

# OF SIGNIFIERS AND SODOMY: PRIVACY, PUBLIC MORALITY AND SEX IN THE DECRIMINALISATION DEBATES

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*[This article focuses on the use of parliamentary debates as an important and effective form of social 'education', demonstrating that power relations between social groups often leads to explicit declarations of competing and sometimes contradictory 'truth claims' or 'ideologies'. The author demonstrates the degree to which fundamental beliefs about patriotism, morality and humanity are articulated, defended and critiqued in the debates surrounding the decriminalisation of sodomy in England and Australia. The role of law in guarding the boundaries between legitimate and illegitimate uses of State power, the role of the family, the 'problem' of homosexuality, the meaning of gender, the place of minorities within a liberal legal system and the increasing separation of religious based morality and scientific values are also explored. The author argues that the theory of privacy articulated in the debates demonstrates a form of social control intended to 'disappear' gay men (and lesbians) which operates at the expense of other liberal values such as freedom and equality.]*

It is testimony to the fact that nobody is, ideologically speaking, a complete dupe that people who are characterized as inferior must actually learn to be so. It is not enough for a woman or colonial subject to be defined as a lower form of life: they must be actively *taught* this definition.<sup>1</sup>

WHEREAS the Parliament does not believe that sexual acts between consenting adults in private ought to be regulated by the criminal law;  
AND WHEREAS the Parliament disapproves of sexual relations between persons of the same sex;  
AND WHEREAS the Parliament disapproves of the promotion or encouragement of homosexual behaviour;  
AND WHEREAS the Parliament does not by its action in removing any criminal penalty for sexual acts in private between persons of the same sex wish to create a change in community attitude to homosexual behaviour;  
AND WHEREAS in particular the Parliament disapproves of persons with care supervision or authority over young persons urging them to adopt homosexuality as a lifestyle and disapproves of instrumentalities of the State so doing.<sup>2</sup>

At the time of writing this article, the Tasmanian Upper House has just rejected a Legislative Assembly initiative to decriminalise the 'unnatural sex' provisions of the Criminal Code (Tas). As disappointing as this event is, it is hardly unexpected or surprising, either to observers of the Tasmanian political scene or in terms of legal history — decriminalising sodomy is usually a difficult and drawn-

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<sup>1</sup> Terry Eagleton, *Ideology: An Introduction* (1987) xiv-xv.

<sup>2</sup> Law Reform (Decriminalisation of Sodomy) Act 1989 (WA) preamble.

out process.<sup>3</sup> Both the House of Commons and the House of Lords in the United Kingdom debated and rejected decriminalisation bills a dozen times over a ten year period, and in various Australian States legislation was proposed and rejected five or six times before being accepted.<sup>4</sup> In fact, it could be said that the decriminalisation process in Tasmania is progressing right on schedule: leaving aside the United Nations intervention,<sup>5</sup> it is in many respects identical to earlier legislative efforts in Australia and England. Given the vehement rejection dealt to previous attempts at reform,<sup>6</sup> perhaps what is most surprising is the speed with which the Legislative Assembly has so significantly changed its own stance, rather than the fact that the Upper House is shifting rather more slowly.

Parliamentary debates are an important and effective form of social 'education' — an arena in which complicated power relations between social groups lead to explicit declarations of competing and often contradictory 'truth claims' or 'ideologies'. An analysis of ideology is crucial when looking for ways to challenge dominant modes of social relations because by looking only for manifest, explicit discrimination or differential treatment of certain groups in society, the more subtle processes by which legislative and judicial decision-making processes reproduce and reinforce the *status quo* are often missed. As long as a dominant ideology remains invisible within a regulating structure such as law

<sup>3</sup> The debates which form the basis of this article are from the United Kingdom and Australia. However, the same conclusions about the drawn-out nature of reform can be made from the debates of New Zealand, Scotland, Ireland and many of the US states. Canada provides an unusual contrast to this trend. In 1969 Prime Minister Trudeau announced his decision to repeal the sodomy provisions in the Criminal Code and did so in the same parliamentary session. Stating the now legendary principle that: '[t]he State has no business in the bedrooms of the nation', and ensuring success by refusing to allow a conscience vote, the opposition could only angrily claim that many government MPs would have voted against the measure if they had had the courage to speak up: George Saywell (Introduction) in Pierre Trudeau, *Federalism and the French Canadians* (1968) iii, referred to in Victoria, *Parliamentary Debates*, Legislative Council, 3 December 1980, 4091 (William Landeryou, Leader of the Opposition). For further details concerning decriminalisation in England, see Les Moran, *The Homosexualisation of Law* (1996); Jeffrey Weeks, *Sexuality and its Discontents: Meanings, Myths and Modern Sexualities* (1985). For a discussion of the situation in Australia, see Miranda Morris, *The Pink Triangle: the gay law reform debate in Tasmania* (1995).

<sup>4</sup> South Australia, Victoria, New South Wales, Western Australia, and Queensland have decriminalised sodomy. Tasmania is still involved in the process. As the Northern Territory never criminalised sodomy, there has been no need for reform. The Australian Capital Territory law was 'decriminalised' after a short speech in the Federal Parliament where the House of Representatives motion that homosexual acts should not be 'subject to the criminal law' was considered applicable to the ACT: Commonwealth, *Hansard*, House of Representatives, 18 October 1973, 2327. (The motion was moved by Sir John Gorton).

<sup>5</sup> *Toonen v Australia* UN Doc CCPR/C/50/D/488/1992 (1994), where the UN Human Rights Committee found the provisions of the Tasmanian Criminal Code relating to 'unnatural sex' to be in violation of the right to respect for privacy under Article 17 of the International Covenant of Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 1976).

<sup>6</sup> The issue has been raised by Labour MPs since the late 1970s but never had any chance of being seriously debated until 1990 when a vote in favour of decriminalisation was taken in the context of HIV prevention. While the vote succeeded after the government exercised its casting vote, the Bill was divided into separate Bills in the Upper House with the decriminalisation provisions being immediately dropped. The parliamentary session lapsed before what remained of the Bill could become law, and when it was later re-introduced the decriminalisation provisions were absent. Since then there have been separate decriminalisation Bills in the House of Assembly, each time with a slightly more favourable reception, but with no success in the Upper House.

there is no opportunity to question it; rather it will be continually reinforced, and inequitable or discriminatory results will be perpetuated in the name of inevitability or precedent. If, on the other hand, a dominant ideology can be located and 'objectified' it is possible to contest it and thus to challenge the assumptions which form the basis of that regulation.<sup>7</sup>

The certainty of ideology is its most attractive feature; as internalised standards are not acknowledged as *being* standards, they leave no room for discussion, and accordingly there is no tolerance of deviance from social norms. It is only where this invisibility fails, where the inevitability of the rules governing co-existence break down, that we find evidence of the existence of ideological processes. In those gaps where social movements question and mount challenges to dominant ideologies, we can often find explicit elaborations of belief structures being made and the very process of elaboration results in further contestation, compromise and eventually consolidation.

Thus it is that parliamentary debates are important sources for the investigation of social relations, and the decriminalisation debates in particular provide an excellent point from which to view these processes of truth construction. In these debates the competing structures seem more radically opposed than is often the case and the task of sewing such opposing views into a seamless, trans-historical whole has been extremely challenging and thus its success all the more remarkable.

The changing legal status of sodomy involves much more than simply an argument over who may sleep with whom; rather that argument can be read as a metaphor in contemporary Western societies for much larger discursive struggles. The decriminalisation debates give definition to the crucial battle over whether religious belief or science should provide the guidelines for human (co)existence in liberal societies. They also provide a forum for struggles over the boundaries of the legitimate sphere and activity of the modern state; the function and ability of law in guarding these boundaries between legitimate and illegitimate uses of state power; the constitution and role of family, marriage, children, childhood, and parental authority; the meaning of gender, sexual identity and social citizenship; and the location and membership of minority groups within liberal legal systems. Within these vast parameters a single sexual act has taken on huge importance, and the distinction between the new homosexual legal citizen and the sex he does or does not have has become blurred and (un)controllable.<sup>8</sup>

<sup>7</sup> Eagleton, above n 1, 33.

<sup>8</sup> In this article I have chosen to use the word 'homosexual' in various contexts rather than the (currently) more usual gay, lesbian, or queer. Because of the extent to which the term 'homosexual' is loaded with medical/psychological meaning and because of its implicit acceptance of that frame of reference it is not a term that I normally use, but the term 'gay' implies a political and social framework which plays no part in the decriminalisation debates. I would argue that while some parliamentarians may now use the word 'gay' it is still not clear that they mean anything different (or importantly, that it is heard any differently) than the much more common 'homosexual'. There is very little (if anything) that is 'queer' about the treatment of sexuality in the debates, and there is even less reason to use 'gay and lesbian' because of the almost total absence of women in the subject matter of the debates. Accordingly, I have chosen to keep to 'homosexual' but to attempt to disrupt the assumptions that go with it by highlighting the extent to which sex, sexuality, and identity have been conflated. Thus I have used homo-sex

The sheer parameters of the debate, the different levels at which 'sodomy' operates within the social structure and the conceptual changes required to work it safely into existing structures means that the success of the project — the overwhelming (hetero-sexual) consensus that has been achieved in such a short time about the constitutive elements of homo-sexual personality, desire and history — make it interesting in itself as a chapter of socio-legal history, and more importantly, constitute a source of invaluable material for those of us thinking about the utility of law in achieving social justice.

This article focuses on the consequences of the battle for the 'real' meaning of the liberal concept of privacy in the decriminalisation debates in England and Australia. By considering the contradictions and difficulties posed by the application of privacy in relation to a sexually autonomous self for both 'liberal' and 'conservative' politicians,<sup>9</sup> it is possible to see the manner in which dominant liberal discourse on privacy and personal autonomy has been reconfigured as a result of engaging with conservative (in this context minority) discourse; and to consider why this particular combination of different points of view has been so effective in attaining dominance. The entrenchment of two quite different views of homo-sex within the accepted definition of homo-sexuality resulted in new regulatory devices such as discriminatory age of consent laws and anti-proselytising clauses being woven into the integral framework of the legal regulation of sexuality: ideological processes have meant that the inconsistencies or incoherency inherent in this position have somehow failed to register.

The article is divided into three sections, considering first the place of privacy in liberal theory, then examining the competing explanations for (and of) homo-sexual existence, and finally examining how these different theories led to a shift in focus from the traditional privacy-as-autonomy of liberal theory to the now dominant privacy-as-secrecy that encircles the homo-sexual in law.

(sexual acts), homosexuality (the concept of male to male sexual preference regardless of sex), and homo-sexual (an identity claimed or imposed and having little or much to do with sexual acts, depending on the political stance of the speaker). I apologise if this seems cumbersome in places.

<sup>9</sup> On yet one more clarificatory point, I note here the difficulty I have had in deciding what to 'name' the two main sides to the debates. I have settled for a division that has been used by the politicians themselves; that of 'liberals' (meaning in this context an MP who accepts and argues for the concept of liberal privacy applying to sexuality), and 'conservatives' (meaning those who do not accept a public/private split relating to homo-sex(uality) and who argue for enforcement by state institutions of biblical law in this regard). This is *not* to say that 'liberal' MPs are what would be called progressive; in fact the intent of this article is to show that there was nothing inherently progressive in the intent of decriminalisation achieved through privacy — rather it is more apt to see decriminalisation as a reassertion of the *status quo*. As I discuss later, conservatives are no more consistent in their desire to enforce public morality than liberals are in theirs to grant privacy in issues such as the economy, prostitution, extra-marital sex or race relations. For example, the MPs I have called 'conservative' are strongly supportive of the public/private divide and think 'morality' is a complicated and private issue. On the other hand, 'liberal' MPs use privacy to justify ends not historically considered 'liberal'. Selective morality is of course hardly a new phenomenon but it does pose problems for the generalising tendency in writing — accordingly these terms are makeshift and context-specific.

## I ON WOLFENDEN AND PRIVACY

I believe in the last analysis the human being in the privacy of his own mind has the exclusive authority to choose his own scale of values and decide which forces will take precedence over others.<sup>10</sup>

The Wolfenden Committee was established in England in 1953 following public concern centring around a rise in the visibility of prostitutes on the streets of London and homo-sex offences in the Magistrates' courts in Britain generally. While no formal evidence existed in England that these sexual offences were on the rise,<sup>11</sup> by the early 1950s the court page of any local paper was certain to contain a list of men charged with various offences against public decency, often accompanied by an inquest into the suicide of some young man who had recently been questioned or charged by the police.

The Committee, led by Sir John Wolfenden and comprising around 18 doctors, teachers and community leaders, was charged with the task of investigating this trend and asked to report back on any changes thought necessary in the legal regulation of homo-sex and prostitution. Originally viewed variously as a stalling measure on a difficult issue or as a formality to go through before increasing criminal sanctions, the Committee took four years, met 62 times, and considered the evidence from over 200 sources before tabling its report in September 1957, astonishing many with its argument that:

It is not the function of the law to interfere in the private lives of citizens, or to seek to enhance any particular pattern of behaviour ... [It is the law's duty to] preserve public order and decency, to protect the citizen from what is offensive and injurious, and to provide safeguards against the exploitation and corruption of others ... unless a deliberate attempt is made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is not the law's business.<sup>12</sup>

The Committee argued that homo-sex and (genetically or psychologically based) homo-identities best fit within the concept of privacy because of the:

<sup>10</sup> Trudeau, above n 3.

<sup>11</sup> For example, in contrast to the United States, where the release of Alfred Kinsey, *Sexual Behaviour in the Human Male* 1948 ('Kinsey Report') five years previously had suggested that up to 10 percent of the American male population had had homo-sex. This discovery went some way towards explaining the ensuing McCarthyite 'purges'. These purges, which are good indicators of the beginning of the Cold War, were initially aimed at exposing communists, but quickly expanded to include the exposure of large numbers of homo-sexuals within American institutions such as educational facilities and government departments. The creation of a communist/homo-sexual domestic demon was a huge success in terms of creating a postwar cultural identity and provides one of the classic examples of developing American cultural and political hegemony in the international arena. By the late 1950s Britain, Australia and New Zealand were all regularly conducting witch-hunts in their public institutions with guidance from American experts. The link between political subversiveness and sexual deviance has only recently (if at all) begun to be challenged. See generally Jeffrey Weeks, *Coming Out ... Homosexual Politics in Britain from the 19th Century to the Present* (1977).

<sup>12</sup> England, *The Report of the Committee on Homosexual Offences and Prostitution* (1957) Cmnd 247, 9-10 ('Wolfenden Report'). This astonishment was aptly summed up in the Australian Parliament when one MP observed that '[t]he Wolfenden Report stunned Britain': Commonwealth, *Hansard*, House of Representatives, 18 October 1973, 2327 (William Fulton).

[v]ital importance of maintaining the fundamental right of a man [*sic*] to decide on his own moral code .... In a free society there are few things more important than to sustain the sense of individual responsibility whether it be civic responsibility, or responsibility for private conduct.<sup>13</sup>

While making it clear that they did not condone or approve of homo-sex in any way and while recognising that criminal sanctions did prevent some men from giving physical expression to homo-sexual desires (a positive feature), the Committee argued the classically liberal line that sexuality was determined by biology or early upbringing and was virtually unchangeable. Thus, the argument goes, the decision to participate in homo-sex must be considered a personal moral one and is not an area into which the law (or the state) should intrude. The Committee was further of the opinion that there would always be 'strong social forces' opposed to homo-sexuality which would be as effective a deterrent as the existing criminal law.<sup>14</sup>

While polls showed that the general population disagreed with these findings, the Committee's adherence to the tenets of liberal privacy struck chords in unexpected places. Almost all the major daily papers in England were strongly supportive of the line taken by the Committee, as were most provincial papers. *The Times* — hardly a bastion of progressive values — was typical of this reception, arguing that:

Adult sexual behaviour not involving minors, force, fraud or public indecency belongs to the realm of private conduct and not of criminal law.<sup>15</sup>

Furthermore, with the notable exception of the Catholic church, all of the leaders of mainstream British Christian churches supported the Committee's recommendations, which created a serious problem for politicians opposed to reform. Without the support of their religious leaders they had to turn to other (more right wing) sources for confirmation of their interpretations of biblical sanctions, and in so doing distanced themselves from their chosen religious affiliations.<sup>16</sup> The response of Dr Fisher, the Archbishop of Canterbury, was typical of the response from Protestant church leaders:

<sup>13</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 26 November 1958, 368 (R A Butler, Secretary of State). Note that because of the separate criminal legal systems within the United Kingdom, the *Wolfenden Report* was debated with regard to England and Wales only. Scotland decriminalised sodomy a full decade later than England and Wales; Eire reluctantly decriminalised after a European Court of Justice decision in the late 1980s.

<sup>14</sup> *Wolfenden Report*, above n 12, 24.

<sup>15</sup> Quoted in Stephen Jeffery-Poulter, *Peers, Queers and Commons: The Struggle for Gay Law Reform from 1959 to the Present* (1991) 32. The author has collected over 50 editorials from British newspapers in 1957 which echo this sentiment, and the Hall-Carpenter archives (the official archives of the Homosexual Law Reform Society and its sister organisation The Albany Trust) contain countless smaller pieces in support of the Committee's findings.

<sup>16</sup> More recently, politicians seeking biblical support have rallied against the leaders of their own church, and then quoted from materials provided by, for example, Seventh Day Adventists: Western Australia, *Parliamentary Debates*, Legislative Assembly, 15 November 1977, 3554 (Brian Sodeman) and the Knights of the Southern Cross (an organisation of Catholic laymen): Western Australia, *Parliamentary Debates*, Legislative Council, 2 November 1989, 4161 (George Cash). These 'sources', which have also included The Salvation Army, and 'religious sources' given by conservative Christian groups such as Focus on the Family, are generally

There is a sacred realm of privacy ... into which the law, generally speaking, must not intrude. This is a principle of the utmost importance for the preservation of human freedom, self respect and responsibility.<sup>17</sup>

While Jewish and Catholic leaders remained firmly opposed to homo-sex, conservative politicians in need of biblical interpretation do not appear to have used those sources at all — which is perhaps not surprising given the nature of 1950s Britain and its white, anglo-saxon parliamentary body, but is more noticeable in later 'multi-cultural' Australia.<sup>18</sup>

Despite the strong media and religious support, parliamentarians were much less favourably inclined towards reform. While the House of Lords, led by Lord Arran, was quick to record its support for the Report and quite swift to draft and pass a Bill to implement it, seven years passed before the Commons agreed to debate decriminalisation and a further four years, many drafts and enormous amounts of debating, lobbying and compromising ensued before the Committee's recommendations were finally enacted in the Sexual Offences Act 1967 (Eng).<sup>19</sup> That eventual success resulted from the growing support for, and then dominance of, the view that privacy and sexuality, if not actually intrinsically linked, should be linked for the public good.

From the earliest debates, politicians who argued for decriminalisation have taken virtually identical positions, seemingly strongly supportive of Mill's theory of the absence of state intervention in individual decision making.<sup>20</sup> Interestingly however, politicians who gave their complete support to this principle did so even as they built new methods for state regulation and intervention. The commitment to individual freedom, choice and autonomy undergoes definite

acknowledged as being more right-wing in their social views than, for example, the Church of England or other major Christian churches in the United Kingdom or Australia.

<sup>17</sup> *Canterbury Diocesan Notes*, October 1957, in Jeffery-Poulter, above n 15, 33.

<sup>18</sup> An exception to this is provided by the debates on the Equal Opportunity Act 1995 (Vic) where those seeking to restrict its application to gays and lesbians referred to papal dogma. See, eg, Victoria, *Parliamentary Debates*, House of Assembly, 25 May 1995, 1771 (N Perrin). This failure to adopt a non-Christian or Catholic (or non-dominant Christian) religious interpretation illustrates the existence of a hierarchy — accepted even by those most adamantly opposed to homo-sex — of religious belief and the dominance of 'mainstream' Christian authority. This point is discussed later in this article.

<sup>19</sup> Jeffery-Poulter, above n 15. See also Weeks, above n 11.

<sup>20</sup> Privacy is an essential cornerstone of liberal ideology. John Stuart Mill's belief that privacy is crucial to individualism, autonomy, and self-fulfilment continues to dominate modern discussions on the superiority of liberalism, and modern day exponents of liberalism continue to state its importance notwithstanding the vast resources that feminist theorists (and others) have devoted towards critiquing privacy and the private realm. In fact, the ever increasing value and importance attached to personal privacy in the western social psyche is matched only by the growth of publicly acknowledged fears that modern society is conspiring to deny us of it: '[t]he constitutional right to privacy is clearly a correct attempt to protect the sphere of moral self-government surrounding intimate personal life from the tyrannies of majoritarian values': David Richards, 'Liberalism, Public Morality and Constitutional Law; Prolegomenon to a Theory of the Constitutional Right to Privacy' (1989) 51 *Law and Contemporary Problems* 123, 141. See also John Young (ed), *Privacy* (1978) 6:

Privacy is seen as necessary to ensure free choice and autonomy, the exercise of power, access to individual relationships, and the often subtle physical and psychological means by which individuals develop and maintain their own sense of individuality.

For a classic example of this application of liberal privacy see United Kingdom, *Parliamentary Debates*, House of Lords, 12 May 1965, 107 (Lord James of Rusholme).

shifts in its application to sexuality: the understanding of privacy which emerges from the debates is much less about autonomy than it is about secrecy, discretion and maintaining the appearance of a universal hetero-sexuality.

Foucault argues that sex and sexual matters have become increasingly public issues in the twentieth century<sup>21</sup> and in particular homo-sex and homo-sexuality have attained notoriety through various scandals (the trials of Oscar Wilde for example) and panics (the McCarthy purges referred to earlier): medical and scientific knowledge have both provided fuel for, and been fuelled by, this publicity. The growing visibility of homo-sex was the reason for the establishment of the *Wolfenden* Committee, and the length and size of the process (as well as the secret nature of the hearings) kept public interest high through the mid 1950s. The tabling of the Committee's report in September 1957 saw homo-sexuality achieve front page coverage in every major newspaper in England and a not-insubstantial percentage of papers in the rest of the United Kingdom, Australia, New Zealand and Canada as well. As the British government remained uncommitted to reform, this interest grew even stronger. By the early 1960s politicians, both in favour of and against reform, considered that awareness of homo-sex and sexuality had been heightened to a dangerous, even 'morbid and harmful' level.<sup>22</sup>

Thus it is not surprising that the most immediately noticeable theme in liberal discourse is how best to 'disappear' homo-sex and the men who (may or may not) engage in it. Rather than being a desire to grant privacy — to maintain an emphasis on space for the exercise of freedom of values — privacy in the debates became something to be imposed. For the first time 'the closet' became an officially constituted, recognised and sanctioned space as liberal politicians argued that privacy should be offered only to the extent that homo-sex (and anything signifying its existence) remained totally invisible in the public sphere. Interestingly, that invisibility was then re-coded: whereas the invisibility imposed by the existing criminal sanctions was argued to be a sign of the oppression of a weak minority and an illegal use of state power, liberal politicians argued that after decriminalisation, invisibility would become a form of freedom:

[m]any homosexuals, like most heterosexuals, treat their sexuality as innately private. Some argue they are suppressed, intimidated, inhibited or just "still in the closet" ... [they] are simply treating it with appropriate respect and privacy.<sup>23</sup>

Thus liberals argued for a law reform which sought to target:

<sup>21</sup> Michel Foucault, *The History of Sexuality: An Introduction* (1980).

<sup>22</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 19 December 1966, 1121 (Norman St John-Stevas).

<sup>23</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 May 1984, 711 (Michael Yabsley).



those men who so order their lives that they do not inflict themselves and their ailment on society, and to allow them in the privacy of their own homes to pursue their lives as they are driven to do.<sup>24</sup>

## II CONTRADICTIONS AND COMPLICATIONS: ON POLITICS AND MORALITY

The desire of politicians to silence the debate and to 'disappear' homo-sex(uality) was neither uniform nor uncomplicated. Perhaps the first problem to be recognised was the fact that legal interventions require even those issues popularly defined as quintessentially private, to first 'go public'. Even though homo-sex(uality) had been the subject of much media interest leading up to the debates, and while homo-sexuals and sex experts had generally been thoroughly interrogated by the Wolfenden Committee, politicians felt it essential that they undertake their own research into the causes and effects of homo-sex in order that their decisions accord with reality. The dissection of homo-sexuality by fascinated politicians was unprecedented and the sheer size and explicit detail of the investigation undertaken both inside and outside of Parliament gives credence to the idea that the debates illustrate as much an obsession with homo-sex(uality) as they do a desire to make the whole subject disappear.<sup>25</sup>

I do not know how people who are homosexual carry out the act. There is talk about standing behind each other, but I believe they usually face each other .... I believe that is the usual position.<sup>26</sup>

While conservatives used conspiracy-type explanations for their need to conduct detailed examinations,<sup>27</sup> science and the legal process itself provided liberal politicians with a legitimate vehicle for this 'will to knowledge'. The debates highlight the importance placed on data gathering and education:

<sup>24</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 19 December 1966, 1111 (David Owen).

<sup>25</sup> Michel Foucault, *The History of Sexuality* (1980) vol 1, argues that (at the risk of abusing his message through over simplification) the idea that sexuality has become increasingly repressed since the 19th century is false. Instead, Foucault argues that the development of a discourse or science of sex has created a mechanism which increasingly incites, rather than represses, sexualities. For Foucault, sexuality is a form of power which demands constant attention in its exercise — it works as power through examination and insistent observation — sexuality must be detected, observed and reported on. While he admits that there is no question that 19th century psychiatry, jurisprudence and sex literature made social controls possible in the area of sexuality, it also made possible the formation of reverse discourses — homo-sexuality began to speak on its own behalf and to demand acknowledgment of its legitimacy at the same time that controls over it were being formulated.

<sup>26</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 15 November 1977, 3575 (Mr Gabriel Dadour).

<sup>27</sup> See, eg. '[T]his legislation looks very nice on the surface, but once one looks beneath the surface one sees what it is really all about': Western Australia, *Parliamentary Debates*, Legislative Assembly, 15 November 1977, 3550 (Thomas Herzfeld). See also 'Decriminalisation is, of course, a nice euphemism that ... covers the harsh reality of facts .... [it] sounds nice but when one examines it the reasons which appear to be advanced generally relate to emotive matters and not to the substance of the matter': Victoria, *Parliamentary Debates*, Legislative Council, 3 December 1980, 4118 (H M Hamilton).

[b]efore the Wolfenden Committee produced its report in 1957, there was a great deal of ignorance in this country about homosexuality, both about its causes and its prevalence and nature. Since then the question has been widely discussed and other publications have also appeared ... a great deal more knowledge has become available to the public.<sup>28</sup>

One of the very interesting matters to come to light as a result of the setting up of the Honourable Royal Commission is that in our society today there is an abysmal ignorance of sexuality in the broadest, total context.<sup>29</sup>

It is only on the basis of knowledge acquired by extensive reading on the subject ... that enables me to understand or even to try to understand the problems and difficulties of a homosexual.<sup>30</sup>

The [Wolfenden] report recommends a research programme on an altogether new scale that I heartily endorse; I hope we all do ...<sup>31</sup>

This gathering and sharing of knowledge was not the only complication in the supporters' desire to (re)closet homo-sex and sexuality: supporters also realised early in the debates that decriminalisation would in fact necessitate homo-sexuals coming 'out' into the open in (hopefully) large numbers in order to effect a cure:

[w]e cannot start tackling the problem on the level at which it should be tackled, which is on the psychological plane, the sociological plane and the spiritual plane ... [u]ntil we get away from a legal solution which merely drives homosexuals into a ghetto.<sup>32</sup>

[Once sodomy is decriminalised] those who need help will come forward and get it, those who are being blackmailed will also seek help and respond to it, and the psychological effect will encourage them to change their lifestyle.<sup>33</sup>

Of course, that potential publicity and the need to 'disappear' homo-sexuality are not really contradictory. Rather than a declaration of individuality or self-government, what was intended was a public admission of sickness and the desire to recover. Such an admission reinforces rather than challenges the normalcy of hetero-sexuality and the rules of socially acceptable conduct. While some Members of Parliament expected that removing criminal sanctions would remove a barrier in the minds of some men and allow them to give physical expression to their desires, it was expected (aided no doubt by 'conciliatory' statements made

<sup>28</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 11 February 1966, 784-5 (Humphry Berkley).

<sup>29</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 15 November 1977, 3566 (Malcolm Bryce).

<sup>30</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 26 November 1958, 486 (Reverend Llywelyn Williams).

<sup>31</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 4 December 1957, 743 (Lord Pakenham).

<sup>32</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 19 December 1966, 1122 (Norman St John-Stevas).

<sup>33</sup> South Australia, *Parliamentary Debates*, Legislative Council, 17 September 1975, 806 (Charles Hill).

by various homosexual law reform associations)<sup>34</sup> that any such change in behaviour would be kept from the public knowledge.<sup>35</sup> Thus Lord Arran, the chief supporter of reform in the House of Lords asked and expected that:

[T]hose who have, as it were, been in bondage and for whom the prison doors are now open to show their thanks by comporting themselves quietly [and] with dignity.<sup>36</sup>

This touches on a refrain in liberal supporter discourse: that decriminalisation would change nothing at all. Parliamentarians have constantly reassured themselves, the opposition and the public that the *status quo* was under no threat. 'Society ... will always condemn homosexual practice'<sup>37</sup> and law reform would not in any way have a 'damaging effect on family life' or promote, endorse, advocate, popularise or even legalise homo-sex!<sup>38</sup> Every parliament that has passed decriminalisation legislation has made it clear that:

[i]t does not represent any approval or condonation of these activities. The Government does not accept sexual relationships between persons of the same sex as an acceptable alternative lifestyle. Nothing in the Bill is intended to give any support to such attitudes.<sup>39</sup>

<sup>34</sup> See the materials provided in Western Australia and by the Homosexual Law Reform Society in England in particular. The materials are relied upon heavily by liberal MPs and are used to demonstrate that a legal right to the closet is the only real intent behind reform. Pamela Buchanan quotes from materials provided by the Gay Law Reform group in Western Australia that '[h]omosexuals simply seek to be able to get on with their lives ... to contribute to society through their work and community activities' and to 'live their lives free from the guilt and fear presently experienced' and that because of this, nothing will change in WA society. She goes on to reassure everyone that homosexuals in WA have no desire to march in parades or to hold mardi gras: Western Australia, *Parliamentary Debates*, Legislative Assembly, 30 November 1989, 5766 (Pamela Buchanan). For English materials see Jeffery-Poulter, above n 15, and for the use of such materials in Tasmania, see Morris, above n 3. Note that this is not to make light of the difficulty in striking the right balance in the necessary task of providing information about gay issues to those with the power to change laws; conservatives scorn 'conciliatory' materials such as those used in WA as hiding the real agenda and are delighted upon finding anything which actually suggests any intent to effect change to societal norms.

<sup>35</sup> Thus one area where homo-sex continues to be stigmatised and criminalised is 'beat' sex: sex which can be observed and defined as dangerous to the public interest by the very fact of its existence.

<sup>36</sup> H Montgomery Hyde, *The Other Love: An Historical and Contemporary Survey of Homosexuality in Britain* (1970) 303. A classic example of the genuine expectation that this would be so, is expressed in the now infamous statement of the Earl of Halsbury in United Kingdom, *Parliamentary Debates*, House of Lords, 18 December 1986, 310:

One of the characteristics of our time is that we have for several decades past been emancipating minorities who claimed that they were disadvantaged. Are they grateful? Not a bit.... We emancipate homosexuals and they condemn heterosexism as chauvinist sexism, male oppression and so on. They will push us off the pavement if we give them a chance.

<sup>37</sup> United Kingdom, *Parliamentary Debates*, House of Commons 19 December 1966, 1111 (David Owen).

<sup>38</sup> Canada, *Parliamentary Debates*, House of Commons, 16 April 1969, 7633 (John Turner, Minister of Justice).

<sup>39</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 18 November 1980, 2874 (Haddon Storey, Attorney-General). See the preamble to the Law Reform (Decriminalisation of Sodomy) Act 1989 (WA), above n 2, and The Criminal Code (Qld) for vivid examples of this procedure.

Privacy is wonderfully flexible stuff indeed, providing both the legal justification for reform and the grounds on which the newly legal must remain socially unacceptable and hidden.

Complicating the publicity/privacy issue further was the discovery by conservatives of the publicity-hungry 'false invert' and the implicit acceptance of his presence by liberal politicians.<sup>40</sup> These curious individuals provided the evidence necessary for conservative politicians to claim that not only was the application of privacy legally inaccurate, it was also pointless and counter-productive:

[p]rivacy [in this context is] a fallacious proposition and one which cannot be accepted as a general proposition with regard to the law.<sup>41</sup>

A large proportion who are in prison for these offences are not true inverts but [are] there for sensationalism or money.<sup>42</sup>

If people who indulge in this act do so away from the public eye then that should be their own business, and the Amendment in 1972 allowed for this. I was of the opinion that most homosexuals were happy with that Amendment. I wonder whether the people who seem most discontented are true homosexuals.<sup>43</sup>

Thus privacy is already accounted for within the existing criminal law, and the issue shifts from denial of privacy to the content of the 'real' homo-sexual agenda ('a fundamental desire for the restructuring of society with destruction of the traditional family, its anchor point, as the supreme trophy')<sup>44</sup> — clearly the polar opposite of a genuine desire for privacy.<sup>45</sup> The point is not, in this scenario, that

<sup>40</sup> Note however that this acceptance is a classic example of twisting the opposition argument: see, eg, United Kingdom, *Parliamentary Debates*, House of Lords, 13 July 1967, 1303-4 (Lord Boothby):

[There is a] lunatic fringe of homosexuals who get a kick out of being on the wrong side of the law, and of the danger which arises from it, and some of them may give it up when we take the danger away .... I can not help hoping that when this Bill and the Abortion Bill are both out of the light we shall not hear of sex in this House again for a very long time.

See also United Kingdom, *Parliamentary Debates*, House of Lords, 12 May 1965, 77 (Lord Arran): '[At present it is] forbidden fruit. It is invested with a glamour to which it has no claim. Remove the penalties, substitute the weapon of compassion for the weapon of punishment, and the thing will become uninteresting overnight.'

<sup>41</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 13 July 1967, 1313 (Viscount Dilhorne).

<sup>42</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 10 May 1966, 61 (Earl of Kilmuir): '[o]ut of 96 cases in prison for homosexual offences ... only 15 were cases of genuine inverts ... the others ... committed the act from motives of sensationalism or for money.'

<sup>43</sup> South Australia, *Parliamentary Debates*, Legislative Council, 16 September 1975, 744 (Andrew Whyte).

<sup>44</sup> Michael Barnard, *The Age* (Melbourne), 28 November 1980 in Victoria, *Parliamentary Debates*, Legislative Assembly, 4 December 1980, 4277 (H M Hamilton). He went on to add in his own words that 'homosexual groups — whether intentionally or not, are bent on the destruction of the nuclear family unit in our society ... the whole basis of our present culture'.

<sup>45</sup> Setting out the hidden (but cleverly spotted) agenda of these false inverts is the task of conservative politicians in all the debates. The following speech in the South Australian Legislative Assembly (South Australia, *Parliamentary Debates*, Legislative Council, 10 September 1975, 632 (Jessie Copper)) is a concise version of the speech given hundreds of times during the decriminalisation debates (for a recent incarnation, one only needs to refer to the latest Tasmanian Upper House reports):

homo-sexuals wish or should be allowed to live free from criminal persecution, but rather that any are ever in the position where they can be prosecuted at all. Rather than being related to autonomy and freedom to make choices, this view of privacy is all about maintaining the appearance of conformity with dominant norms:

Intercourse in private is not found out. If it is found out, it cannot have been in private.<sup>46</sup>

When two consenting adults are alone, when they do not cause any scandal, when there is no witness is there any problem? ... For them to be arrested, they will have to have been seen by someone ... [so] according to the law nothing has changed.<sup>47</sup>

This is not the only problem faced by conservatives over the decriminalisation issue. The nexus between morality, privacy and the law also creates inconsistencies within conservative imaginings about social life. For example, it is hard to find consistency in the demands of conservative politicians for the retention of morality in public policy; the same politicians who argue against legalising homo-sex and abortion almost invariably argue in favour of fewer restrictions on prostitution and believe that extramarital sex should not be subject to the law.<sup>48</sup> On the other hand, selective morality is hardly a conservative phenomenon — the desire to separate the public from the private when it comes to the economy, for example, is certainly not restricted to those politicians who have been termed ‘conservative’ for the purposes of this article. However, despite these difficulties, it is true to say that decriminalisation debates are characterised by strong sustained attacks by conservatives on the loss of morality from the law, combined with arguments to the effect that the state does (and should) have correct (ie

The passing of this law is intended by many people to make it possible for homosexuals to use our newspapers for advertising purposes, to commend the prostitution of the human body, to preach their filthy practices to our school children, even those at primary level, and to attempt to make their depravity ... normal. For the last year, the world at large and Australia in particular have been inundated with propaganda aimed at making harlots, lesbians and prostitutes accepted as respectable women, and at making homosexual males and sodomists accepted as normal men. What is the origin of this diabolical campaign to destroy our home life and our self respect as a people? One can be as sympathetic as one likes to the genuinely sick persons, but to make laws which will give complete freedom to the devil's disciples in our community to destroy all the decency of our lives is quite another thing.

<sup>46</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 26 November 1958, 454 (Jean Mann).

<sup>47</sup> Canada, *Parliamentary Debates*, House of Commons, 16 April 1969, 7615 (Mr René Matte).

<sup>48</sup> See, eg, United Kingdom, *Parliamentary Debates*, 4 December 1957, 790 where Earl Winterdon said that ‘it is no doubt true that some homosexuals, but not all, are so constituted by nature that they cannot help being homosexual. But is that a reason for altering the law and making it easier for them?’ Later in his speech, Earl Winterdon turned to prostitution commenting that ‘[i]t would be easy to pass a law which, however unpleasant and disgraceful a vice prostitution is, would be unjust and contrary to the English concept of justice’: United Kingdom, *Parliamentary Debates*, House of Lords, 4 December 1957, 794. Alternatively, one MP thought morality would be offended by decriminalisation but argued that prostitution should not be criminal because ‘it is a way of life deliberately chosen because it suits a particular woman's personality and gives her [the] freedom from irksome routine’ — going on to argue that rather than being exposed to the criminal law, she should be given every encouragement to keep to traditional areas of female activity: United Kingdom, *Parliamentary Debates*, House of Commons, 26 November 1958, 372 (R A Butler, Secretary of State).

right-wing) opinions about morality and should exercise its power to enforce them:

The man in the street takes the ... view that those actions which the law condemns and punishes are wrong and that those actions that the law does not condemn and punish are right.<sup>49</sup>

Decriminalisation ... is of course equal with legalisation .... I know of no law which distinguishes between tolerating, accepting, welcoming, or condoning certain actions that are not an offence.<sup>50</sup>

It is important to note that this conflict over the separation of law and morality is only indirectly about homo-sex. While for liberals the rhetoric (if not the reality) behind the decriminalisation of homo-sex is an instance of our progress towards enlightenment and freedom, for conservatives it signifies a collection of fears about the secularisation of society and the nature and direction these new societies will take. As was stated in the introduction to this piece, the struggle is for definitional power over law and its role in society. The conservative belief spelled out in the decriminalisation debates, that law is necessary for the upholding of a uniform morality, springs from the nature and dominance of the Christian faith in English and Australian societies; specifically that temptation must be fought against and that the traditional method for enforcing this has been the power of sanction and the fear of punishment. The removal of morality from law (in this case criminal sanctions against sodomy), in effect oversees the removal of the central administrative role of the state in upholding Christian religious belief:

[T]hat such radical changes could thus be proposed reveals the deep moral revolution which has shaken Anglo-Saxon democracies, brought about mostly by advocates of the 'new morality' and the worshippers of the new god of science, who have succeeded in invading our institutions, universities, public schools, churches, communication media of press, radio, and television, without overlooking our political parties .... These so-called reformists claim that God is dead, that there is no moral law of divine origin, and that therefore perversion and crime not only have equal rights with Christian morality but actually have superior rights; which the reformists explain by claiming that Christian morality violates the right of peoples of the post-Christian era to do as they please.<sup>51</sup>

I wish that to tell people that such conduct is a sin against God would be a wholesome and strong deterrent but for a big section of the people especially in the larger towns and cities of England, it means nothing at all; God is so irrele-

<sup>49</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 11 February 1966, 800 (Cyril Black).

<sup>50</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 15 November 1977, 3569 (Andrew Mensaros).

<sup>51</sup> Canada, *Parliamentary Debates*, House of Commons, 16 April 1969, 7666 (Roland Godin), quoting Norman St John-Stevan in *La View, la Mort et la Loi*. Note he also makes much of the marital status of the Bill's sponsor: 'that this [Bill] should be ... introduced by ... a bachelor ... was understandable. The people who knew the Hon. Member as a comical character ... considered this [Bill] with a smile, believing it was a joke': Canada, *Parliamentary Debates*, House of Commons, 16 April 1969, 7663 (Roland Godin).

vant to them and so remote from their thought that he does not enter into the corners of their life.<sup>52</sup>

It is clear from even a brief perusal of the debates that this view has little official support. The dominant ideological position articulated in the debates is that state institutions have nothing to do with creating or maintaining individual morality,<sup>53</sup> and conservative politicians who attempt to link morality and law are ridiculed:<sup>54</sup>

[The] extremes in this debate ... highlight the great differences in approach to this sensitive issue between [us] ... this side [is] scholarly, sensible and rational and very compassionate ... members opposite resorted to fear mongering ... homophobia ... [and] hysterical fears.<sup>55</sup>

[The Opposition's] ... comments were ill informed, narrow and totally intolerant. I wonder whether those who oppose homosexuality so vehemently ... are suppressing their own sexuality.<sup>56</sup>

That these accusations of being old fashioned and irrational have real effect is evidenced by the way that conservative politicians respond. Unable within the prevailing structure to retaliate with counter-claims of hysteria and irrationality, they attempt to reclaim 'rational argument' and to speak through the powerful 'neutral' language of science:

I do not want to deal with the Bill with any degree of emotion. We are here to pass legislation. So I turn now to what seems to me to be a grotesque Bill ...<sup>57</sup>

If members do not accept the evidence from me — being a conservative ... I will cite remarks by ... the Sex Discrimination Commission.<sup>58</sup>

<sup>52</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 4 December 1957, 816 (Lord Bishop of Carlisle).

<sup>53</sup> See United Kingdom, *Parliamentary Debates*, House of Commons, 19 December 1966, 1112 (R Gresham Cooke):

When I was a young man I learnt something about the law. One of the things I learnt was that there were two circles; the circle of law and the circle of morality. They intersected to a certain extent but not by any means the whole extent. There was a large field which was covered only by morality and not by law.

See also Canada, *Parliamentary Debates*, House of Commons, 16 April 1969, 7633 (John Turner, Minister for Justice): 'Law and morals are two separate disciplines involving two separate philosophical propositions.'

<sup>54</sup> Canada, *Parliamentary Debates*, House of Commons, 16 April 1969, 7616-17 (Steven Otto). One Victorian MP has quoted biblical stories to validate his claim that ancient judeo-christian morality is not relevant to today, claiming '[w]e must look only to modern secular law applicable to the preservation of tolerance in a pluralistic society': Victoria, *Parliamentary Debates*, Legislative Council, 18 November 1980, 4289 (J V Guest).

<sup>55</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 7 December 1989, 6367 (Pamela Buchanan).

<sup>56</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 7 December 1989, 6359 (Ian Alexander).

<sup>57</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 19 December 1966, 1080 (Walter Elliot).

<sup>58</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 7 December 1989, 6348-9 (Andrew Mensaros).

Such ridicule is a traditional part of the struggle for ideological dominance: the creation of seamless 'always-already-existing' belief structures requires that any opposition which does occur must appear baseless and irrational. By the end of the decriminalisation debates it almost seems as if homo-sex has *always* been an acceptable everyday fact of social existence:

As I see it, the rightness or wrongness of this proposed change in the law is timeless. The proscription on homosexual acts between consenting adults in private is, in my view, a bad thing today, just as it was bad law twenty or thirty years ago.<sup>59</sup>

It is important to realise that this ideological process, whereby a new feature comes to be seen as trans-historical and universal, operates by visibly excluding certain views and thus building a central position which appears rational and neutral, when in reality that may be far from the case. The obsession with disease, lack of self-control, and fears about the promotion of homosexuality that dominate the decriminalisation debates are illustrations of this point. These concerns and many others are seen as valid, rational concerns within a discourse which has been structured around public (and especially child) safety. The 'rationality' of these concerns is directly linked to the radical (or hysterical) excessively religious views that have been *seen* to be screened out.

### III A BRIEF DIVERSION: ON THE IMMUTABILITY/SOCIAL CONSTRUCTIONISM DEBATE

The demand that homo-sex remain invisible is centred around an acceptance (albeit absolutely silenced) that homo-sex is not necessarily and naturally repugnant but that continual societal sanctioning is required to make it so. An examination of this phenomenon (crucial in the construction of any outsider identity) demonstrates the extent to which liberal notions of sexuality have been altered after engaging with conservative discourse on the social construction of sexuality.

#### *A Liberal Immutability*

Liberal politicians entered the debates with a medical/scientific fact base which fixed sexual identity at birth.<sup>60</sup> This notion of immutability is central to liberal

<sup>59</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 May 1984, 698 (Nick Greiner, Premier).

<sup>60</sup> The medicalisation of homo-sex and sexuality has been covered so well elsewhere that it does not really need to be repeated here: see Foucault, above n 21, and Jeffery Weeks, *Sex, Politics and Society: The Regulation of Sexuality Since 1800* (1981) for introductions to this area. The debates clearly highlight the growing dominance of the view of the 'other' as the result of biology or social conditions rather than sin or immorality. Liberal politicians talk about vulnerable minorities in need of protection. For example, see Dr David Owen who painted a tragic picture of the homosexual toward whom he was aiming law reform; within one column the words 'suicide', 'unhappy lives', 'haunted existence', 'tortured souls', 'mentally unstable', 'anxious' and 'nervous' occurred: United Kingdom, *Parliamentary Debates*, House of Commons, 19 December 1966, 1111 (David Owen). In liberal society it is only considered just to punish behaviour which the perpetrator had some control over, and since homosexuality had status as a medical condition of some kind, criminal sanction of the acts that led from it were inappropriate.



arguments about minority status; it explains both the lack of fear of real change (at four percent of the population, what is there to worry about?)<sup>61</sup> and the compulsion to reform. Choice plays a large role in the liberal legal system; individuals who choose to break social norms can be punished, those who have no choice are judged according to a different standard — thus insanity, duress, self-defence and uninformed consent are all instances where the consequences of actions will usually be alleviated because of a lack of free will. This notion of choice is particularly clear in the decriminalisation debates:

If homosexuals are what they are by birth, or through early environment, and are not in themselves deliberately vicious men, they should not be punished for indulging in what are to them their natural desires, so long as they do not do harm to others.... To punish in such circumstances is to persecute ... a minority.<sup>62</sup>

Once viewed in this light, the liberal politic allows no other result but the repeal of criminal sanctions. However, if it was as simple as that, decriminalisation should have occurred at the turn of the century. More was needed than just a medical status. The development and acceptance of the medical status of homosexuality went hand in hand with the discovery of various other facets of homosexual subjecthood, which together worked to render (his) presence insubstantial and unthreatening.

One of the most important of these discoveries was the 'realisation' by reformers that the homo-sexual was in fact essentially asexual — an interesting development which simultaneously rendered the reforms both moot *and* palatable in the communal imagination. The adoption of a strict distinction between act and identity is a strong part of liberal homo-sex discourse, and by maintaining a silence around sex and focusing instead on the 'humanness' and dignity of the

The removal of homo-sex from the list of psychiatric disorders made no substantive impact on the justification of reform in Australia. While MPs recognised the change they still argued, for example, that '[w]hatever the cause/s for the emergence of the homosexual orientation, the individual is not personally responsible for his particular orientation, being the subject or victim of strong psychological forces beyond his control': South Australia, *Parliamentary Debates*, Legislative Council, 10 September 1975, 632 (John Cornwall). This notion of choice versus disease poses real difficulties for conservatives, and also provides another example of how contradictory elements can be woven into an overall picture: see, eg, Canada, *Parliamentary Debates*, House of Commons, 16 April 1969, 7617 (Theogene Ricard): '[instead of] legalising homosexuality why do we not treat the sick? ... [it is] imperative to cure those afflicted with such a sinful disease'; or, Canada, *Parliamentary Debates*, House of Commons 16 April 1969, 7667 (Mr Léonel Beaudoin): '[there is] not a single minister who can tell us which public or private associations ... have favoured this law and if by chance homosexuals made such representations they would have to be ignored for in my opinion homosexuality is a psychological illness.' In linking sin and disease we see an attempt to meld that part of the homosexuality-as-biology argument, which relates to weakness into a view of homosexuality as a choice, so that at precisely the same time that it is denied to be a real psychological illness, it is also accepted that it is only suffered by those who are biologically weak in some way and thus not fully responsible for that state (and thus the 'love the sinner hate the sin' theme in conservative Christian discourse).

<sup>61</sup> See, eg, Victorian MP William Landeryou who considered (unlike his staunch opponent H M Hamilton) that '4-5 percent of the population' could hardly 'bring down capitalism': Victoria, *Parliamentary Debates*, Legislative Council, 18 November 1980, 4283 (William Landeryou).

<sup>62</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 12 May 1965, 75 (Lord Arran).

'good' homo-sexual citizen, his otherness was watered down to a possible peculiarity, rather than an actual challenge to hetero-sex normality:

It is necessary to differentiate homosexuality from homosexual acts .... It may be useful to the House to have as a useful working definition that homosexuality is a condition in which sexual affection is attracted to persons of the same sex and ... [separated] entirely from the question of homosexual acts.<sup>63</sup>

[W]e must not confuse the condition with the practices and condemn both. Homosexuality is no more morally blameworthy than heterosexuality or an inconvenient condition like claustrophobia or any other natural propensity which heredity or environment bestows on us ...<sup>64</sup>

[A popular fallacy exposed by the report] is that male homosexuality always involves sodomy. In fact ... the great majority of homosexuals merely indulge in an affectional relationship ...<sup>65</sup>

[A]pparently most of them are quite harmless and do not practice the actual homosexual activities ...<sup>66</sup>

I believe that ... [anal sex] does stand in a class by itself and is almost different in kind from other homosexual offences ... many active homosexuals really feel that in that extreme offence there is a degree of depravity to which they are thankful not to have fallen, or in which they are especially reluctant to be partners.<sup>67</sup>

As most homo-sexuals (read, 'real' homo-sexuals) are not at all interested in the sexual acts concerned, we are left to wonder why decriminalisation was such a burning issue to begin with! Further, this reluctance to talk sex and the reliance on medicalisation to create the weak victim image that is most appropriate to the majority/minority paradigm, provides a stark contrast with right wing rhetoric, where every little thing the homo-sexual does is sexual.<sup>68</sup>

<sup>63</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 26 November 1958, 408 (Sir Hugh Linstead).

<sup>64</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 11 February 1966, 836-7 (Richard Wood).

<sup>65</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 26 November 1958, 369 (H Montgomery Hyde). For an interesting response to this kind of claim, see United Kingdom, *Parliamentary Debates*, House of Commons, 11 February 1966, 813 (William Shepherd) who says 'if only 25% of them resort to buggery, can we not get them to do what the other 75% do?' The conservative fascination with statistics and exactly what homosexuals do in bed will be discussed below.

<sup>66</sup> Victoria, *Parliamentary Debates*, Legislative Council, 4 December 1980, 4276 (H M Hamilton). He continues: 'They are usually people of an artistic and sensitive nature. Many of them seek employment in the education department or various branches of the arts. In these positions they are ideally suited and perhaps are the most appropriate people to be employed in the field.'

<sup>67</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 4 December 1957, 814 (Lord Archbishop of Canterbury).

<sup>68</sup> 'They are forcing their sexual way of life on to the other members of the community': South Australia, *Parliamentary Debates*, Legislative Council, 10 September 1975, 629 (John Burdett).

B *Conservative Constructions of Sexuality*

It is not that they are not able to have associations with the opposite sex; the truth is that there is an element of preference — they prefer one form of sexual gratification to another. This preference is dictated by selfish considerations in many cases — the attitude being that if one wants to have heterosexual associations it involves a woman and family life and all the responsibility that goes with it and that in many cases homosexuals are people who are seeking sexual gratification without responsibility.<sup>69</sup>

[Immutability] ... is vehemently rejected by all gay activists. They are incensed if one suggests they were born different ... they argue that it is not some biological defect but because of their right to choose how they have sex.<sup>70</sup>

Conservative politicians are vehemently opposed to the view of sexuality-as-biology because it fails to make sense within a framework that sets homo-sex out as a sin. Sexuality, they argue, is a learned response in humans, and an arena in which childhood, adolescence, and even adulthood are times of constant danger in which the individual is open to temptation and persuasion.<sup>71</sup> In essence they argue that homo-sexuality is potentially present in every childhood (and paradoxically that heterosexuality — the natural sexuality — must be produced through constant intervention). As everyone is capable of becoming either an invisible bi-sexual or a homo-sexual, strong borders must be developed and maintained to sort out who is, and who is not, 'other':

Time and time again, I have said that bisexuals are the great danger in the community ... [they] are the grey area ... [b]isexuality is already present in the heterosexual community ... and there is a great danger that it will spread even further. Who are bisexual people? They are not coming out of the woodwork. [M]any bisexuals travel extensively throughout the world ... many members of the travelling public are involved in homosexual acts.<sup>72</sup>

The construction of the homo-sexual as having remarkable seductive powers and a 'mafia-like' grip from which the newly swayed cannot escape is remarkably malleable. Homo-sexuals are disgusting but attractive, weak yet strong, and their 'practices' are at once wildly enjoyable and addictive and degrading and horrifying. Despite (his) weak (pale, sun deprived) physical presence, (his) grip is such that it can not be escaped, and (he) is easily capable of poisoning the national lifeblood and bringing civilisation to an end. The picture drawn of the

<sup>69</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 11 February 1966, 814 (William Shepherd).

<sup>70</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 7 December 1989, 6362 (James Clarko).

<sup>71</sup> The necessity to constantly ward off temptation is a strong part of the conservative creed. Consider this statement from the deputy leader of the National Party: 'As a married man in a normal relationship with my first and only wife, for twenty four years on 9th April, and as a man who has been able to control his passions over the years, I am totally opposed to any unnatural act such as that suggested by the proposed legislation': New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 May 1984, 765 (Ian Armstrong).

<sup>72</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 28 November 1990, 5492-3 (William Gunn).

ugly/seductive, weak/powerful, pathetic/corrupting homo-sexual in conservative discourse is that of a man driven by his (perverse) sexual habits, living both a haunted and pleasurable self-seeking existence. Likely to commit suicide by the age of 40, but until then refusing the help offered to him, he chooses instead to revel in his miserable 'lifestyle':

Their type of sexual behaviour gives them great enjoyment and that is all they care about.<sup>73</sup>

In many ways conservative imaginings on homo-sex revisit the classic vampire tale; not-quite-humans who prey on innocent citizens under cover of dark; and this vampire theme is continued in the removal of human attributes from same-sex love:

[T]he victim is feeding on his habit and as he does it increases his appetite ...<sup>74</sup>

If we remove love from sex I suggest that we will destroy human personality ... we are seeing human beings behave at an animalistic level ... sex without love is immoral. People are to be loved and not used, and that applies to both sexes. [H]omosexuals are predators ... in matters of sex. Homosexuals prey on juveniles. It is something that spreads like the plague.<sup>75</sup>

Men are sucked in and held on to as it were by an octopus of corruption .... [We must] fight those who would encircle them with their corrupting chains ... homosexuals should be kept on a leash to prevent them from practising.<sup>76</sup>

They are in my opinion a malignant canker in the community and if this were allowed to grow, it would eventually kill off what is known as normal life ... humanity would eventually revert to an animal existence.<sup>77</sup>

The non-human nature of homo-sex means that sex acts can be analysed and interpreted with the statistical accuracy of science and the neutrality that this provides without having to accompany the findings with any relational context:

Anal intercourse (whether by consent or not) is a vicious act and always damaging to the recipient ... [a report gives the following] percentages of those who have engaged in each practice ... 100 percent have been involved in kissing, ... 100 percent masturbation by self, 100 percent in sensuous touching, 98 percent in mutual masturbation, 95 percent in anal intercourse without condoms, 95 percent in fantasy with pornography, 86 percent in oral-anal contact, 81 percent in anal intercourse with condoms, 80 percent in fingering the rectum, 79 percent in anal intercourse without coming, 53 percent in sex aids, 51 percent in cock rings ... 36 percent have been involved in SM-bondage without blood, 35 percent in fisting the rectum, 29 percent in watersports, 12 percent in

<sup>73</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 29 June 1960, 1479 (A D Broughton).

<sup>74</sup> Victoria, *Parliamentary Debates*, Legislative Council, 3 December 1980, 4274 (H M Hamilton).

<sup>75</sup> Canada, *Parliamentary Debates*, House of Commons, 16 April 1969, 7639 (Mr W G Dinsdale).

<sup>76</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 4 December 1957, 797 (Lord Bishop of Rochester).

<sup>77</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 26 November 1958, 417 (Mr F J Bellenger).

SM-bondage with blood, and 8 percent in scat, that is, sex with faeces. This is not a couple of nice old men living in a house, is it?<sup>78</sup>

I have previously mentioned the practices indulged in by these homosexuals, such as water spouting and fisting .... If there are homosexuals in this building we are all at risk of getting AIDS. I have this information here .... Fisting consists of placing one's fist in the anus of one's sexual partner. In the United States some people put a whole arm in.<sup>79</sup>

Didi Herman has questioned the role that such graphic discussion of sexual practices plays in (specifically) New Christian Right discourse in North America. She argues that this relaying of perceptions, speculations, and imaginings about (lesbian and) gay lives acts as pornography for those investigating and those listening:

The relish with which these activities are related, and endlessly repeated, in graphic detail, complete with explicit descriptions of various bodily fluids (and solids) reveals the ways in which, arguably, conservative Christians express their own sexual needs and fantasies, and in so doing, produce pornographic text.<sup>80</sup>

While such material is seemingly intended to disgust and shock its recipients, at the same time it works as 'approved' pornography. This provides a possible explanation for one of the central contradictions that privacy poses for conservatives; that while they claim with one breath that the very bodies of homo-sexuals are not suitable to exist in the public realm for fear that hetero-sexual men will find their presence desirable, at the same time they are involved in endlessly claiming, speculating and hypothesising about the specific nature and practice of homo-sex.

### C *Recruitment and the Need for Sanctions*

I have heard and seen much evidence that many homosexuals are militant and assertive in their attitudes and have a great proselytising zeal ... in universities and other places where they have access to young people, homosexuals use very persuasive methods to seduce young males to their way of life.<sup>81</sup>

The rhetoric of the conversion of the innocent is a major theme in all debates about homo-sex — its discussion by all sides to the decriminalisation debates provides the clearest example of the way in which dominant ideologies can be

<sup>78</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 November 1989, 4330-1 (David Wordsworth).

<sup>79</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 7 December 1989, 6364 (James Clarko).

<sup>80</sup> Didi Herman, *Rites of Passage: Struggles for Lesbian and Gay Legal Equality* (1994) 91. Herman notes that this is not a novel point — that various writers have noted how in lesbian custody decisions, fascinated judges have related details of 'lesbian sex' in their decisions: Mary Eaton, *Theorising Sexual Orientation* (1991) LLM Thesis, Queens University, 199. See below in part IV for continued discussion of this theme.

<sup>81</sup> South Australia, *Parliamentary Debates*, Legislative Council, 10 September 1975, 628 (John Burdett).

captured or changed by subversive (or 'reverse') ideologies. While social constructionism is purportedly removed from legitimate discussion because of its failure to acknowledge scientific fact, the debating process invariably ends with the legislative incorporation of the belief that many supposedly hetero-sexual adults and all children are vulnerable and inordinately open to sexual experimentation and influence from homo-sexuals. This results in a situation whereby politicians, wholly in favour of law reform on the dual grounds of 'privacy-as-autonomy' and immutability, make statements which are identical in effect to those made by politicians called 'fanatics' in the debating chamber, all the while failing to recognise the inconsistency inherent in their own arguments:

As it is mandatory for parents to send their kids to school where they have no control over what they are taught, it is essential that they be reassured that they will not be taught about deviant lifestyles.... [This anti-proselytising amendment] ... would ... cover homosexual activists who disseminate their literature among children with the aim of persuading them to adopt homosexual sexual practices.<sup>82</sup>

The debates illustrate a recognition of children as sexual beings who are open to various interpretations of sexuality and, at the same time, reinforce the idea that children have no ability to distinguish between natural and unnatural. In effect, conservatives argue (and liberals end up supporting the belief) that the category 'unnatural' is a learned social category and not something which occurs outside of the social context:

[Homosexuality is] to most school boys ... a passing and normal phase.<sup>83</sup>

In other words, the principle conservative concern seems to be that if there is no naturally occurring way to distinguish homo-sexual behaviour as a wrong, then the removal of the chief signifier of the abnormality of that behaviour, criminal sanctions, is a very real threat to the hetero-sexual *status quo*.

#### IV MORE COMPLICATIONS AND CONTRADICTIONS

We can now return to where we started with all of this — the repeatedly stated desire of liberal politicians to 'disappear' homo-sex. By now it is clear that that desire was multi-faceted and influenced by constructionist ideas which seem at first to be incompatible with the essentialist majority view. The adoption of the privacy-as-secrecy view ensures minimised opportunities for the public expression (and thus persuasive possibility) of homo-sex in a way which is quite unnecessary if homo-sex is genuinely believed to be immutable and as naturally disgusting as liberal politicians claimed it to be. The end result of this mingling of views is that decriminalisation took on the role of silencing the debate:

<sup>82</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 May 1984, 778 (Guy Yeomans).

<sup>83</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 4 December 1957, 747 (Lord Moynihan).

One of the most powerful arguments for the Bill is that it would finally remove the whole issue from the sphere of the public domain to that of private minority interests, which is where it belongs.<sup>84</sup>

[The publicity given to the Oscar Wilde] trial led to much of the excitement, the fetid talk about the subject, and in fact, so far from the law's preventing people from indulging in this vice, it may well have had the effect of promoting excitement and of inducing people to break the law just 'for the hell of it.'<sup>85</sup>

In other words, politicians envisaged privacy as a 'formal' right; a right which resolves or attempts to resolve rising tension between, on the one hand, liberal ideological commitments to justice, equal distribution of power and social stability, and on the other hand, developing perceptions of actual injustice (resulting from the medical evidence which stated that homo-sexuality was involuntary, as we have already discussed). Application of 'formal' privacy rights are often politically desirable. Justice can be seen to be done even as the actual effects of privacy (on the development of autonomy and self-government) are invisible and impossible to judge. The end result is that those whom privacy affects directly have no legitimate voice with which to speak.<sup>86</sup> The sense of grievance will either be removed (homo-sex is now legal) or the focus of that grievance will be drawn away from the legal system itself (law is not responsible for inequality: societal attitudes are). Either way there will be difficulty in measuring substantive social change or articulating the need or the steps necessary to achieve it. The decriminalisation debates are in this sense firmly embedded in the *status quo*.

Complicating this whole thematic even further, and related to the pornography issue discussed earlier, is an issue of crucial significance in conservative (Christian) discourse: that while conservatives strenuously assert that homo-sex is an abomination which should not be discussed or seen, the possibility that it could actually succeed in becoming truly invisible is equally as dangerous, if not more so, than its constant revelation in public. While conservatives agree with liberals that the public revelation of homo-sex(uality) leads to a dangerous relaxation of morality, many argue that the 'disappearing' of homo-sex from the public realm is not an acceptable solution either. More is needed than for homo-sex(uals) not to be seen or heard or even to cease to occur/exist at all. What is needed is for the space that 'sodomy' provides to create social anxiety and thus resistance. Where privacy/invisibility exists, there follows the situation of *not knowing* whether or not homo-sex is occurring, which makes effective condem-

<sup>84</sup> United Kingdom, *Parliamentary Debates*, House of Commons, 19 December 1966, 1121 (Norman St John-Stevan).

<sup>85</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 10 May 1966, 620 (Lord Arran). See also Lord Bishop of Leicester, who stated that there was a 'danger of coarsening public taste merely by the prolonged public discussion of these matters', United Kingdom, *Parliamentary Debates* House of Lords, 13 July 1967, 1308.

<sup>86</sup> Consider the parallels between this scenario and the right to abortion in the US context where, since a Supreme Court decision in 1989, neither federal nor state funded agencies have been required to provide abortion facilities; while women still have a privacy-based right to abortion, in practice, that right is being denied to those without private health insurance.

nation (with all the rallying cries and public campaigning for the 'return' to 'family values' that comprises much of the conservative Christian agenda) impossible.<sup>87</sup> Thus homo-sex is at the centre of a paradox in conservative Christian discourse — its existence creates the anxiety that in turn creates the desire to organise against it. There must be continual discussions and vivid explanations to bring it into existence, and yet these conversations bring with them the risks of increased tolerance and growing acceptance of difference. Whether the cessation of homosex(uality) can really be a genuine goal for a social movement whose imaginings and research into other erotics are so crucial in the gaining of support needed to fight other fronts is highly debatable. The plaintive repeated cry below seems to sum up these contradictory impulses:

The Minister has chosen the easiest way, he has simply closed his eyes, we shall legalise the law and we shall not hear anything more about homosexuality.<sup>88</sup>

## V CONCLUSION

Several things have hopefully become a little clearer in this necessarily brief attempt to unwind the use of privacy in decriminalisation. It seems that differing understandings of privacy result from, and are inextricably linked to, different political understandings of homo-sex(uality). Liberals are able to believe in the possibility of a sexually autonomous self having also constructed homo-sexuals as asexual and secretive and non-threatening. Because conservatives construct homo-sexuals as totally sexual, and possibly also because they need this totally sexual being to exist for other purposes, they are unable to conceive of privacy as a safe space for sexuality. These contesting ideologies have merged in such a way that sexual mutability and recruitment have been absorbed into dominant discourses on homo-sex even though it goes against the 'evidence' that medicine provided and even though on paper it looks to render the liberal commitment to autonomy almost meaningless.

While the shared meanings that arise out of parliamentary debates have a tendency towards incorporation of right wing beliefs at the expense of liberal values such as freedom and equality, the debating process has failed to a large extent to monopolise the identity creation process which was certainly part of the intention of all involved. The construction of an 'other' against which heterosexuality can be consolidated is never simply prohibitive; the gaps and inconsistencies within law allow space for resistance. While the use of privacy has led to the formal implementation of such horrors as the preamble to the Law Reform (Decriminalisation of Sodomy) Act 1989 (WA) mentioned at the beginning of this piece<sup>89</sup> and section 28 of the Local Government Act 1988 in the United

<sup>87</sup> See generally Herman, above n 80, for discussion of the conservative Christian 'agenda' — the creation of the Christian nation state complete with a religiously driven apparatus to guide it.

<sup>88</sup> Canada, *Parliamentary Debates*, House of Commons, 16 April 1969, 761 (Martial Asselin).

<sup>89</sup> Above n 2.



Kingdom (excluding Scotland and Eire),<sup>90</sup> the formal act of such silencing also creates tangible spaces in which we can begin to rethink our deployment of strategies such as arguments based on privacy and, possibly more importantly, our demands of law in social reform.

<sup>90</sup> Section 28 of the Local Government Act (1988) inserted a new section 2A into the Local Government Act 1986 which prevents local authorities from promoting homosexuality or publishing material with the intention of promoting homosexuality. Additionally, local authorities are prevented from promoting the teaching in any maintained school of the acceptability of homosexuality as a 'pretended family relationship.' For a detailed coverage of the struggle surrounding the enactment and implementation of 'the clause', see Tara Kaufman and Paul Lincoln, *High Risk Lives: Lesbian and Gay Politics After THE CLAUSE* (1991).