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## Gender Identity and the Law: Scholarship Regarding the Gender Binary and Gender Outlaws Generally

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## **Gender Identity and the Law: Scholarship Regarding the Gender Binary and Gender Outlaws Generally**

**Margaret (Meg) Butler\***

American society and the law are deeply entrenched in a binary view of gender, and history demonstrates that the binary has become more entrenched in the American government's regulation of its citizens over time.<sup>1</sup> The scholarship in the following chapters of the bibliography reflects the existence of transgender and gender nonconforming people as well as the artificial, precarious nature of the gender binary.

This chapter includes scholarship that is generally about the law and transgender or gender nonconforming people, with the caveat that some topics that have a greater depth of scholarship have their own chapters. This chapter includes discussion of transgender rights in general, criminal law, representing clients and teaching law students, and equal protection. Topics covered elsewhere address identity or status in the United States, identity or status abroad, family law, health and the law, Title VII and Title IX claims, and immigration law.

In the time covered by this bibliography, scholarship has blossomed. As this is a cutting edge area of scholarship, many pieces are notes or comments written by law students who are passionate about transgender rights, as evinced by their dedications and language. Although there is some redundancy in terms of article structure, in part arising due to the openness of this area of scholarship, authors have been able to engage in scholarly conversation with each other through their scholarship. Themes of the scholarly debate include whether the better approach for equality is to pursue specific, delineated rights or to seek justice or just results for transgender and gender nonconforming people.

As this area of the law develops, there is plenty of room for new contributions. The lens of gender analysis may be applied in areas in which particular gender roles are either legislated or made normative by society. Scholars may contribute by continuing to interrogate the best ways to promote inclusion of trans people in society. Questions of how transgender

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<sup>1</sup> Annette R. Appell, *Certifying Identity*, 42 CAP. U. L. REV. 361 (2014).

people should be treated under United States law and the law of the states remain. Are privacy rights implicated in specific situations? Are there new discrimination claims to assert? Justice questions related to the rates of discrimination and violence experienced by trans people remain<sup>2</sup> to be asked and answered.

Researchers may begin their study in this area by identifying an area of interest, such as a particular individual right, a type of discrimination, etc., and then searching for that area of interest along with the words *transgender* or “*gender nonconforming*” or *genderqueer* or *non-binary*. Such searches would provide helpful starting results in Google or Google Scholar. Another approach would be to browse through the online materials made available by legal advocacy organizations working in the area of transgender rights. Organizations of interest may include the Transgender Law Center, National Center for Transgender Equality, the Sylvia Rivera Law Project, and the National Center for Lesbian Rights. Researchers may also identify leading scholars in the field, such as Dean Spade, and then search for articles and books written by those scholars.

When searching in an academic library catalog that uses the Library of Congress system for organizing its collection (and most academic libraries do), it can be helpful to search for specific subjects. They may include:

- Transgender people--Identity
- Transgender people--Civil rights
- Transgender people--Political activity
- Transgender People--Legal status, laws, etc.
- Transsexuals--Political activity
- Sex and law

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<sup>2</sup> Transgender people are unemployed at a rate of twice the general population, and are underemployed at a rate of 44%. Transgender people experienced workplace discrimination 78% of the time, in a 2015 survey. WILLIAMS INSTITUTE, JUST THE FACTS: 2015, 6, available at [https://williamsinstitute.law.ucla.edu/datablog/just-the-facts-data-overview\\_2015/](https://williamsinstitute.law.ucla.edu/datablog/just-the-facts-data-overview_2015/). The National Coalition of Anti-Violence Programs (NCAVP) gathers data and reports annually on the rate of abuse experienced by LGBT people. “Among this limited data of those who actually felt comfortable reporting hate violence to the organizations, ‘[t]ransgender people as a whole were 3.7 times more likely to experience police violence than [cisgender] people [who reported experiencing hate violence], and 7 times more likely to experience physical violence from the police.’ And trans people of color were ‘6 times more likely to experience violence from the police compared to [w]hite cisgender survivors and victims.’” Carolyn Calhoun, “*Bullseye on Their Back*”: *Police Profiling and Abuse of Trans and Gender Non-Conforming Individuals and Solutions Beyond the Department of Justice Guidelines Note*, 8 ALA. C.R. & C.L. L. REV. 127, 130 (2017) (citations omitted).

**In General**

Abini, Deema B., *Traveling Transgender: How Airport Screening Procedures Threaten the Right to Informational Privacy*, 87 S. CAL. L. REV. POSTSCRIPT 120–55 (2014).

Abini begins with a detailed overview of the implementation of airport screening procedures and a discussion of the experiences of a transgender traveler. After describing the development of the “murky” doctrine of informational privacy (146), Abini applies a generalized version of the individual informational privacy test, noting the type of information at issue, the type of plaintiff, and the extent the government provides privacy safeguards. Abini evaluates the balancing of interests and concludes that the screening procedures intrude unnecessarily on transgender travelers’ privacy.

Allen, Anita L., *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CAL. L. REV. 1711–64 (2010).

In a symposium on privacy, Professor Allen addresses a variety of privacy tort claims. The analysis of the claims as regards transgender individuals focuses particularly on claims arising from publication of private fact, such as the birth sex of a transgender person. In general, Allen concludes that LGBT plaintiffs do not generally fare well on invasion of privacy claims; the ability to selectively disclose aspects of one’s identity is not protected by the invasion of privacy claim; and the push for civil rights for LGBT people may undercut the invasion of privacy tort as there is less stigma and discrimination for LGBT individuals.

Ballard, Amy, *Sex Change: Changing the Face of Transgender Policy in the United States*, 18 CARDOZO J.L. & GENDER 775–800 (2012).

In this note, Ballard reviews briefly the historical treatment of transgender people under United States law and looks forward to consider possible improvements. Ballard notes the U.S. State Department’s passport policy, allowing an individual to change the gender marker on the passport based on certification by an attending physician, was updated in 2010. The passport policy as well as policies and practices of other jurisdictions, such as the United Kingdom’s Gender Recognition Act of 2004, are suggested as alternatives that states and other juris-

dictions may consider when changing law to be more inclusive of transgender individuals.

Crincoli, Shawn Markus, *Religious Sex Status and the Implications for Transgender and Gender Nonconforming People*, 11 FIU L. REV. 137–49 (2015).

Professor Crincoli addresses the question of how do the frameworks of religious dominations understand people to be male or female, and how can a person change that designation. To assist in this consideration, Crincoli uses the term “religious sex status” (139) in this discussion and compares legal sex assignment in traditional Judaism with that in the United States. To a lesser degree, the article addresses intersex experiences.

Cruz, David B., *Transgender Rights after Obergefell*, 84 UMKC L. REV. 693–706 (2016).

Professor Cruz argues that the *Obergefell* case provides support for notion that the right to self-define and express gender identity is a substantive due process right. In terms of immediate effect, Cruz notes that courts will be required to respect transgender persons in the context of civil marriage law. The bulk of the symposium address focuses on a detailed textual analysis of the *Obergefell* opinion.

Davis, Masen & Kristina Wertz, *When Laws Are Not Enough: A Study of the Economic Health of Transgender People and the Need for a Multidisciplinary Approach to Economic Justice*, 8 SEATTLE J. FOR SOC. JUST. 467–89 (2010).

The authors note that, although laws may protect transgender people from discrimination in California, the application of that “legislation alone cannot fulfill the social contract promised by antidiscrimination laws” (468). The authors make a variety of workplace and housing recommendations for government and private action that would improve the economic health of transgender people.

Esses, Daniella Lichtman, *Afraid to Be Myself, Even at Home: A Transgender Cause of Action under the Fair Housing Act*, 42 COLUM. J.L. & SOC. PROBS. 465–510 (2009).

The Fair Housing Act (FHA) contains a prohibition against discrimination on the basis of “sex,” and Esses’s award-winning note advocates that the definition of “sex” be inclusive so as to protect transgender people. The argument is based on importing Title VII sex-discrimination and sexual harassment analysis into the context of the FHA. Underlying Esses’s argument is the claim that residential sex discrimination is unique and that courts should recognize the primacy of gender identification.

Faithful, Richael, *(Law) Breaking Gender: In Search of Transformative Gender Law*, 18 AM. U. J. GENDER SOC. POL’Y & L. 455–70 (2010).

In this Latcrit symposium presentation, Faithful describes problems arising from advocacy based on seeking formal equality. After presenting a theory-based discussion of gender, Faithful suggests that a combination of local nondiscrimination laws and action, keeping in mind Martha Fineman’s vulnerability model, would “best deliver justice” (469).

Flynn, Taylor, *Instant (Gender) Messaging: Expression-Based Challenges to State Enforcement of Gender Norms*, 18 TEMP. POL. & C.R. L. REV. 465–504 (2009).

Professor Flynn’s premise is that the state forces people into sex-based categories (compelled expression) over the objection of the individual, with numerous negative consequences for transgender and gender nonconforming people. Flynn notes that the binary construction of sex often subordinates women, trans individuals, and lesbian or gay people. After considering obstacles to legal challenges based on symbolic expression compelled expression claims, Flynn suggests that the consequences of gender role stereotyping may become increasingly visible as coerced expression is challenged.

Gates, Gary J., *LGBT Identity: A Demographer’s Perspective*, 45 LOY. L.A. L. REV. 693–714 (2012).

Written in response to a criticism that the author’s prior study had estimated too low the size of the LGBT population in the United States, Gates considers the ways in which identity is defined and measured. Gates considers issues arising in determining the size of the closet, noting that identity-based measures undercount the closet. The focus is primarily on the counting of LGB people.

Gordon, Demoya R., *Transgender Legal Advocacy: What Do Feminist Legal Theories Have to Offer?*, 97 CAL. L. REV. 1719–62 (2009).

Gordon provides a thoughtful review of feminist legal theory, names and describes theorists who have presented a feminist legal theory that is inclusive of transgender advocacy, and seeks to further such theory. For analysis, Gordon relies on discussion of Title VII sex discrimination claims, and considers the ways in which different schools of legal feminism fit into transgender legal advocacy.

Green, Jamison, *“If I Follow the Rules, Will You Make Me a Man?”: Patterns in Transsexual Validation*, 34 U. LA VERNE L. REV. 23–88 (2012).

Focusing particularly on transsexual people, Dr. Green first reviews historical debates about personhood and social anxiety resulting from transphobia, including a review of relevant cases from around the world. Green argues that the “concept of the sexed body as the definition of the person” (83) needs to be set aside in favor of the view that legal systems should not treat male and female bodies materially different from each other, and that in such a circumstance, transsexual bodies would be similarly viewed equally. The analysis is informed by Dr. Green’s extensive experience advocating for transgender people.

Hébert, L. Camille, *Transforming Transsexual and Transgender Rights*, 15 WM. & MARY J. WOMEN & L. 535–90 (2009).

Professor Hébert argues that existing anti-discrimination laws, such as Title VII and similar state laws, are sufficient to protect transgender and transsexual plaintiffs who suffer discrimination based on sex. At its crux, the argument is that courts are improperly applying current law. After elaborating on the difficulties of seeking protection under the Americans with Disabilities Act (ADA) and newer gender identity class protection (ENDA), Hébert explains how a Title VII sex discrimination claim could be made based on gender identity to protect a transgender or transsexual plaintiff. The article contains extensive analysis of Title VII case law.

Knauer, Nancy J., *Gender Matters: Making the Case for Trans Inclusion*, 6 PIERCE L. REV. 1–54 (2007).

Seeking inclusion of transgender people in the community described as LGBT, Knauer argues first that gender matters, second that the gender binary may allow for greater gender variance, third suggests legal reforms, and lastly sets forth “a series of action steps appropriate to try at home” (50–51). In conclusion, Knauer suggests steps the reader (presumably law professors and attorneys) may take to become educated, educate colleagues, and improve the experience of law school (for students) and the quality of representation (for transgender clients).

Kopansky, Dina, *Locked Out: How the Disproportionate Criminalization of Trans People Thwarts Equal Access to Federally Subsidized Housing*, 87 TEMP. L. REV. 125–58 (2014).

Transgender Americans are among the most economically vulnerable in the country, and the Department of Housing and Urban Development (HUD) has a “One-Strike” policy that rejects tenants for past criminal activity. Kopansky describes the policy and the ways in which it conflicts with the intent of HUD’s 2012 Equal Access Rule prohibiting discrimination on the basis of gender identity and sexual orientation. Possible resolutions offered include a disparate impact claim under the Fair Housing Act (FHA).

Levasseur, M. Dru, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943–1004 (2015).

Levasseur, Transgender Rights National Project Director for Lambda Legal Defense & Education Fund, Inc. at the time of writing, takes the position in this frequently cited symposium article that transgender identity is biological and the primary determinant of sex. Through that lens, Levasseur describes the injustice faced by transgender people, describes “legal horrors” (963) experienced by transgender people, and argues that legal gains will follow from courts’ acceptance of gender identity as the primary determinant of sex. Discussion includes Title VII, Title IX, state nondiscrimination laws, and related state and federal policies. Levasseur concludes by calling for a normalization of transgender bodies, rather than the reinforcement of cisgender people as “normal.”



Nosanchuk, Mathew S., *The Endurance Test: Executive Power and the Civil Rights of LGBT Americans*, 5 ALB. GOV'T L. REV. 440–77 (2012).

Attorney Nosanchuk, Special Counselor to the Attorney General for the Civil Rights Division of the U.S. Department of Justice, explains how presidents from 1950 to the time of publication used executive power, such as by issuing executive orders, to advance the civil rights of LGBT Americans. One section of the review specifically addresses legal protections for transgender federal employees.

Spade, Dean, *Keynote Address: Trans Law & Politics on a Neoliberal Landscape*, 18 TEMP. POL. & C.R. L. REV. 353–74 (2009).

In a provocative symposium piece, Spade questions whether traditional modalities of seeking neoliberal goals, such as inclusion and incorporation, actually serve to benefit the lives of trans people, or whether those goals have a limited ability to improve the lives of trans people. Spade suggests instead that advocacy turn to administrative systems and policies. Angela Harris's "preservation-through-transformation"; Alan Freeman's perpetrator's perspective analysis; Ruth Wilson Gilmore's definition of racism; and the Bowker and Star approach to classification systems are all tools Spade uses to consider the benefit of administrative advocacy. Spade considers the attorney's role in supporting social change.

SPADE, DEAN, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* (2011).

*Normal Life* is well-constructed, providing the reader first with the opportunity to meet and experience a taste of the systemic prejudice and violence experienced by trans people on a daily basis. From there, Spade considers the failures of reforms seeking nondiscrimination and/or civil rights protections, noting that benefits arising from such legal reforms do not generally improve the lives of trans individuals. Presenting a strong critique of neoliberalism, Spade suggests alternatively that law reform projects should provide trans people tools for survival and that individual legal assistance may help trans people to see collective harm and unite to take action. A central theme of his work is that seeking reform of administrative systems, such as driver registration, federal agencies, etc., would be impactful on trans peoples' daily

lives and to reconsider ways to address the disparities and dignity harms broadly experienced by trans people.

Tran, Stevie V. & Elizabeth M. Glazer, *Transgenderless*, 35 HARV. J.L. & GENDER 399–422 (2012).

Authors Tran and Glazer note in this symposium piece that while so-called perfect gender nonconformists may state actionable claims for protection from workplace discrimination under Title VII, the imperfect gender nonconformists who are only somewhat masculine or feminine or who reject gender entirely, may be overlooked by legal advocates and courts, limiting the advancement of civil rights for transgender people. The article particularly argues that transgender rights should include the right to choose one's gender, rather than being forced into gender binarism. The arguments extend beyond employment discrimination to the development and choices of a social movement.

TRANSGENDER RIGHTS (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006).

Organized in three parts, law, history, and politics, this important collection includes chapters addressing gender pluralisms, family law issues, employment discrimination, and considers the efficacy of disability law as a tool for protecting transgender people. The editors also included several chapters addressing intersex issues. This collection would be a very good starting point for research into the theoretical aspects of gender, as it includes chapters by Judith Butler and Dean Spade, as well as others who are known in the area of transgender legal scholarship. The International Bill of Gender Rights is included as an Appendix.

TRANSGENDER RIGHTS AND POLITICS: GROUPS, ISSUE FRAMING & POLICY ADOPTION (Jami K. Taylor & Donald P. Haider-Markel eds., 2014).

The collection of chapters in this book do not address legal analysis as their central focus, however, the chapters directly address policy and theory matters that directly impact the rights of transgender or gender nonconforming people. The authors focus on how rights are framed in the legislative process as well as the roles played by advocacy and interest groups. The book includes tables, maps, and many references.

Wilson, Jennifer, *Horizontal Versus Vertical Compromise in Securing LGBT Civil Rights*, 18 TEX. J. WOMEN & L. 125–44 (2008).

In this note, Wilson suggests that vertical compromise, which disregards the considerations of defined groups, such as transgender people, should not be made when working toward equal rights. Instead, Wilson advocates for horizontal compromise that is shared by the entire constituency, although it may have an incremental effect. A horizontal compromise would be one that concerns an entire constituency, such as advocating for employment discrimination protection that would protect lesbian, gay, bisexual, and transgender people, but would have a lesser scope of protection, such as not including disparate impact claims.

### Criminal Law

Cramer, Robert J., et al., *An Examination of Sexual Orientation- and Transgender-Based Hate Crimes in the Post-Matthew Shepard Era*, 19 PSYCHOL. PUB. POL'Y & L. 355–66 (2013).

Following the passage of the Hate Crimes Prevention Act (HCPA), the authors of this article raised the questions whether penalty enhancements should be imposed against hate crime perpetrators and whether sexual orientation and gender identity should be included in hate crime protections. Results of the studies conducted by the others are reported.

Gross, Aeyal, *Gender Outlaws Before the Law: The Courts of the Borderland*, 32 HARV. J.L. & GENDER 165–231 (2009).

Gross describes four trials, two arising in the United States and one each in the United Kingdom and Israel, in which the defendants were convicted of impersonation. Gross characterizes the defendants as “gender outlaws” and uses the trials as a backdrop for a discussion of sex and gender theory. Gross observes that the prosecutions for impersonation endorsed compulsory heterosexuality (182) and reified gender norms.

HATE VIOLENCE AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE IN THE UNITED STATES 2008 (2009), [http://avp.org/wp-content/uploads/2017/04/2008\\_NCAVP\\_HV\\_Report.pdf](http://avp.org/wp-content/uploads/2017/04/2008_NCAVP_HV_Report.pdf).

The National Coalition of Anti-Violence Programs gathered data from a number of state or regional LGBT advocacy organizations about hate crimes. A variety of data points (types of incidents and victim/survivor

race, age, sexual orientation, and gender identity) is included. The project also includes survivor narratives, regional data summaries, numerous graphs and charts, and a 50-state survey of hate crime legislation in the United States. The report is updated annually and available on the website.

Leavitt, Adrien, *Queering Jury Nullification: Using Jury Nullification as a Tool to Fight Against the Criminalization of Queer and Transgender People*, 10 SEATTLE J. FOR SOC. JUST. 709–52 (2012).

Leavitt advocates for queer jurors and their allies to engage in juror nullification, in which a jury may ignore evidence and acquit a defendant due to either objection to the law or the prosecution of the specific defendant. In making the call for nullification with the goal of prison abolition, Leavitt describes the racialized history of jury nullification and the ways in which queer and trans people have been criminalized.

Newman, Rebecca J., *Two Sheriffs, One Town: The Problem of Prosecuting Transgender Hate Crimes in the District of Columbia*, 17 GEO. J. GENDER & L. 495–519 (2016).

A federal prosecutor, rather than a local prosecutor, generally handles crimes occurring in the District of Columbia, and thus the federal prosecutor has no accountability to the District residents. With that in mind, Newman questions how the prosecution of crimes against transgender individuals should be pursued. Newman describes the history of home rule in the District including discussion of the hate crime legislation. The solution, Newman argues, would be to empower the local prosecutor to pursue prosecution in a cooperative system with the Office of the Attorney General.

Shay, Giovanna, *In the Box: Voir Dire on LGBT Issues in Changing Times*, 37 HARV. J.L. & GENDER 407–528 (2014).

Shay considers issues related to jury selection and concerns about protecting LGBT prospective venire persons from discrimination. Questions used in voir dire from criminal cases, seeking to identify unconscious feelings about homosexuality, were included, as were suggested questions to uncover homophobia. Shay suggests that jurors should be removed for cause if they express bias, observing that such jurors often are not. Shay ends with a discussion of whether use of a

peremptory challenge to strike an LGBT venire person would or should violate the equal protection law.

Tilleman, Morgan, *(Trans)forming the Provocation Defense*, 100 J. CRIM. L. & CRIMINOLOGY 1659–88 (2010).

The gay panic defense to murder, in which a defendant's heat of passion murder is mitigated so as to be treated as manslaughter, "has been extended to cases with transgender murder victims" (1665). Critical to the extension is the premise that the transgender victim had misled the defendant regarding the victim's sex. Tilleman describes the state of the law, in part relying upon the Model Penal Code, and describes the noteworthy conviction of Allen Ray Andrade for the murder of Angie Zapata in 2008. Further, Tilleman argues that trans panic should not be considered legally sufficient provocation as a defense to murder charges. As a response to the trans panic defense, Tilleman suggests corrective jury instructions that would remind the jury not to let bias influence its decision.

Wodda, Aimee & Vanessa R. Panfil, "*Don't Talk to Me about Deception*": *The Necessary Erosion of the Trans\* Panic Defense*, 78 ALB. L. REV. 927–72 (2015).

The trans panic defense, used by criminal defendants to justify their violence against trans people, is predicated on both an assertion of deception and the dichotomy of male and female gender roles and identities. The authors review a sample of cases in which the trans panic defense was asserted and observe that homophobia, transphobia, and heteronormativity need to be challenged. Further, they note that the defense has fallen out of favor with the American Bar Association and that California passed a law banning use of the trans panic defense.

### Representation and Teaching

Arkles, Gabriel, Pooja Gehi & Elana Redfield, *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. FOR SOC. JUST. 579–627 (2010).

The authors, attorneys representing transgender clients through their work with the Sylvia Rivera Law Project, note that LGB"TT" legal organizations have historically sought legal goals such as gay marriage and the elimination of sodomy laws, an approach that reinforces the

notion that everybody wants and benefits from the entitlements of capitalism and democracy. The authors challenge that belief and call for meaningful change to come from outside legal strategies, through mass mobilization of communities. The frequently cited article provides suggestions about how lawyers can “support social movements without replicating structures of oppression” (582). The authors’ analysis includes case studies of three projects.

Carpenter, Leonore F., *Getting Queer Priorities Straight: How Direct Legal Services Can Democratize Issue Prioritization in the LGBT Rights Movement*, 17 U. PA. J.L. & SOC. CHANGE 107–36 (2014).

Impact litigation groups use litigation as a tool to create significant legal change, and critics of those groups describe the groups as “assimilationist, retrogressive, and unresponsive to the needs of people of color, transgender people, and the poor” (107). Professor Carpenter explores decision-making models for impact litigation and reviews the substantive and procedural critiques of those models. Further, Carpenter suggests that connecting LGBT-specific direct legal services organizations with impact litigation organizations would help strengthen the LGBT movement.

HOWELL, ALLY WINDSOR, *TRANSFEMORING PERSONS AND THE LAW* (2013).

A survey of a variety of areas of the law, Howell addresses issues that a practitioner meeting with a transgender client may find helpful, including identity documentation, usage of public facilities, housing, veterans benefits and military service, family law, education, health care, violence and hate crimes, employment, immigration, and criminal law. There are appendices listing state laws regarding birth certificate correction and name changes. Includes an introduction by the Honorable Phyllis Randolph Frye and a CD of forms.

Infanti, Anthony C., *Bringing Sexual Orientation and Gender Identity into the Tax Classroom*, 59 J. LEGAL EDUC. 3–34 (2009).

Tax professor Infanti notes that surveys indicate that law students experience discrimination in classes and on campus. A best practice to improve law school climate for LGBT students is the coverage of LGBT issues in non-LGBT classes. Examples included income, spousal transactions, and others, each described by Internal Revenue Code section.

OUT AND ABOUT: THE LGBT EXPERIENCE IN THE LEGAL PROFESSION (2015).

This book was written with two goals. First, to educate people about the contributions and struggles of the LGBT legal community. Second to serve as a resource for members of the LGBT legal community. The contributions are individually authored vignettes organized in thematic sections including “T” is for Transgender.”

Steadman, Sarah, *From Out to In: The Opportunity and Need for Clinical Law Programs to Effectively Serve Low-Income LGBT Individuals*, 26 S. CAL. REV. L. & SOC. JUST. 1–36 (2016).

Despite the recent *Obergefell* marriage decision, Steadman notes that LGBT people are marginalized and experience discrimination. Law school clinics, according to Steadman, are well-positioned both to help LGBT people with legal issues and also to train future lawyers to be culturally competent to assist LGBT clients. The article sets forth a wide variety of types of legal services that are often needed by LGBT people, including family law, name change or identification document correction, eviction assistance, legal emancipation of LGBT minors. Law school clinics are also well-positioned to provide services to low-income LGBT clients, and may already be doing so. To further the effective representation of clients, Steadman includes both strategies and actions that clinics may take to increase the services provided, including using LGBT client hypotheticals when training, and networking with local LGBT service organizations.

### Equal Protection

Barry, Kevin M., Brian Farrell, Jennifer L. Levi & Neelima Vanguri, *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507–82 (2016).

The authors take aim at the Americans with Disabilities Act (ADA), demonstrating that the Act’s exclusions from protection, including gender identity disorder, were included in the legislation due to animus. Applying an equal protection analysis, the authors conclude that the ADA exclusions create a transgender class and the class is entitled to a heightened scrutiny. In the alternative, they note that heightened scrutiny is also required when considered as a sex-based class. The facts of

*Blatt v. Cabella's*, in which the authors represented Ms. Blatt, underlie discussion throughout the article.

Elkind, Diana, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895–928 (2007).

Advocating for the critical issue of bathroom access, Elkind calls for national legislation, but “such groundbreaking statutory protection is unlikely” (897). After defining transgender, Elkin identifies transgender people as a suspected class for purposes of equal protection analysis and also notes progress being made in both state and federal legislation for transgender rights. Elkind describes the history of bathroom discrimination and concludes by advocating the New York City and San Francisco models of anti-discrimination ordinances that provide inclusive protection.

Gilden, Andrew, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83–144 (2008).

Gilden suggests that the transformative potential of the transgender legal movement is undermined by normative-seeking rights-based advocacy. After discussing gender theory, Gilden considers the limitations inherent in class-based approaches for gender equality, including approaches that include gender within the scope of sex discrimination protections and *sui generis* protections that explicitly protect transgender people from discrimination as such. Gilden champions “a more socially transformative approach” (144) which looks beyond legal traditions that reify sex and gender identity while purportedly seeking equality.

### Primary Sources

*Blatt v. Cabela's Retail, Inc.*, 33 A.D. Cases 776 (2017)

*Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)

United Kingdom Gender Recognition Act (2004)

Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990)

Employment Non-Discrimination Act of 2013 (ENDA), 159 Cong. Rec. S7907



Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, Final rule (Dep't of Housing and Urban Development, 24 CFR Parts 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982), 77 Fed. Reg. 5662 (2012), 2012 WL 313893

Fair Housing Act, 82 Stat. 81, 42 U.S.C. § 13661(c).

Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84 Division E, 123 Stat. 2835 (2009), codified at 18 U.S.C. § 249, 1389; 42 U.S.C. § 3716, 3716a

Title VII, Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 253 (1964), codified at 42 U.S.C § 2000e-1 to -17

Title IX, An Act to Amend the Higher Education Act of 1965, Pub. L. No. 92-318, 86 Stat. 235 (1972), codified at 20 U.S.C. §§ 1681–1688