

**AALL Publications Series**

**74**

**Sexual Orientation and the Law**

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SEXUAL ORIENTATION AND THE LAW:  
A RESEARCH BIBLIOGRAPHY  
SELECTIVELY ANNOTATING LEGAL LITERATURE THROUGH 2005

Standing Committee on Lesbian and Gay Issues  
Social Responsibilities Special Interest Section  
American Association of Law Libraries

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# PREFACE

*Sexual Orientation and the Law: A Research Bibliography* represents the collaborative efforts of the Standing Committee on Lesbian and Gay Issues, or the "SC." The editors would like to acknowledge the invaluable assistance of all who participated in this sizeable undertaking, helping to bring to completion a long-desired goal of the group. Special thanks are offered to Brad Sears, Executive Director of the Williams Institute on Sexual Orientation Law and Public Policy, for contributing an insightfully provocative introduction that surveys the state of this literature as it stands today. Our hope is that the combination will prove useful to anyone researching the nuances of the numerous points of contact between gay, lesbian, bisexual and transgender citizens and their respective legal systems.

## **Background of the Standing Committee**

The SC is a permanent organization within the American Association of Law Libraries [AALL], housed under the umbrella of the Social Responsibilities Special Interest Section [SR-SIS].

The SC was first called to order in 1985 under the leadership of Carol Alpert.<sup>1</sup> Its eight founding members would grow to more than 160 over the next twenty years. From its inception the SC has worked to raise awareness of law-related problems of gay men and lesbians both within the law librarian profession and among their patrons and the community at large, in keeping with its organizational charge

to provide an avenue to members for interaction and discussion of issues within the group, but also within the larger American Association of Law Libraries ("AALL"), to

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<sup>1</sup> This overview of the SC's history follows that given by Elvira Embser-Herbert, *Why the Heck Is There a Standing Committee for Lesbian and Gay Issues Anyway?*, 10(4) AALL SPECTRUM 18 (Feb. 2006).

the extent of making all members aware of and react to the needs of lesbians and gays within the law library community. The Committee is also intended to serve as a vehicle for dissemination of information, including but not limited to the provision of programs for AALL and other such groups.

Toward these ends the SC has sponsored successful AALL resolutions

- supporting a “policy of equal employment opportunities for lesbian and gay people in all types of libraries”;
- opposing discrimination against “all persons who have acquired AIDS or who test positive for the human immunodeficiency virus—HIV”;
- opposing “federal and state constitutional amendments defining marriage as only between a man and a woman”;
- and
- urging “libraries to acquire legal materials on the role of lesbian and gay people in society.”

Although this bibliography and its predecessors follow directly from the SC’s broader mission to advance the availability of legal information impacting the lives of gay men and lesbians, it was this last resolution that compelled the group to undertake the task of compiling and organizing the legal literature on gay-themed topics.

### **History of the Bibliography**

Camille Broussard, past chair of the SC and project participant in the earlier iterations of the bibliography, shares her memories of the project’s original plan and execution:

“The 1994 bibliography was the result of a project begun in 1987—just two years after the Standing Committee was created. The third update of the bibliography (1969–1992) was accepted for publication in *Law Library Journal* in early Spring 1993. The fourth update (1969–1993) was completed for the Winter 1994 publication.

“We began the bibliography project to provide guidance to all of our librarian colleagues in both developing a core collection of relevant material and in providing research assistance to all law library patrons—professors, students, attorneys and judges. As the introduction in the *Law Library Journal* indicates, ‘the Standing Committee began preparing the bibliography in 1987 after the AALL membership passed the resolution, presented by the Contemporary Social Problems SIS [CSP; predecessor to the SR-SIS], urging libraries to acquire legal materials on the role of lesbian and gay people in society.’ The resolution helped many librarians justify the use of funds to purchase materials on sexual orientation issues and to begin a collection in the area. Many members of AALL had never had any contact with that body of literature. It was also true that many members of AALL did not know that they knew—much less worked with—any lesbian and gay librarians. They did not realize how many young people had grown up using public or school libraries where the only entry in the card catalog for homosexuality was a card saying, ‘Please see the librarian for materials on this subject.’ (And that assumes that many young people knew the word to look for was ‘homosexuality’!) This was one important issue among the many that CSP brought to the attention of our law library colleagues.

“The first bibliography was distributed from the CSP table in the activities area at the 1988 AALL Annual Meeting in Atlanta. I arranged for Lewis & Clark Law School in Portland, Oregon to contribute to our efforts by copying and shipping the bibliography to the convention hotel. The original 200 copies ‘disappeared’ very quickly during the first two days of the convention. (According to the 1989 minutes from the CSP business meeting, the Standing Committee had but 88 names on its mailing list—so it was not just our members who took copies of the bibliography.)

“After the convention, Karen Edwards, the Standing Committee Chair, filled approximately 12 requests for the bibliography. Paul George served as the contact for Standing Committee members requesting copies. In each of the subsequent

years, the Standing Committee Chair made copies of the bibliography for the CSP activities table.

“Many Standing Committee members contributed to the various editions of the bibliography. To promote visibility of all lesbian and gay members within AALL, the Standing Committee decided to publish the bibliography as a group listing the Standing Committee as the author. We did not list or recognize individual contributors. This was an important decision for us for a number of reasons: many folks could not be out at work, many chose not to; it was still a time when we did not publicly announce or advertise the location of the annual reception; we had only just begun to fully comprehend the impact AIDS would have on our community.

“It was James Duggan, with lots of help from Ruth Parlin, who guided the final publication stretch in 1994, but they stood on the shoulders of many. At the risk of forgetting valuable contributions, I have listed a few of the contributors below. I coordinated the first edition along with Paul George. Carol Alpert, Jennifer Rish, George Jackson, James Duggan worked on the various sections. Paul continued as Chair of the bibliography committee the following year and completed the 2nd update. Many of the original contributors updated their sections. (I still remember my section: Discrimination in Employment). And now, a wonderful (and, of course, fresh) group of bibliographers have accepted the lead in taking the publication to a new level. Thank you and congratulations!”

### **The Present Bibliography**

This volume of the *Sexual Orientation and the Law* bibliography reprints that earlier edition which was published as the lead article in the Winter 1994 issue of *Law Library Journal*, the official research organ of the AALL. That version covered material through September 1, 1993. This original document is followed by a new bibliography describing materials published between September 1, 1993, and December 31, 2005.

While some users may wish the two publications had been integrated, several considerations mitigated against that reasonable expectation. First, incorporating the earlier citations into the current bibliography would have required creating annotations for this older material, an enormous undertaking this committee prudently chose to avoid. Second, the subject categories of the two works are not completely identical, precluding any easy attachment of one to the other. And while it would have been helpful to the reader to incorporate the entries of the earlier bibliography into the index, the original publisher was unable to provide an editable version of the text that would allow insertion of the citation numbers used for indexing. In the end, therefore, the 1994 bibliography is presented exactly as it was originally published.

The later bibliography was conceived as an update to the 1994 original rather than as a wholly new work. For that reason its design follows closely the topical outline of its predecessor. Alterations to that outline provide suggestive indicators of the extent to which legal realities have changed in the interim: Whereas AIDS was a separate topic consuming almost half of the 1994 bibliography, in the current version very few AIDS articles have been included. AIDS is no longer viewed as a “gay” disease, and thus selection required that an article deal explicitly with the impact of AIDS on the lives of gay men and lesbians. Surprisingly few satisfied that criterion.

On the other hand, categories receiving little development in 1994 have blossomed extraordinarily, requiring extensive elaboration of the impacted topical headings. Predominant here are the family-related areas. This version also features an attention to foreign and international aspects of sexual orientation law that were missing in the prior documents.

Perhaps the most significant addition to the 1994 bibliography, however, is the inclusion of a separate “Gender Identity” subject heading. On the one hand, because gender identify is not technically a “sexual orientation,” it was not felt by the editors that these materials could be simply folded into the existing sections;

on the other, these discussions were clearly germane to the purpose of the project and therefore merited inclusion. While the SC's charge (given above) is formally limited to "the needs of lesbians and gays within the law library community," as I write this introduction changes to that directive—and correspondingly, the name of the SC—are being contemplated that will expand that language to include the transgender and bisexual members of the law library community as well. Brad Sears spoke better than he may have known when, in his introduction, he suggests that the next edition of the bibliography will need to bear a different name.

Another deviation from the inherited format occurs in the arrangement of citations within each heading. Rather than adopting a strictly alphabetical organization, the editors opted for a chronological arrangement. We wanted to allow for the possibility that some users will wish to consult the bibliography not only to obtain information about a specific cite, but also to glean a sense of the historical trends within a category. Reading the annotations sequentially, we hope, will offer a hint of the development of arguments and issues as they appear and disappear from the academic discourse.

Perhaps to the horror of purists, citation format within the bibliography does not conform to any established format, including the *Bluebook* (the standard style guide for legal writing). The editors found all such rules to be too minimal to provide easy use of the entries by the full range of intended users, from high school students to senior legal scholars. Titles of journals are therefore offered without confusing abbreviations, and with full indication of all terms, easing the transition by the user from citation to library catalog to find the resource. Another feature has been the inclusion of the full page run of an article, rather than the traditional first page only. Our reasoning here was that this expanded information would assist the researcher in choosing which materials were best suited to her present needs.

The annotations themselves, clearly the major innovation in this edition, have been designed to be self-contained. Each case



mentioned includes a complete citation. While this method necessitates a certain amount of repetition, one scenario we hoped this format would prevent was the user who has copied a section of the book for later referencing, finding herself without access to a separate index of case names and citations.

The index of case names, therefore, does not include citations. More noticeably, it is not an exhaustive itemization of all relevant cases on sexual orientation issues that occurred during the review period of 1993–2005. This decision was made after a tentative list was run of all cases with some discernible impact on sexual orientation and gender identity issues, with a result numbering in the hundreds. To compile and annotate such a corpus is no longer feasible. The compromise we offer in this book is to highlight those cases discussed within the cited literature, under the presumption that the most significant cases will be accessible to the user through this method. Once an on-point case has been identified, the researcher should consider Shepardizing the citation to identify subsequent cases that cite to the first. Those interested in a more detailed case law overview should consult the excellent updates provided by *Lesbian/Gay Law Notes*, originally published by the New York Law School's Labor and Employment Law Program, and now sponsored by the school's Justice Action Center <<http://www.nyls.edu/jac>>. This title "tracks significant new legislation, reports on new court decisions, administrative rulings, and executive actions, and highlights new publications of interest." The existence of this valuable resource—with complete online archives going back to 2000, and summaries to even earlier—removed the need for this bibliography to provide an exhaustive accounting of relevant case law.

An additional word about the annotations is warranted. The SC is an organization which, by design, exists to advance the interests of its membership. The user should not be surprised then that the annotators favor articles that believe gay men and lesbians should enjoy the full panoply of civil liberties, and criticize those arguing that we should be satisfied with less. Brad's introduction

makes an intriguing argument concerning whether such negative literature should be included at all. While sympathetic to his view, we can perhaps suggest that, as librarians, we are more ethically obliged to present the full scope of the literature than are other specialists. But while bound to acknowledge its existence, that same professional duty does not require of us a pretense of objectivity concerning works arguing against our collective self-interest. In other words, because the SC has a discernible viewpoint on the topic of the rights of sexual minorities, this bibliography—sponsored by the SC and annotated by SC members—unsurprisingly reflects that same viewpoint. While we do not believe our perspective results in unfair treatment of any cited works, users requiring the façade of an “objective” overview of the gay rights literature may need to look elsewhere.

Despite its length, this bibliography is far from complete. Excluded from inclusion are the less substantial, more ephemeral pieces such as appear in bar journals and legal newspapers. Even so, room only allowed for pieces whose relevance to the organizing topic was direct and easily discernible. Anyone well-versed in the field will perhaps readily identify important citations that have been overlooked. For this we apologize, and can only plead that the slight was not intentional but only pragmatic.

### **Updating the Bibliography**

The incomplete list of citations was tolerable to the editors because it was always the plan to reorganize the bibliography into a constantly updated project of the SC, rather than a decennial-plus publication. In addition to tracking the emerging literature as it appears, updates posted on the internet would allow the team to include retrospectively those earlier items that had been missed. Users of this bibliography are therefore invited to consult the SR-SIS homepage <<http://www.aallnet.org/sis/srsis/>> for links to new bibliography contents. These additions may, publisher willing, be incorporated into future editions of the hardcopy bibliography,

putting the full scope of this important literature into the hands of an ever-broader audience.

James M. Donovan, Editor-in-Chief

# INTRODUCTION

The Scholarship of the Possible:  
Sexual Orientation Law Scholarship 1994–2005

Brad Sears  
*Executive Director, The Williams Institute*<sup>1</sup>

This year marks the fortieth anniversary of the publication of the first sexual orientation law scholarship in law journals.<sup>2</sup> Have we come a long way, baby. The American Association of Law Libraries' Standing Committee on Lesbian and Gay Issues captured the first twenty-seven years of that scholarship in a research bibliography first published in 1988, with updates in 1989 and 1993. This year the editors have taken on the Herculean task of another update. As the length of the update attests, the field has grown exponentially during the past twelve years. As if that didn't make their job hard enough, the editors also decided to add annotations. The result is an ambitious project that has been extremely well-executed.

For this introduction, the editors asked that I map out the major trends in sexual orientation law scholarship during the past decade. To that end, Section III discusses seven critical developments: (1) the quantitative explosion of scholarship and

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<sup>1</sup> I would like to thank James Donovan, Steven Homer, Zak Kramer, Holning Lau, Shannon Minter, and Bill Rubenstein for reviewing and providing feedback on drafts of this introduction. In addition, I would like to thank Deborah Ho for her research assistance and for whipping these footnotes into shape.

<sup>2</sup> See Roger M. Fritts & Favor R. Smith, Comment, *Deviate Sexual Behavior: The Desirability of Legislative Proscription*, 30 ALB. L. REV. 291 (1966); see also Jon J. Gallo et al., *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 UCLA L. REV. 643 (1966) (studying Los Angeles County arrests and prosecutions).

qualitative change in its focus, a change fueled by the expanding possibilities created by the LGBT movement; (2) the institutionalization of the field of sexual orientation law in the legal academy; (3) the specialization of the roles of advocacy and scholarship; (4) the development of queer legal theory; (5) the inception of scholarship opposing LGBT rights; (6) the growth of transgender law scholarship; and (7) the increase of comparative and internationally focused scholarship. However, before turning to these trends, I pause to praise the work of the editors. I now view celebrating this valuable new resource as my primary charge.

### **Use This Resource**

This update to the prior editions will be of great value to anyone doing sexual orientation law research because it is selective, well-organized, and has concise, value-added annotations. Law reviews in the United States now cumulatively publish hundreds of sexual orientation law articles each year. Annually, over the last five years, I have overseen the process of culling through the field to select some of the best articles for recognition in the Williams Institute's *The Dukeminier Awards*, screening hundreds of articles to choose fifty to sixty for our seminar to read—and then selecting three to five prize winners. This process takes forty students and faculty members an entire academic year to complete. Imagine the work reflected here: The editors have sifted through a decade of scholarship to select 877 articles of most use to researchers.<sup>3</sup>

The care with which the editors have organized the bibliography will aid researchers. Instead of starting with a search-term

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<sup>3</sup> The bibliography is intended “to provide librarians with guidance in the selection of materials for their collections, as well as assistance in scholarly research....” and they have included “only articles of substance and sufficient length to prove useful to librarians and scholars.” STANDING COMM. ON GAY AND LESBIAN ISSUES, SOCIAL RESPONSIBILITIES SPECIAL INTEREST SECTION, AM. ASS'N OF LAW LIBRARIES, *Sexual Orientation and the Law: A Selective Bibliography on Homosexuality and the Law, 1969–1993*, 86 LAW LIBRARY JOURNAL 1 (1994) [hereinafter *Selective Bibliography*].

dependent list from a digital database, they can consult this bibliography to identify articles within a general research topic and then help pinpoint articles more precisely on point. For example, if a scholar or student wanted to write an article on extending marriage to same-sex couples, she could use the bibliography to find and quickly review articles on same-sex couples more generally, articles on extending marriage to these couples, articles favoring that extension and those opposed, articles discussing the merits of alternative structures such as civil unions, and articles focused on dissolution. The researcher will also find separate lists of books and symposia on the topic.

The new concise annotations are the most helpful feature of this edition. In an exemplary economy of language, the editors summarize the main thesis of the articles and provide useful details for researchers. For example, the editors include a full case citation where an article discusses a case in detail and annotations of symposia and compilation books include the names of presenters and chapter authors with parentheticals summarizing their argument. Useful appendices are highlighted, such as those presenting primary sources, or a fifty-state summary of a particular type of legislation or doctrine. In addition, the editors identify seminal work(s) on particular topics; articles that provide comprehensive, in-depth, or carefully crafted coverage of an issue; and those presenting novel or provoking arguments or perspectives. Equally useful is background information about the author, including whether he or she is a prominent expert in legal scholarship or another discipline, or whether an article was written by student or someone who publishes a great deal on the topic or in general. Finally, cautionary notes indicate whether articles are brief, lengthy, complex, or convoluted, further helping the researcher focus her efforts.

In short, use this resource! It represents, and will save you, an enormous amount of time and work. Whether brushing up on a topic, tracking down footnotes, brainstorming for a thesis, or embarking on a new research project, this should be one of the first

places you start. Everyone researching and writing in the field owes these editors a huge amount of gratitude.

### Scholarship of the Possible

More. In a word, that is the most significant development in the field of sexual orientation law during the past twelve years. Although the editors felt they were dealing with a “wealth of material”<sup>4</sup> for the 1993 edition, they hadn’t seen anything yet. Behind the sheer volume are a number of developments that have transformed the field.<sup>5</sup> I’ve identified seven, fully recognizing they reflect my personal biases.

It is fortuitous that the last edition to the bibliography closed with 1993. In that year, three events sparked a turning point for sexual orientation law scholarship: the Hawai’i Supreme Court’s favorable marriage decision in *Baehr v. Lewin*,<sup>6</sup> six months of national debate about the military’s gay ban that ended with “Don’t Ask, Don’t Tell,” and the publication of Bill Rubenstein’s textbook, *Lesbians, Gay Men, and the Law*.<sup>7</sup>

*Baehr* and the public debate surrounding “Don’t Ask, Don’t Tell,” marked the beginning of an explosion of possibilities for legal advances for LGBT rights. Some of these possibilities materialized, others did not, and there were plenty of setbacks. But things started lurching forward in a dramatically different way than the previous twenty-seven years. Much of what had seemed impossible, became possible: *Romer*. *Lawrence*. *Goodridge*. Oh my! The actual advances in LGBT rights and the potential for even more, as well as the setbacks they engendered, increased the quantity of sexual orientation law scholarship and changed how scholars approached traditional topics.

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<sup>4</sup> *Id.* at 1.

<sup>5</sup> My ordering of the developments is just loosely suggestive of their relative importance.

<sup>6</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

<sup>7</sup> *LESBIANS, GAY MEN, AND THE LAW* (William B. Rubenstein ed., 1993).

The same forces broadening the possibilities in the real world also improved things within the legal academy. The publication of Rubenstein's textbook in 1993 was a significant milestone. In the twelve years that followed, a widening permission of space made it increasingly possible to study, teach, and write about sexual orientation law. These are the two most significant developments in sexual orientation law scholarship during the past decade: advances outside the academy opened up rich possibilities for the subject matter of sexual orientation law scholarship, while advances within it made it possible for scholars to take advantage of those opportunities.

### **1. Expanding Possibilities Created by the LGBT Movement**

An indicator of how much things have changed during the past decade is the inclusion of a table of cases with "full bibliographic references" in the last edition of the bibliography.<sup>8</sup> Such a table was possible then. Even though that bibliography covered 1966–1993 and included HIV/AIDS related materials<sup>9</sup> the table lists only fifty-four cases. Compiling such a table today would be nearly impossible given the great number of cases that would need to be assessed.

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<sup>8</sup> Although the prior edition says it covers 1960 to 1993 in its title, it includes sources from the "mid 1960s" in the introduction and in fact includes articles from 1966. *Selective Bibliography*, *supra* note 3.

<sup>9</sup> The growth in sexual orientation law material over the past twelve years no doubt is the reason for the biggest change of this edition when compared to prior ones, the exclusion of materials related to HIV/AIDS. Since cases and scholarship on HIV/AIDS issues have also grown exponentially over the past twelve years, hopefully that part of the bibliography will also eventually be updated. Until then, the editors of *Law and Sexuality* will also eventually be updated. Until then, the editors of *Law and Sexuality* produced an incredibly valuable resource on HIV/AIDS in 2004 when they published a comprehensive survey of HIV/AIDS-related laws. *State Statutes Dealing with HIV and AIDS: A Comprehensive State-by-State Summary* (2004 Edition), 13 L. & SEXUALITY 1 (2004).



It is not just that there are more opinions, as well as legislation, initiatives, and constitutional amendments, etc., on sexual orientation issues; it is also true that the LGBT movement started winning more. According to the last edition's table of cases, the judicial opinions attracting the most scholarly attention were *Bowers v. Hardwick* (you can't have sex),<sup>10</sup> *Dronenberg v. Zech*,<sup>11</sup> and *Watkins v. U.S. Army*<sup>12</sup> (or be in the military), *High Tech Gays v. Defense Industry Security Clearance Office*<sup>13</sup> (or the Department of Defense, at least not without scrutiny), and *San Francisco Arts & Athletics v. U.S. Olympic Committee*<sup>14</sup> (or, for that matter, use the word "Olympics"). The only silver lining in the table: *Braschi v. Stahl Associates Co.*<sup>15</sup> and a couple of decisions overturning state sodomy laws.<sup>16</sup> The title of the first law school symposium listed in that edition captures much of what it must have been like to live and write that experience: *Being Gay in America: The Oppression Continues*.<sup>17</sup> And that symposium was held in '91, not '66.

After *Braschi* and *Baehr*,<sup>18</sup> things started to improve more rapidly.<sup>19</sup> In the last twelve years, the exponential increase in judicial opinions and legislation regarding LGBT issues has been

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<sup>10</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986), *reh'g denied*, 478 U.S. 1039 (1986).

<sup>11</sup> *Dronenburg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984).

<sup>12</sup> *Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989).

<sup>13</sup> *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990).

<sup>14</sup> *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987).

<sup>15</sup> *Braschi v. Stahl Associates Co.*, 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (N.Y. 1989) (recognizing a gay couple as a functional family under New York City's rent control regulations).

<sup>16</sup> *See, e.g., Kentucky v. Wasson*, 842 S.W.2d 487 (Ky. 1992).

<sup>17</sup> Symposium, *Being Gay in America: The Oppression Continues*, 18 HUM. RTS. 12 (Spring 1991).

<sup>18</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

<sup>19</sup> That sounds highly qualified because I do not want to undervalue the important work and advances that took place before the early 1990s.

accompanied by a growth in favorable decisions and legislative enactments. This has meant a growth in raw material for sexual orientation law scholarship and has increased the potential for such scholarship to have an impact. The options for writing about on-topic Supreme Court cases illustrate the point: instead of writing about the limitations imposed by *Bowers*, scholars could, and a large number did, write about the possibilities opened up by *Romer v. Evans*<sup>20</sup> and *Lawrence v. Texas*.<sup>21</sup> In addition, scholars had *Boy Scouts of America v. Dale*,<sup>22</sup> *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,<sup>23</sup> and now *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*<sup>24</sup> to chew on; while losses, each decision provided far more grist for the LGBT scholarly mill than the only non-Hardwickian case a decade ago, *Jacobson v. United States*.<sup>25</sup>

The advances and expanding possibilities have also changed how many scholars approach traditional topics. Not only are there simply more articles about marriage, these articles approach the topic differently. The marriage scholarship prior to 1993 was largely concerned with articulating constitutional arguments for extending marriage to same-sex couples, “theories in need of a court,”<sup>26</sup> and iterations of the Ettelbrick-Stoddard debate over

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<sup>20</sup> *Romer v. Evans*, 517 U.S. 620 (1996) (striking down a Colorado law that prohibited future laws protecting gay men and lesbians).

<sup>21</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003) (overturning *Bowers*).

<sup>22</sup> *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

<sup>23</sup> *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

<sup>24</sup> *Rumsfeld v. F.A.I.R.*, 126 S. Ct. 1297 (2006).

<sup>25</sup> *Jacobson v. United States*, 503 U.S. 540 (1992) (reserving conviction because criminal defendant had been entrapped into picking up child pornography from the U.S. Post Office). *Jacobson* is also among the cases in the Table in the prior edition with the most articles discussing it.

<sup>26</sup> Keynote Address by Stanford Law Professor Kathleen Sullivan at 2006 Annual Update on Sexual Orientation Law, The Williams Institute, UCLA School of Law (February 25, 2006) (video available October 2006 at <<http://www.law.ucla.edu/williamsinstitute/home.html>>).

marriage's suitability for, or prioritization by, the LGBT rights movement.<sup>27</sup> With the increasing possibilities for marriage (in 1993) and then reality of marriage (in 2003), those earlier topics have been largely overtaken by scholarship discussing the actual reasoning of favorable decisions such as *Goodridge v. Department of Public Health*<sup>28</sup> and *Baker v. Vermont*,<sup>29</sup> the nuts and bolts of inter-jurisdictional recognition, comparisons of marriage, domestic partnership, and civil unions; and arguments for challenging the federal<sup>30</sup> and mini-DOMAs.<sup>31</sup>

Perhaps more importantly, the broadening possibilities opened up whole new topics for scholars to write about. LGBT youth provide the most dramatic example. In the last edition, scholarship on this topic was almost nonexistent.<sup>32</sup> An "Education" subsection listed only articles about the constitutionality of firing out teachers. In this update, that section has been renamed "Schools/Teachers" and cross-references a new one, "GLBT Youth/Students." The scholarship under these sections now

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<sup>27</sup> Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK: NATIONAL GAY AND LESBIAN QUARTERLY, Fall 1989, at 9; Thomas B. Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, Fall 1989 at 9, both reprinted in WILLIAM B. RUBENSTEIN, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 716–725 (2d ed. 1997).

<sup>28</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941 (Mass. 2003) (leading to the extension of marriage to same-sex couples in Massachusetts).

<sup>29</sup> *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999) (resulting in Vermont's civil union legislation).

<sup>30</sup> See 28 U.S.C. § 1738C (states do not have to give full faith and credit to extension of marital rights by other states to same-sex couples) and 1 U.S.C. § 7 (defining marriage as between a man and woman under federal law).

<sup>31</sup> See Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2165–94 (2005) (Appendix: State Anti-Same-Sex-Marriage Statutes).

<sup>32</sup> *But see*, Donna Dennis & Ruth Harlow, *Gay Youth and the Right to Education*, 4 YALE L. & POL'Y REV. 446 (1986), reprinted in RUBENSTEIN, *supra* note 27, at 299; *see also* Nancy Tenney, Note, *Constitutional Imperative of Reality in Public School Curricula: Untruths about Homosexuality as a Violation of the First Amendment*, 60 BROOK. L. REV. 1599 (1995).

includes the duty of schools to stop verbal, physical, and sexual harassment of LGBT students,<sup>33</sup> the recognition of gay-straight student groups, the inclusion of affirming curricula materials, the provision of LGBT youth services by schools, and the right to take a same-sex date to prom. The “Youth/Students” heading moves beyond schools to address the critical needs of LGBT youth in foster care and juvenile justice systems, and abuse and neglect claims against parents who mistreat or try to “cure” their children. In a little over a decade, the topic went from taboo to one in which great strides are being made in the world and in scholarship.<sup>34</sup> Things changed so scholarship changed.

## **2. Expanding Possibilities Within the Legal Academy**

The same forces advancing LGBT rights in the U.S. also improved the climate within law schools. During the past twelve years, the emerging legal field became institutionalized in the legal academy.

The publication of Rubenstein’s casebook in 1993 marked a turning point in the field’s development. A quick, and necessarily incomplete, history: the first spark was the conceptualization of homosexuals as a minority group deserving of equality, most eloquently articulated in D.W. Cory’s 1951 book *The Homosexual in America*.<sup>35</sup> In 1966, a few years before the Stonewall Riots,<sup>36</sup> a handful of articles about the criminalization of homosexual

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<sup>33</sup> *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996).

<sup>34</sup> See STUART BIEGEL, *EDUCATION AND THE LAW* (2006).

<sup>35</sup> DONALD WEBSTER CORY, *THE HOMOSEXUAL IN AMERICA: A SUBJECTIVE APPROACH* (Greenberg 1951) (explaining why homosexuals should be considered a minority group and listing the forms of legal inequality and subordination they face). *Id.* at 4 and 14.

<sup>36</sup> See generally, JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940–1970* (University Press of Chicago 1983), for an excellent history of the LGBT rights movement in the United States prior to Stonewall. Although the movement predated the Stonewall Riots, it is also clear that the event marked the explosion of the gay rights movement.

behavior appeared in law journals.<sup>37</sup> After Stonewall, publications picked up, but remained scarce throughout the 1970s.

In the 1980s came the first attempts to move beyond looking at individual issues and cases and towards conceptualizing the field of sexual orientation law. Within the legal academy<sup>38</sup> these included the first law school symposium at Hastings Law School in 1979;<sup>39</sup> Art Leonard's tracking of cases, legislation, law review articles, and other developments in *Lesbian/Gay Law Notes* in 1980 (a project that quite remarkably continues to this day);<sup>40</sup> in 1985, articles by Rhonda Rivera<sup>41</sup> and Roberta Achtenberg's *Sexual Orientation Law* treatise;<sup>42</sup> a comprehensive article turned book by the Harvard Law Review Editors in 1990,<sup>43</sup> and then the field's first journal in 1991, Tulane's *Law and Sexuality: A Review of Gay and Lesbian Legal Issues*.

The first law school courses developed during the 1980s as well. Katherine Franke and Bill Rubenstein, two of the field's

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<sup>37</sup> Among the earliest articles were two that were published in 1966; Fritts & Smith, *supra* note 2, and Gallo, *supra* note 2.

<sup>38</sup> A notable precursor was the first edition of the ACLU's *The Rights of Gay People*. E. CARRINGTON BOGGAN ET AL., *THE RIGHTS OF GAY PEOPLE: THE BASIC ACLU GUIDE TO A GAY PERSON'S RIGHTS* (1975).

<sup>39</sup> *Sexual Preference and Gender Identity: A Symposium*, 30 HASTINGS L.J. 799 (1979).

<sup>40</sup> LESBIAN/GAY LAW NOTES (Arthur A. Leonard ed., Legal Foundation of the Lesbian and Gay Law Association of Greater New York), <<http://www.qrd.org/qrd/www/legal/igln>>. See also, Arthur S. Leonard, *Chronicling A Movement: A Symposium to Recognize the Twentieth Anniversary of the Lesbian/Gay Law Notes*, 17 N.Y.L. SCH. J. OF HUM. RTS. 403 (2000). (*Law Notes* grew out of the monthly meeting notices of The New York Law Group, an informal association of lawyers started by Leonard in the spring of 1978. As circulation grew and the need for improved infrastructure increased, the Law Group evolved and in 1991 become the Lesbian and Gay Law Association of Greater New York (LeGaL) which now officially publishes *Law Notes*).

<sup>41</sup> Rhonda Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties* (pts. I & II), 10 U. DAYTON L. REV. 459 (1985), 11 U. DAYTON L. REV. 275 (1986).

<sup>42</sup> *SEXUAL ORIENTATION AND THE LAW* (Roberta Achtenberg ed., 1985).

<sup>43</sup> *SEXUAL ORIENTATION AND THE LAW* (Harvard Law Review eds., 1990).

leading scholars today, both write movingly about what it was like to be an LGBT student before the field had the legitimacy or faculty for official course offerings.<sup>44</sup> Fortunately for us, they took matters into their own hands. As students, they combed their law libraries to create self-study courses. Soon after, the faculty (mainly adjuncts) and the courses arrived. Some of the earliest were taught by Thomas Stoddard, E. Carrington Boggan, Rhonda Rivera, Mary Dunlap, Thomas Coleman,<sup>45</sup> Matt Coles, Jon Davidson, and Nan Hunter.<sup>46</sup>

Enter the first three editions of this bibliography. The first edition was published in 1988, with an update in 1989,<sup>47</sup> as the field was still coalescing and five years before Rubenstein's casebook. As such, this project was not just passively pulling together materials. It was actively part of the process of creating, defining and legitimizing this new field.<sup>48</sup> What to include? What to exclude? Their choices would greatly influence what the future (as well as actual) Katherine Franke and Bill Rubenstein would find when they searched the shelves of their law libraries or digital databases.

Then in 1993, Rubenstein's casebook<sup>49</sup> gave the growing collection of seminars the hallmark of a legitimate and durable

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<sup>44</sup> Katherine M. Franke, *Homosexuals, Torts, and Dangerous Things*, 106 YALE L. J. 2661, 2665–66 (1997) (describing putting together a self-study course at Northeastern University School of Law in 1983 because no course was offered at any law school in the country); William B. Rubenstein, *My Harvard Law School*, 39 HARV. C.R.-C.L. L. REV. 317, 319 (describing piecing together a “self-education” on gay and lesbian rights while at Harvard Law School from 1983 to 1986).

<sup>45</sup> ARTHUR S. LEONARD & PATRICIA A. CAIN, *SEXUALITY LAW* xxiii (2005).

<sup>46</sup> RUBENSTEIN, *supra* note 27, at xxvii.

<sup>47</sup> *Selective Bibliography*, *supra* note 3, at 1.

<sup>48</sup> Franke, *supra* note 44 (discussing the development of the legal field of sexual orientation law and competing visions of what that field constitutes).

<sup>49</sup> RUBENSTEIN, *supra* note 27; *see also* Rubenstein, *supra* note 44 (discussing writing and publishing *Lesbians, Gay Men, and the Law*).

legal field.<sup>50</sup> Perhaps indicative of the academy's reservations, the first edition was a drawing-covered paperback published as part of a non-profit publisher's "law in context" series. When that edition sold out, Rubenstein brought the sales figures to West Publishing,<sup>51</sup> which then published it in "canonical brown" hardcover as part of its American Casebook Series.<sup>52</sup> We had arrived. The field had a book that, at least from the outside and at a distance, was indistinguishable from Torts, Property, or Tax. "In sum, Rubenstein's book seem[ed] to put to rest the first order question: Is sexual orientation and the law a proper subject of a law book?"<sup>53</sup>

From there, things took off. There was an explosion of faculty and courses devoted to the field throughout the 1990s. In a study published in the entirely digital *National Sexual Orientation Law Journal*,<sup>54</sup> founded by Mary Sylla in 1995, Francisco Valdes reported that the number of law schools offering courses primarily focused on lesbian and gay issues increased from thirteen to forty-four schools from 1990 to 1995.<sup>55</sup>

Today, of 176 American law schools surveyed by the Law School Admissions Council (LSAC), 87% have LGBT student organizations, 75% have out faculty, and 64% offered LGBT law courses—114 courses in all.<sup>56</sup> Faculty teaching those courses now

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<sup>50</sup> See Franke, *supra* note 44, for a discussion of the critical role of law school casebooks in defining this and other fields.

<sup>51</sup> Rubenstein, *supra* note 44, at 325–26 (2004).

<sup>52</sup> RUBENSTEIN, *supra* note 27, at vii.

<sup>53</sup> See Franke, *supra* note 44, at 2671.

<sup>54</sup> NAT'L J. OF SEXUAL ORIENTATION LAW, <<http://www.ibiblio.org/gaylaw>>.

<sup>55</sup> Francisco Valdes, *Tracking and Assessing the (Non)Inclusion of Courses on Sexuality and/or Sexual Orientation in the American Law School Curriculum: Reports From the Field After a Decade of Effort*, 1 NAT'L J. OF SEXUAL ORIENTATION LAW 150 (1995), <<http://www.ibiblio.org/gaylaw/issue2/valdes2.html>>. This data was gathered from all 176 law schools belonging to the American Association of Law Schools at that time.

<sup>56</sup> LAW SCHOOL ADMISSION COUNCIL, SURVEY OF LAW SCHOOLS (2005), <<http://www.lsac.org/LSAC.asp?url=lsac/information-gay-lesbian-bisexual-applicants.asp>>.

have not one, but three casebooks to choose from.<sup>57</sup> The AALS Directory now lists more than 300 law teachers in the “Gay, Lesbian, Bisexual” community.<sup>58</sup> A recent LSAC study found that almost 4% of law students identified as LGBT.<sup>59</sup>

Institutionalization? In 1996, the University of Pennsylvania Law School and the Temple University Beasley School of Law founded a student clinic dedicated to LGBT issues.<sup>60</sup> In 2006, Columbia Law School joined them with the founding of the Sexuality and Gender Law Clinic.<sup>61</sup> This year, UCLA in turn recognized the Williams Project, a research center on sexual orientation law and public policy, as the Williams *Institute*, because of its scholarship, faculty and staff, and a designated reading room and collection on sexual orientation law scholarship that contains over 1500 titles.<sup>62</sup> The Williams Institute now funds two law teaching fellowships, designed to place a sexual orientation law scholar on the law teaching market every year.<sup>63</sup>

Clearly, not all obstacles have been removed for LGBT faculty, and students,<sup>64</sup> or those writing in the field, but the

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<sup>57</sup> In addition to the second edition of Rubenstein’s casebook, WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* (Foundation Press 2d ed. 2004) (1997); LEONARD & CAIN, *supra* note 45.

<sup>58</sup> ASSOCIATION OF AMERICAN LAW SCHOOLS, *THE AALS DIRECTORY OF LAW TEACHERS 2005–2006* (2005).

<sup>59</sup> LAW SCHOOL ADMISSION COUNCIL, *supra* note 56, at 11.

<sup>60</sup> The Center for Lesbian and Gay Civil Rights, <<http://www.center4civilrights.org/about/aboutmain.php>>.

<sup>61</sup> See Press Release, Columbia News, Law School Creates Country’s First Sexuality, Gender Law Clinic (April 7, 2006), <<http://www.columbia.edu/cu/news/06/04/lawschool.html>>.

<sup>62</sup> See The Williams Institute, <<http://www.law.ucla.edu/williamsinstitute/home.html>>.

<sup>63</sup> See The Williams Institute Student Involvement, <<http://www.law.ucla.edu/williamsinstitute/about/student.html>>.

<sup>64</sup> LAW SCHOOL ADMISSION COUNCIL, *supra* note 56, at 11 (study finding that almost one quarter of LGBT law students report an experience of sexual orientation discrimination during their first year law school); see also Steven Hartwell, *What a Difference a Gay Makes: An Empirical Study of the Impact of*



possibilities for learning and writing about sexual orientation law has changed dramatically in the last twelve years.

### **3. Specialization of Advocacy and Scholarship**

Improving conditions both in and outside of the academy made possible more specialization between LGBT civil rights advocacy and sexual orientation law scholarship.<sup>65</sup> Rather than resulting in scholarship that is less relevant to the LGBT movement, the growing distinction has increased the opportunities for scholars and scholarship to have a unique and significant impact.

The last edition of the bibliography reflects the significant overlap between scholarship and advocacy during the field's formative period. Most notably, the last edition includes a list of LGBT civil rights organizations. In 1993, that inclusion made more sense, because in the years prior to that date attorneys at these organizations did a significant part of the teaching and writing in the field. For example, authors who had multiple listings in the last edition include attorneys who, at the time, worked for the ACLU Lesbian and Gay Rights/AIDS Project (e.g., Nan Hunter Bill Rubenstein, and Matt Coles), Lambda Legal Defense and Education Fund (e.g., Paula Ettelbrick, Sandra Lowe, Thomas Stoddard, and Evan Wolfson), Equal Rights Advocates (e.g., Mary Dunlap) and Women's Defense Fund (e.g., Nancy Polikoff). You'll recognize many of these names from a list above—while working in the trenches they were also teaching the first sexual orientation law seminars offered at law schools. The content of scholarship during this period also reflects the close connection between scholarship and advocacy. A great deal, but definitely not all, of the scholarship is or resembles case notes and comments—

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*'Out' Gay Law Faculty on Law School Curriculum and Policies*, 1 NAT'L J. OF SEXUAL ORIENTATION LAW 226 (describing the costs of being an 'out' law faculty member).

<sup>65</sup> A trend that started before 1993, but became more pronounced during the past twelve years.

helpful updates in the field. There are briefs published as articles,<sup>66</sup> articles that read as briefs, and articles discussing and proposing litigation strategies.

Starting in the late 1980s, legal scholars and scholarship became increasingly distinct from LGBT advocates and advocacy. Many of the fulltime advocates became fulltime law professors; for example, Nancy Polikoff in 1987, Nan Hunter in 1990, and Katherine Franke and Bill Rubenstein in 1995.<sup>67</sup> Joining them were scholars who came to sexual orientation from other academic disciplines (such as Janet Halley from English) or other legal fields (such as William Eskridge, the nation's leading Legislation scholar). In addition, leading non-LGBT law scholars began to write on sexual orientation law issues in their respective fields, such as Grace Blumberg,<sup>68</sup> Erwin Chemerinsky,<sup>69</sup> Catherine Fisk,<sup>70</sup> and Laurence Tribe.<sup>71</sup> Finally, there emerged scholars who started writing in the field in law school, got clerkships, and then were

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<sup>66</sup> See e.g., Brief for Lesbian Rights Project, et al. as Amici Curiae Supporting Petitioners, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140), 1985 WL 667944.

<sup>67</sup> You only have to hear any one of these four speak or read their work to know that these are not advocates who became scholars, but rather scholars who stepped into the breach in a time of great need who at last were able to pursue their true callings.

<sup>68</sup> Grace G. Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555 (2004).

<sup>69</sup> Erwin Chemerinsky, *The First Amendment and Military Recruiting*, 42-MAY TRIAL 78 (2006).

<sup>70</sup> See Catherine L. Fisk, *ERISA Preemption of State and Local Laws on Domestic Partnership and Sexual Orientation Discrimination in Employment*, 8 UCLA WOMEN'S L.J. 267 (1998).

<sup>71</sup> Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004), reprinted in 4 THE DUKEMINIER AWARDS: BEST SEXUAL ORIENTATION LAW REVIEW ARTICLES OF 2004 145 (2006).

hired into tenure track positions as *sexual orientation law scholars*—too many, in fact, to even risk naming.

With all the time, space, and resources that academia provides, these scholars produced a richer and more diverse scholarship. The scholarly responses to *Lawrence* are illustrative. There are pieces unpacking the case's reasoning,<sup>72</sup> discussing its implications for other LGBT rights issues,<sup>73</sup> critiquing it from a queer theory perspective,<sup>74</sup> exploring the Court's history of considering "morals only" state interests,<sup>75</sup> using it to reframe the Court's substantive due process jurisprudence,<sup>76</sup> and incorporating it into broader theories of the Court's role in refereeing the democratic process.<sup>77</sup> The *Lawrence* scholarship also displays the independence of scholars from the "well-resourced"<sup>78</sup> LGBT rights movement. There are a number of pieces critical of *Lawrence* as an unqualified victory for the LGBT movement,<sup>79</sup> one that reveals the messy facts of the case that no doubt the litigators hoped would not

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<sup>72</sup> Richard D. Mohr, *The Shag-a-Delic Supreme Court: "Anal Sex," "Mystery," "Destiny," and the "Transcendent" in Lawrence v. Texas*, 10 CARDOZO WOMEN'S L.J. 365.

<sup>73</sup> Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, reprinted in 4 THE DUKEMINIER AWARDS: BEST SEXUAL ORIENTATION LAW REVIEW ARTICLES OF 2004 209 (2006).

<sup>74</sup> Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399.

<sup>75</sup> Blumberg, *supra* note 68.

<sup>76</sup> Tribe, *supra* note 71; Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas*, in 2002–2003 CATO SUPREME COURT REV. 21 (James L. Swanson ed., 2003).

<sup>77</sup> William N. Eskridge, Jr., *Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021 (2004)

<sup>78</sup> Craig Willse & Dean Spade, *Freedom in a Regulatory State?: Lawrence, Marriage & Biopolitics*, 11 WIDENER L. REV. 309, 329 n2 (2005). Willse & Spade use the term "well-resourced" where the term "mainstream" is often used because they "wish to be critical of the notion that these groups represent the views of a majority, which the latter term would imply."

<sup>79</sup> Franke, *supra* note 74.

see the light of day,<sup>80</sup> and overarching theories of the case that support a more cautious role for the Court when deciding LGBT rights cases.<sup>81</sup> Sexual orientation scholars are not heeding any party line.<sup>82</sup>

While increasing distance may indicate decreasing relevance, the opposite is very much the case. This distance has allowed scholars and scholarship to make unique and powerful contributions to the movement. The distance produces credibility and facilitates objectivity. The time, space, and resources of academia allows for scholarship that would be impossible while juggling a caseload.

Again *Lawrence* illustrates the unique contributions of independent, rigorous scholarship. In *Lawrence*, the Court held that *Bowers* got the issue wrong, its history wrong, and the law wrong. Although a number of legal scholars had critiqued *Bowers*' cramped construction of the interest at stake, Justice Kennedy explicitly references the work of legal scholars in knocking down its other two pillars. In critiquing *Bowers*' claim that "[p]roscriptions against that conduct have ancient roots," Justice Kennedy relied extensively<sup>83</sup> on the *amicus* brief of Yale Law Professor

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<sup>80</sup> Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464, reprinted in 4 THE DUKEMINIER AWARDS: BEST SEXUAL ORIENTATION LAW REVIEW ARTICLES OF 2004 1 (2006).

<sup>81</sup> Eskridge, *supra* note 77.

<sup>82</sup> I want to emphasize a shift in balance and no more. There are still advocates who write, and attorneys from the ACLU, Lambda, and NCLR who still make up a healthy portion of presenters at symposia, authors of articles, and teachers of courses. More generally, there is still a great deal of scholarship devoted to reporting developments, argument building, and litigation strategy. Conversely, from their earliest days, there were many fulltime scholars doing rigorous and independent scholarly work.

<sup>83</sup> *Lawrence*, 539 U.S. at 567–68 (“In academic writings and in many of the scholarly *amicus* briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers*.”). *Id.*

William Eskridge, which in large part presented his own research on the history of sodomy laws and their enforcement.<sup>84</sup>

The Court turned to the weight of legal scholarship criticizing the *Bowers* Court's reasoning to support its conclusion that the earlier Court had its law wrong. Citing scholarship by Harvard Law Professor Charles Fried and Judge Richard Posner, Justice Kennedy wrote: "When our precedent has been thus weakened, criticism from other sources is of greater significance. In the United States criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions."<sup>85</sup> The research of law scholars and law students also facilitated the Court's relatively novel reliance on foreign precedent: an *amicus* brief summarized this precedent and supplied a legal basis for the Court's use of it.<sup>86</sup> Finally, the equal

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<sup>84</sup> Brief for Cato Institute as Amici Curiae Supporting Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152342. The Cato brief summarized research from a variety of academic sources include Eskridge's work in the following: William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 IOWA L. REV. 1007 (1997); William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946-1961*, 24 FLA. ST. U.L. REV. 703 (1997); WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999). Kennedy also relied on Eskridge's research directly in the opinion in refuting a related claim in Chief Justice Burger's concurring opinion in *Bowers*. *Lawrence*, 539 at 571 ("As with Justice White's assumptions about history, scholarship casts some doubt on the sweeping nature of the statement by Chief Justice Burger as it pertains to private homosexual conduct between consenting adults"). See, e.g., William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631, 656. Eskridge's research is also relied upon several times by Justice Scalia in his dissent. *Lawrence*, 539 U.S. at 597-98.

<sup>85</sup> *Lawrence*, 539 U.S. at 576 (citing CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 81-84 (1991) and RICHARD A. POSNER, *SEX AND REASON* 341-350 (1992)).

<sup>86</sup> *Lawrence*, 539 at 576-77 (citing Brief for Mary Robinson, Amnesty International U.S.A. et al. as Amici Curiae Supporting Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (No. 02-102), 2003 WL 164151). Scholars who worked on this brief include Robert Wintemute of the School of Law of King's College

protection theory that was adopted by Justice O'Connor in her concurring opinion closely tracked the argument put forth by Bill Rubenstein and Pamela Karlan in their *amicus* brief submitted on behalf of a number of the nation's leading constitutional scholars.<sup>87</sup>

In the past twelve years, numerous advances in LGBT rights, as well as the setbacks, increased the possibilities for what scholars could write about and imagine. During this same period, it has become increasingly possible to be a sexual orientation law scholar and thrive in the legal academy. These developments in turn have allowed for the growth of independent scholars and scholarship that not only reflect advances in the movement, but help make them, and so much more, possible.

#### 4. Queering the Field

During the past decade, one of the most significant substantive developments is queer theory's migration from other academic disciplines into legal scholarship. While that migration began before 1993, particularly in the pioneering work of Janet Halley,<sup>88</sup> during the 1990s some of its central tenets, if not the term itself, "went from being a radical outsider ideology to orthodoxy."<sup>89</sup>

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London, Professor Ryan Goodman of Harvard Law School, Professors Harold Koh, and Kenji Yoshino of Yale Law School, and a number of their law students. *Id.*

<sup>87</sup> Brief for Constitutional Law Professors Bruce A. Akerman, et al. as Amici Curiae Supporting Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 136139; see Emily Bazelon, *The same-sex marriage argument that Justice Scalia fears*, BOSTON GLOBE, May 16, 2004, available at <[http://www.boston.com/news/nation/articles/2004/05/16/the\\_same\\_sex\\_marriage\\_argument\\_that\\_justice\\_scalia\\_fears](http://www.boston.com/news/nation/articles/2004/05/16/the_same_sex_marriage_argument_that_justice_scalia_fears)> (discussing the importance of the argument developed by Karlan and Rubenstein in *Lawrence* and to future LGBT rights cases).

<sup>88</sup> See, e.g., Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989). Janet Halley was writing queer theory even before the term was coined in 1991.

<sup>89</sup> Carlos A. Ball, *Essentialism and Universalism in Gay Rights Philosophy: Liberalism Meet Queer Theory*, 26 LAW & SOC INQUIRY 271, 273 (2001).

Today, queer theory is transforming the field's central project and outer bounds.

The bulk of sexual orientation law scholarship continues to be written from a more traditional approach. However, most of the leading scholars in the field have adopted queer theory's social constructionism.<sup>90</sup> In addition, the titles of the symposia in this update attest to the popularity of the approach among emerging scholars. To name but a few: *Intersexions: The Legal & Social Construction of Sexual Orientation*; *Queer Matters: Emerging Issues in Sexual Orientation Law*; *InterSexionality: Interdisciplinary Perspectives on Queering Legal Theory*; *Queer Law 1999*; *Queer Law 2000*; and so on.

What is queer legal theory? The one thing scholars writing about queer legal theory agree upon is that it is difficult, if not impossible, to define.<sup>91</sup> Perhaps the best starting place is to define what it is not: scholarship written from a gay and lesbian identity approach. This traditional scholarship asks the "gay question"—namely, "What is the law's effect on gay men and lesbians?"<sup>92</sup> This approach's defining characteristics are: a tendency to have an essentialist belief in homosexuality (that being gay or lesbian is a natural phenomenon); an affirmation of gay and lesbian identity; a belief that gay men and lesbians as a class are being treated unjustly by society and the law; and an affirmation of LGBT identity politics modeled on the civil rights movements of African-Americans and women. This approach produces legal scholarship that primarily analyzes the ways in which gay men and lesbians are

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<sup>90</sup> *Id.* at 274.

<sup>91</sup> See, e.g., Ian Halley, *Queer Theory, Feminism, and the Law*, 11 DUKE J. GENDER L. & POL'Y 7, 50 ("[t]here is no consensus on the essential or even characteristic attributes of queer theory"); RUBENSTEIN, *supra* note 27, at ix ("defies easy categorization"); Laurie Rose Kepros, *Queer Theory: Weed or Seed in the Garden of Legal Theory?*, 8 LAW & SEX. 279, 281 (1999/2000) ("impossible task of positively defining Queer theory").

<sup>92</sup> Franke, *supra* note 44, at 2667.

treated unequally under the law and proposing arguments and solutions for achieving equality.<sup>93</sup>

Queer legal theory rejects all or most of that, or at best is begrudgingly tolerant of it as “a strategic and historical contingency.”<sup>94</sup> In other words, we may be in these “gay” skins but we should shed them as soon as they have outlived their use. Queer legal theory is anti-essentialist: it does not believe that homosexuality or being gay or lesbian is a natural phenomenon. It is based on the belief that sexual orientation is socially constructed and views the law and legal discourse as central forces in that construction. It is critical of gay and lesbian identity politics on the grounds that it simply reinforces the notion of a natural and stable gay identity.<sup>95</sup> Why is that bad? Because the very creation of the distinction between homosexual and heterosexual is the primary way that society regulates and oppresses non-normative sexualities.<sup>96</sup> It is these “gay” skins that confine our sexuality and humanity and mark us as different and subordinate. Therefore the focus of queer legal theory is “not on lesbian/gay equality but rather on the manner in which heterosexuality has, silently but saliently, maintained itself as a hidden yet powerfully privileged norm.”<sup>97</sup> The project of queer legal scholarship is to analyze the ways in which the law participates in the construction of all sexual orientations, of normal and deviant sexuality, and, at its most ambitious, any and all categories that subordinate. Its endgame: to dismantle these categories; to liberate all people and sexualities from them.

Despite its hearty rejection of the gay identity approach, most of queer legal theory’s adherents shy back from making a clean break. Most identify as gay men and lesbians and still view queer

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<sup>93</sup> *Id.*

<sup>94</sup> Halley, *supra* note 91, at 50.

<sup>95</sup> Ball, *supra* note 89, at 272.

<sup>96</sup> *Id.*

<sup>97</sup> RUBENSTEIN, *supra* note 27, at ix.



theory primarily as a vehicle for addressing the oppression of (to borrow from Prince) the people currently known as LGBT.<sup>98</sup> They express concern that in taking queer legal theory to its limits gay men and lesbians might get lost along the way<sup>99</sup> and, to greater and lesser extents, see the practicalities of sticking with a gay identity approach for the short-term.<sup>100</sup> The vibrant dialectic between the traditional identity approach and the (no longer so) new queer legal theory approach invigorates the field.<sup>101</sup>

This dynamism drives much of the organization and content of all three of the field's current casebooks. Rubenstein's 1993 *Lesbians, Gay Men, and the Law* reflected emerging queer influences but was more or less organized and motivated by a traditional gay and lesbian identity approach. Three years later, his next edition had a new title, *Sexual Orientation and The Law*, signaling the greater influence of a non-identity based approach to the field. Each of the next two casebooks published, Eskridge and Hunter's *Sexuality, Gender, and the Law* (1997), and Arthur Leonard and Patricia Cain's *Sexuality Law* (2005), as well as Rubenstein's forthcoming third edition, *Law and Sexuality*,<sup>102</sup> reflect a field now significantly influenced by queer legal theory.

As the changes in the titles of the course books indicate, some of the more concrete results of these re-framings include moving the field beyond the "gay question" to considerations of all forms of sexual orientations, all different types of marginalized sexualities, and the interplay between the construction of sexual orientation and gender. However, these books aren't merely tacking on additional topics or chapters to traditional sexual orientation law material. By moving from the "gay question" to the

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<sup>98</sup> See, e.g., Kepros, *supra* note 91, at 285.

<sup>99</sup> See Rubenstein, *supra* note 44, at 329.

<sup>100</sup> Halley, *supra* note 91, at 50.

<sup>101</sup> Franke, *supra* note 44, at 2682–83.

<sup>102</sup> See Rubenstein, *supra* note 44, at 329.

“deconstruction of homosexuality question” all of this material becomes a necessary part of the newly constituted field.

For example, in their book Eskridge and Hunter consider the “role the law plays in giving the notion of sexual orientation meaning—whether it be heterosexuality, homosexuality, or bisexuality.”<sup>103</sup> As they explain, “the scope of the book is sexuality in its broadest sense”<sup>104</sup> including the many sexualities that the law stigmatizes and the multiple ways that the law privileges and constructs the social meaning of heterosexuality. They include sections on public sex, commercial sex, adolescent sex, non-marital sex, pregnancy, and rape since regulation of these help “to constitute the social and legal understandings of heterosexuality.”<sup>105</sup> Finally, they view sexuality and gender as so “inextricably linked as to cast doubt on the ability to separate them completely and still attain a thorough understanding of either.”<sup>106</sup> This sexual orientation/gender knot leads them to include sections on transgender issues and to completely reframe issues falling within the traditional gay identity agenda. For example, instead of a chapter focused on eliminating “Don’t Ask, Don’t Tell,” they have a section titled *U.S. Military Exclusions and the Construction of Gender* that provides histories of, and links in between, the military’s exclusion of racial minorities, women, and LGBT people.<sup>107</sup>

Given queer legal theory’s influence on the field’s three casebooks, leading scholars, and emerging scholars, in another decade the editors of this bibliography may need to consider a new name and a major overhaul.

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<sup>103</sup> See Franke, *supra* note 44, at 2668.

<sup>104</sup> *Id.* See also ESKRIDGE & HUNTER, *supra* note 57, at vii.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 653–753.

## 5. Scholarship Opposing LGBT Rights

When reading through this update to the bibliography, I was struck by the number of articles opposing LGBT rights. Articles from this perspective appear under almost every major heading in the bibliography.<sup>108</sup> There are articles supporting sodomy laws and the military ban, and articles opposing LGBT parenting rights, extending marriage to same-sex couples, and gay-straight student groups in schools. Including opponents of LGBT rights has become standard in law school symposia during the past decade.<sup>109</sup> There also have been several symposia either consisting entirely of opponents to LGBT rights<sup>110</sup> or including only a token supporter or two.<sup>111</sup>

Leading this development is a growing group of scholars, such as Lynn Wardle and William Duncan, whose scholarship focuses almost exclusively on opposing LGBT rights. According to the author index included with this update to the bibliography, Lynn Wardle has fifteen annotations, placing him second (to Mark Strasser's twenty-two) in number of annotations among the hundreds of authors listed.

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<sup>108</sup> Although this scholarship has gained considerable traction, some of its scholars feel "discriminated" against by law review journals. Ty Clevenger, *Gay Orthodoxy and Academic Heresy*, 14 REGENT U.L. REV. 241 (2002).

<sup>109</sup> See, e.g., Symposium, *Do Same Sex Couples Have a Right To Marry? The State of Conversation Today*, 17 YALE J.L. & FEMINISM 65 (2005) (including an article by Lynn Wardle, *Tyranny, Federalism, and the Federal Marriage Amendment*, *id.* at 221, supporting the federal marriage amendment); see also, Symposium, *Don't Ask, Don't Tell: 10 Years Later*, 21 HOFSTRA LAB. & EMP. L. J. 325 (2004) (including an article by Eugene R. Milhizer, *Don't Ask, Don't Tell: A Qualified Defense*, *id.* at 349, defending Don't Ask, Don't Tell).

<sup>110</sup> See, e.g., Symposium, *Homosexuality: Truth be Told*, 14 REGENT U.L. REV. 241 (2002); see also Symposium, *Same-Sex Marriage*, 18 B.Y.U. J. PUB. L. 273 (2004).

<sup>111</sup> See, e.g., Symposium, *Interjurisdictional Marriage Recognition*, 32 CREIGHTON L. REV. 1 (1998) (Mark Strasser arguing in *DOMA and the Two Faces of Federalism* that DOMA should be struck down in a symposium otherwise including articles in opposition to LGBT rights). *Id.* at 257.

These authors are clearly writing about how the law impacts LGBT people, but does that make them “sexual orientation law” scholars? Do these growing contributions reflect a maturing of the field, proof of its increasing objectivity? Or does this scholarship belong in the field at all? Is it open to academic criticism and refutation and change of opinion? Does the traditional pro-LGBT rights scholarship meet this standard?

I want to pose, rather than answer, these questions, as they will be important ones confronting the field in the coming years. Nonetheless, without staking out a fixed position, my initial reaction is that there is nothing about the nature of scholarship or academic objectivity that requires the inclusion of this new anti-gay material within the field. There are thousands of highly regarded scientists and scholars dedicated to eradicating cancer, AIDS, poverty, tyranny, and pollution. These fields have objectives, yet they remain scholarly fields. What’s more, a field of scholarship can share an objective and exclude outsiders: the medical literature on HIV disease, for example, tends to ostracize those who do not believe that the virus is responsible for causing the immune deficiencies experienced by people with HIV. Few serious scholars object to that marginalization.

More specifically, much of current legal scholarship shares the objective of helping specific groups of people. In breaking down the major schools or “approaches” of legal scholarship over the past century, Guido Calabresi defined one of the primary four as the “Law and Status” approach. Scholarship under this approach criticizes the law based on its treatment of groups of people that have been disadvantaged<sup>112</sup> and takes for granted an egalitarian value system that “demands equal well-being or power for” those

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<sup>112</sup> Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 Stan L. REV. 2113, 2127 (2003). Calabresi finds that a “very large part” of contemporary legal scholarship falls within the Law and Statutes approach. *Id.* at 2129.

groups.<sup>113</sup> Examples of this scholarship include Law and Organized Labor, Poverty Law, Critical Race Theory and Feminist Jurisprudence.<sup>114</sup> These fields define themselves not only by a group of people but by their view that the group is disadvantaged and that should be remedied. To paraphrase Janet Halley's concise summary of the common characteristics of the many and varied strands of feminism, they "carry a brief" for their group.<sup>115</sup> Scholarship advocating for the continued subordination of white people over people of color would not be considered Critical Race Theory; scholarship supporting the subordination of women would not be considered feminist jurisprudence.<sup>116</sup> Similarly, despite their substantial differences, both the traditional gay identity and queer legal theory approaches "carry a brief" for LGBT people.<sup>117</sup>

So, sexual orientation law scholarship does not *have to* include scholarship from those who don't "carry a brief"—but should it? Two potential benefits suggest themselves: first, the inclusion of opposing voices adds a patina of objectivity to the field. Second, scholars writing from all positions might benefit from the rigorous adversarial critiques provided by scholars writing from others. These potential benefits are somewhat in conflict. To the extent that the scholarship breaks down into warring camps, the field does not appear to be any more

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<sup>113</sup> *Id.* at 2127.

<sup>114</sup> *Id.* at 2128.

<sup>115</sup> See Halley, *supra* note 91, at 8 (finding that opposition to the subordination of women is an attribute of virtually every form of feminism in the United States today).

<sup>116</sup> *Introduction*, CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (Kimberlé Crenshaw et al., eds. 1995) ("Although Critical Race scholarship differs in object, argument, accent and emphasis," it is unified by the need to "understand how a regime of white supremacy and its subordination of people of color have been created and maintained in America" and the desire to understand and change the "vexed bond between law and racial power." In essence, Critical Race scholarship is "unified by an ethical commitment to human liberation.")

<sup>117</sup> Halley, *supra* note 91.

objective—except only to the extent that at frequent symposia both sides are willing to listen to (often token) representatives of the other. Moreover, there are other costs of including anti-gay scholarship in the field of sexual orientation law: it gives this work legitimacy and provides it with a wider audience. For example, the presence of such articles in this bibliography signifies that they are scholarship, within the field, worth reading, and, more specifically, that law librarians should make an effort to acquire them. Of course, seeing these as “costs” likely reflects my own sense of this scholarship’s worth—one gay’s costs is one anti-gay’s benefits.

However, a third, and more significant cost, does not depend on judging the scholarship’s quality or its conclusions. Its inclusion and consideration within the field distracts from vigorous, insightful, and important disagreements among those scholars who do “carry a brief.” Queer theory or identity politics? Marriage or civil unions? Using sex discrimination arguments or not? Unbundling parenting rights or not? The inclusion of LGBT rights opponents in the field brings the discussion back to square one. Without a lowest common denominator, the dialogue sinks to

finding one.<sup>118</sup> Are gay people sick? Moral? Sinners? Do they have children? Do they harm the children they have?<sup>119</sup>

This cost is indicated by “Pro” and “Con” marriage sections in this update. From reading these titles in the Table of Contents, I assumed they would contain the rich debate among scholars carrying a brief for LGBT people about the appropriateness and prioritization of marriage in the LGBT agenda. Instead these sections pit those scholars who carry a brief against those who don’t. Here, the cost of inclusion is having to hunt through the more general sections to piece together the internal debate.

### **6. Transgender Law Scholarship**

While some of the earliest sexual orientation law review articles included discussion of transgender rights,<sup>120</sup> transgender law

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<sup>118</sup> See EVE K. SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 4–7 (1990) (“Knowledge, after all, is not itself power although it is the magnetic field of power. Ignorance and opacity collude or compete with knowledge in mobilizing the flows of energy, desire, goods, meanings, persons. If M. Mitterrand knows English but Mr. Reagan lacks—as he did lack—French, it is the urbane M. Mitterrand who must negotiate in an acquired tongue, the ignorant Mr. Reagan, who may dilate in his native one. Or in the interactive speech model by which, as Sally McConnel-Ginet puts it, “the standard . . . meaning can be thought of as what is recognizable solely on the basis of interlocutors’ mutual knowledge of established practices of interpretation,” it is the interlocutor who has or pretends to have the less broadly knowledgeable understanding of interpretative practice who will define the terms of the exchange . . . . Such ignorance effects can be harnessed, licensed, and regulated on a mass scale for striking enforcements . . . the power of our enemies over us is implicated, not in their command of knowledge but precisely in their ignorance.”).

<sup>119</sup> A set of “Marriage Debates” in April 2006 between scholars both supporting and opposed to LGBT rights included at least references to all of these questions. Video of proceedings available at <<http://www.law.ucla.edu/williamsinstitute/home.html>>.

<sup>120</sup> Including the first law symposium in the field, *Sexual Preference and Gender Identity: A Symposium*, 30 HASTINGS L.J. 799 (1979); see Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, *Id.* at 1131.

scholarship has come into its own during the past five years.<sup>121</sup> The new section on “Gender Identity” in the bibliography captures this development.

As a still emerging field, transgender law scholarship shares some of the characteristics of the early days of sexual orientation law scholarship: there is significant overlap between the leading scholars in this area and the country’s leading transgender advocates,<sup>122</sup> and much of it is written by students or promoted by law symposia. Much of the scholarship also takes a traditional doctrinal approach, providing more descriptive overviews of the emerging field or focusing on specific legal issues transgender people face: access to medical treatment and surgery—whether through public benefits, private insurance, or while incarcerated; discrimination in employment, housing, and public accommodations; hate crimes and prison safety; immigration and asylum; parenting rights; and recognition of marriages where one partner has transitioned.

Unlike the early days of sexual orientation law, a number of non-transgender people are writing in this area and much of the

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<sup>121</sup> In 1994, the year Westlaw begins to carry fuller coverage of law review journals, “transsexual” appeared in only seven law review articles. By 2005, that number had increased to 163, with a total of 837 articles published including the word during that twelve-year period. Of the fifty-one articles that Westlaw lists as having the word “transsexual” in the title, only three were published before 2000. Westlaw searches performed on August 17, 2006. These results do not change significantly when including the terms *transsexual* or *gender identity*. See generally, *TRANSGENDER RIGHTS* (Paisley Currah et al. eds., 2006).

<sup>122</sup> These would include Shannon Minter, Legal Director of the National Center of Lesbian Rights; Jennifer Levi, Gay and Lesbian Advocates & Defenders; Dean Spade, Sylvia Rivera Transgender Law Project; Dylan Vade, formerly with the Transgender Law; Paisley Currah, Executive Director of the Center for Lesbian and Gay Studies at City University of New York (CUNY); and Phyllis Randolph Frye, a private attorney and former Director of the International Conference on Transgender Law & Employment Policy. These scholar-advocates are also doing much of the teaching and as of yet, there is no casebook in the field.



work has a more theoretical bent, influenced by queer legal theory. Many scholars view transgender jurisprudence as a powerful mechanism for the deconstruction of sex, gender, and sexual orientation. Through consideration of transsexual rights cases judges will learn these categories are intertwined and socially constructed, thereby leading to advances in LGBT and women's rights.<sup>123</sup> In particular, scholars have focused on the use of transgender marriage cases in advancing<sup>124</sup> or hindering<sup>125</sup> same-sex marriage cases. If sex is indeterminate or mutable, then what exactly does it mean to have an opposite-sex requirement for marriage?<sup>126</sup> Similarly, scholars have focused on how transgender cases have already and could continue to expand prohibitions of sex discrimination under Title VII and state laws to include protection of people who do not conform to traditional gender roles.<sup>127</sup>

Some of these more theoretical pieces are written with the objective of making a case for the women's and LGBT movements to include transgender rights,<sup>128</sup> but some list towards positioning transgender rights more as a means than an end, like a provocative

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<sup>123</sup> See, e.g., Taylor Flynn, *Transforming the Debate: Why We Need To Include Transgender Rights in Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392 (2001). This article presents an excellent discussion of the potential for transgender rights litigation to advance core issues in feminist and gay rights advocacy. Flynn is also very clear about the importance of such litigation in advancing the rights of transgender people themselves. *Id.* at 393.

<sup>124</sup> See, e.g., Heather G. Berrigan, *Transsexual Marriage: A Trans-Atlantic Judicial Dialogue*, 12 Law & Sexuality 87 (2003) and Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L. J. 219 (1998).

<sup>125</sup> See, e.g., Elizabeth C. Barcna, *Kantaras v. Kantaras: How a Victory for One Transsexual May Hinder the Sexual Minority Movement*, 12 BUFF. WOMEN'S L.J. 101 (2004).

<sup>126</sup> See Terry S. Kogan, *Transsexuals, Intersexuals, and Same-Sex Marriage*, 18 BYU J. PUB. L. 371 (2004).

<sup>127</sup> Flynn, *supra* note 123, at 396–408.

<sup>128</sup> See, e.g., Flynn, *supra* note 123.

law school hypothetical to teach judges a lesson that will advance their projects.<sup>129</sup> As this scholarship develops, it is important it not become fully instrumental to others' goals, but retains a strong focus on addressing the legal needs of a group of people that continues to face alarming rates of discrimination,<sup>130</sup> brutal harassment and violence, and medical neglect.<sup>131</sup>

## 7. Going Global

In addition to topical, theoretical, and political expansions, the field has experienced more grounded growth. As new subsections in the bibliography on "Foreign" or "International" law attest, there has been a growth of LGBT scholarship focused on countries other than the United States. Comparative and international law scholarship is not just confined to these designated sections, but appears throughout the update. While U.S. scholars—including Lee

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<sup>129</sup> See, Leslie Pearlman, Comment, *Transsexualism as Metaphor: The Collision of Sex and Gender*, 43 BUFF. L. REV. 835 (1995) ("This Note challenges the reader to confront the underlying assumptions regarding the nature and language of legal discourse and the construction of sex and gender, and uses the transsexual as a case in point."); Jennifer L. Nevins, *Getting Dirty: A Litigation Strategy for Challenging Sex Discrimination Law by Beginning with Transsexualism*, 24 N.Y.U. REV. L & SOC. CHANGE 383.

<sup>130</sup> See, e.g., Kari E. Hong, *Categorical Exclusions: Exploring Legal Responses to Health Care Discrimination Against Transsexuals*, 11 COLUM. J. GENDER & L. 88 (2002) (survey of forty transsexuals found the majority experienced discrimination by private insurers and medical providers); Tarynn Witten & A. Evan Eyler, *Hate Crimes and Violence Against the Transgendered*, 11 PEACE REVIEW 461 (1999).

<sup>131</sup> See generally, Tarynn M. Witten & Stephen Whittle, *TransPanthers: The Greying of Transgender and the Law*, 9 DEAKIN L. REV. 503, 505–06 (2004); see also, JESSICA XAVIER & RON SIMMONS, FINAL REPORT OF THE WASHINGTON TRANSGENDER NEEDS ASSESSMENT SURVEY 16 (2000), <<http://www.gender.org/resources/dge/gea01011.pdf>> (finding that 26% of transsexuals surveyed report harassment, 18% intimidation, 17% assault with a weapon, and 14% sexual assault/rape).

Badgett,<sup>132</sup> Bill Eskridge,<sup>133</sup> Sonya Katyal<sup>134</sup> and James Wilets<sup>135</sup>—are making important contributions in this area, many of its leading contributors are, quite naturally, from abroad: Eric Heinze,<sup>136</sup> Didi Herman,<sup>137</sup> Yuval Merin,<sup>138</sup> Carl Stychin,<sup>139</sup> Helen Toner,<sup>140</sup> Kees Waaldjik,<sup>141</sup> and Robert Wintemute.<sup>142</sup>

This scholarship tracks advances in LGBT rights in other countries and the application of international and European human rights law to sexual orientation issues. Many of the publications in

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<sup>132</sup> M.V. Lee Badgett, *Predicting Partnership Rights: Applying the European Experience to the United States*, 17 YALE J.L. & FEMINISM 71 (2005).

<sup>133</sup> See, e.g., WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR WORSE?* (2006).

<sup>134</sup> Sonya Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97 (2002).

<sup>135</sup> See James Wilets, *Lessons from the Past and Strategies for the Future: Using Domestic, International and Comparative Law to Overturn Sodomy Laws*, 24 SEATTLE U. L. REV. 49 (2000); James Wilets, *Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, 60 ALB. L. REV. 989 (1997); James Wilets, *International Human Rights Law and Sexual Orientation*, 18 HASTINGS INT'L & COMP. L. REV. 1 (1994).

<sup>136</sup> See ERIC HEINZE, *SEXUAL ORIENTATION—A HUMAN RIGHT: AN ESSAY ON INTERNATIONAL HUMAN RIGHTS LAW* (1995); see also Eric Heinze, *Sexual Orientation and International Law: A Study in the Manufacture of Cross-Cultural "Sensitivity,"* 22 MICH. J. INT'L L. 283 (2001).

<sup>137</sup> DORIS BUSS & DIDI HERMAN, *GLOBALIZING FAMILY VALUES: THE CHRISTIAN RIGHT IN INTERNATIONAL POLITICS* (2003).

<sup>138</sup> YUVAL MERIN, *EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES* (2002).

<sup>139</sup> CARL F. STYCHIN, *GOVERNING SEXUALITY: THE CHANGING POLITICS OF CITIZENSHIP AND LAW REFORM* (2003).

<sup>140</sup> See, e.g., HELEN TONER, *PARTNERSHIP RIGHTS, FREE MOVEMENT, AND EU LAW* (2004).

<sup>141</sup> See, e.g., KEES WAALDIJK & MATTEO BONINI-BARALDI, *SEXUAL ORIENTATION DISCRIMINATION IN THE EUROPEAN UNION: NATIONAL LAWS AND THE EMPLOYMENT EQUALITY DIRECTIVE* (2006).

<sup>142</sup> THE LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW (Mads Andenas & Robert Wintemute eds. 2001).

U.S. law journals focus on issues where the U.S. lags behind other, mainly Western, nations. At the national level, that still includes military policy, immigration policy, anti-discrimination protections, transsexual rights, and the recognition of the rights of same-sex couples. In short, when compared to much of Western Europe, the U.S. lags behind on almost everything except parenting rights.<sup>143</sup>

Even more compelling than the tracking of developments in individual jurisdictions, is scholarship focused on the connections between them. For example, through detailed multinational comparisons, scholars have produced provocative descriptive and normative theories about the progression of legal reforms to advance LGBT rights, such as Kees Waaldijk's *Law of Small Change*.<sup>144</sup>

Scholars are also focusing on the movement of LGBT people, identity, politics, and precedents across borders. Scholars analyze the applicability of immigration law to LGBT people—those seeking asylum, the right to be unified with their foreign-born partner, or the right to carry recognition of a relationship across borders. While many of these articles focus on what the United States could learn from the advances in other countries, or from taking international human rights law seriously, scholars also

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<sup>143</sup> Merin, *supra* note 138, at 253–262 (positing that one of the reason for the difference may be supply and demand, the number of children needing homes is far greater in the United States than in Europe).

<sup>144</sup> Kees Waaldijk, *Law of Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in *THE LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW*, *supra* note 142. By looking at mainly at the progression of laws in a number of European countries, the “law of small change” describes a general order for the recognition of LGBT Rights (decriminalizing of sexual conduct, anti-discrimination protections, recognition of the rights of same-sex couples, and parenting rights) and that progress has been made either incrementally or when accompanied with a corresponding step back.

critique the imposition of U.S. gay identity and identity politics on other countries and cultures.<sup>145</sup>

Much of this scholarship is, not surprisingly, focused on the West, but its geographic reach is spreading with developments in South America, rapid advances in Eastern Europe as part of the EU accession process, and increasing attention to violations of basic human rights of expression and safety in much of the rest of the world. As the globe continues to shrink, this scholarship continues to grow.

### Conclusion

The past twelve years have witnessed breathtaking advances for the LGBT movement, resulting in equally breathtaking advances for sexual orientation law scholarship. However, I write this essay in August 2006 after a bruising summer. Among other setbacks, last month both the highest courts of New York<sup>146</sup> and Washington<sup>147</sup> declined to extend marriage to same-sex couples, largely based on analysis indistinguishable from similar opinions written more than three decades ago. These recent setbacks, the mini-DOMA laws in the vast majority of states, the lack of anti-discrimination protections for LGBT people in over half the states, the continuing violence and harassment that LGBT people face—all indicate that there will be plenty of material, and plenty of opportunities to make an impact, for scholars for decades to come. What has been achieved in the last twelve years is the establishment of a secure, intellectually rich and dynamic field from which scholars can make meaningful and unique contributions for the long haul ahead. That work will be greatly facilitated by the update to this bibliography.

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<sup>145</sup> Katyal, *supra* note 134.

<sup>146</sup> *Hernandez v. Robles*, \_\_\_ N.E.2d \_\_\_, 2006 WL 1835429 (N.Y.), 2006 N.Y. Slip Op. 05239 (2006).

<sup>147</sup> *Andersen v. King County*, 138 P.3d 963 (2006).



# PART I

## 1994 BIBLIOGRAPHY

COVERING MATERIAL THROUGH SEPTEMBER 1, 1993  
(Reprinted from 86 Law Library Journal 1–103 (1994))





# **Sexual Orientation and the Law: A Selective Bibliography on Homosexuality and the Law, 1969-1993\***

Standing Committee on Lesbian and Gay Issues,  
AALL Social Responsibilities SIS

## **Introduction**

At the 1987 annual convention of the American Association of Law Libraries, the membership passed a resolution urging libraries to acquire legal materials on the role of lesbian and gay people in society. In support of that resolution, the Standing Committee on Lesbian and Gay Issues of the Social Responsibilities Special Interest Section<sup>1</sup> prepared this bibliography, which was first distributed at the 1988 annual convention of the Association in Atlanta, Georgia. The second edition, issued in 1989, updated the first bibliography and was complete through 1988. This edition is complete through September 1, 1993. The bibliography is intended to provide librarians with guidance in the selection of materials for their collections, as well as assistance in scholarly research.

As the subject of the bibliography is homosexuality and the law, general works on homosexuality are not included. The sources listed date from the late 1960s (the beginning of the Gay Liberation movement) through mid-1993. The majority of the items have been published in the past five years. The bibliography is selective, and we have included only articles of substance and sufficient length to prove useful to librarians and scholars.

Because of the wealth of materials available, the bibliography has been divided into subject categories. Users should be aware that they may need to consult more than one section to obtain all of the relevant entries on their particular topic of interest. For example, articles on the United States Supreme Court's decision, *Bowers v. Hardwick*, are included in the criminal law or the privacy section, depending upon the approach taken in the article itself. A separate table of cases includes full bibliographic

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\* © Standing Committee on Gay and Lesbian Issues of the Social Responsibilities Special Interest Section of the American Association of Law Libraries, 1994.

1. Formerly the Contemporary Social Problems Special Interest Section. The name change was approved by the AALL Executive Board in November 1993.

references to individual articles, case notes, and comments. These references are also indexed by subject in the main bibliography.

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***E. Legal Organizations***

American Civil Liberties Union  
Lesbian and Gay Rights Project  
132 W. 43rd Street  
New York, NY 10036  
(212) 944-9800

Bar Association for Human Rights  
of Greater New York  
P.O. Box 1899  
Grand Central Station  
New York, NY 10163  
(212) 431-2156

Custody Action for Lesbian Mothers  
P.O. Box 281  
Narberth, PA 19072  
(215) 667-7508

Gay and Lesbian Advocates  
and Defenders  
P.O. Box 218  
Boston, MA 02112  
(617) 426-1350

Lambda Legal Defense  
and Education Fund  
666 Broadway, 12th Floor  
New York, NY 10012  
(212) 995-8585

Lesbian and Gay Labor Network  
P. O. Box 1159  
Peter Stuyvesant Station, NY 10009

Lesbian Mothers National Defense  
Fund  
P.O. Box 21567  
Seattle, WA 98111  
(206) 325-2643

National Center for Lesbian Rights  
1370 Mission Street  
4th Floor  
San Francisco, CA 94103  
(415) 621-0674

National Lawyers Guild AIDS Pro-  
ject  
211 Gough Street, Suite 311  
San Francisco, CA 94117  
(415) 861-8884

National Lesbian and Gay Law  
Students Association  
c/o Lambda Legal Defense Fund  
666 Broadway, 12th Floor  
New York, NY 10012

Section on Gay and Lesbian  
Legal Issues  
Association of American  
Law Schools  
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### III. Discrimination

#### A. Employment

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