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POISED AT THE THRESHOLD: SEXUAL ORIENTATION, LAW, AND THE LAW SCHOOL CURRICULUM IN THE NINETIES

Jane S. Schacter*

LESBIANS, GAY MEN, AND THE LAW. Edited by *William B. Rubenstein*. New York: The New Press. 1993. Pp. xxi, 569. \$30.

If timing is everything, then Bill Rubenstein¹ got it just right. The publication of *Lesbians, Gay Men, and the Law*, the first comprehensive work on sexual orientation and the law suitable for use as a law school casebook, could hardly have come at a more propitious time. The events of 1993 brought a new high profile to the contested relationship between sexual orientation and the law. In terms of sheer media saturation, nothing rivaled the controversy over lifting the ban on gay men and lesbians in the military,² but that was by no means the only issue that put gay rights so decisively on the national screen. Homosexuality and the law collided conspicuously elsewhere, including in the growing spate of antigay ballot measures,³ a constitutional challenge to Colorado's restrictive referendum measure,⁴ a Hawaii Supreme Court decision portending the possible legalization of gay

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1. Director of the American Civil Liberties Union's national Lesbian and Gay Rights Project and lecturer at Harvard Law School, where he has taught a course on sexual orientation and the law.

2. For a description of the so-called "don't ask, don't tell" policy that the controversy spawned, see Michael R. Gordon, *Pentagon Spells Out Rules for Ousting Homosexuals; Rights Groups Vow a Fight*, N.Y. TIMES, Dec. 23, 1993, at A1. For perspectives on the military ban and its history, see ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE* (1990); RANDY SHILTS, *CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY* (1993).

3. Lisa Keen, *Referendums and Rights: Across the Country, Battles Over Protection for Gays and Lesbians*, WASH. POST, Oct. 31, 1993, at C3.

4. *Evans v. Romer*, 63 Empl. Prac. Guide (CCH) ¶ 42,719 (Colo. Dist. Ct. Dec. 14, 1993) (ruling that the Colorado Constitution's Amendment 2, which invalidates local gay civil rights laws and bars the enactment of future state or local gay civil rights laws, violates the Equal Protection Clause of the Federal Constitution); *see also* *Evans v. Romer*, 854 P.2d 1270 (Colo.) (earlier decision by the Colorado Supreme Court upholding a preliminary injunction preventing the enforcement of Amendment 2 pending trial and finding the plaintiffs likely to succeed on the merits of their constitutional challenge), *cert. denied*, 114 S. Ct. 419 (1993); *see generally* Note, *Constitutional Limits on Anti-Gay Initiatives*, 106 HARV. L. REV. 1905 (1993).

marriage in that state,⁵ a judge's ruling in Virginia denying a lesbian custody of her young son,⁶ and heated debates over the right of gays and lesbians to march in St. Patrick's Day parades.⁷ The new primacy of gay-related issues was as much political and cultural as legal. A massive crowd of gay men and lesbians and their supporters marched on Washington in support of civil rights,⁸ covers of major national magazines turned to the subject,⁹ and, by midyear, the unlikely phenomenon of "lesbian chic" was extensively noted in the mainstream press.¹⁰

Rubenstein's book thus comes at a time when many have called the law's stance toward sexual orientation sharply into question. Basic premises about homosexuality — its definition, its properties, its place in contemporary collective life — are the subjects of intense debate. What seems clearest, for the moment, is that normative legal questions about sexual orientation will face close examination and, perhaps, progress toward resolution in the 1990s.

Fortunately, good timing is not the only quality that distinguishes *Lesbians, Gay Men, and the Law*. Rubenstein, director of the American Civil Liberties Union's Lesbian and Gay Rights Project and a lecturer on sexual orientation and the law at Harvard Law School, has masterfully collected, organized, and edited the emerging body of law governing homosexuality, as well as a wide range of nonlegal materials that provide perspective on and insight into the social fact of homosexuality. Nothing that preceded this book had its depth and range.¹¹

5. *Baehr v. Lewin*, 852 P.2d 44 (Haw.) (ruling that, under the state constitution's equal rights clause, a statute restricting marriage to male and female partners is presumed to be unconstitutional and must be invalidated unless, at trial, the state can show a compelling state interest and can demonstrate that the statute is narrowly drawn to avoid unnecessary abridgement of constitutional rights), *reconsidered in part and clarified*, 74 Haw. 645 (1993).

6. B. Drummond Ayres, Jr., *Judge's Decision in Custody Case Raises Concerns*, N.Y. TIMES, Sept. 9, 1993, at A16.

7. Tom Mashberg, *Gays and the Parade: Boston, New York City Views Differ*, BOSTON GLOBE, Mar. 18, 1993, at 3; Richard Pérez-Peña, *Judge Allows Group to Bar Gay Marchers*, N.Y. TIMES, Feb. 27, 1993, at 21.

8. Richard L. Berke, *Milestone for Gay Rights*, N.Y. TIMES, Apr. 26, 1993, at A1.

9. *See, e.g.*, ATLANTIC, Mar. 1993; NATL. REV., Apr. 26, 1993; NATION, May 3, 1993; NEW REPUBLIC, May 10, 1993; NEWSWEEK, June 21, 1993; U.S. NEWS & WORLD REP., July 5, 1993.

10. *See, e.g.*, Sylvia Rubin, *The New Lesbian Chic*, S.F. CHRON., June 22, 1993, at B3; Elizabeth Snead, *Lesbians in the Limelight*, USA TODAY, July 13, 1993, at 1D; Kara Swisher, *We Love Lesbians! Or Do We? 'Hot' Subculture — or Just Hurtful Stereotypes*, WASH. POST, July 18, 1993, at C1.

11. Before this book was published, there was no single text adaptable to use in a law school course about sexual orientation and the law. The books treating legal issues relating to gay men and lesbians most comprehensively were NAN D. HUNTER ET AL., *THE RIGHTS OF LESBIANS AND GAY MEN* (3d ed. 1992) (a handbook published by the American Civil Liberties Union that sets out, in question-and-answer format, the current state of the law on a broad range of topics); NATIONAL LAWYERS GUILD, *SEXUAL ORIENTATION AND THE LAW* (Roberta Achtenberg & Karen B. Moulding eds., 6th release 1993) (a treatise); THE EDITORS OF THE HARVARD LAW REVIEW, *SEXUAL ORIENTATION AND THE LAW* (1990) (a broad narrative survey of "legal problems faced by gay men and lesbians" adapted from a law review article); *cf.* ARTHUR S.

The publication of *Lesbians, Gay Men, and the Law* provides an opportunity to reflect upon how legal education might be part of the process of negotiating the relationship between sexual orientation and law. In this review I focus on two aspects of the book that can yield important insights concerning this question: its pedagogy and its potential to institutionalize courses covering homosexuality in the law school curriculum.

I. LESBIANS, GAY MEN, AND THE LAW AS PEDAGOGY

A. Overview and Organization of the Book

Lesbians, Gay Men, and the Law is ambitious in scope and inventive in pedagogy. The book covers a wide array of topics and traverses many conventional legal domains. It principally emphasizes constitutional, criminal, family, and antidiscrimination law, but it also covers issues implicating tort, property, contract, probate, and immigration law. While this impressive sweep of subject matter strengthens the book, Rubenstein wisely eschews doctrinal organization in favor of a more imaginative, thematic approach. The book begins with an introduction and a first chapter providing some conceptual tools for thinking about the law and homosexuality (pp. xv-76); it ends with two essays by activists that reflect upon the past and future of the gay rights movement (pp. 563-68). In between are the five principal chapters, each of which corresponds to a major aspect of gay and lesbian life: "The Regulation of Lesbian and Gay Sexuality" (pp. 77-154); "The Regulation of Lesbian and Gay Identity: Coming Out — Speaking Out — Joining In" (pp. 155-242); "Lesbians and Gay Men in the Workplace" (pp. 243-376); "Legal Recognition of Lesbian and Gay Relationships" (pp. 377-474); and "Lesbian and Gay Parenting" (pp. 475-562).

Among its other virtues, this organization effectively communicates the idea that institutionalized discrimination still pervades the lives of gay men and lesbians. As the book moves to each area in which formal exclusion and stigma are still the rule, the materials powerfully evoke the sense of sequential legal and social barriers that many gay men and lesbians will find familiar.

Rubenstein richly documents these legal barriers. For example, the early chapter on regulation of sexual activity focuses on the central American legal text regarding homosexuality, the Supreme Court's decision in *Bowers v. Hardwick*.¹² In *Hardwick*, the Supreme Court rejected a privacy-based challenge to a law criminalizing consensual

LEONARD, SEXUALITY AND THE LAW: AN ENCYCLOPEDIA OF MAJOR LEGAL CASES (1993) (collecting major cases concerning sexuality more generally); RUTHANN ROBSON, LESBIAN (OUT)LAW (1992) (a collection of the author's essays relating to lesbians and the law).

12. 478 U.S. 186 (1986) (reprinted at pp. 132-48).

sodomy. Although the Court decided only that the constitutional right to privacy did not invalidate Georgia's sodomy law, the decision is often invoked by opponents of gay and lesbian rights as a broader trump card.¹³ Indeed, some courts have reasoned that, if the Constitution permits the criminalization of gay sexual activity, then gay men and lesbians cannot claim heightened protection from discrimination under the rubric of the Equal Protection Clause.¹⁴ Materials in this and later chapters (pp. 341-67, 502-03) enable readers to consider just how long a legal shadow *Hardwick* casts. To its credit, the book poses this relatively abstract, doctrinal question without losing sight of the excruciatingly human dimension of the case and of the larger issue it raises. Juxtaposed with the *Hardwick* majority opinion's disembodied references to "criminalized consensual sodomy" (p. 132) is an interview with Michael Hardwick, in which he recounts the very concrete story of being arrested while making love in his bedroom (pp. 125-31).

As the book moves from sexuality to other aspects of gay and lesbian lives, it continues to paint a picture of broad legal constraint. Successive chapters document, for example, that under federal antidiscrimination law and the cognate laws of forty-two states, employers may still lawfully fire people based on their sexual orientation;¹⁵ that gay men and lesbians remain formally relegated to the outside of powerful cultural institutions like marriage and the military;¹⁶ and that, in

13. See Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1733-40 (1993) (discussing the multiple contexts in which opponents of gay rights broadly deploy rhetoric about sodomy in general and *Hardwick* in particular).

14. In the chapter on discrimination, the book includes the opposing opinions on this question from *Watkins v. United States Army*, 837 F.2d 1428 (9th Cir. 1988), *affd. en banc on other grounds*, 875 F.2d 699 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990), *reprinted at* pp. 342-67. See also *Steffan v. Aspin*, 8 F.3d 57 (D.C. Cir. 1993), *judgment vacated, reh. en banc granted*, No. 91-5409, 1994 U.S. App. LEXIS 9977 (D.C. Cir. Jan. 7, 1994); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987), *reprinted at* pp. 319-25. For thoughtful analyses of the implications of *Hardwick* for equal protection claims, see Patricia A. Cain, *Litigating for Gay and Lesbian Rights: A Legal History*, 79 VA. L. REV. 1551, 1612-41 (1993); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989); Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531 (1992); Cass Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988).

15. Pp. 243-334. The book lists seven states, in addition to the District of Columbia, with gay civil rights protection: California, Connecticut, Hawaii, Massachusetts, New Jersey, Vermont, and Wisconsin. P. 270. Since the book's publication, Minnesota has become the eighth state to enact such a law. See MINN. STAT. ANN. §§ 363.01-.03 (West 1991 & Supp. 1994). In addition, the book notes that some municipalities include sexual orientation in antidiscrimination ordinances even when the relevant state law does not. P. 270.

16. Pp. 377-430, 334-75. The book was published before the advent of the "don't ask, don't tell" policy governing gay men and lesbians in the military. See *supra* note 2. Notwithstanding the attention generated by its adoption, the policy appears to represent only a minor change from the previous policy. See John Lancaster & Ann Devroy, *Clinton Plan Bars Most Gay Conduct*, WASH. POST, July 17, 1993, at A1; Eric Schmitt, *Military Praises Gay Policy for Ambiguity and Caution*, N.Y. TIMES, July 22, 1993, at A14.

the context of family law, gay men and lesbians struggle daily to maintain or to establish legal bonds with their children (pp. 475-562). As the book explores the ways in which gay men and lesbians are subject to pervasive forms of disadvantage, moreover, Rubenstein does not treat the experience of homosexuality as a monolith. By incorporating the perspectives of African Americans and Latinos, for example,¹⁷ the book enables teachers to explore the ways in which race, like gender, ethnicity, and class, can fracture, influence, and intersect the experience of homosexuality.

Even as the book chronicles the continuing institutionalized subordination of gay men and lesbians, however, Rubenstein adeptly captures the ambiguous state of the struggle for gay and lesbian equality. That struggle is more a story of overlapping progress, regress, and stasis than one of unbroken defeat. Since the contemporary movement for what was once termed *gay liberation* began in 1969 with a riot at a New York City bar raided by police one too many times,¹⁸ much has changed for gay men and lesbians in this country. In addition to noting important dimensions of cultural and social change,¹⁹ the book provides good coverage of the legal victories thus far. Rubenstein notes, for example, the elimination of twenty-six state sodomy laws since 1961 through repeal or invalidation (pp. 80, 87-88); the hard-won enactment of civil rights laws in several states and municipalities²⁰ and domestic partnership ordinances in several municipalities (pp. 439-43); judicial decisions in some states affording gay men and lesbians the right to adopt a partner's biological child²¹ or rejecting homosexuality as a per se basis for denying custody or visitation (p. 492); the movement in some cases toward a more functional definition of family (pp. 448-61); and several important free speech victories (pp. 167-77, 215-16, 223-28). To be sure, the ideological and political right has greeted many of these advances with redoubled activism, and anti-

17. See, e.g., pp. 40-45 (reprinting Richard Goldstein's interview with James Baldwin, in which Baldwin discusses, among other things, how the "sexual question and the racial question have always been entwined"); pp. 239-42 (reprinting Charles Fernandez's essay *Undocumented Aliens in the Queer Nation*, in which Fernandez criticizes "queer nationalism" that takes the form of a "white-led movement with limited racial consciousness"); pp. 476-80 (reprinting Audre Lorde's essay *Man Child: A Black Lesbian Feminist's Response*, in which Lorde reflects upon her experience as a lesbian parent and notes that "Black children of lesbian couples have an advantage because they learn, very early, that oppression comes in many different forms, none of which have anything to do with their own worth").

18. See MARTIN DUBERMAN, *STONEWALL* (1992); Cain, *supra* note 14, at 1580-83.

19. See, e.g., pp. 62-68 (reprinting a Ronald Bayer essay describing the process that culminated in the American Psychiatric Association's ceasing to view homosexuality as a disease in 1973); pp. 188-92 (reprinting a John D'Emilio essay describing the improved climate for gay men and lesbians on university campuses, while noting continuing areas of concern).

20. P. 270. See *supra* note 15.

21. Pp. 532-36. In the wake of the New York trial court decision reported in the book (pp. 532-36), two state supreme courts have recognized the right of a lesbian to adopt her partner's biological child. Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); Adoption of B.L.V.B., 628 A.2d 1271 (Vt. 1993).

gay violence seems with dismaying consistency to accompany the assertion of gay rights.²² Nevertheless, the slow, if interrupted, accretion of legal victories reflects that supporters and opponents of gay rights have engaged the social and legal debate.

B. *Crossing Disciplinary Boundaries*

Lesbians, Gay Men, and the Law is anchored by a central pedagogical choice: to be relentlessly interdisciplinary in presenting the material. The book presents a deeply contextual picture of gay and lesbian lives — a picture in which the reader can see legal rules and doctrines as part of a larger social and cultural landscape. This contextuality is reflected, for example, in the very organization of the book. By focusing on aspects of gay and lesbian lives — the workplace or parenting — instead of on legal constructs — equal protection or privacy — the book enables students and teachers to step outside particular doctrinal vacuums and to consider how legal, social, cultural, and political forces fuse and interact to create rules and attitudes about homosexuality.

Rubenstein's interdisciplinary perspective is, moreover, apparent in the contents of every chapter in the book. He consistently interweaves with standard legal sources — such as cases, statutes, and law review articles — rich and illuminating materials from other disciplines that document the historical, social, and political aspects of gay and lesbian lives and struggles. He draws from history, medicine, politics, psychology, fiction, poetry, autobiography, and popular culture. When I used parts of Rubenstein's then-unpublished materials in my own course on sexual orientation and the law at the University of Wisconsin Law School, this diversity of material strongly encouraged students to think hard about law reform, its limits, and its sometimes elusive interaction with the social forces that surround and shape law. Reading about the experiences of individual gay men and lesbians and about the changing social history of homosexuality in the United States gave students important perspectives on the caselaw they studied. For some students, these perspectives were new; for others, they were quite familiar. In either case, the readings enriched the range and quality of class discussion.

The book's approach to the question of gay marriage is a good example. Rubenstein might well have limited his treatment of the subject to the thoughtful and well-edited collection of legal texts he presents. In addition to a necessarily succinct statement of the existing law on marriage between same-sex partners — no American jurisdiction currently permits it — the book includes portions of the

22. I consider this backlash, and its implications for gay rights and civil rights law more generally, in Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. (forthcoming 1994); see also Note, *supra* note 4.

caselaw rejecting challenges to the gay marriage ban as unconstitutional,²³ as well as *Loving v. Virginia*,²⁴ which declared unconstitutional a Virginia statute banning marriage between people of different races.²⁵ The book also includes materials about other ways that gay men and lesbians have sought to structure their relationships in lieu of marriage, such as contractual arrangements, domestic partnership where available, and the adoption of one partner by another (pp. 431-47). The book also communicates the many practical consequences of the marriage ban in two ways: by concisely listing the many rights and benefits that are granted automatically upon marriage (pp. 430-31) and by including cases and notes that explore these consequences in more depth — including the tragic battles over guardianship that can ensue when one partner in a couple is incapacitated and her biological family seeks to sever contact with her lesbian partner.²⁶

These materials would have been perfectly adequate, but the book paints a far richer and more complex picture than these legal texts alone could have yielded. Also included, for example, are materials probing the experiences of gay and lesbian couples within a social and legal framework that systematically marginalizes their relationships. Especially effective here are narratives from inside gay and lesbian relationships, which teachers can use to give texture and particularity to the psychic reality of lovers who forge relationships within a repressive cultural regime. The book includes, for example, the late Audre Lorde's *Tar Beach*, in which Lorde explores the particular ways in which a love affair with another African-American woman affected her with "the resonance and power of an emotional tattoo" (pp. 378-86). The book also includes Paul Butler's *At Least Me and Rafael*

23. This is one of several places in the book where the perils of trying to cover such a rapidly evolving area are apparent. The Hawaii Supreme Court's decision in *Baehr v. Lewin*, potentially historic for gay men and lesbians, was apparently handed down too late to appear in the book. That decision, which returned the case to a lower court for trial, strongly suggests that Hawaii's ban on gay marriage violates the state's equal rights clause. See *supra* note 5. Only the intermediate appellate court's decision in *Baehr* is mentioned in the book. P. 418.

24. 388 U.S. 1 (1967) (reprinted at pp. 391-96).

25. Pp. 391-96. On the relevance of *Loving* to the ban on gay marriage, see Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187; Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988); and James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93 (1993).

26. Pp. 448-74. Prominently featured here is *In re Guardianship of Kowalski*, 478 N.W.2d 790 (Minn. Ct. App. 1991) (reprinted at pp. 468-74), which is an icon of sorts in the gay and lesbian community because it so dramatically captures the vulnerability of partners who are unable to marry. The case involves Sharon Kowalski who, after suffering disabling injuries in a car accident, became the subject of a fierce struggle between her parents and her long-time lesbian partner Karen Thompson. During the protracted battle, Kowalski's parents sought to bar Thompson from seeing Kowalski. Ultimately, that attempt failed when an appellate court found that Kowalski had the capacity to express her preference and that she clearly wanted to remain with her partner. The ordeal is one from which married couples are spared by virtue of next-of-kin laws. For a trenchant analysis of the *Kowalski* case and its implications for gay and lesbian couples, see Nan D. Hunter, *Sexual Dissent and the Family*, NATION, Oct. 7, 1991, at 406.

Tried, which describes a relationship between two men that ends when one partner cannot sustain the relentlessly hypermasculine affectations that his lover Rafael demands. The story powerfully suggests a link among Rafael's demands, his partner's self-concept, and the internalized homophobia of both (pp. 386-90). These stories can lay a foundation for a probing consideration of the deeper social consequences of delegitimizing gay and lesbian relationships. They evoke, at once, so many things: the ways in which love and passion seem universal; the intense emotional terrain that gay and lesbian lovers inhabit together, in the face of a society that widely denies or derides the existence of their relationship; and the ways in which that terrain can be a source of both joy and pain.

The materials on gay marriage are yet more complex, for they enable readers to go beyond considering only the fairness of excluding gay men and lesbians. While squarely presenting questions of equity and constitutionality, the book also permits teachers to explore questions about social practice and strategy. The book notes, for example, that, notwithstanding the legal ban on marriage, a relatively high percentage of gay couples wear rings or have had a commitment ceremony of some kind, and some newspapers now carry gay "wedding" announcements (p. 420). In addition to describing these social practices, the book poses the provocative normative question of whether gay men and lesbians ought to seek the right to marry at all. Rubenstein includes what has become a classic exchange within the gay and lesbian community, in which gay rights lawyers Paula Ettlebrick and Tom Stoddard debate whether securing the right of gay marriage is a worthy or liberating goal.²⁷ Ettlebrick argues that the institution of marriage has perpetuated the subordination of women and should not provide the model for gay and lesbian unions (pp. 401-05). Stoddard, by contrast, argues that the ban on gay marriage is central to the broader subordination of gay men and lesbians and that opening marriage to homosexuals will necessarily transform the institution (pp. 398-401). Readers are invited into that debate and, in the process, to think hard about the linkage among legal structures, historical experience, and the dynamics of social change.

In the end, the interdisciplinary emphasis of the book is a source of great pedagogical strength. In part, this is because integration of non-legal materials makes the book much richer and more interesting than

27. Pp. 398-405. The Ettlebrick-Stoddard exchange has spawned a growing literature on this question, including Symposium, *The Family in the 1990s: An Exploration of Lesbian and Gay Rights*, 1 LAW & SEXUALITY 1 (1991). Excerpts from that symposium appear in notes in the book that follow the Ettlebrick-Stoddard exchange. Pp. 405-06. For more recent perspectives on this question, see William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1486-511 (1993); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535 (1993).

a traditional casebook would have been. However, the major contribution of the diverse material is to enable teachers to call into question the autonomy of legal rules about sexual orientation. By its very composition, the book presses the reader to think, not only about law and doctrine, but also about how larger social structures and beliefs infuse, shape, and help to constitute law. That enterprise is central to thinking about gay and lesbian issues, and law and inequality more generally. Struggles for equality are and should be waged in legal domains, but they cannot be confined there. With or without law reform, the battle must likewise be waged in social and cultural domains,²⁸ and this book adroitly underscores that point.

C. *The Paradigm Search*

One of the most salient aspects of contemporary gay rights debates, in both the judicial and legislative arenas, is the search for a way to think about sexual orientation and the stance the law ought to take in relation to it. We are, in a fundamental sense, debating how to think about some basic questions: What *is* sexual orientation? What are its origins in individuals? What are its origins as a social category? What is its significance in people's lives? Should we make sexual orientation a generally impermissible criterion of decision or exclusion, as race is, and as gender sometimes is? Do ideas about civil rights apply to sexual orientation with the same force as they apply to other bases of protected group status? How should we think about the larger community's interest in forging sexual norms in a pluralist democracy? These sorts of questions underscore the need for more sharply conceptualizing the legal significance of homosexuality. For those interested in pursuing gay justice, the evolution of such conceptual frameworks will, inevitably, be an important part of shaping how rules and doctrines governing sexual orientation are made and remade.

This ongoing search for premises and paradigms poses important challenges for teaching sexual orientation and the law. Unlike other areas of civil rights law, for example, where the country has reached at least a *formal* — if lamentably thin — social and legal consensus, no clear consensus has yet to emerge in relation to homosexuality. Indeed, given *Hardwick*, teaching a course about sexual orientation and the law today is, in this respect, something like teaching race and the law would have been after *Plessy*²⁹ and before *Brown*;³⁰ much is still up for grabs. In a contemporary course about race or gender discrimination, for example, discussion is likely to focus on the forms, legitimacy, and efficacy of particular legal remedies and doctrines, but few

28. I explore the symbiotic relationship between legal and social forces relating to homosexuality in more depth in Schacter, *supra* note 22.

29. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

30. *Brown v. Board of Education*, 347 U.S. 483 (1954).

will challenge the general proposition that overt discrimination is wrong and properly made illegal. As communicated by recent public debates about gays in the military and the enactment of gay civil rights laws, however, the same cannot yet be said in the context of homosexuality.

This instability and flux makes clear the centrality of developing paradigms in this area of law as we sort through the "metaquestions" that are as yet unanswered. Social and legal theory are, in this sense, a vital part of the enterprise of thinking about sexual orientation and the law, in the classroom and beyond. Unfortunately, the book does not emphasize theoretical materials considering these sorts of questions. While the materials otherwise draw from a wide and rich array of disciplines, there are relatively few readings from social and legal theory that engage the large and overarching questions. Rubenstein is mindful of these kinds of questions, as the introductory and first chapters, which I describe below,³¹ provide some material that speaks to the larger questions at stake. Given his considerable abilities, however, the book left me wishing that he had both *expanded* and further *integrated* materials of this kind. This is true in terms of what some call contemporary *lesbian and gay studies* or *queer theory*, strains of which follow the lead of Michel Foucault³² and emphasize the ways in which sexuality is socially constructed.³³ It is also true in terms of more general theories and critiques about some of the legal doctrines that figure centrally in the law relating to sexual orientation, such as privacy and equality theory.³⁴

The introductory chapter lays the intellectual groundwork for theoretical explorations by presenting material that illustrates how the very conception of homosexuality has shifted among social domains — from a theologically based model of "sin" to a medically based model of "sickness" to a socially based, contested model of "identity"

31. See *infra* notes 35-47 and accompanying text.

32. The leading work is 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (Robert Hurley trans., Vintage Books 1978) (1976).

33. Good examples include *FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY* (Edward Stein ed., 1990); *THE LESBIAN AND GAY STUDIES READER* (Henry Abelove et al. eds., 1993); Teresa de Lauretis, *An Introduction: Queer Theory: Lesbian and Gay Sexualities*, 3 *DIFFERENCES* iii (1991). For work exploring the question of social construction expressly within the context of law, see several of the contributions in *Symposium on Sexual Orientation and the Law*, 79 *VA. L. REV.* 1419 (1993); see also William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 *YALE L.J.* 333 (1992) (reviewing RICHARD A. POSNER, *SEX AND REASON* (1991)).

34. See, e.g., Eskridge, *supra* note 33; Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 *U. MIAMI L. REV.* 511 (1992); Halley, *supra* note 14; Law, *supra* note 25; David A.J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 *N.Y.U. L. REV.* 800 (1986); Sunstein, *supra* note 14; Kendall Thomas, *Beyond the Privacy Principle*, 92 *COLUM. L. REV.* 1431 (1992); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 *HARV. L. REV.* 1285 (1985).

(pp. 1-76). This chapter includes some of Kinsey's famous research modeling sexual orientation as a continuum, rather than a heterosexual-homosexual dichotomy (pp. 1-15). It also includes a summary of recent research suggesting an innate, organic basis for sexual orientation (pp. 15-20). Finally, it includes an essay by historian John Boswell that discusses the constructivist-essentialist debate about sexual orientation that has become so central to scholars interested in gay and lesbian studies (pp. 21-25). That debate explores whether homosexuality is a stable, continuous, and transhistorical construct, consistently traceable through different eras and social arrangements, or, instead, whether it is fluid, historically contingent, and culturally constructed.³⁵

These materials in the opening chapter give teachers building blocks for questioning the very concept of homosexuality and exploring what theorist Eve Sedgwick calls the questions of *ontogeny* — the origins of same-sex attraction in individuals — and *phylogeny* — the origins and ramifications of the category *homosexual* to describe such attraction.³⁶ But some of the richest pedagogical opportunities lie in working with these kinds of questions within the context of specific legal issues.

For example, the origins of homosexuality figure prominently in traditional equal protection doctrine, which treats the "immutability" of a group characteristic as relevant to determining whether such a characteristic is a suspect classification that triggers heightened scrutiny.³⁷ Immutability is one way to talk about the notion, implicit or explicit in many approaches to civil rights questions, that discrimination is somehow least defensible when based on a characteristic not of an individual's own "making." The chapter in the book covering discrimination against gay men and lesbians in the workplace thus offers a highly relevant context for exploring the new scientific research suggesting an organic basis for homosexuality,³⁸ critiques of that new scientific work,³⁹ normative critiques of immutability as an element of

35. See Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833, 1833 (1993). The sources cited in note 33, *supra*, explore these questions in depth.

36. EVE K. SEDGWICK, *THE EPISTEMOLOGY OF THE CLOSET* 40 (1990).

37. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion); see Halley, *supra* note 14.

38. For the leading recent studies, see SIMON LEVAY, *THE SEXUAL BRAIN* (1993); J. Michael Bailey & Richard C. Pillard, *A Genetic Study of Male Sexual Orientation*, 48 ARCHIVES OF GEN. PSYCH. 1089 (1991); and Dean H. Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCIENCE 321 (1993). For a good overview, see generally Chandler Burr, *Homosexuality and Biology*, ATLANTIC, Mar. 1993, at 47.

39. See, e.g., William Byne & Bruce Parsons, *Human Sexual Orientation: The Biologic Theories Reappraised*, 50 ARCHIVES GEN. PSYCHIATRY 228 (1993); Darrell Y. Rist, *Sex on the Brain: Are Homosexuals Born That Way?*, NATION, Oct. 19, 1992, at 424.

equality doctrine,⁴⁰ and literature exploring the link between the origins of homosexuality and its social construction.⁴¹

A similarly appropriate context for thinking about these questions is the chapter on parenting. Decisions involving the right of gay men and lesbians to child custody, visitation, or adoption, for example, frequently consider whether homosexuality may be “learned” by a child raised by gay or lesbian parents (pp. 484, 496, 502, 506, 513). Putting aside the value-laden assumption that such learning would necessarily be bad,⁴² this set of legal issues presents an opportunity to explore how people come to identify themselves as gay or lesbian, as well as the implications of particular ways of thinking about that question.

In a different way, the chapter on regulation of sexual activity would have been enriched by readings exploring and critiquing the premises of liberal privacy theory. The book contains excellent materials on the Supreme Court’s privacy jurisprudence, its decision in *Bowers v. Hardwick*,⁴³ and the law before and after *Hardwick*. Justice White’s opinion for the majority in *Hardwick* and Justice Blackmun’s dissent stake out classic positions on the right of privacy. These positions roughly correspond to those represented in the famous Hart-Devlin debate provoked by the recommendation of the British Wolfenden Committee to decriminalize consensual homosexual acts.⁴⁴ Justice White emphasizes the community’s prerogative to set moral standards through criminal law, echoing Devlin; Justice Blackmun emphasizes the importance of individual autonomy, the centrality of sexual orientation to “personhood,” and the claim that consensual adult homosexuality visits no harm upon others, echoing Hart. Although *Hardwick* captures these important poles of thought about liberal privacy theory, standing outside privacy theory and interrogating its premises can meaningfully deepen and enrich the debate.⁴⁵

Several critical perspectives on privacy theory in general, and regulation of sodomy in particular, can be useful in expanding the debate.

40. See Halley, *supra* note 14.

41. See *supra* note 33.

42. On the cultural depth of this assumption, see SEDGWICK, *supra* note 36, at 42.

43. 478 U.S. 186 (1986), *reprinted at* pp. 132-48.

44. See PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965); H.L.A. HART, *LAW, LIBERTY, AND MORALITY* (1963); see also Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 *YALE L.J.* 1073, 1093-98 (1988) (correlating *Hardwick* opinions with the Hart-Devlin debate).

45. Although *Hardwick* has — at least for the moment — resolved the privacy-based challenge to sodomy statutes under federal law, state courts are still grappling with the issue under state constitutions. Rubenstein notes that, since *Hardwick*, courts in Kentucky, Michigan, and Texas have struck down sodomy statutes based on state constitutional provisions. P. 153. Moreover, core premises of liberal privacy theory are centrally in play in the larger debate about gay rights insofar as that debate frequently focuses on the uncertain boundary between individual freedom and community values. Thus, privacy theory remains fertile ground for exploration, notwithstanding the *Hardwick* result.

Rubenstein briefly alludes to the progressive-communitarian critique of privacy theory, which challenges the insistence on government neutrality that is central to liberal notions of privacy. A note following *Hardwick* excerpts portions of political theorist Michael Sandel's plea for moral argument in constitutional values, as opposed to an ideology of disinterested toleration.⁴⁶ Sandel argues that constitutional rules must embrace, not bracket, substantive questions of "the good." His conception of privacy would accord constitutional protection to gay and lesbian sexuality because of "the human goods the practices realize," not the "autonomy the practices reflect" (p. 150). Another strand of the progressive-communitarian critique, not included in the book, appears in work pursuing principles of civic republicanism. In this context, critics focus on including traditionally marginalized voices — including those of gay men and lesbians — in community dialogue and collective deliberation about conceptions of the good.⁴⁷ These kinds of critiques challenge, from the left, the traditional liberal insistence on state agnosticism about moral choices and pursue a more affirmative case for homosexuality.

Given the increasing progressive appetite for communitarian claims like these,⁴⁸ Rubenstein might have expanded the brief excerpt from Sandel that he includes. Had he done so, the book could have usefully probed the premises of progressive communitarianism more generally. Left-inspired calls for shared communal values create a dilemma. While progressive communitarians frequently make such arguments in defense of gay rights, these claims recall — ominously, if unintentionally — the conservative defense of community values that so strongly characterized the *Hardwick* majority opinion. Liberal responses to progressive communitarianism provide a good vehicle for exploring this dilemma in greater depth.⁴⁹

Rubenstein does not incorporate three other potentially useful perspectives on privacy theory. Each one stands outside the privacy debate and, by offering a critical perspective, can contribute to the search for paradigms. First, feminist critiques of privacy theory explore the ways in which insulating the private sphere from state interference can oppress women. Such work views legal rules rooted in concepts of individual autonomy as having a gendered quality, or at least a

46. See pp. 150-51. The article excerpted is Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521 (1989). It is part of the thoughtful *Symposium on Law, Community, and Moral Reasoning*, 77 CAL. L. REV. 475 (1989).

47. See, e.g., Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

48. See generally Stephen Gardbaum, *Law, Politics and the Claims of Community*, 90 MICH. L. REV. 685 (1992); Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988); cf. William A. Galston, *Clinton and the Promise of Communitarianism*, CHRON. HIGHER EDUC., Dec. 2, 1992, at A52 (exploring the communitarian aspects of the Clinton agenda).

49. See, e.g., Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479 (1989); Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713 (1988).

gendered history, that is sometimes masked, and it argues that privacy theory has functioned to protect the prerogatives of men and the institution of private property.⁵⁰ Ruthann Robson has done some of this work expressly within the framework of lesbian sexuality.⁵¹ She argues that, at best, privacy-based legal theories create a private sanctuary for sexual behavior, but not a public space for multidimensional lesbian lives.⁵²

Second, the work of Michel Foucault supports another critique of liberal privacy theory. This critique challenges the assumption that sexual orientation is, as Justice Blackmun argued, central to "personhood," by questioning whether it is inevitable or desirable to label people and fix their identity based upon sexual orientation.⁵³ Foucault explored the ways in which we may see homosexuality as an artifact of culture by distinguishing sexual acts from the more complex constellation of ideas and ideologies that we know as "sexuality."⁵⁴ For Foucault, the category *homosexual*, once socially invented, became a diverse and diffuse source of oppression.⁵⁵ Privacy theorists inspired by Foucault thus emphasize the many ways in which power can be a menace to freedom. Whereas the sole object of liberal privacy theory is the government's negative power to repress, arguments from Foucault emphasize the ways in which power can also be affirmative or constitutive, as when diverse, multidisciplinary forces — for example, law, medicine, science, religion — create categories like *homosexual*. Such categories can themselves be systematically, yet often quite covertly, enmeshed with state power and deployed to support social structures of oppression.⁵⁶ Thus, these critiques argue that privacy theory must look beyond narrow conceptions of the government's regulatory power and contend, as well, with the way the state shapes, supports, and affects these multiple cultures and structures of intolerance.⁵⁷

Third, an economic critique of privacy theory and approach to reg-

50. See, e.g. CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 184-94 (1989); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* 269-72 (1990); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

51. See RUTHANN ROBSON, *Sexual Privacy*, in ROBSON, *supra* note 11, at 63-71. Rubenstein draws on another of Robson's essays exploring the application of sodomy statutes to lesbian sexual activity (pp. 80-87) but does not include her critique of privacy doctrine.

52. ROBSON, *supra* note 51, at 63-71.

53. See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989); Stephen J. Schnably, *Beyond Griswold: Foucauldian and Republican Approaches to Privacy*, 23 CONN. L. REV. 861 (1991); cf. Halley, *supra* note 13, at 1739-40.

54. See Ortiz, *supra* note 35, at 1833 (noting that "Foucault separated sexuality from sex"); 1 FOUCAULT, *supra* note 32.

55. 1 FOUCAULT, *supra* note 32.

56. See Rubenfeld, *supra* note 53, at 770-82; Schnably, *supra* note 53, at 895-900.

57. See Rubenfeld, *supra* note 53, at 799-802; Schnably, *supra* note 53, at 931-54; cf. Thomas,

ulating sexuality is developed most notably in the work of Richard Posner. In his recent book, *Sex and Reason*,⁵⁸ Posner argues against sodomy statutes, but he attempts to recast the debate as one about the efficacy, not the morality, of such statutes. Posner's work is highly controversial, and there is much with which to argue. The strength of his claim to pure empiricism and the wisdom of his approach raise questions that students and teachers can fruitfully explore within the rubric of traditional privacy theory.⁵⁹ Moreover, much of what he treats as fact about gay men and lesbians is easily unmasked as cultural mythology. For example, Posner describes gay men as not only "effeminate" but "artistic," "neurotic," and "histrionic," and lesbians as "the opposite of effeminate."⁶⁰ Perhaps unwittingly, Posner thus usefully illustrates the persistence of stereotypes among even sophisticated observers and the degree to which legal policies and decisions can be based on such misapprehension.

The absence of extended treatment of theoretical materials like those that I have described does not mean that *Lesbians, Gay Men, and the Law* is "antitheory," for Rubenstein goes much further in this direction than the average casebook. Indeed, the diversity of source material in the book itself may reflect a theory of sexual orientation and the law by implicitly making the point again and again that social values and attitudes powerfully shape law in this area.⁶¹ Thus the book fits nicely within recent work exploring the socially constructed character of sexual orientation⁶² and within the larger rubric of "law and society" work.⁶³ Nevertheless, the book bypasses an important opportunity to probe in depth some of the pressing questions of theory and paradigm that I have described, and it may thus be somewhat

supra note 34, at 1435-36, 1478-92 (drawing upon Foucault and calling for a more "corporeal" conception that looks to the ways in which sodomy laws legitimate antigay violence).

Foucault's work is relevant beyond the domain of privacy law, for it implicates the ways in which legal categories and constructs can shape and affect social forces. See SEDGWICK, *supra* note 36, at 3. At a relatively high level of abstraction, Foucault's idea that the category *homosexual* has been deployed to oppress may undermine the very notion that legal recognition of homosexuals as a group is a path to liberation. See Halley, *supra* note 13, at 1739-40. That notion is deeply embedded in gay law reform strategies that seek constitutional and statutory protections for gay men and lesbians comparable to those that the law has accorded other historically subordinated groups.

58. POSNER, *supra* note 33.

59. For some critiques of Posner pursuing these kinds of questions, see Eskridge, *supra* note 33; *Commentary on Sex and Reason*, 25 CONN. L. REV. 471 (1993) (including commentaries by Katharine T. Bartlett, Ruthann Robson, and Martha Albertson Fineman).

60. POSNER, *supra* note 33, at 304.

61. Rubenstein is, in fact, explicit about this point in his introduction. P. xxi.

62. See *supra* note 33.

63. For a good overview of perspectives on law and society, see ALAN HUNT, *EXPLORATIONS IN LAW AND SOCIETY: TOWARD A CONSTITUTIVE THEORY OF LAW* (1993); Stewart Macaulay, *Law and the Behavioral Sciences: Is There Any There There?*, 6 LAW & POLY. 149 (1984); David Trubek, *Back to the Future: The Short Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 2 (1990).

limited in its ability to encourage students to think critically about these kinds of questions. Those using Rubenstein's book as a central course text may thus choose to supplement the book with additional readings.

II. LESBIANS, GAY MEN, AND THE LAW AS CURRICULAR CATALYST

One of the most exciting and important aspects of *Lesbians, Gay Men, and the Law* is its potential to help institutionalize the teaching of sexual orientation and the law in law schools. As a pathbreaker, the book can influence curricular development by enabling law professors with an interest in the area to offer a course without having to undertake the daunting task of assembling their own materials.

This contribution is important because, as the debate about sexual orientation and the law rages outside the law schools' doors, courses focusing on gay and lesbian legal issues are still relatively rare. In a 1990 survey of institutions belonging to the American Association of Law Schools, Professor Gene Schultz reported that 117 of 158 law schools responded to a 1990 questionnaire soliciting information about, among other things, course offerings relating to sexual orientation.⁶⁴ Of the 117 schools responding, only thirty-five offered at least one course "focusing" on gay and lesbian legal issues.⁶⁵ Of these thirty-five, some listed courses as general as "Civil Rights," "Feminist Legal Theory," and "Gender and the Law" as gay and lesbian focus courses.⁶⁶ Moreover, fully ten of the thirty-five schools list courses about AIDS as such focus courses.⁶⁷ Although AIDS has, of course, ravaged the gay male community, it is neither a "gay disease," nor do many of the legal issues it raises relate in any way to sexual orientation.⁶⁸ When these factors are taken into account, the 1990 survey documents fewer than a dozen schools offering courses clearly devoted to sexual orientation and the law. This number may have increased in the last few years as the profile of the gay rights debate has risen, but the low 1990 baseline makes it likely that it is still the exception, not the rule, to offer a course of this type at American law schools.

The absence of course offerings is unfortunate for a number of reasons, three of which I want to emphasize. First, law schools are train-

64. Gene P. Schultz, *The Inclusion of Sexual Orientation in Nondiscrimination Policies: A Survey of American Law Schools*, 2 LAW & SEXUALITY 131, 135-37 (1992).

65. *Id.* In this respect, law schools appear to be following the rest of the academy, where gay and lesbian focus courses are still relatively sparse. See Larry Gordon, *Opening the Door to Gay Studies*, L.A. TIMES, June 11, 1993, at A1 (reporting results of a National Lesbian and Gay Task Force survey of college courses).

66. Schultz, *supra* note 64, at 136-37.

67. *Id.*

68. See generally SCOTT BURRIS ET AL., AIDS LAW TODAY (1993); MICHAEL L. CLOSEN ET AL., AIDS: CASES AND MATERIALS (1989).

ing lawyers who, with increasing frequency, will be asked to represent gay and lesbian clients. This is true not only because litigation is one important channel for the gay and lesbian equality demand. It is true, as well, because the existence of broad-based social structures of exclusion triggers gay and lesbian reliance on alternative legal structures. In the absence of the right to marry, for example, gay and lesbian couples frequently enter contracts involving jointly held property and child custody in the event that a relationship dissolves.⁶⁹ Lawyers need to understand the issues that such contracts raise and the contexts in which they arise.⁷⁰

Second, law schools are also training many of tomorrow's executive and legislative policymakers, judges, and legal scholars. If we want people in these positions to be able to think intelligently about the pressing social and legal questions raised by the gay and lesbian demand for equality, we need to give them the skills and information to do so. Had some of our national politician-lawyers been educated to think in a more rigorous, sophisticated way about sexual orientation and the law, for example, the recent debate about the ban on gays in the military might have moved beyond the depressing caricature of predatory gay men and lesbians that so crucially structured the discussion.⁷¹ Perhaps the outcome would not have differed, but the debate might at least have been staked out on the terrain of fact, not fantasy.

Third, and relatedly, one of the forces that most powerfully drives homophobia is the traditional invisibility of gay and lesbian life. It is always easier to hate, or at least to fear, what you do not know — or, to be more precise, *what you do not know that you know*.⁷² That is one reason that the gay abstraction wields such cultural power and that opponents of gay rights link homosexuality with a range of myths and stereotypes — such as predatory sexual behavior.⁷³ Invisibility in law

69. Pp. 430-39, 554-62. See generally HAYDEN CURRY & DENIS CLIFFORD, *A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES* (Robin Leonard ed., 1991).

70. See Bill O. Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807, 1810 (1993) (arguing that a lawyer needs to understand "personal identification issues" because "[c]ommon sense, without training, is dangerously fashioned by our own class, race, ethnicity/culture, gender, and sexual background").

71. See, e.g., Frank Browning, *From "Poof" to "Predator": The Military Gay Ban Debate Cuts to the Heart of Our Fear of Homo-Sex*, WASH. POST, Mar. 28, 1993, at C4; David Tuller, *Gays Fight Image as Sexual Predators*, S.F. CHRON., Feb. 18, 1993, at A1.

72. For example, poll findings frequently reflect that those who know people they know to be gay or lesbian are far more supportive of lifting legal restrictions on gay men and lesbians than those who do not. See, e.g., William Schneider & I.A. Lewis, *The Straight Story on Homosexuality and Gay Rights*, PUB. OPINION, Feb.-Mar. 1984, at 16, 18-20; see Fajer, *supra* note 34.

73. For a wide-ranging and thoughtful refutation of this and other stereotypes about gay men and lesbians, see Fajer, *supra* note 34. See also the useful compilations of data with similar findings in Laurence R. Helfer, Note, *Finding a Consensus on Equality: The Homosexual Age of Consent and the European Convention on Human Rights*, 65 N.Y.U. L. REV. 1044 (1990); Steve Susoeff, Comment, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 870-84 (1985).

school curricula follows larger social invisibility. A course in sexual orientation and the law can, as Rubenstein's book shows, add to the historically incomplete picture of gay and lesbian lives that prevails in our culture and shapes our legal rules and doctrines. Thus, such a course can, in the most classic sense of education, expand what people know, whether they are lawyers, lawmakers, or judges.⁷⁴ In the process, such a course can convey to our gay and lesbian students that, in a world still hostile to them, their law schools take their lives and struggles seriously enough to provide course coverage.⁷⁵

This educative value of studying sexual orientation and the law, moreover, extends beyond expanding what people know about the legal treatment of gay men and lesbians. The study of sexual orientation and the law is intellectually rich and can shed important light on a host of other issues — such as the regulation of sexuality and sexual activity more generally, the relationship between legal rules and gender roles, the role of law in supporting or suppressing difference, and the boundary line between individual and communal rights. As illustrated by the deep and difficult questions raised by liberal privacy theory,⁷⁶ many exciting jurisprudential debates converge in controversies about sexual orientation and the law. Thus, the subject may be of interest to many students and teachers who have given little thought to the issues.

A specific course on sexual orientation and the law is, of course, not the only way to realize the various aspirations I have set out. As is the case with gender and race,⁷⁷ questions relating to sexual orientation arise across the curriculum. As a result, coverage of gay and lesbian issues in "core" courses is equally vital.⁷⁸ It may, in fact, be more

74. For an argument in favor of gay studies pursuing this sort of theme, see Martha Nussbaum, *Why Gay Studies? A Classical Defense*, NEW REPUBLIC, July 13 & 20, 1992, at 26; cf. Stephen Reinhardt, *The Court and the Closet: Why Should Federal Judges Have to Hide Homosexuality?*, WASH. POST, Oct. 31, 1993, at C3 (a federal judge advocating the appointment of openly gay or lesbian judges because, among other reasons, "[d]iversity on the bench tends to increase judicial understanding regarding the nature of the problems that come before us," and can help "to reduce the level of our natural prejudices and intolerance").

75. Cf. David A.J. Richards, *Liberal Political Culture and the Marginalized Voice: Interpretive Responsibility and the American Law School*, 45 STAN. L. REV. 1555, 1977 (1993) (arguing that "[c]ritical public culture is not challenged and deepened if women, homosexuals, and other marginalized groups in law schools are largely acculturated there not to engage the issues central to their emancipation as full bearers of human rights").

76. See *supra* notes 44-60 and accompanying text.

77. See Frances L. Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511 (1991); Kimberlé W. Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NATL. BLACK L.J. 1 (1989); Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 STAN. L. REV. 1547 (1993). See generally Barbara A. Babcock, *Introduction: Gender Bias in the Courts and Civic and Legal Education*, 45 STAN. L. REV. 2143 (1993); Judith Resnik, *Ambivalence: The Resiliency of Legal Culture in the United States*, 45 STAN. L. REV. 1525 (1993); Judith Resnik, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195 (1993).

78. There may be some movement in this direction. In 1993, for example, the Society of

important because these courses will reach many more students than will electives focusing only on sexual orientation and law.

The question of whether specific courses on gay and lesbian issues are preferable to general coverage recalls larger debates about ethnic, women's, and gay studies programs. One aspect of that debate is whether such targeted programs "ghettoize" emerging fields of study or blunt the development of more general course offerings that take account of "outsider" perspectives.⁷⁹ One of the virtues of *Lesbians, Gay Men, and the Law* is that it can help move us beyond that kind of false trade-off by helping law teachers *both* to offer courses that focus on the legal dimensions of sexual orientation *and* to recognize how legal rules in many other areas can raise specific problems and concerns for gay men and lesbians. In addition to being ideally suited for a course in sexual orientation and the law, this book can also reveal to teachers in other areas how gay and lesbian issues are implicated in their own domains.

Lesbians, Gay Men, and the Law makes a powerful contribution to legal education. It can galvanize and enable law teachers to think about *whether* and *how* to teach students about sexual orientation and the law. The book can also make an impact far beyond legal education. By influencing the way future lawyers think about these issues, Rubenstein will surely help to shape what is unfolding as a major civil rights struggle in our time.

American Law Teachers sponsored a conference entitled "Integrating Class, Disability, Gender, Race and Sexual Orientation Into Our Teaching and Course Materials."

79. See Sharon Bernstein, *Multiculturalism: Building Bridges or Burning Them?*, L.A. TIMES, Nov. 30, 1992, at A1; Walter Goodman, *Women's Studies: The Debate Continues*, N.Y. TIMES, Apr. 22, 1984, § 6 (Magazine), at 39.