INTRODUCTION TO THE SYMPOSIUM ISSUE SEXUALITY AND GENDER LAW: THE DIFFERENCE A FIELD MAKES

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For a very long time, issues of sexuality and gender remained outside the boundaries of what was considered important legal scholarship. Indeed, the very presence in the legal academy of the concepts of sexuality and gender was viewed as barely legitimate, certainly not respectable, and, in intellectual terms, at best facetious[1]—or, to let Justice White rest in peace, at best frivolous.

One result of this now dying worldview was a series of categorical exclusions and erasures—exemplified by the exclusion of sexual speech from the First Amendment, the exclusion of nonreproductive kinship networks from the definition of family, the exclusion of gender performance from the category of protected expression, and the erasure of culturally legible same-sex desire through the mechanism of criminalization. Although instances of erasure and exclusion continue today, the period of a hegemonic paradigm of occlusion has ended.

Today, few voices would contest that sexuality and gender law is intellectually both mature and sophisticated. Moreover, the themes and tensions that have emerged about and within the field increasingly dominate broad swaths of public law.

The authors represented in this issue were brought together to assess the current state and future prospects of the field of sexuality and gender law, in a symposium cosponsored by the UCLA Law Review and the Williams Institute. The resulting articles present a vivid snapshot taken at the beginning of the

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* Professor of Law, Georgetown University Law Center; Visiting Professor of Law, Spring 2010, UCLA Law School; Legal Scholarship Director, The Williams Institute. I want to thank everyone who participated in the exciting symposium upon which this issue is based. The richness of the final published articles was immeasurably enhanced by a stellar set of commenters and oral presenters, including Lee Badgett, Aaron Belkin, Matt Coles, Kimberlé Crenshaw, David Cruz, Chai Feldblum, Katherine Franke, Zachary Kramer, Holning Lau, Christine Littleton, Melissa Murray, Matt Nosanchuk, Jennifer Pizer, Nancy Polikoff, Russell Robinson, Laura Rosenbury, Reva Siegel, Dean Spade, Ed Stein, and Leti Volpp. The event could not have taken place without the efforts of the superb student editors of the Law Review and the support of UCLA Law School and the Williams Institute, whose staff members oversaw the event in their routinely excellent manner.

1. The reference is to *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986), in which Justice White, writing for the Court, declared that "to claim that a right to engage in [homosexual] conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."

twenty-first century of a field that did not exist until a few decades earlier. They also provocatively sketch complexities that lie ahead.

Like the reach of these articles, the field itself evades containment. Its premise, Bill Eskridge asserts, is "that legal rules and standards pervasively reflect, regulate, and are undermined by the diversity of gender roles, sexual practices, and gender or sexual identities . . . ."[2] As every author points out, in different voices and from multiple perspectives, the impact of sex- and gender-inflected law circulates throughout the body politic, shaping and reshaping our understandings of self, family, community, and nation-state. This is a not inconsiderable accomplishment for a body of law that only recently was overshadowed by the state's prerogative to criminalize the sexual practices at the core of its social meaning[3] and to officially prefer and reinforce a gender-specified model of citizenship.[4]

What has emerged in this post–*Bowers v. Hardwick* moment is a proliferation of gentler regulatory discourses, none with more than provisional dominance. Many reflect what Reva Siegel described as a liberal frame, necessitated by new cultural norms, that nonetheless perpetuates older illiberal concepts.[5] The competing progressive frame of benign sexual and gender variation has achieved substantial cultural traction, but its jurisprudential scope remains limited to that of a negative liberty right against coercion. Affirmative and liberatory claims remain deeply contested. Still, the harshest forms of repression have faded, opening space for scholars to look beyond externally imposed constraints and to analyze the role that LGBT and feminist actors themselves play in fashioning the constructs of meaning that shape our lived reality.

For this field, circa 2010, the future holds both growth and divergence. Its intellectual common ground is a commitment to denaturalizing hierarchies of sexuality and gender, a point made in the Symposium papers from a variety of perspectives. Kim Buchanan, for example, calls out courts' willingness to ignore established equal protection principles when the facts of a case implicate stigmatized sexualities, thereby importing a double standard about sexuality in

2. William N. Eskridge, Jr., *Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive*, 57 UCLA L. REV. 1333, 1334 (2010).

3. *See* Lawrence v. Texas, 539 U.S. 558 (2003) (ruling that a state statute prohibiting private consensual sexual relations between two persons of the same sex violated the Due Process Clause).

4. *See* Nguyen v. INS, 533 U.S. 53 (2001) (holding that when a child is born outside the United States to an unmarried U.S. citizen and a noncitizen, the child's citizenship status will turn on whether the citizen parent is the mother or the father); United States v. Virginia, 518 U.S. 515 (1996) (ruling that a public college—the Virginia Military Institute—violated the Equal Protection Clause by limiting its student body to men in order to preserve its distinctive adversative training method as purely masculine).

5. Professor Siegel made this observation in oral remarks that she delivered during the Symposium.

the guise of "common sense" or anatomy.[6] Mary Anne Case criticizes legal regimes that are bifurcated by sex/gender, such as marriage, as inevitably producing layers of stratification.[7] And Suzanne Goldberg points out that behind what is often taken for authentic disgust toward same-sex sexual practices lies a perhaps even more profound squeamishness about atypical gender roles.[8]

From this common ground, the authors grapple with growing tensions in two contexts that appear throughout the issue: meanings of identity and engagement with institutions.

The field of sexuality and gender law cannot yet be characterized as post–civil rights (if indeed any field can be). Basic protections for the right to equal participation in politics and in the economy are incomplete in major respects, given the absence of a national antidiscrimination standard and the near unbroken record with which voters have opted to single out gay families for de jure disadvantage. But it is a field that *can* be understood as post–coming out, because its animating concerns are now not only open but culturally central.

Articulating queer identities has been a central enterprise in the field of sexuality and gender studies since its inception, a project often freighted with historical, cultural, and emotional resonance. The queer subject described in these pages has shed its once one-dimensional focus on sexuality and its tendency toward reactivity. Instead, today's queer cultural consciousness bespeaks an agent navigating the tension between the marginality of dissent and the inevitable normalization engendered by recognition. Complex questions of stance arise from this tension, along with disagreements over how those advocating legal reform should navigate engagement with the broader society.

Kathryn Abrams analyzes the theoretical dimensions of the conflict between antinormalization principles and antisubordination principles.[9] Divergent conceptions of power either as primarily statist and structural, or as diffused throughout culture with tentacles extending into the realm of law, underlie many of the debates. Not surprisingly, the most frequent point of friction between contrary perspectives at the Symposium arose at the juncture of sexuality, gender, and the state: the question of how to analyze marriage. The range of critique and countercritique as to marriage defies easy summary, but the complexity of feminist/queer stances toward this institution is remarkable.

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6. Kim Shayo Buchanan, *The Sex Discount*, 57 UCLA L. REV. 1149 (2010).

7. Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199 (2010).

8. Suzanne B. Goldberg, *Sticky Intuitions and the Future of Sexual Orientation Discrimination*, 57 UCLA L. REV. 1375 (2010).

9. Kathryn Abrams, *Elusive Coalitions: Reconsidering the Politics of Gender and Sexuality*, 57 UCLA L. REV. 1135 (2010).

Different actors moving simultaneously in multiple directions aspire to democratize, discredit, or displace marriage, all in the heat of cultural warfare, all at once.

Symposium authors address issues related to other social institutions as well. Kenji Yoshino argues that a "gay tipping point" has further problematized the question of how the political powerlessness aspect of equal protection doctrine should be understood when LGB persons seek a heightened standard of review.[10] Yoshino rejects Bruce Ackerman's argument that their status as anonymous and diffuse renders gay people illegible under the famous *Carolene Products*[11] Footnote 4 analysis that extends protection to discrete and insular minorities. Rather, Yoshino asserts that when anonymity is discarded, it reveals an LGB community that has been able, through its invisibility, to circulate throughout every social institution. In a world of profound stigma, anonymity and diffuseness constitute a powerful advantage. Yoshino's argument calls into question whether political powerlessness has any secure meaning as a guidepost for contemporary constitutional analysis.

Scott Cummings and Doug NeJaime examine the institution of courts from a different angle, challenging the conventional view that successful litigation on behalf of LGBT marriage equality has produced backlash because of the countermajoritarian nature of the judiciary.[12] In a careful empirical study of the events leading up to the passage of Prop 8 in California, Cummings and NeJaime find that marriage equality cause lawyering was grounded in multidimensional advocacy, in which law reform organizations deliberately prioritized nonlitigation strategies. Cummings and NeJaime conclude with a deep skepticism of the assertion that the Prop 8 vote outcome would have been different if the California Supreme Court had upheld the exclusion of same-sex couples from marriage in *In re Marriage Cases*.[13]

Lastly, the Symposium authors remind us that we must not fail to attend to issues of global, as well as national, governance. Sonia Katyal paints an elegant vision of the cultural and constitutional hybridities that infuse the notion of queer diaspora, finding not merely a global growth in the LGBT movement, but also a mutually constitutive conversation between Western and non-Western judiciaries in their consideration of differently framed challenges to sodomy laws.[14] Teemu Ruskola deconstructs a masculinist vision of state sovereignty in

10. Kenji Yoshino, *The Gay Tipping Point*, 57 UCLA L. REV. 1537 (2010).
11. 304 U.S. 144 (1938).
12. Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010).
13. 183 P.3d 384 (Cal. 2008).
14. Sonia K. Katyal, *The Dissident Citizen*, 57 UCLA L. REV. 1415 (2010).

international law, reading its nineteenth century history as a narrative of homoerotic violation of non-Western states, an approach that opens up an important new perspective on Western concepts of sovereignty.[15]

From redefinitions of family, to challenging the use of the metaphor of family because of its domestication of queer identity, to a queer reading of the family of nations—the UCLA Symposium marks a watershed in understanding how the field of sexuality and gender law is reshaping the academy and the broader realm of law.

15. Teemu Ruskola, *Raping Like a State*, 57 UCLA L. REV. 1477 (2010).