

GAY ORTHODOXY AND ACADEMIC HERESY

*Ty Clevenger**

This volume of the *Regent University Law Review* might well be known as the refugee edition of Volume 12 of the *Stanford Law and Policy Review (SLPR)*. As co-editor of *SLPR's* symposium on gay rights, I solicited and tentatively accepted the articles by A. Dean Byrd and Stony Olson, George A. Rekers and Mark D. Kilgus, Ben Kaufman, and Judith Reisman, all of which question or criticize various tenets of gay rights orthodoxy. Unfortunately, all these articles were rejected at the last moment by the *SLPR* editorial board.

The history of this process is perhaps as informative as the articles themselves. In 1999, a left-leaning friend and colleague on *SLPR* proposed a print symposium on gay rights to the editorial board of *SLPR*, and he asked that I serve as co-editor. As one of the few visible non-leftists at Stanford, my task was to recruit authors with more traditional viewpoints on gay rights, while he was to recruit authors who support expanded gay rights. The editorial board accepted the proposal, and we were appointed co-editors of the symposium.

In the Fall of 2000, the editorial board, without warning or prior consultation, informed me that it would publish only the pro-gay articles. The stated reason for this decision was that the rejected articles did not meet the academic standards of the journal. I found that explanation suspect, to say the very least.

SLPR has historically published symposia that are a mix of traditional law review articles and commentary outside the traditional law review format.¹ One of the articles rejected by the *SLPR* board was later published in the *Harvard Journal of Law and Public Policy*.² As co-editor, I had personally declined another article on gay marriage because I wanted to cover other areas of the gay rights debate, and that article likewise appeared in the Harvard journal.³ Moreover, the editor-in-chief

* Ty Clevenger graduated in 2001 from Stanford Law School and currently serves as a clerk to Judge Morris S. Arnold of the U.S. Court of Appeals, 8th Circuit. He received his B.S. from Texas A & M University in 1992. Prior to law school, Mr. Clevenger worked for various newspapers as a reporter and also as a deputy sheriff in Camp County, Texas.

¹ See, e.g., David A. DeSchryver, *Strong Charter School Laws: A Necessary Condition for the "Ripple Effect,"* 11 STAN. L. & POL'Y REV. 311 (2000).

² See Lynn D. Wardle, *"Multiply and Replenish": Considering Same Sex Marriage in Light of State Interests in Marital Procreation,* 24 HARV. J.L. & PUB. POL'Y 771 (2001).

³ See David Orgon Coolidge & William C. Duncan, *Reaffirming Marriage: A Presidential Priority,* 24 HARV. J.L. & PUB. POL'Y 623 (2001).

described one of the pro-gay articles as the "most poorly written,"⁴ yet that article was published.⁵ Finally, Professor Kathleen Sullivan, Dean of Stanford Law School, and Professor Barton H. "Buzz" Thompson, Jr., Vice Dean of Stanford Law School, subsequently reviewed the articles and stated that they were not particularly impressed with the substance of the articles on *either* side of the issue.⁶ The deans suggested, and I concurred, that the symposium be delayed until the quality of *all* the articles could be improved or until new authors could be recruited. The editorial board declined the suggestion and published only the pro-gay articles.

Those who discount the effect of systemic bias and political correctness in academia, such as Professor Mary Coombs of the University of Miami Law School,⁷ are willfully ignorant, if not dishonest. Coombs argues, somewhat like my former colleagues, that only pro-gay articles are published in academic journals because the other side is so bereft of substance.⁸ While that notion may suit her own intellectual vanity, it overlooks mounting evidence to the contrary. At a recent meeting of the American Psychological Association (APA), for example, former APA President Robert Perloff denounced the organization as "too politically correct" and beholden to special interests.⁹ He noted that the organization had tried to prevent research into "conversion therapy" (therapy to change one's sexual orientation) and had tried to label it "unethical" a priori, even when the patient *wants* conversion therapy.¹⁰ The APA blocked presentations from researchers on whether sexual orientation can be changed through counseling and therapy,¹¹ yet it published controversial research suggesting that sex between children and adults may not be harmful and then styled itself a defender of academic freedom (prompting both houses of Congress to take the

⁴ Memorandum from Stanford Law and Policy Review Editor-in-Chief to the Stanford Law and Policy Review editorial board (undated) (on file with author).

⁵ See Michael Kirby, *Law and Sexuality: The Contrasting Case of Australia*, 12 STAN. L. & POL'Y REV. 103 (2001).

⁶ Meeting of Kathleen Sullivan, Barton H. Thompson, and author, Stanford Law and Policy Review, Office of Dean Sullivan at Stanford Law School.

⁷ See Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219, 228 (1998).

⁸ *Id.*

⁹ Bridget Murray, *Same Office, Different Aspirations*, MONITOR, Dec. 2001, available at <http://www.apa.org/monitor/dec01/aspirations.html>.

¹⁰ *Id.*

¹¹ National Association for Research and Therapy of Homosexuality, *APA Defends Scientific Freedom: NARTH Responds* (Aug. 2001), at <http://www.narth.com/docs/scifreedom.html>.

unusual step of passing a unanimous resolution of condemnation).¹² Meanwhile, the American Psychiatric Association [not to be confused with APA, which is American Psychological Association] offered luridly titled presentations on counseling aspiring transsexuals.¹³ This creates a rather bizarre contrast. On the one hand, "mainstream" academic/professional organizations publish research suggesting adult-child sex may not be harmful, and ["on the other" seems to suggest a contrast . . . the contrast does not arise until the next sentence] they endorse supportive therapy for individuals who wish to surgically alter themselves (some would say physically mutilate themselves) from one sex to the other. Yet, they denounce as unethical any healthcare professionals who offer therapy to homosexuals who wish to become heterosexuals. In other words, it is ethical to counsel a man to have his penis removed so he can have sex as a heterosexual woman, but it's unethical to counsel a man to have sex as a heterosexual man even if he *wants* to have sex as a typical man.

The history of the Rekers and Kilgus article, *Studies of Homosexual Parenting: A Critical Review*, is a case study in the sort of academic bias that faces non-conforming researchers. Since the article included more social science data and analysis than is typically found in a law journal, I assembled an ad hoc peer review panel of two psychiatrists and one psychologist. I contacted various academics and professionals to find reviewers from different realms of the ideological spectrum who would nonetheless provide a fair review of the article.

Dr. Richard Williams, Professor of Psychology at Brigham Young University, and Dr. Robert Spitzer, Professor of Psychiatry at Columbia University, supported publishing the Rekers article.¹⁴ (Interestingly, Dr. Spitzer describes himself even now as a supporter of gay adoption.)¹⁵ A third reviewer opposed publication of the article, but not on the basis of flaws in the article itself. Dr. William Byne, a psychiatrist at Mt. Sinai Medical Center, instead criticized the author:

You must realize that publishing anything by Rekers will give legitimacy to his voice which is prominent among the antigay religionists. One might argue that it is unethical to act in any way to

¹² *Id.*; see also Stacey Burling, *Group Drops Plans for Review of Child Sex-Abuse Study*, MILWAUKEE J. SENTINEL, Nov. 21, 1999, at 1, available at 1999 WL 21552494.

¹³ See e.g., American Psychiatric Association, *Transgender Perspectives: Women to Men...You Don't Know Dick*, 1998 Annual Meeting Agenda, available at <http://www.psych.org/pnews/98-02-20/0604.html> (last visited Apr. 6, 2002).

¹⁴ Letter from Dr. Richard N. Williams, Professor of Psychology, Brigham Young University, to Ty Clevenger (Nov. 2, 2000) (on file with author); E-mail from Dr. Robert Spitzer, Professor of Psychiatry, Columbia University, to Ty Clevenger (Sept. 12, 2000) (on file with author).

¹⁵ Telephone interview with Dr. Robert Spitzer, Professor of Psychiatry, Columbia University (Feb. 1, 2002).

promote the agenda of such a movement that is driven by fear and hatred and almost devoid of compassion.¹⁶

In my correspondence, I asked Dr. Byne for his criticisms of the article, not the author. He referred me to a philosophy professor who ostensibly could guide me on the ethics of rejecting an article based on the alleged reprehensibility of its author rather than the scientific shortcomings of its content:

[The philosophy professor] would also be a good person to consult regarding the possibility of an editorial decision to reject an article on the basis of authorship rather than content. For example, if Hitler were to submit an unbiased article on the topic of Jewish parenting would you publish it[?] That may be a crude analogy, but it's the end of a long week¹⁷

Dr. Byne's criticism was, of course, a classic *ad hominem* argument, i.e., the research and arguments of Dr. Rekers and others whom he cites should be ignored or suppressed because they are "bad" people or have "bad" motives.

Even Byne concedes that gay activists, specifically gay psychiatrists and psychologists, have likely produced biased research on gay parenting.¹⁸ However, that bias exists not only within the research produced by gay activists themselves; instead, the bias is exerted against publication of any research that does not conform to pro-gay orthodoxy. In fact, the most consistent theme among the articles in this volume is that a pervasive bias exists against those who stray from pro-gay orthodoxy. Many libertarians, myself included, debate the role of public morality versus individual liberty, but disputes about sexual mores are no longer the central issue in the gay rights debate. Instead, the greater threat to individual liberties comes from gay activists themselves, many of whom seem to view the slightest deviation from pro-gay orthodoxy as something akin to religious heresy.

The work of Dr. Robert Spitzer, one of the reviewers of the Rekers article, is an example of this phenomenon. Dr. Spitzer is perhaps best known for his role in removing homosexuality from classification as a mental disorder, and he was widely hailed as a hero by the gay rights community thereafter. But in the fall of 2000 he announced preliminary results from research on re-orientation therapy, i.e., therapy to change homosexuals to heterosexuals, wherein he found evidence that change was possible, at least in some cases.¹⁹

¹⁶ E-mail from William Byne, M.D., Psychiatrist, Mt. Sinai Medical Center, to Ty Clevenger (Sept. 29, 2000) (on file with author).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Malcolm Ritter, *Study: Some Gays Can Go Straight*, AP ONLINE, May 9, 2001, available at 2001 WL 21143216.

The reaction was swift and hyperbolic. The communications director of the National Gay and Lesbian Task Force, whose scientific expertise consisted of having worked as a newspaper reporter, intoned that Spitzer's work was "snake oil" and "scientific bunk."²⁰ The Human Rights Campaign accused Spitzer of "anti-gay views, close ties to right-wing political groups and [a] lack of objective data,"²¹ and a psychologist at the Lesbian and Gay Service Center said "she cannot believe Columbia would allow any of its professors to do anything like this."²² As a *Wall Street Journal* editorial noted, no one called Spitzer a quack back in 1973 when he spearheaded the effort to de-classify homosexuality as a mental disorder.²³ Yet he quickly became a pariah among gay activists when he deviated ever-so-slightly from the party line.

Dr. Spitzer's treatment illustrates the rampant extremism and intolerance among gay rights activists toward those who dare question their orthodoxy. In an interview for this essay, Dr. Spitzer reported that a colleague at Columbia objected that merely conducting the research was "unethical," and that same colleague later formally complained to Columbia's Institutional Review Board that it should not have approved the research.²⁴ Dr. Spitzer has since submitted the article for publication, and he reports that he expects the article to be rejected due to the biases of the journal.²⁵ Fortunately, another journal has already expressed interest in publishing the research.²⁶

As Dr. Spitzer explained, it is very easy for a gay-activist journal staff to torpedo a non-conforming article merely by assigning the article to hostile peer reviewers.²⁷ Similarly, private and government funding agencies, which ostensibly fund research on scientific merit, can be subverted merely by assigning biased reviewers to the funding committees.²⁸ Unlike the voir dire process for selecting jurors, establishment science has no process for vetting the fairness of peer reviewers. In fact, peer reviewers are often anonymous.

²⁰ Erica Goode, *Study Suggests Gays Can Change Sexual Orientation*, TIMES UNION (Albany), May 9, 2001, at A7, available at 2001 WL 6305580.

²¹ Editorial, *Review & Outlook: Straight Talk*, WALL ST. J., May 11, 2001, at W17, available at 2001 WL-WSJ 2863223.

²² Kate Sheehy, *Gays Bash Study That Says 'Go Straight,'* N.Y. POST, May 9, 2001, at 4, available at 2001 WL 19770238 (quoting Barbara Warren of the Lesbian and Gay Community Center in Manhattan).

²³ *Review & Outlook: Straight Talk*, supra note 21.

²⁴ Telephone interview with Dr. Robert Spitzer, Professor of Psychiatry, Columbia University (Feb. 1, 2002).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

Yet, when non-conforming researchers are forced to turn to alternative venues for publication, that fact is held against them insofar as their work is not published in a "mainstream" peer-reviewed journal.²⁹ Frankly, I realize that publication of this essay in the *Regent University Law Review* will be grounds for criticism because Regent is identified, rightly or wrongly, as part of the "religious right." Any sort of religious affiliation is deemed grounds for grave suspicion, as I can personally attest. During the process of recruiting and interviewing authors, I had to undergo somewhat of a vetting process wherein potential authors or interviewees asked me about my own religious background and beliefs before agreeing to talk with me. While I do not object to this practice altogether, I must note that it only seems to operate in one direction. The objectivity of researchers who are Christian, Mormon, Jewish Orthodox, etc., is open to question, while the fact that a researcher may himself or herself be a homosexual is not considered grounds for suspicion of bias. The "voir dire" process, if you will, targets only one side of the debate.

Dr. Byne, for example, never offered any evidence for lumping Dr. Rekers with "antigay religionists." I can only speculate that it is because Dr. Rekers holds a doctorate in theology in addition to his doctorate in psychology. But Rekers is also a tenured professor of neuropsychiatry at the University of South Carolina and an internationally recognized expert on Gender Identity Disorder. Is it really so much to ask that his paper be evaluated on its merits?

One might ask why, aside from general concerns about corruption of the academy, the legal community should be concerned about such bias in the fields of psychology and psychiatry. The answer can perhaps be found in *Brown v. Board of Education*, the first Supreme Court case to cite psychological research as a basis for overturning a prior holding of the court.³⁰ Fortunately, courts often see through the veneer of individual experts, some of whom might try, for example, to conceal political and moral opposition to the death penalty in the guise of a professional opinion on the competence or culpability of a defendant.³¹ In the gay rights arena, however, the issue is not merely the bias of individual practitioners or researchers, but of entire professional organizations and their respective journals.

²⁹ E-mail from Dr. William Byne, M.D., Psychiatrist, Mt. Sinai Medical Center, to Ty Clevenger (Sept. 29, 2000) (on file with author) (concerning the Rekers and Kilgus article, for example, Dr. Byne objected that some of the research it cited had been published in "Psychological Reports," which he did not deem to be credible).

³⁰ 347 U.S. 483, 494 n. 11 (1954).

³¹ See, e.g., *United States v. Byers*, 740 F.2d 1104, 1168 nn.177-79 (D.C. Cir. 1984) (acknowledging that mental health experts have their own biases).

This phenomenon is not unknown to the legal profession, which has seen the American Bar Association adopt increasingly politicized stands on gun control, abortion, and gay rights, a sore spot for many conservatives and libertarians.³² The question is what additional weight, if any, should be afforded these political opinions merely because the holders of these opinions claim to have relevant expertise. (Not much, according to President George W. Bush, who has ended the ABA's role in vetting judicial nominees, in part because of the ABA's perceived political biases.³³) Likewise, when the APA gives its opinion on the "normality" of homosexuality based on its members' notions of morality, what makes that opinion any more "expert" than an American Bar Association opinion on whether abortion should be legal? If opinions are founded purely on the alleged expert's personal morality or subjective beliefs, then a psychiatrist is no more an expert on homosexuality than an Orthodox rabbi or a Baptist preacher.

Nonetheless, the fact remains that courts regularly rely on published social science research, not just individual expert witnesses, and cases concerning gay rights are no exception.³⁴ Accordingly, counsel would be well advised to delve into the biases of peer-reviewed journals and professional organizations rather than taking their claims at face value. The aura of scientific objectivity clearly is long overdue for a challenge, particularly in the fields of psychology and psychiatry. Indeed, the law may, in many respects, be better equipped to insure the accuracy and fairness of social science research than the alleged scientists themselves, particularly in academic fields where political bias has overtaken empirical results. The rules of evidence, for example, allow counsel to examine rigorously a witness—even an expert witness—for evidence of bias, and the adversarial system of justice provides an opportunity for robust debate between competing points of view. Unfortunately, those attributes are increasingly rare in academia or the professional journals, where viewpoint discrimination and "political correctness" are the norm. Perhaps that dearth of honest debate explains why so many leftist academics, like Mary Coombs, think the gay rights debate is already over.

³² See, e.g., Don Feder, Editorial, *ABA gets payback for partisanship*, BOSTON HERALD, Mar. 26, 2001, at 19, available at 2001 WL 3796640.

³³ Amy Goldstein, *Bush Curtails ABA Role In Selecting U.S. Judges*, WASH. POST, Mar. 23, 2001 at A1, available at 2001 WL 2553157.

³⁴ See e.g., *Baker v. State*, 744 A.2d 864, 868 n.1 (Vt. 1999). The *Baker* court did not cite social science research in its opinion, but noted that it was included in the record. *Id.*