
IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS,
Plaintiff/Appellee

v.

MATTHEW R. LIMON,
Defendant/Appellant

Review Granted May 25, 2004
State v. Limon, 32 Kan. App. 2d 369 (2004)
On Appeal from the Court of Appeals
of the State of Kansas

**BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF SOCIAL
WORKERS AND THE KANSAS CHAPTER OF THE NATIONAL
ASSOCIATION OF SOCIAL WORKERS IN SUPPORT OF
DEFENDANT/APPELLANT MATTHEW LIMON**

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INTEREST OF *AMICI CURIAE*

With 153,000 members, the National Association of Social Workers (“NASW”) is the largest organization of professional social workers in the world. The Kansas Chapter of NASW represents 5,300 members in the State of Kansas. NASW’s mission is to protect the public and to ensure high quality social work services in all communities. It publishes numerous scholarly reference materials, four quarterly professional journals, and comprehensive research abstracts.

NASW’s members are highly trained and experienced professionals who counsel individuals, families, and communities in a variety of settings, including schools, hospitals, mental health clinics, senior centers, and private practices. The practice of social work requires knowledge of human development and behavior; social, economic, and cultural institutions; and the interaction of all of these factors. NASW members often provide services to victims of sexual and physical abuse and conduct research into related issues. They, thus, have unique and extensive professional and clinical expertise with regard to sexual abuse, teenage sexual development, and issues relating to sexual orientation.

NASW recognizes that discrimination and prejudice directed against any group are damaging not only to the social, emotional, and economic well-being of the affected group’s members, but also to society in general. NASW has long been committed to working toward the elimination of prejudice and discrimination based on sexual orientation. NASW adopted its first policy statement on sexual orientation issues in 1977. The NASW Code of Ethics requires social workers to provide services on the same basis whether clients are involved in sexual activity with a member of the same

gender or with a member of the opposite gender, and it encourages social workers to expand access, choices, and opportunities for gay men, lesbians, and bisexual people.

NASW supports child abuse laws and does not oppose criminalizing sex between adults and minors. Indeed, social workers have long been at the forefront of efforts to identify child abuse and provide avenues for intervention. Holding perpetrators criminally responsible is often a key factor in the recovery of victims of sexual abuse. NASW does not condone any non-consensual sexual activity, regardless of age. (Non-consensual activity is not at issue in this case, however, as shown by the State's stipulation that the minor in this case consented to the sexual activity. R. Vol. I, at 41.)

Consistent with NASW's policies and Code of Ethics, NASW opposes laws, like the ones at issue in this case, that provide for differential and discriminatory treatment of consensual sexual activity between teenagers based solely on the parties' sexual orientation or gender. There is no support in social science for the grossly disparate sentencing outcomes that such laws impose on teenagers involved in sexual activities with members of the same sex. On the contrary, social science confirms that these laws cause harm by reinforcing prejudice and discrimination against persons who are involved in sexual activity with same-sex partners.

Accordingly, given NASW's policies and the work of its members, NASW has expertise that will assist the Court in reaching a proper resolution of the questions presented in this case.

SUMMARY OF ARGUMENT

The State's "Romeo and Juliet law," K.S.A. 2002 Supp. § 21-3522(a)(3), provides a far more lenient penalty than the criminal sodomy statute, K.S.A. § 21-3505(a)(2), but applies only to opposite-sex sexual partners. In pertinent part, the Romeo and Juliet law

states: “(a) Unlawful voluntary sexual relations is engaging in voluntary . . .

(2) sodomy . . . with a child who is 14 years of age but less than 16 years of age and the offender is less than 19 years of age and less than four years of age older than the child and the child and the offender . . . are members of the opposite sex.”

The State and the opinions of the panel majority below assert that the differential treatment of opposite-sex and same-sex partners serves a host of legitimate purposes, but decades of social science and clinical experience prove otherwise.

First, restricting the Romeo and Juliet law to members of the opposite sex does not, and cannot, serve the ostensible goal of ensuring heterosexual sexual development. According to current studies and professional understanding, a person’s sexual orientation is already settled by the time he or she turns 14, which is the youngest age that can trigger the Romeo and Juliet law. The law will not encourage minors either to become heterosexual or to disavow homosexuality, because a person’s intimate experiences during adolescence do not determine his or her sexual orientation. To the extent the law is somehow intended to pressure gay and bisexual teenagers into switching their sexual orientation, decades of social science research indicate that it will fail.

Second, the differential penalties at issue here do not prevent harm to teenagers. Consensual sexual encounters between same-sex partners are not more harmful than those between opposite-sex partners. Mental health professional organizations long ago recognized that homosexuality is not a disorder. They also have recognized that intimacy is a crucial aspect of the human experience and is an important aspect of mental health and well-being, and that homosexuality is a normal expression of sexuality.

Finally, the differential treatment of same-sex and opposite-sex consensual sexual activity between teenagers poses a grave risk of causing harm not only to otherwise-qualified teenagers who are excluded from the Romeo and Juliet law based on gender and/or sexual orientation, but also to society in general. By excluding same-sex sexual partners, and thereby ensuring that same-sex activity is punished more severely, the Romeo and Juliet law reinforces prejudice and discrimination. It also encourages violence against people who are, or are perceived to be, homosexual or bisexual.

ARGUMENT

I. THE EXCLUSION OF OTHERWISE-QUALIFIED SAME-SEX SEXUAL PARTNERS FROM THE ROMEO AND JULIET LAW DOES NOT PROTECT “THE TRADITIONAL SEXUAL DEVELOPMENT OF CHILDREN”

Judge Green’s opinion below asserts that the Romeo and Juliet law seeks to, and does, protect the traditional sexual development of teenagers. As the opinion declares:

During early adolescence, children are in the process of trying to figure out who they are. A part of that process is learning and developing their sexual identity. As a result, the legislature could well have concluded that homosexual sodomy between children and young adults could disturb the traditional sexual development of children.

State of Kansas v. Limon, 32 Kan. App. 2d 369, 377 (2004).

The State takes a somewhat different approach, contending that “the law furthers the legitimate *purpose of recognizing and, in part, promoting traditional sexual relationships between teenagers.*” (Supp. Br. of Appellee at 9 (emphasis added).) The State’s suggestion that the Romeo and Juliet law serves the purpose of promoting sexual relationships between teenagers is contradicted by the fact that both the Romeo and Juliet law and the Kansas criminal sodomy statute *criminalize* sexual activity between

teenagers. The asserted purpose of *promoting* such *criminal* sexual relationships cannot be considered a legitimate purpose for the law and deserves no credence from this Court.

Neither the opinion nor the State cites any study to support the assumption that, by excluding same-sex sexual partners from its more lenient penalties, the Romeo and Juliet law protects traditional sexual development. In fact, decades of social research and clinical experience indicate that the law cannot achieve that ostensible purpose.

Sexual orientation is already well settled by the time the law first applies.

According to current studies and professional understanding, a person's sexual orientation is already settled by the time he or she turns 14, which is when the Romeo and Juliet law first applies:

Accumulating studies from the United States over the past decade suggest that the development of sexual attraction may commence in middle childhood and achieve individual subjective recognition sometime around the age of 10. As these studies have shown, first same-sex attraction for males and females typically occurs at the mean age of 9.6 for boys and between the ages of 10 and 10.5 for girls.

Gilbert Herdt, *The Magical Age of 10*, 29 Archives of Sexual Behavior 587, 597 (2000) (citations omitted); *see also* Ritch C. Savin-Williams and Lisa Diamond, *Sexual Identity Trajectories Among Sexual-Minority Youths: Gender Comparisons*, 29 Archives of Sexual Behavior 607, 609-11 (2000) (reviewing authorities and concluding that same-sex attraction occurs between ages of 9 and 11); Martha McClintock et al., *Rethinking Puberty: The Development of Sexual Attraction*, 5 Current Directions in Psychological Science 178, 178 (1996) ("Recent findings from three distinct and significant studies have pointed to the age of 10 as the mean age of first sexual attraction — well before puberty, which is typically defined as the age when the capacity to procreate is attained."); Dean H. Hamer et al., *A Linkage Between DNA Markers on the X*

Chromosome and Male Sexual Orientation, 261 *Science* 321, 322 (1993) (reporting study of homosexual males that found most experienced first attraction to other males by age 10). Thus, the Romeo and Juliet law cannot protect teenagers from becoming homosexual or bisexual because their sexual orientation is already well settled by the time the law first applies.

Sexual orientation is not affected by the intimate sexual experiences that teenagers have. A person's sexual orientation is not determined by whether he or she engages in same-sex sexual activity, other-sex sexual activity, both, or neither. According to the Kinsey Report, it is not uncommon for heterosexual men to have had same-sex sexual experiences as preadolescent boys. Alfred C. Kinsey, *Sexual Behavior in the Human Male* 167 (1948) ("It is not improbable that nearly all boys have some preadolescent genital play with other boys or with girls."). Even at older ages, "[b]etween adolescence and 15 years of age, about 1 male in 4 (27%) has some homosexual experience." *Id.* at 629; *see also* R.C. Savin-Williams et al., *Child Adolesc. Psychiatric Clin.*, 14, 537 (2004) (reporting that "children and adolescents of all sexual orientations and identities participate in same-sex and cross-sex behavior," and concluding that "neither preadult cross- nor same-sex behavior necessarily implies an impending heterosexual or homosexual adaptation"). Despite this high level of same-sex sexual activity, only a small percentage of men are homosexual. Alfred C. Kinsey, *Sexual Behavior in the Human Male* 650-51 (1948) (finding that only 4% of white male population is homosexual).

The same principle is true for homosexuals, most of whom have had sexual experiences with members of the opposite sex. *Id.* Indeed, in one study, 80% of self-

identified lesbian/bisexual female youth had a history of sexual activities with males, while 56% of self-identified gay and bisexual male youth had a history of sexual activities with females. Margaret Rosario et al., *The Psychosexual Development of Urban Lesbian, Gay, and Bisexual Youths*, 33 *Journal of Sex Research* 113, 120 (1996); see also Susan Rosenbluth, *Is Sexual Orientation A Matter of Choice?*, 21 *Psychology of Women Quarterly* 595, 596 (1997) (reporting that 95% of lesbians have dated men, 84% have had sustained romantic relationships with them, and one third have previously been married). Thus, because one's sexual experiences in adolescence do not determine one's sexual orientation, imposing more severe punishment on teenagers who engage in sexual activity with same-sex partners will not increase the ultimate number of adult heterosexuals.

Efforts to pressure homosexual teenagers into becoming heterosexual are ineffective. To the extent the law is intended to pressure homosexual teenagers into becoming heterosexual, decades of social science research demonstrate that it will not work. No data demonstrate that so-called "reparative" or conversion techniques are effective. Douglas C. Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 *Journal of Consulting and Clinical Psychology* 221, 222-26 (1994).

Based on the prevailing knowledge, NASW has adopted the policy that social workers must explain to their clients the lack of documented successful attempts at changing sexual orientation. NASW, *Policy Statement on Lesbian, Gay and Bisexual Issues* (Aug. 1996) (approved by NASW Delegate Assembly), reprinted in NASW, *Social Work Speaks: NASW Policy Statements* 230 (6th ed. 2003). Similarly, in 1997, the

American Psychological Association recognized that homosexuals cannot be forced to change their sexual orientation, and adopted a policy reaffirming the view that homosexuality is not a treatable mental illness. American Psychological Association, *Resolution on Appropriate Therapeutic Responses to Sexual Orientation*, Position Statement (August, 1997).

In sum, social science research and clinical experience demonstrate that the Romeo and Juliet law cannot serve the ostensible purpose of protecting traditional sexual development.

II. THE EXCLUSION OF OTHERWISE-QUALIFIED SAME-SEX SEXUAL PARTNERS FROM THE ROMEO AND JULIET LAW DOES NOT PREVENT HARM TO MINORS

The panel majority below and the State suggest that it is proper to exclude otherwise-qualified same-sex sexual partners from the Romeo and Juliet law to prevent harm to children. As Judge Green's opinion asserts, "the Kansas Legislature has made an implicit fact-finding that same-sex sex acts are different from heterosexual sex acts." *Limon*, 32 Kan. App. 2d at 375. In its brief to this Court, the State asserts that "[t]he Legislature's classification underscores the realization that non-traditional sexual relationships can, in many instances, such as here, be more damaging to a child." (Supp. Br. of Appellee at 8.)

Neither the Court of Appeals nor the State cites any research or empirical findings in support of the claim that consensual same-sex encounters between teenagers cause more harm than heterosexual ones. Once again, social science research and clinical experience establish the opposite.

Same-sex sexual activity is not innately harmful. In studies of both human beings and animals, scientists and professionals have found that homosexuality is normal.

Studies “overwhelmingly suggest that homosexuality per se is not related to psychopathology or psychological adjustment . . . The few studies that suggest the contrary are typically among the weakest methodologically, and some of these are so flawed as to be uninterpretable.” John C. Gonsiorek, *The Empirical Basis for the Demise of the Illness Model of Homosexuality*, in *Homosexuality: Research Implications for Public Policy* 115, 131 (John C. Gonsiorek & James D. Weinrich eds., 1991); *see also* John A.W. Kirsch and James D. Weinrich, *Homosexuality, Nature and Biology: Is Homosexuality Natural? Does it Matter?*, in *Homosexuality: Research Implications for Public Policy* 18-19 (John C. Gonsiorek & James D. Weinrich eds., 1991) (reporting that homosexual behavior occurs widely in humans and other species).

Indeed, for more than a quarter of a century, the mental health professions have viewed homosexuality as an alternative form of biopsychosocial development and *not* a mental disorder. NASW, for example, believes that homosexuality is a normal form of sexuality. NASW, *Policy Statement on Lesbian and Gay Issues* (Aug. 1993) (approved by NASW Delegate Assembly), *reprinted in* NASW, *Social Work Speaks: NASW Policy Statements* 162 (3d ed. 1994). Similarly, in a resolution voting to remove “homosexuality” from the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders, the Association declared in 1973:

Whereas homosexuality per se implies no impairment in judgment, stability, reliability, or general social or vocational capabilities, therefore, be it resolved that the American Psychiatric Association deplores all public and private discrimination against homosexuals in such areas as employment, housing, public accommodation, and licensing, and declares that no burden of proof of such judgment, capacity, or reliability shall be placed upon homosexuals greater than that imposed on any other persons.

American Psychiatric Association, *Position on Homosexuality and Civil Rights* (Dec. 15, 1973), 131 *American Journal of Psychiatry* 497 (1974). The American Psychological Association adopted the same position the following year, urging all mental health professionals to dispel the stigma of mental illness that had been associated with homosexuality. J.J. Conger, *Proceedings of the American Psychological Association, Incorporated, for the Year 1974: Minutes of the Annual Meeting of the Council of Representatives*, 30 *American Psychologist* 620, 633 (1975). Thus, scientific research and the experience of the mental health professions refute the position that homosexuality is more harmful than heterosexuality.

Prejudice against gay men, lesbians, and bisexual people does not justify the Romeo and Juliet law's exclusion. Although homosexuality is not itself harmful, people who are, or are perceived to be, homosexual or bisexual may sometimes face prejudice or discrimination. Gregory M. Herek, *The Psychology of Sexual Prejudice*, 9 *Current Directions in Psychological Science* 19, 19 (February 2000). However, concern that teenagers who engage in same-sex sexual activities may face prejudice and discrimination is not a valid legal basis for the State itself to impose discriminatory penalties on such teenagers. On the contrary, “[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person’s physical liberty.” *O’Connor v. Donaldson*, 422 U.S. 563, 575 (1975). Indeed, “[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.” *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); see also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (“[T]he City may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the

body politic.”); *Pruitt v. Cheney*, 963 F.2d 1160, 1165 (9th Cir. 1992) (applying same principle in determining that complaint stated claim that law targeting homosexuality violated Equal Protection Clause).

Thus, any asserted purpose of protecting teenagers from the purported harm of homosexuality cannot be considered rational, because homosexuality is a normal form of human behavior and is not innately harmful.

III. THE EXCLUSION OF OTHERWISE-QUALIFIED SAME-SEX SEXUAL PARTNERS FROM THE ROMEO AND JULIET LAW CAUSES HARM

Rather than preventing harm, the exclusion of otherwise-qualified same-sex sexual partners from the Romeo and Juliet law poses a risk of *causing* harm. Laws that impose harsher penalties on sexual activity engaged in by same-sex partners than on acts between opposite-sex partners “marginalize and stigmatize the whole community. They send the message that same-sex activity is ‘unnatural,’ ‘deviant,’ and not to be tolerated.” Barbara Perry, *In the Name of Hate: Understanding Hate Crimes* 111-12 (2001); *see also* Gary W. Harper and Margaret Schneider, *Oppression and Discrimination Among Lesbian, Gay, Bisexual, and Transgendered People and Communities: A Challenge for Community Psychology*, 31 *American Journal of Community Psychology* 243, 246 (2003) (“Other forms of discrimination and oppression are supported by legislation and other legal actions that explicitly exclude lesbian, gay, bisexual and transgendered people from enjoying the rights and protection afforded most citizens.”). By labeling identical conduct “criminal sodomy” when engaged in by partners of the same gender, and “unlawful voluntary sexual relations” when engaged in by partners of the opposite gender, and by imposing a far more severe penalty on same-sex sexual partners than on

opposite-sex partners, the Romeo and Juliet law's exclusion reinforces prejudice and discrimination.

The exclusion also encourages violence. The "designation of 'deviant' has long facilitated the persistence of the criminalization and pathologizing of same-sex relations. Consequently, gay men and women have been harassed, persecuted, and disempowered for their difference." Barbara Perry, *In the Name of Hate: Understanding Hate Crimes* 112 (2001). Indeed, "[p]ractices within the state — at an individual and institutional level — that stigmatize, demonize, or marginalize traditionally oppressed groups legitimate the mistreatment of these same groups on the streets." *Id.* at 179; *see also* Gregory M. Herek, *The Psychology of Sexual Prejudice*, 9 *Current Directions in Psychological Science* 19, 19 (February 2000) ("[L]esbians, gay men, and bisexual people — as well as heterosexuals perceived to be gay — routinely experience violence, discrimination, and personal rejection.").

The law causes harm in other ways, as well. Public campaigns that pressure individuals to become heterosexual harm gay, lesbian, and bisexual people by "distorting the truth about sexual orientation, and fueling prejudice." Douglas C. Haldeman, *Therapeutic Antidotes: Helping Gay and Bisexual Men Recover from Conversion Therapies*, 5 *Journal of Gay & Lesbian Psychotherapy* 117, 127-28 (2001). In addition, the State's endorsement of discriminatory treatment of consensual same-sex sexual activity may lead many people to conceal their sexual orientation. Gregory M. Herek, *Why Tell if You're Not Asked? Self-Disclosure, Intergroup Contact and Heterosexuals' Attitudes Toward Lesbians and Gay Men*, in *Psychological Perspectives on Lesbian Gay and Bisexual Experiences* 270, 277-78 (eds. Garnets & Kimmel, 2003). This response to

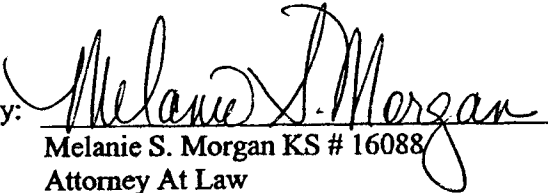
anticipated prejudice is itself cause for concern because actively concealing significant aspects of the self can have negative effects on mental and physical health. Gregory M. Herek, *Why Tell if You're Not Asked? Self-Disclosure, Intergroup Contact and Heterosexuals' Attitudes Toward Lesbians and Gay Men*, in *Psychological Perspectives on Lesbian Gay and Bisexual Experiences* 270, 277-78 (eds. Garnets & Kimmel, 2003); see also NASW, *Policy Statement on Lesbian, Gay and Bisexual Issues* (Aug. 1996) (approved by NASW Delegate Assembly), reprinted in NASW, *Social Work Speaks: NASW Policy Statements* 227 (6th ed. 2003).

Thus, because the Romeo and Juliet law poses a risk of causing harm by sustaining prejudice and encouraging violence, it should not withstand this Court's scrutiny.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be reversed.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief *Amici Curiae* of the National Association of Social Workers and the Kansas Chapter of the National Association of Social Workers in Support of Defendant/Appellant Matthew Limon was served by first class U.S. mail, postage prepaid, this 9th day of August, 2004, to each of the following:


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