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## Symposium Foreword: Coping with the Aftermath of Victory

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# SYMPOSIUM: THE LEGISLATIVE BACKLASH TO ADVANCES IN RIGHTS FOR SAME-SEX COUPLES

## SYMPOSIUM FOREWORD: COPING WITH THE AFTERMATH OF VICTORY

Linda J. Lacey\* & D. Marianne Blair\*\*

It is the best of times and the worst of times for gays in America. In three landmark cases, gays have scored major legal victories. In an opinion that came as a surprise to some commentators, the U.S. Supreme Court in *Lawrence v. Texas*<sup>1</sup> overruled *Bowers v. Hardwick*,<sup>2</sup> and held that the laws against same-sex sodomy were a violation of due process. The opinion contained language of great importance for gays, recognizing for the first time the level of discrimination they have suffered. Writing for the majority, Justice Kennedy acknowledged that: “The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”<sup>3</sup> Gay commentators began crying with joy when the opinion was announced.

The other two significant and highly-publicized decisions, *Baker v. State*<sup>4</sup> and *Goodridge v. Department of Public Health*,<sup>5</sup> addressed the need to afford formal recognition to same-sex relationships. For years, when confronted with constitutional challenges to same-sex marriage bans, courts issued boilerplate opinions, saying that the dictionary defines marriage as a union between men and

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1. 539 U.S. 558 (2003).

2. 478 U.S. 186 (1986).

3. *Lawrence*, 539 U.S. at 578.

4. 744 A.2d 864 (Vt. 1999).

5. 798 N.E.2d 941 (Mass. 2003).

women.<sup>6</sup> Period. Then, to the shock of many, in *Baehr v. Lewin*<sup>7</sup> the Hawaii Supreme Court used a gender discrimination, strict scrutiny analysis to uphold an attack on Hawaii's same-sex marriage ban. Although Hawaii voters invalidated this result with a constitutional amendment,<sup>8</sup> the ground was laid for the judiciary to closely examine the constitutionality of same-sex marriage bans. The highest courts of two other states accepted this challenge: the Vermont Supreme Court, which held in *Baker* that the Common Benefits Clause of the Vermont Constitution entitled same-gender partners to access to the rights and benefits afforded to married couples,<sup>9</sup> and the Massachusetts Supreme Court, which declared in *Goodridge* that barring entry of same-sex couples into marriage violated the equal protection and due process provisions of the Massachusetts Constitution.<sup>10</sup> As matters stand today, gays from all over America may enter into civil unions in Vermont and same-sex couples actually living in Massachusetts may legally marry.

The legal climate for same-gender couples is improving in other nations as well. Following recent decisions by the Canadian Supreme Court<sup>11</sup> and some of the highest provincial courts,<sup>12</sup> as well as legislative reform in Europe, same-sex couples can legally marry in many Canadian provinces and in Belgium and the Netherlands. Many other nations recognize registered partnerships or other forms of alternative status that confer some marital privileges upon gay partners.<sup>13</sup> Just this past December, South Africa's Supreme Court ruled that the South African Constitution requires the common law definition of marriage to be extended to include same-sex couples.<sup>14</sup>

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6. See e.g. *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. App. 1973).

7. 852 P.2d 44 (Haw. 1993).

8. *State Ballot Initiatives: Among Top Ballot Issues Decided Tuesday*, Wash. Post A46 (Nov. 5, 1998).

9. *Baker*, 744 A.2d at 886.

10. *Goodridge*, 798 N.E.2d at 968.

11. *In the Matter of Section 53 of the Supreme Court Act, R.S.C. 1985, c. S-26*, 2004 S.C.R. 79 (finding proposed federal legislation defining marriage as "the lawful union of two persons" to be within the exclusive legislative competence of Parliament and consistent with the Canadian Charter of Fundamental Rights and Freedoms).

12. *EGALE Canada, Inc. v. Canada (Attorney General)* (2003) B.C.J. No. 994 (B.C. C.A.) (holding that common law ban on same-sex marriage violates Canadian Charter of Fundamental Rights and Freedoms); *Halpern v. Toronto (City)*, (2003) 225 D.L.R. 529 (Ont. Ct. App.) (holding that ban on same-gender marriage violates Canadian Charter of Fundamental Rights and Freedoms).

13. See e.g. ABA Sec. Fam. L. Working Group on Same-Sex Marriages and Non-Marital Unions, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 36-38, 42-43 (2004) (available at <http://www.abanet.org/family/whitepaper/fullreport.pdf>) [hereinafter *White Paper*] (observing that Brazil, Croatia, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, New Zealand, Norway, the majority of the regions of Spain, Sweden, several Swiss states, municipalities in Argentina, and the United Kingdom all legislatively provide some benefits for same-gender partners). For an in depth discussion of some of these provisions, see D. Marianne Blair & Merle H. Weiner, *Family Law in the World Community* 310-23 (Carolina Academic Press 2003).

14. *Fourie v. Minister of Home Affairs*, Case No. 232/2003 (Nov. 30, 2004) (available at <http://www.equality.org.za/marriage/fourie.pdf>). The decision is currently on appeal to the Constitutional Court of South Africa. South African Dept. of Home Affairs, *Home Affairs Appeals Judgment of Same Sex Marriages*, [http://home-affairs.pwv.gov.za/media\\_releases.asp?id=200](http://home-affairs.pwv.gov.za/media_releases.asp?id=200) (Dec. 22, 2004).

Gays also have unprecedented rights to create their own families. Although Florida has banned adoptions by homosexuals and Mississippi has banned adoptions by same-gender couples,<sup>15</sup> those states currently represent an extreme minority view. Many courts are upholding same-sex couple adoptions,<sup>16</sup> and the rise in sophisticated alternative means of reproduction gives lesbians access to artificial insemination by donor and gay men access to surrogate mothers.

Perhaps of equal significance is the affirmation gays receive from increasing acceptance in the popular culture. In 1998, Ellen DeGeneres became the first lead character on television to “come out,” almost simultaneously, in her role and in her own personal life.<sup>17</sup> Although the show itself was cancelled, her popularity has not diminished and she now has a popular talk show. Celebrity gay couples have won the dubious privilege of having their privacy invaded and their breakups chronicled by magazines like *People*. Television shows like *Will and Grace* and the teen favorite, *Diggrassi*, have central gay characters. Even conservative soap operas, which still do not allow women characters to have abortions without going crazy or becoming sterile, discuss gay issues. The popularity of *All My Children*, a long running soap, increased as it introduced its first major gay character, the saintly Bianca, and featured daytime’s first lesbian kiss.

The changes in acceptance of gays can be seen at many less highly publicized levels. We have come a long way from the time when homosexuality was considered a form of mental illness and tennis star Martina Navratilova lost millions of dollars in endorsements because of her sexual orientation.<sup>18</sup> To give just one example, at several schools in a conservative state like Oklahoma, there are active Gay/Straight Alliances. Many of the teenage members are openly gay, and there are few instances of mistreatment by other students. LGBT organizations are common on college campuses and in professional schools, including our own School of Law. Twenty years ago, that would have been unheard of.

It was inevitable that the court victories for gay marriage and the less heralded daily victories for gay acceptance in the popular culture would generate a backlash. The U.S. Congress and the legislatures of the majority of American states have rushed to pass laws and promote constitutional amendments prohibiting gays from marrying.<sup>19</sup> Some states are also trying to limit the rights of

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15. Fla. Stat. Ann. § 63.042(3) (West 2005); Miss. Code Ann. § 93-17-3 (2004).

16. E.g. *In re M.M.D. & B.H.M.*, 662 A.2d 837 (D.C. 1995); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); *Adoption of B.L.V.B & E.L.V.B.*, 628 A.2d 1271 (Vt. 1993).

17. Seeq.com, *When Ellen Came Out*, [http://www.shootthemessenger.com.au/pre\\_dec97/a\\_tele\\_dec97/t\\_ellen.htm](http://www.shootthemessenger.com.au/pre_dec97/a_tele_dec97/t_ellen.htm) (last updated Feb. 1998).

18. See Steven Wine, *Navratilova Endorses Gay Travel Company*, <http://msn.foxsports.com/tennis/story/3489494> (accessed Apr. 10, 2005) (“When asked how much endorsement money being gay cost her, Navratilova said ‘Who cares? It’s millions of dollars, but so what?’”) As the article points out, Navratilova’s sexual orientation is now seen as a positive attribute, rather than a negative one, by some advertisers.

19. See Phyllis G. Bossin, *Same-Sex Unions: The New Civil Rights Struggle or an Assault on Traditional Marriage?* 40 *Tulsa L. Rev.* 381, 389-93 (2005).

gays to form their own families.<sup>20</sup> Right wing groups have tried to counter the acceptance of gays in the popular media by activities such as protesting against a PBS show featuring a lesbian couple.<sup>21</sup> Many analysts blame the Democratic loss of the 2004 presidential election on the gay marriage issue, theorizing that this issue on the ballot drew enough Republican voters to the polls in the pivotal state of Ohio to elect Bush.<sup>22</sup>

How real is the backlash against gay marriage and what are its implications? That is the timely topic of the essays in this symposium. Each article in the symposium explores the backlash and its corollary issues from an important different perspective.

One of the immediate questions is whether the backlash is limited to gay marriages or whether it is part of a wider strategy of anti-gay forces to reverse the clear trend toward popular acceptance of gays. There appears to be something sacred about marriage itself, so that otherwise tolerant people find the idea of two people of the same sex marrying unacceptable. As a result, anti-gay groups are cleverly choosing to focus on this popular and emotional issue, instead of going after more widely accepted gay victories.

It is also worth noting, however, that the gay community itself is divided about the issue of gay marriage. Some prominent gay commentators, like Nancy Polikoff, argue that the concept of marriage is patriarchal and gays should not waste their energy and political capital trying to become part of this deeply flawed heterosexual institution.<sup>23</sup> Others argue that whatever the merits of gay marriage, its high visibility has hurt gays in the long run and gays should move in less dramatic, more incremental ways to achieve their goals.<sup>24</sup>

Phyllis Bossin, Chair of the ABA Section of Family Law in 2004, examines the history of the struggle over gay marriage in the first article of this symposium, *Same-Sex Unions: The New Civil Rights Struggle or an Assault on Traditional Marriage?*<sup>25</sup> Bossin is uniquely qualified to provide this historical perspective, for during her tenure as Section Chair, she submitted the report by the Family Law Section and the Section of Individual Rights and Responsibilities in support of the

20. See Robert G. Spector, *The Unconstitutionality of Oklahoma's Statute Denying Recognition to Adoptions by Same-Sex Couples from Other States*, 40 *Tulsa L. Rev.* 467 (2005); Mark Strasser, *Rebellion in the Eleventh Circuit: On Lawrence, Lofton, and the Best Interests of Children*, 40 *Tulsa L. Rev.* 421 (2005).

21. See John G. Culhane & Stacy L. Sobel, *The Gay Marriage Backlash and Its Spillover Effects: Lessons from a (Slightly) "Blue State,"* 40 *Tulsa L. Rev.* 443, 443 (2005).

22. *Id.* at 445 n. 15.

23. Nancy D. Polikoff, *Making Marriage Matter Less: The All Domestic Partner Principles Are One Step in the Right Direction*, 2004 *U. Chi. Leg. Forum* 353; Nancy D. Polikoff, *Ending Marriage As We Know It*, 32 *Hofstra L. Rev.* 201 (2003).

24. See Culhane & Sobel, *supra* n. 21, at 461-62. The authors state:

A middle position, sketched out recently by the Human Rights Campaign ("HRC"), calls for a double-barreled approach: In the short term, advocate for specific pieces of legislation that confer the most important marriage benefits, such as social security death benefits for "spouses." In the long term, gain full marriage equality.

*Id.* at 462.

25. *Supra* n. 19.

ABA Resolution opposing the proposed federal constitutional amendment banning same-sex marriage,<sup>26</sup> testified before Congress in opposition to the amendment,<sup>27</sup> and served on the Working Group that drafted the Section's *White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*.<sup>28</sup> Bossin provides a detailed review of the struggle in the courts for recognition of same-gender marriage, from the earliest cases in the 1970s through litigation in 2004 and 2005 seeking recognition of Canadian marriages and Vermont civil unions. She recounts the efforts of Congress and state legislatures to stave off recognition of same-gender marriage by the judiciary, first through the federal and state defense of marriage acts following the Hawaii Supreme Court's *Baehr* decision, and then through constitutional amendments following the U.S. Supreme Court decision in *Lawrence*, the decision of the Ontario Court of Appeals in *Halpern v. Toronto (City)*,<sup>29</sup> and the Massachusetts Supreme Court's *Goodridge* decision. Her article includes an insightful analysis of the proposed federal constitutional amendment and the forces driving its introduction, as well as a valuable overview of the rights affected by the denial of formal recognition to same-gender couples, particularly in the area of family law. She concludes, however, on a hopeful note, relating the recent legislative efforts in Vermont, California, and New Jersey to afford some marital privileges to gay partners, and predicting that the current struggle by same-gender partners, like the civil rights struggles of the 1960s, will ultimately result in the replacement of the newly passed constitutional amendments and mini-DOMAs with laws protecting same-sex couples.

Professor Mark Strasser's article looks at one of the few major legal defeats in recent litigation, *Lofton v. Secretary of the Department of Children and Family Services*,<sup>30</sup> in which the Eleventh Circuit upheld Florida's ban on gay adoptions.<sup>31</sup> He theorizes that in *Lofton* the Eleventh Circuit was "throwing down the gauntlet and challenging the [Supreme] Court to either stand by or repudiate *Lawrence*."<sup>32</sup> Strasser begins by recounting the background of the case. The plaintiff, Steve Lofton, had served as a foster parent for a twelve-year-old boy who had tested positive for HIV at birth.<sup>33</sup> Lofton had received an outstanding foster parent award and it was clear that to uproot the boy from the home and parent he had known for almost thirteen years would not be in his best interests. The *Lofton* court asserted: "[I]n the adoption context, the state's overriding interest is the best

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26. See ABA, *Resolution Adopted by the House of Delegates*, <http://www.abanet.org/leadership/2004/2004/dj/103d.pdf> (Feb. 9, 2004).

27. See Phyllis G. Bossin, *Statement on Behalf of the American Bar Association Presented to the Committee on the Judiciary, United States Senate*, [http://www.abanet.org/family/newsletters/2004/Mar\\_BossinTestifies.pdf](http://www.abanet.org/family/newsletters/2004/Mar_BossinTestifies.pdf) (Mar. 23, 2004).

28. *White Paper*, *supra* n. 13.

29. 225 D.L.R. 529.

30. 358 F.3d 804 (11th Cir. 2004).

31. Strasser, *supra* n. 20.

32. *Id.* at 421.

33. *Id.* at 422.

interests of the children whom it is seeking to place with adoptive families.”<sup>34</sup> Nevertheless, it was clear that in this case, where there was no other family even interested in adopting the child, the real motive of the court was not this particular boy’s best interests. Strasser’s theory is that the Eleventh Circuit disagreed with *Lawrence*’s reasoning, stating: “The tone of the *Lofton* decision was that of an appellate court rebuking a lower court rather than that of a lower court attempting in good faith to implement the law as made clear by the United States Supreme Court.”<sup>35</sup> Strasser concludes by strenuously arguing that the Supreme Court made a major mistake in refusing to grant certiorari in the *Lofton* case, because “[t]he Court missed a great opportunity not only to protect very important interests but also to maintain its own credibility.”<sup>36</sup>

In *The Gay Marriage Backlash and Its Spillover Effects: Lessons from a (Slightly) “Blue State,”*<sup>37</sup> authors John Culhane and Stacy Sobel squarely address the backlash from a broader perspective. They begin with anecdotal examples of the backlash, then move to the many victories anti-gay forces have scored on the same-sex marriage issue, ultimately asking the question: “In such a climate, why wouldn’t the most radical anti-gay forces feel emboldened?”<sup>38</sup> They answer this question by arguing that the anti-gay backlash is real, but overstated. They then give specific examples of victories for LGBT forces in different arenas. Part III of their article discusses the ultimately successful efforts to pass a hate crimes bill in Pennsylvania.<sup>39</sup> The authors go on to discuss ways in which reactionary forces hurt their own cause by trying to pass too sweeping anti-gay legislation.<sup>40</sup> They then discuss alternative strategies for dealing with the backlash and conclude on an optimistic note:

The good news is that we will prevail. No movement grounded in such basic precepts of justice and fairness as marriage equality can long be held back, especially if gay people resist the temptation to shrink from the battle when opposition stiffens. Our response must be precisely the opposite: To be more insistent, more visible, and more confident.<sup>41</sup>

The next two articles turn our attention to Oklahoma law. First, Professor Robert Spector, who served as Reporter for the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”), examines a recent amendment to Oklahoma’s Adoption Code that attempts to launch a different kind of threat to the legal right of gays to parent than does the Florida adoption ban examined by Professor Strasser. During its 2004 Session, the Oklahoma legislature amended the statute regulating the recognition of adoption decrees from other states and foreign nations to provide that “an adoption by more than one individual of the

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34. 358 F.3d at 810.

35. Strasser, *supra* n. 20, at 428.

36. *Id.* at 421.

37. Culhane & Sobel, *supra* n. 21.

38. *Id.* at 444.

39. *Id.* at 453-57.

40. *Id.* at 457-61.

41. *Id.* at 465.

same sex”<sup>42</sup> would not be recognized in Oklahoma. Acknowledging that the scope of the new nonrecognition clause is itself murky, Professor Spector asserts that regardless of the legislature’s intent as to its breadth, the clause cannot be constitutionally applied in any context to the adoption decree of another U.S. state.

Most applications of the clause would be constitutionally infirm, from a procedural posture alone,<sup>43</sup> on at least two grounds. First, Professor Spector explains, any adoption decree rendered by a court exercising jurisdiction consistently with the jurisdictional requirements of the federal Parental Kidnaping Prevention Act (“PKPA”)<sup>44</sup> would be entitled under that federal law to recognition in all other U.S. states. To ignore the clear directives of that federal statute would violate the Supremacy Clause of the U.S. Constitution.<sup>45</sup> Any adoption decrees that did not fall within the protection of the PKPA, however, would still be entitled to recognition under the general federal full faith and credit statute<sup>46</sup> and the Full Faith and Credit Clause of the U.S. Constitution,<sup>47</sup> an assertion that Professor Spector ably supports with analysis of case precedent from courts across the nation.<sup>48</sup>

The other backlash to *Goodridge* and *Lawrence* by the Oklahoma legislature was a Legislative Referendum<sup>49</sup> to place on the ballot a constitutional amendment adding Section 35 to Article II of the Oklahoma Constitution. The referendum, which defined marriage in Oklahoma as “the union of one man and one woman” and banned recognition of same-gender marriages in other states, was then passed by the Oklahoma electorate in November 2004. Though Oklahoma marriage statutes had previously barred couples of the same sex from legally marrying in Oklahoma,<sup>50</sup> and recognition by Oklahoma courts of such marriages performed in other states was thwarted by a mini-DOMA<sup>51</sup> passed by the legislature in 1996, passage of the constitutional amendment imposed yet another obstacle by precluding same-sex couples from successfully attacking these statutes on state constitutional grounds. Moreover, Section 35 goes further by now providing that neither the Oklahoma Constitution nor any other provision of Oklahoma law

42. Okla. Stat. tit. 10, § 7502-1.4(A) (Supp. 2005).

43. Professor Spector notes an equal protection challenge, based on *Romer v. Evans*, 517 U.S. 620 (1996), presents a tenable alternative ground for constitutional attack, but his discussion focuses on the Supremacy Clause and Full Faith and Credit Clause grounds that he views as incontrovertible. Spector, *supra* n. 20, at 468 n. 4.

44. 28 U.S.C. § 1738A (2000).

45. U.S. Const. art. VI, cl. 2.

46. 28 U.S.C. § 1738 (2000).

47. U.S. Const. art. IV, § 1.

48. Spector, *supra* n. 20, at 474-77.

49. Okla. Legis. Referendum No. 334 (2004) (adding State Question No. 711 to the ballot for the general election of November 2, 2004).

50. See Okla. Stat. tit. 43, § 3 (Supp. 2005) (“Any unmarried person who is at least eighteen (18) years of age and not otherwise disqualified is capable of contracting and consenting to marriage with a person of the opposite sex.”).

51. Okla. Stat. tit. 43, § 3.1 (Supp. 2005) (“A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage.”).



“shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups,”<sup>52</sup> a provision that if interpreted overbroadly could conceivably block civil unions, registered partnerships, and possibly other legal devices that would otherwise confer various rights arising out of committed relationships between not only same-gender couples, but also unmarried opposite-gender couples. Regardless of how liberally the amendment is construed, at its core it confirms that same-sex couples will be prevented from enjoying the myriad federal and state marital benefits that are granted to married opposite-gender couples.

Camille Quinn and Shawna Baker, shareholders in a Tulsa firm specializing in estate planning and probate, address in their article the profound discriminatory effects of the Oklahoma marriage ban on the rights of same-gender couples in the event of a severe injury or death of one partner.<sup>53</sup> By constructing two hypothetical couples, one married and one a committed same-sex couple, the authors explore the impact of an automobile accident that incapacitates and ultimately kills one partner of each couple to illustrate the different rights available to the surviving partners in the areas of medical decision-making and visitation, inheritance through intestacy or probate, and estate tax obligations. While decrying the differential treatment, the authors also provide an invaluable primer on the complex estate planning that attorneys for same-sex couples must undertake to at least partially confer some of the benefits and protections on same-sex partners that are automatically or more readily available to opposite-gender spouses. In so doing, Ms. Quinn and Ms. Baker provide a wonderful overview of Oklahoma health and estate planning law for all attorneys and review numerous legal devices—designation of agent directives, advanced health care directives, durable powers of attorney, HIPAA releases, various types of wills and trusts, family limited partnerships, and life insurance to offset tax obligations—that are relevant to representation of all clients, regardless of their family structure. Copies of relevant forms are provided in an appendix.<sup>54</sup>

Finally, Bruce Carolan provides an important international perspective in his discussion of the position of gays and lesbians in European Union law.<sup>55</sup> Although Europe is often heralded as a much better place for gays than America, because of countries like the Netherlands that permit gay marriage, Carolan demonstrates that gays in Europe face a set of legal difficulties similar to those caused by the American backlash. He notes that the European situation is the reverse of America’s. In America, “a somewhat progressive judiciary has been thwarted, in some instances, by a conservative legislative backlash,”<sup>56</sup> while in Europe it is the legislators who represent the progressive forces and the European Court of Justice

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52. Okla. Const. art. II, § 35.

53. Camille M. Quinn & Shawna S. Baker, *Essential Estate Planning for the Constitutionally Unrecognized Families in Oklahoma: Same-Sex Couples*, 40 Tulsa L. Rev. 479 (2005).

54. *Id.* at 518-26.

55. Bruce Carolan, *Judicial Impediments to Legislating Equality For Same-sex Couples in the European Union*, 40 Tulsa L. Rev. 527 (2005).

56. *Id.* at 529.

that has proven to be the conservative force. Carolan contends that particularly in the case of same-sex couples, the decisions of the European Court of Justice threaten to undermine the gains made by legislation. Carolan provides a very comprehensive discussion of the background of European Union legislation, the development of human rights jurisprudence by the European Court of Justice, and the decisions of the court regarding discrimination based on sexual orientation. This analysis takes place using the “premise in the context of a possible judicial challenge to the express terms of the Irish legislation prohibiting discrimination based on sexual orientation.”<sup>57</sup> He theorizes that the EU Court of Justice is likely to accept the very conservative Irish legislation and “thus set a very low benchmark for implementing the principle of equality for sexual minorities into the national law of EU member states.”<sup>58</sup>

All of the symposium articles have one thing in common: A recognition of the reality of the backlash, but also an understanding and appreciation of the gains that gays have made in the last few decades. The *Tulsa Law Review* editors are to be commended for initiating a symposium on this controversial topic. The result of their efforts is a thorough examination of many aspects of the subject from a variety of perspectives and a compilation of articles that will be of great use to many scholars in the future.

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57. *Id.* at 530.

58. *Id.*

