

Sexuality Law

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Sexuality Law

Second 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 25 years, and now,
thanks to recent victories by committed public interest lawyers,
my spouse for life.*
Pat

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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 from 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 hard-bound 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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