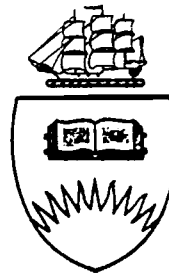


THE
FLINDERS
JOURNAL
OF LAW
REFORM



VOLUME 2 ISSUE 1 DECEMBER 1997

— Special Issue —

Proceedings of the ALTA Conference:
July, 1996

CONTENTS

**The Role of the State in the Administration of Justice: The Trend to Private
Dispute Resolution**

- The Move Towards Primary Dispute Resolution
in Family Law: the Role of Government
and Implications for Justice *Dale Bagshaw* 1
- Elizabeth's Story: Mediation, Violence and
the Legal Academy *Hilary Astor* 13
- Diminished Responsibility?
The Changing Role of the State *Chief Justice John Doyle* 31

The Role of the State in the Regulation of Commercial Morality

- Australian Corporations Law and
Global Forces *Justice Michael Kirby* 41
- The Corporation as Citizen and as
Government: Social Responsibility and
Corporate Morality *Suzanne Corcoran* 53

The Role of the State in the Regulation of Sexuality

- Sexual Minorities and "the State":
Some Struggles and US Perspective *Ruthann Robson* 67
- The Role of the State in the Regulation
of Sexuality: the Police and Violence
Against Lesbians and Gay Men *Barbara Baird* 75

The Role of the State in the Provision of Services to the Community

- Private Sector Provision of Public Hospital Services:
Rationale, Benefits, Risks and Accountability *Michael Forwood* 87
- The Push for Privatisation, Productivity and
Cost Effectiveness: How Does this Cater
for the Need for Accountability and Acceptable
Minimum Standards in the Provision of Publicly
Legal Services to the Community? *Helen Wighton* 93

Sexual Minorities & The State: Some Struggles and US Perspectives

*Ruthann Robson**

The global struggles for lesbian, gay, bisexual and transgendered equality often focus on "the state" as the pre-eminent site of operation. Yet such struggles for sexual equality embody undeveloped and contradictory notions of the state. Like many other advocates pursuing justice for minorities ill-represented by those who wield state power, we argue both that the state should refrain from regulating us and that the state should act to ensure our rights.

The argument that the state should refrain from regulating us (by criminalizing our sexual practices) is a rather entrenched and comfortable position and is based upon a conception of the so-called "negative state." Under this quasi-libertarian view, the less state intervention that occurs, the better. Such a view is predicated upon the specific history of state regulation of sexual minorities, including raids upon our gathering places and resultant arrests, prosecutions of persons for wearing less than three items of clothing of the "appropriate" gender, and prosecutions for sexual relations. While we tend to think such draconian restrictions are anachronisms, criminal prosecutions for sexuality still occur in many parts of the United States. For example, just this past year many men were prosecuted for solicitation of sodomy pursuant to a municipal ordinance in Topeka, Kansas.¹ Such men typically became the targets of criminal prosecution when approached by undercover law enforcement officers while sitting in their cars in the lot of a public park; an officer would engage in casual conversation and obtain a vague promise for a sexual relationship to occur in a private residence.² Further, even when prosecutions do not occur, the criminalization of sexual practices is often the linchpin upon which other sorts of discrimination may rest. So, for example, in a child custody trial, an attorney can cross-examine a parent on the basis of his or her homosexual practices and procure an admission that the

* Professor of Law, City University of New York. This article is based upon remarks delivered at "Diminished Responsibility? The Changing Role of the State" (the 1996 annual conference of the Australasian Law Teachers Association).

¹ TCC ss 54-133. The definition of sodomy is based upon KS ST ss 21-3505 which provides that "criminal sodomy is "sodomy" between persons who are 16 or more years of age and members of the same sex or between a person and an animal" and sodomy is defined as "oral contact or oral penetration of the female genitalia or oral contact of the male genitalia; anal penetration, however slight, of a male or female by any body part or object; or oral or anal copulation or sexual intercourse between a person and an animal."

² *City of Topeka v Movsovitz* (unrep, District Court of Shawnee County, Kansas no 95-MC-00021). I am grateful to Professor Charlene Smith of Washburn University College of Law, Topeka, Kansas, for information regarding this case and the opportunity to meet Max Movsovitz, the defendant who is challenging the constitutionality of the ordinance.

parent is an "admitted criminal".³ Portrayed as less than law-abiding, the parent is thus not the best person to serve as a role model for any future-citizen child, even apart from any moral or sexual concerns.⁴

Such examples support a position that if the state were to remove its proscriptions against our sexuality, we would attain some measure of equality. While many nations have adopted such a view, many more have not. For example, in the infamous *Bowers v Hardwick* decision in 1986, the United States Supreme Court rejected the view that governments may not constitutionally criminalize certain sexual practices, reasoning that such practices have historically been subject to moral and civil sanctions.⁵ At present, almost half the States in the United States continue to criminalize certain homosexual practices.⁶ Another example is the current controversy in the State of Tasmania which also concerns a government's attempt to regulate sexual practices with the countervailing argument that the state should not be allowed to interfere in such private realms.⁷ Again, under such views of the "negative" state, the solution is for the state to absent itself from the contested arena.

Co-existing with the "negative" state is the contradictory notion of the "positive" state — a government that could and should take positive steps to ensure equality for sexual minorities. Under this quasi-socialist view, state intervention for the public good is preferable to maintaining undesirable social conditions. In the context of sexual minorities, such a view may be predicated upon the specific history of state intervention on behalf of other minorities. So, for example, in the United States many laws prohibiting discrimination on the basis of sexual orientation are often amendments to pre-existing laws which prohibit discrimination on the basis of race, colour, nationality, or "sex,"⁸ or even if protections for gay men and lesbians against discrimination are free-standing, such

3 Eg, in *Bottoms v Bottoms* (1995) 457 SE 2d 102 the Virginia Supreme Court upheld a trial court which expressed this view.

4 The so-called "nexus" test for custody requires that there be a showing of harm caused by the parent's sexual behaviour. However, even courts employing this "liberal" (as compared to the *per se* disqualification) test often resort to rhetoric concerning the example set by a non-law abiding citizen.

5 *Bowers v Hardwick* (1986) 478 US 186.

6 Generally, such laws employ one or more of these three distinct strategies to criminalize lesbian and gay sexual expression: the natural strategy, the anatomically specific strategy and the gender-specific strategy. The natural strategy relies upon understanding "naturalised" sexuality as including only a certain traditional type of heterosexuality. The anatomically specific strategy prohibits certain body parts from coming into contact with certain body parts of another person. The gender-specific strategy, a rather recent development, prohibits sexual contact between persons of the same sex and might even prohibit a person kissing someone of the same gender.

7 Criminal Code (Tas) ss 122 and 123 are presently being considered by the High Court of Australia in *Toonen* (1995) 69 ALJ 600. For discussions of the controversy see R Croome, "Sexual (Mis) Conduct: the High Court and Gay Law Reform in Tasmania" (1995) 20 *Alternative Law Journal* 282; M Dobber, "Sex Crime" (1995) 20 *Alternative Law Journal* 285.

8 Sex in such an instance has been interpreted to mean only gender and not sexual orientation or transgenderism. For discussions of the doctrinal intricacies that have developed because of this approach see M Case, "Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence" (1995) 105 *Yale Law Journal* 1; K Franke, "The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender" (1995) 144 *University of Pennsylvania Law Review* 1.

laws are modelled after laws pertaining to other minorities.⁹ Similarly, the advent of state recognition of crimes against lesbians, gay men, and transgendered persons as “bias crimes” — crimes based upon an animus toward sexual minorities — has been linked to the recognition of crimes committed due to racial, ethnic, and religious hatred.¹⁰

Importantly, however, the notion of the positive state employed to ensure equality for sexual minorities is also related to a recognition that the state regulates all sorts of “social” relations. In the United States, this recognition is often fleeting due to an anti-socialist tradition. However, arguments that gay and lesbian equality will be furthered by state recognition of same-sex marriages implicitly rest upon a comparison of gay/lesbian relationships with heterosexual relationships in terms of state recognitions and benefits. Under this view, gay and lesbian relationships are “unequal” because heterosexual relationships can procure the status, benefits, and burdens of marriage — and the state should act to extend marriage to same-sex couples.

Whatever one thinks about same-sex marriage, or enhanced penalties for crimes committed with a showing of bias, or anti-discrimination laws which might also prevent lesbian/gay organisations from “discriminating” against heterosexuals,¹¹ the notion of the positive state is certainly important in the struggle for equality. Also vital, however, if we want our sexual practices not to be subject to criminal penalties and resultant stigmas, is the notion of a negative state. In other words, we want to prohibit the state from enforcing its morality when that morality prohibits our sexual practices, yet we also want the state to enforce its morality against others when that morality is the ethic of equality. While there are arguments that would seek to distinguish sexual morality from civil rights, such arguments often collapse of their own weight and fall into conflicting liberal conceptions. Instead, I think that we must directly confront the reality that these conceptualisations — the state as both positive and negative — are both necessary and inconsistent.

Such an inconsistency is troubling because it makes our positions on disparate issues such as sex statutes and anti-discrimination statutes difficult to ground with foundational arguments about state and state power. We want theoretical clarity but we also want specific results. While I do not suggest that we abandon the quest for theoretical clarity and consistency, I do believe that we should not hold

9 At present, in the United States these laws are limited to those passed by municipalities and a handful of States, including Wisconsin (the first in 1992), Massachusetts, Hawaii, Connecticut, California, Minnesota and New Jersey. A recent vote on the Employment Discrimination Act of 1995, Senate Bill 2056, which would have prohibited discrimination on the basis of sexual orientation in employment (exempting, however, the military and religious organisations) was defeated by a single vote in the United States Senate on September 10, 1996.

10 The Hate Crime Statistics Act 28 USC s 534 mandates the collection of data concerning crimes evincing prejudice of the basis of “race, religion, sexual orientation, or ethnicity”. Interestingly, the Act does not include gender as a category. While the Federal statute only relates to the collection of statistics, a few States have enhanced penalties for criminal acts which evince bias, including bias on the basis of sexuality: see eg, New Hampshire Revised Statutes ss 651.6.

11 My own views on these matters, as well as others, are contained in R Robson, *Lesbian (Out)Law: Survival Under the Rule of Law* (Firebrand Books, New York, 1992).

ourselves to a standard of clarity unattained by others. As has been convincingly argued, those opposing les-bi-gay-trans equality have availed themselves of inconsistent arguments with much success.¹² More importantly, however, for my argument is the state's practice of employing inconsistent conceptions of its own power and acting in a less than unitary manner.

An elucidating example is the recent case of *Romer v Evans*, also known as the *Colorado Amendment Two* case, decided by the United States Supreme Court on May 20 1996.¹³ *Romer v Evans* is important because it is the very first time that les-bi-gay-trans equality issues have been successful in the United States Supreme Court. This success arrives after some stunning defeats. As previously mentioned, *Bowers v Hardwick* ten years earlier gave a constitutional imprimatur to State statutes which criminalized homosexual practices. Perhaps less well known, but equally offensive, was the Court's decision in *San Francisco Arts and Athletics v United States Olympic Committee*, in which the Court held that the United States Olympic Committee "owned" the word "Olympics" and could seek an injunction against the "Gay Olympics" for infringement, despite granting the use of the term "Olympic" to other groups (such as the "Explorer Olympics") and its failure to enforce its right against other groups (such as the "Crab-racing Olympics").¹⁴ Similarly, just last year, in *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston*, the Court overruled the Massachusetts Supreme Court which had held that the group organising Boston's St. Patrick's Day Parade violated State laws by excluding gay, lesbian, and bisexual Irish-Americans from the St. Patrick's Day Parade, because the parade organisers had a first amendment right to determine the content of the parade.¹⁵

In terms of conceptualisations of state power, *Bowers v Hardwick* and *San Francisco Arts and Athletics v United States Olympic Committee* are inconsistent with *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston* in terms of the arguments relied upon by the advocates for sexual minorities as well as in terms of the rationales adopted by a majority of the Justices of the Court. In *Bowers v Hardwick* and the "Gay Olympics" case, sexual minority advocates argued that "the state" should not be interfering with the lives of gays, lesbians, and bisexuals. In contrast, in *Hurley*, sexual minority advocates argued that "the state" should be interfering to protect the rights of gays, lesbians, and bisexuals.¹⁶

12 As David Helperin argues:

Homophobic discourses are incoherent, then, but their incoherency, far from incapacitating them, turns out to empower them. In fact, homophobic discourses operate strategically by means of logical contradictions. The logical contradictions internal to homophobic discourses give rise to a series of double binds which function — incoherently, to be sure, but nonetheless effectively and systematically — to impair the lives of lesbians and gay men.

D Helperin, *Saint Foucault* (Oxford University Press, New York, 1995) at 34.

13 *Romer v Evans* (1996) 116 S Ct 1620.

14 (1987) 483 US 522.

15 *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995) 515 US 557, (1995) 115 S Ct 2338.

16 Advocates in *Hurley*, however, also argued that the parade was an affair of state, given the tremendous support — in terms of state services and resources — that the city of Boston lent to the parade.

Yet we can easily accept that different cases warrant different arguments. Thus, it may be more useful to consider the disparate arguments in the context of the situation involving Colorado Amendment Two. The Amendment Two controversy reveals the ruptures and fragmentations of an entity which could be labelled "the state." In order to understand these complexities, further discussion of the background of the case is necessary.

Amendment Two was an amendment to the State constitution of Colorado, passed by voter referendum.¹⁷ The Court's majority opinion by Justice Kennedy most properly begins a discussion of the history of Amendment Two with references to anti-discrimination ordinances passed by some progressive municipalities within the State, such as Aspen, a popular ski resort and Boulder, site of the University of Colorado. Such ordinances prohibited public and private discrimination based upon "sexual orientation." There was also an executive order, promulgated by the Governor, which prohibited discrimination on the basis of sexual orientation in State employment.

Such positive steps by the state provoked a response — or what might be termed a "backlash" — from conservative opponents such as "The Coalition for Family Values." Such well-funded organisations, known as part of the "religious right," obtained sufficient signatures to have a referendum placed on a State-wide ballot. The referendum provided that the State constitution would be amended to prohibit any "statute, policy, ordinance" which allowed sexual minorities any claim to minority status. The referendum was supported by an intense media campaign which sought to persuade the populace that the amendment would prevent "special rights" for gay men and lesbians." The campaign implicitly alleged that "special rights" were always problematic in a democracy, but explicitly focused on the two reasons gay men, lesbians, and bisexuals were especially undeserving of any special consideration. First, "gay people" (presumably including bisexuals and lesbians) did not deserve protection because they did not need protection — they were already more privileged economically than the rest of the population and were portrayed as having higher disposable incomes, linked to their childless status and better education. Second, "gay people" did not deserve protection because they were not worthy of protection — they were moral degenerates who flouted the conventional, spread disease, and posed a danger to children.

At the time Amendment Two was being considered in Colorado, similar rhetoric — and referenda — were being attempted in other States, including Maine, Oregon, and Washington. The difference was that in Colorado, the

17 The text of the amendment entitled "No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation" provides:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

referenda was approved and Amendment Two became part of the Colorado State Constitution.

Amendment Two was immediately challenged by advocates for lesbian and gay organisations, joined by the cities of Aspen and Boulder. Ironically, the named defendant in the case was Roy Romer, governor of Colorado, who had publicly opposed Amendment Two when it was a referendum. The case was brought in the State courts on many grounds, including federal constitutional ones. The Colorado Supreme Court — the highest court in the State — ultimately found Amendment Two unconstitutional under the United States Constitution.¹⁸

Because the Colorado Supreme Court rested its decision on federal constitutional grounds, its decision could be reviewed by the United States Supreme Court, as ultimate arbiter of the United States Constitution. The Governor of Colorado — the same governor who had publicly opposed the amendment — authorised the State to pursue the only type of appeal allowed, a petition for a writ of certiorari directed to the Court's discretion. The United States Supreme Court granted review, but affirmed the decision (if not the reasoning) of the Colorado Supreme Court and held Amendment Two unconstitutional as violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

This brief procedural recap of Amendment Two's history demonstrates the fragmented nature of "the state". What precisely do we mean when we say "the state" in the context of Amendment Two? We might mean municipalities such as Aspen and Boulder. Despite their status as "creatures of the state," these municipalities seem to position themselves as "other," although surely the conservatives who objected to the anti-discrimination ordinances realised that the municipalities were exercising state power. We might also mean the executive, which had an order prohibiting discrimination, whose head officer publicly opposed the amendment but which appealed a ruling from its own judicial branch to a federal court. And we might also mean the judiciary, which we sometimes seem to include in our notions of "the state," and sometimes expect to be positioned "above and beyond" the rest of government. In a more typical situation, surely we would mean the legislature, which is peculiarly absent in the Amendment Two controversies. In the case of a referendum, then, we must certainly mean the citizens of the state, those voters who passed Amendment Two.

In federalist systems such as the United States and Australia, "the state" is further complexified by two co-existence systems of government — the federal and state. In the United States context, a vacillating notion of dual sovereignty is freighted with the unfortunate history of "State rights." Despite a recent contrary trend, an assertion of "State rights" is understood in the context of the history of race relations, including the Civil War, Reconstruction, and the 1960's civil rights

18 As the Court stated, "We must conclude that Amendment Two classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws." *Romer v Evans* (1996) 116 S.Ct 1620.

movement during which racial desegregation was enforced (imposed) by the federal government against the (southern) States. Indeed, some of the rhetoric in the Amendment Two controversy was marked with this history, although with a Western "frontier" State inflection rather than a Southern one.

Thus, at the very least it is necessary to be precise when referring to "the state." For as we have long realised and the Amendment Two controversy demonstrates, "the state" is a multi-faceted creation. Yet interestingly, the recognition of this multiplicity is often paired with a conception of a pure and unsullied state which must be preserved through reclamation of that portion of the state that had been "captured" or "commandeered" by special interests alien to the state. In the Amendment Two case, gay and lesbian advocates implicitly argued that the voters had been captured by religious special interests, while conservatives, including Justice Scalia, argued that the anti-discriminatory ordinances as well as the appeal to the judiciary's powers to interpret the United States Constitution were products of the powers of a concentrated "gay elite".¹⁹

But to whatever particular aspect of the state we refer, any argument must include an exhortation to embody either a positive or negative conception of the state. For example, the arguments of lesbian and gay advocates predominantly rested on a positive conception of the state, specifically the judiciary, which should ensure equality. Yet the arguments of gay and lesbian advocates also embodied a negative conception of the state, at least regarding an electorate which should not be allowed to enforce its majoritarian prejudices in this realm. Similarly, the arguments of those seeking to uphold Amendment Two predominantly rested upon a negative conception of the state, specifically the judiciary, and any other organ of government which might seek to recognise the "special interests" of gay men, lesbians, and bisexuals. Such arguments, however, also embodied a positive conception of the state, at least regarding an electorate which can act to interfere with other organs of the state.

19 Justice Scalia, dissenting in an opinion joined by Justices Rehnquist and Thomas, argued that the Court's characterisation of "homosexuals" as a politically unpopular group was "nothing short of preposterous" given their "enormous influence in American media and politics" and the fact that although "composing no more than 4% of the population had the support of 46% of the voters on Amendment 2." Justice Scalia also specifically berated the members of the Court who joined the majority opinion:

When the Court takes sides in the culture wars, it tends to be with the knights rather than the villains — and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's members are drawn. How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation's law schools. The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womaniser; because she wears real-animal fur, or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant's homosexuality, then he will have violated the pledge which the Association of American Law Schools requires all its member-schools to exact from job interviewers: "assurance of the employer's willingness to hire homosexuals". (By Laws of the Association of American Law Schools Inc s 6-4(b))

Thus it is evident that the state is fragmentary and duplicitous and that to theorize about "the state" is to theorize reductively and unhelpfully. Yet further specificity is not necessarily curative. The conflict between the "positive" state and the "negative" state is real, but I believe we must be wary of how these conceptions are employed. The positive/negative oppositional framework cannot be a foundational principle that would be employed consistently. It is not employed consistently by opponents of les-bi-gay-trans equality and it is not employed consistently by "the state" itself — to restrict ourselves to a consistent position would be ludicrous.

Nevertheless, in terms of gay, lesbian, bisexual and transgendered theory and advocacy, I do believe that we must continue to search for foundational principles beyond liberalism which might ground our theories and legal arguments. In this search, I suggest that we consider two things. First, we should take into account our own complicities with "the state," as activists, as voters, as educators, as lawyers, and as agents of state power. Too often, we view the "state" as something external to our own agency. Second, and somewhat contradictorily, we should honour our historic opposition and outsider position vis-a-vis "the state" so that we might have a modicum of freedom to develop alternatives and because someone has to perform that role — lest we have a state without opposition, which is usually called a tyranny.