An Introduction to a Festschrift in Honor of Jeffrey Sherman

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THE EVOLUTION OF ACADEMIC DISCOURSE ON SEXUAL ORIENTATION AND THE LAW:
AN INTRODUCTION TO A FESTSCHRIFT IN HONOR OF JEFFREY SHERMAN

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The festschrift is the academic tradition, popular in Europe, in which the retirement of a noted scholar is celebrated by other scholars who contribute original works to a bound volume dedicated to the honoree. This symposium takes the form of a festschrift in tribute of Professor Jeffrey Sherman, who has announced his retirement from the Chicago-Kent College of Law. For decades, Professor Sherman has excelled at all three elements that compose a remarkable legal academic career: he is a pioneering and respected scholar, a brilliant classroom teacher who has effectively educated and (by all accounts) wildly entertained thousands of law students, and a generous colleague whose sage, sanguine, and always clever advice is sought by other professors, both seasoned and budding scholars.

The theme of this symposium is The Evolution of Sexual Orientation and the Law because Professor Sherman played an important role in this history. This introduction will briefly explore the role of legal academics in this evolution. Part One will review some of the many ways that the law affected the lives of gay people and will note the relative absence of legal scholarship discussing these issues for several decades. Part Two will posit some explanations for the dearth of law review articles and examine the significance of those early scholars, including Professor Sherman, who

* Professor of Law, Chicago-Kent College of Law. This symposium would not have been possible without the excellent efforts of several people. At the beginning, Professor David Gerber proved instrumental in getting this project off the ground. The contributors to this symposium represent some of the most respected academics in the field. Finally, the editors of the law review provided adept editing.

This introduction requires an enormous caveat. Throughout the introduction, assertions are made about the dearth of scholarship in many areas of law related to gay rights. Such assertions are inherently dangerous because relevant literature could easily exist that I am unaware of. To verify the presence or absence of pertinent scholarship, my research assistant—the extraordinarily capable Kate Sedey—and I performed exhaustive research in the Index to Legal Periodicals and Books and the Current Law Index, and various searches of Westlaw, Lexis, and Hein OnLine. If I have overlooked germane scholarship, the responsibility is mine alone and the omission reflects a failure on my part, and is not intended as a slight on the omitted scholarship. I apologize in advance for any oversights.
helped create the academic subject of Sexual Orientation and the Law. Finally, Part Three will introduce the articles that compose this symposium and attempt to put them into historical context.

I. EARLY GAY LEGAL CONTROVERSIES AND THE DEARTH OF SCHOLARSHIP

Much of the history of gay Americans in the twentieth century can be told as a legal narrative. Government actors at all levels developed plentiful means to persecute and discriminate against gay men and lesbians. This Part highlights some examples and briefly surveys state criminal laws, federal immigration law, military policy, employment discrimination, the associational rights implicated by gay bars and student organizations, the debate over antidiscrimination laws, and family law, including custody issues and same-sex marriage.

A. Sodomy Laws

Until the early 1960s, every state in the union criminalized homosexual conduct through sodomy laws. Sodomy laws proscribed all oral and anal sex between consenting adults, even if done in private. Most sodomy laws condemned both heterosexual and homosexual conduct, but the laws were widely interpreted and applied to focus on same-sex relations.

The consequences for violating sodomy laws were significant. As of the late 1950s, Colorado, Georgia, and Nevada provided for a life sentence for a sodomy conviction; in Georgia, a life sentence was mandatory unless clemency was recommended; North Carolina had a 60-year maximum sentence and Connecticut a 30-year maximum sentence. At least 9 states had a 20-year maximum sentence and another 8 states had a 15-year maximum sentence. Finally, 17 states had a 10-year maximum sentence for those convicted of private sexual relations between consenting adults.1 In addition to potential criminal punishments, government actors invoked sodomy laws to label gay people as a group as criminal—even without evidence of any illegal conduct—and thus justify discrimination against gay men and lesbians in employment, family law, and immigration matters.2

Most people have assumed that sodomy laws were not actively en-

forced. Although arrests and prosecutions were rare by the 1980s, Professor William Eskridge estimates that "between 1946 and 1961 [states] imposed criminal punishments on as many as a million lesbians and gay men engaged in consensual adult intercourse, dancing, kissing, or holding hands." While most gay men charged with sodomy plea-bargained to a lesser offense to avoid the humiliation of a public trial, others were imprisoned for engaging in consensual sex with another adult.

Sodomy statutes received significant judicial attention during the 1960s and 1970s as court after court upheld the legality of laws criminalizing private sexual conduct. Many judicial battles implicated numerous legal issues, especially when state actors manipulated procedural rules in order to protect sodomy laws from adverse judicial decisions. Moreover, in the 1970s the Supreme Court itself had upheld sodomy laws as constitutional against vagueness challenges—brought because many statutes simply referred to "the abominable and detestable crime against nature" without actually defining the crime. The Court also summarily affirmed a lower court decision that sodomy laws did not violate the constitutional right to privacy.

Legal debates ensued outside of the courts as well. As early as 1955, the members of the American Law Institute advocated removing private consensual sodomy between same-sex adults from the crimes listed in the institute’s Model Penal Code. The ALI Council, however, “rejected the

5. Id. at 66 (“Hence, each year between 1946 and 1965, between 800 and 4,250 people, on average, were arrested for consensual sodomy. These were the most serious encounters with the law, and some sodomy defendants went to jail or a mental hospital for decades. (Most, however, plea-bargained to a lesser offense.”).
10. Estelle B. Freedman, “Uncontrolled Desires”: The Response to the Sexual Psychopath, 1920-
proposal because homosexuality ‘is a cause or symptom of moral decay in a society and should be repressed by law.’"11 Even the American Civil Liberties Union endorsed criminalizing private sexual conduct between adult men. In 1957, the ACLU issued a statement that sodomy laws were constitutional and that it was "not within the province of the Union to evaluate the social validity of the laws aimed at the suppression or elimination of homosexuals."12

Law professors knew that police were using sodomy laws to harass and discriminate against gay people. Research published in law reviews—by authors who were not law professors—documented the abuse that gay men suffered at the hands of police and state actors.13 Mainstream authors wrote books that indicted sodomy laws, arguing that states could not widely enforce the laws because "if they had, more than 80 percent of the population would be in jail."14 Instead, law enforcement officials used gender-neutral laws to target the gay population, often engaging in entrapment and lying to secure convictions.15

Despite the ubiquity, insidiousness, and arguable unconstitutionality of sodomy statutes, law professors did not take up the cause en masse and write law review articles arguing that state sodomy laws were unconstitutional. The outstanding exception was Professor David A. J. Richards, who published several articles beginning in the late 1970s that developed fully conceived models for why the constitutional right to privacy precluded government from criminalizing the private sexual conduct of consenting adults.16 Other law professors did not join Professor Richards’ brave effort

1960, 74 J. AM. HIST. 83, 103 n.43 (1987) (citing MODEL PENAL CODE 276 (Tentative Draft No. 4, 1955)).
11. Id.
15. CAIN, supra note 12, at 54.
until a decade later in response to the Supreme Court’s decision in *Bowers v. Hardwick*. In contrast, dozens of law students authored notes and comments discussing, scrutinizing, and advocating the invalidation of state sodomy laws well before the *Bowers* decision. The sheer ratio of student-authored notes to law professor-authored articles on the constitutionality of sodomy laws is surprising. Absent Professor Richards’ pioneering scholarship, the ratio would have been staggering.

**B. Sexual Psychopath Laws**

Operating in tandem with sodomy statutes were state sexual psychopath laws. These laws were passed in response to so-called “sex crime pan-
ics" caused by highly publicized incidents of kidnappings or assaults against children. In the post-war era of the 1940s and 50s, most states, “including all the urbanized jurisdictions of the East and West Coasts and the Midwest, either enacted new sexual psychopath laws or revised exsiting laws, or both. . . .” Like sodomy statutes, these laws did not distinguish between consensual and forcible acts.

Sexual psychopath laws differed from sodomy laws in several significant ways. First, sodomy laws were, at least theoretically, gender neutral and applied equally to heterosexuals and homosexuals. In many instances, “sexual psychopathy is equated with homosexual, and male homosexual offenders bear the brunt of the prosecutions.” Second, sexual psychopaths were held in state mental hospitals or psychiatric wards of prisons, not in traditional prisons. Third, the sentence under sexual psychopath laws was indeterminate and those institutionalized could remain so “until the institutional psychiatrists declared them cured.” This posed a particular problem for gay men, since sexual orientation cannot be “cured” since it is inate and biological. Fourth, the “treatments” inflicted on sexual psychopaths in order to cure them included “electro-shock; hormonal injections; sterilization; group therapy; and, in some cases, frontal lobotomy.” Not surprisingly, these procedures did not “cure homosexuality.”

Armed with the pliable nature of sexual psychopath laws, government action against those gay men began in earnest as homosexuals were labeled sexual psychopaths because of their so-called deviant sexual orientation. In some states, such as New Jersey, the sexual psychopath laws applied to persons “merely suspected of sexual offenses.” In other states, sexual psychopath laws interacted with sodomy laws as police and prosecutors manipulated gay men accused of sodomy to plea bargain. In Iowa, for example, gay men felt forced to plead guilty to conspiracy to commit sodomy (which had a 3-year maximum sentence) to avoid prosecution on sodomy charges (with a 10-year maximum penalty). The gay men thought that pleading to the lesser charge would reduce their potential punishment. They were wrong. Pleading guilty to conspiracy to commit sodomy meant that

19. Freedman, supra note 10, at 89.
20. ESKRIDGE, supra note 4, at 61.
22. Freedman, supra note 10, at 98.
23. Id.
25. Freedman, supra note 10, at 99.
27. NEIL MILLER, SEX-CRIME PANIC 121 (2002).
they were declared to be "criminal sexual psychopaths." In Iowa in the mid-1950s, this process was used to institutionalize gay men in a state facility until they were "cured." 

As with sodomy laws, sexual psychopath laws received a great deal of local and national attention. On the one hand, "the media, law enforcement agencies, and private citizens' groups took the lead in demanding" that states enact sexual psychopath laws. On the other hand, most psychiatrists and many lawyers opposed such laws. In contrast, law professors in the middle decades of the last century did not take up the case in scholarship to argue why sexual psychopath laws (as applied to consensual conduct between adults) infringed on the rights of gay men and should be either repealed by state legislatures or struck down by courts. Sexual psychopath laws gradually fell into disfavor and many were repealed in the 1970s. But legal scholarship authored by law professors did not seem to play a significant role in the demise of state sexual psychopath laws because no such body of scholarship existed.

C. Immigration Policy

Once government officials began labeling gay men and lesbians as psychopaths, the label had implications for immigration law. The Immigration Act of 1952 provided that individuals with a "psychopathic personality" could be denied entry into the country and deported if detected. When circuit courts split as to whether gay people were, by definition, psychopaths, the Supreme Court in Boutilier v. INS held that "[t]he legislative history of the Act indicates beyond a shadow of a doubt that the Congress intended the phrase 'psychopathic personality' to include homosexuals..." Boutilier represented the Supreme Court's first major written opinion adjudicating the rights of homosexuals, and the Court "conclude[d] that the Congress used the phrase 'psychopathic personality' not in the clinical sense, but to effectuate its purpose to exclude from entry all homo-

28. Id.
29. Id. at xvii.
30. Freedman, supra note 10, at 84.
31. Id. at 84, 95–96.
32. The Iowa legislature, for example, repealed the state's sexual psychopath law in 1976. MILLER, supra note 27, at 277.
33. Leslie, supra note 2, at 164–65.
The legal academy did not respond aggressively to either the Supreme Court's decision or the congressional action to discriminate against gay immigrants. Even gay professors did not appear willing to argue in legal scholarship that they were neither psychopaths nor perverts and that laws that imposed blanket categorical hardships on homosexuals might violate constitutional principles. In contrast, law students authored several articles after Boutilier discussing and condemning the anti-gay policies.

D. Military Policy

Legally classified as criminals and psychopaths, homosexuals were not officially welcomed into the U.S. armed forces. The American military's discrimination against gay servicemembers had early roots but had become well-entrenched by the conclusion of World War II. During World War II, conservative estimates show that at least nine thousand sailors and soldiers were discharged because of their homosexuality. The Defense Department modified its policies over the years, but the basic anti-gay features remained the same. During the 1970s and 1980s, discharged ser-

36. Id. at 122.
39. ESKRIDGE, supra note 4, at 51.
40. CAIN, supra note 12, at 121 ("In 1981 new regulations were crafted, and they were published by the DOD as a directive in 1982. The new regulations stated clearly that homosexuality and military
vicemembers challenged the military's treatment of gay men and lesbians as unconstitutional, but federal courts upheld the military's exclusionary policies.41

Despite this, law professors in the era before Bowers did not generally challenge the legality of antigay regulations, either through scholarship or collective action at the institutional level. (This stands in stark contrast to the legal academy's challenge to the military policies in the wake of the current Don't Ask, Don't Tell policy, adopted in 1993.)42 The silence of law professors was hardly surprising in the 1950s, when even the ACLU declined to assist gay servicemembers "threatened with dishonorable discharges after World War II... by saying that homosexuality was 'relevant to an individual's military service.'"43 But as the ACLU changed course and began supporting the constitutional rights of gay Americans in 1960s, legal academics did not follow.44 Law students, however, did write law review pieces challenging the military's anti-gay policies as misguided and unconstitutional.45

E. Employment Discrimination

Beginning in the 1940s and proceeding through the 1960s, the federal government systematically began to detect and remove gay Americans from the State Department and then the government more broadly.46 In the service were incompatible and that no exceptions would be recognized. Homosexuality was now grounds for automatic exclusion in all branches of the service."); ESKRIDGE, supra note 4, at 68 ("A memorandum of October 11, 1949, codified a sterner policy for excluding sexual deviants from the armed forces. The new policy made mandatory the prompt separation of all 'known homosexuals.'").


43. CAIN, supra note 12, at 67.


spring of 1950, the Hoey Commission (named after North Carolina Senator Clyde Hoey) investigated the so-called problem of homosexuals in the federal government. Although the Commission did not find a single instance of a gay worker divulging state secrets, the Commission issued a report that “stated emphatically that all of the intelligence agencies of the government that testified ‘are in complete agreement that sex perverts in Government constitute security risks.’” Workers were dismissed for transgressions like being seen in a gay bar. During the 1950s and 1960s, the Department of State dismissed approximately 1,000 persons suspected of homosexuality.

The consequences for gay people caught up in the government’s witchhunts went well beyond the inability to work for the State Department. Highly qualified workers were barred from all government work. The federal government went to international agencies, including the U.N., UNESCO, the World Bank, and the International Monetary Fund and informed them that if they hired homosexuals whom the federal government had terminated, then those international agencies could lose their financial support from the American government. Scientists were forced to do menial work, like digging ditches. Barred from any meaningful employment, many committed suicide.

The government’s anti-gay policies were widely known. The State Department made annual presentations to Congress to announce how many suspected homosexuals had been fired the previous year. As early as 1950, national reporters, such as Eric Sevareid, spoke out against the State Department’s mistreatment of gay employees. Courts upheld government decisions to fire employees discovered to have ever engaged in any homosexual acts in their past. The government engaged in maneuvers to insulate its policies from potentially unfavorable judicial scrutiny. For example, in the Dew case, “[w]hen the Supreme Court agreed to hear the case, the


47. Id. at 114.
48. CAN, supra note 12, at 105.
49. JOHNSON, supra note 46, at 76.
50. Id. at 157.
51. Id. at 132–33.
52. Id. at 157.
53. Id. at 158.
54. Id. at 107 (“Arguing that a ‘frank and open homosexual’ was less vulnerable to blackmail than a philandering heterosexual, Sevareid concluded that homosexuality was ‘marginal’ to the nation’s security concerns.”).
government abandoned the charges against Dew and reinstated him. Although this was a fortunate result for Dew, the government’s action mooted the case and prevented further consideration of the government’s policy by the Supreme Court.\(^{57}\)

Law professors remained largely silent. The ACLU, however, issued a report in 1964, “calling upon the federal government to ‘end its policy of rejection of all homosexuals on that ground alone.’ It labeled this policy ‘discriminatory’ because it was based on attributes that ‘bear no necessary relation to job qualifications.’\(^{58}\) Eventually, courts began protecting gay civil servants, for example, by finding government violations of the Civil Service Act.\(^{59}\) Throughout this evolution, legal academics wrote scant little.\(^{60}\) Law students, however, advocated legal protection for gay employees, including through Title VII.\(^{61}\)

57. CAIN, supra note 12, at 106–07.
58. JOHNSON, supra note 46, at 190–91.
60. See J.W. Friedman, Constitutional and Statutory Challenges to Discrimination in Employment Based on Sexual Orientation, 64 IOWA L. REV. 527 (1979); Stuart A. Wein, Employment Protection and Gender Dysphoria: Legal Definitions of Unequal Treatment on the Basis of Sex and Disability, 30 HASTINGS L.J. 1075 (1979); see also Arthur S. Leonard, Employment Discrimination Against Persons with AIDS, 10 U. DAYTON L. REV. 681 (1985).

F. Associational Rights: From Gay Bars to College Campuses

Gay bars became an early focal point of both social networks and the gay rights movement. Bars were one of the few places—and often the only place—where gay men and lesbians could meet others like them, reducing their crippling sense of isolation. In the post-war era, police and liquor license inspectors targeted bars that served gay customers. Professor William Eskridge has explained how police in Los Angeles and New York "sometimes employed snap raids: officers would march into a bar, line up the patrons, taunt them with sexual threats, and arrest or detain people at random." Through a combination of liquor board actions and police harassment, in the late 1950s every gay bar in Miami and Miami Beach was forced out of business.

Gay bars gave rise to many legal issues. When the owners (and, in some later cases, patrons) of these establishments began to challenge the governmental action in courts, most judges to address the issue explicitly upheld liquor board decisions to shut down gay bars based solely on the so-called immorality of the customers. Success, however, sometimes ensued. The California Supreme Court notably invalidated anti-gay liquor policies in 1951's Stoumen v. Reilly. Professor Pat Cain has suggested that this "is probably the first successful gay rights case in America." But the judicial victory was short-lived when the state legislature responded with explicitly anti-gay legislation to overturn the decision. This statute was, in turn, struck down by the California Supreme Court in Vallerga v. Department of Alcoholic Beverage Control. Ultimately, gay bars in California suffered a significant defeat in 1963 when an appellate court "ruled that such conduct as male patrons kissing and caressing each other was sufficient grounds to justify revocation of [a bar's] liquor license under the court's dictum in Vallerga." Similar legal battles were fought in the courts of New York, Florida, Pennsylvania, Rhode Island, Louisiana, and Illinois, where the

62. Eskridge, supra note 4, at 80.
63. Id. at 78.
65. 234 P.2d 969 (Cal. 1951).
67. See Cain, supra note 12, at 81 ("This statute was enacted by the legislature shortly after the decision in the Stoumen case, for the explicit purpose of reversing the result in Stoumen. The new statute declared the illegality of gay bars by authorizing revocation of a liquor license if the premises were a "resort for illegal possessors or users of narcotics, prostitutes, pimps, pandereers, or sexual perverts.").
68. 347 P.2d 909 (Cal. 1959).
69. Cain, supra note 12, at 83.
owners and customers of gay bars often met defeat.\textsuperscript{70}

The point here is not to analyze the constitutionality of these old statutes, but to lament the lack of analysis from law professors who worked during this era. This was an active judicial debate. As noted, most courts of the 1950s and 1960s ruled against establishments that served gay men and lesbians. Most infamously, a Florida appellate court upheld an “ordinance [that] prohibit[ed] liquor licensees from knowingly employing a homosexual person, or knowingly sell[ing] to, serv[ing], or allow[ing] a homosexual person to consume alcoholic beverages, or [from] knowingly allow[ing] two or more homosexual persons to congregate or remain in his place of business.”\textsuperscript{71} Despite the sweeping nature of the ordinance and the opinion upholding it, apparently no law professors condemned, analyzed, or even mentioned the opinion for over a decade. Eventually more state courts began to protect gay bars against state action,\textsuperscript{72} but still law professors neither fully analyzed the conflicting opinions nor examined their significance for gay Americans.

The judicial battle over associational rights of gay people later shifted from bars to college campuses. When gay student organizations in the 1970s attempted to organize or hold social events, university officials clamped down. For example, the Dean of Student Affairs at MIT refused a request to hold a dance because “homosexuality was a disease and . . . students should be protected from the unhappiness caused by this disease.”\textsuperscript{73} In 1972, when the University of Georgia refused to permit a dance by the student group Committee on Gay Education, the students fought back in federal court, and the district judge agreed that “the Defendants’ denial of University facilities is an infringement on their first amendment rights of freedom of speech, assembly and association.”\textsuperscript{74} Professor Cain noted that the decision “is the first reported case recognizing the First Amendment associational rights of a gay and lesbian student group.”\textsuperscript{75} Other cases followed suit.\textsuperscript{76}

Although the Supreme Court did not issue any opinions discussing the constitutional rights of gay student organizations, some justices weighed in

\textsuperscript{70} Id. at 81–88.
\textsuperscript{72} See, e.g., One Eleven Wines and Liquors, Inc. v. Div. of Alcoholic Beverage Control, 235 A.2d 12 (N.J. 1967).
\textsuperscript{73} CAIN, supra note 12, at 93.
\textsuperscript{75} CAIN, supra note 12, at 94.
\textsuperscript{76} See Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976); Gay Students Org. of Univ. of New Hampshire v. Bonner, 509 F.2d 652 (1st Cir. 1974).
on the issue. When the University of Missouri refused to recognize a gay and lesbian student organization, Gay Lib, the Eighth Circuit struck down the university policy as violating the students’ First Amendment rights. When the Supreme Court denied the university’s petition for certiorari, Justice Rehnquist dissented. Focusing on the fact that Missouri had a sodomy law and asserting that the existence of a gay student group would “lead directly to violations of a concededly valid state criminal law,” Justice Rehnquist argued that “the question is more akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measles sufferers be quarantined.”

In Justice Rehnquist’s world view, gay men and lesbians were individual pathogens that needed to be isolated from each other and from society at large.

The gay student organization cases presented a range of interesting legal issues. They stood in stark contrast to the gay bar cases of the previous decade. But law professors of the 1970s did not discuss the juxtaposition of these two lines of authority or its significance for either constitutional law or the gay rights movement. In particular, law professors did not discuss or refute Justice Rehnquist’s argument that gay people are contagions or Chief Justice Burger’s suggestion in his own dissent from the denial of certiorari in Gay Lib that lower court decisions finding that gay organizations have First Amendment rights should be reversed without oral argument. Except for one practitioner article from the late-1970s, students wrote the law review scholarship during the 1970s about the legal issues surrounding university officials’ attempted exclusion of gay student organizations.

78. Professor Cain explained:
   The student organization cases provide an interesting contrast to the gay bar cases. In both sets of cases, the issue was access to public space. In all of the student organization cases, even when the litigated claim was over space for social purposes, the federal courts readily recognized the important First Amendment issues at stake. In the gay bar cases, by contrast, those courts that did recognize the rights of the gay patrons to gather in public never elevated that right to a First Amendment one.
Cain, supra note 12, at 98–99
79. Ratchford, 434 U.S. at 1084 (Burger, C.J., dissenting from denial of certiorari).
G. Anti-Discrimination Measures

The university-based gay groups ultimately proved critical to the growing gay rights movement. In the early to mid-1970s, these groups successfully lobbied college towns such as East Lansing, Michigan and Iowa City to adopt anti-discrimination ordinances that banned discrimination based on sexual orientation.82

The early success of the anti-discrimination movement led to a backlash as social conservatives sought to repeal nondiscrimination measures through public referenda, the first being in Boulder, Colorado in May 1974.83 The anti-gay movement received significant national attention when in 1977 former Miss America Anita Bryant launched her so-called “Save Our Children” campaign, which sought to repeal nondiscrimination measures through referenda. “Bryant argued not only that ‘homosexuality is immoral and against God’s wishes,’ but also charged that the gay rights law would encourage people to ‘cross-dress, molest children, and rape animals.’”84 Most of the anti-gay referenda passed, eliminating protection for gay people in those jurisdictions.85

The repeal of individual rights through popular referenda raised serious constitutional issues, yet law professors were largely silent in response to the popular backlash against gay rights. It would take over a decade before law professors authored scholarship questioning the constitutionality of such anti-gay referenda.

H. Family Law—Custody and Marriage

Anti-gay laws and legal rulings extended beyond the public sphere of employment to reach into gay households. Few traumas are more devastating for a parent than to have a child taken away, especially when the parent has done nothing wrong. Yet judges during the 1970s ripped apart hundreds, and probably thousands, of gay families. While most of the decisions happened out of the public eye in family courts and unpublished opinions, many judicial decisions to separate gay parents from their own children...
were published, generally in the form of appellate opinions upholding lower court decisions to take children away from their gay parents. During this era, courts invoked four rationales for denying custody to gay parents: “that the child might be harassed or stigmatized, that the child’s sexual orientation might be affected, that the child’s moral development might be harmed, and that the state sodomy statute mandates the custody denial or restriction.”

Although these rationales were factually incorrect and/or legally suspect, very few legal scholars in the early era of the gay rights movement examined the growing body of jurisprudence designed to separate gay parents from their own children. Although practitioners—including Nan Hunter, who would later become a law professor and one of the leading scholars in the field—published articles on gay custody issues, law professors seem to have avoided the topic. Again, law students authored the bulk of the scholarship.


Same-sex marriage represents perhaps the most controversial battleground in the gay civil rights movement today. The legal recognition of same-sex couples is critical because most rights associated with couples flow from marriage. Marriage confers many rights and benefits to the individuals in a marital relationship. Over 1,000 federal statutes and related regulations reflect the benefits of marriage, including in Social Security, taxes, and immigration. The inability of members of the same gender to marry each other necessarily imposes significant costs on gay citizens. In addition to the denial of marriage benefits, the inability of gays to marry is used to justify discrimination against gay men and lesbians, including denial of custody to gay parents and termination from government employment.

For most Americans—and probably most legal academics—same-sex marriage seems like a relatively new issue. But the legal battle over same-sex marriage began decades ago. Long before Massachusetts became the first state to recognize same-sex marriages, many couples sought marriage equality in the courts. In the 1970s, gay couples sued their state and local governments to obtain marriage licenses. These early efforts failed, but did produce judicial opinions.

In 1971, the Minnesota Supreme Court issued the first major opinion on same-sex marriage in Baker v. Nelson. Although the court did analyze the petitioners' Ninth and Fourteenth Amendment arguments—mainly by distinguishing Supreme court precedent that seemed to support marriage rights for gay couples—the court in a footnote "dismiss[ed] without discussion petitioners' additional contentions that the statute contravenes the First Amendment and Eighth Amendment of the United States Constitution." Three years later, a Washington appellate court addressed the issue of...
same-sex marriage in Singer v. Hara. The court struck a respectful tone and focused primarily on whether the refusal to recognize same-sex marriage violated the state's recently enacted equal rights amendment (ERA). Because no law professors had addressed the issue in their scholarship, the only legal literature cited by the court was a student-authored note. The court also cited another student comment to report "the fact that public attitude toward homosexuals is undergoing substantial, albeit gradual, change."

Legal academics in the 1970s did not respond to either the Baker or Singer opinions. They certainly did not attempt to make the case for same-sex marriage. In 1980, Professor Kenneth Karst boldly advanced arguments for same-sex marriage in the context of a larger article on associational rights. Law students wrote and advocated same-sex marriage long before the topic apparently reached the consciousness of most law faculty.

In sum, in the decades before the Supreme Court's decision in Bowers, law was a significant tool for repressing the freedom of gay and lesbian individuals, as well as for some attempts to resist that repression. While law review articles in the 1960s through the mid-1980s began to examine how the law treated gay people and to advocate for legal change, most of those law review articles were not written by law professors but rather by practicing lawyers and, especially, by law students.

98. Id. at 1193 (citing Note, The Legality of Homosexual Marriage, 82 YALE L.J. 573 (1973)).
99. Id. at 1196 n.12 (citing Comment, Homosexuality and the Law—A Right to be Different? 38 ALB. L. REV. 84 (1973)).
II. HOW SEXUAL ORIENTATION AND THE LAW BECAME A FIELD OF INQUIRY

Part I showed that despite the fact that courts, legislatures, and other government actors were persecuting gay people in the middle decades of the 20th century, legal academics were largely absent from the discussion about those actions. Indeed, they appear to have been unwilling to even start a debate. This part hypothesizes why law professors were generally silent while the rights of gay people—including themselves in the case of law professors who were gay—were being trampled. It then praises those early law professors who did describe the homophobia within the American legal system and advocate change. Finally, it examines the role of student scholarship and argues that the anti-gay Bowers decision had the effect of helping make pro-gay legal scholarship by legal academics mainstream.

A. Explaining the Early Dearth of Scholarship

The process of legal academics writing scholarship in the hopes of influencing judges is well-established in American jurisprudence. In common law development, academic legal discourse often precedes the evolution of legal doctrine. Law professors espouse a new point of view in such a well-argued and persuasive manner that common law judges adopt the articulated position as law, or at least allow the academic argument to flavor or inform their judicial decisions and opinions.

Twentieth-century America witnessed several civil rights revolutions. Gay Americans, however, lived largely on the periphery of the civil rights and sexual revolutions of the 1960s and 1970s. Criminal law, family law, employment law and government policies all discriminated against gay Americans—and immigration law discriminated against gay immigrants, labeling all gay men and lesbians as afflicted by psychological disorders.

Yet in the face of this onslaught against millions of innocent people, the legal academy remained largely silent. Federal, state, and local government officials were persecuting gay Americans. Federal and state courts were generally neither recognizing nor protecting the rights of gay litigants. This is precisely the type of scenario where one might expect law professors to sound the clarion call. But Gay Legal Studies as a field of study did not exist. Law professors, for the most part, largely did not teach or write
about such issues. Taking student scholarship out of the count,102 most of the articles about gay legal issues published in American law reviews before 1986 were not authored by law professors. Instead, a significant majority was authored by practitioners and by academics and professionals from non-legal disciplines, including clergy,103 psychiatrists,104 history professors,105 business professors,106 and psychology professors,107 to name but a few.108

The absence of legal scholarship by law professors may have affected the analysis, if not the outcomes, of early gay rights cases. When charting a new path in constitutional law, judges need some authority for staking out their chosen path. In the absence of relevant precedent, judges often turn to scholarship. Legal scholarship provides the ammunition—and air cover—for judges who seek to write opinions that recognize the rights of minorities, whether racial or sexual. But no such body of scholarship existed to support gay litigants during the 1950s through 1970s. As a result, even judges inclined to recognize the rights of gay men and lesbians may have felt constrained by the lack of persuasive authority, such as legal scholarship, upon which to base a pro-gay opinion.

What explains the dearth of early legal scholarship by law faculty advocating equal treatment for gay Americans? No doubt many different personal, social, cultural, political, and other factors are relevant to varying

102. This is a large concession because most legal scholarship addressing gay issues was authored by students. If student scholarship were included in the count, articles by law professors would represent a minor fraction—around 10%—of the total scholarship in the area.


degrees in different cases in explaining why particular legal academics did not write scholarship about how the law was affecting the lives of gay people. A full consideration of those explanations is beyond the scope of this Introduction. It is important to highlight, though, three reasons why gay and lesbian law professors in particular might have been understandably quite reluctant in the decades before Bowers to write legal scholarship about gay and lesbian issues.

First, it is hardly surprising that legal academics who were gay would decline to draw attention to their sexual orientation. To publicly acknowledge one’s homosexuality was to draw a target on one’s back. As noted above, gay Americans were treated as criminals and psychopaths, who could be imprisoned or institutionalized. And most law professors are lawyers as well, and in some states homosexuality was grounds for disbarment.109 (Here, again, law professors did not write law review articles about such disbarments, but law students did.)110 The hatred of gay people was so intense that gay people could not openly oppose the mistreatment lest the exposure subject them to more mistreatment.

Second, untenured law faculty were particularly vulnerable to reprisals should they write about gay issues. Gay educators, in general, lived and taught in fear, as at the time teachers below the university level were terminated for revealing their sexual orientation, yet law professors wrote little about the issue111 while law students addressed the problem earlier than faculty.112 Even in higher education, outside of law schools, universities

109. See, e.g., Florida Bar v. Kay, 232 So. 2d 378, 379 (Fla. 1970); State ex rel. Florida Bar v. Kimball, 96 So. 2d 825, 825 (Fla. 1957) (disbarring gay attorney based, in part, on existence of state sodomy law); see ESKRIDGE, supra note 4, at 73 (“Lawyers, officers of the court, were disbarred for homosexual activities with consenting adults in Florida, California, and other states.”).


discriminated against untenured gay employees, and federal courts held that termination was entirely appropriate when a gay employee was so audacious as to bring a lawsuit arguing that the right to marriage extended to same-sex couples. Thus, a gay university librarian could be fired for pursuing such gay rights litigation because, the Eighth Circuit reasoned, the mere act of seeking rights represented an attempt “to foist tacit approval of this socially repugnant concept upon his employer, who is, in this instance, an institution of higher learning.”\(^1\) Other courts were more protective of gay academics’ First Amendment rights, as when the district court in Delaware awarded damages and ordered reinstatement for a university lecturer dismissed for discussing his homosexuality in public interviews.\(^2\)

Despite such occasional judicial victories, many untenured professors would sensibly be too scared to write about gay issues due to a legitimate fear of the bigot’s veto. Tenure votes are generally secret and law professors who were prejudiced against gay Americans could exercise their bigotry by secretly voting against granting tenure to assistant professors who wrote in support of gay rights.

Third, even tenured professors were not safe. Prosecutors and other government authorities, including university officials, equated homosexuality with criminality.\(^3\) Criminal conduct, in turn, could be sufficient grounds to terminate a professor, even one afforded the protection of tenure.\(^4\) Laws did not protect gay employees against anti-gay discrimination. It was perfectly legal then—as it is now in most states—to fire an employee based solely on her sexual orientation. Indeed, throughout the 1970s, the ABA declined to advocate an end to discrimination against gay lawyers.\(^5\)

In sum, many law professors may have perceived that it was unsafe or at least not prudent to write any advocacy of gay rights. The gravitational pull of the closet prevented people from publicly supporting gay rights.

B. The Courage of Academic Pioneers in Sexual Orientation and the Law

Given the potential negative consequences, both personally and professionally, of advocating basic rights and equal treatment of gay people perhaps what is surprising is not that most legal academics did not address gay and lesbian legal issues in their scholarship but rather that a few aca-

\(^1\) McConnell v. Anderson, 451 F.2d 193, 196 (8th Cir. 1971).
\(^3\) Leslie, supra note 2.
Sexual Orientation and the Law

demics actually did. The first law professors to write about the intersection of law and sexual orientation all displayed a courage that is hard to appreciate in today’s legal climate where the discussion of gay legal issues is ubiquitous in the legal academy.

In some ways, the modern field of Sexual Orientation and the Law has its foundations in a law review symposium published in 1979 in the Hastings Law Journal.118 In the symposium’s lead article, Professor Rhonda Rivera wrote a sweeping and comprehensive overview of the many ways in which the law—both statutory and common law—unfairly discriminated against gay men and lesbians.119 Despite the fact that this single article provided a sturdy foundation for a new academic field of law, Professor Rivera reported two decades later that she “personally received very little direct comment on it for many, many years” because “most people were terrified to talk about the issue.”120 Paradoxically, Professor Rivera helped create a new field of legal scholarship that other law professors—whose lives were directly affected—were afraid to discuss. That is, with the exception of a few other legal academics brave enough to write scholarship in the field that dared not speak its name.121

Professor Jeff Sherman was a member of this first-mover generation,


when against this homophobic backdrop he published his seminal law review article, *Undue Influence and the Homosexual Testator.*\(^\text{122}\) Professor Sherman's article was a revelation on several levels. Professor Sherman explained the state of the law objectively, but he then exposed how courts were more likely to overturn the testamentary plans of gay testators. He further explained how legal hurdles made estate planning unnecessarily difficult and complicated for gay people. His scholarship treated gay relationships as natural, healthy, and deserving of respect.

When Professor Sherman courageously published the article while untenured,\(^\text{123}\) he was well aware of the risk he was taking. The article's first footnote reported the results of a then-recent poll showing that "two-thirds of the American public considered homosexuality 'obscene and vulgar,' and that one-half believed that homosexuality would bring about the 'downfall of civilization.'"\(^\text{124}\) Such homophobic views permeated the legal community: Professor Sherman began his article by noting that "Homosexuality is a subject with which most Americans are still ill at ease, and it is not surprising that this homophobia is reflected in judicial opinions" and by quoting a New Jersey judge who had opined that "[f]ew behavioral deviations are more offensive to American mores than is homosexuality."\(^\text{125}\) While this common vitriol caused most gay academics to hide their orientation, Professor Sherman responded with the first law review article to report and document discrimination against gay people in wills and trust law.

Professor Sherman followed up his pre-tenure triumph by writing one of the first published explanations for why law schools should hire gay faculty.\(^\text{126}\) He argued that gay faculty "(1) provide gay and lesbian students with needed role models; (2) provide heterosexual students and faculty members with an image of gay and lesbian competence and value; and (3) expand the school's intellectual boundaries, as gays and lesbians present points of view that are both different from those presented by heterosexuals and necessary to a full understanding of important issues."\(^\text{127}\) To support his third rationale, Professor Sherman discussed how gay academics bring a unique perspective to the hot-button issues of pornography and abortion.

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123. Professor Rivera was also untenured when she wrote her field-creating article.
127. *Id.* at 123–24.
This essay provided the early basis for what would become Professor Sherman’s most provocative and audacious piece of scholarship, Love Speech.\footnote{128} Published by the Stanford Law Review in 1995, Love Speech presented a moral defense of gay pornography. In marked contrast to earlier literature that argued that pornography is distasteful or repugnant but must be tolerated in the name of free speech, Professor Sherman argued that gay pornography was affirmatively valuable, a controversial idea that other scholars later adopted.

Professor Jeffrey Sherman—along with David Richards, Rhonda Rivera, and a handful of others (including, as noted below, some of the authors in this symposium)—were academic trailblazers who risked their careers so that the upcoming generation of law students, lawyers, and law professors would have a framework for understanding the legal oppression of gay men and lesbians and advocating for necessary change. We owe them a tremendous debt of gratitude. Professor Sherman’s pioneering work in Sexual Orientation and the Law is all the more impressive given his expertise in the areas of wills, taxation and employee benefits, on which he has written extensively.\footnote{129} His scholarship on these topics has proved influential in the courts.\footnote{130} And while writing on gay legal issues in the early 1980s may have involved career risks, Professor Sherman has gone on to be elected an academic fellow of the American College of Trust and Estate Counsel and is a member of the American Law Institute.\footnote{131}


\footnote{131} He is also the author of JEFFREY G. SHERMAN, CASES AND MATERIALS ON PENSION PLANNING AND DEFERRED COMPENSATION (1990).
C. Students of the Revolution

The vast majority of scholarship written on gay legal issues before the Supreme Court announced the *Bowers* decision was authored by students. Many of the student publications are case notes as opposed to longer pieces that approximate a more traditional professor-authored article. But these notes are rarely purely descriptive. Most forcefully argue for the recognition of legal rights for gay Americans. The student authors disagreed with court decisions that rejected equality and championed judicial opinions that recognized gay rights.

The early student-authored scholarship ultimately proved persuasive and useful to courts in upholding the rights of gay litigants. Courts cited student scholarship in criminal law cases that struck down sodomy laws and invalidated anti-gay solicitation statutes. In family law, courts found student scholarship helpful in cases allowing gay parents to retain custody of their children, to adopt children (including second-parent adoptions by same-sex parents) as well as in cases involving adult adoptions. Courts also used student notes to support decisions holding that sexual orientation should not affect the distribution of assets after dissolution of a marriage. Courts cited student scholarship in cases rejecting employment discrimination against gay workers, including cases holding that gay teachers cannot be terminated solely for their sexual orientation. Also on

132. This section only traces the persuasive effect of pre-*Bowers* student notes and comments. Student work after 1986 has no doubt remained influential, but is not the focus of this Introduction.


the educational front, courts cited student scholarship in preventing universities from discriminating against gay student groups. Finally, student scholarship played a role in immigration cases allowing gay persons to remain in the country and in one of the few successful challenges to the military's anti-gay policies.

This raises the question of why law students were more willing to advocate gay rights, when law faculty were not. In part, some students probably had less anti-gay baggage because of their younger age. For example, most had no memory of gay men being institutionalized as sexual psychopaths. In addition, law students may have been better informed about gay issues. Then, as now, the visibility of gays was greater among younger Americans. Law students may have had a better appreciation for the legal lives of gay men and lesbians. In contrast to their professors, the relatively young law students were more likely to be aware of the goals, tactics, and motivations of the gay rights movement.

Some student may not have appreciated the professional risks of writing scholarship supportive of gay rights and how this might alienate potential employers. But most students, I suspect, were simply brave and principled. Their sense of justice—and justifiable anger or empathy about the injustices committed against gay people—may have motivated them to write about gay rights simply because it was the right thing to do. These law students were important players in the early movement for gay rights and, like the few courageous law professors of the 1970s and early 1980s, are due our gratitude.

D. Bowers as a Turning Point

Law students today may find it difficult to believe that not so long ago it could be professionally dangerous for law professors to write about gay


144. Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989) (citing Miller, supra note 121); Watkins v. United States, 837 F.2d 1428 (9th Cir. 1988) (citing Miller, supra note 121).

145. A small number of students may have been liberated by anonymity. During the 1960s and 1970s, some law reviews provided no byline for students. Although notes and comments were each authored by an individual law student, many law reviews maintained the fiction that this form of scholarship was the product of the law review membership as an undifferentiated whole. This allowed student authors to remain anonymous, but also to claim credit for the work on their resumes if they chose to highlight the publication. Either way, this system reduced the danger of unwanted visibility.
legal issues. How could it be perilous to author scholarship about due process, employment discrimination, the constitutionality of certain criminal laws, wills and estate law, or any of the other areas of law? What changed between the 1970s and today? A large part of the explanation is that gay people came out of the closet and put a human face on the clinical and foreign label “homosexual.” As people interacted with relatives, neighbors, and co-workers who were openly gay, it became harder for heterosexual society to view gay people as “sexual psychopaths” worthy of contempt and legal condemnation. But in addition to more general social changes, the legal academy had a specific catalyst: Bowers v. Hardwick, the case in which the Supreme Court held that state sodomy laws were constitutional.

In many ways, Bowers v. Hardwick helped create the field of gay legal studies. It did so for many reasons. First, once the Supreme Court announced its first major opinion on the relationship between homosexuality and substantive due process, constitutional scholars could not ignore the tenuous relationship between gay Americans and their Constitution. Discussions on the right to privacy, beginning with Griswold146 and moving on to Roe v. Wade147 would necessarily have to at least touch upon Bowers. (This in turn meant that gay people stood a better chance of being represented in the mainstream law school curriculum.) In short, Bowers legitimized the discussion of gay rights in the legal academy.

Second, the Bowers opinion rightly generated a great deal of significant scholarship, in large part because the opinion was disingenuous in its framing of the legal issues, its contortion of relevant legal history, its misapplication of precedent, and its palpable disdain for millions of gay Americans. Most respected scholars carefully explained the multitude of sins wrapped within the Court’s holding and reasoning.148 In addition to discussions on the nature of constitutional privacy rights and on Bowers’ place in the broader field of substantive due process, the opinion spawned scholarship focused more specifically on the legal lives of gay men and

147. 410 U.S. 113 (1973).
148. Of course, some law professors wrote in defense of sodomy laws. Yet, even these defenses of anti-gay laws represented a sign of progress, in that prior to Bowers pro-discrimination legal academics had little need to commit their arguments to paper. Discrimination was the law of the land and few in the academy had the courage to openly question the then-status quo. Consequently, opponents of gay rights did not have to defend their positions.

Similarly today, as a minority of legal commentators writes to oppose the recognition of same-sex marriage, the perceived need to publicly proffer arguments against marriage rights for gay and lesbian couples shows how far the gay rights movement has come. Even as a handful of same-sex marriage cases were actually litigated in the 1970s, legal academics generally paid the issue no heed. Most pro-equality academics essentially censored themselves and anti-gay academics had no need to defend an essentially unchallenged legal landscape that refused to take same-sex marriage seriously.
Third, the Bowers decision changed the social and legal landscape in which legal scholarship occurs. The majority opinion's harsh and disrespectful tone—for example, dismissing Hardwick's privacy arguments as "facetious"—inspired a pro-gay response. Pat Cain explained that the opinion:

galvanized the lesbian and gay legal community, causing national organizations to step up their calls for stronger laws to protect gay men and lesbian, including marriage laws. In October 1986, just months after the Hardwick decision, the ACLU became the first national civil rights organization to support the "elimination of legal barriers to homosexual and lesbian marriages." This was hardly the reaction that the Bowers majority was hoping to induce. Bill Eskridge has noted that "Hardwick angered gay people with its disrespect and with its unembarrassed ignorance about homosexuals and their history. In defiance of what was considered open bigotry, many gay lawyers came out of the closet, and gay legal activism was reenergized overnight." As lawyers and regular folk reacted to the Bowers opinion by increasing their support for gay rights, it became easier for law professors—gay, straight, or bisexual—to expose the various ways in which local, state, and federal law unfairly discriminated against gay people and to make the case for equal rights.

Ultimately, the Bowers opinion changed the landscape of legal scholarship, as it became both safer and more acceptable for all academics to weigh in on the law's treatment of gay men and lesbians. Ironically, while making life more dangerous for many gay men and lesbians, the Bowers decision made life less dangerous for academics writing about gay legal issues.

III. THE NEXT STEPS IN THE EVOLUTION OF SEXUAL ORIENTATION AND THE LAW

The contributions to this symposium demonstrate how Sexual Orientation and the Law has evolved as a field of academic inquiry. The first four contributions address various aspects of the legal battle for same-sex mar-

149. 478 U.S. 186, 194 (1986) ("to claim that a right to engage in such conduct [sodomy] is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.").
150. CAIN, supra note 12, at 257.
151. ESKRIDGE, supra note 4, at 167.
152. See CAIN, supra note 12, at 181 ("The movement got an amazing dose of positive, supportive publicity after the loss in Hardwick.").
riage. This is an appropriate way to begin this symposium for several reasons. First, Professor Sherman’s seminal article, *Undue Influence and the Homosexual Testator*, foreshadows the current debate by noting the legal asymmetry in estate law between married opposite-sex couples and same-sex couples who could not marry.\(^{153}\) Second, in addition to same-sex marriage being the current ground zero in the battle over gay rights, each of the four articles shows the growing sophistication of scholarship in Sexual Orientation and the Law.

The articles examine the history, legal arguments, and consequences of the current legal battle over same-sex marriage. Nothing like this existed when courts heard the first constitutional challenges to same-sex marriage bans in the 1970s. The ongoing debate—and win-loss record in judicial challenges—will look much different and brighter because of the full participation by legal academics, including our contributors here.

Professor Jane Schacter—one of the first law professors to teach Sexual Orientation and the Law as a course and a co-author of a widely respected casebook on the topic—begins the symposium by revisiting an often overlooked fact from the history of same-sex marriage in America. Professor Schacter surveys the internal debate within the gay community that took place between those who favored same-sex marriage and those who feared the perceived assimilation into an institution created by a dominant culture that had been hostile to both gay people and the equal treatment of women. Professor Schacter shows how the backlash against the Hawaii Supreme Court’s *Baehr* decision in 1993\(^{154}\) effectively unified the gay community in support of same-sex marriage, in part, because the opponents of equal rights for gay Americans made same-sex marriage the primary battleground over gay rights more broadly. After presenting the legal history of the battle over same-sex marriage, Professor Schacter considers a series of counterfactuals in order to explore other paths that gay rights advocates could have pursued, including domestic partnerships and civil union. The article demonstrates that there is more than one path to gay rights and suggests avenues for future empirical research on same-sex marriage and its effects on the gay community.

Professor Ed Stein’s contribution shows how the arguments against same-sex marriage have changed over time. In the earlier 1970s cases, courts engaged in almost no actual constitutional analysis.\(^{155}\) In rejecting


\(^{155}\) For example, in *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973), the court simply asserted “no constitutional issue is involved. We find no constitutional sanction or protection of the right of marriage between persons of the same sex.”
the plaintiffs’ constitutional claims, the courts didn’t bother to explain why marriage rights were unavailable to same-sex couples. Some courts, however, asserted that marriage could be limited to opposite-sex couples because marriage was a vehicle for raising children. Professor Stein reviews this procreation argument and its demise in the face of evidence and logic. He then explains how the traditional procreation argument has morphed into the accidental procreation justification for same-sex marriage bans, namely that marriage can constitutionally be limited to opposite sex couples because only they can accidentally procreate. In his article, Professor Stein methodically dismantles the so-called accidental procreation argument against same-sex marriage. By calmly and persuasively dissecting and disproving the latest argument against giving equal rights to same-sex couples, Professor Stein’s article helps establish that bans on same-sex marriage are without a rational basis.

Professor John Culhane explores the relationship between same-sex marriage, tort law, and private ordering, examining important intersections of three disparate fields of law. In his article, Professor Culhane scrutinizes the arguments against same-sex marriage in general, as well as the congressional debate over the Federal Marriage Amendment, which would amend the U.S. Constitution to prohibit same-sex marriage. But beyond this, he explores the unappreciated effects that such legal moves have on the day-to-day existence of gay couples. In particular, he explains how the differences between tort and contract can have important implications for same-sex couples denied the ability to legally wed. Finally, he puts these legal issues in context and provides both suggestions and hope for gay rights advocates.

Professor Patricia Cain supplies the final contribution that touches on the legal issues surrounding same-sex marriage. Before discussing her article, it bears noting that, like Jeffrey Sherman, Professor Cain is one of the academic pioneers in the field of Sexual Orientation and the Law. In addition to her impressive body of scholarship, Pat Cain made history by being half of the first open same-sex couple in the legal academy, along with her partner (and now wife) Jean Love. Each prolific and respected in her own

156. Judges largely asserted that marriage meant opposite-sex marriage and then quoted dictionary definitions of marriage as meaning only between a man and a woman. See Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973). This tactic will no longer work in the future as standard dictionaries have updated their definitions to include same-sex marriage. Now, courts have to actually advance legitimate reasons why same-sex couples are denied the marriage rights that heterosexual couples take for granted. This requirement of evidence to support the status quo definition of marriage will ultimately lead to an expansion of marriage rights—much as once defenders of anti-miscegenation laws had to support their opposition to interracial marriage with evidence, the definition of marriage expanded.
right, as a couple Professors Cain and Love definitely fulfilled Professor Sherman’s prediction that openly gay faculty can serve as role models for other gay lawyers and academics, as well as demonstrate the competence, skill, and intellect of gay lawyers to the broader society. In her contribution to this symposium, Professor Cain analyzes one of the worst consequences of the federal Defense of Marriage Act—DOMA as tax policy. In particular, Professor Cain focuses on Section 3 of DOMA, which has the effect of forcing disparate tax treatment for same-sex couples that are legally married in their home state. Professor Cain cogently explains why DOMA creates bad tax policy, how the policy is irrational in a manner that undermines the constitutionality of this provision of DOMA, and how Congress should remedy the problem.

Professor Arthur Leonard is another of the true pioneers in the field of Sexual Orientation and the Law. His encyclopedia on Sexual Orientation and the Law helped establish the field. He is also one of the first law professors to write about the legal implications of AIDS. In his contribution to this symposium, Professor Leonard analyzes the lingering effects of Bowers v. Hardwick. Because the Supreme Court in Lawrence v. Texas\textsuperscript{157} reversed Bowers, one would expect that it has no continuing legal significance. Professor Leonard explains how before Lawrence, a large body of federal cases relied on Bowers to deny the legal claims of gay men and lesbians, especially those based on equal protection arguments—despite the fact that Bowers was not an equal protection case. Professor Leonard argues that Bowers continues to infect judicial thinking, leading to adverse results in employment and military cases. The article is important because once courts recognize that decisions based on the repudiated Bowers opinion are themselves suspect—if not invalid—the import of the Lawrence opinion can be realized.

M.V. Lee Badgett, Brad Sears, Holning Lau, and Deborah Ho present their research on employment discrimination against lesbian, gay, bisexual, and transgender people. The authors are affiliated with the Williams Institute at UCLA School of Law, a think tank that focuses on the legal issues confronting the LGBT community. In their contribution to this symposium, Bias in the Workplace, the authors show that employment discrimination against LGBT employees remains significant. The Williams Institute’s presence at one of America’s most respected law schools shows how the study of gay legal issues has evolved and demonstrates the progress that the gay rights movement has made. This type of research was not possible in

\textsuperscript{157} 539 U.S. 558 (2003).
the forty years following World War II because gay employees in so many professions would be terminated should their sexual orientation be discovered. Studies such as this lay the groundwork for protective legislation, including state anti-discrimination laws and the Employment Non-Discrimination Act\textsuperscript{158} at the federal level.

Finally, Professor Andrew Koppelman concludes the symposium by placing Professor Sherman’s article, \textit{Love Speech}, within the larger debate about free speech and pornography. Professor Koppelman develops James Madison’s argument for protecting speech and shows how it is critical but incomplete. He rebuts those who would narrowly construe Madison’s position. Professor Koppelman then extends Professor Sherman’s thesis—that gay pornography is valuable and life-affirming for gay men who lead isolated existences—and explains that gay pornography has a political component and hence is worthy of First Amendment protection.

\textbf{CONCLUSION}

We owe an enormous debt of gratitude to those legal scholars who wrote in the \textit{pre-Bowers} era and explained why the law should be more inclusive and protect the rights of gay men and lesbians. In large part because of their efforts, the academic environment is much different—and better—today than in the \textit{pre-Bowers} era. The ABA’s anti-discrimination policy includes sexual orientation. The AALS includes sexual orientation in its anti-discrimination policy.\textsuperscript{159} Over a hundred openly gay faculty members are listed in the AALS Directory. Most law schools have a course on Sexual Orientation and the Law. Several casebooks on Sexual Orientation and the Law exist, all by highly respected legal academics.

Hundreds of law review articles lay out cogent legal arguments for recognizing constitutional rights and creating statutory rights for gay Americans. I am proud that this symposium presents seven more excellent articles by some of the best scholars in the field. And I am extremely pleased to dedicate this symposium to my friend and colleague Jeff Sherman.

\begin{footnotes}
\item \textsuperscript{158} H.R. 3685, 110th Cong. (2007).
\item \textsuperscript{159} Indeed, Justice Scalia mocked the AALS policy in his \textit{Romer} dissent. Romer v. Evans, 517 U.S. 620, 652-53 (1996) (Scalia, J., dissenting).
\end{footnotes}