

**LGBT Legal Issues**  
**Emory University School of Law**  
**Visiting Assistant Professor William B. Turner, Ph.D., J.D.**  
**Fall 2007**  
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Purpose of the course

The purpose of this course is to explore the legal issues that lesbian, gay, bisexual, transgender, and intersexed persons may face, particularly in the 11<sup>th</sup> Circuit. We will work from the assumption that the students in this course can expect in the near future to represent LGBTI clients, such that we should strive to be as current as possible on relevant law.

Readings

We will not use a casebook. The vast majority of the readings for this course consist of cases, statutes, ordinances, and articles that you can easily get via Lexis or Westlaw, and Hein Online. Some of the articles appear in books that are on reserve in the law library. You should have purchased a copy of Michel Foucault's *The History of Sexuality, Volume I: An Introduction*, whether from the bookstore or somewhere else.

I have put some books on reserve that can serve more as references than as sources of assigned readings.

Writing Requirement

This course is officially a seminar, meaning that the major assignment is an essay that will meet the law school's writing requirement. Please note that I will adhere strictly to the guidelines that the law school has published for such assignments at this URL:

<http://www.law.emory.edu/current-students/registrar/writing-requirement.html>

The requirements that I would emphasize from this web page include that the final document must be at least 30 pages, excluding reference notes (the web page refers to a bibliography, but you will submit a separate bibliography in advance, so you will not need one for the final paper); you must submit a substantial draft before the end of the semester; attendance and participation in the seminar are required; and you must earn a grade of C or higher in order to count the writing credit toward graduation. If you prefer word counts to page counts, 30 pages is about 13,000 words.

I would encourage you, if you are so inclined, to see this paper as a potential law review article. My article on *Holtzman v. Knott*, which we will read this semester, started as a seminar paper while I was in law school. I will be happy to help you, continuing past the end of the current semester, should you decide to publish your paper for this course. The aspiration to publish is not a requirement.

Neatness and formatting count. I don't care what citation style you use, but pick one and stick to it. If you wish to aim for publication in a law review, I strongly recommend that you use Bluebook format from the outset, since that's what the vast majority of law reviews require. You

will lose points on EVERY writing assignment in this course for typographical, spelling, grammatical, and other mechanical errors, and for unexplained variations in citation formatting.

For all assignments, I encourage you to e-mail documents to me, preferably in Word. You may print a hard copy and submit it that way if you choose.

### Paper Topic

Note that you must submit a preliminary topic statement by September 17. I believe firmly that you will do a better job writing about something that genuinely interests you than if you allow me, or someone else, to hand you a topic. At the same time, I would encourage you come talk to (or e-mail) me about your topic. I can help you develop an idea into a suitable topic. My only criteria for topics will be some discernable connection to the course, and feasibility.

### Grading

|   |    |
|---|----|
| Participation .....                       | 20 |
| Topic Statement.....                      | 10 |
| Anti-Marriage Amendments Assignment ..... | 20 |
| Preliminary Bibliography.....             | 20 |
| Final Paper.....                          | 30 |

The grading scale for this course will be the usual one for Emory Law School courses.

### Late Penalties

All of the assignments you must submit for the course are listed in the schedule below. That is, you now know the deadlines. The penalty for late work is one letter grade per day, with Saturday and Sunday counting as one day each.

### August 27: Introduction to Course

**Read:** Foucault, *The History of Sexuality*; Wyatt Buchanan, “The Battle over Same-Sex Marriage: Divorcing Gay Couples Create New Legal Issues,” *San Francisco Chronicle*, Sept. 25, 2006; Steve Rothaus, *Wanted: Openly Gay Lawyers*, Miami Herald, Jul. 8, 2007.

### September 3: No class for Labor Day

### September 10: The Historical and Constitutional Context for LGBTI Civil Rights Claims

**Guest speaker: Vanessa King, Emory Law Librarian**

**Articles:** Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 Va. L. Rev. 1643 (1993); Marc Stein, *Boutilier and the U.S. Supreme Court’s Sexual Revolution*, 23 Law and

History Review 491 (2005); Nan D. Hunter, *The Boundaries of Liberty after Lawrence v. Texas: Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 Mich. L. Rev. 1528 (2004); Arthur Leonard, *From Bowers v. Hardwick to Romer v. Evans: Lesbian and Gay Rights in the Supreme Court*, in *Creating Change: Sexuality, Public Policy, and Civil Rights* (on reserve).

**Cases:** *One, Inc. v. Olesen*, 241 F.2d 772 (CA9 1957), rev'd by 355 U.S. 317 (1957) (per curiam), by reference to *Roth v. United States*, 354 U.S. 476 (1957); *Boutilier v. INS*, 387 U.S. 118 (1967); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995); *Romer v. Evans*, 517 U.S. 620 (1996); *BSA v. Dale*, 530 U.S. 640 (2000); *Lawrence v. Texas*, 539 U.S. 558 (2003); *State v. Limon*, 32 Kan. App. 2d 369, 83 P.3d 229 (Kan. Ct. App., Jan. 30, 2004), rev'd & remanded by *State v. Limon*, 280 Kan. 275, 122 P.3d 22 (2005); *Lofton v. Sec'y of the Dep't. of Children & Family Svcs.*, 358 F.3d 804 (CA11 2004), reh'g. en banc denied, 377 F.3d 1275 (CA11, 2004), cert. denied, 2005 U.S. Lexis 285 (Jan. 10, 2005).

#### September 17: Same-Sex Marriage

##### **Guest Speaker: Judi O'Kelley, Lambda Legal**

**Articles:** Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation?*, on reserve; Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 Am. U. J. Gender Soc. Pol'y & L. 167 (2000); Chai R. Feldblum, *A Progressive Moral Case for Same-Sex Marriage*, 7 Temp. Pol. & Civ. Rts. L. Rev. 485 (1997-1998) (this is the short version – one who wishes to see how Feldblum develops this argument further may read Feldblum, *Gay is Good: The Moral Case for Marriage Equality and More*, 17 Yale J. L. & Feminism 139 (2005)); Chambers chapter on marriage, domestic partnerships, and civil unions in *Creating Change*, on reserve.

**Cases:** *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (Haw. 1993); *Baehr v. Miike*, 1999 Haw. Lexis 391; *Baker v. Vermont*, 170 Vt. 194, 744 A.2d 864 (Vt. 1999); *Goodridge v. Dept. of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003); *Lewis v. Harris*, 188 N.J. 415, 908 A.2d 196 (N.J. 2006); *Hernandez v. Robles*, 7 N.Y.3d 338, 855 N.E.2d 1 (NY 2006).

##### **Initial Topic Statement due.**

#### September 24: DOMAs and state constitutional amendments

**Read:** Defense of Marriage Act, P.L. 104-199, 110 Stat. 2419, codified at 1 USC sec. 7, 28 USC sec. 1738C; state constitutional amendments prohibiting recognition of same-sex marriages. Useful reports from 2004, 2005, and 2006 containing language and facts of passage for both legislation and constitutional amendments prohibiting recognition of same-sex marriages are available from HRC at:

[http://www.hrc.org/Template.cfm?Section=About\\_HRC&CONTENTID=24615&TEMPLATE=/ContentManagement/ContentDisplay.cfm](http://www.hrc.org/Template.cfm?Section=About_HRC&CONTENTID=24615&TEMPLATE=/ContentManagement/ContentDisplay.cfm)

**Assignment:** Review all of the state anti-marriage constitutional amendments. Categorize them according to the similarities and differences in their language. Which will be the easiest to challenge? Which will be the hardest? What is the most likely doctrinal theory to use in such challenges? Get creative – any ideas about far-fetched approaches that might still be worth discussing?

#### October 1: Immigration/Asylum

**Articles:** Arwen Swink, *Queer Refuge: A Review of the Role of Country Condition Analysis in Asylum Adjudications for Members of Sexual Minorities*, 29 Hastings Int'l & Comp. L. Rev. 251 (2006); Barney Frank chapter in *Creating Change*, on reserve.

**Cases:** *Mockeviciene v. U.S.*, 2007 U.S. App. Lexis 15167 (CA11, June 26, 2007) (unpublished); Opening Brief for Petitioner, *Soto Vega v. Ashcroft*, Ninth Circuit Court of Appeals, Oct. 25, 2004, <http://data.lambdalegal.org/pdf/319.pdf>; *Soto Vega v. Gonzales*, 183 Fed. Appx. 627 (CA9, May 3, 2006) (unpublished); Lambda Legal amicus brief on behalf of Y.S., available at <http://data.lambdalegal.org/pdf/legal/in-re-ys/in-re-ys-brief-amicus.pdf>

#### October 8: Incidents of Marriage by Contract

**Guest Speaker: Barbara E. Katz, Attorney at Law**

**Preliminary Bibliography due.**

#### October 15: Relationship Recognition

**Articles:** Emily J. Sack, *Civil Unions and the Meaning of the Public Policy Exception at the Boundaries of Domestic Relations Law*, 3 Ave Maria L. Rev. 497 (2005); Turner, *The Lesbian De Facto Parent Standard in Holtzman v. Knott: Judicial Policy Innovation and Diffusion*, 22 Berkeley J. of Gender L. & Just. 135 (2007); Turner, *The Perils of Marriage as Transcendent Ontology: National Pride at Work v. Governor of Michigan*, forthcoming, Geo. J. Gender and L. (on reserve); John Holl, *As New Jersey Opens Door to Civil Unions, Couples Rush In*, NY Times, Feb. 19, 2007; Tina Kelley, *No Rush to Get Civil Unions in N.J.*, NY Times, March 20, 2007.

**Cases:** *Moses v. King*, 281 Ga. App. 687, 637 S.E.2d 97 (Ga. Ct. App. Sept. 27, 2006); *Burns v. Burns*, 253 Ga. App. 600, 560 S.E.2d 47 (Ga. App. 2002), cert. denied, 2002 Ga. Lexis 626 (Ga. July 15, 2002); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 2006 Vt. Lexis 159 (2006); *Miller-Jenkins v. Miller-Jenkins*, 49 Va. App. 88, 637 S.E.2d 330 (2006), remanded, 2007 Va. App. Lexis 158 (Va. Ct. App. Apr. 17, 2007); *Holtzman v. Knott*, 193 Wis. 2d 649, 533 N.W.2d 419 (Wis. 1994); *Knight v. Schwarzenegger*, 128 Cal. App. 4<sup>th</sup> 14, 26 Cal. Rptr. 3d 687 (Cal. App. 2005); *Nat'l Pride at Work, Inc., v.*

*Governor of Mich.*, 2007 Mich. Lexis 1017 (May 23, 2007) (appeal granted, 2007 Mich. App. Lexis 240 (Feb. 1, 2007)); *Alon v. Iowa District Court for Woodbury County*, 698 N.W.2d 858 (Iowa June 17, 2005); *Finstuen v. Crutcher*, 2007 U.S. App. Lexis 18500 (CA10 Aug. 3, 2007); *In Re: Kandou*, 315 B.R. 123 (2004); *Shahar v. Bowers*, 114 F.3d 1097 (CA11 May 30, 1997).

#### October 22: Adoption, Foster Care, Surrogacy, and Child Custody (mostly) in the Eleventh Circuit

##### **Guest Speaker: Kathy Kelly from Mega Family Project**

**Articles:** Elizabeth Erin Bosquet, *Contextualizing and Analyzing Alabama's Approach to Gay and Lesbian Custody Rights*, 51 Ala. L. Rev. 1625 (2000); Sara K. Alexander, *Who is Georgia's Mother? Gestational Surrogacy: A Formulation for Georgia's Legislature*, 38 Ga. L. Rev. 395 (2003); Adam P. Plant, *With a Little Help from my Friends: The Intersection of the Gestational Surrogacy Agreement, Legislative Inaction, and Medical Advancement*, 54 Ala. L. Rev. 639 (2003).

**Cases:** *Lofton v. Sec'y of the Dep't. of Children & Family Svcs.*, 358 F.3d 804 (CA11 2004), *reh'g. en banc denied*, 377 F.3d 1275 (CA11, 2004), *cert. denied*, 2005 U.S. Lexis 285 (Jan. 10, 2005); *Burns v. Burns*, 253 Ga. App. 600, 560 S.E.2d 47 (Ga. App. 2002), *cert. denied*, 2002 Ga. Lexis 626 (Ga. July 15, 2002).

**Statutes:** GA adoption statute, OCGA sec. 19-8-3.

#### October 29: Employment Discrimination

**Articles:** Keith J. Hilzendeger, *Walking Title VII's Tightrope: Advice for Gay and Lesbian Title VII Plaintiffs*, 13 Law & Sex. 705 (2004); Clare Diefenbach, *Same-Sex Sexual Harassment after Oncale: Meeting the "Because of...Sex" Requirement*, 22 Berk. J. Gender L. & Just. 42 (2007).

**Cases:** *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1988); *Oncale v. Sundowner Offshore Svcs.*, 523 U.S. 75 (1998); *Nichols v. Azteca*, 256 F.3d 864 (CA9 2001); *Mowery v. Escambia County Util. Auth.*, 2006 U.S. Dist. Lexis 5304 (N.D. Fla. Feb. 10, 2006); *James v. Platte River*, 113 Fed. Appx. 864 (CA10 Oct. 25, 2004); *Desert Palace v. Costa*, 539 U.S. 90 (2003); *Oiler v. Winn-Dixie Louisiana, Inc.*, 2002 U.S. Dist. Lexis 17417, 89 Fair Empl. Prac. Case (BNA) 1832 (E.D. La., Sept. 16, 2002); *Schroer v. Billington*, 424 F. Supp. 2d 203 (D. D.C., March 31, 2006); *Dawson v. Bumble & Bumble*, 398 F.3d 211 (CA2 Feb. 17, 2005).

#### November 5: Military Service

**Cases:** *Rumsfeld v. FAIR*, 547 U.S. 47 (2006); *Able v. USA*, 968 F. Supp. 850 (E.D. N.Y., July 2, 1997), *rev'd. by Able v. USA*, 155 F.3d 628 (CA2, Sept. 23, 1998); *Cook v. Rumsfeld*, 429 F. Supp. 2d 385 (D. Mass. 2006), *recon. denied*, 2006 U.S. Dist. Lexis

63037 (D. Mass. Sept. 5, 2006), oral argument, First Circuit Court of Appeal, March 7, 2007 (OPTIONAL: available at <http://www.sldn.org/templates/law/record.html?section=207&record=3894>). This is a 26.6m file that I note the existence of here just in case you want to download it. Downloading this file is not a requirement for the course).

### November 12: Transgender Rights

**Articles:** Katrina C. Rose, *When is an Attempted Rape Not an Attempted Rape? When the Victim is a Transsexual*, 9 Am. U. J. Gender Soc. Pol'y & L. 505 (2001); Terry S. Kogan, *Transsexuals, Intersexuals, and Same-Sex Marriage*, 18 BYU J. Pub. L. 371 (2003-2004); Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 Berkeley Women's L.J. 15 (2003); Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory*, 28 Law & Soc. Inquiry 1 (2003); Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 Harv. J.L. & Gender 51 (2006).

**Cases:** *Ulane v. Eastern Airlines*, 742 F.2d 1081 (CA7 1984); *Schwenk v. Hartford*, 204 F.3d 1187 (CA9 2000); *Kantaros v. Kantaras*, 884 So. 2d 155 (Ct. App. Fl. July 23, 2004), rev. denied, 898 So.2d 80 (Fla., Feb. 23 2005).

### November 19: Medical Treatment for Transgender Prisoners

**Articles:** Linda Chin, *A Prisoner's Right to Transsexual Therapies: A Look at Brooks v. Berg*; Rebecca Mann, *The Treatment of Transgender Prisoners, Not Just an American Problem – A Comparative Analysis of American, Australian, and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and a “Universal” Recommendation to Improve Treatment*, 15 Law & Sex. 91 (2006).

**Cases:** *Brooks v. Berg*, 270 F. Supp. 2d 302 (N.D. N.Y. 2003), *complaint dismissed*, *Lewis (a/k/a Brooks) v. Berg*, 2006 U.S. Dist. Lexis 21422 (N.D. N.Y. April 20, 2006); *Kosilek v. Maloney*, 221 F. Supp. 2d 156 (D. Mass. 2002); *Tates v. Blanas*, 2003 WL 23864868 (E.D. Cal.); Complaint for Declaratory and Injunctive Relief, *Sundstrom v. Frank*, E.D. Wis. (on reserve), Brief in Support of Plaintiffs' Emergency Motion for a Temporary Restraining Order and Preliminary Injunction Enjoining Defendants from Reducing or Terminating Plaintiffs' Hormone Therapy, *Sundstrom v. Frank* (on reserve).

### November 26: Intersexed issues

Sara R. Benson, *Hacking the Gender Binary Myth: Recognizing Fundamental Rights for the Intersexed*, 12 Cardozo J. L. & Gender 31 (2005-2006).

**First draft of paper due.**

### December 3: Students/Schools

*Nabozny v. Polesny*, 92 F.3d 446 (CA7 1996); *White County High School Peers Rising in Diverse Education v. White County School District*, 2006 U.S. Dist. Lexis 47955; *Gay-Straight Alliance of Okeechobee High School v School Board of Okeechobee County*, 483 F. Supp. 2d 1224 (S.D. Fla. April 6, 2007).

Organizations:

American Civil Liberties Union  
Human Rights Campaign (HRC)  
National Gay and Lesbian Task Force (NGLTF)  
National Organization for Women  
Lambda Legal Defense and Education Fund  
National Center for Lesbian Rights  
Servicemembers Legal Defense Network  
Gender PAC  
Gay, Lesbian, and Straight Education Network