

## How Does a Radical Lesbian Feminist Who Just Knows How to Holler Somehow Become a Noted Legal Scholar?<sup>1</sup>

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I began my career as a full-time tenure-track law professor in the clinic of American University Washington College of Law (WCL) in July 1987. Before that I had created the two jobs that occupied me for most of the twelve years after I graduated from Georgetown Law Center—first co-founding the Washington, D.C., Feminist Law Collective,<sup>2</sup> and then running family law programs at the Women’s Legal Defense Fund (now the National Partnership for Women and Families). I couldn’t hide who I was, as some feminists of my generation did to get jobs in legal academia. If I had tried, I would have had no resume.

Even if I could have hidden my lesbianism, I didn’t want to. Nor did I want to feel uncomfortable or fearful that my lesbian activism would keep me from advancing. And that is how I wound up in a phone call with Professor Bob Dinerstein, the acting director of WCL’s clinical programs, shortly after I received my job offer. As I look back on it, I was quite blunt. I called Bob and told him that all my activism and scholarship would be about lesbian and gay legal issues, and that I wanted to know before accepting whether that would be a problem.

Bob’s response affected me so profoundly that I remember it clearly to this day. He said that not only would it not be a problem, but that, if it was a problem for me, it would be a problem for him as well. And so I signed on, fortified by knowing I had a heterosexual ally who would have my back in this,

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1. This title is best rapped to the opening bars of *Guns and Ships* from *Hamilton*, words and music by Lin Manuel Miranda.
2. For more about the collective, see my submission in *OUT AND ABOUT: THE LGBT EXPERIENCE IN THE LEGAL PROFESSION* 141 (2015).

my first, mainstream legal job. For at least a decade, as I walked across the campus at American University, I would chuckle in wonder and disbelief that a conventional institution had hired me—me, who had been, well, myself, and that it was actually paying me a salary to grow and develop into the teacher, scholar, and advocate I am today.

This essay reflects upon two early aspects of my career as a legal academic, my pretenure scholarship and my service as 1992 chair of the AALS Section on Gay and Lesbian Legal Issues (now named the Section on Sexual Orientation and Gender Identity Issues). I was not present at the creation of the section, nor was I the country's first openly lesbian law professor. But many more have followed me in the past twenty-five-plus years, and I hope I have in small measure inspired at least some of them. Today I get my greatest satisfaction from whatever ability I have to nurture the next generation of legal scholars and activists to take the advances of my generation and move beyond them in the quest for ever greater social and economic justice.

### **Finding My Way As a Scholar**

I was WCL's first explicit tenure-track clinical hire. The university had just agreed that all clinicians would be eligible for tenure according to the same standards applied to classroom faculty. The existing WCL clinicians switched to tenure-track status, with the exception of one, who left specifically because he did not want to produce scholarship. It was that one slot that became available in 1987, and I was hired to fill it. I well understood that evaluation of my legal scholarship would be a critical determinant of my ability to advance and ultimately achieve tenure.

I had reason for trepidation. Before I joined the WCL faculty my primary law review publishing experience had been rather traumatic. In 1974, when Nan Hunter and I were classmates at Georgetown Law Center, we each wrote papers on the custody rights of lesbian mothers for our family law course with Professor Judith Areen (now Executive Director of the AALS). I can't remember whose idea it was to join forces, co-author a piece, and try to get it published, but Nan and I did just that. At the time there was not a single piece of legal scholarship on the issue.<sup>3</sup> Our article encompassed both legal analyses of the cases in which lesbian mothers had won or lost custody of their children and litigation strategies for representing lesbian mothers in such cases.

*Harvard Civil Rights-Civil Liberties Law Review* accepted our submission, but then its editorial board changed, and our new editors asked for a number of revisions. They suggested that writing about litigation strategies was unsuitable in legal scholarship. At some point it became clear that no revisions leaving that section of our article intact would suit them. We were unwilling to abandon it, and so we parted ways. I remember a postgraduation telephone

3. After we wrote our article, but before it was published, the *Women's Rights Law Reporter* at Rutgers Law School, the first explicitly feminist law journal in the country, published what became the first law review article on lesbian mothers. See Rose Basile, *Lesbian Mothers*, WOMEN'S RTS. L. REP., Dec. 1974, at 3.

call with Judy Areen in which I was alternately tearful and enraged, but she encouraged us to move on and seek out other journals.

I cannot remember how we wound up sending the piece to the *Buffalo Law Review*. There too we faced some skepticism, but a junior faculty member at Buffalo, family law Professor Grace Blumberg, whom neither Nan nor I had ever met or spoken with, praised our submission, and so it was finally published.<sup>4</sup> That first law review article reflected what I would identify now as a primary characteristic of my scholarship—academic analysis in the context of producing something that can be used in the world to make a difference.

It had actually never occurred to me that theory and practice were separate spheres, and I never intended to abandon activism. I had called Bob Dinerstein before accepting a position at WCL not only because I wanted no trouble being openly gay, but also because I wanted to remain active in the world outside academia, and I did not want that to be a setup for failure.

On that front, I wasted no time. July 1987 was well into the organizing for what became the Second National March on Washington for LGBT Rights, held on October 11, 1987. One major motivation for the march was the 1986 U.S. Supreme Court ruling in *Bowers v. Hardwick*,<sup>5</sup> upholding a Georgia statute criminalizing private consensual sodomy. A group of activists connected to the march had also decided to plan a civil disobedience at the Supreme Court. I volunteered to coordinate the legal team. And that is how, three months after I entered legal academia, I found myself training a group of legal observers, including a number of WCL law students, and overseeing the arrests of roughly 800 protesters, including my lover and my closest friends, on the steps of the Supreme Court on October 13, 1987.<sup>6</sup> Many years later, *Harvard Civil Rights-Civil Liberties Law Review* published my article describing that experience, “*Am I My Client? The Role Confusion of a Lawyer Activist.*”<sup>7</sup> To my surprise and amazement, that article has become a staple in clinical and public interest lawyering curricula around the country.

In 1988 I was asked to be on the committee of judges and lawyers planning a session at the annual mandatory judicial conference attended by all District of Columbia trial and appeals court judges. D.C. Court of Appeals Judge Theodore Newman had decided that the focus of that year’s conference would

4. In fact, neither of us met Grace Blumberg for another thirty years. She moved on to UCLA, and for my first two decades in academia our paths never crossed. After publication of my book, *Beyond (Straight and Gay) Marriage: Valuing All Families under the Law*, in 2008, the Williams Institute at UCLA asked me to speak at their annual update on “Equality and Beyond: Envisioning the Future of LGBT Rights.” The organizers asked Grace Blumberg to introduce me, and that is when I was finally able to thank her in person for the boost she had given me all those years ago.
5. 478 U.S. 186 (1986).
6. For a collection of firsthand accounts of this action, see FOR LOVE, LIFE AND LIBERATION, <http://supremecourtcd.org/Home.html>.
7. Nancy D. Polikoff, *Am I My Client?: The Role Confusion of a Lawyer Activist*, 31 HARV. C.R.-C. L. L. REV. 443 (1996).

be race, sex, and sexual orientation and the law. Our committee, tasked with preparing the sexual-orientation panel, chose postdivorce custody disputes between a lesbian mother and a heterosexual father as our focus.

At my suggestion, we presented a simulation, which I scripted, consisting of a direct and cross-examination of an expert witness testifying on behalf of the mother, advocating that she be permitted to retain custody of her children even though she had begun living with her female partner. It was a complex script, in which the action broke periodically to allow a panel of preselected, but unscripted, commentators to address matters that came up in the direct or cross, such as whether the expert should be required to answer a question about his own sexual orientation.

At the conclusion of the hearing, the judge presiding over the simulation asked for a show of hands from the judges in the audience about how each would rule on the father's motion to change custody. The vast majority voted to leave the children with their mother. It was an experience I hoped would stay with those who would someday be asked to rule in a real case involving gay and lesbian parents. Three years later, I published an article describing and analyzing this program.<sup>8</sup>

There's a theme to these two examples: Do something that matters. Then write about it. Write an amicus brief; turn it into a law review article.<sup>9</sup> Draft legislation; turn it into a law review article.<sup>10</sup> In my pretenure days I could not have articulated this as a successful career path for a legal academic. And perhaps it would not have been had I not also proved myself along more orthodox lines—a conventional law review article placed in a top legal journal.

In 1989, I began what became my major tenure article, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and other Nontraditional Families*.<sup>11</sup> Early in the process of writing, I submitted a very rough draft for internal review by the rank and tenure subcommittee assigned to me. When the subcommittee chair, Professor Robert Vaughn, read the draft and reported something to the effect that I would never have trouble there, it was a great relief. I really had landed in a place that would value exactly the work I wanted to do, scholarship that I hoped would improve the lives of

8. Nancy D. Polikoff, *Educating Judges about Lesbian and Gay Parenting: A Simulation*, 1 *LAW & SEXUALITY* 173 (1991).
9. See Nancy D. Polikoff, Brief, *The Social Construction of Parenthood in One Planned Lesbian Family*, 22 *NYU. REV. L. & SOC. CHANGE* 203 (1996) (including Brief Amicus Curiae of the National Legal Center for Lesbian Rights; Lambda Legal Defense and Education Fund; Gay and Lesbian Advocates and Defenders; Center Kids; and Gay and Lesbian Parents Coalition International in Support of Respondent-Appellee, *In re Thomas S. v. Robin Y.*, 618 N.Y.S. 2d 356 (A.D. 1974).)
10. Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 *STAN. J. C.R. & C.L.* 201 (2009).
11. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 *GEO. L.J.* 459 (1990).

lesbian and gay families. I'm not sure I realized then just how lucky I was, and how many law schools would not have been so welcoming.

As I wrote that article in the late 1980s, I could confidently say I knew the vast majority of D.C. lesbian couples consciously choosing to bear and raise children within their relationships. Years later, as I saw more and more such families, all over the country, none of whom I knew, I marveled at how those couples took for granted their right and their ability to become parents. I feel profound satisfaction from knowing that my work, my words, in that article and others that followed, helped make possible the world into which their children were born. And I feel immense gratitude to my home in legal academia at American University for making that work possible.

### **1992: My Year As AALS Section Chair**

Becoming involved with the AALS Section on Lesbian and Gay Legal Issues was a no-brainer for me. My school valued it as external service, and I was looking for my place in the larger world of academia. I volunteered for the executive committee in 1990 and became chair in 1992, the year following Barbara Cox, who describes her year in this volume.<sup>12</sup> Being chair meant I had responsibility for planning the programming at the 1993 AALS annual meeting. The mandatory time frame for the annual meeting required that all programs be in place by May 1, 1992.

As Barbara Cox has documented,<sup>13</sup> the AALS had adopted its non-discrimination policy and was figuring out how to implement it. By far the biggest challenge was the military, whose official exclusion of gay men and lesbians from the armed services meant that no school could be in compliance with AALS policy if it allowed the military to recruit on campus. This was a business matter for our section, but it was also a legal and political matter, with litigation and legislative efforts underway to end the ban. It was, therefore, an obvious choice for annual meeting programming.

The May 1 programming deadline was particularly significant that year. It was not until two weeks after that date that Arkansas Governor Bill Clinton, campaigning in the California primary to be the Democratic nominee for President, spoke before a group of gay and lesbian supporters and proclaimed, "I have a vision of America, and you are part of it."<sup>14</sup> Among other things, he pledged to end the ban on military service. I could never have known, as I put the panel in place, that Clinton would be elected, and that he would

12. Barbara J. Cox, *Time for a Change: 20 Years after the "Working Group" Principles*, 66 J. LEGAL EDUC. 531 (2017).

13. See Cox, *supra* note 12, and Barbara J. Cox, *AALS as Creative Problem-Solver: Implementing Bylaw 6-4(a) to Prohibit Discrimination on the Basis of Sexual Orientation in Legal Education*, 56 J. LEGAL EDUC. 22 (2006).

14. John M. Broder, *Gay and Lesbian Group Offer Thanks to Clinton*, N.Y. TIMES, Oct. 4, 1999, at A18, <http://www.nytimes.com/1999/10/04/us/gay-and-lesbian-group-offers-thanks-to-clinton.html>.

reaffirm, shortly after the election, his commitment to ending the ban through executive order.

The speakers for the session, “Excluding Lesbians and Gay Men from Military Service: Whither the Policy, Whither the AALS,” included two advocates from outside of legal academia. They were Mary Newcombe, a Lambda Legal staff attorney, and Kate Dyer, former legislative assistant to openly gay Congressman Gerry Studds and editor of *Gays in Uniform*. The sole law professor was Roberto Corrada, then a junior faculty member at University of Denver, who was researching and writing about the legal issues involved in barring military recruiters from law schools.

Bill Clinton had yet to be inaugurated when the session was held on January 9, 1993. Congress and the military establishment had voiced their opposition but had yet to make it impossible for President Clinton to fulfill his campaign pledge. The phrase “Don’t Ask; Don’t Tell” did not yet exist. And of course the AALS had yet to face the challenge described by Frank Valdes in his account of his year as chair, how to respond to federal legislation punishing any school refusing to allow the military on campus.<sup>15</sup> The session was a snapshot of a moment in a chronicle still being written, whose latest chapter comes just as I write this reflection, the announcement by the Defense Department of an end to the exclusion of transgender individuals from military service.<sup>16</sup>

The session on the military ban was only one of two section programs that year. It represented a matter of section interest and identity politics. It did not, however, manifest my personal priorities. I covered those in the section’s other program, “Censoring Art and Sex in the Age of AIDS,” with panelist law professors Nan Hunter (then at Brooklyn, now at Georgetown) and David Cole (Georgetown, on leave, currently serving as the national legal director of the ACLU), joined by performance artist Tim Miller and AIDS educator Chuck Frutchey of the San Francisco AIDS Foundation. Both the content and the format of the session reflected my identity.

The content of the session expressed my prosex feminism. The 1980s was the decade of the feminist sex wars. On one side, anti-pornography feminist activists decried sexual images of women in art, performance, and literature as subordination of and violence against women, and aligned themselves with conservatives in and out of government who favored censorship. On the other side, anti-censorship feminist activists, also known as prosex feminists, celebrated the ability of sexual words and images to liberate women from the patriarchy’s suppression of women’s sexual agency and to experience their sexuality as a source of pleasure and freedom.<sup>17</sup>

15. Francisco Valdes, *Sexual Minorities in Legal Academia: A Retrospection on Community, Action, Remembrance, and Liberation*, 66 J. LEGAL EDUC. 510 (2017).

16. Terri Moon Cronk, *Transgender Service Members Can Now Serve Openly, Carter Announces*, U.S. DEP’T OF DEFENSE (June 30, 2016), <http://www.defense.gov/News-Article-View/Article/822235/transgender-service-members-can-now-serve-openly-carter-announces> [https://perma.cc/VE89-TZZ9].

17. In the legal arena, this “war” culminated in the constitutional litigation that saw a feminist



When the Attorney General's Commission on Pornography released its final report in 1996,<sup>18</sup> anti-pornography feminists celebrated. Prosex feminists saw the report as the product of a biased process designed to co-opt the language of feminism in the service of a conservative and decidedly anti-feminist agenda. The thrust of the report was fully consistent with the "standards of decency" that governed grant-making by the National Endowment of Arts, the very standards that were applied in 1990 to block grants to panelist Tim Miller and the others who comprised the "NEA Four."<sup>19</sup>

During this same time, the AIDS epidemic was growing. In 1992, AIDS was the leading cause of death for men ages 25-44 in the United States.<sup>20</sup> The cocktail of anti-retroviral drugs that would finally reduce the number of new AIDS cases each year was still three years away.

Preventing the spread of AIDS by promoting safe-sex practices was a primary focus of AIDS organizations. Gay men needed not clinical terms but explicit safe-sex images and arousing portrayals of safe sex written in the sexual vernacular. AIDS organizations, such as the one where panelist Chuck Frutche worked, were producing such materials but were running up against the government's refusal to fund what it considered pornography that "promoted" homosexuality. In other words, censorship was blocking effective public health measures. The prosex politics that guided my feminist activism in the 1980s had, by the time I was entrusted to plan the section's 1993 annual meeting sessions, become a matter of life and death for gay men.

The format of the session was inspired by my recent immersion in clinical pedagogy. My clinic students learned best not from reading about lawyering but from doing it, watching themselves and others doing it, and critiquing those performances. This was the pre-PowerPoint era, when visual aids at academic conferences were far less common than they are now. I thought that serious legal analysis of government restrictions on sexual words and images required hearing those words and seeing those images. I had a connection to Los Angeles-based performance artist Tim Miller through my partner, Cheryl Swannack, and he agreed to perform "Civil Disobedience Weekend," his piece about a group of lesbians and gay men arrested in a protest action

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anti-pornography ordinance drafted by Catherine MacKinnon and Andrea Dworkin ruled unconstitutional in litigation supported by the Feminist Anti-Censorship Task Force (FACT). See generally Lisa Duggan, Nan D. Hunter & Carol S. Vance, *False Promises: Feminist Anti-Pornography Legislation*, 38 N.Y.L. SCH. L. REV. 133 (1993).

18. ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY: FINAL REPORT (1986) (widely known as the "Meese Report" for then-U.S. Attorney General Edwin Meese).
19. In addition to Miller, the "NEA Four" included Holly Hughes, Karen Finley, and John Fleck. Although a peer review process resulted in a recommendation that the four performance artists receive grants from the National Endowment for the Arts in 1990, NEA Chair John Frohnmayer vetoed the grants based on their openly gay and feminist subject matter. See generally Michelle Freeman, Note, *First Amendment Protection for the Arts after NEA v. Finley*, 38 BRANDEIS L.J. 405, 409-17 (2000).
20. *Update: Mortality Attributable to HIV Infection Among Persons Aged 25-44—United States, 1991 and 1992*, 42 MORTALITY & MORBIDITY WKLY. REP. 869 (1993).

and held over a weekend in single-sex jail cells. The annual meeting that year was in San Francisco, one of the epicenters of AIDS activism, and the Chuck Frutchey agreed to do a presentation using slides to illustrate numerous sexually explicit, and therefore highly controversial, AIDS education images. No doubt I owe the session's record crowd, crammed into a small portion of the Hilton ballroom, to these appearances.

Nan Hunter and David Cole gave more conventional annual meeting presentations, but not as ivory tower academics. After co-founding the Washington, D.C., Feminist Law Collective and working as a staff attorney at the ACLU Reproductive Freedom Project, Nan Hunter had founded the ACLU Lesbian and Gay Rights Project in 1986. David Cole had spent five years as a litigator at the Center for Constitutional Rights. They remained involved in litigation after entering academia and were co-counsel on the two federal court cases most directly connected to the work of their fellow panelists. They represented the "NEA Four" in *Nat'l Endowment for the Arts v. Finley*,<sup>21</sup> challenging the agency's denial of funding on the grounds that their art violated the "decency clause" of the federal statute governing the agency. And they represented AIDS advocates in *Gay Men's Health Crisis v. Sullivan*,<sup>22</sup> challenging the prohibition of federal funding of AIDS education materials that were offensive to the majority of adults, including those outside the target audience of the materials. They were not only the best academics to analyze the relevant legal issues. They were also examples of who a legal academic could be—both deeply theoretical and engaged in real-world legal actions. I hoped they would inspire audience members to follow similar paths.

### Concluding Thoughts

This essay began with an anecdote about Bob Dinerstein, a heterosexual ally who assured me I could make a home at American University Washington College of Law. But I am struck at how many allies in different-sex relationships figure in these reflections: Robert Vaughn, the senior colleague who evaluated my scholarship (and of course many other WCL faculty who remain unnamed here<sup>23</sup>); Judy Areen, the law school professor who mentored and encouraged me; Grace Blumberg, the then-Buffalo law professor who had never met me but recommended my work for publication; and David Cole, the litigator and legal scholar who dedicated so much thought and effort to advancing gay and lesbian rights. I am grateful to all of them. And I hope I follow their examples by being a stalwart ally of others who face discrimination different from my own, especially students and colleagues of color who face racial injustice in academia, in the legal system, and in the law itself.

21. 524 U.S. 569 (1998).

22. 733 F. Supp. 619 (S.D.N.Y. 1989).

23. I would be remiss not to specifically name Dean Claudio Grossman who, as WCL dean for over twenty years, consistently encouraged and valued my scholarship and supported my work with funding for research, writing, research assistants, and travel to conferences.



This essay also revisits the time when I was a newcomer to legal education, and reminds me of my first opportunity to boost someone even newer than I was. Shortly after I became AALS section chair, I received a call from a man I did not know. He was an S.J.D. student writing his dissertation on sexual orientation theory who had just joined the faculty at California Western School of Law. He wanted to become involved in the section. He was openly gay and Latino, newly embarking on a career in legal academia. He was looking to find his place, as I so recently was. He wanted to contribute and I was in a position to give him a boost. I asked him to moderate the 1993 section program on censorship and sex.

That newcomer was Frank Valdes, and he did far more than introduce each speaker. In just a few minutes, he offered a brief summary of why the program mattered. “Wow,” I thought to myself, “This guy is amazing!” And so he remains. Frank went on to become a founder of LatCrit and a boost to future generations of newcomers to legal academia.<sup>24</sup>

This year I spoke at the AALS New Law Teachers Conference, where I also hosted a reception on behalf of the AALS Section on Sexual Orientation and Gender Identity Issues. Three people attended that reception—brand-new law professors beginning their careers in Phoenix, Arizona; Richmond, Virginia; and Fayetteville, Arkansas. I fervently hope they find the allies they need. And, although they are now newcomers, I equally hope they can take the accumulated wisdom and experiences of the authors in this collection of essays and make contributions to justice both inside and outside legal academia that go beyond what any of us so far have been able to imagine.

24. As well as the convener of this group of essays.