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LAW, SEXUALITY, AND TRANSNATIONAL PERSPECTIVES

*Holning Lau**

ABSTRACT

Law teachers can enrich students' experiences by incorporating transnational perspectives into their course materials and classroom discussions. This contribution to Drexel Law Review's Symposium – Building Global Professionalism: Emerging Trends in International and Transnational Legal Education – explores four ways that teachers can integrate transnational perspectives into classes on law and sexuality. First, teachers can situate U.S. law in the context of transnational norms. Second, by using foreign cultures as a foil, teachers can illuminate cultural constructs in the United States that influence the regulation of sexuality. Third, when discussing potential reform of U.S. law, classes can explore legal innovations developed in foreign jurisdictions. Fourth, classes can discuss transnational lawyering to prepare students who wish to pursue sexuality-related advocacy abroad.

INTRODUCTION

It has become common for law schools in the United States to offer classes on law and sexuality.¹ These courses typically focus on issues related to sexual orientation and gender identity. Sometimes, the courses take a wider view of sexuality, covering additional top-

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1. There are now several casebooks for courses on law and sexuality. See WILLIAM N. ESKRIDGE & NAN D. HUNTER, *SEXUALITY, GENDER & THE LAW* (3d ed. 2012); SHANNON GILREATH & LYDIA E. LAVELLE, *SEXUAL IDENTITY LAW IN CONTEXT: CASES AND MATERIALS* (2d ed. 2011); ARTHUR S. LEONARD & PATRICIA A. CAIN, *SEXUALITY LAW* (2d ed. 2009); WILLIAM B. RUBENSTEIN ET AL., *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* (3d ed. 2008). The International Commission of Jurists, an organization in Geneva, has published a casebook dedicated to comparative law on sexual orientation and gender identity. INTERNATIONAL COMMISSION OF JURISTS, *SEXUAL ORIENTATION, GENDER IDENTITY AND JUSTICE: A COMPARATIVE LAW CASEBOOK* (2011).

ics such as prostitution and obscenity.² This contribution to *Drexel Law Review's* Symposium on globalization and legal education examines how teachers of law and sexuality can enrich students' experiences by incorporating transnational perspectives into their course materials and classroom discussions.³

This Article encourages teachers of law and sexuality to integrate transnational perspectives into their classes, with the goal of inspiring teachers to think about how transnational perspectives can enhance classes across the law school curriculum, not just classes with the words "international," "comparative," or "transnational" in their titles. Even when transnational dynamics are not the primary focus of a class, occasional discussion of transnational perspectives can enrich students' learning experiences.⁴ The following discussion of law and sexuality provides examples of this effect.

At the Symposium dedicated to this issue of the *Drexel Law Review*, some attendees lamented that the globalization of law school curriculum has become siloed, with a limited number of students participating in stand-alone programs such as summer classes abroad and international human rights clinics.⁵ Other Symposium attendees expressed concerns about disequilibrium; they believe that U.S. law schools spend a great number of resources on expanding their influence abroad, contributing to the export of ideas, while failing to spend comparable resources on importing and incorporat-

2. The second edition of the casebook by Professors Hunter and Eskridge addressed prostitution and obscenity in quite some detail. ESKRIDGE & HUNTER, *supra* note 1.

3. In this Article, the phrase "transnational perspectives" refers to perspectives that are acquired by looking beyond one particular nation, either by comparing nations or by examining laws or norms that govern more than one nation. This definition of "transnational perspectives" mirrors the way that law school classes on "transnational law" typically cover both comparative and international law. See Margaret Martin Berry, *Practice Ready: Are We There Yet?*, 32 B.C. J.L. & SOC. JUST. 247, 259 (2012) (describing Washington & Lee University's class entitled "Transnational Law"); Mathias Reimann, *Taking Globalization Seriously: Michigan Breaks New Ground by Requiring the Study of Transnational Law*, 82 MICH. B.J. 52, 52 (2003) (describing the University of Michigan's class entitled "Transnational Law").

4. See, e.g., Mathias Reimann, *Two Approaches to Internationalizing the Curriculum: Some Comments*, 24 PENN ST. INT'L L. REV. 805, 806 (2006) ("Upper-class courses can (and should) also contain comparative and international perspectives, and in some areas, such as corporations, antitrust, or intellectual property, limiting the syllabus strictly to domestic materials borders on educational malpractice under modern conditions."); Franklin A. Gevurtz, *Incorporating Transnational Materials into Traditional Courses*, 24 PENN ST. INT'L L. REV. 813, 814 (2006) (promoting the integration of transnational perspectives into "traditional domestically-oriented core courses—such as Civil Procedure, Constitutional Law, Contracts, Corporations, Criminal Law and Procedure, Torts, and Property").

5. See Drexel Law Review, *Models of Internationalization*, INT'L L. SYMP. 0:30:00–2:30:00 (Oct. 12, 2012), <http://media.irt.drexel.edu/Mediasite/Play/bfc59761fdaf40c1b21b9ef74a116c861d>.

ing foreign perspectives into classes at home.⁶ This Article addresses these concerns and argues that examining transnational perspectives in classes such as law and sexuality helps to reduce siloing and exposes students to ideas from abroad.

The remainder of this Article will explore four ways to incorporate transnational perspectives into classes on law and sexuality. First, teachers can situate U.S. law in the context of transnational norms.⁷ Second, by using foreign cultures as a foil, teachers can illuminate cultural constructs in the United States that influence the regulation of sexuality.⁸ Third, when discussing potential reform of U.S. law, classes can explore legal innovations developed in foreign jurisdictions.⁹ And, fourth, classes can examine transnational lawyering to prepare students who wish to pursue sexuality-related advocacy abroad.¹⁰

Before proceeding, it is worth noting that this Article does not prescribe precisely how much time teachers should invest in transnational components of class. Teachers should allocate time differently based on factors such as their students' expressed interests and the credit load of each course. For deep exploration of transnational perspectives, teachers can assign relevant reading materials for lengthy discussions. Other teachers might choose to raise transnational perspectives more casually during class and point interested students to reading materials that are optional. At a minimum, teachers should give serious consideration to the benefits of transnational perspectives when designing courses on sexuality and the law.

I. TRANSNATIONAL NORMS

Perhaps the most obvious way to inject transnational perspectives into classes is to examine whether the United States conforms to transnational norms. To some readers, incorporating these discussions into classes on law and sexuality will seem intuitive because of *Lawrence v. Texas*, the landmark Supreme Court case that struck down a ban on same-sex sodomy.¹¹ *Lawrence* overruled the earlier

6. *Id.*

7. *See infra* Part I.

8. *See infra* Part II.

9. *See infra* Part III.

10. *See infra* Part IV.

11. 539 U.S. 558, 578-79 (2003) (holding that a state sodomy prohibition violated constitutional protection of substantive due process).

case of *Bowers v. Hardwick* and paved the way for expanding sexuality rights over the past decade.¹² In *Bowers*, Chief Justice Burger's concurring opinion legitimized sodomy bans by invoking transnational norms.¹³ He claimed that, throughout history, sodomy had been condemned in Western civilization.¹⁴ Writing for the majority in *Lawrence*, Justice Kennedy countered Chief Justice Burger's account of norms by citing foreign laws to show that sodomy has, in fact, not been universally condemned.¹⁵ Quite to the contrary, many Western parts of the world affirmatively protect the rights of adults to engage in consensual sexual activity with partners of the same sex.¹⁶

Because *Lawrence* is so fundamental to classes on law and sexuality, it is usually taught early in the semester. It thus provides an early opportunity to engage students in an introductory discussion about comparative law. Justice Kennedy's references to foreign law in *Lawrence* elicited harsh criticisms from Justice Scalia in his dissenting opinion.¹⁷ In the wake of *Lawrence*, commentators produced a great deal of literature on the arguments for and against judicial citations to foreign law.¹⁸ Commentators examined whether transnational norms are particularly relevant to specific types of legal disputes.¹⁹

12. See *id.* at 578, *overruling* *Bowers v. Hardwick*, 478 U.S. 186 (1986).

13. *Bowers*, 478 U.S. at 196-97 (Burger, C.J., concurring).

14. See *id.* at 196 ("Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization.").

15. Justice Kennedy cited British law, case law from the European Court of Human Rights, and an amicus brief that surveyed laws from different parts of the world. *Lawrence*, 539 U.S. at 572-73, 576-77.

16. *Id.* at 576-77. Although Justice Kennedy was responding to Chief Justice Burger's claim about "Western civilization," it is worth noting that laws in many non-Western parts of the world also support the freedom of adults to engage in consensual sodomy. See Holning Lau, *Grounding Conversations on Sexuality and Asian Law*, 44 U.C. DAVIS L. REV. 773, 777-78 (2011) (discussing Asian countries that either have never criminalized sodomy or had repealed sodomy laws by the time of *Lawrence*).

17. *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (arguing that the majority's discussion of foreign law constituted "[d]angerous dicta," and the Court "should not impose foreign moods, fads, or fashions on Americans") (quoting *Foster v. Florida*, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of certiorari)).

18. See Holning Lau, *Sexual Orientation & Gender Identity: American Law in Light of East Asian Developments*, 31 HARV. J.L. & GENDER 67, 69 n.9 (2008) (providing a list of articles that discuss judicial citation of foreign sources).

19. See Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 125 (2005) ("[T]he legitimacy of looking to foreign experience will vary with the issue, depending on the specificity and history of our constitutional text . . ."); see also Jessica R. Feierman & Riya S. Shah, *Protecting Personhood: Legal Strategies to Combat the Use of Strip Searches on Youth in Detention*, 60 RUTGERS L. REV. 67, 86 (2007) (contending that "Eighth Amendment jurisprudence lends itself to the integrated use of foreign precedent" and agree-

They also explored different ways that foreign laws might matter. For example, some commentators believe that, regardless of whether transnational trends have inherent normative value, it is appropriate for courts to cite foreign judicial opinions for their underlying logic or for empirical evidence.²⁰

Introducing students to the jurisprudential debates that *Lawrence* generated will help them to understand how foreign legal developments may or may not influence future decisions about sexuality rights. Students should also be made aware that these debates about citing foreign laws have centered on the role of courts. Even critics of courts' engagement with foreign laws generally concede that developments beyond U.S. borders can inform deliberations in the United States that take place in legislative bodies and in broader public discourse.²¹

Previously, I have argued that the "United States should not blindly follow norms that emerge among its peers; however, if the United States falls out of line with its peers, that deviation should be cause for critical questioning," prompting greater public scrutiny of the rationales that underlie U.S. laws.²² In this view, it is worth noting some emerging transnational norms, such as growing support

ing with scholars who have "argued that Fourteenth Amendment jurisprudence is equally receptive to foreign law").

20. See, e.g., Daniel Bodansky, Debate, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT'L & COMP. L. 421, 425 (2004) ("[B]y looking to foreign sources, we can get empirical evidence about how a prospective legal rule operates in practice."); Panel Discussion, *Citation to Foreign Decisions in Constitutional Adjudication*, 43 SUFFOLK U. L. REV. 135, 138 (2009) (quoting Eric Blumenson, who remarked that "[t]here is another use of foreign law that I believe is wholly legitimate, and quite distant from the concerns of the critics: looking to foreign opinions as a source of empirical data."); Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL'Y 653, 666-68, 670-71, 676-77 (2009) (arguing that, although there are some problematic uses of foreign law, citing foreign law for "logical reinforcement" is generally acceptable and citing foreign law for either "empirical consequences" or "persuasive reasoning" is, when executed properly, acceptable as well).

21. See, e.g., *Foster*, 537 U.S. at 990 n.* (Thomas, J., concurring) ("While Congress, as a legislature, may wish to consider the actions of other nations on any issue it likes, this Court's Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans."), quoted in *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting).

22. Lau, *supra* note 18, at 78. Sujit Choudhry has also addressed this issue, noting that: the study of comparative law 'encourages the student to be more critical about the functions and purposes of the rules he is studying and to learn not to accept their validity purely because they belong to his own system of law.' . . . [C]omparative jurisprudence can be an important stimulus to legal self-reflection.

Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 835-36 (1999) (quoting PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 18 (1995)).

for the right to be free from sexual orientation discrimination and the right of transgender individuals to be legally recognized in their acquired sex.²³ Laws in the United States often fail to comport with these patterns.²⁴

II. CULTURAL CONSTRUCTS

Classes on law and sexuality usually include discussions about whether aspects of sexuality are culturally constructed. Most students readily recognize that some beliefs previously held to be facts of nature are now widely regarded as cultural constructs. In the

23. For more on protections against sexual orientation discrimination, see Aaron Xavier Fellmeth, *State Regulation of Sexuality in International Human Rights Law and Theory*, 50 WM. & MARY L. REV. 797, 831-32 (2008) (explaining that “a growing number [of national and provincial governments] now unilaterally prohibit discrimination against sexual minorities comprehensively, including in government action and services, housing and real estate, employment, education, and public accommodations such as the provision of goods and services.”). Regarding transgender recognition, consider the pending litigation in the Hong Kong case of *W v. Registrar of Marriage*. Although the Court of Appeal decided that the transgender woman in the case did not have a right to be recognized as a woman for the purposes of marriage, the court noted:

Internationally, there is a strong trend toward recognition of an individual’s new gender by changing the gender indicated on birth certificates and other identity documents. The change of official identity documents is closely linked, in turn, with an individual’s ability to marry a now opposite sex partner. . . . [M]ost Asian countries permit a transgender individual to marry in his or her acquired gender or have erected no legal barrier.

W v. Registrar of Marriages, [2011] 1 H.K.C. 442, ¶¶ 148-49 (C.A.) (quoting an amicus brief submitted by the International Commission of Jurists); see also *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 18 (2002) (holding that the European Convention on Human Rights protects the rights of transgender individuals to marry in their acquired sex). The case of *W* is now pending before the Court of Final Appeal in Hong Kong. See *W v. Registrar of Marriages*, [2012] H.K.C. 105, ¶¶ 4, 7 (C.A.) (granting leave to appeal to the Court of Final Appeal).

24. Advocates in the United States have pushed for federal legislation that would ban employment discrimination based on sexual orientation, but Congress has not passed such legislation. See Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 715-16 (2012). Only 21 states currently prohibit employment discrimination based on sexual orientation. *Id.* at 755. With respect to transgender rights, consider the fact that courts in the United States have divided on whether transgender individuals have a right to be recognized in their acquired sex for the purposes of marriage. Compare *M.T. v. J.T.*, 355 A.2d 204, 210-11 (N.J. Super. Ct. App. Div. 1976) (recognizing the right of transgender individuals to marry in their acquired sex), with *In re Marriage of Simmons*, 825 N.E.2d 303, 311 (Ill. App. Ct. 2005) (invalidating the marriage of a transsexual male to a female as a same-sex marriage). Of course, legalizing same-sex marriage renders it unnecessary to determine whether a transgender person is male or female for the purposes of marriage. Currently, eleven states and the District of Columbia issue marriage licenses to same-sex couples. See *Defining Marriage: Defense of Marriage Acts and Same-sex Marriage Laws*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (last updated May 15, 2013).

1873 case of *Bradwell v. Illinois*, the Supreme Court allowed Illinois to forbid Myra Bradwell from practicing law because she was a woman.²⁵ Justice Bradley's concurring opinion supported the Court's decision by noting the "natural and proper timidity and delicacy" of women.²⁶ The Supreme Court has since rejected Bradley's suggestion that women are naturally timid and delicate.²⁷ Similarly, most students now recognize that culture plays a role in shaping social views about women, including the view that women are timid and delicate.

Myra Bradwell's case illustrates that entrenched cultural views can be mistaken for natural facts. *Bradwell*, however, is an old example. Students sometimes find it difficult to shift the focus from past to present and think critically about the extent to which society still mistakenly perceives cultural ideas about sexuality as facts of nature. Looking abroad helps to illuminate the role that culture continues to play. This is because foreign cultures can serve as a foil, illuminating culture in the United States.

The sex binary is a cultural construct that still dominates thinking in the United States.²⁸ It is common to think that all human beings belong to one of two sex categories, male or female, in a way that is fixed at birth.²⁹ Commentators have argued that this classification scheme is not ordained by nature, but instead, is a product of culture.³⁰ For some students, this argument can be difficult to grasp at first, but introducing students to law and culture outside the United States can help to illustrate the claim. For example, the highest courts of both Nepal and Pakistan have held that individuals have a constitutional right to be recognized as a third sex and that members of the third sex have rights against discrimination.³¹ Although these

25. See *Bradwell v. Illinois*, 83 U.S. 130, 139 (1872).

26. *Id.* at 141 (Bradley, J., concurring).

27. For example, in *United States v. Virginia*, the Supreme Court rejected "fixed notions concerning the roles and abilities of males and females" and "overbroad generalizations about the different talents, capacities, or preferences of males and females." 518 U.S. 515, 533, 541 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

28. See, e.g., Paisley Currah, *Defending Genders: Sex and Gender Non-Conformity in the Civil Rights Strategies of Sexual Minorities*, 48 HASTINGS L.J. 1363, 1371 (1999) (noting the "common sense" belief that "biological sex is immutable, is limited to two categories, and is determined by the body").

29. *Id.*

30. See Jessica Knouse, *Intersexuality and the Social Construction of Anatomical Sex*, 12 CARDOZO J.L. & GENDER 135, 136 (2005); Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 278-84 (2005).

31. For more on Nepal, see 2 N.J.A. L.J. 261, 268, 275-78, 280 (2008), available at

legal developments in Nepal and Pakistan are relatively new, there is a long cultural history of recognizing more than two sex categories in South Asia.³² Beyond South Asia, Australia has also begun offering a third sex option on passports for intersex individuals.³³

Examples from outside of the United States help students to see that binary sex categories are not adhered to universally. Differences between sex classification systems in the United States and in other parts of the world suggest that sex categories are shaped, at least in part, by local culture. In introducing students to classification systems from abroad, I do not mean to propose that the United States adopt the foreign systems. Rather, I use examples from abroad to illustrate the cultural contingency of sex categories. Recognizing that sex categories are cultural constructs sheds light on current policy proposals. Most rights activists in the United States have not been seeking legal recognition of a third sex.³⁴ Rather, they advocate granting individuals more liberty to choose whether to identify as male or female.³⁵ Recognizing that sex categories are cultural con-

http://njanepal.org.np/index.php?option=com_rokdownloads&view=folder&Itemid=157 (translating *Pant et al. v. Nepal*, Writ No. 917, Dec. 21, 2007). With regard to Pakistan, see Khalid Aziz, *SC Directs Govt to Support Eunuchs Financially*, THE NATION, July 15, 2009, <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/islamabad/15-Jul-2009/SC-directs-govt-to-support-eunuchs-financially>; Mark Magnier, *A Small Victory for Pakistan's Transgenders*, L.A. TIMES, Mar. 3, 2010, <http://articles.latimes.com/2010/mar/03/world/la-fg-pakistan-transgender3-2010mar03>.

32. Although the third sex has been stigmatized in South Asia, it is recognized as a sex category nonetheless. See, e.g., Serena Nanda, *Hijras: An Alternative Sex and Gender Role in India*, in THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY 373, 373-418 (Gilbert Herdt ed., 1996) (describing the recognition of a third sex within various cultural and religious traditions in India).

33. Zosia Bielski, *Australians Have Third Option for Gender on Passports*, THE GLOBE AND MAIL (Canada), Sept. 15, 2011, <http://www.theglobeandmail.com/life/travel/travel-news/australians-have-third-option-for-gender-on-passports/article544980/>. For an Australian organization's argument that eliminating sex categories would be better than creating a third category, see Gina Wilson, *Third Gender? No Thanks, Says Australian Intersex Organization*, GAY STAR NEWS, July 12, 2012, <http://www.gaystarnews.com/article/third-gender-no-thanks-says-australian-intersex-organization120712>.

34. See Alice D. Dreger & April M. Herndon, *Progress and Politics in the Intersex Rights Movement: Feminist Theory in Action*, 15 GLQ: J. LESBIAN & GAY STUD. 199, 217 (2009) (noting the positions of intersex organizations including the Intersex Society of North America, the DSD Consortium, and Bodies Like Ours).

35. For example, intersex rights advocates argue that intersex individuals should not be subjected to so-called corrective surgeries when they are children, so that they have the liberty to define their own sex identifications when they are old enough to do so. See Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J.L. & GENDER 51, 62 (2006). Rights advocates likewise seek greater liberty for transgender individuals by advocating for policies that make transitioning from one sex to another more accessible. See, e.g., *id.* at 55-60, 96 (describing litigation seeking insurance coverage of sex reassignment sur-

structs supports these claims by reminding us that rules regarding classification are not set rigidly by nature.

Classes on law and sexuality typically also discuss the cultural construction of gay identity. Individuals who are sexually intimate with members of the same sex do not always form identities around that conduct by claiming labels such as “gay,” “lesbian,” or “bisexual.”³⁶ Students can learn about the historical development of gay identity in the West by reading the writings of scholars such as John D’Emilio and Michel Foucault.³⁷ In some parts of the world, thinking about homosexuality in terms of identity is a more recent cultural development than it is in the West. For example, ethnographers have suggested that, until the past decade or so, individuals in Iran who engaged in same-sex intimacy almost never identified themselves as gay, homosexual, or members of any such identity category.³⁸ Exploring such recent examples puts in stark relief the cultural contingency of gay identity.

In other places, such as Nepal, sexual identity categories are much more nuanced than the categories “lesbian,” “gay,” “bisexual,” and “transgender.” Some identity categories in Nepal simultaneously convey an individual’s sex, gender identity, sexual orientation, and preferred role in intimacy.³⁹ As the Nepalese advocacy group Blue Diamond Society put it, sexual minorities in Nepal include “Meti, Ta, Dohori, Singaru, Maruni, Strain, Kothi, Fulumulu, Lesbian women, Gay, Bisexual, Transgender men and women, Hijras and many more.”⁴⁰ Societies abroad, such as Nepal and Iran, serve as

geries); Press Release, Am. Civil Liberties Union, Alaska Lt. Governor Files Regulation For Changing Driver’s Licenses (July 26, 2012) (on file with author), available at <http://www.aclu.org/lgbt-rights/alaska-lt-governor-files-regulation-changing-drivers-licenses> (arguing that surgery should not be a requirement for transgender individuals to change the sex designation on their drivers’ licenses and lauding the State of Alaska for eliminating the surgical requirement).

36. See EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 299 fig.8.2 (1994) (illustrating that sexual desire, behavior, and identity are not coextensive).

37. JOHN D’EMILIO, *MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS AND THE UNIVERSITY* (1992); MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (Robert Hurley trans., Pantheon Books 1978) (1976).

38. See, e.g., Pardis Mahdavi, *Questioning the Global Gays(ze): Constructions of Sexual Identities in Post-Revolution Iran*, 18 *SOC. IDENTITIES* 223, 225–31 (2012) (presenting ethnographic fieldwork conducted in Iran between 2000 and 2007).

39. SUNIL BABU PANT, *BLUE DIAMOND SOC’Y, SOCIAL EXCLUSION OF SEXUAL AND GENDER MINORITIES: FINAL REPORT* 7, 7–8, 39 (2005), available at <http://www.asylumlaw.org/docs/sexualminorities/NepalBDSreport05.pdf>.

40. *Id.* at 39. Some of these categories overlap. See *id.* at 7–8.

foils, illuminating the role that culture plays in shaping categories of sexual identity in the United States.

Recognizing that gay identity is a cultural construct has implications for legal advocacy. U.S.-trained lawyers who advocate for sexuality rights abroad must familiarize themselves with local conceptualizations of identity in order to be culturally competent. Within the United States, some commentators have criticized gay identity politics, arguing that progressive advocacy should not reify gay identity and instead should reduce the social salience of gay identity because pigeonholing people into identity categories is stifling.⁴¹ Recognizing that gay identity is a cultural construct helps one to see that reducing the salience of gay identity is possible because cultural constructs are susceptible to change.

III. LABORATORIES OF INNOVATION

Classes on law and sexuality usually discuss not only existing black-letter law, but also potential law reform. Exploring experiences from abroad enriches conversations about law reform because foreign jurisdictions have experimented with innovative approaches to legal issues.⁴² These foreign approaches warrant attention, but not necessarily because they have become a transnational norm that the United States should follow for the sake of norm compliance. Rather, the United States ought to consider foreign innovations because the reasoning that underlies novel foreign approaches might be persuasive or might help us to appreciate the approaches that we have developed in the United States.

Examining foreign ideas can enhance conversations about several topics in the law and sexuality curriculum. In the context of constitutional law, for example, students of law and sexuality grapple

41. For critiques of gay identity politics, see, for example, Mary Bernstein, *Identity Politics*, 31 ANN. REV. SOC. 47, 56 (2005); Joshua Gamson, *Must Identity Movements Self-Destruct?: A Queer Dilemma*, in QUEER THEORY 395, 409-11 (Steven Seidman ed., 1996); Judith Butler, *Imitation and Gender Insubordination*, in INSIDE OUT: LESBIAN THEORIES, GAY THEORIES 13, 27-29 (Diana Fuss ed., 1991). Of course, there is also significant commentary recognizing that gay identity politics has been a powerful tool for social change. See, e.g., Gamson, *supra*, at 396 (discussing gay identity politics in the United States); Mahdavi, *supra* note 38, at 231-34 (describing interview subjects' views that the development of gay identity politics in Iran has been empowering).

42. "Just as our states are laboratories for social experiments from which other states and the federal government can learn, so are foreign nations laboratories from whose legal experiments we can learn." Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFF., July-Aug. 2004, at 38, 42 (arguing that policymakers in the United States can learn from foreign experiences, but courts in the United States should not cite foreign law as authority).

with determining what standard of review should be applied to equal protection claims concerning sexual orientation.⁴³ Courts in the United States disagree on whether laws that treat people differently based on sexual orientation should trigger strict scrutiny, intermediate scrutiny, or rational basis review.⁴⁴ Other countries, however, have not followed the United States in creating these different levels of review. Some judges and academic commentators believe that the United States should jettison its tiered approach to equal protection.⁴⁵ When considering those critiques, it could be helpful to explore whether the proportionality test that many foreign jurisdictions apply in equal protection cases is a desirable replacement for any or all of the tiers of review that the United States currently employs.⁴⁶ Same-sex marriage cases from Canada provide an example of how the proportionality test can be applied to cases of sexual orientation discrimination.⁴⁷

43. For background on the United States' tiered approach to equal protection, see, e.g., James E. Fleming, "There's Only One Equal Protection Clause": An Appreciation of Justice Stevens's Equal Protection Jurisprudence, 74 *FORDHAM L. REV.* 2301, 2304-10 (2006); Suzanne B. Goldberg, *Equality Without Tiers*, 77 *S. CAL. L. REV.* 481, 494-518 (2004).

44. See, e.g., *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012) (applying intermediate scrutiny); *Massachusetts v. U.S. Dep't Health & Human Servs.*, 682 F.3d 1, 9-11 (1st Cir. 2012) (applying rational basis review); *In re Marriage Cases*, 183 P.3d 384, 435-40 (Cal. 2008) (applying strict scrutiny). As I write this Article, two same-sex marriage cases are pending before the Supreme Court. See *United States v. Windsor*, 133 S.Ct. 786 (2012) (mem.) (granting certiorari); *Hollingsworth v. Perry*, 133 S.Ct. 786 (2012) (mem.) (granting certiorari). In these cases, the Court might announce the standard of review for laws that discriminate on the basis of sexual orientation. The Court might, however, avoid the merits of the cases by deciding them on procedural grounds. See Suzanne B. Goldberg, *Article III Double-Dipping: Proposition 8's Sponsors, BLAG, and the Government's Interest*, 161 *U. PA. L. REV. PENNUMBRA* 164, 164 (2013) (discussing the standing question in both cases).

45. See, e.g., *Craig v. Boren*, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting); Goldberg, *supra* note 43, at 518-27.

46. For information on the proportionality test adopted by many foreign jurisdictions, see Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 *EMORY L.J.* 797, 799, 802-06 (2011). Mathews and Sweet note:

In contrast to the United States, constitutional courts in legal systems around the world have converged on a method for adjudicating rights claims—proportionality analysis (PA)—an analytical procedure with balancing at its core. In the past half-century, PA has become a centerpiece of jurisprudence across the European continent, as well as in common law systems as diverse as Canada, South Africa, Israel, and the United Kingdom.

Id. at 799.

47. See, e.g., *Halpern v. Canada*, (2003) 65 O.R. 3d 161 (Can. Ont. C.A.); *Barbeau v. British Columbia*, 2003 BCCA 406 (Can.). In previous writing, I have described how case law from Hong Kong has applied the proportionality approach to sexual orientation discrimination. See Lau, *supra* note 18, at 80-85.

Looking abroad can also prompt students to think more carefully about proposals to reform sex classification policies in the United States. As mentioned earlier, some foreign jurisdictions differ from the United States because they recognize more than two sex categories.⁴⁸ The number of categories, however, is not the only way in which foreign jurisdictions differ. If someone wants to change her legal sex in the United States, a medical diagnosis of Gender Identity Disorder or Gender Dysphoria is usually required, and, in most cases, surgery of some sort is required as well.⁴⁹ Advocates in the United States have argued that these requirements are too burdensome.⁵⁰ When considering critiques of medical requirements, it is helpful to examine foreign regimes such as the United Kingdom, Spain, and Argentina. The United Kingdom and Spain have enacted national legislation that allows individuals to change their sex for all legal purposes without having to undergo any surgical procedures.⁵¹ Argentina has relaxed requirements further by defining legal sex entirely by self-determination, not requiring any medical diagnosis.⁵²

Sexual harassment is another relevant topic. In the United States, an employee can win a sexual harassment lawsuit only if he or she successfully argues that the harassment was discriminatory.⁵³ As a

48. See *supra* notes 31–33 and accompanying text.

49. Gender reclassification policies in the United States almost always require individuals to undergo surgery. See Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 736–37 (2008) (providing background on gender reclassification policies). Some reclassification policies require evidence of medical intervention, but not necessarily surgical intervention. See *id.* at 736; Amy Ballard, Comment, *Sex Change: Changing the Face of Transgender Policy in the United States*, 18 CARDOZO J.L. & GENDER 775, 788–89 (2012) (explaining that the United States Department of State no longer requires surgical intervention for gender reclassification on passports). In very limited contexts, the government will classify individuals based solely on individuals' self-identification. For example, some cities in the United States have homeless shelter placement policies that classify individuals based entirely on self-identification. Spade, *supra*, at 736–37.

50. For criticism of surgical requirements, see, for example, Ballard, *supra* note 49, at 796–98. For broader criticism of the medicalization of gender identity, see Alvin Lee, Note, *Trans Models in Prison: The Medicalization of Gender Identity and the Eighth Amendment Right to Sex Reassignment Therapy*, 31 HARV. J.L. & GENDER 447, 457–59 (2008) (creating a typology of criticisms against the medicalization of gender identity).

51. See Gender Recognition Act, 2004, c.7 (U.K.), available at http://www.legislation.gov.uk/ukpga/2004/7/pdfs/ukpga_20040007_en.pdf. For commentary on the United Kingdom's Gender Recognition Act, see generally Andrew N. Sharpe, *Gender Recognition in the UK: A Great Leap Forward*, 18 SOC. & LEGAL STUD. 241 (2009). For discussion of the Spanish legislation, see Raquel (Lucas) Platero, *The Narratives of Transgender Rights Mobilization in Spain*, 14 SEXUALITIES 597, 599, 601 (2011) (describing Spanish Law 3/2007, B.O.E. 2007, 65, p.11251).

52. Emily Schmall, *Transgender Advocates Applaud New Law in Argentina: Far-Reaching Measure Is One of World's Most Liberal on Changing Sex*, INT'L HERALD TRIB., May 26, 2012, at 6.

53. See, for example, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986), the landmark case

result, some defendants have avoided liability by convincing courts that they are “equal opportunity” sexual harassers who are indiscriminately offensive.⁵⁴ In class discussions that critique existing law, students benefit from exploring foreign approaches to sexual harassment that are not based exclusively on antidiscrimination principles. During my first year of teaching law and sexuality, an LLM student from Israel gave me Israel’s sexual harassment statute to share with the class, and, many years later, I still share the Israeli law with my students.⁵⁵ In Israel and in other parts of the world, laws prohibit sexual harassment even when the harassment is not discriminatory.⁵⁶

Foreign jurisdictions have also served as policy laboratories with respect to prostitution. Looking beyond the United States allows students to consider Sweden’s approach, which criminalizes the buying of sex, but not the selling of it.⁵⁷ Students might also consider the laws of New Zealand, which are considered to be among the world’s most liberal in terms of decriminalizing prostitution.⁵⁸ To be sure, none of the policy discussions mentioned so far require looking beyond the United States. For example, students can certainly examine the pros and cons of decriminalizing prostitution by exploring competing theories about decriminalization and by examining Nevada’s limited experience with legalizing brothels.⁵⁹ Looking abroad, however, enriches discussions by leading us to additional concrete examples for consideration. Similarly, foreign jurisdictions provide concrete examples for the topics examined earlier in this

in which the U.S. Supreme Court accepted that sexual harassment is sometimes a form of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964.

54. See, e.g., *Holman v. Indiana*, 211 F.3d 399, 403 (7th Cir. 2000) (“Title VII does not cover the ‘equal opportunity’ or ‘bisexual’ harasser . . . because such a person is not *discriminating* on the basis of sex. He is not treating one sex better (or worse) than the other; he is treating both sexes the same (albeit badly).”) (citation omitted).

55. See Prevention of Sexual Harassment Law, 5758–1998, SH No. 1661 (Isr.).

56. *Id.* § 1 (“The purpose of this law is to prohibit sexual harassment in order to protect human dignity, liberty and privacy and in order to promote equality between the sexes.”); see also Noya Rimalt, *Stereotyping Women, Individualizing Harassment: The Dignitary Paradigm of Sexual Harassment Law Between the Limits of Law and the Limits of Feminism*, 19 YALE J.L. & FEMINISM 391, 446–47 (2008) (critiquing the Israeli sexual harassment law).

57. For a list of literature discussing the Swedish approach to prostitution, see Barbara Havelková, *Using Gender Equality Analysis to Improve the Wellbeing of Prostitutes*, 18 CARDOZO J.L. & GENDER 55, 59 n.18 (2011).

58. See NEW ZEALAND GOVERNMENT, REPORT OF THE PROSTITUTION LAW REVIEW COMMITTEE ON THE OPERATION OF THE PROSTITUTION REFORM ACT 2003, 22–23 (2008).

59. See NEV. REV. STAT. § 201.354(1) (2009) (making it unlawful to engage in prostitution “except in a licensed house of prostitution”).

section—constitutional standards of review,⁶⁰ sex classification policies,⁶¹ and sexual harassment law.⁶² These are some of the many different areas in which foreign jurisdictions have been policy innovators.

IV. TRANSNATIONAL LAWYERING

Transnational perspectives are important not only because they enhance our understanding of law and policy in the United States. They are also important because lawyers trained in the United States can, and do, work on sexuality-related advocacy abroad. To prepare students for this possibility, it is important to equip them with pertinent legal knowledge and understandings about the cultural dynamics that complicate transnational lawyering.

To start, teachers should introduce students to the international and regional human rights systems that influence sexuality rights in many parts of the world. Although the United Nations' treaty bodies are not very influential over the United States, they hold sway elsewhere. For example, the United Nations Human Rights Committee's landmark decision in *Toonen v. Australia* played an important role in bringing about the decriminalization of same-sex sodomy in Tasmania, Australia.⁶³ Although the major international human rights treaties do not explicitly mention sexual orientation, the United Nations bodies tasked with treaty interpretation have stated that treaty provisions protecting equality, privacy, and other human rights subsume the protection of sexual orientation rights.⁶⁴ Indeed, the United Nations treaty bodies have developed a significant corpus of jurisprudence protecting sexual orientation rights.⁶⁵ Beyond

60. See *supra* notes 43–45 and accompanying text.

61. See *supra* notes 48–52 and accompanying text.

62. See *supra* notes 53–56 and accompanying text.

63. See Human Rights Comm., Comm'n No. 488/1992, *Toonen v. Australia*, 50th Sess., Mar. 31, 1994, U.N. Doc. CCPR/C/50/D/488/1992 (Apr. 4, 1994), available at <http://www.unhcr.ch/tbs/doc.nsf/0/d22a00bcd1320c9c80256724005e60d5>; Carl F. Stychin, *Same-Sex Sexualities and the Globalization of Human Rights Discourse*, 49 MCGILL L.J. 951, 956–60 (2004) (discussing the impact of *Toonen* in Australia).

64. See Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 HUM RTS. L. REV. 207, 214–25 (2008).

65. See *id.* See generally INT'L COMM'N OF JURISTS, SEXUAL ORIENTATION AND GENDER IDENTITY IN HUMAN RIGHTS LAW: REFERENCES TO JURISPRUDENCE AND DOCTRINE OF THE UNITED NATIONS HUMAN RIGHTS SYSTEM (4th ed. 2010), available at http://www.asiapacificforum.net/support/issues/acj/references/sexual-orientation/downloads/Jurisprudence_and_Doctrine_of_UN_Human_Rights_System.pdf/view (providing “a comprehensive collection

the United Nations, independent human rights experts convened and codified the Yogyakarta Principles, which purport to clarify how international human rights treaties protect sexual orientation and gender identity rights.⁶⁶

In addition to the international human rights system, regional human rights systems influence sexuality rights as well. Teachers may wish to provide students with background about the Inter-American Human Rights System and the Inter-American Court of Human Rights' landmark 2012 decision in *Atala v. Chile*, in which the Court recognized sexual orientation rights for the first time.⁶⁷ The Court condemned Chile for withholding child custody rights from a woman because she was lesbian.⁶⁸

Students are usually interested in also learning about the European Court of Human Rights (ECHR), which has become influential around the world, not just within Europe.⁶⁹ Courts outside of Europe—including the U.S. Supreme Court in *Lawrence v. Texas*—have cited the ECHR as persuasive authority.⁷⁰ In this light, teaching students about the ECHR is relevant not only to lawyering in Europe, but to transnational lawyering more generally. A case that gives students a nice look at how the ECHR operates is *Schalk & Kopf v. Austria*, which held that Austria did not violate the European Convention on Human Rights by denying same-sex couples the right to marry.⁷¹ *Schalk & Kopf* introduces students to two of the ECHR's most important doctrinal features: the consensus and margin of appreciation doctrines, both of which the ECHR invoked to affirm Austria's refusal of same-sex marriage rights.⁷²

of jurisprudence, general comments, concluding observations, and reports" on sexual orientation and gender identity).

66. See O'Flaherty & Fisher, *supra* note 64, at 232–37.

67. *Atala v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 111 (Feb. 24, 2012).

68. *Id.* ¶¶ 109–17.

69. See John B. Attanasio, *Rapporteur's Overview and Conclusions: Of Sovereignty, Globalization, and Courts*, 28 N.Y.U. J. INT'L L. & POL. 1, 16 (1995) ("The ECHR may be becoming a sort of world court of human rights.").

70. See *Lawrence v. Texas*, 539 U.S. 558, 573, 576 (2003).

71. *Schalk & Kopf v. Austria*, 2010 Eur. Ct. H.R. 24–25, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99605>.

72. See *id.* at 21, 22–23 (invoking the doctrines of consensus and margin of appreciation). In previous writing, I have critiqued the ECHR's application of the consensus and margin of appreciation doctrines in *Schalk & Kopf*. See Holning Lau, *Rewriting Schalk and Kopf: Shifting the Locus of Deference*, in DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR 243–64 (Eva Brems ed., 2013). For background on the ECHR's consensus and margin of appreciation doctrines, see Laurence R. Helfer, *Consensus, Coherence and the European Conven-*

Because the ECHR struck down a sodomy law more than two decades before the U.S. Supreme Court did so in *Lawrence*,⁷³ some students come into class thinking that the ECHR is an extremely progressive court. Discussing *Schalk & Kopf* complicates that view by showing students that the consensus and margin of appreciation doctrines limit how far the ECHR is willing to go to protect rights.⁷⁴

Beyond studying international and regional human rights law, students benefit from examining the debate about whether human rights are universal or culturally relative.⁷⁵ Female genital cutting and gay rights are two topics that illuminate this debate. Cultural relativists argue that female genital cutting is a local cultural practice that warrants protection.⁷⁶ In this view, international human rights organizations that campaign against female genital cutting are imposing foreign norms upon local cultural groups.⁷⁷

Allegations of cultural imperialism also arise in the gay rights context. Indeed, the gay rights context is particularly interesting because both proponents and opponents of gay rights invoke Western imperialism in their advocacy. For example, opponents of decriminalizing sodomy in Uganda have argued that decriminalization would amount to an imposition of Western norms,⁷⁸ meanwhile,

tion on Human Rights, 26 CORNELL INT'L L.J. 133, 135-40 (1993); Eva Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [HEIDELBERG J. INT'L L.] 240, 240-56 (1996) (Ger.); George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. LEGAL STUD. 705, 705-15, 724-29 (2006).

73. See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. 19-20 (1981) (holding that the United Kingdom's criminalization of sodomy violated the European Convention on Human Rights).

74. For criticisms of the ways that the doctrines of consensus and margin of appreciation limit the ECHR's protection of human rights, see Ivana Radačić, *The Margin of Appreciation, Consensus, Morality and the Rights of the Vulnerable Groups*, 31 ZBORNIK PRAVNOG FAKULTETA SVEUČILIŠTA U RIJECI [COLLECTED PAPERS OF THE L. FAC. OF THE U. OF RIJEKA] 599, 601-04 (2010) (Croat.). See also Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 850-52 (1999).

75. For background on the debate about universalism and cultural relativism, see HENRY J. STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 517-39 (3d ed., 2007).

76. See generally Michelle Goldberg, *Rights Versus Rites*, 20 AM. PROSPECT 46 (2009) (describing and critiquing relativist defenses of female genital cutting).

77. See *id.* A milder but related criticism is that, even if one accepts that female genital cutting should be condemned, human rights lawyers from the United States have focused excessive amounts of attention on female genital cutting due to cultural biases. See, e.g., Yael Tamir, *Hands Off Clitoridectomy*, 21 BOSTON REV. (1996), available at <http://www.bostonreview.net/BR21.3/Tamir.html>. For additional background on cultural relativism as it relates to women's rights, see generally Tracy Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89 (1996).

78. HUMAN RIGHTS WATCH, *THIS ALIEN LEGACY: THE ORIGINS OF "SODOMY" LAWS IN*

proponents of decriminalization have pointed to the fact that the sodomy laws were implemented by British colonial powers in the first place.⁷⁹ Students who are interested in the globalization of sexuality rights benefit greatly from examining how these specters of cultural imperialism arise in debates about law reform projects around the world. Students interested in international human rights ought to be mindful of these difficult cultural dynamics.

CONCLUSION

This Article has argued that incorporating transnational perspectives into classes on law and sexuality can greatly enhance students' experiences. Moreover, this Article has described four ways that teachers of law and sexuality can integrate transnational perspectives into their classes. First, teachers can help students understand how U.S. law fits within the context of transnational norms. Second, by using foreign cultures as a foil, teachers can illuminate cultural constructs in the United States that shape laws concerning sexuality. Third, classes can explore legal innovations developed in foreign jurisdictions and examine what the United States might learn from such innovations. And, fourth, classes can help prepare students to pursue advocacy abroad.

BRITISH COLONIALISM 3 (2008).

79. Human Rights Watch has detailed the British colonial origin of sodomy prohibitions in many parts of the world, such as Uganda. *See id.* at 53–62. Human Rights Watch has shined a light on the colonial origins of sodomy laws to problematize the claim that rejecting gay rights is a rebuke of the West; however, Human Rights Watch's main arguments for decriminalizing sodomy are based not on the laws' British origins, but on the laws' effects on human dignity. *See id.* at 52–62. I have written another article arguing this is the proper approach; laws are not inherently problematic simply because they can be traced to colonial origins. *See* Holning Lau, *The Language of Westernization in Legal Commentary*, 61 AM. J. COMP. L. (forthcoming 2013).