

A BISEXUAL PERSPECTIVE ON LAW SCHOOL HIRING

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There is still a significant amount of discrimination in the legal academy relating to many different issues, including race, gender, sex, sexuality, and class. The most overt discrimination that I have faced has been based on being bisexual. This has been exacerbated by the fact that some of my scholarship is about sexuality. In this short Article, I focus on discrimination in law school hiring based on bisexuality. The topic is important because discrimination against bisexuals in the legal academy (and elsewhere) is little understood and often invisible. Additionally, because it was the type of discrimination that was the most apparent to me in the hiring process, I have important insights to share about it. Furthermore, the invisibility and lack of understanding of bisexuality mean that even people who are broad-minded and committed to social justice may discriminate against bisexuals without realizing it. I firmly believe that most or all of the people in the examples that I discuss below did not intend any harm, and many of them are colleagues whom I respect and admire.

Before I begin to discuss the different forms of stereotyping and discrimination I have faced related to my sexuality, I want to address a threshold question that some readers may be curious about. When I first presented the initial results of an online survey about discrimination against bisexuals that I was conducting at the time, a more senior professor who had once herself identified as bisexual asked me paradoxically why anyone would want to identify as bisexual. What was the point? I got the sense that she had faced a great deal of push-back and confusion in response to her own brief self-identification as bisexual and had concluded it was a pointless undertaking. (She now identifies as lesbian.)

I did not fully respond then, but I do think it is an important question. The point of identifying as bisexual, for me at least, is to be true to myself. In most of my life, I could pass as straight, and, in few situations, I could pass as lesbian, but, when a person passes, something is lost. Indeed, “[n]onrecognition or misrecognition . . . can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.”¹ And,

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1 Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Discrimination Law*,

as Kenji Yoshino explains, passing causes discrete types of harm to the person who is passing, including alienation (from both the stigmatized group from which she dissociates and the non-stigmatized group that she appears to join), an exertion of constant effort to maintain the subterfuge, and the moral harm of repeatedly engaging in deception.²

Beyond the pain of being misperceived and the related harms of passing, there is also the fact that failing to challenge the status quo facilitates its continuation. If bisexuals, who constitute—by most counts—the largest group in the LGBT community,³ agree to their own invisibility by not self-identifying, prejudice against bisexuals is unfortunately likely to continue unabated. As civil rights leader Bayard Rustin explained in an interview nearly thirty years ago:

[I]f people do not organize in the name of their interest, the world will not take them as being serious. And that is the chief reason that every person who is gay should join some gay organization. Because he must prove to the world that he cares about his own freedom. People will never fight for your freedom if you have not given evidence that you are prepared to fight for it yourself.⁴

And to say this is not to judge those who cannot come out or who choose not to, but only to recognize that the stakes are high for all of us.

Turning now to my experiences in the legal academy, first, I want to talk about the discrimination by religious schools. I entered the job market three times in order to land a tenure-track job, and each time it was clear to me that many, but not all, religious schools either avoided interviewing me or wanted to run in the other direction once some appointments committee members—often a dean who must have delegated the initial review of Faculty Appointments Register (“FAR”) forms to faculty—found out during the

94 CALIF. L. REV. 1271, 1275 (2006) (quoting CHARLES TAYLOR, MULTICULTURALISM AND “THE POLITICS OF RECOGNITION” 25 (1992)).

2 Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485, 527–28 (1998).

3 Ann E. Tweedy & Karen Yescavage, *Employment Discrimination Against Bisexuals: An Empirical Study*, 21 WM & MARY J. WOMEN & L. 699, 699 & n.1 (2015).

4 *Brother to Brother: An Interview Between Bayard Rustin and Joseph Beam*, ADVOCATE.COM (Jan. 1, 2015), <http://www.advocate.com/arts-entertainment/people/2015/01/01/brother-brother-interview-between-bayard-rustin-and-joseph-beam> [http://perma.cc/65DM-8BVL].

interview that I had written about sexuality and the law. The discomfort was usually evident from the facial expressions of one or more search committee members or by a change in the tone of their questions after my scholarship on sexuality was discussed. Sometimes the committee member would ask questions in an incredulous tone, such as “What gave you the idea for that topic?”

At one point, I was told by a dean of a religious law school that almost all the schools that were affiliated with the same Christian denomination as her law school would be off limits to me because I’d written about polyamory, and my writing about that topic suggested that my values were not in accord with those of that denomination.

The discrimination by religious schools was disappointing but somewhat expected. Given the number of religious schools out there,⁵ I do believe it put me at a significant disadvantage in obtaining a tenure-track job. One bright spot is that I was eventually hired by Hamline University School of Law, which is a Methodist university.

What I found even more troubling than the discrimination by religious schools was that it seemed that even liberal schools that were dedicated to recruiting LGBT faculty often did not see me, as a bisexual, as being part of the LGBT community. In one case, this was clear to me from informal conversations with a search committee member who was also a friend.

Additionally, some of the faculty at schools I interviewed with saw my scholarship about polyamory as problematic because of its lack of concord with current LGBT advocacy priorities such as same-sex marriage. One of the strategies of marriage equality advocates has been to argue that gays and lesbians are entitled to marry because their relationships are the same as those of different-sex couples.⁶ However, my work on polyamory was about alternative plural relationships, and many seemed to see this work as implicitly detracting from mainstream scholarship on sexual orientation. Comments by appointment committee members (often tinged with suspicion) and body language when I answered questions

5 It appears that roughly one quarter of nationally accredited law schools are religiously affiliated. See, e.g., Thomas R. Schaffer, *Erastian and Sectarian Arguments in Religiously Affiliated American Law Schools*, 45 STAN. L. REV. 1859, 1864 n.18 (1993) (noting the author’s conclusion that there were then forty-eight religiously affiliated law schools); *ABA-Approved Law Schools*, AM. BAR ASS’N, http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html [<http://perma.cc/96YQ-YEK5>] (last visited July 29, 2015) (listing accredited law schools and the date of each school’s accreditation).

6 See, e.g., Tweedy & Yescavage, *supra* note 3, at 714 & n.75 (citing Janet E. Halley, “Like Race” Arguments, in *WHAT’S LEFT OF THEORY: NEW WORK ON THE POLITICS OF LITERARY THEORY* 40, 52–53 (Judith Butler et al. eds., 2000)).

about the article made this clear to me. At least one committee member asked me directly whether I was concerned about my project's possible detraction from the goals of the same-sex marriage movement.

The most blatant discriminatory comment I heard, however, was not about my article on polyamory, but rather about my empirical project on discrimination against bisexuals that was then just in the brainstorming stages. An appointments committee member who is nationally known for leadership on diversity issues stated during an interview that bisexuality was only a way to be cool and identify oneself as an ally to the gay and lesbian community, suggesting that it was not a real orientation at all. This appointments committee member then shook her head and said, "If you're suggesting that bisexuals need a specific legal remedy . . .," the implication clearly being that bisexuals have no legal problems. This committee member's comment had a significant effect on me, derailing that interview and harming the rest of my interviews that day. Indeed it comes to mind whenever I've interviewed since.

The type of discriminatory thinking that this comment represents—viewing bisexuality as an illegitimate orientation or a disingenuous way of retaining heterosexual privilege—is commonly experienced by bisexuals, as I learned during the course of my research.⁷ Since the committee member made this comment in 2009, much social science research about bisexuals has come to light, including data showing that bisexual women and men have much higher rates of suicide ideation than lesbians or heterosexual women or gay men or heterosexual men respectively, as well as other alarming health and mental health data, and the problems these data reveal may well be related to the level of stigma bisexuals face.⁸

7 See, e.g., MEG BARKER ET AL., THE BISEXUALITY REPORT: BISEXUAL INCLUSION IN LGBT EQUALITY AND DIVERSITY 21 (2012); Naomi Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts*, 10 BERKELEY WOMEN'S L.J. 98, 116–18 (1995); Brent Chamberlain, *Stonewall Workplace Guides: Bisexual People in the Workplace: Practical Advice for Employers*, STONEWALL 2–3 (2012), http://www.stonewall.org.uk/documents/bisexual_people.pdf [<http://perma.cc/E3KA-ZUTP>]; see also Cindy Rizzo, *When You Use Your Identity As A Hammer, Everything Looks Like A Nail*, DO I LOOK LIKE A WRITER IN THIS? ON WRITING, IDEAS, LESFIC, LGBT ISSUES, AND OTHER LATE MIDLIFE THOUGHTS (Sept. 12, 2014), <https://cindyruzzo.wordpress.com/2014/09/12/when-you-use-your-identity-as-a-hammer-everything-looks-like-a-nail> [<http://perma.cc/5C2V-GDUL>] (discussing the common practice among lesbians of accusing bisexual women of unfairly taking advantage of heterosexual privilege).

8 S.F. HUMAN RIGHTS COMM'N LGBT ADVISORY COMM., BISEXUAL INVISIBILITY: IMPACTS AND RECOMMENDATIONS 12–13, 27 (2011); see also Mark L. Hatzenbuehler et al., *Structural Stigma and All-Cause Mortality in Sexual Minority Populations*, 103 SOC. SCI. & MED. 33, 33 (2014) (reporting that the life expectancy of sexual minorities living in communities with high levels of anti-gay prejudice is twelve years shorter than for those living in low-prejudice communities); Mark L. Hatzenbuehler et al., *The Impact of Institutional*

Furthermore, the empirical research I conducted with my co-author shows that bisexuals face significant rates of employment discrimination.⁹

Negative views about bisexuality and ignorance about it affected my job search in multiple ways. I was rejected for my sexuality-related scholarship by many religious schools, liberal schools in some cases did not see me as LGBT, some liberal appointments committee members were troubled that my sexuality-focused scholarship did not fit with the advocacy priorities of the LGBT movement, and, finally, in one case, I faced disparaging comments about my orientation in the course of the interview. Together, these obstacles created a significant handicap that I hope can be remedied for others in the future. Greater awareness about these problems is the first step toward a solution.

Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations: A Prospective Study, 100 AM. J. PUB. HEALTH 452 (2010) (reporting increased rates of psychiatric disorders, especially mood disorders and generalized anxiety disorder, among LGB respondents living in states that passed anti-marriage equality constitutional amendments); Lori E. Ross et al., *Perceived Determinants of Mental Health for Bisexual People: A Qualitative Examination*, 100 AM. J. PUB. HEALTH 496, 497 (2010) (detailing bisexual participants' perceptions that biphobia and monosexism played critical roles in their mental health experiences).

9 See generally Tweedy & Yescavage, *supra* note 3.