Cleveland State Law Review

Volume 48
Issue 1 *Symposium: Re-Orienting Law and Sexuality*

Article

2000

Legislating Special Rights

Karen Engle
University of Utah College of Law

LEGISLATING SPECIAL RIGHTS

KAREN ENGLE[1]

Good morning. I'd like to thank the Cleveland-Marshall College of Law for hosting this conference, and Tayyab Mahmud and Ratna Kapur for bringing us together under the topic of sexual outlaws. I think we will learn an immense amount today through the juxtaposition of work on sex workers and on sexual orientation.

I want to use local and national gay rights initiatives to ask the following question: Is it possible to pursue a queer agenda in promoting and defending gay rights ordinances? My answer is yes, or at least that we need to try to do it. I propose that we pursue a queer agenda by arguing for special rights, not equal rights. Not only does the special rights argument fit with the queer agenda; it also provides our best hope for confronting gay rights opponents. Implicit in my call for special rights is the assumption—based partly on the work of Janet Halley, Kendall Thomas and others—that *Romer v. Evans*[2] is a "thin" victory.

I'll put forth my argument in the following way. First, I'll talk about what a queer sensibility is, and discuss how a call for special rights fits within that sensibility. Second, I'll look at the rhetoric that gay rights opponents use when they argue against ordinances, initiatives and national laws protecting gay rights. As a part of this discussion, I will explore what they mean when they use the term "special rights." Third, I'll look at how proponents of gay rights talk about special rights and study how, in responding to gay rights opponents, they often miss the boat. Finally, I'll talk about what it would be like to respond with a special rights argument.

The Queer Sensibility

In his most recent book, *The Trouble with Normal*,[3] queer theorist Michael Warner explores ways that a "politics of sexual shame" has reduced the gay movement to what he calls a "desexualized identity politics." For him, the antithesis of desexualized identity politics would be "[t]he frank refusal to repudiate sex or the undignified people who have it, which I see as the tacit or explicit ethos in countless scenes of queer culture."[4] Warner shows how the politics of sexual shame has guided the post-gay position of *Out Magazine*'s editor James Collars, the new Gay magazine *Hero* that states its explicit purpose is to get beyond sex and has taken out any reference to sex and has no sex ads; the anti- or post-sexual politics of Larry Kramer; and the near-universal embrace of same sex marriage campaign by gay rights activists. For Warner, gay rights activists attempt to address social stigmatization but not sexual shame, and they do so by portraying gay men, lesbians and bisexuals as "normal."

---

[1]Professor of Law, University of Utah.

[2]517 U.S. 620 (1996).

[3]MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE (1999).

[4]*Id.* at 75.

Importantly, Warner argues that this politics of sexual shame is a shift in gay politics, but not in queer culture. Rather, it represents a conscious choice by a few to distinguish themselves as dignified, apart from the flaunters and others who make them feel uncomfortable about their identity. It would be a mistake to see such politics as the coming of age for the gay rights movement. For Warner, "[i]t is, in effect, a takeover." [5]

Not surprisingly, many of those Warner critiques are lawyers. Our work in the area of gay rights, it seems, has been liberal (read conservative). "Proper" legal arguments and rights campaigns tend to shy away from descriptions of the "class" that we represent. We make vague, if clever, arguments about equal protection, the illegality of class stigmatization and maybe even the right to petition. Our cry that we are everywhere suggests that we are okay. We're in your schools, your neighborhoods, your churches, and the military—and the important thing is you haven't even noticed. "We're here, we're queer, and we are not getting out of your face" is no longer our rallying cry. Rather, we argue that we want equal rights just like you, not special rights.

My intervention in the queer legal theory discourse has been to suggest that we actually reverse the argument, and call for special rights, not equal rights. That argument, I contend, is in line with Warner's position. It does not focus on normalcy— neither normalcy for queers nor for the society in which we live. Rather it centers on the way that American culture through the regulation of our sexuality has, in Justice Kennedy's words in his majority opinion in *Evans*, made us "a stranger to its laws."[6] It is because we have been singled out for special treatment that we need special rights.

The Fear of "Special Rights" by Gay Rights Opponents

We need to abandon the "equal rights not special rights" slogan both because it fails as a strategy to respond to gay rights opponents and because it has serious negative implications for civil rights discourse. To illustrate this argument, I now turn to how gay rights opponents use the term "special rights." I glean from their use of the term special rights four different meanings. Each meaning is outlined in detail in my article, *What's so Special About Special Rights?*,[7] but I'll just give you a few examples here. The arguments can be divided into two main positions: 1) all civil rights are special rights; and 2) gay rights are special rights because they give homosexuals rights that others who are presumably similarly situated don't have.

The first argument that all civil rights are special rights takes two forms. The first form, which I call the overt argument, is most often seen in legislative debates over the Employment Non-Discrimination Act ("ENDA")[8] and over local gay rights ordinances. Judges rarely make the overt argument, probably because civil rights

---

[5] *Id*.

[6] *Romer*, 517 U.S. at 635.

[7] Karen Engle, *What's So Special About Special Rights?*, 75 DENV. U. L. REV. 1265 (1998).

[8] ENDA is a federal bill prohibiting discrimination on sexual orientation. It was first introduced in 1994 as S. 2288, 103d Cong. (1994) and H.R. 4636, 103d Cong. (1994). It was subsequently introduced in 1996 as S. 2056, 104th Cong. (1996) and H.R. 1863, 104th Cong. (1996) and again in 1997 as S. 869, 105th Cong. (1997).

law is fairly entrenched in the law. To give you an example of this type of argument, I'll read from Senator Ashcroft's statement against ENDA:

> But I remember a situation when I was Governor of Missouri in which one man operating a laundry fired a black woman from the laundry. She was one of seven black women working in the laundry. She was replaced by a black woman. But she sued alleging that she was fired because she was discriminated against on the basis of both race and sex.
>
> The truth of the matter is that the establishment of protected classes makes much more difficult the ability of anyone to even use good judgment in hiring and firing because there is always the threat of litigation.[9]

Basically, for Senator Ashcroft, civil rights law has made life very tough for employers. Adding to the civil rights corpus would only exacerbate the already negative consequences of antidiscrimination law.

The second form of the argument, which is related to the first, is a bit more subtle. While the first form suggests that all civil rights are special rights and therefore bad, this form asserts that, regardless whether special rights are justified in other civil rights contexts, we certainly don't want them with regard to gay rights. My examples of this argument are Justice Scalia's dissent in *Evans* and Judge Krupansky's majority opinion in *Equality Foundation Inc. v. City of Cincinnati.*[10] Those familiar with the *Cincinnati* case and the difference that the Sixth Circuit drew or tried to draw between the Colorado Amendment and the Cincinnati Initiative know that much of the debate was over whether the new laws denied gay, lesbian and bisexual citizens the protection of general laws or whether they merely denied them special rights. The Cincinnati Charter Amendment is itself a good example of this conflation of civil rights and special rights. The amendment prohibited giving homosexuals, lesbian or bisexuals "any claim of minority or protected status, quota preference or other preferential treatment."[11] I don't read "or preferential treatment" here to refer only to quotas but to refer to any claim of minority or protected status. In this form of the argument, then, all civil rights are special rights, but they are particularly bad in the case of gay rights.

The second major argument against special rights assumes that gay rights are special rights because they give gay men, lesbians and bisexuals protection that other groups don't have. This argument is also made in two forms. The first is that gay rights are special because they grant homosexuals rights based on conduct. The second assumes that the ordinances prohibiting discrimination based on sexual orientation and ENDA grant special rights to homosexuals and bisexuals by protecting them, but not heterosexuals, from discrimination. The first form of this argument appears in Justice Scalia's dissent in *Evans*. He bases much of that opinion on a distinction between status and conduct. In the opinion Justice Scalia critiques the regulation of the American Association of Law Schools that requires member

---

[9] 142 CONG. REC. S9986-01, S10000 (daily ed. Sept. 6, 1996) (statement of Sen. Ashcroft) (emphasis added).

[10] 128 F.3d 289 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998).

[11] CINCINNATI, OHIO, CHARTER art. XII.

schools to prohibit employers that discriminate based on sexual orientation from interviewing on campus. Justice Scalia suggests that these same employers are free "to 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 womanizer; because [and this is the only time the student is a she] she wears real-animal fur; or even because he hates the Chicago Cubs."[12] I think that Justice Scalia sees all of these examples he gives as related to conduct. The idea is that if homosexuality is defined by the conduct, then giving homosexuals rights would be treating them differently from snail-eaters and fur-wearers. Such different treatment would constitute special treatment.

The second form of the argument that gay rights give homosexuals rights that others don't have assumes that anti-discrimination ordinances only prohibit discrimination against gay men and lesbians and maybe bisexuals. This argument is a bit odd given that the ordinances and ENDA make it clear that they prohibit discrimination based on the *classification* of sexual orientation. Moreover, it seems that regardless of the purpose for passing anti-discrimination laws, they are often used to protect majorities as well as minorities. Despite the clarity of the language in the ordinances, and in ENDA, and despite the history of the interpretation of antidiscrimination laws, the argument continues to be made. Again an example comes from Senator Ashcroft's argument against ENDA: "We should be wary of telling young people that . . . you can sue someone for failing to hire you if you can allege that you are a homosexual—you will not be able to do that if you have ordinary sexual orientation."[13]

The gist of all of these arguments is that gay rights proponents have not justified the need for special rights, or rights that are guaranteed to other protected classes. For Justice Scalia, in particular, the question is why sexual orientation should be treated more like race than like snail-eating and fur-wearing. Of course, because of the negative meaning that is attached to special rights, the conflation of all civil rights with special rights represents a general entrenchment in civil rights law. Gay rights advocates need to be careful about how we respond to that conflation, which leads me to the third part of my talk.

The Fear of Special Rights by Gay Rights Proponents

The response by gay rights activists to the special rights critique has often only added to the retrenchment of civil rights discourse and law. Moreover, the advocacy fails to respond to the call for justification. Advocacy on behalf of ENDA provides an example of this failure. Two main arguments are perenially made on behalf of this legislation. The first is business efficiency. The argument seems to be that homosexuals are good, normal and dignified workers, and it is in the interest of the country to protect them. For me, one of the problems with this argument is not only that it is assimilationist, but also that it has a xenophobic hue. I'll read to you from Senator Kennedy's comments on behalf of ENDA: "Job discrimination is not only un-American—it is counterproductive. It excludes qualified individuals, lowers

[12] *Romer*, 517 U.S. at 652-53 (Scalia, J., dissenting).

[13] 142 CONG. REC. S9986-01, S10,000 (daily ed. Sept 6, 1996) (statement of Sen. Ashcroft). I assume, for lack of a better guess, that "ordinary sexual orientation" refers to heterosexuality.

workplace productivity, and hurts us all. For the nation to compete effectively in a global economy, we have to use all our available talent, and create a work environment where everyone can excel."[14] So the thrust of this position seems to be that it is better to hire gays and lesbians than to let those jobs and the competitive advantage go to foreigners.

The second argument that is often given by gay rights advocates revolves around an insistence that we don't want special rights anyway. We don't want affirmative action. We don't want domestic partnership benefits. We don't want anything "special" or "preferential." At least with regard to ENDA, advocates have made it very clear that they aren't asking for any of those things. In fact, President Clinton wrote to the Senate Labor Committee in his letter—I think it is important to emphasize—*in support* of ENDA: "[Y]our bill specifically prohibits preferential treatment on the basis of sexual orientation, including quotas. It also does not require employers to provide special benefits."[15] These sentiments are echoed throughout pro-ENDA testimony, buying into the idea that affirmative action or preferential treatment is bad, at least for "normal" people. In fact, the bill has now been amended specifically to prohibit affirmative action. This attitude toward affirmative action has consequences for other struggles over affirmative action by suggesting that affirmative action is negative.

Arguing for Special Rights

Now I turn to my fourth and final part, which is to suggest that we really need to provide a thick description of our lives and of the discrimination we face when arguing on behalf of gay rights ordinances and also against their repeal. An obvious justification for prohibiting discrimination against a group would be that such discrimination is widespread, unlike the discrimination against fur-wearers and snail-eaters. It is surprising, though, that in ENDA advocacy and advocacy for local ordinances, there is little discussion about the discrimination that gay men and lesbians face. We should talk about such discrimination, but we should do so in a way that doesn't just focus on victimization. That is, we need to assert our own understanding of pleasure and desire. One of the reasons we tend not to talk about discrimination or to assert queer identities, I think, is because we often push these ordinances as decent, normalizing remedies. Indeed, advocates often point to the little impact such laws are likely to make. ENDA advocates, for example, use data from states with antidiscrimination laws that include sexual orientation to show how rarely claims are brought.

Rather than insisting that the legislation is unremarkable, I would urge gay rights advocates to address the potentially radical impact of the bill on the legal subjectivity of gay men and lesbians. Janet Halley gives us one way of doing that by contrasting the thin description of homosexuality given by the *Evans* majority with what she sees

---

[14]ENDA 1994 Hearing, *supra* note 8, at 2 (statement of Sen. Edward M. Kennedy); *see also* ENDA 1996 Hearing, *supra* note 8, at 65, 66 (statement of Mike Morley, Eastman Kodak Co.) ("Our competitive position will clearly be strengthened by increasing understanding of the value of people's diverse opinions, on a global basis. . . . A truly diverse global workforce will be our greatest strength in a fiercely competitive marketplace.").

[15]Letter to Edward M. Kennedy, Massachusetts Senator, *II Pub. Papers, William J. Clinton* 1632 (Oct. 19, 1995).

as the thick description set forth by the majority in *Bowers v. Hardwick*.[16] She notes: "The claim that 'sodomy' is 'the behavior that defines the class' implies a thick description of sexual orientation categories, and has precipitated a series of legal struggles to control their description and thus the legal understanding of the real people inhabiting them."[17] While *Hardwick* "frankly acknowledg[es] its textual character by inviting its audience to become engaged in reading it"—and to be presumably disgusted by it—the *Evans* majority, she says, suppresses "this intense, and tense, relationship between the text and its readers. It invites us to forget ourselves in a way that *Hardwick* does not."[18] It could be said, I think, that gay rights advocates follow the same course as the *Evans* majority by refusing to confront the very issues that guide the debate about whether sexual orientation should be a protected classification. Two of these issues Halley describes are sex and hate. I would suggest that those provide a good place to start.

Gay rights advocates should seize the opportunity through public debate, whether surrounding ENDA, local ordinances or other law reform projects, to counter the thick description of homosexuality that equates it with the moral reprehensibility, which the conservatives have successfully propagated. And I think the way to do that is to begin to argue for special rights. Lest you think I'm way out there, let me suggest that special rights are not a radical idea when we're talking about the rights of corporations, property owners, and married people. Indeed, Oliver Wendell Holmes gave us a good idea over one hundred years ago about what special rights might be. For him:

> Every right is a consequence attached by the law to one or more facts which the law defines, and wherever the law gives any one special rights not shared by the body of the people, it does so on the ground that certain special facts, not true of the rest of the world, are true of him.[19]

The question gay rights advocates should address is not whether we are advocating for equal rights or special rights, but why gay men and lesbians need special rights. Even with the absence of antigay initiatives, the state makes homosexuals strangers to the law. Because of these facts, homosexuals are in need of special rights. It's time to admit it.

---

[16]478 U.S. 186 (1986).

[17]Janet E. Halley, *Romer v. Hardwick*, 68 U. COLO. L. REV. 429, 439 (1997).

[18]*Id.* at 435 (quoting Romer v. Evans, 517 U.S. 620, 641 (1996)).

[19]OLIVER. W. HOLMES, JR., THE COMMON LAW 214 (1881).