



1-1-2004

# "The Right to Be Sexual" (Revisited): Remembering Mary Dunlap

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## Recommended Citation

19 Berkeley Women's L.J. 19

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# “The Right to Be Sexual” (Revisited):

## *Remembering Mary Dunlap*

Patricia A. Cain†

### I. INTRODUCTION: THE DAY THE MAGIC DIED

February 3, 1959.<sup>1</sup> “The day the music died.”<sup>2</sup>

January 17, 2003. The day the magic died. That’s what I thought when I first heard of Mary Dunlap’s death. I knew she had been ill. I knew there was little hope left as the cancer in her body spread. But I just could not imagine a world without Mary. Even after her death, I could not imagine such a world. She wasn’t a professional magician or musician, although she did create things magical and she loved music. She had the vision and understanding of an artist and she shared the power and creativity of her insights in words and images. She was, for most of her professional life, a civil rights lawyer.

I first met Mary in the 1970s. I knew her as a co-founder of Equal Rights Advocates and as a frequent speaker at the National Conference on Women and the Law. Her energy, creative thinking and passionate advocacy inspired me. I had never met anyone like Mary. I considered her a national treasure. Recognizing the unique value that she brought to the practice and teaching of law, I concluded somewhere along the line that it was my personal duty to share this “national treasure” with my students. So I leaned on Mary to come to Texas on several occasions to talk to my students there and to spend time with my students in California when I was a visiting professor at the University of Southern California. She always graciously agreed, and I continue to treasure the memory of

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- †. Aliber Family Chair in Law and Interim Provost, University of Iowa. I am grateful to my research assistant, James Burgess, who provided excellent and timely research for this project.
1. Shortly after midnight, early in the morning of February 3, 1959, a private plane fell from the Iowa skies close to Mason City. *Iowa Air Crash Kills 3 Singers*, N.Y. TIMES, Feb. 4, 1959, at 66. Killed in the accident were musicians Buddy Holly, Ritchie Valens, and J.P. Richardson (known as “The Big Bopper”). *Id.* The twenty-one-year-old pilot, Roger Peters, also died in the crash. *Id.*
  2. See DON MCCLEAN, *American Pie*, on AMERICAN PIE (United Artists 1971).

each magic moment in those classes.

Mary was a brilliant lawyer. She argued twice before the Supreme Court: once on behalf of pregnant schoolteachers,<sup>3</sup> and once on behalf of the Gay Olympics.<sup>4</sup> She sued the city;<sup>5</sup> she sued the military.<sup>6</sup> And she served as a role model for the next generation of lesbian and gay rights lawyers.

Mary was the epitome of those people we often describe as “bigger than life.” Some would say she could fill up a room. That is true, but what I remember most is the way she gave you her rapt attention if you were in the room with her. Even when we had not seen each other for years, when we would happen to meet, there was an instant connection. She would speak your name and then engage personally in a way that made you feel that you were the only person in the room.

Because I am a law teacher, I want to include in this essay some specific words about Mary as a teacher and scholar. She was brave in the classroom. She was not afraid to be “out” as a lesbian even in the 1970s. Her first stint as a full-time law teacher was in 1979 at the University of Texas, where I was teaching at the time. Despite the demands of full-time law teaching, she never abandoned her advocacy. She lawyered for women who were being denied tenure and for a gay male couple who had been thrown out of an Austin hotel in violation of the local antidiscrimination ordinance. Her teaching was informed by her activism, and her activism was informed by her teaching.

Mary was also a legal scholar. A Texas colleague once complained, as only law professors can do, that her scholarship was political. Of course it was. Mary could no more check her passion at the door when she was writing scholarship than at any other time in her life. But it was brilliant scholarship. Well before the transgender movement took hold, Mary was writing about the male/female dichotomy and arguing that sex was not an either/or category.<sup>7</sup> While scholars carefully developed privacy theories to explain the constitutional right to intimate sex, Mary named it correctly: the “right to be sexual.”<sup>8</sup> The amicus brief she wrote in *Bowers v. Hardwick*<sup>9</sup> was the only brief that described our choice to love as a moral one, worthy of constitutional protection, apart from geographical concerns about privacy.<sup>10</sup>

Her life has been celebrated by her friends. Her art has been displayed in

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3. Richmond Unified Sch. Dist. v. Berg, 434 U.S. 158 (1977).
  4. S.F. Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987).
  5. United States v. City & County of S.F., 656 F. Supp. 276 (N.D. Cal. 1987).
  6. Saal v. Middendorf, 427 F. Supp. 192 (N.D. Cal. 1977), *rev'd sub nom.* Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980).
  7. Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L.J. 1131 (1979).
  8. Mary C. Dunlap, *Toward Recognition of “A Right to Be Sexual”*, 7 WOMEN'S RTS. L. REP. 245 (1982) [hereinafter Dunlap, *Right to Be Sexual*].
  9. 478 U.S. 186 (1986).
  10. Brief of Amici Curiae Lesbian Rights Project et al., *Bowers v. Hardwick*, 478 U.S. 186 (1986), *reprinted in* Mary C. Dunlap, *Introduction to Amicus Brief in Bowers v. Hardwick*, 14 N.Y.U. REV. L. & SOC. CHANGE 949, 953 (1986).

public settings. Here, in the *Berkeley Women's Law Journal*, I want to pay tribute to her scholarship.

## II. THE RIGHT TO BE SEXUAL

The Supreme Court recognized a new fundamental right in 1965. In *Griswold v. Connecticut*,<sup>11</sup> Justice Douglas called it the right to privacy. Mary first called it the right to be sexual in 1982.<sup>12</sup>

The *Griswold* decision paved the way for constitutional recognition of the rights of lesbians and gay men. *Griswold* held that marital privacy was a fundamental right, and thus the government could interfere with that right only for compelling reasons.<sup>13</sup> *Griswold* was limited to marital privacy, but the Court quickly extended this right to unmarried individuals in *Eisenstadt v. Baird*.<sup>14</sup> Other privacy decisions of this era similarly focused on things sexual.<sup>15</sup>

Yet the Court, in all of its privacy decisions, avoided talking about sex. Instead, opinions focused on marriage, the marital bedroom, the home, and the right to choose whether to have children. In striking down governmental regulation that interfered with marriage, the bedroom, privacy in the home, and choices about procreation, the Court often distanced itself from other criminal statutes that regulated sexual relations, such as incest, fornication, adultery, and sodomy.<sup>16</sup> Because the Court never developed a positive concept of sexual relationships, it was never able to articulate exactly what it was that was positive and valued about the activities occurring in marital bedrooms<sup>17</sup> and in the bedrooms of unmarried couples who chose sexual activities that included birth control.<sup>18</sup> Absent any clear theory of why sexual activity should sometimes be protected from government regulation, the Court invited progressive litigators to challenge all types of sexual repression. The fundamental right to privacy recognized by the *Griswold* Court served as a central argument in cases that challenged (unsuc-

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11. 381 U.S. 479 (1965).

12. Dunlap, *Right to Be Sexual*, *supra* note 8, at 245.

13. *Griswold*, 381 U.S. at 485-86.

14. 405 U.S. 438 (1972). There is some question whether the *Eisenstadt* Court relied on equal protection or due process in striking down the state restrictions on distribution of contraceptives. Nonetheless, the Court unquestionably extended the *Griswold* right to privacy to unmarried persons when it proclaimed: "[I]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453.

15. *See, e.g.*, *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (recognizing privacy rights in minors who wished to use contraception); *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing privacy rights in women who wished to terminate a pregnancy); *Stanley v. Georgia*, 394 U.S. 557 (1967) (reversing conviction of a man who viewed obscene material in the privacy of his own home).

16. *See, e.g.*, *Poe v. Ulman*, 367 U.S. 497, 551-52 (Harlan, J., dissenting), *cited in Griswold*, 381 U.S. at 495 (Goldberg, J., concurring).

17. *See Griswold*, 381 U.S. at 486.

18. *See Eisenstadt*, 405 U.S. at 453.

cessfully) discriminatory marriage statutes<sup>19</sup> and in cases that challenged (sometimes successfully) sodomy statutes.<sup>20</sup> Finally, the Court drew a line in its privacy jurisprudence.<sup>21</sup> Perhaps it was the lack of clear theory and positive articulation that led the Court to draw the line as silently as possible. In 1976, the Court summarily affirmed a federal district court ruling in favor of Virginia's sodomy statute, holding that the statute did not implicate the privacy rights of the gay men and lesbians who challenged its application to them in situations involving consensual adults in private settings.<sup>22</sup> In summarily affirming the holding below, the Court elected not to have oral arguments in the case and not to issue a written opinion.

It was this "silent" line drawing, together with a handful of other lower court opinions, drawing lines between good and bad sex, that prompted Mary Dunlap to argue that the privacy decisions imply there is a constitutionally protected "right to be sexual." I could not agree more.<sup>23</sup> But, lesbians and gay men are only a part of the focus in her argument for the right to be sexual. And herein lies Mary's brilliance as an advocate and insightful human being. She begins her argument for the right to be sexual by focusing on groups beyond her own. First, she discusses a case that seems to question whether older people have sexual needs at all.<sup>24</sup> Next, she focuses on a case that questions the sexual rights of young interracial couples.<sup>25</sup> If the right to be sexual is fundamental, then it must be equally available to us all.

Concluding that the privacy cases imply an underlying right to be sexual, Dunlap bravely moves to the most problematic question about sexual rights: how to distinguish authentic claims from destructive ones.<sup>26</sup> Here she says:

Perhaps the sharpest challenge posed by the notion that people have a right to be sexual arises in regard to the question of what limitations are

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19. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) (holding that *Griswold* could not be stretched to support a constitutional claim to same-sex marriage).
  20. *See, e.g., Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex. 1970) (holding Texas sodomy statute unconstitutional because it was broad enough to apply to married couples), *vacated*, *Wade v. Buchanan*, 401 U.S. 989 (1971) (questioning standing of gay defendant in sodomy case to challenge statute on basis of invasion of marital privacy); *see also State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976) (relying heavily on *Griswold* to strike down Iowa's sodomy statute).
  21. *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976), *summarily aff'g* 403 F. Supp. 1199 (E.D. Va. 1975).
  22. *Id.*
  23. I have done so in writing elsewhere. *See* Patricia A. Cain, *The Right to Privacy Under the Montana Constitution: Sex and Intimacy*, 64 MONT. L. REV. 99 (2003).
  24. *Wagner v. Sheltz*, 471 F. Supp. 903 (D. Conn. 1979). (While the claim in the case hinges on the plaintiff's failure to meet the state action requirements of the Fourteenth Amendment, Dunlap uses the case to question decisions based on assumptions about inappropriate romantic or intimate behavior of elderly people in nursing homes).
  25. *Fiedler v. Marumscu Baptist Church*, 486 F. Supp. 960 (E.D. Va. 1979), *rev'd sub nom. Fiedler v. Marumscu Christian School*, 631 F.2d 1144 (4th Cir. 1980) (holding that the school could not restrict interracial dating).
  26. Dunlap, *Right to Be Sexual*, *supra* note 8, at 248.

to be placed on such a right. The realities of sexual violence, exploitation, and repressiveness in our society, and the tendency of “rights” to become chiefly the possessions of those empowered to define them, render the issue of legal limits intensely difficult and controversial. Once we have *rejected* the idea that “proper” sexual behavior in the female consists of nothing more, less or different than sexual intercourse within the bounds of a legally valid marriage – aimed at pregnancy and resulting in childbirth and the fulfillment of the “noble and benign offices of wife and mother”<sup>27</sup>—and once we have *rejected* all related notions of “impropriety” based on gender, we face a vast and difficult array of questions. These questions will not merely be directed toward developing a strategy for implementing sexual freedom; they will address the purposes and directions of the newly gained freedom to be sexual.<sup>28</sup>

This is “vintage Mary,” who was never a fan of short sentences because, after all, everything is connected to everything else, and why stop before you’ve given every punch you can to the idea. And then, just as she has you focusing on whatever content you may be willing to argue should be included in this new right to be sexual, she pulls another Mary punch: don’t ever be too sure about your own self-righteousness. Or, in her own words:

The inclination to be moralistic about one’s own definition of sexual propriety is exceedingly strong. Tolerance of sexual behavior that does not fit within one’s own definition of what is “natural,” “healthy,” or “positive” – regardless of the actual contents of those definitions – rarely demonstrates itself in legal and political domains. Self-righteousness as to one’s definitions of sexual propriety is perhaps as deep-founded as the individual’s sense of boundaries upon his/her privacy and identity.<sup>29</sup>

Here, she is speaking not only to the fundamentalists, the Jerry Falwells, and the narrow-minded prudes in this country. She is also speaking to lesbians who question the permissiveness of gay male bathhouses and same-sex couples who bristle at the notion of threesomes. She is asking all of us to check our biases at the door and ponder openly the question of what exactly the right to be sexual should protect.

### III. *BOWERS V. HARDWICK*

In 1986, the Supreme Court was given the chance to clarify its line-drawing on the question of sexual privacy.<sup>30</sup> Michael Hardwick, a gay male, had been arrested by the Atlanta police for committing sodomy (oral sex) with another male in the privacy of his own bedroom.<sup>31</sup> The question before the Court

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27. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring).

28. Dunlap, *Right to Be Sexual*, *supra* note 8, at 248.

29. *Id.* at 248-49.

30. *See generally* *Bowers v. Hardwick*, 478 U.S. 186 (1986).

31. *Id.* at 187-88.

was whether the state of Georgia could justify the pursuit of same-sex private consensual liaisons by threatening to throw offenders in jail for twenty years under its sodomy statute.<sup>32</sup> Professor Laurence Tribe briefed the case for Michael Hardwick and argued the case before the Court. Tribe focused on the geographical location of the alleged crime and argued that the right to privacy surely included the right to have consensual sex of any sort in the privacy of one's own bedroom without risk that the State would come barging in. The justices questioned Tribe about where to draw the line. Exactly which activities would be protected just because they occurred in private? And exactly how private would the location of the activity have to be? The bedroom? A motel room? An automobile?<sup>33</sup>

Tribe's answers were solid. Line drawing was easy. Consensual sex between adults in private caused no harm. And this case did involve the bedroom. No need to draw the line, for now, beyond that.

Mary Dunlap bristled at these arguments. Line drawing of this sort and privacy arguments based on geography did not honor her principle of the right to be sexual. The Tribe argument could be interpreted to say yes, what these two men did was wrong, but since it happened in the privacy of their own bedroom, the state has no justified reason to be concerned. Dunlap wanted to argue about the beauty and the value of the shared sexual intimacy and not about the geography. So she did. She co-authored an amicus curiae brief on behalf of the Lesbian Rights Project.<sup>34</sup>

Describing the brief, Dunlap says:

[T]he brief took a more radical position, and a more plainly pro-gay/lesbian position, than did the brief in support of respondent Hardwick. The principal brief for the respondents and the oral argument of Professor Laurence Tribe emphasized the fourth amendment physical privacy of the bedroom, while the Lesbian Rights Project *amicus* focused upon the personal privacy of gay, lesbian, and bisexual persons, and on the constitutional implications of that human-centered privacy concept. The respondents' brief assured the Supreme Court that a ruling for Hardwick would not be a ruling in favor of the legitimization of gay/lesbian persons and relationships. In contrast, the Lesbian Rights Project et al. forthrightly argued that because gay men and lesbians constitute an oppressed minority worthy of constitutional protection, the Court was required by law to render a decision which would legitimate

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32. *Id.* at 188 n.1.

33. The oral argument in *Hardwick* can be heard on the Internet at OYEZ: U.S. SUPREME COURT MULTIMEDIA, <http://www.oyez.org> (last visited Apr. 7, 2004).

34. The Lesbian Rights Project began at the public interest law firm of Equal Rights Advocates. In 1989, the project was transformed into the National Center for Lesbian Rights. *See* EQUAL RIGHTS ADVOCATES, SPINOFFS OF ERA, <http://www.equalrights.org/about/spinoffs.asp> (last visited Mar. 10, 2004).

gay/lesbian persons and relationships.<sup>35</sup>

The Court ultimately ruled against Michael Hardwick, refusing to recognize even his narrowly constructed privacy rights.<sup>36</sup> In a street protest following the decision, Mary stood above the crowd waving the opinion in her hand, and then she shredded it to bits.<sup>37</sup> *Bowers v. Hardwick* became the law of the land, and it would have to be overruled.

In a 1994 law review article,<sup>38</sup> Mary Dunlap challenged gay legal advocates to stop litigating around *Hardwick*<sup>39</sup> and instead to challenge its validity more directly:

In the wake of the *Hardwick* decision, many commented that the litigation of *Hardwick* had been a mistake, and the case should never have been taken to the, or at least this, Supreme Court.

....

... [T]o say that *Hardwick* should not have been litigated is more than a bit like saying that someone who got gaybashed in a hostile neighborhood should not have gone there, or should have been differently dressed, and so on and so on. As long as the courts are unsafe to us, just as the streets, we will not progress by hiding indoors.

....

... We must focus on directly and actively working to overturn *Hardwick* by planned legal actions (including but by no means limited to direct “sodomy” law challenges in courts and legislatures,) as well as by indirect challenges seeking to limit *Hardwick*’s harmful seepage into non-criminal law areas, and, perhaps most affirmatively and hopefully, by commencing and sustaining a national drive to adopt “privacy” as an explicit guarantee of the U.S. Constitution.

....

If, instead of these pro-active and aggressive steps, we get caught up in

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35. Mary C. Dunlap, *Introduction to Amicus Brief in Bowers v. Hardwick*, 14 N.Y.U. REV. L. & SOC. CHANGE 949, 950 (1986).

36. *Hardwick*, 478 U.S. at 196.

37. Mary C. Dunlap, *Gay Men and Lesbians Down By Law in the 1990’s USA: The Continuing Toll of Bowers v. Hardwick*, 24 GOLDEN GATE U. L. REV. 1, 5 n.9 (1994) [hereinafter Dunlap, *Continuing Toll*].

38. *Id.*

39. *See, e.g.*, Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531 (1992).



adapting to *Hardwick* and in shifting and reconstructing and settling for trying to find ways around it, then surely for as long as *Hardwick* remains "citeable law," we will continue to see our frustration, rage and grief rise. . . . As long as *Hardwick* remains, with its open permission to government and citizens alike to mistreat gay, lesbian and other sexual minority people, not only our privacy but our peace, safety, equality of opportunity and of human compassion and co-operation are jeopardized. If we are to make progress within law in this phase and quarter of the human rights movement, the monument of *Bowers v. Hardwick* must fall promptly, absolutely and irreversibly.<sup>40</sup>

#### IV. LAWRENCE V. TEXAS

On June 26, 2003 just six months after Mary's untimely death, the Supreme Court of the United States laid to rest *Bowers v. Hardwick* once and for all.<sup>41</sup> Justice Kennedy, writing for the Court, a fact that would have surprised Mary,<sup>42</sup> could not have said it more clearly: "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."<sup>43</sup>

Yes, Mary Dunlap would have rejoiced in this resounding reversal. But if she were with us today, I know she would not be silent. She'd be asking questions. What is this liberty interest that the Court has recognized? Is it a fundamental right? Will it protect elderly women in nursing homes who retain their sexual identities? Will it protect young interracial couples, gay and nongay? Is this liberty interest the beginning of the "right to be sexual"? If so, how far will it take us?

Mary, the missing scholar, would expect those of us who were her friends to help answer these questions. They are the same questions she asked in 1982, when she first argued for a right to be sexual:

What seem to be good primary elements of a "right to be sexual"? Can such a right be adequately defined by reference to sexual privacy? What of sexual expression, and what of free speech and association related to sex? How can the right be sexual, as exercised by those who insist that privacy means secrecy and non-accountability, be harmonized with the right to be sexual, as exercised by those who insist that secrecy and non-accountability in sexual matters leads to suffering, disorder in relation-

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40. Dunlap, *Continuing Toll*, *supra* note 37, at 5, 7, 38-39.

41. *Lawrence v. Texas*, 123 Sup. Ct. 2472 (2003).

42. Mary argued *Saal v. Middendorf*, 427 F. Supp. 192 (N.D. Cal. 1977), *rev'd sub nom.* *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), before Justice Kennedy when he was on the Court of Appeals for the Ninth Circuit. She lost the case. While some read Kennedy's opinion as holding out hope for gay equality in the future, Dunlap's sense of Kennedy from the personal encounters surrounding the argument was that he did not respect lesbians and gay men. I am certain she would have been thrilled to be proved wrong.

43. *Lawrence*, 123 Sup. Ct. at 2484.

ships and usurpation of disadvantaged persons?<sup>44</sup>

Good questions, Mary.

### MARY C. DUNLAP: SELECTED WORKS

SEX DISCRIMINATION IN EMPLOYMENT—APPLICATION OF TITLE VII (Mary C. Dunlap ed., 1975).

Mary C. Dunlap, *The Legal Road to Equal Employment Opportunity: A Critical View*, in AMERICAN WOMEN WORKERS IN A FULL EMPLOYMENT ECONOMY, A COMPENDIUM OF PAPERS SUBMITTED TO THE SUBCOMMITTEE ON ECONOMIC GROWTH AND STABILIZATION OF THE JOINT ECONOMIC COMMITTEE, CONGRESS OF THE UNITED STATES, 95TH CON., 1ST SESS. 61 (1977).

Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L.J. 1131 (1979). This work describes the fallacy of the “only two sexes” presumption in the American legal system and details the implication of this presumption for the constitutional claims of sexual minorities.

Mary C. Dunlap, *Where the Person Ends, Does the Government Begin? An Explanation of Present Controversies Concerning “The Right to Privacy,”* 12 LINCOLN L. REV. 47 (1981). Describing, analyzing, and criticizing the constitutional structuring of the right to privacy, Dunlap focuses on the extreme gap between an individual’s complete lack of privacy on death row and the imaginary transcendental mountaintop where one enjoys full privacy and attempts to uncover the character and core makeup of the right.

Mary C. Dunlap, *Toward Recognition of “A Right to Be Sexual,”* 7 WOMEN’S RTS. L. REP. 245 (1982). This piece examines the Supreme Court’s past cases involving sex discrimination and privacy and notes the Court’s limited recognition of privacy in certain “normative” behaviors, such as marriage and procreation. It recognizes two kinds of claims to the “right to be sexual” (authentic and destructive) and proposes “directions for the continuing struggle.”

Ellen C. DuBois, Mary C. Dunlap, Carol J. Gilligan, Catharine A. MacKinnon, & Carrie J. Menkel-Meadow, *The James McCormick Mitchell Lecture: Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFFALO L. REV. 11 (1985). Four feminists discuss the progress of feminism, and Dunlap aligns herself with a world view of total equality between the sexes rather than female—or male—superiority. This event is remembered for the moment in which MacKinnon makes her claim that all women are subservient to all men all of the time, and Dunlap asks for women who disagree to stand.

Mary C. Dunlap, *Employment*, in NATIONAL LAWYERS GUILD, SEXUAL ORIENTATION AND THE LAW 5-1 (Roberta Achtenberg ed., 1985).

Mary C. Dunlap & Jose Gomez, *First Amendment*, in NATIONAL LAWYERS GUILD, SEXUAL ORIENTATION AND THE LAW 9-1 (Roberta Achtenberg ed.,

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44. Dunlap, *Right to Be Sexual*, *supra* note 8, at 249.

1985).

Mary C. Dunlap, *Introduction to Amicus Brief in Bowers v. Hardwick*, 14 N.Y.U. REV. L. & SOC. CHANGE 949 (1986). This work addresses the patterns that had emerged in recent "hot" Supreme Court cases, especially the patterns among *amicus* briefs. The brief submitted on behalf of the Lesbian Rights Project in *Bowers v. Hardwick* (which was reprinted in the pages following Dunlap's article) followed the named patterns to a great degree. Dunlap proposed that such "vibrantly dissenting voices" must continue to inform the Supreme Court, even in the face of decisions such as *Bowers*.

Mary C. Dunlap, *Sexual Speech and The State: Putting Pornography in Its Place*, 17 GOLDEN GATE U. L. REV. 359 (1987). Taking a closer and more deliberate examination of the anti-pornography campaign following *American Booksellers v. Hudnut* and looking at the broader legal, political, and psychological consequences of the drive against pornography, the author explains why the campaign had serious and ill-considered implications for a broader category of communications, which could be called "sexual speech."

Mary C. Dunlap, *AIDS and Discrimination in the United States: Reflections on the Nature of Prejudice in a Virus*, 34 VILL. L. REV. 909 (1989). Noting that AIDS was a disease that discriminated and disproportionately affected sexual and racial minorities and intravenous drug users, Dunlap argued that (1) fear of people with AIDS, rather than fear of the HIV virus, is irrational and promotes prejudices against persons believed to be at high risk for HIV infections, and (2) the AIDS crisis was a "magnifying glass," through which the institutional strengths and weaknesses of the nation and society could be viewed.

Mary C. Dunlap, *The "F" Word: Mainstreaming and Marginalizing Feminism*, 4 BERKELEY WOMEN'S L.J. 251 (1989). Noting that "feminism" was widely perceived as a "dirty" word, the author stresses the power of the word to challenge and provoke change. Dunlap posits several other "F" words that were in greater need of consideration: *five-four* (as in the 5-4 "Gay Olympics" and *Frontiero v. Richardson* decisions), *fetus fetishism* (regarding the Court's forays into the abortion controversy), the *fanatical* right and other frightful "F" words, and legal *fictions* (such as the reasonable man standard and equal justice under law).

Mary C. Dunlap, *Law and Society: Foundering on the Seas of Hopelessness*, 87 MICH. L. REV. 1366 (1989) (reviewing RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* (1988)). Dunlap criticizes Mohr's reliance on stereotypes and argues that he should have developed analogies to other civil rights movements and abuses.

Mary C. Dunlap, *The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 L. & SEXUALITY 63 (1991). This work explores the array of policy issues that arise from the possibility of permitting same-sex marriage in the United States and considers not only the widespread legalistic and feminist criticisms of the institution of marriage, but also the personal and cultural experiences that come with the institution. Dunlap be-

lieved that some civil rights lawyers would in the not-so-distant future conduct a campaign to provide same-sex marriage. If only she could see where we are today in 2004.

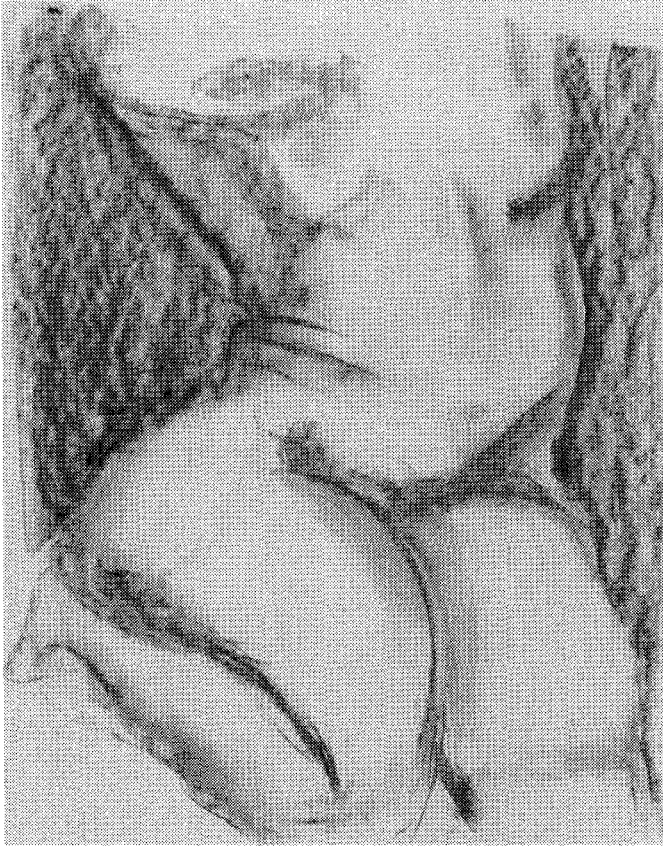
Mary C. Dunlap, *Mediating the Abortion Controversy: A Call for Moderation, or for One-Sided Etiquette While the Bombs Keep Flying?*, 30 WASHBURN L.J. 41 (1990-1991) (reviewing LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990)). Dunlap criticizes Tribe for the lack of attention given to the sex discrimination aspects of the abortion debate and for his silence as to the effects of *Bowers v. Hardwick* on the *Roe v. Wade* decision.

Mary C. Dunlap, *Gay Men and Lesbians Down by Law in the 1990's USA: The Continuing Toll of Bowers v. Hardwick*, 24 GOLDEN GATE U. L. REV. 1 (1994). Dunlap argues that the post-*Bowers* situation for the GLBT population was even more dire than many realized. She points out that while some members of the community attempted to work through the courts, others engaged in acts of civil disobedience, and others in "outing" to draw "confrontational reaction against that person's closeted identity."

Mary C. Dunlap, *Are We Integrated Yet? Pursuing the Complex Question of Values, Demographics and Personalities*, 29 U.S.F. L. REV. 693 (1995). This piece is an essay about Title VII and stereotypes, in which she contrasts Justice Thurgood Marshall with Justice Clarence Thomas.

Mary C. Dunlap, *Choosing*, in *SAME-SEX MARRIAGE: PRO AND CON* 124-28 (Andrew Sullivan ed., 1997).

Mary C. Dunlap, *Trial Practice in Civil Cases Concerning Gender-Motivated Violence*, in *VIOLENCE AGAINST WOMEN: LAW AND LITIGATION* 12-1 (David Frazee, Ann M. Noel, Andrea Brenneke, & Mary C. Dunlap eds., 1997).



*Nude*, by  
Mary Dunlap  
(1992)  
Charcoal,  
18" x 24"

# Postscript

The Boalt Hall Queer Caucus established the Mary C. Dunlap Memorial Fellowship in 2004 to provide grants to Boalt Hall students spending their summer working with traditionally invisible or underserved segments of the queer community, broadly defined (for example, projects assisting transgendered or intersex individuals, addressing issues of lesbian health, or working on behalf of LGBTQ people of color). For information, please contact the Caucus at [caucus@law.berkeley.edu](mailto:caucus@law.berkeley.edu).

Additionally, an annual lecture series in Mary's name will be hosted by the Center for Social Justice starting in early 2005. For information, please contact Mary Louise Frampton, Director of the Center for Social Justice, at [csj@law.berkeley.edu](mailto:csj@law.berkeley.edu).

Mary Dunlap's poetry and artwork courtesy of Maureen C. Mason.