

Updates for LGBTbib.org

April 2009

I. General Works on Sexual Orientation and the Law

A. Books

B. Symposia

C. Reference

II. Legal Status of Lesbians and Gay Men

A. General

Ball, Carlos A., *Against Neutrality in the Legal Recognition of Intimate Relationships*, 9 Georgetown J. Gender & L. 321-336 (2008).

While conservatives tend to merge law and morality, liberals prefer to maintain a distinction between the public activity of politics and the private sphere of morality. Ball suggests that pro-same-sex-marriage liberals should not blush to incorporate moral arguments into their briefs. The alternative, "neutral" position Ball characterizes as either "unappealing or unrealistic." While Ball may be right that individual justifications for favoring gay marriage may include moral premises, that is still far from concluding that a democratic State should likewise select for special favor one moral viewpoint from among all those espoused by its citizens. For example, his Proposition #1 ("Same-sex sexual relationships are as morally good as different-sex relationships"), which he takes as unexceptional, is exactly what conservative moralists would point to as being the primary disagreement. One cannot employ this premise without telling everyone who disagrees that their worldview is erroneous, which is precisely the kind of acquiescence our form of government should not be demanding. Governmental neutrality on moral questions may be flawed, but, given our prior political commitments it may remain the only posture consistent with our values.

B. Criminal Law

Lee, Cynthia, *The Gay Panic Defense*, 42 U.C. Davis L. Rev. 471-566 (2008).

The author examines the historical and doctrinal background of the "gay panic defense," a variety of strategies that suggest a criminal defendant should be excused or justified if his violent actions were in response to a (homo)sexual advance. Drawing lessons from the Matthew Shepard trial, this article supports generally permitting gay panic defense arguments, since they are less harmful when made to a jury in open court than when forced underground. It proposes strategies for prosecutors to minimize homophobic juror bias and foster enlightened deliberations.

C. Civil Law / Election Politics

D. Constitution

1. *General Works*

2. *First Amendment*

Allen, Michael P., *The Underappreciated First Amendment Importance of Lawrence v. Texas*, 65 Wash. & Lee. L. Rev. 1045-1070 (2008).

Allen's article "discusses the potential implications of the Court's morality-based rationale in *Lawrence* for First Amendment jurisprudence." First he determines that the Supreme Court's meaning in *Lawrence v. Texas*, 539 U.S. 558 (2003), is that legislatures cannot use morality as the sole purpose for enacting a law. He then discusses how this applies to judicial rulings as well. After that Allen "considers the implications of the decision's morality-based reasoning for First Amendment doctrine." He specifically addresses implications for two free speech concepts under the first amendment: obscenity and hate speech. He argues that under *Lawrence* obscenity laws would fail if passed solely for moral reasons, but may survive if non-moral based reasons were provided, encouraging legislatures to create more evidence-based legislation. Allen also finds that hate speech laws are more suspect under *Lawrence*, since they are generally based on moral concepts, which corresponds with current jurisprudence. He concludes that "*Lawrence's* prohibition on the use of morality as the sole or dominant rationale for both constitutional interpretation and legislating undermines certain aspects of established law while simultaneously providing support of others."

Harvard Law Review, *First Amendment - California Supreme Court Holds that Free Exercise of Religion Does Not Give Fertility Doctors Right to Deny Treatment to Lesbians. - North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court*, 189 P.3d 959 (Cal. 2008), 122 Harvard L. Rev. 787-794 (2008).

After a fertility doctor refused to perform an intrauterine insemination procedure due to his religious beliefs -- there was a disagreement whether he objected to the patient's status as a lesbian or as an unmarried woman -- the patient sued for a violation of California's Unruh Civil Rights Act. The California Supreme Court held, relying upon *Employment Div. v. Smith*, 494 U.S. 872 (1990), that there exists no First Amendment "exemption from a neutral and valid law of general applicability." Doctors are therefore not allowed to refuse to provide medical treatments due to their own religious beliefs, with two exceptions: The doctor can either cease to provide that service completely, or can refer the patient to another nonobjecting doctor within the same practice. The commentator views this as a realistic compromise. This ruling can be read in the context of moves by President Obama to overturn the Bush administration's hastily enacted "Provider Refusal Rule," which went into effect the day Obama took office, that has allowed doctors to claim such a religious exemption.

3. *Privacy, Equal Protection, Due Process*

Fair, Bryan K., *The Ultimate Association: Same-Sex Marriage and the Battle Against Jim Crow's Other Cousin*, 63 U. Miami L. Rev. 269-299 (2008).

The argument in this article is fairly straightforward: Among the constitutionally protected rights is "the ultimate personal liberty," right of intimate association, of which marriage is a basic example. Denial of marriage rights to gay men and lesbians also infringes the right to privacy, which both the new conservative members of the U.S. Supreme Court -- Roberts and Alito -- testified the Constitution protects. The "barest majority of the Supreme Court [thus] appears prepared to defend these fundamental rights and not to reify outdated theories of substantive due process or equal protection that have been repudiated during the past fifty years." An optimistic assessment, to be sure.

Lau, Holning, *Formalism: From Racial Integration to Same-Sex Marriage*, 59 Hastings L.J. 843-876 (2008).

Oops. Lau reads *Parents Involved in Community Schools v. Seattle School District, No. 1*, 127 S. Ct. 2738 (2007), the majority of which included four conservatives, as introducing a new form of equal protection analysis that -- while created to resolve a dispute over racial integration in public schools -- can also be applied to bolster arguments for same-sex marriage. The sex discrimination argument for same-sex marriage has received little support in courts because the ban on marrying someone of your own sex "is applied equally to men and women." Virginia used this same argument to defend its anti-miscegenation laws in *Loving v. Virginia*, 388 U.S. 1 (1967), but lost because in practice the law "reinforced white supremacy." LGBT advocates have had a difficult time making a similar argument that banning same-sex marriage supports a gender-based hierarchy. Those difficulties have now been removed, says Lau, because as a result of *Parents Involved* "laws that make race-based distinctions -- even equally applied distinctions in integration programs -- are now subject to heightened scrutiny regardless of their substantive effects." In other words, *Loving* would have been decided the same way under the new rule even without a finding that the practice supported white supremacy, opening the door for a similar reassessment of the sex-discrimination argument for same-sex marriage.

4. *Full Faith and Credit / DOMA*

E. Foreign / International Law

1. *Other than USA*
2. *International Law / Human Rights*

Boele-Woelki, Katharina, *The Legal Recognition of Same-Sex Relationships within the European Union*, 82 Tulane L. Rev. 1949-1981 (2008).

The author, a Dutch law professor, examines the problem of cross-border recognition of same-sex relationships in the European Union. National courts have restricted

competence to rule on these cases, depending upon the legislative enactment of specific rules. Thirteen of twenty-seven member states currently provide for some statutory recognition for same-sex couples. The variety of local solutions generate complicated interactions when couples migrate into new countries with differing categories, as illustrated in some intriguing tables to analyze her four scenarios. Local approaches are embedded in a more supportive European position that is grounded in human rights law, and which over time may effect more national uniformity within Europe favoring recognition of same-sex couples.

3. *Comparative*

4. *Immigration / Refugees*

Holland, Aubry, *The Modern Family Unit: Toward a More Inclusive Vision of the Family in Immigration Law*, 96 Cal. L. Rev. 1049-1091 (2008).

While not writing directly on issues relevant to a GLBT audience, Holland's analysis of the ways in which enforcement of immigration laws serves as de facto governmental regulation of family form offers some insight into difficulties experience within our own community. While family law has expanded to recognize many modern realities--step-and adopted children, and "functional" family units among others -- immigration policy remains mired in archaic notions of the traditional constellation. She contrasts two cases - - *Nguyen v. INS*, 533 U.S. 53 (2001) and *Yin v. Esperdy*, 187 F. Supp. 51 (S.D.N.Y. 1960) -- to show that INS rules are strictly construed to the extent the family at issue fails to conform to traditional nuclear models. Consequently many individuals who would be recognized by family law are denied that status by immigration authorities, and thus not allowed to enter this country to rejoin their relatives.

III. Discrimination

A. Private Employment

1. *General*

2. *Harassment / Title VII*

Eno, Amanda S., *The Misconception of "Sex" in Title VII: Federal Courts Reevaluate Transsexual Employment Discrimination Claims*, 43 Tulsa L. Rev. 765-791 (2008).

The rationale of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) that protects against sex stereotyping discrimination can protect a transsexual "experiencing discrimination based on the failure to conform to the employer's expectations of how stereotypical men and women act," it does not necessarily offer a useful precedent for a transsexual who in fact conforms to such stereotypes, but nonetheless suffers discrimination because gender identity does not match biological sex. The author reads *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006) as filling this gap. (Later opinions in this case continued to favor the employee; see 525 F.Supp.2d 58 (D.D.C. 2007); 577 F.Supp.2d 293 (D.D.C. 2008)). This outcome promises to bring transsexuals fully within the protections of Title VII's "because of ... sex" rule, an achievement currently denied to other sexual minorities

like gay men and lesbians because, as Eno notes, "Transsexualism is about being a man or a woman, not about being attracted to a man or a woman."

3. *Benefits*

4. *School / Teachers*

B. Public Employment

1. *Military / Campus Recruitment*

Koslosky, Daniel Ryan, *Sexual Identity as Personhood: Towards an Expressive Liberty in the Military Context*, 84 N. Dakota L. Rev. 175-218 (2008).

The author, finding the "formation of identity, sexual or otherwise, to be inherently a communicative process," suggests that the holding in *Lawrence v. Texas*, 539 U.S. 558 (2003) "implicates the First Amendment by the nature of the identity it seeks to protect," and thus may provide the wedge needed to overturn Don't Ask, Don't Tell.

2. *Non-Military*

C. Hate Crimes

D. Housing / Sports

E. Other

IV. Family Issues

A. General

B. Couples

1. *General*

Cain, Patricia A., *Heterosexual Privilege and the Internal Revenue Code*, 34 U. San Fran. L. Rev. 465-495 (2000).

In this contribution Cain provides an accessible catalog of harms imposed by the preference of the IRS Code for heterosexual relationships. The benefits denied to same-sex couples include those involving filing status and ability to split income, the taxation of fringe benefits, the marital deduction for gratuitous transfers, and rules involving tax-free property divisions at divorce. She also examines the tax burdens same-sex couples avoid because they do not fall under the negative tax consequences married couples encounter in some situations.

Cain, Patricia A., *Taxing Families Fairly*, 48 Santa Clara L. Rev. 805-855 (2008).

Cain here makes another contribution to her body of work on the tax problems of same-sex couples. Her focus in this article concerns the growing discrepancies in the way couples are treated between states and between state and federal tax regimes. These inconsistencies raise not only equity issues, but also practical ones for citizens and state tax authorities. The problem can be resolved, however, only by federal legislation that would overturn DOMA. She favors a federal law that ignores "marriage" and favors domestic partnerships, which would be taxed like a business partnership. Marriage would "no longer create penalties or bonuses," and any couple wishing "to form a tax partnership may do so."

Rickey, Anthony, *Loving Couples, Split Interests: Tax Planning in the Fight to Recognize Same-Sex Marriage*, 23 Berkeley J. Gender L. & Justice 145-180 (2008).

Before reading this article one might wish first to become familiar with the works of Patricia Cain on the relationship of the tax code and sexual orientation. Rickey takes her observations a step further, finding in the tensions between DOMA, which forbids recognizing same-sex marriages, and the IRC, "which uses marital status to identify parties likely to collude in order to minimize their collective tax burden," a new way to force the hand of anti-marriage supporters. They must either knowingly "allow a "homosexual-only tax shelter" or "recognize same-sex relationships for the purpose of tax law." Forcing the government to make this choice results from what the author calls a "gonzo" tax strategy, one that by insisting upon the strict application of the rules leads to their disruption, which can be contrasted with a "guerilla" strategy of collective disobedience of those rules.

2. Marriage

a. General

Culhane, John G., *Beyond Rights and Morality: The Overlooked Public Health Argument for Same-Sex Marriage*, 17 Law & Sexuality 7-37 (2008).

While much of the debate over same-sex marriage has focused on questions of rights, Culhane directs attention to a different inline of argumentation, that of public health. In this light the central question is whether the public goods from marriage "would be realized by marriage equality?" While assertions that gay marriage would be harmful to society have been "cast in general, speculative terms," the author constructs "a preliminary case that allowing same-sex couples to marry would materially advance public health."

Pallitto, Robert M., and Jason Hungerford, *The Proposed Anti-Gay Marriage Amendment: The Constitution, the Law of Standing, and Liberal-Democratic Values*, 17 Law & Sexuality 75-106 (2008).

The authors raise the intriguing point that, given the existence of a federal constitutional amendment prohibiting same-sex marriage, no private or public party would have standing to bring suit. In the first case the amendment creates no right, and "the tests for the type of injury sufficient to gain legal standing could not be satisfied by a third party complaining about another's marriage." The Eighteenth Amendment -- "the only relevant case in our constitutional history" -- offers an ambiguous record that the authors suggest failed due to the "infeasibility of federal enforcement" of morality. "Thus, with neither private nor public enforcement actions created by it, the proposed marriage ban would be a provision lacking legal effect."

Turner, William B., *The Perils of Marriage as Transcendent Ontology: National Pride at Work v. Governor of Michigan*, 9 Georgetown J. Gender & L. 279-320 (2008).

Turner contrasts the two opposing opinions in *National Pride at Work v. Governor of Michigan*, 2005 WL 3048040 (Mich. Ct. App. Sept. 27, 2005); 732 N.W.2d 139 (Mich. Ct. App. 2007), both of which seek to construe whether the Michigan constitutional amendment prohibiting same-sex marriage also forbids public employers "from conferring employee benefits on the same-sex partners of their employees." The different outcomes, he suggests, are due to the fact that while the trial court is more consistent "with the language of the amendment itself, and also with the principles of constitutional interpretation that both courts claim to agree on," the appellate court imported understandings that marriage "precedes and exceeds the church and state," and is thus extra-legal. In such an environment, "law can describe marriage accurately or inaccurately, but law cannot change what marriage fundamentally is," an assertion that "is antithetical to the Anglo-American legal and political tradition." Even in the absence of overt claims of this kind, such ontological thinking is evidenced by the appellate decision's reliance upon entry criteria to marriage, even though the constitutional amendment speaks in terms of benefits.

b. *Pro*

Barrett, S.J., *For the Sake of the Children: A New Approach to Securing Same-Sex Marriage Rights?*, 73 Brook. L. Rev. 695-727 (2008).

The student author makes an intriguing proposal built upon the observation that "the debate over gay marriage [has] evolved into a balancing act that considers not only the rights of same-sex couples, but also the rights of these couple's children." Noting the rationales in cases like *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006), and *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006), the author sees a potential opening in arguments for same-sex marriage, one based on "an Equal Protection challenge based on a child's right to presumed legitimacy at birth." While interesting on its face, the article perhaps does not fully confront the unintended fallout of making marriage legitimacy a function of procreation rather than, as it is for heterosexuals, a union between two adults.

c. *Con*

3. Civil Unions / Domestic Partnership

4. Dissolution

C. Parenting

1. *General*

Althouse, Laura Nicole, *Three's Company? How American Law Can Recognize a Third Social Parent in Same-Sex Headed Families*, 19 *Hastings Women's L.J.* 171-209 (2008).

Three parent family constellations are becoming more common. Recent cases in Canada - - e.g., *A.A. v. B.B.*, 83 O.R.3d 561 (2007) -- illustrate a possible future within the United States, where third parents have been typically judicially recognized only "a second father for the purposes of collecting child support in a heterosexually headed family where the mother has divorced and remarried." Lacking is any routine status of "two parents performing the full panoply of parenting duties and a third parent providing limited social parenting," as is the hope for families headed by same-sex couples. The author analyzes the Uniform Parentage Act to see what changes would be required "to accommodate multiple parenthood within this population subset."

Baker, Katharine K., *Bionormativity and the Construction of Parenthood*, 42 *Ga. L. Rev.* 649-715 (2008).

Baker believes that "family law as a discipline is shifting from a set of rules designed primarily to regulate sexual relationships between adults to a set of rules designed to regulate parental relationships between adults and children." Decreased emphasis on marriage has created a "desperate need of a system to determine parenthood." The role played by social arrangements like marriage can now, she suggests, be played by biology. The values of parental "bionormativity" are that it should be private ("meaning that the state has no legitimate interest in regulating, but also no requirement to finance, parenthood") and binary ("there are at least two and only two parents"), and discourages functional parents (those who, while lacking a biological tie to the child, invest time, love and money). While the author claims that a bionormative regime does not "necessarily follow conventional political lines" -- in other words, that this is not fancy theoretical dress for fundamental conservative social policies -- it is difficult to take that assertion seriously. Pointing out the possibility that in that environment "someone eager to legitimize families with gay parents may be enthusiastic about a binary requirement for parenthood because a binary rule makes it more likely that a non-biological related partner will retain legal status," it seems more likely that it will disfavor such partners in the event of split, given the disfavor of "functional" parents.

Bowen, Deirdre M., *The Parent Trap: Differential Familiar Power in Same-Sex Families*, 15 *Wm. & Mary J. Women & L.* 1-49 (2008).

Bowen raises the important question of how the different legal relationships between each parent to the child -- where one partner is the biological parent or primary adopter, while the other is a second adoptive parent -- impact the dynamics of the family itself. Research suggests that "second parent adopters had much less emotional power in the

family, but often had more economic power," setting up complementary insecurities. Unawareness of the rights and obligations that have been created in this situations, and lack of confidence in these legal protections when known, combine "to undermine these families on both a macro and micro level." Bowen recommends the creation of new legal presumptions about parenthood that will reinforce these family structures.

Graham, Kathy T., *Same-Sex Couples: Their Rights as Parents, and Their Children's Rights as Children*, 48 Santa Clara L. Rev. 999-1037 (2008).

Emphasizing the need to protect the children of same-sex households, Graham observes that while the "debate on the legitimacy of same-sex partnerships has concentrated largely on the partners' relationship with one another...when considering the right of a child to have the parent/child relationship recognized between the two partners who intend to be his or her parent, the debate should focus on the children, rather than the partners." She analogizes from the immigration case of *Plyler v. Doe*, 457 U.S. 202 (1982), which argued that while adult illegal immigrants should suffer the consequences of their chosen illegal status, those disabilities should not necessarily extend to their children who did not choose the manner of their entry to this country. Likewise, the fallout of the adults' choice "to create a family unit not recognized or protected by state law" should not exact penalties on the children of those families.

2. *Custody / Visitation*
3. *Adoption / Fostering*
4. *Pregnancy / Insemination*

D. Wills, Trusts, Estates / Elders

E. Domestic Violence

Little, Shannon, *Challenging Changing Legal Definitions of Family in Same-Sex Domestic Violence*, 19 Hastings Women's L.J. 259-279 (2008).

Gender-neutral domestic violence laws, Little believes, are an imperfect solution to the problem of assuring protections to same-sex couples. While a step in the right direction, such laws fall short in several ways, such as failing to recognize "societal homophobia [as] another 'arsenal of terror' in a same-sex relationship" that can manifest either in the types of violence inflicted -- e.g., *Richardson v. Easterling*, 878 A.2d 1212 (D.C.C. 2005) -- or in the responses from system officials (*Rucks v. State*, 692 So.2d 976 (Fla. Dist. Ct. App. 1997)). New questions have been raised whether such laws violate recent constitutional prohibitions on same-sex marriage, as well as the extension of benefits of marriage to unmarried individuals, as was argued in *State v. Nixon*, 845 N.E.2d 544 (Ohio Ct. App. 2006) and *State v. Ward*, 166 Ohio App. 3d 188 (2006). She advocates as remedy the inclusion of language extending these protections to same-sex couples.

V. GLBT Youth / Student

Higdon, Michael J., *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 U.C. Davis L. Rev. 195-253 (2008).

Higdon considers the discrimination built into state "Romeo and Juliet" laws -- laws that offer an exception to statutory rape laws if the defendant is close in age to the minor victim, usually within three years. Some states, however (e.g., Texas, Alabama, and California), restrict this exception to acts between opposite sexes, meaning that gay teens face "felony convictions, large fines and mandatory sex offender registration -- penalties that would not attach had the victim been the opposite gender." For obvious reasons the author finds this inequitable treatment cruel, and that it qualifies as "invidious discrimination that violates the Equal Protection Clause."

Kennedy, Amanda, *Because We Say So: The Unfortunate Denial of Rights to Transgender Minors regarding Transition*, 19 Hastings Women's L.J. 281-301 (2008).

Transgender youth face a number of obstacles when considering their options for transitioning. The author reviews some of the legal variables associated with the three scenarios of parental agreement, parental disagreement between themselves about transitioning, and when both parents oppose the process. While this discussion may not be as in-depth as some would like, it can serve as an accessible means to frame one's deeper investigation of the issues.

VI. Health Issues

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

VIII. Gender Identity

A. General

Capers, I. Bennett, *Cross Dressing and the Criminal*, 20 Yale J. L. & Humanities 1-30 (2008).

Although Capers considers the case of transvestism and "drag," for him these kinds are just examples of a broader concept of "cross dressing" in which one can engage. In addition to exchanging the apparel of one gender for another, one can also use the mental exercise to expose other biases, including race, class, sexuality, and status. Would Martha Stewart have been convicted if she had been seen not as a privileged woman with an expensive Birkin bag, but as a male with a briefcase, or a secretary with a purse from the Gap? Imaginative cross dressing thus becomes a form of Rawls' "veil of ignorance," a technique to detect our otherwise unrecognized prejudices.

Spade, Dean, *Documenting Gender*, 59 *Hastings L.J.* 731-841 (2008).

Spade begins with a critical overview of the inconsistent administrative decisions concerning gender: "policies related to gender markers on identification documents, policies related to placement in sex-segregated facilities, and policies related to the state provision of health care that is prohibited based on the gender on record for the person seeking coverage." He goes further to place this classificatory chaos in the context of the "War on Terror" and the resulting initiatives to standardize recordkeeping. Does gender, he wonders, really need to be tracked at all?

B. Legal Status

Gilden, Andrew, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 *Berkeley J. Gender L. & Justice* 83-144 (2008).

This is the kind of article that would have been well served by a abstract that distilled its complicated arguments. The reasoning appears to be that linking transgender rights to the formal legal categories of "sex" and "gender identity" undermine the "reconstructive potential" of transgender lives to demonstrate the fundamentally distorting influences of those ideas on our social and political systems. The article appears then to follow the reasoning of those that suggest, for example, that excluding gay couples from marriage is not the problem; marriage is the problem. Readers may find particularly interesting the author's use of the Native American "berdache" tradition -- and the Navaho *nadleeh* particularly -- as an illustrative of an alternative gender fluidity to take the place of our own static gendered hierarchies and stereotypes.

C. Discrimination

D. Family

E. Health

F. Prisoners