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Introduction

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Introduction

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On November 4, 2006, the Lesbian, Gay, Bisexual and Transgender Law Association Foundation of Greater New York ("LGBT Law Association")[1] collaborated with the New York Law School Stonewall Law Students' Association to present a full-day legal conference at New York Law School. This special issue of the *New York Law School Law Review* presents a collection of papers derived from that conference, titled *LGBTQ Law 2006: Legal Issues Affecting Ourselves and Our Families*.[2]

The purpose of this annual conference is to enable members of the LGBT Law Association to undertake continuing professional education on subjects of particular interest to the community, to address legal issues particular to the LGBT community, to provide an opportunity for law students to expand their education beyond the subjects generally taught in the classroom, and to provide a point of contact between students and members of the practicing bar.

The 2006 conference began with a plenary panel discussion titled *Where Do We Go From Here? Refining Our Focus*, in which three prominent attorneys long associated with public interest legal organizations in the LGBT community discussed the aftermath of significant setbacks in litigation over the quest for legal marriage for same-sex couples in the United States. In the months prior to the conference, the highest courts in New York State and Washington State each rejected claims that the continuing exclusion of same-sex couples from the right to marry violated guarantees of due process and equal protection under their respective state constitutions.[3] The discussion was overshadowed by the expectation that the New Jersey Supreme Court would soon rule on the same question. This ruling was handed down just weeks after the conference, finding, contrary to the New York and Washington courts, that principles of due process and equal protection demanded that same-sex couples be afforded the same rights and benefits that are provided to different-sex couples who marry.[4] However, a bare majority of the court held that whether to provide those rights and benefits through marriage or some other legal construct should be left to the legislature. The legislature responded by enacting the New Jersey Civil Unions Act later in 2006.[5]

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1. The LGBT Law Association Foundation of Greater New York is the educational, non-profit affiliate of the LGBT Law Association of Greater New York—a professional association that performs the functions of a bar association for its members. In addition to organizing and administering an annual legal conference, the foundation supports the publication and distribution of the *Lesbian/Gay Law Notes* (a monthly publication edited by the writer of this introduction) and administers continuing legal education programs, and free, walk-in legal clinics at the LGBT Community Center in New York City and at other locations in the metropolitan area. The foundation also supports a summer judicial fellowship program for law students.

2. LGBTQ is an acronym for lesbian, gay, bisexual, transgender, and queer or questioning.

3. *See* Hernandez v. Robles, 7 N.Y.3d 338 (2006); Andersen v. King County, 138 P.3d 963 (Wash. 2006).

4. Lewis v. Harris, 908 A.2d 196 (N.J. 2006).

5. N.J. STAT. ANN. § 37:1-31 (West 2007).

Thomas Hoff Prol,[6] a New York Law School alumnus, spoke later during the conference about the history leading up to the marriage litigation and legal developments affecting sexual minorities in New Jersey. This symposium issue gave Mr. Prol, who has been active as a leader of the bar in New Jersey, the opportunity to expand his paper, *New Jersey's Civil Unions Law: A Constitutional "Equal" Creates Inequality*, to discuss the New Jersey Supreme Court's decision and its aftermath.

Another topic of intense concern to the LGBT community is the ability of sexual minority refugees to obtain asylum in the United States. Paul O'Dwyer, who practices immigration law in New York, participated in the panel titled *Fleeing Persecution: LGBT Asylum Law*, and expanded his remarks into a paper that provides a detailed discussion of the current system of asylum law in the United States and its failure to provide consistent results for sexual minority applicants. In his paper, *A Well-Founded Fear of Having My Sexual Orientation Asylum Claim Heard in the Wrong Court*, Mr. O'Dwyer argues that the system fails to provide equal justice because of the lack of a well-articulated definition of persecution in the context of the sexual minority experience. The circuit courts (and even different panels of the same circuit) have differed in their application of the concept, some focusing on status,[7] others seeking to artificially differentiate between status and conduct—resulting in a denial of relief upon finding that the persecution was aimed at conduct.[8] Because asylum law appears, at least superficially, to be focused on status as a basis for protection against persecution, this status versus conduct distinction—which is not routinely made in cases where asylum claims are based on membership in religious or political groups, the two most frequently invoked grounds for asylum—raises significant issues of fairness. Mr. O'Dwyer contends that the current state of affairs lends itself to forum shopping within the United States, as those asylum applicants with savvy counsel may try to maneuver their way into a judicial circuit with more favorable case law. Since asylum law is federal, and presumably the treaties and statutes governing this area should have the same meaning regardless where an asylum claim is raised, such internal disparities are cause for serious concern. Unfortunately, even the circuit with the most favorable decisions, the Ninth Circuit, favors gay asylum applications only about half the time, making this a risky business for the applicants.

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6. Mr. Prol is a member of the board of trustees of the New Jersey State Bar Association and a director of Garden State Equality, a political organization that is supporting the effort to convince the state legislature that the civil unions law is inadequate and should be replaced by a measure opening up marriage for same-sex couples.

7. *See*, *e.g.*, Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997) (holding that a Russian lesbian threatened with therapy to "cure" her homosexuality could show persecution).

8. *See*, *e.g.*, Kimumwe v. Gonzales, 431 F.3d 319 (8th Cir. 2005) (holding that a gay man from Zimbabwe could not show persecution where his sexual conduct, rather than status, was cited as the reason for confinement and threats; the extreme anti-gay atmosphere in Zimbabwe was deemed irrelevant).

Another paper from the conference breaks new ground by examining legal issues raised by the way that infant circumcision is carried out in American hospitals. While the link to a conference on LGBT law is not obvious, the author of *Informed Consent for Routine Infant Circumcision: A Proposal*, who writes under the pseudonym of David Solomon,[9] was inspired to speak and write on this subject by the publicity given to recent studies purporting to show that circumcision could play a role in reducing the spread of HIV. These studies recently lead to suggestions that the New York City Health Department promote circumcision in city hospitals as part of its strategy to combat the AIDS epidemic.[10] Mr. Solomon undertook a study of what hospitals say to parents when obtaining consent to perform circumcision on newborn males, and concluded that the process of obtaining consent is generally inadequate when measured by the standards normally applied to surgical procedures. He found that in almost half the cases parents were given no factual information upon which to base an informed decision, and that in some cases circumcision was performed as a routine procedure without any specific request for consent, despite the significant impact the decision might have for the future of the child. Since his study revealed that many people have only the most vague understanding of what is involved, it is clear that many circumcisions are performed in this country every year without there being true informed consent for this surgical procedure. Mr. Solomon argues that hospitals should embrace new standards that would involve providing detailed factual information to parents about the nature of the operation, its physical impact on the male in both the short- and the long-term, and the arguments pro and con over whether it is a procedure that makes medical sense.

This symposium issue concludes with a paper on the civil remedies available in New York to LGBT survivors of domestic violence, by Sharon Stapel, director of the Family/Domestic Violence Unit at South Brooklyn Legal Services. In *Falling to Pieces: New York State Civil Legal Remedies Available to Lesbian, Gay, Bisexual, and Transgender Survivors of Domestic Violence*, Ms. Stapel shows how the existing legal framework needs to be adjusted to reflect the particular issues raised by violence in same-sex relationships, which fail to conform to the traditional household definitions by which New York statutory law and regulations define eligibility for particular remedies. The law's shortcomings relate back to the issue addressed at the first plenary session, the failure of New York State to provide any specific legal status for same-sex couples who may be sharing their lives and their homes.

Also included in this issue, although not a part of the symposium, is a note by Sarah E. Warne, a member of New York Law School's class of 2007. Ms.

9. The author chose to write under a pseudonym, because he believes that he would suffer reputational harm within his practice community of Jewish lawyers were his true identity known.

10. Donald G. McNeil, Jr., *New York City Plans to Promote Circumcision to Reduce Spread of AIDS*, N.Y. TIMES, Apr. 5, 2007, at B1.

Warne presents a more detailed perspective on one of these shortcomings in *Rocks, Hard Places, and Unconventional Domestic Violence Victims: Expanding Availability of Civil Orders of Protection in New York*, which addresses the difficulty of obtaining civil orders of protection in New York without the legal status of marriage. She shows how the current legal regime fails both same-sex couples and the significant number of individuals who suffer violence in the context of dating and other "non-legal" relationships, where many of the same factors that would logically support legal intervention go unheeded by an archaic legal structure.

While the various papers cover diverse topics, bringing into play widely varying fields of law, they have at their core the consideration of how law has lagged behind social change by perpetuating stereotyped views of sexual minorities and of families, thus falling short of building on the kinds of insights about human autonomy that fueled the U.S. Supreme Court's historic decision in *Lawrence v. Texas*, which found that the intimate association of same-sex couples comes within the liberty protected by the Fourteenth Amendment of the U.S. Constitution.[11] Such liberty would undergird a right of informed consent in infant circumcision decisions, the right to equality in marriage for same-sex couples, the right to a safe haven for sexual minorities persecuted in other lands, and the right to state protection for those who suffer violence in what should be their most sacred safe haven against the depredations of the outside world, their homes.

11. 539 U.S. 558 (2003).