

A Real “People” Person

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“Dear People:”

That’s how Mary Dunlap opened her letter of recommendation in support of my applications to law schools. Some of my friends at the time thought this quite peculiar; these friends had not had the pleasure of knowing Mary. To me, it made perfect sense, as I will suggest below. First, though, I need to underscore the sad fact that this world has lost a brilliant soul and a visionary legal mind with Mary’s death. As a scholar working at the intersections of constitutional law and sex, gender, sexual orientation, and sexuality, I mourn the loss of a legal thinker who was ahead of her time in the exploration of law’s treatment of sex and gender. Yet my grief at this loss runs deeper, for without her intellectual and personal support and encouragement, I might not be where I am today, might not be the person I am today.

I met Mary Dunlap when I was a graduate student at Stanford. I had been studying logic but was seriously considering leaving my doctoral program to attend law school. In my volunteer work at the Lesbian, Gay, and Bisexual Community Center on campus, which served the wider San Francisco peninsula community, I had become too aware of the real life difficulties faced by lesbian, gay, bisexual, and transgendered persons. Formal logic became too arid, offered too few resources for combating discrimination against this community.

So late in the summer of 1990, I emboldened myself to ask Mary Dunlap whether I could take her elective course on sexual identity in the law. This person, teaching a course in the prestigious Stanford Law School, made me feel instantly welcome. She did not care that I was not a law student. I might not find the course as easy as someone who’d been through at least their first year of law school, she acknowledged, but she assured me that I could do the work. Law was not the exclusive property of some anointed class.

And I loved the class. Our first day, Mary asked us all to “draw gender.” What an assignment! As long as I knew her—not long enough—Mary had always loved art. Indeed, that’s what occupied much of her time during her “early retirement,” when she worked from what she described to me as her “gloriously bright studio in Bayview.” So it’s not surprising that if anyone might combine

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legal pedagogy with art, it would be Mary. This exercise did much to set the tone for the class. No one was advantaged in it by virtue of the grades they had received the previous year. This exercise asked more of us than just technical legal reasoning. Thoughtful creativity and expression were the order of the day. I won't bother trying to reproduce my pencil sketch (although I may still have it in a box or file drawer) in all its geometric abstraction, albeit fuzzy-edged. It's enough for me to remember Mary's pleasure with my effort and with the explanation I offered about the coercive ordering and rigidity and ambiguities of gender.

After that, though, it was all business—but business could be fun, as Mary showed us. I don't know if I ever had enjoyed a class more. Her anecdotes were terrific, such as her tale of the distracted discussion by the United States Supreme Court Justices at conference trying to recall whether she had worn pants when arguing *San Francisco Arts and Athletics, Inc. v. United States Olympic Committee*.¹ (She had not.) But the material itself was fascinating, challenging and frustrating and occasionally encouraging. *Bowers v. Hardwick*² was only four years old, and although clearly a disaster for justice, its full toll was not yet apparent. It was to be four more years before Mary's powerful indictment of that decision was published in the Golden Gate University Law Review's Women's Law Forum.³

In a more positive vein, *Price Waterhouse v. Hopkins*⁴ was only a year old. Mary may have been one of the first in the academy, perhaps because as an adjunct professor she was also outside the academy and involved in real people's lives, to appreciate the enormous potential of this case. Most of the ink spilled in the engagement between the plurality and concurring Justices and the dissenters addressed a vitally important but somewhat dry, rather procedural point about burdens of proof in mixed-motive employment decision discrimination cases under Title VII. Yet Mary saw, and helped us to see, that its discussion of sex stereotyping could, perhaps, lead to important legal advances for lesbian, gay, transgendered persons including transsexual men and women, and gender nonconforming persons generally. Although it has taken some time, *Price Waterhouse* is now showing signs of making good on the promise that Mary immediately discerned in it.⁵

1. 483 U.S. 522 (1987).

2. 486 U.S. 186 (1986) (holding that a Georgia statute outlawing sodomy did not violate the fundamental rights of gay persons).

3. Mary C. Dunlap, *Gay Men and Lesbians Down by Law in the 1990's USA: The Continuing Toll of Bowers v. Hardwick*, 24 GOLDEN GATE U. L. REV. 1 (1994).

4. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that when a plaintiff shows that her gender played a part in an employment decision, the defendant may avoid liability by proving by a preponderance of the evidence that it would have made the identical decision without accounting for plaintiff's gender).

5. See, e.g., *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (en banc) (rejecting summary judgment granted against a male plaintiff subjected to hostile environment where the man was victim of gender stereotyping); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001) (holding that Title VII hostile environment law addresses sex

Mary Dunlap's power of discernment, her vision, continues to awe me. Mary published *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy* in 1979 in the *Hastings Law Journal*.⁶ In it, she argued that law—she tended to use the less abstract, more real phrase “the legal system”—improperly enforces the view that every person falls into one of two mutually exclusive and exhaustive sex classifications (“female” and “male”), to which it attaches a variety of consequences, consequences that are actively harmful to those who are subjected to law's normative sex roles: “women, homosexuals, mothers of illegitimate children, sexually reassigned persons, and others.”⁷ Job opportunities, clothing options, marriage rights, sexual autonomy, privacy, due process, and equal protection have all been denied in the service of “the male/female dichotomy.”⁸ Her utopian conclusion⁹ called for a system in which each individual person is “free to define that person's own sex identity for legal purposes.”¹⁰ (Note how careful Mary was not even to limit people to the choice of the two conventional sex pronouns “her” or “his.”¹¹) At the time, there was very little scholarship about “sexual minorities” and the law, certainly very little about transgendered persons. Today, a quarter century later, these are flourishing areas of legal inquiry and, I am sure more importantly to Mary, subjects about which there is a great deal of case law – much of it bad for real persons' lived lives,¹² but some of it, an increasing amount, quite encouraging.¹³

Mary Dunlap's personal encouragement of my career change was critical to me. I was afraid of giving up, of seeming like a failure for not completing my Ph.D. program. Mary helped me to appreciate that it didn't matter what folks

stereotyping and protects males harassed for being effeminate); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (holding Equal Credit Opportunity Act may be violated by refusing loan application to man dressed in traditionally feminine attire); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (sustaining transsexual woman's section 1983 sex discrimination claim predicated on sex stereotyping).

6. Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L.J. 1131 (1979).

7. *Id.* at 1147.

8. *Id.*

9. I do not think Mary would have objected to my characterization of her prescription. As she wrote in one e-mail about her desire for more honesty in discussions on the Queerlaw listserv: “Okay, so, let's be utopian here. What's the harm? What's the real harm?” Posting of Mary Dunlap, MaryDunlap@aol.com, to Queerlaw@abacus.oxxy.edu (Nov. 3, 1996) (copy on file with author) [hereinafter Posting of Mary Dunlap].

10. Dunlap, *supra* note 6, at 1147.

11. One can compare her reference to “[t]he late Frank McGee, a news anchorperson with NBC National News for many years, whose news broadcasts I recall were marked by courtesy and thoughtfulness.” Posting of Mary Dunlap, *supra* note 9.

12. See, e.g., *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000) (insisting that evidence presented supported only an inference of unproscribed sexual orientation discrimination and not of gender stereotyping of a male employee); *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001) (holding that segregating restrooms on the basis of biological gender is not prohibited gender identity discrimination against a preoperative transsexual woman).

13. See, e.g., *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (en banc); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

made of that choice; that it was my choice to make; and that there was tremendous value to my plan to become a plaintiffs' discrimination lawyer, perhaps of the impact litigation variety. I could matter to real people's lives, people whose rights were not respected and who needed as many advocates as possible. Litigation was far from the only way to achieve progress in improving the material and spiritual dimensions of human living, Mary well appreciated, but it was one valuable tool. And so, she encouraged me in my law school applications. She who had taught me that law could be interesting and fun, if frustrating, and who forewarned me that not all law school classes would be like hers, trusted my honesty and commitment and ability enough to endorse me. She believed I would do it, succeed, make a difference in the life of people, which in her book was the entire game. Thus, "Dear People" was a wholly suitable salutation to the real persons who would decide the fate of my applications, persons whom Mary was committed not to trapping in gender.

I hope that Mary would be proud of what I'm doing today. I know she was pleased for me and for my students when I took the job at the University of Southern California, choosing to become an academic rather than a full-time litigator. I have tried to keep my scholarship real, to address legal questions that matter to real persons. Much of my work now is devoted to studying and advancing the campaign for marriage rights for all people without respect to sex. Although civil marriage is far from a perfect legal institution, it matters to real people's lives. Mary knew this, and her own words are more powerful than anything I might say here on the matter:

We can bog ourselves down forever fighting over whether to call it same-gender marriage, gay marriage, not to say marriage, not to not say marriage, etc. ad nauseum. This kind of exchange is exactly the kind and degree of nasty self-censorious self-flagellating reflex that the anti-gay forces relish. Or we can join hands and realize that some of us want to marry, that few of us enjoy being victimized by discrimination whether we want to marry or not, and that the idea that the government decides who is family is anathema to equality and liberty, not just for the discriminated-against lesbian mothers and gay fathers and the outcast queer kids, but for us all.¹⁴

Mary Dunlap was a real "people" person. Her work never lost sight of the real lives upon whom law operates. Her teaching and scholarship inspired me and countless other students over the course of her career. I hope that I can be as committed, and I thank Mary for all that she shared with me.

I miss you, Mary.

14. Posting of Mary Dunlap, MaryDunlap@aol.com, to Queerlaw@abacus.oxy.edu (Oct. 27, 1996) (copy on file with author).