
1. Introduction to the *Research Handbook on Gender, Sexuality and Law*

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This collection could not have existed five or ten years ago. While collections of gender, sexuality and law scholarship have periodically been produced since the 1990s, it is arguably in the past decade or so that this area has matured into a developed field.

This edited collection forms part of Edward Elgar's *Law and Society* series (edited by Austin Sarat and Rosemary Hunter). This particular collection seeks not only to document the prodigious debates of the present, but to point the way to future sociolegal scholarship in the area of gender, sexuality and law. We sought to bring together scholars from different generations and different viewpoints to provide a sense of the current gender, sexuality and law research landscape.

This is a field that is in many ways defined by contested concepts and ongoing debates: within feminism, between feminism and other concepts; between queer theorists, liberationists and those who embrace the equality movement; and between those who resist these temptations to label and define perspectives and those who do not. While many collections inevitably betray editor or author viewpoints in assembling collections, this book seeks to bring together a range of differing perspectives to truly reflect the field of gender, sexuality and the law. The authors will often not agree with one another, let alone the editors, but we feel this is critical for the development of the field and to enable a rich engagement with the research in this area by those new to this area of scholarship.

DEFINING A FIELD

It has become a wellworn narrative to note the transformation in attitudes and the regulation of gender and sexuality, particularly since the 1950s. From Wolfenden and the Stonewall riots through to same sex marriage;¹ from women entering employment in the Second World War through to the feminist struggles of the 1970s, through to #MeToo. Yet, the development of these areas has not been a simple linear course. It has been contested within communities and continues to be. The very boundaries and meanings of gender and sexuality continue to be argued about, as do the substantive issues that are then examined. This collection seeks to incorporate the activist and theoretical debates that continue to define this field.

It is from this activism,² protest and debate that the field emerges. Yet, recent years have seen what is arguably a growing disconnect between 'mainstream' LGBTQ advocacy organisations and LGBTQ citizens, often – as Adler has noted – setting priorities that continue to

¹ See more generally: Jeffrey Weeks, *The World We Have Won* (Routledge 2007).

² See more generally: David Paternotte and Manon Tremblay (eds) *The Ashgate Research Companion to Lesbian and Gay Activism* (Ashgate 2015).

neglect those most in need.³ Intersectionality has come to prominence, and a recognition of the ways that race, class, age, and – fundamentally – power intersect with issues of gender and sexuality.

With this more nuanced understanding of gender and sexuality has come the beginnings of an attempt to (re)understand liberation and the story of gay rights, recognising the combination of a variety of insurgent struggles across race, gender, class, and sexuality,⁴ and the emergence of sexual citizenship,⁵ in which we consider a new rights landscape.⁶ This threatens to challenge our simplified and wellworn narratives, noting the struggles and actions that predated Stonewall, reinstating the critical role that trans activists had in the LGBTQ story, reappraising responses and attitudes to sexual behaviours – whether these be BDSM, bareback sex, masturbation, chem/drug use or gender and power, to mention but a few. Moreover, the limits of expression and queer spaces themselves now find themselves debated and contested,⁷ while technology is rapidly impacting upon our expression of gender and sexuality.⁸ We exist at a time of extraordinary (trans)formation.

Outside of this civil-based rights discourse, we've also seen the much noted repeal of Don't Ask, Don't Tell in the United States under the Obama presidency, but the Trump presidency has introduced a 'trans ban' for serving troops.⁹ A seeming tilt towards nationalism and the right with President Trump in the United States, Brexit in the United Kingdom and growth in nationalism in Europe has also seen a rejection of 'experts' and evidence in favour of emotion and reaction. The forces that have delivered profound legal change in the arenas of gender and sexuality are now in retreat and struggling to combat this new narrative. Fear and hate are seemingly rapidly replacing hope and love. In the East too, nationalism is apparently on the rise, coupled with a growingly confident authoritarianism.

These developing debates operate within a landscape of a shift away from criminalised sexualities and towards a rights-based discourse – although there are outliers to this trend, namely pornography,¹⁰ on one hand, and sex work,¹¹ on the other. Adler has noted the power of LGBTQ equal rights, stating that 'the discourse comprises a cluster of constituent strands that depict, characterise, and represent LGBT people – recognizable tropes that tell us about our virtues, our vulnerabilities, and our relationships'.¹²

³ Libby Adler, *Gay Priori: A Queer Critical Legal Studies Approach to Law Reform* (Duke University Press 2018) 3.

⁴ Roderick A. Ferguson, *One-Dimensional Queer* (Polity 2019).

⁵ Diane Richardson, *Sexuality and Citizenship* (Polity 2018).

⁶ Also see: Chris Ashford, 'Sexualities and the Law' (2011) 14(3) *Sexualities* 265–72.

⁷ See: Amin Ghaziani, *There Goes the Gayborhood?* (Princeton University Press 2014).

⁸ See for example: Sharif Mowlabocus, *Gaydar Culture: Gay Men, Technology and Embodiment in the Digital Age* (Ashgate 2010); and Emily Witt, *Future Sex* (Farrar, Straus and Giroux 2016).

⁹ Dave Phillips, 'New Rule for Transgender Troops: Stick to Your Birth Sex, or Leave' (2019) *The New York Times*, 13 March, www.nytimes.com/2019/03/13/us/transgender-troops-ban.html (last accessed 30 June 2019). Also see: Matthew F. Kerrigan, 'Transgender Discrimination in the Military: The New Don't Ask, Don't Tell' (2012) 18(3) *Psychology, Public Policy, and Law* 500–18.

¹⁰ See: Clarissa Smith, 'Policy, Politics and Porn' (2018) 21(8) *Sexualities* 1351–9.

¹¹ See: Teela Sanders, 'Enhancing the Study of Sex Work' (2018) 21(8) *Sexualities* 1346–50.

¹² Libby Adler, *Gay Priori: A Queer Critical Legal Studies Approach to Law Reform* (Duke University Press 2018) 3.

This has been particularly noteworthy in an international law context, and notably in engagement with LGBTQ issues at the level of European human rights law,¹³ which has in turn sparked debates about cultural and national identity and rights-based settlements with nation-based clusters of citizens. This has tremendous significance for future readers of this book who may find our western-dominated discourses of rights quaint in a world dominated by political and cultural powers in the East.

Western discourses on rights and sexuality are already being questioned, with a seeming conclusion of a journey prompting an increase in those questioning the journey and the destination of law and sexuality.¹⁴

Robson has noted that while the development of sexuality and law has meant that topics of sexuality have permeated broader law literature, the discipline of law creates a challenge as to crossing doctrinal barriers, notably between sexuality as a family law matter, or criminal, or constitutional, or tax, for example.¹⁵

It is in this global context that there remains a persistence of global criminalisation of LGBTQ identities,¹⁶ although this is sometimes also accompanied by acts of resistance. When in 2019 Brunei introduced a new law meaning that those convicted of adultery or gay sex would be stoned to death, the international community spoke out to condemn the move. Ultimately, the Brunei government declared that it would not carry out the executions.¹⁷ Also in 2019, activists in Botswana successfully challenged years of colonial legacy, religion and bigotry to overturn laws that criminalised gay sex.¹⁸ Yet at the time of writing, 68 countries still have laws criminalising same sex relations between consenting adults.¹⁹

Public pushback, aided by social media, has also been key for reappraising some gender debates. The #MeToo movement emerged through the use of technology and in response to sexual abuse allegations and a newfound strength to challenge the toxic masculinity which has come to dominate in many industries and workplaces.²⁰

Gender as a category has arguably emerged as a result of feminist struggles, and contemporary struggles such as #MeToo have been seen as providing a new platform for feminist voices. Auchmuty has argued that ‘without women’s movements, which challenged men’s

¹³ See for example: Damian A. Gonzalez-Salzberg, *Sexuality & Transsexuality under the European Convention on Human Rights: A Queer Reading of Human Rights Law* (Hart 2019) *passim*.

¹⁴ See for example: Dennis Altman, *The End of the Homosexual?* (University of Queensland Press 2013); Martin Duberman, *Has the Gay Movement Failed?* (University of California Press 2018); David M. Halperin, *How to Be Gay* (The Belknap Press of Harvard University Press 2012); and Michelangelo Signorile, *It’s Not Over: Getting beyond Tolerance, Defeating Homophobia, and Winning True Equality* (Houghton Mifflin Harcourt 2015).

¹⁵ Ruthann Robson, *Sexuality and Law* Volume 1 (Ashgate 2011) x.

¹⁶ See for example: Joey L. Mogul, Andrew J. Ritchie and Kay Whitlock, *Queer (In)justice: The Criminalization of LGBT People in the United States* (Beacon Press 2011).

¹⁷ Austin Ramzy, ‘Brunei Says It Won’t Execute Gays after Protests of Stoning Law’ (2019) *New York Times*, 6 May, www.nytimes.com/2019/05/06/world/asia/brunei-gays-stoning-execution.html (last accessed 30 June 2019).

¹⁸ Alan Yuhas, ‘A Win For Gay Rights in Botswana Is a “Step against the Current” in Africa’ (2019) *New York Times*, 11 June, www.nytimes.com/2019/06/11/world/africa/botswana-gay-homosexuality.html (last accessed 30 June 2019).

¹⁹ Human Rights Watch, http://internap.hrw.org/features/features/lgbt_laws/ (last accessed 30 June 2019).

²⁰ See: Rosalind Gill and Shani Orgad, ‘The Shifting Terrain of Sex and Power: From the “Sexualization Culture” to #MeToo’ 21(8) *Sexualities* 1313–24.

material and ideological power, there would have been no interest in gender²¹ and it is indeed feminism that has been key in reframing policy debates from employment law to reproductive rights, through to debates about gender and place/space.²² The emergence of feminist judgments projects,²³ which have seen judgments rewritten by scholars with a feminist perspective, has served to demonstrate the power of possibility that feminist voices and perspectives can provide for law. This work has also notably contributed to reframing perspectives taught in law schools, reframing law school pedagogy alongside law school research.²⁴

This book brings together these gender and sexuality sociolegal debates,²⁵ recognising that gender and sexuality are ‘intimately intertwined’ with one rarely understood without engaging with the other.²⁶ Far from being distinct areas of enquiry, gender and sexuality interact and overlap, contributing to a shared discourse.

This shared discourse is not merely examined by researchers: increasingly, it is examined by students at undergraduate as well as postgraduate levels. Jones et al noted their collection came out of a teaching experience,²⁷ and the emergence of a new generation of students who demand new answers to questions that are both familiar and new. While this collection is not intended as primarily a teaching resource, it is nonetheless hoped that student readers will find this collection useful and a catalyst for further questions. You are the activists, legislators, lawyers, jurists and global citizens of the future.

THE STRUCTURE OF THIS BOOK

The book is divided into seven parts, each with four or five chapters. These parts are intended to highlight the key strands and themes that have emerged within gender, sexuality and law. The first part of the handbook turns to *New Boundaries and Activism* within the field, looking at the advancing political, legal and social developments taking place globally, with a focus on Europe, Africa and Asia. Celia Kitzinger and Sue Wilkinson chart their own personal journey at the front line of activism and judicial proceedings in Canada and the United Kingdom, recounting their experience as litigators in a landmark High Court decision. Following on from this, Jens Scherpe provides a comparative international perspective on the boundaries of family law in the recognition of adult same sex relationships. Kay Lalor examines the effect of transnational diplomatic, financial and activist pressure for LGBT rights in Sub-Saharan Africa; this is followed by Tingting Liu and Jingshu Zhu’s discussion of the struggle for

²¹ Rosemary Auchmuty (ed.) *Great Debates in Gender and Law* (Palgrave 2018) xiii.

²² See for example: Margaret Davies and Vanessa E. Munro (eds) *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013).

²³ Rosemary Hunter, Clare McGlynn and Erika Rackley, *Feminist Judgments: From Theory to Practice* (Hart 2010).

²⁴ In 2012 Rosemary Hunter edited a special issue of *The Law Teacher* to highlight these approaches. See: (2012) 46(3) *The Law Teacher* 214–80.

²⁵ On gender, sexuality and law and sociolegal study more generally, see: Chris Ashford, ‘Socio-Legal Perspectives on Gender, Sexuality and Law’ (2010) 31(1) *Liverpool Law Review* 1–12.

²⁶ Momin Rahman and Stevi Jackson, *Gender & Sexuality: Sociological Approaches* (Polity 2014) 5.

²⁷ Jackie Jones, Anna Grear, Rachel Anne Fenton and Kim Stevenson, ‘Gender, Sexualities and Law: Critical Engagements’ in Jackie Jones, Anna Grear, Rachel Anne Fenton and Kim Stevenson (eds) *Gender, Sexualities and Law* (Routledge 2011) 1–2.

relationship recognition of LGBT populations in China. Melanie Judge and Dee Smythe close this section by focusing on the exciting development of scholarship and activism of gender, sexuality and law in South Africa.

The second section of the text turns to the theme of *Identity and the State*, comprising investigations into the interaction of law with the formation and enactment of identity, with a particular focus on Europe. Libby Adler first analyses discourses of lewdness, indecency and LGBT youth, contrasting the current equality-driven rights agenda to the previous ‘privacy’ agenda. This is followed by Paul Johnson and Silvia Falcetta’s critical analysis of the role of European Court of Human Rights jurisprudence on the Article 12 ‘right to marry’ in relation to same sex marriage. Helen Fenwick and Daniel Fenwick also discuss the emergent values of dignity and equality arising from the Convention and the recognition of a universal right to registered partnership. Alexander Schuster discusses LGBTI migration within the European Union, while Peter Dunne focuses on the rights of transgender populations within the EU and the Council of Europe in advancing gender identity equality.

The third part of the book addresses the theme of the *Lived Society*, assessing the lived experiences of law, gender and sexuality through the application of theoretical and doctrinal analysis. Within this, Alex Powell applies queer theory in order to address the normative understandings rooted within the United Kingdom’s asylum process for LGBT refugees. Rosemary Auchmuty, in contrast to those authors arguing for substantive rights to marriage, presents a feminist interjection against the regulation offered by the institution. Anthony Infanti provides a comparative analysis of tax law for LGBT couples, analogous to assimilation debates within Europe and America. Finally, Lise Rakner and Siri Gloppen discuss the rising politicisation of LGBT rights within Africa, and the role of law in the process.

The fourth theme of the book is *Bodily Autonomy* and focuses on the role of law, healthcare, gender transition, and disability. Stephen Whittle and Fiona Simkiss begin this part discussing transgender policy making and the Gender Recognition Act 2004. stef m. shuster discusses the unintended consequences of the informed consent doctrine with regard to transgender medicine, providing a criticism of paternalistic medical practice, discussing empirical data from medical practitioners. Within this field of transgender research, Flora Renz presents a sociolegal perspective on the regulation of transgender identity in law. Rosie Harding and Ezgi Taşcıoğlu discuss the support of intellectually disabled people’s decisionmaking capacity with regard to their sexuality, utilising empirical data from practitioners. Maria Moscati then closes this part by presenting an assessment of dispute resolution proceedings with a focus on domestic violence in lesbian relationships.

The fifth part of the book turns to *Violence and Vulnerability*. In introducing these concepts, Rosemary Barberet and Aneesa Baboolal examine the definitional and measurement issues surrounding femicide and track the legal developments in its definition and prosecution. Nan Seuffert and Trish Mundy present their comparative findings on the methodological process of tackling domestic violence in Australia, the United Kingdom and the United States. Following this, Marian Duggan discusses the reform of hate crime protections in the United Kingdom, with a focus on the inclusion of gender-based violence. Similarly, Jessica Cabrera discusses the Title IX Movement in US universities and its implementation as a procedure against sexual assault. Finally, Sharon Cowan and Rebecca Hewer critically engage with the concept of vulnerability and its application within the criminal justice system, using sex work and sexual assault case studies in the United Kingdom in bringing together theoretical and empirical analysis.

The sixth theme in this collection is *Deviancy and Illicit Constructions*. Ummni Khan first presents a comparative analysis of BDSM sexuality in the sociolegal imaginary of the United Kingdom, United States, and Canada, utilising statutory and common law to analyse the various manifestations of stigma surrounding kink identities. Thomas Crofts then discusses the regulation of male sex work in Australia. Alexander Kondakov presents a historical analysis of the regulation of desire in Russia, culminating in a commentary of the current ‘gay propaganda’ laws established by President Putin. Chris Ashford, Alexander Maine and Giuseppe Zago discuss the construction of morality and normative behaviour in the United Kingdom and Italy, focusing on same sex marriage and conjugal visits in prison, utilising empirical and doctrinal analysis. Finally, Brian Simpson discusses children’s right to autonomy and the construction of deviancy in the law with a focus on Australia.

The seventh and final part of the book turns to the theme of *Transgressive Boundaries*. Richard Collier revisits his analysis of the family law construction of masculinity and its conceptualisation and engagement, discussing its role in advancing family law scholarship. Matthew Weait then discusses the transgressive embodiment of HIV and the healthcare rights of those living with HIV, concluding with consideration of the ways in which law can be utilised in order to halt the spread of the virus. Clare McGlynn and Fiona Vera-Gray argue that a deeper understanding of the situation of pornography within lived inequalities is needed in order to develop a more effective regulation of the subject. Alex Dymock, conversely, discusses pornography and identity formation, while Stephan Ferris discusses the criminalisation of BDSM in the United States.

This book – and its collection of authors and ideas – marks a moment in time, and while it showcases debates and authors writing in the field of gender, sexuality and law, the intention is that this research and scholarship will further fuel debate and enquiry.