

Sexuality Law

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THIRD EDITION

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*I dedicate my work on this book to my Husband, Tim Nenno, and
I celebrate that legal developments between the first and second editions
made our marriage possible after thirty years as partners.*

—Art

*I dedicate my work on this book to Jean Love,
my partner in love and life for over 35 years, and now,
thanks to recent victories by committed public
interest lawyers, my spouse for life for over ten years.*

—Pat

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Preface to the Third Edition

This book provides court decisions and text that will be useful for instructors presenting courses on sexuality and the law, focusing mainly on sexual orientation and gender identity issues. We understand that many schools will allocate only two credit hours for such a course, and that consequently instructors have to be selective in deciding on coverage. (Indeed, even a three-credit course would not provide enough time for a comprehensive presentation of the wide range of legal issues related to sexuality and law.) We have tried to provide sufficient material for those who have the luxury of more credit hours, and to arrange the material in such a way that instructors can customize use of the book along the lines they desire.

However, we faced the problem—reflected in the significant length of other casebooks in this field—that any attempt to be comprehensive would result in a book too bulky and expensive to justify asking students to buy for a course that will usually carry only two credit hours, three at most. Furthermore, the sheer volume of litigation and doctrinal development—especially at the level of the Supreme Court—has been such since we published our second edition in 2009 that we concluded that a reconceptualization of the book for the third edition was justified. Both of us have taught from drafts of parts of this new edition over the past two years, and we think it is possible to put together a satisfying two-credit course based on these materials, even though we have omitted some of the subject area coverage that was found in earlier editions.

The second edition's Chapter One provided a brief textual introduction, the texts of three significant Supreme Court decisions—*Bowers v. Hardwick*, *Romer v. Evans*, and *Lawrence v. Texas*—and a state high court decision to introduce transgender issues, followed by some textual information about public interest lawyering. For this reconceptualized book, we have converted Chapter One into a historical survey of sexuality law issues in the United States Supreme Court, beginning with textual discussion of early litigation in the 1950s and the first Supreme Court merits opinion in which homosexuality was an issue: *Manual Enterprises v. Day* (1962). The chapter then presents chronologically the significant Supreme Court merits rulings running through *Obergefell v. Hodges* (2015) and its aftermath, concluding with textual treatment of *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018).

One could easily spend the first half (or even more) of a two-credit course just on Chapter 1 as the organizing framework, if one decided to provide a historical perspective of the Supreme Court's treatment of sexuality law issues as a main focus of the course. Alternatively, one might organize the entire course around Chapter 1

by interspersing later cases with the Supreme Court cases. (For example, one could immediately follow up *Price Waterhouse* and *Oncale* in Chapter 1 with the material from Chapter 2 on the question whether sex discrimination laws cover sexual orientation and gender identity claims, and similarly one could follow up *Lawrence* in Chapter 1 with material from Chapter 6 on the impact of *Lawrence* on sodomy laws.) Apart from the issue of marriage equality and some consequences flowing from it, however, the Supreme Court has not addressed the bulk of LGBT family law issues that are primarily questions of state law, so those who want to cover such issues would probably do so outside of the Chapter 1 framework.

For those inclined to adopt our historical approach in full using Chapter One, there are many opportunities along the way to observe the changing understandings of the Supreme Court of sexuality issues, and to explore the evolving vocabulary of the Court in dealing with such issues. The chapter can provide a case study in law and social change, and of how the Justices had gradually been moved to adjust their approach to the direction in which society was going. The dissenting opinions in the major cases are important in helping to underline the prior beliefs and understandings that a majority of the Court rejected in the more forward-looking cases. However, we thought it important to include the zigs and zags along the way, showing that progress towards the legal equality of sexual minorities has not been all smoothly in one direction. *Boy Scouts of America v. Dale* is a prime example of this, and deserves full coverage on a par with *Romer* and *Lawrence*.

Chapter 2 covers the treatment of sexual orientation discrimination claims by the lower courts, a subject that has yet to be explored in depth by the Supreme Court. Although *Romer*, *Boy Scouts*, *Lawrence*, *Windsor* and *Obergefell* all raise equality issues, the Court's disposition of those cases never overtly engages with the full-blown equal protection analysis that would discuss whether sexual orientation or gender identity are suspect or quasi-suspect classifications and the proof issues that would flow from such a determination. Lower courts, however, have necessarily engaged in such analysis in the absence of Supreme Court guidance. The first part of Chapter 2 explores due process and equal protection theories chronologically, setting the stage with a textual introduction, explaining the many questions that are open in light of the Supreme Court's avoidance of the opportunities presented to it to provide an in-depth analysis, and launching case coverage with the 9th Circuit's 1980 decision in *Beller v. Middendorf*, a military discharge case in which then-Circuit Judge Anthony Kennedy explored some of the themes that would come back in his major gay rights opinions for the Court. We then provide a series of lower federal court decisions tracing the reactions of those courts to the Supreme Court's rulings from Chapter 1.

The second part of Chapter 2 explores statutory claims of sexual orientation discrimination, with a particular focus on the developing case law on the question whether laws banning discrimination because of sex can be construed to cover sexual orientation discrimination claims. Until relatively recently, federal and state courts had unanimously rejected such claims ever since Title VII of the Civil Right

Act of 1964 went into effect in July 1965. Early in this century, courts began to respond to the impact of *Lawrence v. Texas* and *U.S. v. Windsor* and the implications of *Price Waterhouse v. Hopkins* and *Romer v. Evans*. (We included *Price Waterhouse* (1989) in Chapter 1, even though it is not technically a sexual orientation or gender identity discrimination case, because it has proved highly influential on this very question, and provides a basis for class discussion on the potential of sex discrimination laws to protect sexual minorities from discrimination. A similar rationale prompted the inclusion of *Oncale v. Sundowner Offshore Services*, which has been frequently cited in recent court decisions extending Title VII coverage to sexual minority discrimination claims, even though the plaintiff was not gay.) Our first case for this section of the chapter is *Baldwin v. Foxx*, an Equal Employment Opportunity Commission ruling under its federal sector appellate administrative jurisdiction applying the federal sector provisions of Title VII, which provides a detailed review of the developing case law that led the agency to adopt a new interpretation of the statute. We follow with the 7th Circuit's en banc 2017 decision in *Hively v. Ivy Tech Community College*, the first federal appellate ruling to endorse the EEOC's new approach to the issue.

The third part of Chapter 2 provides material to discuss the interpretation and application of laws expressly forbidding sexual orientation discrimination. Our principal case, *Cookson v. Brewer School District* (2009) by the Maine Supreme Judicial Court, provides a vehicle to cover how state courts have adapted federal Title VII methodology for analyzing discrimination claims by LGBT plaintiffs under state sexual orientation and gender identity laws, which are in effect in a minority of the states (22 by latest count in terms of private sector employment).

The final part of Chapter 2 concerns the exploding question of the degree to which defendants in sexual orientation discrimination cases may raise 1st Amendment defenses against having to comply with anti-discrimination laws. Had the Supreme Court decided *Masterpiece Cakeshop v. Colorado Civil Rights Commission* on the merits in its June 4, 2018, decision, we would have added full text treatment of that opinion to Chapter 1 and, depending on the potential scope of that ruling, might not have included this section in Chapter 2. Since the Court "punted" in *Masterpiece Cakeshop*, we have chosen the New Mexico Supreme Court's *Elane Photography* decision, which explores both constitutional and statutory (state religious freedom law) defenses in the case of a wedding photographer who refused to provide services to a lesbian couple. The court's decision, which the U.S. Supreme Court declined to review, considers many of the same arguments that have been addressed by other state appellate courts since the Supreme Court's 2015 marriage equality ruling. This is a rapidly developing area, and it is likely that the issue will come back to the Supreme Court, perhaps as soon as its October 2018 Term. We fully expect that the next edition of this book—perhaps even a 2019 annual supplement—will have a Supreme Court decision on the subject.

Chapter 3 provides what could be a self-contained unit on gender identity and the law, and could be placed at any point in the course after the constitutional

groundwork is laid with cases from Chapter 1. Because gender identity recognition and discrimination has emerged as a hotly contested area of public debate, legislative proposals, and court rulings, a course on sexuality law would be incomplete without its in-depth consideration. Because the Supreme Court has consistently denied review of lower court decisions presenting gender identity issues, this topic is barely broached in Chapter 1. We have included there the Supreme Court's ruling in *Farmer v. Brennan*, which discusses gender identity sufficiently to provide a bit of an introduction to the issue, but it is not really a gender identity decision so much as a more generalized treatment of the 8th Amendment obligations of correctional institutions for the safety of vulnerable inmates. Some instructors may decide to skip it in Chapter 1 and present it instead as part of Chapter 3. In Chapter 3, we provide some historical textual introduction and early cases culminating in the 7th Circuit's 1984 ruling (denied review by the Supreme Court) in *Ulane v. Eastern Airlines*, an opinion that rejected protection for transgender plaintiffs under Title VII, which was widely cited as an authoritative negative precedent through the end of the 20th century. We also include the Texas Court of Appeals' 2000 ruling in *Littleton v. Prange*, a case challenging the legitimacy of the marriage of a transgender person, partly because of its extensive discussion of the history of transgender litigation up to that time. *Obergefell* overrules *Littleton* sub silentio, of course, by making the gender of the parties irrelevant to the question of who can marry whom.

The bulk of Chapter 3 focuses on the momentous developments in transgender law since the beginning of the 21st century, as lower federal courts have seized upon the Supreme Court's *Price Waterhouse* decision and the concept of sex stereotypes as evidence of sex discrimination, which has come to dominate the case law in this area. Many courts have begun to develop a reasonably sophisticated understanding of gender identity, at least by contrast to the views expressed by courts in the last century. Our organizing principle in this part of the chapter is chronological, as cases arising in widely-varying factual contexts build upon each other in developing and extending the courts' understanding of gender identity and how existing laws can be interpreted to deal with the struggles faced by transgender people. We present a series of cases examining different aspects of transgender life and the law, including employment discrimination, legal recognition of gender identity (and transition), special issues surrounding gender transition by prison inmates (which has generated a large and growing body of case law), parental status of transgender people, asylum and refugee law, rights of transgender students (the "bathroom" cases), and military service. As we were closing the book to new cases, the 6th Circuit issued a landmark decision, *Harris Funeral Homes v. EEOC*, which may finally bring the issue of gender identity discrimination to the Supreme Court while also providing a vehicle to determine whether the federal Religious Freedom Restoration Act allows private sector entities to discriminate against transgender individuals based on the defendant's religious views. To end the chapter, we have included one of the first published decisions in U.S. law to deal with intersexuality and persons who reject the "gender binary" — identifying neither fully as male or female — in the context of a dispute

over the U.S. State Department's refusal to issue a passport that does not identify a person as either male or female.

Chapter 4 retains its focus on the recognition of adult relationships between persons of the same sex, including marriage, registered partnerships and informal cohabitation. The material presented at the beginning of the chapter is intended to spur a lively debate about what marriage is, whether it is a valuable institution, and who should be included in the institution.

This was a difficult chapter to revise in light of *Obergefell*. We decided to leave much of the historical material about the road that led to the *Obergefell* decision because we think it underscores how social justice organizations work to accomplish their goals. But some professors may decide to skip the historical material.

Perhaps the most relevant portions of Chapter 4 in the current state of affairs address the fact that most federal agencies (other than Social Security) have determined that marriage alternatives ("registered domestic partners" and "civil union partners") shall not be treated as spouses. This differential treatment opens up a rich conversation about the power of the state to define relationships, the power of the federal government to recognize (or not recognize) state recognition of relationships, and whether or not marriage should be the "gold standard."

The material at the end of the chapter on property rights of unmarried cohabitants is important because many couples never marry, even though they live together in a relationship that is very similar to that of spouses. In the United States, we have not generally recognized property rights on the basis of "status" (e.g., cohabitation or commitment). Washington is the only state that has done so. Introducing the concept should lead to an important policy discussion about statuses other than marriage that ought to be recognized, at least for some purposes, in the United States.

Chapter 5: "Recognition of the Parent-Child Relationship" continues to include a number of the big constitutional family law cases from the past that deal with the parent-child relationship in order to provide background for some of the constitutional arguments that could be made on behalf of LGBT parents. State laws vary greatly as to who is a legal parent, although a number of states have adopted their own versions of the Uniform Parentage Act. Amendments to the Uniform Parentage Act have changed individual rules in a number of states since the publication of the prior edition of this casebook, and those changes are noted. But the general policy decisions today are similar to those of the past: who should be a parent (best interest of the child should control as always), what is the importance of a genetic connection between the parent and the child, and what effect should a valid marriage between the alleged parents have on the legality of the parent-child relationship (or on the ability of one partner to adopt the partner's child)? This chapter covers all of those issues, as well as selected issues that lesbians and gay men face in accessing and using assisted reproductive technology (ART).

Chapter 6, "Additional Selected Topics," consists of a variety of topics in sexuality law that have not been decided by the Supreme Court. We suspect that Chapters 1–5

will provide more than enough material for a two-credit course, but we wanted to include the option for instructors to present one or more of the other “hot topics” in sexuality law. Room could be made for these by omitting much of the historical material in Chapter 1 and selectively presenting the most significant Supreme Court cases from that chapter: *Romer v. Evans*, *Boy Scouts v. Dale*, *Lawrence v. Texas*, *U.S. v. Windsor*, and *Obergefell v. Hodges*. (Although, it strikes us as difficult to make sense out of *Lawrence* without first having covered *Bowers v. Hardwick*, the decision that *Lawrence* expressly overruled.)

The topics we cover in Chapter 6 are: (1) *Lawrence v. Texas*'s impact on existing sodomy laws; (2) laws penalizing prostitution; (3) laws criminalizing the production and distribution of obscene material; (4) defamation and sexuality; (5) sexual minority refugees (a topic addressed in one case in Chapter 3 concerning transgender refugees); and (6) laws banning the practice of “conversion therapy.” In the first two editions of this book, we provided extensive coverage of criminal law topics related to sexuality, but the main focus of scholarship and practice seems to us to have shifted away from criminal law, and we decided to omit most of those materials.

We hope that this new version of our book will prove useful to instructors in the field of sexuality law, and we welcome comments. In particular, are there topics that should definitely be included in a fourth edition that we have opted not to cover in this one?

Arthur S. Leonard, New York Law School
Patricia A. Cain, Santa Clara Law School
Summer 2018

Preface to the Second Edition

The first edition of this casebook was finished in early 2005, at a time when lower courts had just begun to determine how *Lawrence v. Texas* (U.S. Supreme Court 2003) should be applied to issues other than state criminalization of homosexual conduct and when only one state, Massachusetts, had begun to recognize marriage for same-sex couples. Legal developments affecting the LGBT community have exploded since then, requiring us to update the first edition with lengthy annual supplements. By 2009, it was obvious that the book needed a new edition rather than another supplement.

This new edition follows the basic organization of the first edition, and maintains our commitment to lightly editing cases. Most of the key cases from the first edition and annual supplements have been retained and supplemented with notes to reflect recent developments. New cases have been added or have replaced old ones when they create significant change in the law. Significant changes in this edition include:

Chapter One. We have retained the four leading cases from the first edition, but have added a new section on public interest lawyering for sexual minorities, providing an introduction to the history and organization of the legal movement for sexual minority rights. In accord with this change, we have moved the Lambda Legal cases contesting the formation of that law firm from Chapter Seven to this part of Chapter One.

Chapter Two. The basic concept of the chapter remains the examination of constitutional law governing LGBT rights in the wake of *Lawrence v. Texas*, but we have substantially expanded the chapter to provide contrasting views from different federal circuits by presenting the 9th Circuit *Witt* case challenging the military “don’t ask, don’t tell” policy as a counterpoint to the 11th Circuit *Lofton* case concerning Florida’s statutory ban on adoption of children by “homosexuals.” We have also added a brief section on state constitutional law, built from excerpts of state supreme court decisions addressing doctrinal issues similar to those raised in *Lawrence* and *Romer*.

Chapter Three. The theme remains government regulation of sexual conduct through criminal law, in light of the approach the Supreme Court took towards consensual adult sodomy in *Lawrence*, but as the consequences of *Lawrence* have played themselves out in lower courts, we have expanded the range of topics that we cover, some of this change having been anticipated in our annual supplements to the first edition. We have updated coverage on solicitation and prostitution with more recent,

post-*Lawrence* cases. One area where the consequences of *Lawrence* have taken odd turns is regulation of sex involving minors, and we have expanded this section with new appellate decisions. We have added a new section on incest, as criminal defendants have sought to expand the reach of *Lawrence* by raising due process and equal protection defenses in incest prosecutions, which raise some different issues depending upon the genders of the participants. Among the objections raised to same-sex marriage has been the establishment of a slippery slope to a right to plural marriage, and we have expanded the section on adultery to include polygamy so that the policy issues can be explored in light of post-*Lawrence* cases.

Chapter Four. This chapter has been substantially revised to take account of the extraordinary developments in the law relating to legal recognition and status for non-traditional families, building on the Massachusetts Supreme Judicial Court's 2003 ruling in *Goodridge*, which remains a key opinion in the chapter. This chapter has posed some of the greatest difficulties for revision, because the stream of lengthy decisions by the highest courts of numerous states, together with major legislative developments, has produced a profusion of material sufficient to make a casebook of its own. We have necessarily had to be selective, relying on notes and questions and occasional textual description to avoid expanding this chapter beyond manageable proportions. By dint of much "last minute" labor, we have brought the text up to date through the first week of June 2009, when New Hampshire legislated same-sex marriage, but legislative developments were still pending in several major jurisdictions. Stay tuned for the first annual supplement!

Chapter Five. In this chapter, we have revised the section on adoption to reflect the continuing litigation over the Florida ban and the emerging case law on interstate recognition of second parent adoptions pursuant to federal law and the Full Faith and Credit Clause. Otherwise, the main change in this chapter is to incorporate into the text the California Supreme Court's 2005 decisions applying various provisions of the Uniform Parentage Act to same-sex couples with children and to supplement them with cases and references to significant developments in other jurisdictions.

Chapter Six. The most significant additions here are textual discussion and a case about qualified immunity enjoyed by government officials against liability for their discretionary functions, a frequently-raised defense in sexual orientation discrimination cases, and consideration of the impact of state constitutional amendments banning same-sex marriage on public employee benefit rights. We have also freshened the coverage of asylum claims with some newer court of appeals decisions.

Chapter Seven. In this chapter, we have added a section on the clash of rights over anti-gay speech in public schools, exemplified by the "t-shirt wars" surrounding the National Day of Silence. Individuals seeking to counter speech in support of equal rights for gay students with messages of moral disapproval have taken to the courts over restrictions on their speech by school administrators. This is a growing area of conflict, and we have provided materials to consider the policy issues raised by these conflicts. We have also added materials on so-called "hate crimes" laws, which seemed more appropriately included here than in Chapter Three, which is devoted to

state regulation of sexual conduct through the criminal law. These criminal statutes have to do not with sexual activity but rather with an attempt to mark as worthy of greater punishment those crimes motivated by the identity of the victim as a member of a sexual minority. They raise interesting issues about public policy and equality.

We recommend that instructors using the book keep current on LGBT law issues by consulting Professor Leonard's publication, Lesbian/Gay Law Notes, a monthly newsletter that is archived on the New York Law School website in the Justice Action Center Section. Those interested can enroll to receive an email notice upon the posting of each new issue of this newsletter.

New York Law School supported Professor Leonard's work on this edition of the book and the new edition of the Teachers Manual with faculty research grants.

Arthur S. Leonard, New York Law School
Patricia Cain, Santa Clara Law School

Preface to the First Edition

Some law schools began to offer courses on lesbian/gay legal issues in the 1980s, under a variety of titles, such as Sexual Privacy Law, Sexuality and Law, Sexual Minorities and the Law. As there were no textbooks, professors put together their own teaching materials from various sources. In those pre-internet days, that meant lots of photocopying and physical cutting and pasting.

The pioneers teaching in this field included Thomas B. Stoddard at New York University, E. Carrington Boggan at New York Law School, Rhonda Rivera at Ohio State University, and Mary C. Dunlap and Thomas Coleman at several California law schools. The classes were small, with many students reluctant to take the course out of fear that the presence of such a course title on their transcript would harm their employment chances.

When Boggan first offered the course at New York Law School under the title “Homosexuality and the Law,” no students enrolled. When he offered the same course the following year as “Sexual Privacy Law,” he had a full house.

When Arthur Leonard took over the New York Law School course upon Boggan’s retirement, Tom Stoddard’s teaching materials from N.Y.U. provided his starting point for creating a new set of materials. By the 1990s, casebooks began to appear, so professors had a choice of continuing to assemble materials on their own or to adopt the first published casebook, an N.Y.U. press paperback offered by William B. Rubenstein, then the director of the American Civil Liberties Union’s Lesbian and Gay Rights and AIDS Projects, who was teaching the course on an adjunct basis at various schools. Soon a second book emerged, co-authored by Nan Hunter of Brooklyn Law School and William Eskridge of Yale, and Rubenstein’s book migrated to a different publisher for a new hardbound edition. The two books had very different philosophies; Rubenstein’s focusing on sexual orientation law while Hunter & Eskridge broadly surveyed gender, sexuality and the law.

Now we are excited to present the third published casebook in the field, *Sexuality Law*. Each of us has been teaching this course under various names and configurations and at various schools for many years, sometimes with our own materials and sometimes with one of the published casebooks. When Carolina Academic Press invited us to put together a new casebook in the area, we thought about ways to make it distinctively useful for instructors and students. We decided our focus would fall somewhere between the narrower focused approach on homosexuality and the broadly-encompassing gender. This book seeks to incorporate relevant

material beyond sexual orientation, embracing legal issues raised by varying gender identities. We tried to introduce some practical issues that haven't necessarily been covered elsewhere, such as tax issues for same-sex couples, and to inject a public interest lawyering perspective. We also decided that as we both prefer to teach from cases that have been lightly edited so as to leave in the full flavor and context of the original opinion, we would follow that principle in presenting cases for this book.

One of the biggest challenges we faced was deciding when to "close" the book to new developments. Completion of this project was several times delayed as we awaited important forthcoming rulings by the United States Supreme Court and various lower courts, most notably the Massachusetts Supreme Judicial Court's ruling on same-sex marriage. Finally we just came to accept that the book would never be completed if we kept waiting for the next major ruling to come along, and we decided to cut things off with the beginning of April 2005. Subsequent developments will be noted in the Teachers Manual and in periodic updates. This is a field where new developments are frequently occurring and a timely text is important, but a termination point must be reached. For example, just shortly after we "closed" the book, Connecticut enacted the nation's second Civil Union law and Canada and Spain took final legislative steps to make same-sex marriage available. We decided not to engage in extensive rewriting in Chapter IV to account for these developments, which had been anticipated a bit in the text.

Our schools have been very supportive of our work on sexuality law in general and "Sexuality Law" in particular. Arthur Leonard wishes to acknowledge New York Law School faculty research grants supporting the work on this book. Patricia Cain acknowledges Provost Michael J. Hogan, University of Iowa, for supporting a research leave from the Provost's office that enabled her to finish work on this project.

This book, like law and life themselves, is never-ending. Welcome to the fascinating unfolding story of Sexuality Law.

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