

## University of Richmond Law Review Symposium

### Commemorating the Fiftieth Anniversary of the Stonewall Riots: Reflecting on the Rise and Evolution of LGBTQ Activism and Rights in the Law

#### Public & Administrative Law Panel

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#### Queering Sex: The Origins of LGBTQ Public Accommodations Struggles

This presentation examines the history of LGBTQ activism for equality in public accommodations—the term for businesses as well as public and non-profit entities that open their doors broadly to the public. It argues that LGBT people’s demands for rights in public places both built on and provided a foundation for prohibitions on sex discrimination.

LGBT advocates used newly minted prohibitions on “sex” discrimination to reach sexual orientation. LGBTQ advocacy for local ordinances and state statutes was linked to earlier and contemporaneous campaigns in the late 1960s and early 1970s for prohibitions on sex discrimination—campaigns led by middle-class cisgender women who challenged the exclusion and subordination they faced in the public sphere, in sites ranging from restaurants, to parks, to country-club membership. States responded by enacting laws prohibiting discrimination in public accommodations because of sex as well as race, color, national origin, and religion. Drawing on examples from multiple states, this paper explores LGBTQ campaigns to include sexual orientation and what today we call gender identity in antidiscrimination law. It brings to light the ways activists used statutory prohibitions on sex

discrimination to attempt to reach sexual orientation and gender discrimination from the mid-1970s through the 1980s. In Minnesota, the ACLU and other activists groups used that state's law prohibiting sex discrimination to challenge sexual orientation discrimination in arenas ranging from universities, to state funded social services, to public parks. In Los Angeles, life-partners Deborah Johnson and Zandro Rolon Amato filed a lawsuit to challenge the refusal of the Papa Choux restaurant to serve them a romantic dinner, arguing that the denial of access constituted sex discrimination in violation of California's civil rights law.

The history related in this piece offers new theoretical insights into the relationship between different social movements for liberation and equality. Conventionally, historians and legal scholars understand the civil rights movements of the twentieth century to build progressively upon one another in succession, from black civil rights of the early 1960s to the women's rights in the late 1960s to gay rights in the mid-1970s. By contrast, we suggest that legal campaigns for sex, sexual orientation, and gender identity equality learned from and relied on one another in a dynamic and contemporaneous way. Cisgendered women challenging state laws that regulated "unescorted" women in bars cited prior precedent striking down laws that barred gays from socializing. Public accommodations lawsuits alleging sex discrimination succeeded in ending gendered dress codes in some places, potentially opening space for queer people. Our paper argues that activists saw sex and sexual orientation as mutually constitutive categories of social and legal analysis—they developed theories about gender and the meaning of equality by seeing each category in light of the other. Thus, they drew on their experiences and understanding of sexual orientation discrimination to inform their analysis of sex discrimination, just as they interpreted "sex" to reach sexuality and gender identity.

### **Contemporary Debates over LGBTQ Status in Public and Administrative Law**

The historic interplay between sex, sexuality, and gender identity holds significance for contemporary legal debates. Controversy rages today about LGBTQ persons' access and belonging in the commercial, leisure, and civic sites that comprise social citizenship. Can private vendors refuse to sell wedding cakes to gay couples? Do businesses need to allow customers to use the bathrooms consistent with their gender identity? Must healthcare providers counsel and treat transgender people? Can private adoption agencies discriminate against gay and lesbian couples? The answers to these questions implicate state public accommodations law, administrative regulations, and contractual obligations of government contractors. Frequently, these issues emerge in litigation raising religious objections or free speech claims against the application of these nondiscrimination laws. Through history, we can more thoroughly understand the interests at stake and the ways in which exemptions for discrimination against gay couples implicate protections against sex discrimination for cisgender people as well.

This presentation gives an overview of developments in public accommodations law, healthcare, and adoption. It explores the links between LGBTQ equality and cisgender women's equality in each of these areas. It concludes with some thoughts on how the connection between sex, sexuality, and gender identity might offer the possibility of expanding nondiscrimination through statutory interpretation. Twenty-one states explicitly list "sexual orientation" in their public accommodations statutes and eighteen specify "gender identity" and "marital status," but all forty-five public accommodations statutes ban discrimination because of "sex. As we argue in another article, advocates of those laws, their opponents, politicians and courts all understood sex discrimination to reach the regulation of

sexuality and gender performance—raising the possibility of states' interpreting their laws in this way (as Pennsylvania and Michigan recently have done).