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Legal Rights in Historical Perspective: From the Margins to the Mainstream (Program)

Institute of Bill of Rights Law at the William & Mary Law School

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"Legal Rights in Historical Perspective" will focus on examining how group-based rights move — or should move, or are stalled in their movement — from the margins of legal protection towards the mainstream.
LEGAL RIGHTS IN HISTORICAL PERSPECTIVE:
FROM THE MARGINS TO THE MAINSTREAM

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LEGAL RIGHTS IN HISTORICAL PERSPECTIVE:
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ABSTRACTS:

Carlos Ball

I am thinking of writing on the recent backlash against same-sex marriage that followed the Massachusetts Supreme Court’s opinion in Goodridge. My initial thought is to compare it to the backlash that followed the issuance of Brown v. Board of Education. I wonder whether the gay rights movement can learn from the civil rights movement’s legal and political responses to the backlash. That history may inform the decision of whether, for example, to continue to pursue same-sex marriage or whether to “settle” for civil unions instead.

In comparing the aftermath of Brown with the aftermath of Goodridge, my paper will focus on what has become known as the backlash theory of Brown. That theory, prominently advanced by Michael Klarman in his recent book From Jim Crow to Civil Rights, holds that Brown played a minor role in the integration of schools in the South, and that the case, decided when it was, was actually counterproductive to the integration enterprise for a variety of reasons, including the fact that it led civil rights activists to place too much faith on litigation.

Some liberal/progressive commentators, after the November 2004 election, made similar backlash arguments in relation to Goodridge, arguing that the case was unhelpful and counterproductive because of the political and legal backlash that it engendered. My initial thinking on this leads me to disagree with this view and to argue that the same-sex marriage litigation in the state courts has, on the whole, been a good thing for gay rights, even when accounting for the recent backlash. I also think, however, that we are reaching the point of diminishing returns with these cases, and that gay rights supporters need to shift with greater vigor to the political and legislative arenas. I hope to use the lessons from the aftermath of Brown to support both of these conclusions.
I will do a piece of the following project, likely focused on the first of the below paragraph:

What is the relationship between the most virulent opposition to same-sex marriage in the United States and the paradox that this country, with a much greater commitment to separation of church and state, conflates civil and religious marriage to a far greater extent than countries like Germany with established churches? In this paper, I consider the possibility that the following is the best explanation of opposition to legal recognition of same-sex marriage on the part of evangelical Protestant religious conservatives who claim such recognition would undercut their own marriages: Unlike observant Jews and Roman Catholics, who clearly understand that civil marriage and marriage within their faith are not the same, such that one can be married in the eyes of the state and not the faith and vice versa, Protestant denominations have essentially abdicated the definition, creation and, above all the dissolution of marriage to the state. There is, for example, nothing like the get or annulment available to or required of Protestants. This leaves religiously conservative Protestants far more dependent on the state’s regulation of marriage, far less able to distinguish conceptually between marriage as their religion defines it and as state law does and, unsurprisingly, far more opposed on a percentage basis to same-sex marriage than conservative Catholics and Jews who otherwise, according to poll data, share their opposition to homosexuality. I trace the roots of this conflation to before Lord Hardwicke’s Act, which not only asserted for the first time the state’s monopoly over marriage, but did so in conjunction with the Established Church of England.

From before Lord Hardwicke’s Act to after DOMA (The Defense of Marriage Act)

I then will compare the development in Anglo-American law of the role of the state in business corporations and marriage, beginning with the high water mark of the assertion of state monopoly control of both institutions, with the passage in the eighteenth century of Hardwicke’s Act and the Bubble Act. My contention will be that the law of marriage has followed a similar trajectory to the law of corporations, but with a substantially more gradual arc, so that the trajectory is not yet complete. Corporate charters in the United States used to be issued only to the favorites of the state and only for a limited number of enumerated worthy purposes, but, like marriage licenses, gradually became available to almost anyone and for purposes the state no longer required be enumerated or inquired into so long as they were lawful. Like corporate charters, marriage licenses used to function as a grant of monopoly, but, in a series of developments the paper will trace, every constitutionally recognized aspect of liberty legal marriage formerly monopolized (sex, reproduction, parenting, etc) is now seen to be, as a matter of constitutional right, no longer within the state’s or marriage’s monopoly control. Moreover, in the United States today, we do not only license those marriages entered into only for certain enumerated or even only for worthy purposes. We ask little more of incorporators and couples marrying than that they comply with otherwise applicable law. To the extent that anything remains of government promotion of “human goods” through marriage or incorporation it is the assumption that the social good is likely to be promoted when government facilitates people working together to achieve joint ends. Perhaps at some extremely high level of generality this accords with the scriptural injunction that “two are better than one, because they have a good reward for their labor,” but it is hardly a thick and rich ethical vision that is presently being given state sponsorship.

My hope is that examining the current debate over the nature of civil marriage in this historical perspective will illuminate otherwise obscure aspects of current controversies and provide leverage for helping resolve them.
The Bill of Rights in Historical Perspective:
The New Deal, the “Renew Deal,” and the Problem of the Subject

ABSTRACT: There is a lot of ferment in the scholarly literature these days about the possibility that as a nation (and maybe as a globe) we are entering a new political-economic era, in which the paradigm of “rights” and “markets” is being replaced by the paradigm of “governance.” The idea behind the new focus on “governance” is that legal scholars and policymakers are beginning to understand the realms of state, market and family-civil society as interdependent. Thus, for example, policymakers should think about the issues of “market failure,” “government failure,” and social norms together when conceiving of and evaluating methods of regulation.

The new excitement about governance presents (as one might expect) both dangers and opportunities. One of the less discussed problems with the prior approach to regulation and its tendency to take juridical rights as exhausting the category of “law” is what we might call the problem of the subject: the fact that some legal subjects (in the United States, most notoriously, women and nonwhites) have been treated as partial, failed, or incomplete. During the past era, the notion of “equality” has been the primary way to address this injustice in the realm of the state. Equality, however, has notorious problems, including (1) its limited application to state action (as opposed to “private” realms of market, family, and nation, for example) and (2) its identitarian focus. The transition to a regime of “governance” might be helpful to the extent that nonstate, “private” methods of regulation that have produced subordinated identities can now be better criticized.

The danger, of course, is that in the new enthusiasm for governance the problem of the subject will, as before, be left off the table. Neither traditional legal analysis nor traditional economic analysis, for example, deals explicitly with the problem of the subject other than through equality talk or questions of “distribution.” To the extent that the language of “governance” will rely on these two methods, the problem will continue. This paper argues that the architects and supporters of the “governance” approach should be aware of the problem of the subject as a central one.

The paper begins with a brief history of the problem of the subject as seen through a legal lens, focusing on racial injustice. The United States has moved from a period I identify as a “racial republic” to a period of “racial liberalism.” Although racial liberalism has been an improvement for people identified as nonwhite as compared to the racial republic, liberalism’s characteristic public-private splits (which I call “structural liberalism”) have often made it difficult for racialized groups to move beyond strictly symbolic and identity-based gestures toward emancipation.

Both equality’s successes and its failures are, of course, closely tied to the regnant interpretation of the Bill of Rights in the era of racial liberalism. From the point of view of racial emancipation, I argue that to make the “Renew Deal” complete—that is, to incorporate the paradigm of governance fully by recognizing the problem of the subject—would require a new approach to constitutional law, resembling more the “radiating” and “horizontal/vertical” approaches of the South African Constitution than the United States approach to constitutionalism.
Sonia K. Katyal

Anti-Essentialism, Sexuality and Sovereignty: The Global Limits and Possibilities of Lawrence

Introduction

In the summer of 2003, the Supreme Court handed gay and lesbian activists a stunning victory in the decision of Lawrence v. Texas, which summarily overturned Bowers v. Hardwick. At issue was whether Texas’ prohibition of same-sex sexual conduct violated the Due Process clause of the U.S. Constitution. In a powerful, poetic, and strident opinion, Justice Kennedy writing for a six-member majority, reversed Bowers, observing that individual decisions regarding physical intimacy between consenting adults, either of the same or opposite sex, are constitutionally protected, and thus fell outside of the reach of state intervention. Volumes can be written about the decision; it represents a culmination of nearly a century’s worth of work in dismantling prejudicial views on gays and lesbians in American law, and indeed, the rest of the world.

For a moment, civil rights activists took in an unusual turn of events: the Supreme Court, largely regarded as conservative, unwittingly unleashed a firestorm of controversy by refusing to differentiate between the intimacy enjoyed by same-sex and opposite-sex couples, and by attaching a protective cover of liberty to each. This very act of equivocation was edifying, profoundly courageous, and, for some legal scholars, ultimately reminiscent of the era just after Brown v. Board.

At the same time that the decision corrected a grave injustice, it gave rise to a curious host of criticism and discomfort from parts of the American public, the majority of which had previously, and quietly, favored decriminalizing same-sex sexual activity. While supporters of gay and lesbian rights rejoiced in a stunning triumph of corrective justice, antigay advocates seemed to discover a new battle cry, vocally warning the American public that Lawrence had suddenly, unwittingly, opened the door to a cavalcade of undesirable outcomes. In a scathing dissent, Justice Scalia vociferously complained that the majority “has largely signed on to the homosexual agenda,” and observed that “[m]any Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe is immoral and destructive.” Republican Senator Rick Santorum predicted that if sodomy was legalized, “then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to anything.”

Elsewhere over the globe, Lawrence was met with a comparable mixture of trepidation and satisfaction. While some gay rights advocates rejoiced in the United States’ decision to join a growing cadre of nations that had decriminalized laws against sodomy (and in particular, cited the Court’s willingness to draw on international human rights jurisprudence to that effect), other governments took a different route, and used the opinion to signify a growing distaste with Western decadence. One of Egypt’s religious leaders proclaimed a new-found commitment to fighting the “plague” of gay visibility, declaring his opposition to the appointment of gay clergy and same-sex marriage. [NF: find more examples of reactions post-Lawrence] The Vatican, just weeks after Lawrence, issued a sweeping declaration repudiating same-sex unions as “gravely immoral,” urging non-Catholics to join in combating them. And, in perhaps the most powerful example of this trend, the Indian government offered a resounding defense of its own sodomy laws, claiming in a recent brief, that despite recent
signs of tolerance in the West, "Indian society by and large disapproves of homosexuality," pointing out that such "disapproval was strong enough to justify it being treated as a criminal offense even where the adults indulge in it in private." (The Government, notably, reached this conclusion even in light of the ironic fact that India's sodomy laws were enacted by British colonial regimes in the 1800s, not by Indians themselves.)

These examples carry with them hidden, and unstated implications for the recent globalization of gay civil rights, forcing us to actively contemplate whether Lawrence is yet another symbol of a global wave of change, or whether it represents an ultimately unfulfillable goal worldwide, particularly in places where gay rights movements have been met with considerable backlash. For, as Professors Arnaldo Cruz and Martin Manalansan have observed, "[q]ueerness is now global. Whether in advertising, film, performance art, the Internet, or the political discourses of human rights in emerging democracies, images of queer sexualities and cultures now circulate around the globe." They continue, "[i]n a world where what used to be considered the 'private' is ever more commodified and marketed, queerness has become both an object of consumption, an object in which nonqueers invest their passions and purchasing power, and an object through which queers constitute their identities in our contemporary consumer-oriented globalized world."

Interestingly, as the 'private' becomes more and more commodified, the role of law has become much more central in defining the rights of particular sexual minorities, particularly in times of tremendous cultural transition. Thus, given India's recent, and pronounced, embrace of its own laws against sodomy, one might ask whether or not Lawrence carries any global significance for postcolonial debates regarding sodomy. For the example of India offers gay activists in the West a particularly rich and cogent lesson regarding the limits of globalization of gay rights, one that reflects a deeper ambivalence and complexity regarding current narratives of global gay rights.

The recent emergence of gay or lesbian-identified individuals in postcolonial contexts have created complex ruptures in existing social fabrics, calling into question the universality of legal constructs governing sexuality and culture. Throughout the globe, various cultural rules, histories, symbols, and meanings create complex intersections with preexisting categories of sexual identity. Three perspectives dominate. On one side, some governments view homosexuality as "western" phenomena, devoid of local expression. On the other side, global gay rights activists favor a universalized understanding of sexual identity that erases the diversity of various sexualities in favor of encouraging individuals to identify under the categories of "gay," "lesbian" or "bisexual" identity. And a third group, largely composed of social constructionists, favor localized meanings of sexual identity and meaning without reference to their larger political significance as a global phenomenon.

As I will show, the pronounced risk of backlash necessarily forces us to contemplate the limits and possibilities of each of these prisms, particularly in terms of the boundaries between public and private space, and in terms of the need for cultural translation. I will argue in this paper that Lawrence offers us another way that surpasses, and yet challenges, the perspectives offered by these different groups. For a close reading of Lawrence represents a culmination of a historic, and increasingly global, convergence between liberty, privacy, and anti-essentialist theories of sexual identity. Indeed, the ultimate significance of Lawrence lies not in its tacit shielding of sexual minorities from criminalization, but rather in its willingness to offer to the American, (indeed global) public, a version of sexual autonomy that is filled with both promise and danger, fragility and universality. For, quite unlike Bowers, which largely directed its judicial gaze towards gays and lesbians in particular, the
court in Lawrence carried a message of sexual autonomy for everyone, irrespective of sexual orientation, but relegated the exercise of liberty and autonomy to private, rather than public spaces.

Yet, despite the power of its universalist vision, this paper argues that Lawrence is circumscribed by potential limitations wrought by culture, nationality, and citizenship. The Indian response, just weeks after Lawrence, presents us with the uncomfortable reality that even the universalist vision put forth by the Court has limitations, particularly where the interpretation of culture and history are concerned. Yet, despite these limitations, the objective of this Essay is to use Lawrence as a starting point with which to build a theoretical model for global sexual autonomy that encompasses many of the anti-essentialist critiques offered by both human rights discourse, critical race theory, and queer theory.

In the past, equality-based movements on the basis of sexual orientation have historically focused on identity, drawing upon comparisons with race and sex for their persuasion. Within this paradigm, gay and lesbian advocates often claimed that sexual orientation is like race, or that gay men and lesbians are similar to racial groups, defined by an essence that is inalterable, fixed, immutable, and ultimately fundamental to one’s identity. Largely since Bowers, scholars and courts embraced this alternate conception by defining the class of homosexuals by a shared, public personality, thus deemphasizing sexual intimacy in private space. Indeed, the most successful cases for gay rights have unerringly utilized this public notion of gay personhood, framed by reference to sexual orientation, as a central animating figure in exploring other fundamental rights affecting speech, assembly, or association; or the right to participate in the political process.

Yet Lawrence, by focusing on privacy and liberty, instead, has quietly, and subtly, reoriented this project along a different, and more convergent continuum that emphasizes the need for protection through the lens of autonomy, privacy and liberty, rather than public assertions of identity. Emerging from this decision is a vision of sexual self-determination, of sexual sovereignty, that represents the intersectional convergence of three separate prisms: spatial privacy; expressive liberty; and deliberative autonomy. In creating a space for the convergence of all three facets, Lawrence is a triumph and a product--of anti-essentialism, and thus is striking in its potential to traverse both theoretical and global divisions.

This paper, written for a symposium on the development of social movements, attempts to first use Lawrence as a recent example of this emergent theory; and second, attempts to predict what using this type of theory might yield for similar battles that are being fought elsewhere throughout the globe, particularly those which intersect with questions of race, culture, and sexuality. Part I of this Essay turns to exploring the common problems of global gay civil rights discourse, with special reference to India and its own debates regarding sodomy laws. Part II discusses the tri-partite prism of Lawrence, arguing that Lawrence offers the public a vision of “sexual sovereignty,” that is, a vision of sexual self-determination that is deeply bordered between public and private expressions of sexuality and desire. Part III attempts to show how Lawrence offers us a new navigation of global gay rights and sexual autonomy. Indeed, India’s own treatment of sexuality and sexual orientation provides us with a fascinating application of the limits and possibilities behind each facet of Lawrence spatial privacy, expressive liberty, and deliberative autonomy—in a post-colonial context. I argue here that although Lawrence may be culturally circumscribed by Western notions of sex and sexual identity, particularly in India, that its theory of sexual autonomy offers a vital shift from identity to privacy and autonomy that may be more easily translatable to cultures that lack corresponding entrenchments of publicly heterosexual, homosexual, and bisexual identities.
Jane Larson

I am writing about the ways in which 19th century women took private sexual and familial wrongs and made them public, especially through issues like seduction, age-of-consent laws, prostitution, and temperance. I will argue this was the crucial first step for an articulation of a notion of women's "rights" as such. Although most attention has been paid to the genesis of claims to women's rights in abolition (and for someone like Elizabeth Cady Stanton this was undoubtedly true), for the greater majority of women who came to support the vote for women and broader notions of "equality," the arena of sexual wrongs and familial abuses of male power were as, or perhaps more, important narratives.

Holly Tuhvonen and Michael Stein

Disabling Brown.

The Supreme Court decisions in Brown v. Board of Ed. and Tennessee v. Lane were handed down exactly fifty years apart. Our comment proposes to compare the methodology of these decisions within their historical contexts. (We stress methodology because we do not make assertions of equivalence, either doctrinally or in the nature of the prejudice, between the two). Part one compares the manner that Brown unanimously shattered the separate but equal doctrine without the support of a civil rights statute or a statement of public/legislative support, with the narrow holding by the slim Lane majority that upheld a right of access to court services for the disabled some fourteen years after the ADA's near-unanimous passage. Part two applies the methods of analysis utilized by the various Justices in Lane to Brown to provide an impression of how the current Court's perspective might have rendered a very different opinion.
LEGAL RIGHTS IN HISTORICAL PERSPECTIVE:
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Who's Who in the Symposium

Carlos Ball
Professor Carlos Ball is widely acclaimed as one of the nation’s most important emerging scholars of gay rights. His recent book, The Morality of Gay Rights: An Exploration in Political Philosophy, published by Routledge in 2003, already is having a significant impact on academic and public discourse concerning gay rights issues. In The Morality of Gay Rights, Professor Ball assesses the connection between gay rights and broader questions of law and morality. Professor Ball, who also writes in the area of disability law and property, joined the faculty of Penn State Dickinson in June 2003. Previously, he was a Professor of Law at the University of Illinois College of Law, a trial attorney with the New York Legal Aid Society, and Special Counsel for HIV & Tuberculosis Policy for the New York City Department of Health. A graduate of Tufts University and Columbia University Law School, Professor Ball also holds an L.L.M. degree from Cambridge University.

Mary Anne Case
A graduate of Yale College and the Harvard Law School, Mary Anne Case studied at the University of Munich, litigated for Paul, Weiss, Rifkind, Wharton and Garrison in New York and was the Class of 1966 research professor of law at the University of Virginia as well as a visiting professor at N.Y.U. before joining the Chicago faculty. Among the subjects she teaches are feminist jurisprudence, constitutional law, European legal systems, marriage and regulation of sexuality. While her diverse research interests include German contract law and the First Amendment, her scholarship to date has concentrated on the regulation of sex, gender, and sexuality, and on the early history of feminism. In the spring of 2003, she was the Bosch Public Policy Fellow and a winner of the Berlin Prize at the American Academy Berlin.

Angela P. Harris
Angela Harris is Professor of Law at the School of Law, University of California, Berkeley. Before joining the Boalt faculty in 1988, Professor Harris served as a law clerk to Judge Joel M. Flaum of the U.S. Court of Appeals for the Seventh Circuit and as an attorney with the San Francisco firm of Morrison & Foerster. She was a visiting professor at Stanford Law School in 1991, at Yale Law School in 1997 and at Georgetown Law Center in 2000.

Her recent publications include Gender and Law: Theory, Doctrine, Commentary (with Katherine Bartlett, 1998) and Race and Races: Cases and Resources for a Diverse America (with Juan Perea, Richard Delgado and Stephanie Wildman, 2000).
Sonia Katyal

Professor Katyal teaches in the areas of intellectual property, property and civil rights at Fordham University School of Law. Before coming to Fordham, Professor Katyal was an associate specializing in intellectual property litigation in the San Francisco office of Covington & Burling.

She received her A.B. from Brown University in 1993, and her J.D. from the University of Chicago Law School in 1998. After law school, Professor Katyal clerked for the Honorable Carlos Moreno (now a California Supreme Court Justice) in the Central District of California from 1998-99 and the Honorable Dorothy Nelson in the U.S. Court of Appeals for the Ninth Circuit from 1999-2000.

Katyal’s scholarly work focuses on intellectual property, civil rights, and new media. Katyal’s paper "Exporting Identity," received a Dukeminier Award in 2002, and her more recent paper, "The New Surveillance," was selected as the winning entry for the Yale Cybercrime Writing Competition for 2004.

Jane E. Larson

The Voss-Bascom Professor of Law at the University of Wisconsin Law School, Professor Larson studies the diverse fields of legal history, property and land-use regulation, and the legal and institutional control of sexual relationships. Two overarching themes run through her scholarship: the problem of regulating matters closely linked to human liberty, including land and the body, and the problem of crafting interdisciplinary methods that ask and answer specifically legal questions in more relevant terms than those of conventional legal doctrinal analysis. She combines her groundbreaking research with teaching and service to the university and the community. She is the author of Hard Bargains: The Politics a/Sex (Oxford Press, 1998) (with Linda R. Hirshman) and numerous articles.

Michael Stein

Professor Stein joined the William & Mary School of Law faculty in 2000 after teaching at Stanford and New York University law schools. Prior to teaching, he practiced with Sullivan & Cromwell in New York City and clerked for Judge Samuel A. Alito, Jr. of the U.S. Court of Appeals for the Third Circuit. Stein also served as president of the National Disabled Bar Association, and pro bono counsel for both the United States Department of Justice’s Environmental Division and the Legal Aid Society’s Juvenile Rights Division. He currently serves on the Board of Directors of AUTONOMY, as well as on several advisory boards. Stein’s awards include an American Council of Learned Societies Andrew W. Mellon Faculty Fellowship, a Harvard Law School East Asian Legal Studies Program Grant, a National Institute on Disability and Rehabilitation Research Merit Fellowship, a Mark DeWolfe Howe Fund Grant, and a National Endowment for the Humanities Summer Stipend. Professor Stein will spend calendar year 2004 at Harvard Law School as a Visiting Scholar and a Visiting Fellow in the Human Rights Program.

Holland Tahvonen

Currently a law clerk for the Honorable Lawrence F. Stengel in the Eastern District of Pennsylvania, Holly Tahvonen is a recent graduate of William & Mary. At William & Mary, Tahvonen served as Editor-in-Chief of the Law Review and authored a note on disability-based harassment. Following law school and prior to her clerkship, she practiced law in the litigation department at Latham & Watkins in Chicago. This fall, she will begin a clerkship with the Honorable D. Brooks Smith of the Third Circuit.