Book Review

Homosexuals, Torts, and Dangerous Things

Cases and Materials on Sexual Orientation and the Law. By William B. Rubenstein.* *St. Paul, Minn.: West Publishing Co.*, 2d ed. 1997. Pp. xlv, 922. \$54.00.

Sexuality, Gender, and the Law. By William N. Eskridge, Jr.** and Nan D. Hunter.*** *Westbury, N.Y.: Foundation Press*, 1997. Pp. xlviii, 1185.

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Negligent, intentional, and strict liability torts. From a canonical standpoint, whatever else one might teach, it is not a first-year torts course if these three concepts are not covered. Torts has a canon, even a Restatement.¹ Yet a canon evolves only after some criteria of value has been established such that privileged texts can be identified according to some authoritative standard. In other words, a canon is the result of a process by which a rule of recognition identifies authoritative texts.

At what point can we say that torts became a field and an intact legal *subject*, the canon of which could be taught in law schools? Most often, casebooks reveal an existing canon, as is the case with most contemporary torts texts. However, during a period of field formation or reformation, casebooks can play a critical role in the evolution of a field, the creation of a disciplinary rule of recognition, and the concomitant development of a canon. Two new casebooks, William Rubenstein's *Cases and Materials on Sexual*

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1. See RESTATEMENT (SECOND) OF TORTS (1965).

*Orientation and the Law*² and William Eskridge and Nan Hunter's *Sexuality, Gender, and the Law*,³ enter legal education at a moment when they can have a profound effect upon the formation of a law school subject, a legal field, and a canon. What is, or should be considered, the canon of the field alternatively termed gay/lesbian, sexual orientation, sexuality, or queer law? What should we teach? If a canon is "'a historical, political, and social product, something that is fashioned by men and women in the name of certain interests, partisan concerns, and social and political agenda,'"⁴ then these books reflect two competing social and political agendas.

I. CANON FORMATION IN TORTS: THE PERSUASIVE POWER OF ONE CONCEPTUAL SCHEME

In a well-established field such as torts, contemporary law school texts reveal to students an existing canon.⁵ But a century ago, the struggle to define a coherent subject called torts was being waged within the academy and the larger legal community. Until the end of the nineteenth century, the American legal system approached the problem of personal injuries by resort to common law writs of Trespass and Case.⁶ While eighteenth- and nineteenth-century lawyers knew there was a distinction between these two forms of action, few could have elaborated just what that distinction was:

It was certain there was a distinction [between trespass and case] even if nobody knew what it was The law itself was seen as based, not upon elementary ideas, but upon the common law writs, as consisting in a range of remedies which had as it were come down from the skies. If a case fell within the scope of no writ, then in general there was no law. If it fell within the scope of one writ, then in general no other writ could be proper.⁷

In 1870, C.G. Addison published one of the first treatises on torts, in which he catalogued various common law forms of action but did not provide an overarching theory of torts.⁸ In fact, Addison's timing was rather

2. WILLIAM B. RUBENSTEIN, *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* (2d ed. 1997).

3. WILLIAM N. ESKRIDGE, JR. & NAN HUNTER, *SEXUALITY, GENDER, AND THE LAW* (1997). Because this book had not been published when this Review went to press, page references are based on proofs.

4. *Canon Busting: The Basic Issues—An Interview with Stanley Fish*, NAT'L F.: PHI KAPPA PHI J., Summer 1989, at 13, 13 (quoting Stanley Fish).

5. See, e.g., DAN DOBBS, *TORTS AND COMPENSATION* (2d ed. 1993); RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* (5th ed. 1990).

6. The writ of Trespass provided relief for injuries, usually between strangers, that were the result of direct and immediate harm from the unauthorized use of physical force, whereas actions on the Case were appropriate for harms inflicted between parties who had a relationship of either contract or status. See S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 393 (2d ed. 1981).

7. *Id.* at 309.

8. See C.G. ADDISON, *THE LAW OF TORTS* (Boston, Little, Brown, & Co. 1870).

unfortunate, as he published the treatise at a time when the formal English writ system was losing favor in U.S. courts.⁹ As a result, the book was not well received. An unsigned review, widely attributed to Oliver Wendell Holmes,¹⁰ made a damning observation about Addison's book: "We are inclined to think that Torts is not a proper subject for a law book."¹¹ Between the lines of the review lay the judgment that the field of torts, such as it was in 1870 and such as it was captured in Addison's treatise, was merely an amalgam of procedural forms of action, rather than a coherent and unified system by which "to fix the dividing lines between those cases in which a man is liable for harm which he has done, and those in which he is not."¹²

Addison's treatise had been reviewed in no small measure because Harvard Law School had determined to teach torts as a separate law school subject in 1870 and it was regarded as the work best adapted for a textbook.¹³ Sensing that the time might be right for a new field to emerge, but in a form that provided overriding philosophical and theoretical principles, the reviewer ended with the following entreaty: "We long for the day when we may see these subjects treated by a writer capable of dealing with them philosophically, and self-sacrificing enough to write a treatise as if it were an integral part of a commentary on the entire body of the law."¹⁴

That day was not long in coming. A second anonymous essay, again widely attributed to Holmes,¹⁵ appeared in the *American Law Review* under the title, *The Theory of Torts*.¹⁶ In this essay, the author outlined a tripartite conception of torts: liabilities in which culpability is in general an essential element (negligent torts); liabilities irrespective of culpability (strict liability torts); and liabilities arising from acts done intentionally (intentional torts).¹⁷ Holmes would go on to develop more fully his metatheory of torts in *The Common Law* in 1881.¹⁸ His project was "to discover whether there is any common ground at the bottom of all liability in tort, and if so, what that ground is."¹⁹ He concluded that "[s]uch a theory is very hard to find. The law did not begin with a theory. It has never worked one out."²⁰ As such, the task

9. The emergence of the Field Code in 1848 is one example of this trend. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 391-94, 403-06 (2d ed. 1985).

10. See G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 12 (1980).

11. Book Notice, 5 AM. L. REV. 340, 341 (1871) (reviewing ADDISON, *supra* note 8).

12. O.W. HOLMES, JR., *THE COMMON LAW* 79 (Boston, Little, Brown, & Co. 1881).

13. See Book Notice, *supra* note 11, at 340.

14. *Id.* at 341.

15. See, e.g., WHITE, *supra* note 10, at 12.

16. *The Theory of Torts*, 7 AM. L. REV. 652 (1873). Compare the implicit confidence displayed by Holmes's use of the word "the" in the article's title with the humility of the indefinite article used by John Rawls, certainly a no less important legal philosopher, in the title of his germinal work. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

17. See *The Theory of Torts*, *supra* note 16, at 653.

18. HOLMES, *supra* note 12.

19. *Id.* at 77.

20. *Id.*

fell to him to develop one. In so doing, Holmes located his conception of tort liability within a larger modernist discourse of human agency. Rather than relying upon arcane forms of action that organized wrongs by reference to the nature of the injury alleged, Holmes's theory was animated by a universal moral agent, the reasonable or prudent man: "The ideal average prudent man . . . is a constant, and his conduct under given circumstances is theoretically always the same."²¹

In 1874, convinced of the soundness of the case method recently introduced to Harvard Law School by Dean Christopher Columbus Langdell, Professor James Barr Ames published for his Harvard students the first torts casebook.²² In this text, Ames did not heed the call to theory provided by Holmes, but rather offered his students 800 pages covering the common law forms of action for trespass, case, conversion, and defamation. Ames's book contained not one negligence case.²³ In 1893, however, the second edition of the book devoted "six chapters to negligence, including discussions of standards of care, the concept of duty, and contributory negligence."²⁴ From that time forward, Holmes's theoretical framework has defined the field by locating the reasonable person at the center of a tripartite system of civil liability. Within this structure, a canon of tort law has evolved, and contemporary torts casebooks invariably include canonical cases, such as *The T.J. Hooper*,²⁵ *United States v. Carroll Towing Co.*,²⁶ *Palsgraf v. Long Island Railroad Co.*,²⁷ and *Escola v. Coca Cola Bottling Co.*²⁸

The process by which torts emerged as the field we know today mirrored a larger process taking place in American jurisprudence during the latter half of the nineteenth century: the maturation of a distinctly American legal system. The movement away from the English common law writ system, and toward a new conceptual scheme based on fault, individual responsibility, and the emergence of generalized standards of care, was provoked in significant part by the writings of Holmes. But it also reflected a response to changes in the U.S. economy, most notably the emergence of national railroads, large mills, and industrialized factories producing numerous accidents between strangers.²⁹ A new theory of civil liability was necessary to respond adequately to a newly

21. *Id.* at 111.

22. See JAMES BARR AMES, SELECT CASES ON TORTS (Cambridge, Mass., n.pub. 1874).

23. See WHITE, *supra* note 10, at 18.

24. *Id.* at 18-19. Ames's colleague Jeremiah Smith authored these six chapters as part of a supplement to the original work. See *id.*

25. 60 F.2d 737 (2d Cir. 1932) (considering industry custom in establishing standards of care in negligence cases).

26. 159 F.2d 169 (2d Cir. 1947) (establishing risk-utility rule in negligence cases).

27. 162 N.E. 99 (N.Y. 1928) (establishing "risk rule" approach to limiting tort liability).

28. 150 P.2d 436 (Cal. 1944) (applying doctrine of *res ipse loquitur* to injuries sustained from defective product).

29. See FRIEDMAN, *supra* note 9, at 468; MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 95 (1977).

industrialized United States. Thus the canonical cases of tort law came to enjoy a privileged status according to criteria of value that reflected particular historical, social, and political agendas.

In *Doing What Comes Naturally*, Stanley Fish observed that a powerful critic "can have a profound and *direct* effect on what gets taught in the schools, what appears in the curriculum, what gains entrance into the canon, what gets published, reviewed, anthologized, disseminated."³⁰ If ever this observation were true, it would be with respect to Holmes's theory of torts. With his general theory, Holmes created the field known as torts, shaped the curriculum of law school torts classes, and mapped out the contours of our contemporary torts canon. In the years since *The Common Law*, other torts theorists have tried to introduce new or alternative paradigms for conceptualizing the field of torts,³¹ but with the exception of Guido Calabresi's introduction of law and economics,³² the inertia of Holmes's model has been too powerful to resist.

II. THE EVOLUTION OF A NEW FIELD: SEXUAL ORIENTATION/SEXUALITY AND THE LAW

The two new casebooks I review here appear at a critical point in the maturing of the gay rights movement and as a distinctly gay, some might say queer, American jurisprudence begins to emerge. Gay men and lesbians have just been found to have the right to marry under the Hawaii Constitution,³³ and the U.S. Supreme Court recently ruled that the Colorado Constitution cannot legitimately serve as the vehicle for the majority of Colorado citizens to express raw prejudice against gay people.³⁴ Both of these casebooks are clear, well-organized, and will teach very well. They will provide students with both doctrinal and theoretical grounding in areas of law and policy not typically covered in law school curricula. My goal in this Book Review is to locate the texts within an emerging legal field, and within gay and lesbian theory more generally. The choice to use one book over the other will derive not from any particular weaknesses in either, but from a view of what is the proper object of this subject.

When I was in law school in 1983, classes on sexual orientation and the law or sexuality and the law were not offered at my or any other law school.

30. STANLEY FISH, *DOING WHAT COMES NATURALLY* 306 (1989).

31. See, e.g., LEON GREEN, *THE JUDICIAL PROCESS IN TORT CASES* (1931). Dean Green suggested a conceptual scheme with which to approach tort law grounded in kinds of harms, rather than kinds of duties. As such, he organized the field into categories such as "Threats, Insults, Blows, Attacks, Wounds, Fights, Restraints," "Surgical Operations," "Keeping of Animals," and "Power, Telephone and Telegraph, Water, and Gas Companies." *Id.* at ix. Green's casebook was never widely adopted.

32. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

33. See *Baehr v. Miike*, CIV No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996).

34. See *Romer v. Evans*, 116 S. Ct. 1620, 1629 (1996).

I and my fellow lesbian and gay law students, however, wanted to educate ourselves about gay rights law; some of us wanted to practice in this area, others were merely curious, and all of us felt the weight of our invisibility in the law school curriculum. This desire motivated us to put together our own self-taught course; certainly no one on the faculty had any greater expertise in the matter. We went to the library and found a few reported decisions that dealt with the rights of lesbians and gay men: a handful of employment cases,³⁵ a few lesbian custody cases,³⁶ cases concerning gay and lesbian student groups that had been denied official university recognition,³⁷ and a few sodomy cases.³⁸ We created an independent study course, and taught the material to ourselves. At that point in my life, no text revealed an overarching *theory* of sexual orientation or sexuality and the law.³⁹ As a result, not unlike C.G. Addison, we merely assembled existing reported decisions according to the type of harm alleged: employment discrimination, sodomy prosecutions, school recognition, child custody, and others. We shared with many gay rights advocates and scholars of the time a pre-*Hardwick* innocence grounded in the firmly held belief that soon the Supreme Court would dignify our lives by recognizing a right to privacy for consensual adult same-sex sexuality. Surely the judicial assault on our families, relationships, and public lives could not continue much longer.

Things have come a long way in the intervening fourteen years. While many commentators might have denied in 1983 that sexuality and the law was a legal field, few contemporary reviewers would maintain that "sexual orientation and the law" or "sexuality and the law" are not proper subjects for a casebook today. Unlike Ames's casebook on torts, the Eskridge-Hunter and Rubenstein casebooks have emerged not at the pedagogical moment when Harvard Law School determined to teach a course in sexual orientation and the law,⁴⁰ but after many American law schools have deemed this subject important enough to include it in their curricula. Indeed, as of 1995, one quarter of American law schools were offering courses devoted primarily to

35. See, e.g., *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980); *Singer v. United States Civ. Serv. Comm'n*, 530 F.2d 247 (9th Cir. 1976); *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969); *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592 (Cal. 1979).

36. See, e.g., *S v. S*, 608 S.W.2d 64 (Ky. Ct. App. 1980); *Jacobson v. Jacobson*, 314 N.W.2d 78 (N.D. 1981).

37. See, e.g., *Gay Lib v. University of Mo.*, 558 F.2d 848 (8th Cir. 1977).

38. See, e.g., *Doe v. Commonwealth's Att'y*, 403 F. Supp. 1199 (E.D. Va. 1975); *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980).

39. In 1985, Roberta Achtenberg, then Directing Attorney at the National Center for Lesbian Rights, edited a treatise on sexual orientation and the law that employed the Addisonian approach of cataloguing the material. See *SEXUAL ORIENTATION AND THE LAW* (Roberta Achtenberg ed., 1985). It was merely a more comprehensive compilation of cases than we were able to assemble as second-year law students.

40. Harvard Law School has included courses such as "Sexual Orientation and the Law" and "Law, Sex, and Identity" in its curriculum for several years now, all of which have been taught, however, by adjunct or visiting professors (including Bill Rubenstein).

sexuality and/or sexual orientation,⁴¹ and the percentage increases to one third if one counts courses that provide some significant or substantial coverage of these issues.⁴² But what is being taught in these courses?⁴³ What is the proper subject of these courses and of these casebooks? What would a sophisticated and philosophic "commentary on the entire body of the law"⁴⁴ in this area look like? Would it promise "a 'critical' intellectual domain in American legal jurisprudence,"⁴⁵ or just a compilation of historic wrongs done to gay men and lesbians?

A survey of the syllabi used in the forty-eight law school courses devoted primarily to sexuality and/or sexual orientation and the law indicates highly idiosyncratic responses to the question of what to teach.⁴⁶ Some professors, in effect, ask the "gay question," just as many teachers of "Women and the Law" courses ask the "woman question"⁴⁷ and many teachers of "Race, Racism, and the Law" ask the "race question":⁴⁸ They seek to analyze the law's effect on gay men and lesbians as a class. Presupposing a fully constituted homosexual subject who is regulated by legal norms and rules, these courses examine the ways in which lesbians and gay men are treated or mistreated by the state through the enforcement of sodomy laws, denial of child custody, expulsion from the military, and limitations on the right to marry. Grounded in an acceptance of identity politics as the foundation of equality claims, this approach to the subject of sexual orientation and the law most often regards the aim of the struggle for gay rights as securing suspect class status for gay men and lesbians.

In contrast, others approach this subject by considering the ways in which gay men and lesbians are not the object, but the *effect* of legal regulation. On

41. See Francisco Valdes, *Tracking and Assessing the (Non)Inclusion of Courses on Sexuality and/or Sexual Orientation in the American Law School Curriculum: Reports from the Field After a Decade of Effort*, 1 NAT'L J. SEXUAL ORIENTATION L. 150, 151 (1995) <<http://sunsite.unc.edu/gaylaw/files/valdes2.pag>>.

42. An example of the latter is "AIDS and the Law." See *id.* Of course, these numbers reveal that the majority of law schools do not offer courses on sexuality or sexual orientation law. This fact can be explained in several ways, the most generous of which is that these courses, like "Feminist Jurisprudence" and "Critical Race Theory," tend to be offered with greater frequency at the more elite schools that feel they have more freedom to offer non-black letter, jurisprudential courses.

43. The first edition of Rubenstein's book, WILLIAM B. RUBENSTEIN, *LESBIANS, GAY MEN, AND THE LAW* (1993), was adopted for use in roughly 25 to 30 classes, including non-law school courses on the rights of gay men and lesbians.

44. Book Notice, *supra* note 11, at 341.

45. Victor F. Caldwell, Book Note, 96 COLUM. L. REV. 1363, 1363 (1996) (reviewing *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberle Williams Crenshaw et al. eds., 1995)).

46. See Valdes, *supra* note 41.

47. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990) ("[T]he woman question' . . . is designed to identify the gender implications of rules and practices which might otherwise appear to be neutral or objective.") (footnote omitted); Patricia A. Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 20 (1991) ("Feminist legal scholarship seeks to analyze the law's effect on women as a class.").

48. See, e.g., PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991)

this view, a course entitled "Sexual Orientation and the Law" is not about gay men and lesbians, but about the role that law plays in giving the notion of sexual orientation meaning—whether it be heterosexuality, homosexuality, or bisexuality.⁴⁹ For instance, Jane Schacter has taught a course at the University of Wisconsin Law School that "examine[s] the relationship between sexual orientation and the law."⁵⁰ The course focused "on the interaction between the law and social, cultural and political attitudes about sexual orientation—that is, how social forces shape, and are shaped by, legal doctrine."⁵¹ There are also those who approach this subject with their own particular intersectional interests. For instance, Mary Becker teaches a course at the University of Chicago entitled "Critical Race and Lesbian-Gay Legal Theory," while Twila Perry teaches "Race, Gender, and Torts" at Rutgers University-Newark.

Given that the question—"What is the proper subject of sexual orientation and the law?"—provokes as many different answers as there are courses so named, is this the proper topic for a casebook? Can we even begin to call such a diverse constellation of material a field? Just as Holmes provided the philosophical framework within which to understand torts as a field, Eskridge-Hunter and Rubenstein provide frames to approach the subject of sexuality/sexual orientation. These two books, while providing very different views on the subject they purport to present, will have profound effects upon the evolution of sexual orientation, or queer theory, and the law. My hope, however, is that the effect these two new casebooks will have on this field will differ significantly from the effect Holmes's metatheory had on the creation of the law of torts: No winner will emerge who, by virtue of winning, marginalizes the loser as naive, outdated, or irrelevant. Both of these books should receive equal respect in the academy, for they will keep alive an ongoing dynamic debate within the lesbian/gay/bisexual/transgender/queer communities with respect to the nature of sexuality, sexual identity, and the law. About this, I will have more to say later.⁵²

III. RUBENSTEIN'S *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW*

Rubenstein's text is the second edition of a book he published under a different title in 1993.⁵³ When Jane Schacter reviewed the first edition, she

49. At a 1996 American Association of Law Schools' conference in Washington, D.C. on lesbians and gay men in law teaching, Nan Hunter suggested that the attendees consider teaching a course entitled "Heterosexuality and the Law" as a way of unmasking the powerful normative priority of heterosexuality.

50. Jane S. Schacter, *Sexual Orientation and the Law* 1 (Spring 1994) (syllabus, on file with author).

51. *Id.*

52. *See infra* Part V.

53. *See* RUBENSTEIN, *supra* note 43.

wrote that "[i]f timing is everything, then Bill Rubenstein got it just right."⁵⁴ He still does. This is a very good book. Indeed, it is a better book than the first edition because Rubenstein took to heart virtually all of Schacter's criticisms of the first edition.⁵⁵ In *Cases and Materials on Sexual Orientation and the Law*, Rubenstein essentially asks the "gay question." About this perspective he is quite up-front. In the preface to the second edition he recounts the problems he had while a student at Harvard Law School searching for himself—a gay man—in the law school curriculum, in Harvard's well-stocked library, and in legal literature generally: "In the vast majestic expanse of Harvard Law School's library—where no subject was too obscure for its own shelf—the absence of legal materials about my life was itself awe-inspiring."⁵⁶

This identity statement frames Rubenstein's text: It is a book for and about gay men and lesbians. Should non-gay people choose to take, or even teach, a class on the subject, they are welcome. Yet the fundamental "aspects of gay and lesbian lives"⁵⁷ is what this book is about, a subject for which many students and teachers are looking. With the exception of sodomy and solicitation cases in criminal law and a few recent constitutional law cases, gay men and lesbians remain invisible in courses other than those that are explicitly dedicated to sexual orientation and the law. Until recently, traditional law school courses likewise ignored women's lives completely, yet to varying degrees women now appear in the cases and problems that are used in mainstream casebooks. If it were not for courses dedicated to sexual orientation, gay men and lesbians would still be wandering the halls of their law schools hopelessly looking for themselves in the curriculum, just as Rubenstein and I did during the early to mid-1980s.

The Rubenstein book begins with a chapter he titles "Basic Documents," which is divided into six subjects: Sexuality, Identity/History, Religion, Psychiatry, Philosophy, and Queer Theory. What makes these documents "Basic" is not entirely obvious; I wondered, "basic to what?" or "to whom?" Certainly Rubenstein is trying to set a cultural stage for the legal materials that

54. Jane S. Schacter, *Poised at the Threshold: Sexual Orientation, Law, and the Law School Curriculum in the Nineties*, 92 MICH. L. REV. 1910, 1910 (1994) (book review) (footnote omitted).

55. For instance, Schacter suggested that "the chapter on regulation of sexual activity would have been enriched by readings exploring and critiquing the premises of liberal privacy theory." *Id.* at 1921. The new text includes excerpts of writings on privacy theory by Michael Sandel, Jed Rubenfeld, Kendall Thomas, and Andrew Koppelman. See RUBENSTEIN, *supra* note 2, at 265–80. Similarly, Schacter felt that the book needed more "readings from social and legal theory that engage the large and overarching questions" regarding the nature of sexual orientation. Schacter, *supra* note 54, at 1919. Again, Rubenstein heeded Schacter's call and included in the second edition readings from Martha Nussbaum, Mary McIntosh, Michel Foucault, and Judith Butler that he identifies as "Philosophy" and "Queer Theory." See RUBENSTEIN, *supra* note 2, at 122–44. To be sure, these materials, raising complex and difficult questions, take up only 20 pages of the chapter entitled "Basic Documents." I suspect they would be more accessible and pedagogically useful were they integrated into the discussion of particular legal problems.

56. RUBENSTEIN, *supra* note 2, at v.

57. Schacter, *supra* note 54, at 1915.

follow. However, by calling them basic, Rubenstein leaves the impression that these documents—which include both fictional and nonfictional essays, amicus briefs, news articles, and academic studies—reflect a snapshot of background materials necessary to understand gay men, lesbians, and the law. It is unclear why these materials were determined significant enough to be considered basic, and why other materials were ruled out. They admittedly provide a nice, albeit brief, introduction to the history of the gay rights movement, including the coercive treatment of gay people by institutions such as the church and the psychiatric profession; but as a substitute for an introductory course in lesbian and gay studies and as a framing device, the first chapter provides an unnecessarily partial account of the fundamental aspects of lesbian and gay lives by focusing the reader on gay men. For instance, most of the material Rubenstein includes in the first section, entitled “Sexuality,” describes gay male sexuality. Lesbians are the subject of less than a quarter of the material in this section, and what is included is dated—for instance, Alfred Kinsey’s uniformly discredited observations that women exhibit same-sex sexual behavior much less frequently than men do,⁵⁸ and Marilyn Frye’s essay, *Lesbian ‘Sex’*, which advances the dubious notion that lesbians prefer cuddling to penetration.⁵⁹ There is so much good pro-sex writing by lesbians available these days.⁶⁰ It is unfortunate that none of it was included in this section.

Five substantive chapters follow Rubenstein’s “Basic Documents”: “Sexuality” (focusing on sodomy laws), “Identity” (as expressed in schools, private associations, or coerced through outing), “The Workplace” (private and public employment, including a new section on the Equal Protection Clause), “Coupling” (marriage and legal instruments that replicate marriage rights, such as guardianships and domestic partner benefits),⁶¹ and “Parenting.” Each of these chapters provides evidence of the law’s coercive treatment of lesbians and gay men—for instance, sodomy law prosecutions, military discrimination against homosexuals, and the denial of custodial rights to lesbian and gay

58. See RUBENSTEIN, *supra* note 2, at 14–19 (excerpting ALFRED KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 446–501 (1953)).

59. See *id.* at 28–33 (excerpting MARILYN FRYE, *Lesbian ‘Sex’*, in *WILLFUL VIRGIN: ESSAYS ON FEMINISM*, 1976–1992, at 109 (1992)).

60. See, e.g., DOROTHY ALLISON, *SKIN: TALKING ABOUT SEX, CLASS & LITERATURE* (1994); AUDRE LORDE, *ZAMI: A NEW SPELLING OF MY NAME* (1982); *THE PERSISTENT DESIRE: A FEMME-BUTCH READER* (Joan Nestle ed., 1992); MINNIE BRUCE PRATT, *REBELLION: ESSAYS 1980–1991* (1991); Amber Hollibaugh, *Desire for the Future: Radical Hope in Passion and Pleasure*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 401 (Carol S. Vance ed., 1984).

61. Curiously, the chapter entitled “Legal Recognition of Lesbian and Gay Relationships” in the first edition is renamed “Coupling” in the second. Notwithstanding the name change, the first and second edition cover the same material: gay marriage, domestic partnership, and other legal fictions through which lesbian and gay men in relationships can gain some of the financial and legal benefits afforded married heterosexuals. Given the thorough and complex critique of monogamy, marriage, and traditional family structures that the gay liberation movement has developed, it is unfortunate that Rubenstein chose to rename the chapter on gay and lesbian relationships “Coupling.”

parents. Rubenstein does a good job of including materials that portray complex debates within the lesbian and gay community, such as disagreements over the legitimacy of intergenerational sex, the debate over gay marriage, and parenting disputes within lesbian or gay male families.

It is an unfortunate reality that the overwhelming majority of plaintiffs in gay rights cases are white men. Notwithstanding my earlier observations about the male bias of the "Basic Documents" chapter, Rubenstein does make an effort to supplement the cases with readings, both legal and nonlegal, written by or about the many types of people who make up the lesbian and gay communities. "Basic Documents" includes an interview with James Baldwin,⁶² Audre Lorde's *Tar Beach*⁶³ and Paul Butler's *At Least Me and Rafael Tried*⁶⁴ appear in the "Coupling" chapter; and Lorde's *Man Child: A Black Lesbian Feminist's Response*⁶⁵ is included in "Parenting." To the extent that the lives of gay men and lesbians are generally hidden from and unknown to heterosexual people, the lives of gay men and lesbians of color are even more invisible—even within the gay community. Rubenstein's book reflects a sensitivity to this problem, although it could go further still. The section on marriage would benefit from the inclusion of writings such as Barbara Omolade's *The Unbroken Circle: A Historical and Contemporary Study of Black Single Mothers and Their Families*,⁶⁶ and the "Parenting" chapter would be enhanced by Regina Austin's *Sapphire Bound!*⁶⁷ or excerpts from Martha Fineman's *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies*.⁶⁸

In sum, Rubenstein's book seems to put to rest the first order question: Is sexual orientation and the law a proper subject of a law book? To the more difficult second order question—What is the proper object of sexual orientation and the law? Rubenstein's answer is the lives of gay men and lesbians: "The organizing principle of the book remains the life experiences of lesbians, gay men, and bisexuals."⁶⁹ His book makes pedagogical space in the academy for gay men and lesbians; it "serves as a treatise or 'deskbook' on lesbian/gay

62. See RUBENSTEIN, *supra* note 2, at 71–78 (excerpting Richard Goldstein, "Go the Way Your Blood Beats": An Interview with James Baldwin, in JAMES BALDWIN: THE LEGACY 173 (Quincy Troupe ed., 1989)).

63. See *id.* at 688–98 (excerpting Audre Lorde, *Tar Beach*, in HOME GIRLS: A BLACK FEMINIST ANTHOLOGY 145 (Barbara Smith ed., 1983)).

64. See *id.* at 699–704 (excerpting Paul Butler, *At Least Me and Rafael Tried*, AURORA, Spring 1982, at 17).

65. See RUBENSTEIN, *supra* note 2, at 802–08 (excerpting AUDRE LORDE, *Man Child: A Black Lesbian Feminist's Response*, in SISTER OUTSIDER: ESSAYS AND SPEECHES 72 (1984)).

66. Barbara Omolade, *The Unbroken Circle: A Historical and Contemporary Study of Black Single Mothers and Their Families*, 3 WIS. WOMEN'S L.J. 239 (1987).

67. Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539.

68. MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

69. RUBENSTEIN, *supra* note 2, at vi (emphasis omitted).

law.”⁷⁰ In a curious way, Rubenstein’s approach to sexual orientation and the law relies upon a form of secular humanism similar to that employed by Holmes in *The Common Law*.⁷¹ Just as the reasonable person is the animating subject of modern torts doctrine, the gay person centrally animates Rubenstein’s approach to his subject. Rubenstein’s casebook reflects a maturation of the legal discourse about gay men and lesbians, from object of legal regulation to moral subject who has certain vested natural, legal, political, and social rights.

The social and political agenda Rubenstein brings to this project thus creates a rule of recognition that identifies authoritative texts, which with time may make up the canon in this field. If your subject is the lives of lesbians and gay men, then the canonical cases are, to name a few, *Bowers v. Hardwick*,⁷² *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*,⁷³ *Romer v. Evans*,⁷⁴ *DeSantis v. Pacific Telephone & Telegraph Co.*,⁷⁵ *Watkins v. United States Army*,⁷⁶ *Baehr v. Lewin*,⁷⁷ and *Braschi v. Stahl Associates*.⁷⁸ These cases are privileged because they evidence the struggle between the gay or lesbian subject and legal institutions that seek to deny that subject full civil rights.

IV. ESKRIDGE AND HUNTER’S *SEXUALITY, GENDER, AND THE LAW*

Eskridge and Hunter’s book raises the specter of a competing conceptual scheme, one that will potentially assemble a different set of canonical cases than those selected by Rubenstein. Rather than examining the law’s treatment of the fundamental aspects of lesbian and gay lives, *Sexuality, Gender, and the Law* is primarily concerned with readings that illustrate how there is “[a] mutually constitutive dynamic operat[ing] between sexuality and the state, just as one operates between the market and the state.”⁷⁹ Rather than take the lives of lesbians and gay men as the object of legal analysis, the text

70. *Id.* at x.

71. HOLMES, *supra* note 12.

72. 478 U.S. 186 (1986) (upholding constitutionality of Georgia sodomy statute as applied to gay man).

73. 115 S. Ct. 2338 (1995) (finding that private association has First Amendment right to exclude gay organization from its St. Patrick’s Day parade).

74. 116 S. Ct. 1620 (1996) (invalidating state constitutional amendment that prohibited state or localities from enacting laws forbidding sexual orientation-based discrimination).

75. 608 F.2d 327 (9th Cir. 1979) (holding that Title VII does not prohibit sexual orientation-based discrimination).

76. 875 F.2d 699 (9th Cir. 1989) (ordering reinstatement of gay member of U.S. Army on equitable estoppel grounds).

77. 852 P.2d 44 (Haw. 1993) (finding that prohibition of gay marriage is presumptively unconstitutional under Hawaiian constitutional provision barring sex-based discrimination).

78. 543 N.E.2d 49 (N.Y. 1989) (allowing surviving gay partner of leaseholder to inherit tenancy as family member).

79. ESKRIDGE & HUNTER, *supra* note 3, at v.

consider[s] "sexuality" in its broadest sense. One enterprise . . . is the deconstruction and analysis of sexual identity, and we do not limit that to gay, lesbian, and bisexual identities. We explore how the law constructs homosexuality *and* heterosexuality in diacritical relationship to each other. . . . [so as] to render visible the lives of lesbians and gay men, who are often invisible in the law, and at the same time to analyze the social meanings of heterosexuality, which is often unquestioned in the law.⁸⁰

Recognizing the dynamic relationship that a casebook can have within the development of a field, Eskridge and Hunter openly confess their aspiration: "We hope that this book will help shape the field itself."⁸¹ But what is their field? Is it the same field Rubenstein's book seeks to capture? Rather than focus upon the multiple ways in which the law interferes with or fails to take account of the lives of lesbians and gay men, Eskridge and Hunter seek to show how the law's regulation of sexuality permeates all facets of public and private life, and indeed, produces a coherent boundary between the public and the private spheres. For these authors, law is a regulatory practice that has the power to create lesbian, gay, bisexual, transgendered, and heterosexual subjects.

As the title indicates, however, the book does not limit its focus to sexuality alone. The authors are committed to exploring the degree to which sexual norms and gender norms cannot be fully understood independent of one another: "[W]e view sexuality and gender in intellectual terms as so inextricably linked as to cast doubt on the ability to separate them completely and still attain a thorough understanding of either."⁸² To this end, they include readings from natural law theorists such as John Finnis,⁸³ materialists such as Richard Posner,⁸⁴ and feminist deconstructionists such as Judith Butler⁸⁵ and Eve Sedgwick.⁸⁶ One of the strengths of this text is the manner in which these difficult theoretical readings are paired with cases that ground abstract insights from cultural and gender studies in real life problems.⁸⁷

Although Eskridge and Hunter do not start off with a chapter entitled "Basic Documents," it would have looked quite different from Rubenstein's

80. *Id.* at vii-viii.

81. *Id.* at v.

82. *Id.* at vii.

83. *See id.* at 230-32 (excerpting John M. Finnis, *Law, Morality, and "Sexual Orientation"*, 69 NOTRE DAME L. REV. 1049, 1063-69 (1994)).

84. *See id.* at 241-44 (excerpting RICHARD A. POSNER, *SEX AND REASON* 146-47, 157-59, 174-78 (1992)).

85. *See id.* at 280-82 (excerpting JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 6-7, 22-23, 24-25 (1990)).

86. *See id.* at 289-300 (excerpting EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 67-68, 71-76, 78-90 (1990)).

87. These materials, particularly Butler and Sedgwick, are hard going for most law students. Indeed, after several attempts, I have given up trying to teach Butler.

had they done so. Their basic documents would touch on fundamentals of privacy doctrine; sex discrimination; scientific and cultural theories of sexual identity; First Amendment treatment of sexual speech, association, coming out, and the problem of conflicting norms about homosexuality under the religion clauses; and the law's construction of consent in an array of sexual contexts.

Instead, the Eskridge-Hunter text is organized within three clusters of four chapters each, covering a wide array of topics that all generally fall within the domain of sexuality. The first cluster provides constitutional, historical, and theoretical materials; it emphasizes theories of privacy and equality, the medicalization of sexuality, and competing philosophical visions of sexual identity.⁸⁸ Recall that Rubenstein includes the Kinsey study of lesbian sexuality in his "Basic Documents."⁸⁹ Eskridge and Hunter, however, discuss Kinsey in a chapter entitled "Medicalization of Sex, Gender, and Sexuality."⁹⁰ In so doing, they better situate Kinsey's *Sexual Behavior in the Human Female* within the evolving medicalization of sexuality that began with sexologists of the eighteenth century, continued through Freud in the nineteenth, and concludes with feminist critiques of Freud⁹¹ and antiscientists such as Foucault.⁹²

This first third of the book ends with a chapter entitled "U.S. Military Exclusions and the Construction of Manhood," in which the authors use the norm of masculinity in the military as a way of practically illustrating the intersection of race, sexuality, gender, and sexual orientation. This chapter in particular provides a salient example of the different approaches the Rubenstein and Eskridge-Hunter books bring to a common topic. In Rubenstein's section on the military, he first considers important regulations with regard to sodomy and homosexuality,⁹³ then excerpts two academic accounts of the subject,⁹⁴ and concludes with two significant legal challenges to the Pentagon's policies that exclude gay men and lesbians from military service.⁹⁵ In contrast, Eskridge and Hunter situate many of these same materials within a larger discussion of the military's history of racial segregation and exclusion⁹⁶ and the prohibition of women from combat positions.⁹⁷ In so doing, they render the subject in terms that implicate both gender- and race-based norms of

88. See *id.* at vi.

89. See *supra* note 58 and accompanying text.

90. See ESKRIDGE & HUNTER, *supra* note 3, at 145-48.

91. See, e.g., NANCY J. CHODOROW, *FEMINISM AND PSYCHOANALYTIC THEORY* (1989).

92. See 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (Robert Hurley trans., 1978).

93. See RUBENSTEIN, *supra* note 2, at 585-95.

94. See *id.* at 595-607 (excerpting Judith Hicks Stiehm, *The Military Ban on Homosexuals and the Cyclops Effect*, in *GAYS AND LESBIANS IN THE MILITARY* 149 (Wilbur J. Scott & Sandra Carson Stanley eds., 1994), and POSNER, *supra* note 84, at 314-23).

95. See *id.* at 610-41, 650-63 (excerpting *Watkins v. United States Army*, 837 F.2d 1428 (9th Cir. 1988), and *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (en banc)).

96. See ESKRIDGE & HUNTER, *supra* note 3, at 321-41.

97. See *id.* at 342-65.

masculinity, rather than framing the matter in merely gay/straight terms, as Rubenstein does. The latter approach reflects a kind of civil libertarian, equal access view of the problem, while Eskridge and Hunter are more concerned with exposing the powerful cultural work done by the military's policies in shaping modern notions of masculinity.

The second cluster of the Eskridge-Hunter text, beginning with a chapter entitled "Identity Speech in the Body Politic," examines the role of sexuality and gender in various aspects of public and political life. Here, the readings cover First Amendment rights to speak about sexual identity and about sex, hate speech, outing, and the relationship between sexuality and citizenship. With respect to this last topic, the materials suggest an interesting connection for classroom discussion between domestic anti-gay referenda and asylum petitions made on behalf of women who seek to escape cultural practices such as female circumcision.⁹⁸ If we can understand *Romer v. Evans*⁹⁹ to stand for the proposition that a moral majority may not express its disdain for a minority's sexual practices by disenfranchising that minority, then does this precedent estop a majority of the western world from expressing its disdain for African sexual practices by allowing asylum petitions from African women who object to those practices? In other words, does *Romer's* mandate of a norm of tolerance between competing moral views on the domestic level require the same degree of cross-cultural tolerance when we encounter a conflict of values on the international level? The inclusion of these materials by Eskridge and Hunter illustrates the thoughtful and nuanced approach they bring to the intersection of sex, sexuality, and culture.

Eskridge and Hunter's final cluster is devoted to "sexuality and gender in daily life."¹⁰⁰ These materials cover the role of sexuality in family law including the right to marry, sexuality in the workplace, a critique of the notion of consent, and a catch-all chapter entitled "The Body: New Frontiers" that covers AIDS, transgender issues, and the legal regulation of cross-dressing. It is unclear why these topics have any more to do with daily life than, say, coming out, or being prosecuted for engaging in public sex. The readings are nonetheless interesting and, if connected up to earlier material, they round out a thorough treatment of the various ways in which law shapes sexual, sex, and gender identity.

One of the book's shortcomings, expressly acknowledged by the authors, is its inattention to the relationship between sex, gender, and race. The disclaimer provided at the end of the introduction¹⁰¹ reiterates, in a now

98. See *id.* at 755-61.

99. 116 S. Ct. 1620 (1996).

100. ESKRIDGE & HUNTER, *supra* note 3, at vii

101. The authors write:

One shortcoming that we must acknowledge is the insufficient depth to which this book examines the interrelationship between sexuality and race. We have, we hope, demonstrated some of the ways that sexuality is racialized and race is sexualized in American law. We

familiar fashion, what has come to be the familiar footnote to Kim Crenshaw's "intersectionality" article¹⁰² in almost every article written on feminist jurisprudence by a white woman. Yet the jurisprudence of equality and identity have moved beyond the point where all one needs to do is flag for separate discussion the complex implications of race. The unmarked terms "sexuality" and "sexual orientation" cannot now, and never could, legitimately denote an aspect of human identity that transcends or traverses racial locations.¹⁰³ We can, and must, do better. Mary Becker's course at the University of Chicago on "Critical Race and Lesbian-Gay Legal Theory" represents a laudable and serious effort to move beyond the phantasm of de-racialized sexuality. In this course, she provides readings that address the intersectional identities of gay men and lesbians of color, the sexualization of African and gay Americans, and the limitations of gay marriage for dismantling sexism and racism, as well as readings that critique paradigms of formal equality that have been more successful for white, gay men than for other lesbian and gay peoples.

The Rubenstein book has an internal logic produced by the coherent narrative of the lesbian/gay subject traversing various sites of legal regulation. For this reason, students will find that the text makes sense independent of whatever the instructor might contribute. The Eskridge-Hunter book presents a more difficult task for both instructor and student. Without a firm hand setting up each set of readings, guiding class discussions, and drawing connections between what may appear to the uninitiated to be unrelated topics, many students may find *Sexuality, Gender, and the Law* a frustrating experience. The book tries to do much more than Rubenstein's book and, for this reason, demands more of those who will use it.

While Rubenstein's book is predominately descriptive in nature—documenting the legal treatment of lesbians and gay men—the Eskridge-Hunter book is more normative. Rather than assuming lesbian and gay subjects, the readings in the latter over and again suggest the regulative and constitutive power of law to create sexed subjects. Its structure, case

realize, however, that the issue goes much deeper, to the point where, at least in the United States, meanings of race and sexuality are often mutually dependent. Developing the materials necessary to fully explore this proposition was simply beyond the abilities of the authors to do in the time allotted to produce this book. We invite our readers to join the scholarly project of helping fill that gap.

Id. at viii.

102. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

103. Thirteen years ago, Hortense Spillers demanded that feminists appreciate that black women's sexuality and experience of sexism are not identical to those of white women: "With the virtually sole exception of Calvin Hernton's *Sex and Racism in America* and less than a handful of very recent texts by black feminist and lesbian writers, black women are the beached whales of the sexual universe, unvoiced, misseen, not doing, awaiting *their* verb." Hortense J. Spillers, *Interstices: A Small Drama of Words*, in PLEASURE AND DANGER, *supra* note 60, at 73, 74 (citation omitted); see also *id.* at 79 ("Black American women in the public/critical discourse of feminist thought have no acknowledged sexuality because they enter the historical stage from quite another angle of entrance from that of Anglo-American women.").

selection, and commentary reflect a theory of sexuality that is both problematizing and, for some, problematic in nature. Many people who teach in this area love Rubenstein's book precisely because gay men and lesbians are neither an afterthought—as is the case in some texts on women and the law or feminist jurisprudence—nor are they relegated to the status of exemplar of some larger theory. Yet others will regard the Eskridge-Hunter treatment as more successfully framing the central and cutting edge debates in contemporary queer theory with respect to the nature of sexual identity and the role of law and culture in the creation of subjects who possess a sexual orientation. Does this mean I regard the Eskridge-Hunter text as the better book? Not at all. These two books provide competing accounts of the proper object of gay and lesbian legal theory, accounts that mirror an ongoing debate in the field of Women's Studies. It is from this parallel debate that I want to draw some insights, which will help illuminate the canonical significance of the Rubenstein and Eskridge-Hunter books.

V. CANON FORMATION IN WOMEN'S STUDIES: THE POWER OF TWO IDEAS

The evolution of the torts canon provides a model of field production in which one powerful critic, scholar, and jurist was able to impose his view of the field and vanquish all others. I hope that something different takes place with respect to the evolution of the field of sexuality and the law. Rather than having one view prevail, my hope is that the academy, and the law more generally, can entertain competing canons within one field loosely termed sexuality and the law. The evolution of the discipline called Women's Studies provides an alternative model of field and canon creation.

Beginning with the work of Simone de Beauvoir,¹⁰⁴ and as interpreted by American feminist writers such as Betty Friedan,¹⁰⁵ Nancy Chodorow,¹⁰⁶ Susan Brownmiller,¹⁰⁷ and Catharine MacKinnon,¹⁰⁸ a field known as Women's Studies emerged in the late 1970s and early 1980s that understood its proper object of study to be the lives and experiences of women. These early Second Wave feminists took on several important political and theoretical projects. They began by identifying and valorizing the ways in which women arguably are different from men.¹⁰⁹ They also sought to document the many forms of patriarchal power that subordinate women at home, at work, and on the street. Thus, much of the work of this time was

104. See SIMONE DE BEAUVOIR, *THE SECOND SEX* (H.M. Parshley trans., 1953)

105. See BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

106. See NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978).

107. See SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975)

108. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979)

109. See, e.g., CHODOROW, *supra* note 106 (articulating theory that woman's role as primary parent has significant effect on different cognitive development of male children and female children)

devoted to voicing women's experiences of rape,¹¹⁰ sexual harassment,¹¹¹ and domestic violence.¹¹²

The integrity of Women's Studies, as originally defined, came under attack in the mid- to late 1980s, when the thinking of postmodern continental philosophers became fashionable. The early writing of Joan Scott,¹¹³ Seyla Benhabib,¹¹⁴ and Gayatri Spivak¹¹⁵ among others, provoked a theoretical rift within the field of Women's Studies that has yet to be resolved. These writers called into question the metaphysics of the subject as formulated by enlightenment feminists. It was during this period that "essentialist" became an epithet—to be charged with advancing essentialism was to have one's work attacked as naive, outmoded and, to some, counterproductive.¹¹⁶ Instead, these feminists questioned the normative function of a fixed female identity and were more concerned with the ways in which a constellation of social practices, some of which were patriarchal, produced male and female subjects. The category "woman" was not something that could merely be asserted and then valorized; it was, rather, a normative fiction. As such, sexual difference could not be disaggregated from culture.

This rupture provoked an anguished, and often impatient, cry from some quarters:

Why is it that just at the moment when so many of us who have been silenced begin to demand the right to name ourselves, to act as subjects rather than as objects of history that just then the concept of subjecthood becomes problematic? Just when we are forming our own theories about the world, uncertainty emerges about whether the world can be theorized. Just when we are talking about the changes we want, ideas of progress and the possibility of systematically and rationally organizing human society become dubious and suspect. Why is it only now that critiques are made of the will to power inherent in the effort to create theory?¹¹⁷

Right around the same time, both essentialist and anti-essentialist feminists launched class and race critiques of Women's Studies, claiming that the object of study—*woman*—was in fact a white, middle-class woman who mirrored

110. See BROWN MILLER, *supra* note 107.

111. See MACKINNON, *supra* note 108.

112. See SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE* (1982).

113. See JOAN WALLACH SCOTT, *GENDER AND THE POLITICS OF HISTORY* (1988).

114. See SEYLA BENHABIB, *CRITIQUE, NORM, AND UTOPIA: A STUDY OF THE FOUNDATIONS OF CRITICAL THEORY* (1986).

115. See GAYATRI CHAKRAVORTY SPIVAK, *IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS* (1987).

116. See, e.g., Alison M. Jaggar, *Sexual Difference and Sexual Equality*, in *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* 239, 245 (Deborah L. Rhode ed., 1990).

117. Nancy Hartsock, *Foucault on Power: A Theory for Women?*, in *FEMINISM/POSTMODERNISM* 157, 163–64 (Linda J. Nicholson ed., 1990).

those individuals who had secured tenured appointments in Women's Studies departments. Anti-essentialists appropriated these arguments to undermine the legitimacy of cultural feminists who claimed to be vocalizing a universal woman's voice. At the same time, essentialists used these critiques to advance a more diverse identity politics that recognized and validated the experiences of women of color and low-income women. In the end, both sides—essentialists and anti-essentialists—called each other racist.¹¹⁸

The early 1990s saw the field(s) of Women's Studies struggle with a reconciliation between the defenders of identity politics and those who regarded it as bankrupt, or at best, a naive or quaint notion. A new critique of the critique of essentialism evolved that recognized the counterproductivity of the binarism that the anti-essentialist critique had engendered, and sought to move the discussion to a new, less polarized discursive space. Several good books appeared that attempted to move the debate to new terrain,¹¹⁹ and many writers took up a strategy Spivak termed "strategic essentialism":¹²⁰ "[Strategic essentialism entails] consciously choosing to essentialize a particular community for the purpose of a specific political goal. Strategic essentialism ideally should be undertaken by the affected community, which is best situated to undertake the process of selecting the appropriate circumstances in which to offer cultural information."¹²¹ Interestingly enough, the feminists drawn to "strategic essentialism" are frequently, although not exclusively, women of color. Joan Williams offered a third way beyond the binarism.¹²² Rather than providing a theory as to whether women are the same as or different from men, Williams suggested that "sameness and difference are not arguments about the essential nature of human beings. Instead, they are questions that stem from the fact that 'neutral' standards systematically disadvantage outsiders."¹²³ Our strategy should be to "describe differences between outsiders and the mainstream in ways that do not reinforce

118. See, e.g., PAULA GIDDINGS, *WHEN AND WHERE I ENTER . . . THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* (1984) (arguing that absence of African-American female intellectuals in academy results in feminist theory that promotes idea of universal female subject that reflects white middle-class identity of theorists themselves); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

119. See, e.g., *CONFLICTS IN FEMINISM* (Marianne Hirsch & Evelyn Fox Keller eds., 1990); *FEMINISM BESIDE ITSELF* (Diane Elam & Robyn Wiegman eds., 1995); *FEMINIST NIGHTMARES* (Susan Ostrov Weissner & Jennifer Fleischer eds., 1994); DIANA FUSS, *ESSENTIALLY SPEAKING* (1989).

120. See Gayatri Chakravorty Spivak, *Subaltern Studies: Deconstructing Historiography*, in *SELECTED SUBALTERN STUDIES* 3, 13–15 (Ranjit Guha & Gayatri Chakravorty Spivak eds., 1988).

121. Loti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense"*, 17 HARV WOMEN'S L.J. 57, 95–96 (1994); see also Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1296–99 (1991); Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 21 (1995); Angela P. Harris, *Forward: The Unbearable Lightness of Identity*, 2 AFR. AM. L. & POL'Y REP. 207, 211 (1995).

122. See Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296.

123. *Id.* at 323.

stereotypes, [while forging] working agreements on the most effective strategies to pursue in the face of the supposedly 'neutral' standards of a tradition that disinherits us."¹²⁴ As Williams acknowledged, her solution was "tidy in theory but difficult in practice."¹²⁵ But it did have the effect of dislodging the sameness/difference logjam.

Women's Studies, as a field, is now experiencing a quite interesting framing moment. The various sides, if I can describe them so grossly, are speaking to one another in a new way. There are three, although not only three, possible outcomes of this intramural conversation. First, one side or the other could win the debate, just as Holmes's vision of a coherent theory of tort law vanquished once and forever the defenders of the old school, organized around forms of action, as well as other theorists who structured the field around types of injuries. This is unlikely, given the problematic nature of the notion of winning in this context, and the compelling and legitimate investment each side has in the integrity of its position. On the one hand, the power of the women's movement resides in identity-based assertions, and Women's Studies continues to have strong ties to the women's movement. At the same time, no serious scholar can any longer reject out of hand the insights of poststructuralist thinking that at a minimum have shifted questions of subjectivity from the realm of metaphysics to phenomenology, from the fact of being a woman to the process of becoming one. Given that resolution in the form of victory for one side is unlikely, the second and more likely alternative is that Women's Studies will rupture into two distinct fields: the study of culture in which women remain the proper objects of investigation, and Gender Studies, a discipline committed to the critique of cultural practices and norms that are understood as antecedent to the emergence of viable male and female subjects. Thus understood, "gender is not something we have, but something that has us."¹²⁶

Equally possible, and I believe more desirable, is a third alternative whereby we keep talking to one another and maintain a creative tension between identity politics and the politics of identity. At present, it is unclear what kind of insights will emerge from a discourse that retains a dynamic investment in the uncertainty and provisionality of identity claims. But with the death of grand theory, Women's Studies, like all other fields, must develop new ways of doing theory itself. A synthesis of insights about the interrelationship between power and the subject holds out the promise of a new paradigm. In a faculty workshop in which I recently participated, a colleague offered that the theory of sex discrimination she prefers is one in which women always win. Even in this postmodern era, outcomes should still

124. *Id.*

125. *Id.*

126. Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 501, 574 n.390 (1997).

count—and count for a lot. The power of a theory still lies not only in critique, but in what it can do for the lives of subordinated people.

The field of Women's Studies stands at the threshold of a paradigm shift, in which the category of things that are considered proper objects of study are not characterized solely by the properties shared by all members—femaleness—but rather by a system of principles that give meaning to or make sense of what it means to be a woman.¹²⁷

Against this backdrop, the Rubenstein and Eskridge-Hunter casebooks have appeared. Both attempt to define an emerging field. Both do so in very different ways. My hope is that the proper subject of this field will not be defined according to the winner of these two competing visions, but instead will be made up of a combination of the two. For some time to come, lesbian and gay law students will want to see themselves mirrored as intact subjects in law school curricula, and heterosexual students should be made aware that there are gay people in their midst. Furthermore, given the violence and discrimination that some gay people *qua* gay people experience every day, it remains important that explicitly gay legal organizations such as Lambda Legal Defense and the ACLU Lesbian and Gay Rights Project address the legal needs of a community defined in the terms of identity politics. This is well understood by Bill Rubenstein and Nan Hunter, both of whom headed the ACLU's Project prior to entering academia full-time.

At the same time, "gay politics" needs to be shaken from its roots in identity politics. The push for gay marriage, as framed by the plaintiffs in the Hawaii case,¹²⁸ represents to my mind a short-sighted example of "me too-ism," reflecting a kind of "institutional domestication [whereby] normalizing the queer would be, after all, its sad finish."¹²⁹ To demand entrance into an institution such as marriage without providing a critique of the meaning of marriage for both hetero- and homosexuals is not only naive, but dangerous as either a theoretical project or a political strategy. For this reason, the identity politics implicit in the Rubenstein text must be informed by the cultural critique that motivates the Eskridge-Hunter book; at the same time, the critique

127. George Lakoff drew the distinction between a classical view of categorization in which categories are made up of sets defined by common properties shared by all objects within the category, and new theories of categorization in which "our bodily experience and the way we use imaginative mechanisms are central to how we construct categories to make sense of experience." GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE HUMAN MIND* at xii (1987). Lakoff illustrates how the process by which humans categorize the world is not grounded in the perception of objective qualities that all members of the category share, but rather is based upon culturally contingent norms that produce similarities and differences. As an example, he cites the category "balan" in the Australian aboriginal language Dyirbal. Things that are balan include women, fire, and dangerous things. *See id.* at 92–96. This kind of categorizing seems incoherent to us, but makes perfect sense within the logic that underlies Dyirbal.

128. *See Baehr v. Miike*, CIV No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

129. Judith Butler, *Against Proper Objects*, *DIFFERENCES*, Summer-Fall 1994, at 1, 21.

of identity underlying the Eskridge-Hunter approach cannot lose sight of the enduring political and personal need to make identity claims.

VI. CONCLUSION

When the Supreme Court issued its decision in *Romer v. Evans*¹³⁰ last May, many members of the gay community jubilantly took to the streets proclaiming, "This is our *Brown*!" Particularly after *Bowers v. Hardwick*,¹³¹ we needed a *Brown*-like judicial recognition of the equality rights of lesbians and gay men. But *Romer* is not that case to the extent that the Court refused to include gay people within a traditional civil rights discourse animated by suspect classes. Instead, *Romer* could very well signal the end of the equal protection jurisprudence grounded in identity politics, of which *Brown* is the paradigm example: Discrete and insular minorities deserve special protection under the Fourteenth Amendment, so the argument used to go.¹³² Clearly this Court is not going to expand the members of the classes termed suspect; disabled¹³³ and gay people¹³⁴ have been denied such exalted constitutional status. Nonetheless, *Romer* opens the door to thinking about the Equal Protection Clause in a whole new light, one that redirects the equality inquiry toward practices endorsed or enforced by the state that vilify their objects as legal strangers.¹³⁵ In this sense, *Romer* is entirely consistent with a theory of equality that at once prefers neither of the contested paradigms of identity and equality framed by Rubenstein and Eskridge-Hunter and draws from both. Hopefully, in this postidentity era, other victims of state sanctioned bigotry, such as immigrants and single mothers, will one day rejoice: "This is our *Romer*!"

It is high time that books such as the two I review here have found mainstream legal publishers, for they have long had audiences impatiently waiting for them to enter the law school classroom. These books appear as part of the field-formation process, and will play a dynamic role in the creation of a subject within the law. But it is my hope that these casebooks will play a different role in the creation of a field, and of a canon, than did James Barr

130. 116 S. Ct. 1620 (1996).

131. 478 U.S. 186 (1986).

132. See *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

133. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

134. *Romer* declined to reach this question, see 116 S. Ct. at 1627, but virtually every federal appellate court that has decided it has eschewed heightened scrutiny, see, e.g., *Nabozny v. Podlesny*, 92 F.3d 446, 454 (7th Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996) (en banc); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990). But see *Watkins v. United States Army*, 847 F.2d 1329, 1349 (9th Cir. 1988), *vacated and aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc).

135. See *Romer*, 116 S. Ct. at 1629 ("A State cannot so deem a class of persons a stranger to its laws.").

Ames's 1893 torts casebook.¹³⁶ Rather than answer the Holmes-like call for a philosophical approach that neatly and rationally unifies an "entire body of law,"¹³⁷ the best effect these texts can have is to frame an ongoing discussion, such as the one now taking place within Women's Studies, between those for whom the subject is the place to start and those for whom the subject is where you end up.

136. See AMES, *supra* note 22.

137. Book Notice, *supra* note 11, at 341.