

Updates for LGBTbib.org

February 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

Ronner, Amy D., *The Crucible, Harvard's Secret Court, and Homophobic Witch Trials*, 73 Brook L. Rev. 217-298 (2007)

In 1920 Harvard College venomously pursued students it thought were homosexual. It convened a secret court, "tried" about twenty students, and expelled seven undergraduates. Targeting both gays and friends of gays, Harvard was unsatisfied with expelling the men, but afterward displayed a "relentless commitment to hunting these men down and sabotaging their efforts to finish school, find work, and self-actualize." The harassment continued for decades, as when Harvard tried to derail the 1953 elevation of Joseph Lumbard to the federal appeals court. Several committed suicide as a result. Ronner situates this horrific episode alongside the Salem witch hunts, and the post-9/11 climate to show that "the malevolent forces that propel witch hunts are omnipresent and can spring into action at any time."

B. Criminal Law

C. Civil Law / Election Politics

Butland, Brodie M., *The Categorical Imperative: Romer as the Groundwork for Challenging State "Defense of Marriage" Amendments*, 68 Ohio St. L.J. 1419-1467 (2007)

The author creates a four part typology of state defense of marriage amendments: court-stripping amendments that reserves the question strictly to the legislature; marriage definition amendments that install a one-man-one-woman definition of marriage into the constitution; amendments that ban same-sex marriage and comparable statuses; and amendments banning recognition and the legal incidents thereof. Butland then ascertains the differential impact of the equal protection analysis of *Romer v. Evans*, 517 U.S. 620 (1996), for each of the four amendment types, concluding that types 3 and 4 violate the Romer standards, while types 1 and 2 do not.

D. Constitution

1. *General Works*

2. *First Amendment*

Jahanian, Arash, *True Endorsement: A Critical Race Approach to Bans on Same-Sex Marriage*, 9 Georgetown J. Gender & L. 237-268 (2008)

This student note argues that “bans on same-sex marriage violate the First Amendment's Establishment Clause.” Of particular focus is Justice O'Connor's “endorsement test, which prohibits the government from conveying ‘a message of endorsement or disapproval’ of a particular religious viewpoint.” The author applies this test “from the non-Christian's perspective to bans on same-sex marriage and concludes that these laws endorse the viewpoint of the dominant Christian majority.”

3. *Privacy, Equal Protection, Due Process*

Lenhardt, R.A., *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 Cal. L. Rev. 839-900 (2008)

Discussion in the popular press (e.g., the Advocate's Dec. 16, 2008 cover issue on whether "Gay is the New Black") have added urgency to the long-standing question of the proper relationship of antimiscegenation laws against interracial marriage--and the judicial decisions that overturned them, including *Loving v. Virginia*, 388 U.S. 1 (1967)--to the current bans on same-sex marriage. Lenhardt suggests that the key to reframing this debate is to look at Loving's predecessor, *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948). *Perez* encourages not an "analogy" that compares two different groups, but "a deeper appreciation of the extent to which state-imposed obstacles to marriage have operated to police identity, restrict opportunities for self-definition, and impede belonging."

Smith, Catherine, *Queer as Black Folk?*, 2007 Wis. L. Rev. 379-407 (2007)

The gay-themed contribution to a theme issue devoted to *Loving v. Virginia*, 388 U.S. 1 (1967), Smith offers a critique of the "same-as mantra as a potential organizing strategy used by white mainstream LGBT organizations in their attempt to build meaningful coalitions with black people and sway public opinion." While useful in some contexts (e.g., legal briefs), sameness arguments, she points out, "are not the optimal approach to an interracial dialogue on LGBT issues." As an alternative, she suggests looking to the superordinate goals in correcting the "overarching structures of oppression" that the two movements share. As to examples she offers "recognizing the harms to black LGBT people," and "expanding the concept of 'family'."

4. *Full Faith and Credit / DOMA*

Poirier, Marc R., *Same-Sex Marriage, Identity Processes, and the Kulturkampf: Why Federalism is Not the Main Event*, 17 Temple Pol. & Civ. Rgts. L. Rev. 387-420 (2008)

Rather than a legitimate experiment in the laboratories of the states, federalism offers instead only a stage of historical accident for the thrashing out of the same-sex marriage controversy. Poirier frames the struggle instead as a "kulturkampf," or culture war, a term invoked by U. S. Supreme Court Justice Scalia in his *Romer v. Evans* dissent (517 U.S. 620, 636 (1996)). The error of the first view is that the state is the proper level of analysis at which to frame the central arguments at issue in marriage adjudication. In contrast, Poirier points out that the "core dynamics are either local and place-based, or are universal and aterritorial." Resort to federalism is therefore "tactical" rather than central, a "beachhead" attempt to make opportunistic arguments. "Where Kulturkampf and cultural identity are concerned, federalism simply is not the main event."

E. Foreign / International Law

1. *Other than USA*

Leckey, Robert, *Private Law as Constitutional Context for Same-Sex Marriage*, 2 J. Comparative L. 172-191 (2007)

Observing that for a provincial opinion such as *Halpern v. Canada*, 65 Ontario Rep. 161 (2003), there is "no higher honour ... than such lofty acknowledgment that it exists" as being criticized in Justice Scalia's dissent in *Lawrence v. Texas*, 593 U.S. 558, 573 (2003), the author uses that opportunity for a deeper scrutiny from the perspective of comparative constitutional law. Problems arise, he finds, in studying issues of constitutional law "in isolation from their enculturation in private law," with the result that too much of the credit goes to constitutional texts rather than to the private law that "informs the attitudes of the judges who construe constitutional rights."

Zafran, Ruth, *More Than One Mother: Determining Maternity for the Biological Child of a Female Same-Sex Couple: The Israeli View*, 9 Georgetown J. Gender & L. 115-163 (2008)

The author considers the problem of ascertaining, from the particular view of Israeli law, parenthood of a child who was conceived by the egg of one lesbian partner being carried to term by the other. Because current law "cannot provide an adequate response," she proposes legislative changes that will allow recognition "through appearance before a registry official." Until such time, however, the Family Court will have jurisdiction over this question.

2. *International Law / Human Rights*

Samar, Vincent J., *Throwing Down the International Gauntlet: Same-Sex Marriage as a Human Right*, 6 Cardozo Pub. L. Pol'y & Ethics J. 1-55 (2007)

"Do nations who do not recognize same-sex marriage have an obligation to recognize same-sex marriage, when such marriages have been consummated abroad?" Yes, replies

Samar, if the right to same-sex marriage could be framed as a substantive human right. He defends this proposition by building upon the arguments of Alan Gewirth, whose ethical rationalism posits a supreme "principle of generic consistency" that logically follows from the structure of human agency. The principle states that "everyone should have the same freedom as long as it does not interfere with anyone else's similar freedom," and thus allows for the recognition of same-sex marriage. This approach thus defends same-sex marriage not by special pleading, but because it comports with a more general basis for the recognition of human rights.

3. *Comparative*

4. *Immigration / Refugees*

O'Dwyer, Paul, *A Well-Founded Fear of Having My Sexual Orientation Asylum Claim Heard in the Wrong Court*, 52 N.Y.L. Sch. L. Rev. 185-212 (2008)

O'Dwyer, a practicing immigration attorney, combines data and practical experience to conclude that "one of the decisive factors in asylum claims based on sexual identity will continue to be the identity of the judge, rather than that of the applicant." All told, "with the exception of the Ninth Circuit, the odds of being successful on a petition for review in a sexual-identity-based protection claim are extremely slim." Immigration courts, in fact, despite reputations to the contrary, "have proven themselves far more receptive to sexual-orientation based protection claims than the federal courts." Given these obstacles and inconsistencies across jurisdictions, the author shares the lessons of his experiences by offering advice on how asylum cases might be successfully argued.

III. Discrimination

A. Private Employment

1. *General*

2. *Harassment / Title VII*

Hatami, Sheila, and **David Zwerin**, *Educating the Masses: Expanding Title VII to Include Sexual Orientation in the Education Arena*, 25 Hofstra Lab. & Emp. L.J. 311-354 (2007)

While courts--including the U.S. Supreme Court--have construed Title VII's "because of sex" language to include protections not explicit in the language of the statute, they have not exercised this same generosity to cover discrimination abased on sexual orientation. This reticence, seen by comparing the cases of *Rene v. MGM Grand*, 305 F.3d 1061 (9th Cir. 2002), and *Nichols v. Azteca Restaurant Enterprises*, 256 F.3d 864 (9th Cir. 2001), results in the line between gender stereotyping, which is prohibited, and sexual orientation discrimination, which is not, becoming "so thin that the distinction is confusing, unworkable, and must be wholly abandoned." These authors assert that the time has come to change this shortfall especially in the context of education.

Tannenwald, Alan K., *An Ironic Twist in Employment Law: The Conservative Case for Amending Title VII to Ban Discrimination on the Basis of Sexual Orientation*, 9 Georgetown J. Gender & Law 269-278 (2008)

If Title VII were amended to prohibit sexual orientation discrimination, this action would "prevent employers from developing unrestricted affirmative action programs for LGBT employees and unduly discriminate against straight employees" -- although the author offers little evidence that such programs are a serious likelihood. Nevertheless, such an outcome should make the change to the law attractive to conservatives.

3. *Benefits*

4. *School / Teachers*

B. Public Employment

1. *Military / Campus Recruitment*

Symposium, *Don't Ask, Don't Tell: Military Recruitment and Legal Education*, 57 J. Legal Educ. 159-194 (2007)

This collection of four pieces was originally presented as an AALS Workshop on the Solomon Amendment in the aftermath of *Rumsfeld v. FAIR*, 547 U.S. 47 (2006). Martha Ertman begins with a brief introduction to the issue. Joan Schaffner next uses events at the George Washington University Law School to ask "To what extent should student organizations be bound by the regulations that govern the GW placement office regarding military recruitment?" She believes that the "student interest in equal protection outweighs the student interest in employment," and that the FAIR decision "requires that law schools provide equal access but not equal treatment." James G. Leipold, Executive Director of NALP, reports results of a survey of law school responses, and offers three suggestions "for what law schools can and should do." Finally, the most personal account comes from Shalanda H. Baker, who tells of her expulsion from the military under DADT and being ordered to repay the costs of her Air Force Academy education.

2. *Non-Military*

C. Hate Crimes

D. Housing / Sports

E. Other

IV. Family Issues

A. General

B. Couples

1. *General*

Cain, Patricia A., *Dependency, Taxes, and Alternative Families*, 5 J. Gender Race & Just. 267-288 (2002)

Building upon Martha Fineman's suggestion that "governmental support for the family ought to support relationships of dependency rather than the adult sexual bond between husband and wife," Cain illustrates the ways in which "current law is biased against dependent children in non-traditional families." Looking at three examples--filing status under the federal income tax, tax credits, and state inheritance taxes, she hopes policy makers will amend laws so that "tax rules that are intended to provide benefits to households with minor dependent children...provide those benefits to all households with minor dependent children."

2. *Marriage*

a. *General*

Ball, Carlos A., *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages*, 76 Fordham L. Rev. 2733-2770 (2008)

Writing as part of a larger symposium on the fortieth anniversary of the Loving decision, Ball considers the detail that the plaintiffs in that famous case were also parents. Laws against miscegenation were often justified in terms of the potential offspring of such unions, and Ball finds that the concerns about children are echoed in today's conservative arguments against same-sex marriage. Both share the feature of essentializing a dualistic understanding of race and gender, leading the author to conclude that while most courts reject the relevance of Loving to same-sex marriage, "that case would seem to be highly relevant to an equality-based challenge to same-sex marriage bans given that the optimal parenting justification for those bans is grounded ... in the idea of natural, essential, and predetermined differences between men and women that is similar to the notion of natural, essential, and predetermined differences between whites and blacks that served as the normative foundation for the antimiscegenation regime."

Berger, Dov, *Separating Civil Unions and Religious Marriage: A New Paradigm for Recognizing Same-Sex Relationships*, 6 Cardozo Pub. L. Pol'y & Ethics J. 163-197 (2007)

This student note advances a commonly held, but erroneous argument that marriage is an intrinsically religious institution, and thus civil laws regulating it are unconstitutional. While well-intentioned, the position ignores the historical development of marriage in Western Civilization, in which Christianity came late to having any specific interest in it. The church wedding was elevated to the status of a sacrament only in the fifteenth century, and the presence of a priest required for a valid and binding marriage not until 1563 (see Lawrence Stone, *The Family, Sex, and Marriage in England 1500-1800* (1979)). The secular interests in marriage have always been the more fundamental. So

while this author argues that the state should cease to regulate marriage and leave these to religion, and instead offer civil unions, in fact it is as validly argued that the proper solution is the reverse.

b. *Pro*

Knauer, Nancy J., *Same-Sex Marriage and Federalism*, 17 Temple Pol. & Civ. Rgts. L. Rev. 421-442 (2008)

All too often the debate over same-sex marriage takes on an erudite, disinterested intellectual tone as constitutional issues are pondered, social trends reviewed, and judicial opinions summarized. Knauer, a frequent writer on the topic, does some of this in her brief article about the shortcomings of federalism for this topic. The eye is drawn, however, to the concluding section which points out the real human costs of the disparate state approaches concerning gay and lesbian relationships.

c. *Con*

Culbertson, Tucker, *Arguments against Marriage Equality: Commemorating and Reconstructing Loving v. Virginia*, 85 Wash. U. L. Rev. 575-609 (2007)

Culbertson argues that *Loving v. Virginia*, 388 U.S. 1 (1967), was wrongly decided. Instead of finding a fundamental right to marry, he insists the Court should instead "have renounced all governmental traditions that privilege civil marriage." It "presumes the legitimacy of illiberal and unequal sexual, religious, and other governance in order to condemn only the facial racial governance of antimiscegenation law." He believes--erroneously, it must be said--that "any of [marriage's] possible ends" are owed equally "to unmarried and unmarriageable persons," and that consequently "the status afforded civil marriage is irrational and illegitimate."

Severino, Roger, *Or for Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 Harv. J. L. & Pub. Pol'y 939-982 (2007)

The author, legal counsel for the Becket Fund for Religious Liberty, reads gains for gays regarding same-sex marriage as a threat to religious liberty. "Because of the undeniable centrality of marriage to civic and religious life, conflicts will inevitably arise where the legal definition of marriage differs dramatically from the religious definition." As his essay illustrates, however, the potential challenge to religious institutions does not concern governmental regulation of religious beliefs, but only areas of secular activity engaged in by religious institutions (e.g., employment, housing, and public accommodations). While no religion should be coerced into changing its private beliefs, neither is it obvious that any organization should be free to discriminate in the public sphere whatever its claimed motivation, especially when supported by governmental benefits such as tax exemptions. Severino offers no justification to support such a radical extension of religious protection.

Symposium, *Traditional Marriage*, 83 N.D. L. Rev. 1199-1412 (2007)

In this controversial theme-issue (see Legal Blog Watch, <http://tinyurl.com/8cros1>), the editors offer a handful of conservative anti-gay law professors a platform from which to declaim the reasons why gay men and lesbians are not entitled to full civil rights, including the right to marry. Bradley P. Jacob first argues that *Griswold v. Conn.*, 381 U.S. 479 (1965), which properly protected "the right of a husband and wife to the privacy of their sexual relationship within the marital bedroom," had it been properly understood, "need not have been the disaster for traditional marriage, family and sexuality that its progeny have become and are becoming." Gary A. Debele offers a reasonable analysis of the constitutional dimension of custody decisions which should elevate "the interests of the child and any long-standing caregivers who have or will love and nurture the child, while at the same time maintaining a healthy, although not absolute, respect for the interests and rights of the biological parent." William C. Duncan's contribution, titled "Does the Family Have a Future," is concerned not with families, but only with husband-wife nuclear units whose sole purpose is biological procreation. Steven W. Fitschen serves up reasons why a federal constitutional amendment is needed to prevent gays from winning the right to marry at the state level. Richard G. Wilkins and John Nielsen point to the outcome in *Lawrence v. Texas*, 539 U. S. 558 (2003), to ask "Does America still have a written Constitution?" Finally, Lynn D. Wardle analogizes gay marriage to the Holocaust.

3. Civil Unions / Domestic Partnership

Kolli, Bindu, *In Love and In Jeopardy: Why Legal Recognition of Same-Sex Unions Does Not End the Need for Domestic Partner Benefit Programs*, 10 U. Pa. J. Business & Emp. L. 225-243 (2007)

When same-sex marriages become available, should corporate-sponsored domestic partner benefit programs be abandoned? This author votes no, and offers as reasons that couples may choose not to formalize relationships in order to avoid the stigma of homosexuality, that state recognition often results in something less than true marriage, and that domestic partner programs remain a "prudent business decision." While the latter two circumstances may justify corporate benefit programs, Kolli offers an unconvincing case that there exists a broader societal interest in maintaining marriage substitutes after true marriage becomes available. In that situation the stronger argument may be that those foregoing marriage should also forgo the benefits of marriage.

Prol, Thomas Huff, *New Jersey's Civil Unions Law: A Constitutional "Equal" Creates Inequality*, 52 N.Y.L. Sch. L. Rev. 169-182 (2007/08)

Part of a 2006 symposium, "LGBTQ Law 2006: Legal Issues Affecting Ourselves and Our Families," Prol's paper criticizes the New Jersey opinion in *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006), for stopping short of requiring full marriage equality. The New Jersey legislature has failed, and indeed must necessarily fail to provide civil unions that are equivalent to marriage in all but name. In addition to noting the lack of federal

recognition, Prol recounts the ways in which later state legislation neglects to include civil unions. He illustrates the point through new laws adding irreconcilable differences as a basis for divorce, but which did not explicitly extend to civil unions. The result is that New Jersey attorneys "may have to engage in expensive motion practice" to claim this ground to terminate civil unions, a cost not borne by heterosexual married couples. The bottom line is that the label "marriage" offers value not contained in civil unions, and consequently unions are inherently unequal and inferior to state-recognized marriages.

4. Dissolution

C. Parenting

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

D. Wills, Trusts, Estates / Elders

E. Domestic Violence

Stapel, Sharon, *Falling to Pieces: New York State Civil Legal Remedies Available to Lesbian, Gay, Bisexual, and Transgender Survivors of Domestic Violence*, 52 N.Y.L. Sch. L. Rev. 247-277 (2008)

Writing from her perspective as a practitioner specializing in the issues surrounding domestic violence in LGBT relationships, the author examines the topic from the state-specific viewpoint of New York. Finding that the lack of legal recognition of same-sex couples "hinders LGBT survivors from protecting themselves from domestic violence and its effects," and that whatever "fragmented relief" that is therefore available is "neither efficient nor effective" and is not without consequences for the victims, she advocates for more "holistic legislation" to redress the shortcomings.

V. GLBT Youth / Student

Valentine, Sarah E., *Queer Kids: A Comprehensive Annotated Legal Bibliography on Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 19 Yale J.L. & Feminism 449-493 (2008)

This contribution collects and annotates materials related to LGBT youth (defined as "falling somewhere between the ages of ten and twenty"). The citations were collected "to assist practitioners, policymakers, and scholars working on issues affecting queer youth."

VI. Health Issues

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

VIII. Gender Identity

A. General

B. Legal Status

C. Discrimination

D. Family

Kajstura, Aleks, *Sex Required: The Impact of Massachusetts' Same-Sex Marriage Cases on Marriages with Intersex and Transsexual Partners*, 14 *Cardozo J. L. & Gender* 161-184 (2007)

Expanding on the common trope that marriage is one-man-one-woman, the author notes that its full expression is "one male, who has all the biological and psychological characteristics of a male, and one female, who has all the biological and psychological characteristics of a female." The effects of the Massachusetts decision that included gay couples into full marriage protections, *Goodridge v. Dept. of Pub. Health*, 440 Mass. 309 (2003), were denied to nonresidents from states where such marriages would be invalid under a 1913 law upheld by *Cote-Whitacre v. Dept. of Pub. Health*, 446 Mass. 350 (2006). Kajstura suspects that because the "Cote-Whitacre opinion lists some barriers to marriage in other states--including the fact that a couple is of the same sex--but...does not appear to specifically contemplate the effects of sex determination by home states," the outcome for transgendered persons is that they "may have more obstacles to marriage now than before Massachusetts allowed same-sex marriage."

E. Health

F. Prisoners