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Introduction to the Symposium: Homophobia in the Halls of Justice: Sexual Orientation Bias and its Implications within the Legal System

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INTRODUCTION TO SYMPOSIUM: HOMOPHOBIA IN THE HALLS OF JUSTICE: SEXUAL ORIENTATION BIAS AND ITS IMPLICATIONS WITHIN THE LEGAL SYSTEM

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The gay moment is unavoidable.

-Andrew Kopkind¹

Gay activist, journalist and political commentator Andrew Kopkind made this profound observation at a critical moment in the queer rights movement, in the midst of the March on Washington, pride rallies, queer organizing and the ever strengthening movement to address the AIDS crisis within the queer community. The moment, however, meant different things to participants in the movement. Over the years, the queer or sexual liberation movement transformed itself into a much more equality-based movement with the most energy focused on securing recognition of gay marriage and equal access to the military.² As such, and even with the constantly

* Professors Bridgewater and Smith are Associate Professors of Law at the *American University Washington College of Law*. We particularly appreciate Michael Shortnacy for organizing this Symposium. In addition, Professors Angela Davis and Nancy Polikoff provided valuable support and guidance to the student organizers, panelists and moderators. Ramona Cotca, a second-year law student, provided invaluable research assistance to the authors. Finally, congratulations and thank you to the editors and staff of the *American University Journal of Gender, Social Policy & the Law* for facilitating this important discussion.

1. Andrew Kopkind, *The Gay Movement*, 256 NATION 577, 577 (1993).

2. See Thomas K. Duane, *Gay Pride, Gay Rights*, N.Y. TIMES, July 4, 2002, at A12 (noting the lawsuit filed by seven same-sex couples against the State of New Jersey for the right to marry under equal protection); *Hartford Lawmakers Consider 2 Bills on Gay Couples' Legal Status*, N.Y. TIMES, Feb. 12, 2002, at B6 (discussing a public hearing held by Connecticut Legislature to consider two bills on homosexual marriage and civil union under equal protection); Diane Carman, *The Rights Hand of Ignorance*, DENV. POST, Jan. 11, 2000, at B01 (acknowledging the political debate surrounding homosexuals and the military); David Reinhard, *Smoking Out the Portland School Board*, OREGONIAN (Portland), Nov. 1, 2001, at C09 (criticizing the government's "don't ask,

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increasing strength and visibility of the mainstream gay rights movement, many queer issues and queer people remain marginalized, avoided or excluded.

One such issue is the impact of sexual orientation bias in the legal system.³ Today's long overdue discussion comes after the court reforms of the 1970s and after the courts, at the insistence of the American Bar Association, began to examine gender and race bias in the courts in the late 1980s and early 1990s.⁴ Despite an apparent willingness to revamp and reconstruct the courts and judicial system, in some regards, to fit our more inclusive society, there is still incredible reluctance to probe for bias based on an individual's either real or perceived sexual orientation.⁵

If Andrew Kopkind were alive today, he might agree with the statement that we are at an important "gay moment," but he might also question whether or not it is unavoidable. The public, still reeling from the misdeeds of public officials and betrayals of trust by important institutions like corporations,⁶ the government⁷ and

don't tell" policy on homosexuals in the military).

3. See Michael B. Shortnacy, *Guilty and Gay, A Recipe for Execution in American Courtrooms: Sexual Orientation as a Tool for Prosecutorial Misconduct in Death Penalty Cases*, 51 AM. U. L. REV. 309, 320-31 (2001) (discussing the legal community's lack of attention to sexual orientation bias in the courts).

4. See Lynn Hecht Schafran, *Two Anniversaries of Challenge and Change*, 10 COLUM. J. GENDER & L. 51, 52 (2000) (discussing the American Bar Association's amendment to its model code on judicial conduct prohibiting judicial bias based on race and gender); see, e.g., Lynn Hecht Schafran, *California: First as Usual*, 22 WOMEN'S RTS. L. REP. 159 (discussing the first task force report on gender bias in the courts published by the New Jersey Supreme Court in 1984, which was motivated by work already being done on the topic by the National Organization for Women Legal Defense and Education Fund in California since 1970); see generally ALASKA JUDICIAL COUNCIL, ALASKA FELONY SENTENCING PATTERNS: A MULTIVARIATE STATISTICAL ANALYSIS (1974-76) 27-36 (Apr. 1977) (surveying racial discrimination in sentencing in Alaska's courts); N.J. SUPREME CT., TASK FORCE ON WOMEN IN THE COURTS, FIRST YEAR REPORT (1994) (studying gender-based discrimination in the courts); George Lange III, *Second Circuit: Study of Gender, Race, and Ethnicity*, 32 U. RICH. L. REV. 703, 703-04 (1998) (noting that the Second Circuit created a "Task Force on Gender, Racial and Ethnic Fairness in the Courts" in 1993); Hon. Dolores K. Sloviter, *Third Circuit: Gender, Race, and Ethnicity—Task Force on Equal Treatment in the Courts*, 32 U. RICH. L. REV. 707, 707-08 (1998) (mentioning that the Third Circuit created the "Task Force on Equal Treatment in the Courts" for gender, racial and ethnic bias in the courts in 1994 in response to the 1993 vote of the Judicial Conference of the United States for each circuit judicial council to conduct studies on gender bias in their respective courts); Shortnacy, *supra* note 3, at 323-29 (discussing two statewide reports released in 1999 and 2001, in Arizona and California, respectively, on sexual orientation in the legal community).

5. See, e.g., Shortnacy, *supra* note 3, at 320, 330 (noting that as of 2001, only four statewide studies have been conducted on sexual orientation bias and that completed studies call for further research on the topic).

6. See Ken Kurson, *Who's to Blame?*, MONEY, Sept. 1, 2002, at 87 (easing worries that corruption will destroy corporate America); James Toedtman et al., *Execs Show and Tell: No Surprises*, NEWSWEEK, Aug. 16, 2002, at A53 (stating that sixty-nine of the

religious institutions,⁸ are reluctant to examine deficits in our justice system. Is our legal system accountable, or for that matter, fair? Do we need to craft an inquiry into fairness or accountability that will give information about the experiences of lesbian, gay, bisexual, intersexual and transgendered persons?

It is understandable then when one thinks about how specific individuals within certain categories (race, sexual identity, gender and class) might experience the criminal justice system, there may not be popular support for inquiry or critique. This is precisely why the decision to publish the presentations and papers from the symposium, *Homophobia in the Halls of Justice: Sexual Orientation Bias and its Implications Within the Legal System*, is such an important first step. This decision is necessary in order to transform an important moment into an unavoidable one.

The symposium specifically focused on queer issues in the legal system. The symposium premise is that people within every aspect of the legal system, regardless of position or sexual identity, aspire to live their lives with respect and dignity. The participants in the symposium built upon this proposition by exploring the ways in which the legal system can be an important tool in protecting the interests attendant to sexual identity. In addition, the participants also addressed the ways in which the legal system perpetuates sexual identity discrimination and repression. The participants in the symposium panels, as well as the keynote speaker, addressed these issues and assisted us in developing our thoughts about key issues in the delivery of legal services to and by queer people.

The first panel comprised a group of experts who represented the advocacy community, academia and the judiciary. Amelia Craig Cramer, a public attorney who has a long history of working on gay, lesbian, bisexual and transgender issues, participated in the State Bar

largest firms based in New York City and Long Island filed sworn statements with the Securities and Exchange Commission vouching for their companies' book keeping); Gary Strauss, *Bush's Call for Reform Draws Mixed Reviews*, USA TODAY, July 10, 2002, at 1B (discussing the President's reaction on Wall Street to recent events surrounding the collapse of Enron and other instances of big business corruption).

7. See *Orange County Commentary*, L.A. TIMES, Mar. 19, 2002, at B19 (claiming that potential improvements in housing and traffic are forestalled because the public still doubts and mistrusts the local government); Craig Timberg, *Scandal Survives Mayor's Apology*, WASH. POST, Jan. 13, 2002, at C04 (discussing Washington, D.C. Mayor Anthony A. William's recent fundraising scandal).

8. See *Church does Little to Help its Image*, CHI. SUN TIMES, June 20, 2002, at 29 (questioning the payment of \$85,000 by the archdiocese to a Catholic priest accused of abusing young boys in light of recent scandals uncovered in the Catholic Church); Elizabeth Mehren, *Retired Priest Pleads Not Guilty to Abuse*, L.A. TIMES, July 11, 2002, at 19 (reporting that Catholic priest pleaded not guilty to allegedly abusing four boys ages six to fifteen from 1979 to 1989).

of Arizona Task Force on Gay & Lesbian Issues. Ms. Craig Cramer authored Arizona's report on discrimination and bias in Arizona's justice system.⁹ Todd Brower, a Professor at *Western State College of Law* in Fullerton, California, is a member of the California Judicial Council, Access and Fairness Advisory Committee, the policymaking arm of the California courts charged with issues of equal treatment, access, and fairness for all persons within the California judicial system. Emilio Cividanes, a Partner at the Washington, D.C. office of Piper Rudnick, served on the D.C. Bar Task Force on Sexual Orientation and the Legal Workplace and on the Special Committee on Race and Ethnicity of the D.C. Circuit Task Force on Gender, Race and Ethnic Bias. The final member of the panel was the Honorable Inez Smith Reid, an Associate Judge of the District of Columbia Court of Appeals and Chair of the Standing Committee for Fairness and Access to the Courts for the District of Columbia Superior Court and the District of Columbia Court of Appeals.

While each panelist talked about the experiences of working on the committees to examine sexual orientation bias in the individual jurisdictions, there were common tasks that each of the committees undertook: (1) to define the scope of the inquiry;¹⁰ (2) to secure the support of the legal and gay, lesbian, bisexual and transgender communities; (3) to develop a methodology for obtaining information; (4) to determine the significance of their findings; and (5) to make recommendations to their respective courts.

The reports' findings, while troubling, were unsurprising.¹¹ Those

9. See generally STATE BAR OF ARIZ. GAY AND LESBIAN TASK FORCE, REPORT TO THE BOARD OF GOVERNORS (1999) [hereinafter ARIZ. BAR REPORT].

10. Jurisdictions differed in taking a broad approach, like the Arizona Task Force on Gay & Lesbian Issues, which developed separate surveys for law professors, law students and for members of the gay, lesbian, bisexual and transgender community or the narrower approach of the California Judicial Council, Access and Fairness Advisory Committee, which surveyed court users and court employees about bias based on sexual orientation. Still another approach was the approach of the District of Columbia Bar which surveyed law firms about sexual orientation bias in the practice of law. Interestingly, neither the District of Columbia Federal Circuit, nor the District of Columbia local courts have conducted a comprehensive study of the presence of bias based on sexual orientation. The District of Columbia Bar study is the only study addressing sexual orientation bias in the District of Columbia legal community.

11. See generally, e.g., Shortnacy, *supra* note 3, at 329-31 (discussing Arizona and California statewide reports' findings that homosexuals encounter a hostile environment in the courts because of their sexual orientation); JUDICIAL COUNCIL OF THE STATE OF CAL., SEXUAL ORIENTATION FAIRNESS IN THE CALIFORNIA COURTS: FINAL REPORT OF THE SEXUAL ORIENTATION FAIRNESS SUBCOMMITTEE OF THE JUDICIAL COUNCIL'S ACCESS AND FAIRNESS ADVISORY COMMITTEE (2001) [hereinafter SOF REPORT]; ARIZ. BAR REPORT, *supra* note 9; Amelia Craig & Amy Todd, *Sexual Orientation Bias in Arizona's Legal System*, ARIZ. ATT'Y, Oct. 2000, at 38; see generally Symposium, *Homophobia in the Halls of Justice: Sexual Orientation Bias and its Implications*

perceived as gay, lesbian, bisexual or transgendered are subjected to bias in overt and subtle ways in their experience and their court interactions. For example, respondents reported that their sexual orientation was a factor in litigation.¹² One respondent reported that his claim for the loss of income of his partner was devalued because they were not heterosexual.¹³ Other respondents believed that they were viewed as less credible witnesses because of their sexual orientation.¹⁴ Still other respondents, regardless of their sexual orientation, noted that they had heard disparaging comments based on sexual orientation from all actors in the justice system—judges, litigants, lawyers and court personnel.¹⁵ This pervasive pattern of disparagement led the Arizona Task Force to conclude that “a hostile environment” based on sexual orientation existed in the Arizona justice system.¹⁶

One of the more interesting findings was the apparent hostility in many justice systems aimed at even conducting these surveys of sexual orientation bias in the court system.¹⁷ Professor Brower noted a

Within the Legal System (Mar. 26, 2002) (transcript on file with *the American University Journal of Gender, Social Policy & the Law*) [hereinafter *Symposium Transcript*].

12. See SOF REPORT, *supra* note 11, at 5 ¶ 17; see also Todd Brower, *Of Courts and Closets: A Doctrinal and Empirical Analysis of Lesbian and Gay Identity in the Courts*, 38 SAN DIEGO L. REV. 565, 610 (2001) (stating that homosexuals using the court found that the court made sexual orientation an issue even when it was not relevant to the case).

13. See Craig & Todd, *supra* note 11, at 38 (discussing survey results of sexual orientation-based discrimination in the courts); see also *Symposium Transcript*, *supra* note 11, at 14.

14. See SOF REPORT, *supra* note 11, at 5 (disclosing that 39% of homosexual court users believed the court used their sexual orientation to devalue their credibility); see also *Symposium Transcript*, *supra* note 11, at 14 (“A jury member suggested that the witness was gay and therefore the testimony was not to be believed.”).

15. See, e.g., ARIZ. BAR REPORT, *supra* note 9 (listing findings of disparaging remarks made in courts about homosexuals); Shortnacy, *supra* note 3, at 324 (noting that one in every five Arizona court employees heard derogatory comments about homosexuals in open court from judges, lawyers or court employees).

16. See ARIZ. BAR REPORT, *supra* note 9, at 1.

17. Although the California survey results indicated on the surface that gay and lesbian court users were relatively satisfied with the treatment they received while in the judicial process, the results further showed that once sexual orientation was visible, treatment of gay and lesbian court users degraded. Among other indicators of hostility were survey respondents’ hostility and resistance to answering the survey. See generally SOF REPORT, *supra* note 11; *Symposium Transcript*, *supra* note 11, at 14-15 (discussing results of the survey on sexual orientation discrimination in California courts). Like the survey done in California, the report published by the District of Columbia Bar’s Task Force on Sexual Orientation in the Legal Workplace was met with hostility from survey respondents towards conducting a survey on discrimination based on sexual orientation and the idea that sexual orientation discrimination was on par with race and gender discrimination. See generally D.C. BAR TASK FORCE ON SEXUAL ORIENTATION IN THE LEGAL WORKPLACE, FINDINGS AND RECOMMENDATIONS (1999); *Symposium Transcript*, *supra* note 11, at 31-39 (discussing results of the D.C. Bar survey on sexual orientation based discrimination in the legal system).

major difference between the court user survey respondents who tended to be “relatively affluent, relatively well-educated, male and white” and the court employee survey respondents who were primarily “African American women of a lesser socioeconomic status than . . . the court users.”¹⁸ Professor Brower reported that in the California court study, the court employees were quite hostile to the court conducting such a survey.¹⁹ The court employees juxtaposed the court’s commitment of resources to the study against the court’s recent decision to deny court employees a raise.²⁰

While on the surface this hostility is yet another example of sexual orientation bias, it reveals a significant gap in the work on bias in the courts—the bifurcation of race, class, ethnicity and sexual orientation. Depending on where people are situated, they may feel more or less comfortable with examining the impact of race, gender, ethnicity or sexual orientation.²¹ From their unique vantage point, the impact of bias based on race, gender and/or class may be much more salient. However, few of the reports attempt to show the complex and confounding effects of race, gender, ethnicity *and* sexual orientation on an individual’s experience in the justice system.

The second panel, “The Use and Abuse of Sexual Orientation in Criminal Cases—The Death Penalty and Beyond,” focused directly on how sexual identity is impacted by homophobia within the criminal justice system, particularly in capital cases. The articles published in this volume are representative of the insightful presentations by all the participants on the second panel. The first presenter, Steven Presson, a partner at Jackson & Presson in Norman, Oklahoma, whose practice is limited to criminal appeals with special emphasis on capital collateral appeals, discussed his representation of Wanda Jean Allen.²² Ms. Allen, a mentally retarded black lesbian, was the first woman to be sentenced to death in Oklahoma.²³ Mr. Presson, who became involved in the case during the habeas corpus stage, stated that while evidence of her retardation was not presented by her defense at trial, her sexual orientation was the focal point in

18. *Symposium Transcript*, *supra* note 11, at 14, 16.

19. *Id.* at 16-17.

20. *Id.* at 31.

21. *See, e.g.*, Regina Austin & Elizabeth M. Schneider, *Mary Joe Frug’s Postmodern Feminist Legal Manifesto Ten Years Later: Reflections on the State of Feminism Today*, 36 NEW ENG. L. REV. 1, 3-4 (2001) (discussing feminists’ approach that addresses gender inequality by incorporating social factors such as sexual orientation, race and social class into the analysis).

22. *See Symposium Transcript*, *supra* note 11, at 69-73.

23. *See Oklahoma Executes Second Female Prisoner*, WASH. POST, May 2, 2001, at A22.

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the case because the victim was Ms. Allen's lover. According to Mr. Presson, the prosecution's theory was that "Allen was a lesbian and she was the man in the relationship; she wore the pants in the family. They put on quite a bit of evidence about how domineering and controlling Allen was."²⁴ Mr. Presson also described that race was an important role in his strategy to save Allen's life.²⁵ However, according to Mr. Presson, the black churches in Oklahoma refused to rally or petition the governor for lenience toward Ms. Allen because, "she was a lesbian."²⁶ Wanda Jean Allen was executed in 1991.

In addition to learning about how the death penalty impacts the queer community, the presenters urged us to recognize the importance of how issues of race, class and gender impact one's understanding and experience of the criminal justice system generally and the death penalty in particular. In this regard, the second presenter, Steven Hawkins, Executive Director of the National Coalition to Abolish the Death Penalty, discussed homophobic comments by prosecutors during criminal cases. His comments put the primal issues of race, class, gender and sexual identity in the experience of sexual minorities within the criminal justice system in sharp perspective.²⁷ Mr. Hawkins also offered a particularly startling example of the ways in which attitudes regarding gender and sexual identity create a specific experience for women: "while less than two percent of those under sentence of death in the United States are women . . . upwards of forty percent of those women on death row are lesbians."²⁸

The final presenters on this panel were Professor Abbe Smith of *Georgetown University Law Center* and Professor Amy Dillard, Deputy Public Defender for the City of Alexandria and Adjunct Professor at the *American University Washington College of Law*. Professor Smith's article, which appears in this volume, addresses the complexity of sexual identity and criminal defense. Additionally, both presenters focused on the ethical and political challenges of representing the queer accused and the queer victim.²⁹

The address of the keynote speaker, Professor Darren Lenard Hutchinson, also appears in this volume. Professor Hutchinson, a

24. *Symposium Transcript*, *supra* note 11, at 71-72.

25. *See id.* at 73.

26. *Id.*

27. *See id.* at 80-86.

28. *Id.* at 83.

29. *See id.* at 90, 105 (arguing that sexual orientation should arise in a criminal case more from legal strategy than one's own ethics or politics).

noted scholar on the issues of sexual identity and critical race theory, is a member of the faculty at *Southern Methodist University* and is currently a Visiting Professor at the *American University Washington College of Law*. In his address, Professor Hutchinson explored the distinctions between homophobia and heterosexism, suggesting that we must direct more attention to the subtle structures within the law and that society privileges heterosexuality and creates institutional subordination of sexual minorities. Additionally, Professor Hutchinson also made the poignant point that heterosexism cannot be examined in a vacuum and added that issues of multidimensionality should be incorporated into inquiries as to how heterosexuality operates in our legal system.

The final panel, “The Professional Implications: Canons of Ethics and Codes of Professional Conduct,” explored the ways in which sexual identity raises ethical issues for lawyers and judges and other participants in the criminal justice system. Professor Jennifer Brown of *Quinnipiac Law School* argued that the Judicial Canons, specifically Canon 3, prohibit judicial bias on the basis of sexual orientation.³⁰ Her article, which juxtaposes the Canons of Judicial Conduct and judicial bias based on perceived sexual identity bias is published here. The next panelist, Professor William Duncan, the assistant director of the Marriage Project at *Columbus School of Law of the Catholic University of America*, addressed the application of ethics rules to lawyers who exploit allegations of sexual orientation bias in family law matters.³¹ The ideas raised in Professor Duncan’s presentation are expanded in an article that appears in this volume of the Journal. Finally, Professor Muneer Ahmad of the *American University Washington College of Law* closed the symposium with his discussion of the ethical obligations of lawyers and specifically the ethics of narrative within the judicial process. Professor Ahmad’s article also appears in this volume.³²

We are very pleased to introduce the publication of the selected articles of the Washington College of Law’s Founder’s Celebration symposium, “Homophobia in the Halls of Justice.” The student organizers, journal staff and presenters all worked very hard to bring you what reflects another important and potentially “unavoidable” aspect of the ever evolving gay moment.

30. *Id.* at 155.

31. *Id.* at 167.

32. *Id.* at 184.