.E. 2d 1244 (Mass. 2004)]. After a survey of the case law landscape, the author offers “precautionary measures for same-sex parents” that may protect the interests of their children.

Kotlyarevskaya, Olga V., & Sara B. Poster. *Separation Anxiety Among California Courts: Addressing the Confusion Over Same-Sex Partners’ Parentage Claims.* 10 U. C. DAVIS J. JUV. L. & POL’Y 153-227 (2006).

The evolution of same-sex parenting rights in California is given both a historical and a theoretical examination in this article. The Uniform Parentage Act (UPA) and recent decisions by the California Supreme Court receive the bulk of attention: *Elisa B. v. Superior Court* [117 P.3d 660 (Cal. 2005)]; *K.M. v. E.G.* [117 P.3d 673 (Cal. 2005)]; and *Kristine H. v. Lisa R.* [117 P.3d 690 (Cal. 2005)].

Parness, Nicole L. *Forcing a Square Into a Circle: Why Are Courts Straining to Apply the Uniform Parentage Act to Gay Couples and Their Children?* 27 WHITTIER L. REV. 893 – 923 (2006).

K.M. v. E.G. [117 P.3d 673 (Cal. 2005)] is the focus of this discussion of the Uniform Parentage Act (UPA). The author asserts that the court improperly applied the UPA, although she supports the ultimate outcome of the case, in which each lesbian partner was granted the status and duties of a “parent.”

2. Custody / Visitation

Scope/Keywords: Troxel; Visitation; “Best interests of the child” standard

Zapotocny, Emily. *My Two Moms: California’s Supreme Court Decision in K.M. v. E.G. and Why Gay Marriage Offers the Best Protection for Same-Sex Families* 21 WIS. WOMEN'S L.J. 111-131 (2006).

In *K.M. v. E.G.* [117 P.3d 673 (Cal. 2005)], the California Supreme Court held that a lesbian who had donated her eggs to her partner and had helped raise the resulting children had legal parentage claims. Zapotocny explores this and other cases involving same-sex unions and the custody of children. The article includes a discussion of California surrogacy law, and an exploration of legal doctrines which may protect same-sex parents.

3. Adoption / Fostering

Buethe, Heather. *Second-Parent Adoption and the Equitable Parent Doctrine: The Future of Custody and Visitation Rights for Same-Sex Partners in Missouri.* 20 WASH. U. J. L. & POL'Y 283-309 (2006).

A general discussion of same-sex parenting is followed by specific attention to the legal status of same-sex co-parents in Missouri, which is unsure at best. This article may be helpful to persons researching developing law on same-sex parenting in conservative states. In the absence of statutory guidelines, the author advocates that courts use equitable theories to protect children born to same-sex couples.

Maurer, Elizabeth L. *Errors that Won't Happen Twice: A Constitutional Glance at a Proposed Texas Statute That Will Ban Homosexuals from Foster Parent Eligibility.* 5 APPALACHIAN J. L. 171 – 193 (2006).

Proposed legislation in the Texas Senate would prevent lesbians and gay men from becoming foster parents. A Fourteenth Amendment analysis of the legislation is followed by a discussion of a Florida case, *Lofton v. Secretary of the Department of Children and Family Services* [157 F. Supp. 2d 1372 (S.D. Fla. 2001)], in which a federal court upheld a Florida ban on adoptions by lesbians and gay men. Rather than discriminate by statute, the author suggests a case-by-case approach to child placement that includes sexual orientation as one among multiple considerations.

4. Pregnancy / Insemination

Scope/Keywords: Assisted Reproductive Technologies [ART]; Surrogacy

Almanck, Kathryn. *Seeking Sperm: Accounts of Lesbian Couples' Reproductive Decision-Making and Understandings of the Needs of the Child.* 20 INT'L J. L. & POL'Y & FAM. 1-22 (2006).

More sociological than legal in emphasis, this article discusses the comments of respondents to a qualitative study of lesbian parents in the United Kingdom. Respondents discuss routes to conception and involvement of fathers in children's lives.

Shapiro, Julie. *A Lesbian Centered Critique of "Genetic Parenthood."* 9 J. GENDER RACE & JUST. 591-612 (2006).

Advances in assisted reproductive technology (ART) have begun to diminish the "genetic link in defining parentage." Increasingly, legislatures and courts are recognizing the importance of "social parents," who act as parents to children although possessing no genetic link. The author defines lesbian legal theory and then uses this critical method to examine the link, or lack thereof, between genetics and parenthood. Finally, she examines how ART and morphing social patterns are affecting the evolution of American family law. In footnote 1, the author thanks Stephanie Wilson (one of the associate editors of this annotated bibliography) for "her tireless and effective research."

D. Wills, Trusts, Estates / Elders

SCOPE/KEYWORDS: ELDERS; INHERITANCE RIGHTS; DISPOSITION OF REMAINS

Articles

Hammerle, Christine A. *Free to Will? A Case for the Recognition of Intestacy Rights for Survivors to a Same-Sex Marriage or Civil Union.* 104 MICH. L. REV. 1763-1783 (2006).

When legislatures and courts refuse to recognize same-sex marriages and same-sex civil unions, they usually reject same-sex intestacy rights as well. The author of this article posits that states may reject formal recognition of the relationships for public policy reasons while still recognizing intestacy rights of survivors to a same-sex marriage or civil union. She says that this compromise allows states to exercise powers under the Full Faith and Credit Clause while still respecting the likely donative intent of a decedent and preserving wealth that two same-sex partners jointly generate.

E. Domestic Violence

SCOPE/KEYWORDS: PARTNER ABUSE

V. GLBT Youth / Student

Scope/Keywords: Equal Access Act; Rights of minors; Proms

Orman, Sarah. *“Being Gay in Lubbock”: The Equal Access Act in Caudillo.* 17 HASTINGS WOMEN'S L.J. 227-246 (2006).

Caudillo v. Lubbock Independent School District became the first case in which a court, when applying the Equal Access Act (EAA), has upheld a school district's ban of a gay/straight alliance (GSA) from meeting on school grounds. The author of this note questions the validity of the courts reasoning on a number of grounds including: 1) an outright ban did not meet the “least restrictive method” test of protecting students from sexually explicit material, 2) access was denied based upon speculative misconduct (i.e. the meetings were inherently based on sex and sexual activity), and 3) the court incorrectly applied the “well-being exception” to the EAA, thereby creating a “heckler’s veto” (i.e. the school district contended that the GSA was excluded to protect its members from harassment).

Riener, Alice. *Pride and Prejudice: The First Amendment, The Equal Access Act, and the Legal Fight for Gay Student Groups in High Schools.* 14 AM. U. J. GENDER SOC. POL'Y & L. 613-643 (2006).

This article questions the reasoning of *Caudillo v. Lubbock Independent School District*, [311 F. Supp. 2d 550 (N.D. Tex. 2004)], in which the court upheld the school district's decision not to allow Gay And Proud (GAP) Youth to meet on school grounds. The author contends that the school district violated both the First Amendment and the Equal Access Act. The author argues that the court's reasoning “represents a strong departure from the First Amendment and Equal Access Act jurisprudence on student speech in school settings...[and] establishes a discriminatory and unconstitutional precedent.”

VI. Health Issues

A. AIDS / HIV

B. Other

SCOPE/KEYWORDS: PUBLIC HEALTH; ORGAN DONATION; CONVERSION THERAPY; HEALTH INSURANCE

Books:

Sember, Brette McWhorter. GAY & LESBIAN MEDICAL RIGHTS : HOW TO PROTECT YOURSELF, YOUR PARTNER, AND YOUR FAMILY. Franklin Lakes, NJ : Career Press (2006).

This is targeted to lesbian, gay, bisexual, and transgender (LGBT) people who want answers to questions about how to deal with difficult life and death situations in light of their sexual orientation. Topics covered include: discrimination, informed consent, mental health care, same-sex unions and medical rights, health-care directives, insurance, HIV, hospital visitation, terminal illness, family and medical leave, children, LGBT elderly, and post-life issues such as funerals, estate planning, bereavement leave, and collection of benefits. The book includes a selected bibliography of LGBT resources for health, finance, and family planning. The book also includes a list of organizations that provide assistance to LGBT individuals and families, as well as an index.

VII. Prison(er)s, Corrections, and Criminal Justice

Books:

Amnesty International. STONEWALLED, STILL DEMANDING RESPECT: POLICE ABUSES AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE IN THE USA. London : Amnesty International (2006).

This is a report of a study conducted between 2003 and 2005, which focused on police brutality and misconduct against lesbian, gay, bisexual, and transgender (LGBT) people in the cities of Chicago, Los Angeles, New York, and San Antonio. Amnesty International contends that the USA “has a long history of both criminalizing homosexuality and failing to protect LGBT people against violence and discrimination.” This report shows that although significant progress has been made in the last three decades, serious police abuses against the LGBT community persist. Chapters include: police brutality, abuses in police detention, policing crimes in the community, profiling and selective enforcement, and training and accountability. Appendix A outlines international and domestic (including states) law and standards with respect to police conduct. Appendix B provides the surveys and interviews with law enforcement officials that were used to compile the report. This publication is available online at the Amnesty International web site.

Articles:

Equal Protection – Sexual Orientation – Kansas Supreme Court Invalidates Unequal Punishments for Homosexual and Heterosexual Teenage Sex Offenders. – State v. Limon, 122 P.3d 22 (Kan. 2005). 119 HARV. L. REV. 2276-2283 (2006).

In the aftermath of the U.S. Supreme Court’s decision in *Lawrence v. Texas* [539 U.S. 558 (2003)] (holding that state laws criminalizing homosexual sodomy violated substantive due process), the Kansas Supreme Court reversed the conviction of Matthew Limon, who at the age of 18 had performed consensual oral sex on a boy three years younger. Matthew had been sentenced to 17 years in prison. Had Matthew performed the act on a 15-year-old girl, under Kansas law he would have been sentenced to only 15 months in prison. The author explains that *Limon’s* application of *Lawrence* is very narrowly construed, and does advance an equal protection claim, or heightened scrutiny. At best, the author argues, the Kansas Supreme Court has said that “a law punishing homosexuals fifteen times more harshly than heterosexuals for the same conduct is invalid.”

VIII. Gender Identity

A. General

B. Legal Status (domestic and foreign)

Ben-Asher, Noa. *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties.* 29 HARV. J. L. & GENDER 51-98 (2006).

A comparison of legal struggles of transsex and intersex individuals, this article suggests that the two groups are not necessarily at odds. “Transsex individuals often desire the future body that they should have, while intersex individuals often mourn the body they had before an unwanted normalizing surgery...” (usually at birth or in early childhood). The author explains that transsex individuals are seeking a positive liberty (i.e. Medicaid coverage of adult transsex surgeries) based upon gender identification, while intersex individuals (or those advocating for them) are seeking a negative liberty (i.e. protection from intrusive sex assignment surgery). The author argues that the two groups could avoid contradicting each other by basing their claims to liberty on a premise of “gender identity as an inner-self that is distinct from the body,” rather than medical conceptions of gender.

C. Discrimination

Hoskinson, Tracy. *Etsitty v. Utah Transit Authority: Transposing Transsexual Rights Under Title VII.* 15 LAW & SEXUALITY 175-184 (2006).

A federal court decision in Utah is called into question by the author who disagrees with the court’s reasoning in denying Title VII protection to a preoperative transsexual who was fired from her job for using the women’s restroom while she still had male genitalia. The author argues that the court made a mistake in choosing to define a preoperative transsexual in

accordance with her biological sex. Rather, the court should have classified that plaintiff as a “female who was discriminated against because she happened to have male genitalia.”

D. Family

Fletcher, Katie D. & Judge Lola Maddox. *In Re Marriage of Simmons: A Case for Transsexual Marriage Recognition.* 37 LOY. U. CHI. L.J. 533-570 (2006).

This article explores an Illinois domestic relations case in which a father (who had undergone sexual reassignment surgery to remove his internal female organs, and obtained an amended birth certificate changing his legal sex from female to male) was denied custody of the couple’s children based on the court’s ruling that the marriage was invalid. The court reasoned that because the father still had external female genitalia at the time of marriage, it was a same-sex marriage, and therefore invalid under Illinois law. The authors argue (consistent with a decision from the European Court of Human Rights) that “gender identity, public persona, hormone levels, and medical and psychiatric diagnoses” taken as a whole would be a better legal determinant of sex than “what physical genitalia a person has between his or her legs.” The authors further argue that “the law should not require complex surgery for a female-to-male transsexual.”

E. Health

F. Prisoners