

**Judicial Review, Judicial Activism, Queer Rights, and Literature:  
A Conversation Between the Honorable Michael Kirby<sup>1</sup> and  
Professor Ruthann Robson<sup>2</sup>**

Preface by Professor Kate Nace Day<sup>3</sup>

Introductory Remarks by Dean Alfred C. Aman<sup>4</sup>

Closing Remarks by Christina Miller<sup>5</sup> of the Massachusetts Lesbian and Gay  
Bar Association

*Preface*

*They lose their senses. Sight goes. They have no time to look at pictures.  
Sound goes. They have no time to listen to music. Speech goes. They have no  
time for conversation. They lose their sense of proportion on the relations  
between one thing and another. Humanity goes.*

Virginia Woolf<sup>6</sup>

*. . . the best moments at a law school happen in conversation.*

Kim Brooks<sup>7</sup>

Poets and writers often work unseen, shuttered away in rooms and silences  
so wide and clear that to speak in this kind of silence one must have the

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1. Retired Justice of the High Court of Australia. First appointed to the Australian judiciary in 1975 and appointed to the High Court in 1996, Justice Kirby is Australia's longest serving justice. Since 2004, he has been a member of the UNAIDS global reference panel on HIV/AIDS and human rights. Justice Kirby has also served on numerous educational institutions, including the board of governors at the Kinsey Institute at Indiana University.

2. Professor of Law and University Distinguished Professor, City University of New York School of Law. Thanks to Suffolk University Law School Professor Kate Nace Day for inspiring and arranging this conversation, to the Queer Alliance and *Law Review* students at Suffolk University Law School for organizing the event, to the *Law Review* Editors and Staff for their work on this publication, and to CUNY School of Law students Tanya Kessler, Class of 2009 and Emily Reigel, Class of 2011, for research assistance.

3. Professor of Law, Suffolk University Law School. Special thanks to Nicholas MacInnis and Heather Thomson, Lead Article Editors of the *Suffolk University Law Review*, and Matthew Gavin and Elisa Filman, Presidents of the Queer Law Alliance, for their work on the Conversation and its publication.

4. Dean of Suffolk University Law School from 2007-2009. Alfred C. Aman, Jr. is currently the Roscoe C. O'Byrne Professor of Law at the Indiana University School of Law-Bloomington.

5. Ms. Miller is the Chief of the Massachusetts District Courts and Community Prosecutions, and co-chair of both the Massachusetts Lesbian and Gay Bar Association, and the Boston Bar Association's Criminal Law section.

6. THREE GUINEAS 92, 109-110 (1938).

7. *Pedagogy: Feminists, Angels, Poets and Revolutionaries*, 8 N.Y. CITY L. REV. 633, 653 (2005).

courage to listen to oneself. Visual artists celebrate the light and solitude of their studios, the being alone with one's self in the world. There may be art on the writing room walls or music playing in the studios, but there is rarely conversation. Unseen and unheard, artists and writers are free alone to devolve everything they are into the work they make.

Law more often proceeds in formal spaces filled with art, carpets, and ceremonial gestures where language moves between people, much as it does in conversation. Law, though, imposes a structure on its dialogue, an exchange of questions and answers that mirrors the form of legal reasoning and the internal dialogue seen throughout appellate cases. In courtrooms and classrooms, the language of law defines a geography where arguments and strategies about hierarchies, authority and legal categories displace concerns with justice and caring, social context and ethical dilemmas. Sadly and too often, the messy details of law's human stories go unseen and unheard.

A conversation creates its own landscape, raises its own questions. One must listen. The resonances of language—talk of conscience, talk of power—make sidesteps, taking on the form of stories, taking on direction, movement, development, change. There are stories about nation states and leaders, disappointments and lessons, stories that begin with the Queen's birthday and end with one's truth in the world left unanswered. While events in our lives happen in time and sequence, in conversation their significance finds its own order, its own thread—forward and back, seldom in a straight line, changing with respect to each other in open talk about coded language. A shoulder is offered, a shoulder distinguished as different positions in different worlds ask different questions. There is discovery and the promise of revelation in charged meeting points of individual human memories—talk of the young and old, past and present, living and dead. All that is seen and heard, during its moment.

*Kate Nace Day*

ALFRED C. AMAN: A warm welcome to you all. Today's forum is path breaking and creative in a number of ways. It is the first time in which the Suffolk University Queer Law Alliance has joined forces with the *Suffolk University Law Review* to work together on publishing a future issue of the *Law Review*. This issue will deal with a very important set of topics: judicial review, judicial activism, gay rights and literature, and these topics will not be explored in the traditional manner—i.e., a set of papers or a debate on some of the more contentious aspects of these issues. Rather, today's format will be a conversation initially between two enormously talented and knowledgeable individuals—Justice Michael Kirby and Professor Ruthann Robson—whom I shall introduce in a moment. That conversation will enable them to range widely and deeply over a range of issues which we shall transcribe for

publication in the near future. Christina Miller, whom I shall also introduce in a moment, will make some concluding remarks and then we will open this conversation to include all of you here today. To that end, we invite you all to stay for the reception that will follow these proceedings.

We are fortunate indeed to have such remarkable participants in our conversation today. Let me welcome and introduce them. Justice Michael Kirby has recently retired from being one of seven justices on the High Court of Australia. He is Australia's longest serving justice, having been first appointed in 1975. He has been the recipient of many well-deserved awards, including the laureate of the UNESCO prize for human rights education. Since 2004, he has been a member of the UNAIDS global reference panel on HIV/AIDS and human rights. In addition to these international activities, Justice Kirby has served on numerous educational institutions, including the board of governors at the Kinsey Institute at Indiana University.

As your program notes, famously, his recreation is work. I must say that I took full advantage of his hobby. He has done little else but work since he has arrived at Suffolk: he has taught a class and read huge amounts of new materials in preparation for the events today and there will be more tomorrow. But let me say that as someone who has had the honor and the pleasure of knowing Justice Kirby for some time and of hearing him on many occasions, this is a person that is always learning, always growing, and, lucky for us, always teaching. In his scholarly work, Justice Kirby is always in the moment, thinking about the issues of the day, trying to sort them out, trying to say something original about them that will be useful, wise and often courageous as well. This mirrors his career as a judge. As the Australia Attorney General stated so well when Justice Kirby stepped down from the High Court: "Alongside your extensive achievements and contributions to the law, to academia, and to the community, you will be remembered most for serving justice with a bold heart, a brilliant mind, and respect for the fundamental rights of all citizens." And anyone who knows Justice Kirby, has read his opinions, and has had the chance to listen to him, will know how powerful and true those words are. Welcome to Suffolk Justice Kirby.

We are also honored to have as an integral part of our conversation Professor Ruthann Robson. A warm welcome to you! Professor Robson is Professor of Law and University Distinguished Professor at the City University of New York, where she teaches in the areas of constitutional law and sexuality and the law. Professor Robson is well known for her legal scholarship which can take many forms. She also writes fiction, poetry, and creative non-fiction. She's the author of *Sappho Goes to Law School*<sup>8</sup> and *Lesbian Outlaw: Survival Under the Rule of Law*,<sup>9</sup> as well as a novel, *a/k/a*,<sup>10</sup> and short fiction collections, including

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8. RUTHANN ROBSON, *SAPPHO GOES TO LAW SCHOOL* (1998).

9. RUTHANN ROBSON, *LESBIAN OUTLAW: SURVIVAL UNDER THE RULE OF LAW* (1992).

10. RUTHANN ROBSON, *A/K/A* (1997).

*The Struggle for Happiness*.<sup>11</sup> The *New York City Law Review* recently published a symposium of her work, and you can find that in Volume VIII, Issue II of the law review.<sup>12</sup> We are delighted that she joins us today to participate in this conversation.

Our own Professor Kate Day was to moderate today's session but I am sorry to report that she was taken ill earlier today. I understand that all is well, but, unfortunately, she could not be with us this afternoon. I want to thank her for all of the hard work that she's put into this session and for so creatively helping to conceptualize this format and suggesting some of the directions it might take. I am so sorry that she couldn't be here to hear the fruits of her labors and to participate as moderator. We look forward to sharing these transcribed proceedings with her.

Lastly, let me say that when the conversation between Justice Kirby and Professor Robson finishes, Christina Miller will make some concluding remarks. Ms. Miller is the Chief of the District Courts and Community Prosecutions, and is a co-chair of both the Massachusetts Lesbian and Gay Bar Association, and the Boston Bar Association's Criminal Law Section. Welcome Ms. Miller. Let the conversation begin!

MICHAEL KIRBY: Well, perhaps I can start by, first of all, expressing my concern that Professor Day isn't here and hoping that she will be doing fine. We had breakfast with her this morning, and we were plotting and planning what we were going to do in this session. She's a tremendous spirit, and we have her to thank that we are here.

I am very glad to be here with Fred Aman, a friend of many years from Indiana University, where I served on the Kinsey Board, the board of governors at the Kinsey Institute. This was in a way, my way, as an Australian, of paying back a debt that I had for the research that Alfred Kinsey performed in the 1940s and '50s. Amazing to think of it, that this expert in the taxonomy of bees (gall wasps) should turn his attention, midlife, to the taxonomy of human beings. Kinsey's work rang around the world, and when I was a young boy reaching puberty, a word of Kinsey's research, his report on sexuality in the human male, sexuality in the human female, brought me a message in far away Australia that I was not alone. And it brought that message, in part, because of Kinsey, but, in part, because of the great constitutional traditions of this country. Kinsey was defended by the president of Indiana University, a wonderful scholar named Herman Wells. He actually took a very important part, after the War, in the foundation of UNESCO. So he was an internationalist, he was an intellectual, and he was a brave defender of university independence. And so that's where Fred Aman and I met.

I met Professor Robson in Sydney, Australia, where she was teaching for a

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11. RUTHANN ROBSON, *THE STRUGGLE FOR HAPPINESS: STORIES* (2000).

12. See Lynda Hall, *Ruthann Robson: Writing Life and Fiction Theory*, 8 N.Y. CITY L. REV. 401 (2005).

time. I regard her as a guru and a teacher. She is a wonderful writer, and I especially commend to the Americans here a magnificent essay that was given for my reading on judicial review and sexual freedom. It is published in the *Hawaii Law Review*<sup>13</sup>, and it gives the best explanation I have yet seen on why Americans have this schizophrenic anxiety about judicial review, and about the non-democratic character of judicial review. I have always been a bit inclined, being a child of *Marbury v. Madison*<sup>14</sup> in Australia, to tell Americans, “Get over it and forget about this anxiety, it is necessary to have an umpire.” That’s the way it is in most countries of the world. But it is a really insightful essay.

Professor Robson’s insights into constitutional law and into issues of sexuality lead me on to my last introductory comment which is this: I realize that many people in this room are heterosexual, and I honor the heterosexual people who have turned up. It’s very easy to stay away, because one doesn’t entirely understand things. And it is a terrific thing that we have heterosexual friends. All of the great reforms that have been achieved, certainly in Australia, have been achieved by or with the strong support, and majority support, of heterosexual people: ‘straight’ people. So it is great to have so many here. But also I welcome the gay people, and by that I include all of the queer community. As an old codger, I still find the word “queer” a bit in your face and, therefore, I don’t feel entirely comfortable using it. But I will probably lapse every now and again, and use it, because it is handy to have a word that encompasses all of the diverse groups of gays, lesbians, bisexual, transgender, intersex, etcetera, etcetera, that fall under the “queer” classification.

I am first and foremost a human being. I happen to be a gay man. I am greatly blessed by having a partnership with my partner, Johan van Vloten, a Netherlands-Australian man, who has been with me, and I with him, for forty years and three weeks. It is his seventieth birthday on Thursday of this week. And the greatest sacrifice, in fact, the only sacrifice, of my being here in Boston, at the insistent demands of your Dean, is that I will be away for his seventieth birthday. I feel a bit of a rotter for that. Yet if he could see all of your friendly and interested faces here with Professor Robson and me, I’m sure he would be partly assuaged. And so from him, and from the perspective of this very long relationship, I express thanks to those who see the importance of the issue of sexuality law.

And I especially would like to mention Justice Greaney who is here. I taught a class with him today. And I went back and read the opinions of all of the justices of the Supreme Judicial Court of Massachusetts in *Goodridge*.<sup>15</sup> I pay respects to all of them for their heartfelt endeavor to explain their different views. And I acknowledge, as an appellate judge of a very long standing

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13. Ruthann Robson, *Judicial Review and Sexual Freedom*, 30 U. HAW. L. REV. 1 (2008) [hereinafter Robson, *Judicial Review*].

14. 5 U.S. 137 (1803).

15. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

(almost as long-standing as Justice Greaney) that there are legal arguments both ways on this, as on most issues.

I am very glad to be here with Professor Robson. I value greatly her insights, and the insight of scholars, because in the busy work-a-day world of judges and practitioners, you often don't have time to think of the big conceptual issues. Ruthann Robson has been a marvelous teacher from the earliest days, long before sexuality and law became common, long before it became fashionable (if that it yet is). So I am specially proud to be here on this stage with her.

RUTHANN ROBSON: Thank you, Judge. And I would like to echo almost everything that you said, but actually—

MICHAEL KIRBY: Where did I lapse?

RUTHANN ROBSON: Well, actually, we met in the early '90s, and it was at an Australian Law Teacher's Association conference. I had been brought over from the United States, to speak on a plenary about sexuality and law. After my talk, I was sitting in the audience, and you came up to me and sat next to me, and said, "Hi, I'm Michael," and then you talked about some things. I had no idea who you were. After you departed, three or four people came up to me and said, "Do you know who you were talking to?" And I said, "Yes, some guy named Michael, I think he's gay. I'm not sure." And several people then said, "That is Michael Kirby, a noted jurist." So that is how we met, Judge.

MICHAEL KIRBY: So the gaydar worked, and my well-crafted disguise fell away under the watchful scrutiny of Professor Robson.

RUTHANN ROBSON: I just figured that was the only reason you were talking to me.

MICHAEL KIRBY: I think that was at the University of Adelaide, a tremendous University in Australia.

RUTHANN ROBSON: It certainly was, yes.

MICHAEL KIRBY: Well, South Australia is a state with a lot of German immigrants, and it was actually the first Australian state to decriminalize homosexual offenses. They had a premier, the leader of the government in the state, named Don Dunstan. He was a wonderful charismatic leader with a beautiful voice. He pioneered reforms in environment law, and consumer protection, and this and that, and also same-sex legislation. He later turned out himself to be gay. I'm sure you would have never picked that up with him. He was a great performer, and he showed what the parliamentary system can deliver. I think that is one of the themes that runs through your work, and is brought out in your essay on judicial review: that putting all of your eggs in the basket of the judiciary, as some legal scholars are a bit inclined to urge, because of their lack of faith in democratic legislatures, has its own risks. Maybe, as perhaps Vermont has taught in the last week or so, we should be more confident in the United States, that the legislatures will, with a little help and persuasion, and a little more candor by gay people, make the steps which are problematic in

the judiciary, simply because there it all depends so very much upon the relatively few people who make the judicial decisions.

RUTHANN ROBSON: Although there are issues about who makes the decision in legislative and the executive branches too, of course. Right now there is much discussion in the United States in terms of what President Obama will do, what he's willing to do, what he has political purchase to do. Many people are expressing disappointment, given his campaign stances.<sup>16</sup>

MICHAEL KIRBY: Maybe one has to be, as once was said about President

16. Barack Obama assured prospective voters in an open letter to the LGBT community on February 28, 2008 that he supported several issues important to queer communities:

I support the complete repeal of the Defense of Marriage Act (DOMA), a position I have held since before arriving in the U.S. Senate. While some say we should repeal only part of the law, I believe we should get rid of that statute altogether. . . . And as president, I will place the weight of my administration behind the enactment of . . . a fully inclusive Employment Non-Discrimination Act. . . . I have also called for us to repeal Don't Ask, Don't Tell.

See Posting of Alex Okrent to My.Barack.Obama.com, *Equality is a Moral Imperative* <http://my.barackobama.com/page/community/post/alexokrent/gGgJS> (Feb. 28, 2008, 11:53 EST). Many view these "campaign promises" as unfulfilled. The Obama Administration has not only not moved to repeal DOMA, the Justice Department filed a brief defending the Act from a constitutional challenge that the New York Times called "disturbing" in a high-profile editorial. See Editorial, *A Bad Call on Gay Rights*, N.Y. TIMES, June 16, 2009, at A20. The White House responded by issuing a short statement which asserted that the DOJ was merely doing its job and that, though the President supported the Act's repeal, such a repeal must be done legislatively. See Posting of Michael Finnegan to L.A. Now, *Mayors Criticize Justice Department Support for Defense of Marriage Act*, <http://latimesblogs.latimes.com/lanow/2009/06/newsom-calls-doj-support-of-defense-of-marriage-act-a-big-mistake-villaraigosa-expresses-concern.html> (June 14, 2009, 13:22 EST). This explanation was met with skepticism and anger. See Jonathan Capehart, *For Obama, a Hit and a Miss on Gay Rights*, WASH. POST, June 21, 2009, Columns (contending, "[t]he department could have fulfilled its obligation to defend the nation's laws without repeating ugly reasoning rooted in ignorance"). Likewise, President Obama has not urged the passage of a fully inclusive ENDA, currently in House committee. Serving to solidify the growing doubts held by many, the White House has, since the election, either removed or watered down language on its web site which alluded to these initial promises. See, e.g., Ali Frick, *White House Eliminated Pledge to Repeal Defense of Marriage Act from Website*, THINK PROGRESS, May 4, 2009, <http://thinkprogress.org/2009/05/04/white-house-website-doma/>; Posting of Ruthann Robson to Constitutional Law Prof Blog, <http://lawprofessors.typepad.com/conlaw/2009/05/executive-policy-by-website-do-changes-to-whitehousegov-matter.html> (May 2, 2009); Propublica.org, <http://www.propublica.org/ion/chanetracker> (last visited July 25, 2009). Additionally, since Obama's election to the presidency, even with Congressional urging, there has been no move to repeal DADT, disappointing some. Attorney and former Army infantryman James Pietrangelo II, himself dishonorably discharged, referred to Obama as, "a coward, a bigot and a pathological liar." See Mark Thompson, *Dismay over Obama's 'Don't Ask Don't Tell Policy*, TIME, Jan. 9, 2009, <http://www.time.com/time/nation/article/0,8599,1903545,00.html>; see also Shikha Dalmia, *Obama's Betrayal On 'Don't Ask, Don't Tell'*, FORBES.COM, June 3, 2009 <http://www.forbes.com/2009/06/02/dont-ask-dont-tell-opinions-columnists-gay-military.html>. Dalmia opines, "To backburner a major civil rights cause for which the country is ready, and that is well within his power to advance, in order to save the world first, bespeaks a profound megalomania." Ultimately, the administration's overall reluctance to act on GLBT rights issues has prompted anger and a backlash. See, e.g., Josh Gerstein & Ben Smith, *Obama Fails to Quell Gay Uproar*, POLITICO, June 18, 2009 <http://www.politico.com/news/stories/0609/23868.html>; Posting of Declan McCullagh to CBS News Political HotSheet, *Gay Rights Groups Irate After Obama Administration Lauds Defense of Marriage Act*, <http://www.cbsnews.com/blogs/2009/06/12/politics/politicalhotsheet/entry5084948.shtml> (June 12, 2009, 18:56 EST). Many queer rights activists have spoken out against what they see as a failure of the Obama administration to make good on promises made. See Amita Parashar & Michelle Garcia, *More LGBT Leaders Pull DNC Support*, ADVOCATE, Aug. 1, 2009, [http://www.advocate.com/news\\_detail\\_ekti\\_d92088.asp](http://www.advocate.com/news_detail_ekti_d92088.asp) (last visited July 25, 2009).

Ford, you have to be able to do two things at once, or several things at once. And that maybe means that in all of our societies, the courts have functions, the executives have functions, the legislatures have functions. In the Australian system, as in most Commonwealth countries, the executive sits in the legislature. Therefore, they are in the one framework really. If the executive wants it, it can normally get it through the legislature. But when last December, the Australian parliament enacted a whole raft of legislation in the federal legislature to get rid of the disadvantages for gay people in tax law, pensions, and the like, the attorney general said to me, "It went through with surprisingly little opposition." Now, I think the lesson of that is, it went through with "surprisingly little opposition" only because people had become more accustomed. And so when you ask, "Was *Goodridge* premature?" I read, for example, the minority opinion of Justice Sosman with respect because her main argument was, "It should have been left to the legislature, not enough deference to the legislature, and the test of not rationally supportable," or words to that effect, "was a very high test." It is a bit like the test in Australian administrative law that we know as the "*Wednesbury* unreasonable test."<sup>17</sup> The decision has to be so unreasonable that no reasonable decision-maker could make it. I suppose your "not actually supportable" test is that the challenged law is "so unreasonable that no reasonable legislature could conceive it."

When you think about the sequence of events, it may be that the Massachusetts decision was itself a move of a piece on the chessboard that itself stimulated other judicial, executive, and legislative moves. When the history of this is looked back at, in twenty or thirty years, when this contest is over, people will say, "Well, it was all part of a series of steps. They weren't pre-ordained, and nobody knew the sequence in which they would happen. But each one affected the next." That's certainly what happened in Australia. The sodomy laws were repealed, but only step-by-step and state-by-state and through the legislatures. Then there was nowhere left, except Tasmania. And in Tasmania, a gay group decided they wanted to go to Geneva, because Australia had just signed the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). This gave the right of individual complaint to the human rights committee of the United Nations.

I was then the President of the Court of Appeal of New South Wales. These two gay guys rang up. I knew them very partly. They said, "What do you think? Do you think we should go off to Geneva?"

And I said, "Don't waste your time. You are not being prosecuted. Nobody is threatening to prosecute you. You haven't exhausted all of the domestic remedies. And there is no way the United Nations Committee, which speaks to the whole world (Iran, and everywhere else) is going to get in on this act."

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17. *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, (1948) 1 K.B. 223 (CA); *see also Abebe v. The Commonwealth* (1999) 197 CLR 510, 519, 537-38, 583, 608 (1999) (Austl.) (applying the *Wednesbury* unreasonable test).

They said, “Thank you very much, Judge, thank you.” And then they went away, and they went straight to Geneva. And, of course, the result went against Australia.<sup>18</sup> It held, substantially on privacy grounds, that Australia was in breach of its obligations under the ICCPR.<sup>19</sup> That led, in turn, to federal legislation in Australia to override the Tasmania law.<sup>20</sup> That led, in turn, to a challenge in the High Court of Australia, by which time I had been appointed to the High Court of Australia. So I never thought, when I gave that advice, that this would ever come before me. But, of course, I then had to recuse myself.

The lesson of the story is A: You never know where in life you are going to end up. But more importantly, B: The progress that is made is made by people of courage, who stimulate the executive, the legislature, and the judicial branches. In Australia, that was one of the lessons that I received. Also, that one’s own journey is accompanying the journey of society. Judges go to, believe it or not, supermarkets and push trolleys. They are a part of society. And they are getting the vibes of society as well.

RUTHANN ROBSON: I do think that there is a way in which when you think back on your own career—or as I think back on my own litigation career as opposed to academic career—the perspective is different. There were many times when I thought, “This is a bad argument, this is a crazy argument, I am not going to make this argument, it will never fly before some judges.” And I have been amazed at what has won and what hasn’t won. I was a judicial law clerk for several years, as was Dean Aman, and it does teach certain things about what arguments judges in general and some judges in particular will find compelling.

I remember clerking for one judge, and the counsel made an argument that was rather ableist, denigrating disabled people, and it had nothing to do really with the content of his argument. Counsel just added a few little slurs here and there. We clerks are sitting in the courtroom knowing that members of the judge’s family are disabled.

We wanted to stand up and say, “Don’t make the argument in those terms.” Although, I wouldn’t have done that, not just because I was a good clerk, but I wasn’t on that attorney’s side! But it did show me that a human element is always there. It’s there when one is being a student, being a litigator, being a judge, and being a dean.

MICHAEL KIRBY: In fact, that’s what I was trying to tell Justice Greaney’s class today: that judges have choices. The common law system works by analogy, by reasoning, by using materials. Judges have choices. And the choice that you might make at one stage in your career, in your life, at one level

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18. *Toonen v. Australia* (1994) 1 INT’L HUM. RIGHTS REPS. 97 (No. 3).

19. International Covenant on Civil and Political Rights, Dec. 16, 1966, 2200A O.H.C.H.R. 49. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of December 16, 1966. Entered into on March 23, 1976 in accordance with Article 39.

20. Human Rights (Sexual Conduct) Act, 1994 (Aust’l).

of the hierarchy, may be different from a choice that you would make later when you are a bit, we hope, wiser and better informed. And possibly elevated!

Now, an example of that is the case of *Quilter*, which I think Professor Robson mentions in her article on judicial review. *Quilter* was a case in New Zealand in 1998.<sup>21</sup> It involved a lesbian couple who went to the marriage registrar and asked to be married, shades of *Goodridge* in 1998, in far away, sunny New Zealand. The registrar refused to issue the license. So they then took that decision on appeal. And they got it to the Court of Appeal in New Zealand. The first question was, similarly to the *Goodridge* case, “Can we read the Marriage Act,” which was expressed neutrally in terms of a “person” down, or broadly, so that it would apply to this female couple in the light of the newly enacted New Zealand Bill of Rights Act, which talked about equality. All of the justices of the Court of Appeal in New Zealand, a very distinguished court, said, “No, you can’t. You cannot read the Act to apply to a couple of females.” Then the question was, “If you can’t read the Act to apply to them, should we then say that this is discriminatory, because the Bill of Rights Act envisaged a machinery that would put the matter before Parliament?” And the majority said, “No, it is not discriminatory. Marriage forever, or at least since the decision in *Hyde v. Hyde*,<sup>22</sup> has been man and woman, to the exclusion of all others forever.” Therefore, there is no discrimination. That’s just what the word “marriage” connotes.”

A dissent was written in *Quilter* by Justice Ted Thomas.<sup>23</sup> He was a very distinguished New Zealand judge, who later became a judge of the Privy Council, before New Zealand finished appeals to that body. I remember reading his dissent at the time. He said in effect, “Of course this is discriminatory. Marriage is a civil status, provided by law. This is unequal. It is not demonstrated why it should be unequal. It’s discriminatory. And it should be drawn to the notice of Parliament, so Parliament can at least consider whether it wishes to fix it up.”

I remember reading that in 1998, and thinking, “Ted Thomas has taken leave of his senses.” Of course, “marriage” has always been man and a woman. Law school notes; blinkers on; forgetting to think conceptually; not thinking novelly, or in a new way. And I really thought, “What a shame, poor Ted, he’s really lost it in this one.” But boy, after ten years, you now read *Goodridge*, and you read all of the other cases, and you see the decisions of legislatures around the world, and the courts in different parts of the world, the South Africans and the Canadians, and Ted Thomas is looking better and better every year.

So I support what Professor Robson has said. We are all hostage to our law school notes. We are all hostage to you, the teachers. It’s in our brains. And sometimes we have to be liberated, so as to think freshly. And we do that in the

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21. *Quilter v. Attorney General*, [1998] 1 N.Z.L.R. 523 (C.A.).

22. (1866) L.R. 1 P.&D. 130 at 133.

23. [1998] 1 N.Z.L.R. 523, 541 (C.A., Thomas, J., dissenting).

light of social data, including that derived at the supermarkets, when we are pushing our trolleys along with other citizens.

RUTHANN ROBSON: Interestingly, in the United States there were same-sex marriage cases in the 1970s, including arguments about the effect of a so-called, “Little ERA,” in a state constitution. One went to a state Supreme Court, another went to a state court of appeals. Both, as I recall, involved references to the dictionary, and asking “What does marriage mean?” The courts rejected the arguments that “marriage” could mean anything else other than a narrow traditional meaning, even if there was an equality or even a privacy problem.<sup>24</sup>

Although I had a different experience, Justice Kirby, when I first read those cases. I thought, “Why would anyone in their right mind want to get married?”

MICHAEL KIRBY: Well, that question is a question I asked my partner. I went to a conference in London. It was on same-sex issues. I think it was the first international conference on same-sex things.<sup>25</sup> We were only thirty years together at this stage. We were, sort of, relatively new to our relationship. So I rang him from London, and I said, “Would you marry me?” And he said, “What are you doing over there? Is this a serious conference you are at?” I said, “Yes, we are talking about this.” So we have since talked about it. And after what we have been through (and some of it hasn’t always been nice, I mean, not everybody in this world is lovely). And after all we have been through, I am not sure that, if we could marry in Australia, (which we can’t)<sup>26</sup> that we would.

After forty years, it is getting a bit late for us for white tuxedos and confetti. But that is not a relevant question. The question is not what we, personally, as two human beings, would do who have a loving, faithful, long-term relationship and companionship and friendship, which is a beautiful thing, as Andrew Sullivan, I think, has written in this country.<sup>27</sup> It is not what we would do. It is what should be there for fellow citizens. It is a notion of citizenry and citizen’s entitlements and duties. So it is natural ask what you would do, but also you’ve got to ask, “Well, what would other citizens want to do?” I believe that’s what the Supreme Judicial Court of Massachusetts majority did, in the end. I respect both sides in *Goodridge*. But I was a bit more convinced by the majority. Naturally, you would say.

RUTHANN ROBSON: This is interesting in the way that marriage is conceptualized as the “big M,” as the gold standard of relationships, and the legal struggles around that. I’ve always had the—and still maintain the idea—that sexual “liberation” (to use a term from the 1970s) does not have marriage

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24. For a discussion of the same-sex marriage cases of the 1970s, including *Singer v. Hara*, 522 P. 2d 1187 (Wash. Ct. App. 1974) and *Baker v. Nelson*, 191 N.W.2d 185, 185-86 (Minn. 1971), see Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709, 734-737 (2002) [hereinafter Robson, *Assimilation*].

25. See Michael Kirby, *Same-sex Relationships* in THROUGH THE WORLD’S EYE 64 (2000).

26. Marriage Amendment Act 2004 No. 126 (Aust’l) (amending Marriage Act 1961 to define marriage as between a man and a woman).

27. See generally ANDREW SULLIVAN, LOVE UNDETECTABLE (1998).

as one of its goals. But I find it interesting that what is happening now is that, in some ways, the left/progressives and the right/conservatives may be starting to meet in terms of the relevance of marriage. So that the argument of people like Professor Nancy Polikoff, taking what might be termed a marriage abolitionist position, asks why should the state have the investment in marriage, and that there should be a religious or a sacred institution, and then there are certain benefits that the state gives, some of which would depend upon family relationships, and then some which would not, right? So the question always is, should my health insurance depend upon whether I'm married or not? Should the tax scheme depend upon whether I'm married or not?<sup>28</sup>

On the right, we see a professor of law on the *Colbert Report*, arguing that, "No, I'm saying the state should get out of the business of marriage, and this way we will keep the religious institution, and the state should be looking at benefits and civil partnerships."<sup>29</sup>

I remember the first time that I heard someone coming from a rather conservative outlook saying things like, "Well, not marriage, but civil union would be okay, or civil partnership." And the argument really was on some sides, once the conservatives were saying, well, civil partnership or civil union is fine with them, then the game was up in the United States, and similar to Australia, where there is a civil partnership scheme.<sup>30</sup>

MICHAEL KIRBY: It is true of the European countries, or many of them. For example, the Netherlands borrowing from French law. I think it was Napoleon and his codifiers who got the church out of marriage, and made marriage a civil status, which you would go first to the registry office and you get married, and then you go and have a wedding, if you want to, in a religious establishment. That differentiation makes the point that marriage is civilly important, because of the fact that there are various entitlements and duties attached to it.

However, repeated polls in Australia in the 1990s and early 2000s, indicated that most gay people, most who were polled, were not in favor of marriage in Australia.<sup>31</sup> And I rather think this might be because I have always conceived of the United States of America as a much more religious society than Australia. Marriage has become the big hot issue here, because a lot of people

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28. See NANCY POLIKOFF, *BEYOND STRAIGHT AND GAY MARRIAGE* (2008); see also Ruthann Robson, *Beyond Straight and Gay Marriage by Nancy Polikoff*, 25:4 *WOMEN'S REVIEW OF BOOKS* 12-13 (July/Aug. 2008) (book review).

29. See Posting of Ruthann Robson to Constitutional Law Prof Blog, *Civil Partnerships & Religious Marriages? Douglas Kmiec's Views*, <http://lawprofessors.typepad.com/conlaw/2009/04/civil-unions-v-religious-marriages-.html> (Apr. 19, 2009) (includes link to *Colbert Report*).

30. For an excellent discussion of the Australian schemes, see Reg Graycar & Jenni Millbank, *From Functional Family To Spinster Sisters: Australia's Distinctive Path To Relationship Recognition*, 24 *WASH. U. J.L. & POL'Y* 121 (2007).

31. See Sotirios Sarantakos, *Legal Recognition of Same-sex Relationships*, 23 *ALT. L.J.* 79 (1994) (noting marriage not preferred option for legal recognition for eighty percent of couples surveyed); Sotirios Sarantakos, *Same-sex Marriages: Which Way to Go?*, 24 *ALT. L.J.* 79 (1994) (illustrating only one-fifth of gays and lesbians surveyed demonstrated interest in same sex marriage).

living together in a sexual relationship don't feel comfortable with not being married. They feel it's important to have that sort of public focus, and, if possible, a celebration; and if at all possible, a blessing of some kind. I think that stems from the fact that religion and church-going are still very much a feature of the United States. Less so in Australia. (I should say I went to a service at Saint Paul's Cathedral immediately after I came here on Sunday. I felt very comfortable in an Anglican environment here in Boston. So I am not against religion. But it's very much in the private zone. It really is in the private zone in Australia.) However, the different attitudes to the legal concept of marriage pinpoint the fact that Professor Robson has written that marriage is not necessarily a status for everyone, because it does have patriarchal characteristics.<sup>32</sup>

Now, for example, my partner Johan was entitled, under Australian pension law, to his own individual pension right, as a citizen. He worked for decades in Australia, since he migrated from The Netherlands at the age of twenty-two. He paid his taxes, so he had a pension right. He's presently being paid a full pension, the old age pension. But come the first of July 2009, under the same-sex equality legislation, he is going to be relegated to the position of an opposite-sex spouse, or an opposite-sex de facto partner.<sup>33</sup> He loses his pension right. He becomes entirely dependent on my pension rights, and because of the size of my judicial pension, he gets nothing. So he went to the officials at the Social Security office.

They said, "Yes, we know about you two."

And the key official said, "After the first of July, I am pulling the switch."

Johan said, "Could you express that a little more appropriately?"

He said, "Yes, I'm pulling the switch on you."

So Johan said, "I would prefer to keep my pension. If we can't get married and be recognized, why am I losing my pension?"

The official replied, "It's because under the new federal legislation you lose it." So Johan rather dislikes that, because that makes him completely dependent on me financially.

This is very relevant, I think, to Professor Robson's notion that marriage puts women, mostly, in a position that they are beholden to their partner, who is often the income earner, or the pension bringer. The dependent partner, therefore, is excluded from, sort of, civic independence.

And when Johan mentioned this, the official said, "Well, that's the law, and, in any case, when, God forbid, your partner dies, you will inherit a very substantial pension for the rest of your life. Though you were never a judge, you will get thereafter half of the then salary of a Justice of the High Court of Australia forever."

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32. See generally Robson, *Assimilation*, *supra* note 26.

33. Under the Same-sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Act, 2008, No. 134 (Aust'l).

So Johan said, “Are you trying to tell me that when my partner dies, I strike lotto?”

And the official said, “Well, I’m not quite saying that.” But it is an element of dependence, and it is based on a premise that a dependent partner (usually a woman) is, sort of, a second class citizen, and is beholden to, and dependent on, another one. All that arises from the state’s interest to organize people in that fashion.

And I can tell you, Johan van Vloten, Australian citizen, Netherlands national of way back,<sup>34</sup> doesn’t like it very much. So he’s not very strong on this gay marriage idea. At the moment, he is not all that strong on the judicial pension. Mind you, if I choke on another clam chowder in Boston, he would be quite a wealthy pensioner.

RUTHANN ROBSON: But what if you don’t want to be married? I am fascinated by the possibility that the government can decide I am married—impute marital status to me—regardless of my own desires to be legally married. Let’s consider welfare entitlements in the United States. Imagine thinking about the computing income and social services coming into a home. The question is whether people are married and in some schemes whether the people are economically independent or dependent.

In some cases I have litigated, I’ve seen evidence submitted about types of food in the refrigerator and whether the food is labeled with names. The theory here is that if you are a mutually dependent couple and married, you share your food, and if you are independent “roommates,” you label your food. I have to say I have had a lot of roommates, and never labeled my own food, but perhaps others may. So social services might deem the couple married; and of course the same “deeming” could happen to same-sex couples. This deeming is quite interesting, because it means that for the purposes of welfare, you are married, but not for anything else.<sup>35</sup>

In a similar (but perhaps opposite) way, in the immigration context in the United States, the immigration officials can say, “We don’t recognize your marriage,” but, of course, if you went and said, “Oh, immigration doesn’t recognize my marriage, I think I will go marry someone else,” that would be bigamy; you might be prosecuted for that.<sup>36</sup>

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34. See Robson *Judicial Review*, *supra* note 15, at 30-37 (discussing legislation recognizing same-sex marriage in the Netherlands).

35. See Robson, *Assimilation*, *supra* note 26, at 788 n.397 (discussing federal legislation deeming parties married for welfare purposes). In *Smith v. Shalala*, the court upheld 42 U.S.C. § 1382c(d)(1988) which allows the government to deem two people receiving supplemental security income for disability based upon indigence (SSI), to be married if they “hold themselves out as husband and wife,” regardless of their actual legal status. 5 F.3d 235, 240 (7th Cir. 1993).

36. See *Adams v. Howerton*, 673 F.2d 1036, 1038 (9th Cir. 1982) (discussing two step marriage analysis). “[A] two-step analysis is necessary to determine whether a marriage will be recognized for immigration purposes. The first is whether the marriage is valid under state law. The second is whether that state-approved marriage qualifies under the [Immigration and Nationality] Act. Both steps are required.” *Id.* Although *Adams* involved a same-sex couple, the Ninth Circuit’s separation of the state law and federal

It is really quite odd having all of these different systems within the United States in terms of regulating the family.

MICHAEL KIRBY: It teaches that it is really a transitional phase in the law. Query whether the transition will work its way out, so that everybody settles for marriage. Or that everybody settles for civil partnership or civil union. Or we go the Napoleonic way, and we separate them, and have the marriage or civil union status fixed at the local public office, and then, if you want to, you can have a religious blessing and the like.

By the way, I would never wish to interfere with people's rights to have religious ceremonies and weddings. These are precious rights. I wouldn't ever want to force religious people against their conscience to marry same-sex couples. But there is a big case coming up in England, before the Court of Appeal of England, about whether an Islamic official in the Borough of Islington in London who refused to conduct a same-sex civil partnership ceremony on the ground of her conscience, had the right in law to opt out. The trial tribunal said, "Yes." The review court said, "No, she's a public official, and she's in office, she must perform the functions of her office and all of them, unless there is a statutory exemption providing for a conscientious objection," as I think Professor Robson points out in her article exists in South Africa.<sup>37</sup>

RUTHANN ROBSON: Right.

MICHAEL KIRBY: But there isn't in the legislation in Britain. So that case will go up to the Court of Appeal. On the ordinary administrative law principles, I would think the Court of Appeal will reject the appeal, because if you are a public official, without a relevant legal exemption, it's hard to see how you can say, "Well, I'm going to allow my private beliefs to exempt me from my public duties."

RUTHANN ROBSON: I think there is going to be a real question in South Africa, as well as in some other places, in terms of these conscience clauses. In South Africa, the Constitutional Court in *Fourie*<sup>38</sup> did the same thing as the Vermont Supreme Court did in *Baker v. State*.<sup>39</sup> The Constitutional Court essentially said, "Yes, we find it unconstitutional not having same-sex marriage, but we are going to give it to Parliament, and we are going to give them twelve months to figure it out. If they don't figure it out, we are going to take it back."<sup>40</sup> And Parliament, kind of, figured it out, depending upon what

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immigration law is applicable to heterosexual couples. *Id.* As the court notes, "[v]alid marriages entered into by parties not intending to live together as husband and wife are not recognized for immigration purposes" and, therefore, "[e]ven though two persons contract a marriage valid under state law and are recognized as spouses by that state, they are not necessarily spouses for purposes of section 201(b)" of the Immigration and Nationality Act. *Id.* at 1040. Thus, a marriage deemed invalid for purposes of immigration for failure to meet the federal standards under the second step of the analysis could nevertheless remain valid under state law.

37. See Robson, *Judicial Review*, *supra* note 15, at 44.

38. Minister of Home Affairs & Another v Fourie & Another 2006 (1) SA 524 (CC) (S. Afr.).

39. *Baker v. State*, 744 A.2d 864 (Vt. 1999).

40. See generally Minister of Home Affairs & Another v Fourie & Another 2006 (1) SA 524 (CC) (S.

you think of what they did. Parliament devised a civil partnership scheme including a conscience clause that includes not only religious officials but government officials from refusing to perform same-sex unions.<sup>41</sup> Freedom of conscience is more expansive than freedom of religion; it encompasses so-called non-believers and sidesteps some of the issues we have in the United States with the First Amendment's religion clauses. Nevertheless, in the United States, we have had similar controversies, especially regarding reproductive rights.<sup>42</sup> In both cases, the situation for rural people is most pronounced. When you think of rural communities there, as you would here, there might be only one court clerk in a township or in another kind of rural area. Many people think the conscience clause challenge is going to be the next case regarding queer rights before the South Africa Constitutional Court.

MICHAEL KIRBY: One of the things you bring out in your brilliant article on judicial review is that American readers should go beyond the United States with those issues.<sup>43</sup> Although there are some judges who don't like any comparative constitutionalism, of course, real scholars have to look at the constitutional and other situations in other countries.

Two weeks ago, I gave a plenary at the Commonwealth Law Conference in Hong Kong.<sup>44</sup> Curious that it was held in Hong Kong, given that Hong Kong isn't now part of the Commonwealth of Nations. Even more curious that that conference opened with the national anthem of the People's Republic of China, which, I think, would have rather surprised Queen Victoria. It might even have surprised Queen Elizabeth, whose birthday it is today. But the point that I made was that the big issue in gay rights is not, fundamentally, marriage and civil partnership. We in Australia and the United States will, ultimately, muddle our way to the correct answers on these issues. It will take time, but it will be resolved by a mixture of the democratic and the judicial process (which, by the way, I regard as part of the democratic process stimulating the democracy of the time). But the real issue, if we are concerned about human

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Afr.); see also TO HAVE AND TO HOLD: THE MAKING OF SAME-SEX MARRIAGE IN SOUTH AFRICA (Anthony Manion et al. eds., Jacana Media-Fanele Imprint, S. Afr. 2008) (providing extensive exploration of the South Africa marriage case and legislation); Ruthann Robson, *Sexual Democracy*, 23 SAJHR 409-31 (2007)(discussing South Africa marriage case and legislation).

41. S. AFR. CIVIL UNION ACT 17 of 2006 §6 (outlining Minister's ability to opt out). A "[m]arriage officer, other than a marriage officer referred to in section 5, [governing religious officials] may in writing inform the Minister that he or she objects on the ground of conscience, religion and belief to solemnizing a civil union between persons of the same-sex. Such marriage officer shall not be compelled to solemnize such a civil union."

42. See generally *Stormans, Inc. v. Selecky*, 571 F.3d 960 (9th Cir. 2009); see also Amanda Allen, *A Plan C for Plan B: A Feminist Legal Response to the Ways in Which Behind-the-Counter Emergency Contraception Fails Women*, 12 N.Y. CITY L. REV. (forthcoming 2009).

43. See Robson, *Judicial Review*, *supra* note 15, at 5-6.

44. See generally Michael Kirby, *Homosexual Law Reform: An Ongoing Blind Spot of the Commonwealth of Nations*, Address at the 16<sup>th</sup> Commonwealth Law Conference (Apr. 8, 2009); Michael Kirby, *Legal Discrimination Against Homosexuals: A Blindspot of the Commonwealth of Nations*, E.H.R.L.R. 2009, 1, 21-36.

rights in the world, is presented by the forty-one of the fifty-three countries of the Commonwealth of Nations that still have the inherited English anti-sodomy laws.

Keep in mind that Napoleon's reformers got rid of those laws in France in about 1803. The Netherlands copied this reform in 1811, because they were then under Napoleonic rule.<sup>45</sup> Similarly, most of Europe, most of the Soviet empire, many of the countries, China, Japan, which copied civil law, did not have sodomy laws. They never criminalized gay sexual relationships in The Netherlands empire, for example. Thus, in Indonesia, the country with the biggest Islamic population in the world, it has never been part of their criminal law. And there are no moves to make it a part of their criminal law except in Aceh and that recently.

However, in all of these former British colonies, they got it. If you trace the history,<sup>46</sup> it goes back to about Henry II's reign, when the rulers were concerned that the French were bringing over this behavior into England.<sup>47</sup> It had to be stopped. And then Henry VIII wanted to get his hands on the monasteries, made up of all of those single male priests.<sup>48</sup> So the criminal laws were strengthened. And then they started to blame the Irish, of all people to mention in Boston, for bringing sodomy into England. So these criminal statutes got passed. And then there were three imperial penal codes: There was the Macaulay Code, which became the Indian Penal Code. There was the Fitzjames Stephen's Code, which spread throughout parts of Africa. And there was the Griffith Code, which was named after Sir Samuel Griffith in Australia. All of these codes were there for export to the British colonies. The net result of this was, they all got it. And most have still got it.

When I was in Kenya, at the last Commonwealth conference in 2007 with Edwin Cameron, a great judge from South Africa (who is not only gay, but he is living with HIV and very open about it) he invited the gay and lesbian community of Kenya to come and meet us at the Hilton Hotel. I thought, "Well, about one hundred people will turn up, and we will have a good dialogue." Edwin had promised beer and eats, which is always good to get young people along. But in the result, only two people turned up, James and Judith. When we asked them, "Well, why don't your people come?" They said, "We are afraid of you. We are afraid of lawyers. We are very afraid of judges. We are very, very afraid of the police. They bash us. They humiliate us. They imprison us, and won't release us until we pay fifty shillings to get released. It is used as an oppression. And people, frankly, don't trust the law."

Therefore, if we are looking at the big picture of forty-one of fifty-three Commonwealth countries, and about 80 of 196 nations of the United Nations,

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45. See Robson, *Judicial Review*, *supra* note 15, at 32.

46. See generally LOUIS CROMPTON, *HOMOSEXUALITY & CIVILIZATION* (2003).

47. *Id.* at 361-62.

48. *Id.* at 363-66.

the big question is taking that first step. This involves getting rid of the anti-sodomy laws. They are the primary source of the oppression that makes it very difficult for people in many countries to even come to a meeting with foreign dignitaries and to feel free to talk about their oppression.

RUTHANN ROBSON: Although one thing that I think that does happen in terms of the sodomy rhetoric is that it drives a wedge between women and men. So that the sodomy laws are often thought of as just prosecuting men. I have argued that women are both persecuted and prosecuted somewhat differently. So they are prosecuted as prostitutes, for example, when what they are doing is not commercial. They are picked up on other kinds of sex work or just a general lewdness. It can look like a different world in terms of how women are criminalized.<sup>49</sup>

And then we also have the other problem, I think, with women inhabiting the so-called “private” sphere. Consider South Africa, where sodomy is no longer illegal, there is same-sex marriage, yet there still has been a rash of private actions, vigilante actions, such as raping lesbians for reparative or therapeutic rationales.<sup>50</sup>

Many lesbians throughout the world experience a kind of violence that some might simply name “heterosexuality,” but I think it’s often more than that, from their family. It can come from female family members, but also from brothers, male cousins, and fathers exercising sexual control.

So, there is state power—in terms of sodomy and other sexual laws—but there is also private power that the state doesn’t really protect lesbians from. It

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49. For further elaboration, see generally Ruthann Robson, *Lesbianism in Anglo-American Legal History*, 5 WIS. WOMEN’S L.J. 1 (1990).

50. See U.S. Dep’t of State, Bureau of Democracy, Human Rights, and Labor, *2008 Human Rights Report: South Africa*, 18.2.3(e)(2009) available at <http://www.state.gov/g/drl/rls/hrrpt/2008/af/1119025.htm>. The report explains:

The post apartheid constitution outlaws discrimination based on sexual orientation, and in 2006 the country legalized same-sex marriage. There were no reports of official mistreatment or discrimination. However, in its annual Social Attitudes Survey released on November 24, the Human Sciences Research Council found widespread public intolerance of homosexuality, which was commonly labeled “unAfrican,” with 80 percent of respondents believing sex between two same-gender persons was “wrong.” Rights groups reported that homosexuals were subject to societal abuses including hate crimes, gender violence targeting lesbians, and killings. The NGO People Opposed to Women Abuse reported that attacks increased during the year and estimated that a lesbian was killed every three months in the country’s townships. On April 28, Eudy Simelane, a former player on the national women’s soccer team and well-known lesbian activist, was allegedly gang-raped and then stabbed to death east of Johannesburg. Five men were arrested; four were charged with murder, robbery, and rape. The case was pending at year’s end. On December 5, following at least 16 postponements, testimony began in the trial of seven men accused of the 2006 murder of a lesbian woman in Cape Town. The case was pending at year’s end. In July 2007 lesbian activist Sizakele Sigasa and her partner Salome Masooa were raped and shot to death in Soweto; no arrests were made. Two weeks later in July, Thokozane Qwabe, a lesbian, was killed in KZN, prompting an outcry from rights groups.

*Id.* at § 5.

works in a different way, I think, for many women than for men. Although I do not think we should be saying one or the other is “worse.”

MICHAEL KIRBY: We mustn't divide ourselves on this. We must stand shoulder to shoulder.

RUTHANN ROBSON: We are shoulder to shoulder, but there are two different shoulders.

MICHAEL KIRBY: Well, I offer my shoulder here, because, first of all, in some Commonwealth countries, in the name of equality, they have extended the sodomy laws in recent years to extend it to the women. Sri Lanka comes immediately to mind. They thought, “Oh, we can fix that omission right up, not by abolishing, but by extending it.” And similarly, when the courts started to decide that “unnatural sexual conduct” included oral sex, that really worried them in Singapore, because they thought, “Well, there are quite a few heterosexuals who engage in oral sex. So if this is unnatural, our solution is not to abolish it, but to give an exemption yet only for heterosexual oral sex.”

Ultimately, in Singapore, there was a reform bill introduced to repeal all these offences. Mr. Lee Kuan Yew, the Senior Minister, who had been prime minister, a big guru in the land, said he didn't see why Singapore should keep the old anti-sodomy laws. They were driving good people out of Singapore. However, the net result was that a Singapore female law professor, who somehow got attached to an American Pentecostal Christian Church, got up in Parliament and said (with resonances of the language of Judge Bork) “This is slouching to Gomorrah, and we must stop this affront to our morality,” and so on.<sup>51</sup> The net result was that the reform bill failed.

Quite apart from the reforms that have gone that way, I think what we have to look at, as common ground, are the criminal laws that are misused to this day against sexual minorities. They make it difficult for them to be open and candid. It's difficult enough for a young queer person to come to terms with their sexuality, and to be open to their families, because of social stigma and pressure, which still exists today.

However, it's doubly difficult, and it's particularly difficult for boys, especially who tend to be singled out by these laws, if the state's mechanisms tell you that you are a criminal. Other laws criminalize some (generally) female conduct, such as prostitution, or consensual sex work. Together with anti-sodomy laws, these are still part of the oppression of the patriarchal state. They are trying to force adult, consenting sexuality into a particular ‘acceptable’ category, usually based, when the chips are down, on religious tastes, and often on the enforcement of religious beliefs, even in so-called secular communities. It's a sad thing that churches of religions of love are often, unfortunately, in the forefront of the oppression of homosexual people

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51. Michael Kirby, *Fundamental Human Rights and Religious Apostasy: The Malaysian Case of Lina Joy*, 17 GRIFFITH L. REV. 151, 176-78 (2008).

and women.

RUTHANN ROBSON: I went to law school in Florida, lived there for many years, and practiced law there. It provides some interesting examples. First, at the time I was applying, the Bar was still quite interested in whether one was a “practicing homosexual.” Going through law school, I was able to wonder “Well, what exactly does that mean? Does it mean “practicing” until one gets it right or does it mean “practicing” in the sense of being devoted to it? And I was able to research, so that I knew that while I was in law school, the Florida Supreme Court decided that “mere preference for homosexuality” did not bar one from being a lawyer in the state.<sup>52</sup> Nevertheless, the Florida Bar Examiners sent out people to interview my neighbors; luckily my neighbors liked me.

A few years later in Florida, I was thinking about having a child. Florida had then—and still has—the homosexual adoption ban.<sup>53</sup> Then, I had a friend who worked in social services, and she said, “Just check, ‘No’ when you are asked whether you are a homosexual and, I will get you through.” And although I had some of the same thoughts “well, what exactly does that mean?” I knew I just couldn’t say “no.” I have gone through law school and know lots of clever arguments, but I also recognize perjury.

The homosexual adoption ban has been challenged, of course, on constitutional grounds, but it did not fare so well in the Eleventh Circuit.<sup>54</sup> However, the struggle continues in the state courts.<sup>55</sup>

The kind of social science evidence in these cases, as well as custody cases, can be very dangerous. The homosexual adoption ban is based in part on an assumption that children raised by queer parents will be “influenced” to be queer. So it can happen that a litigant or litigator is trying to show the court, “No, this child will be quote, ‘normal,’ this child will be heterosexual.” And it is possible to fall into the argument that it would not be in the best interest of anyone to be something other than heterosexual, whatever it might be. So, in essence, one is standing in front of the court saying, “Well, I guess I’m not happy. It wouldn’t be in my best interest to be what I am, although this is what I am, and sorry, judge.”<sup>56</sup> So, it is very, very complicated to decide what social

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52. See *In re Florida Board of Bar Examiners*, 358 So.2d 7, 9 (Fla. 1978). One Justice dissented, referring to Florida’s sodomy law and stating, “There should not be admitted to The Florida Bar anyone whose sexual life style contemplates routine violation of a criminal statute.” *Id.* at 10 (Boyd, J., dissenting).

53. FL. STAT. § 63.042(3) provides “No person eligible to adopt under this statute may adopt if that person is a homosexual.”

54. See generally *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004). The en banc Eleventh Circuit declined to reconsider the opinion, with concurring and dissenting opinions. *Lofton v. Sec’y of Dep’t of Children and Family Servs.*, 377 F.3d 1275, 1275-76 (11th Cir. 2004).

55. See Posting of Ruthann Robson to Family Law Prof Blog, *Florida Adoption Ban Unconstitutional—Again*, [http://lawprofessors.typepad.com/family\\_law/2008/11/florida-adoptio.html](http://lawprofessors.typepad.com/family_law/2008/11/florida-adoptio.html) (discussing various challenges to statute).

56. For further discussion, see Ruthann Robson, *Our Children: Kids of Queer Parents & Kids Who are Queer—Looking at Sexual Minority Rights from a Different Perspective*, 64 ALB. L. REV. 915 (2001).

science evidence to submit, what psychological evidence to put on, and what argument we want to make to a judge who has so much discretion. The amount of discretion in adoption cases (as well as custody cases) in the family court is just amazing in the United States, and in Australia, I think.

MICHAEL KIRBY: Very hard to review and change such decisions on appeal, because of the deference ordinarily given by appellate judges to the original decision maker.

That's a very American story. I have never heard of that form of questioning. And as far as I know, it has never existed in Australia. In fact, when I was growing up, (thanks, I believe, partly to Kinsey's research,<sup>57</sup> and the growing acceptance that there was this cohort of gay people in the community) generally speaking, we had the "Don't ask, don't tell" philosophy from about the 1950s. "Leave it alone. Please don't confront us with your truth. So long as you don't confront us with your truth, we will do a deal with you. And we won't harass you. The police will keep out of your life. We will allow a certain number of clubs, even dances to occur, and you will be let alone. If you play our game, we will play yours." Basically, that's what my partner and I did for three decades, so it really was a *laissez faire* situation.

However, by the late 1980s, when AIDS came around, I started to take a much more active role in AIDS awareness in both the national and international spheres. And, in fact, some of my colleagues in the Court of Appeal of New South Wales, when they heard that I had been to the first national AIDS conference in Melbourne in 1985,<sup>58</sup> came to see me, I had just been appointed the President of the Court of Appeal. They were very respectful and very courteous, as we lawyers, generally are, and especially amongst judges in a collegiate court. It was a difficult thing for them, and a bit difficult for me. But they came to see me. I was new on the block. I was much younger than they were. They said, "It isn't seemly that the President of the Court of Appeal should go to such events. There are homosexuals at these conferences. There are prostitutes, and there are heroin users. These are the people we have got to deal with in the courts." And so I said, "Well, I have been the chairman of the Australian Law Reform Commission for a decade. These are matters of law reform, and I feel I have a contribution to make. I feel a moral obligation. So I'm sorry. I will be respectful of your views, and I will try not to cause too much ruckus. But I have got to take a part in this." And so I think that's how you sort of announced your sexuality in code language. In my case, nobody then made a big fuss about it. I certainly didn't have to answer any questions of the kind that you mentioned.

Looking back, I think this is also the way in Australia we overcame our big

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57. ALFRED KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 659-66 (1948); ALFRED KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 484-87 (1953); *see also* WILLIAM N. ESKRIDGE GAYLAW: *CHALLENGING THE APARTHEID OF THE CLOSET* 82, 297 (1999).

58. *See* Michael Kirby, *AIDS Legislation—Turning Up the Heat?*, 60 AUSTRALIAN L.J. 324 (1986).

phobia about Asians. Until 1966 we had the White Australia policy. We had it for a very long time. Virtually from the beginning of the colony, which was set up as a direct result of what happened in this city, in the Boston tea party. We had it in the beginning of Australia in 1788, up until 1966. We had a very restricted immigration policy based on race. But the reason that it began to come unstuck was, in part, because of international pressure, stimulated by the anti-apartheid movement, the intolerance of people doing nasty things on racial grounds, *Brown v. Board of Education*, all of these developments played a part in the world evolution of ideas of racial dignity and equality. But in part we started to meet neighbors and other people who were Asian. We found they were, some of them, very educated, very intelligent, very civilized. Some of them were very boring, just like the rest of us. That, I believe, really started to change the psyche of Australia.

It is now the same with gays. When people start to learn that a justice of the highest court in the land is a gay person, and has this comfortably reassuring long relationship with a partner for forty years, it becomes less easy to hate them. And I think that is why it is important to say to young queer people here, and everywhere, that it's all part of a journey. And the journey depends on all of us.

And it does depend, in part, on young gay people taking a step, which is sometimes awkward with their families. But it is a step for freedom, and for equality, and for human dignity. It is certainly harder for people to hate gay people when more and more such steps are taken. When you see how unthreatening it is, and how it really isn't anyone's business to try to force others into having sex in a particular way. That is *really* an unnatural interference by the state. It's got to stop. So I am really standing for your sexual liberties. With necessary public restrictions, of course.

RUTHANN ROBSON: Oh, we can talk about the restrictions.

But I do think that there is this way in which we think that there is progress, and that there is this developmental trajectory, and it is always getting better and better. I'm not sure that that is true. Perhaps it is the mistake of looking at one's own life as a way of looking at the whole world. But for me, even when I look at my own life, I am not sure everything is better. Perhaps I had a different experience. In the late '60s and '70s, it was free love for everyone; although I mistook that to include me. I read a certain sexual liberation into it. And I had a fine old time, I must say, or a fine young time. I believed, at a certain point, that sexual liberation was very expansive and included many different kinds of people. I didn't perceive much of a need to normalize anything, or pressure to be normal and be like the person next door. Perhaps the point was not to be like the person next door?

And there is also now, I think, pressure to be exemplary, to be the best. So that if you are on the High Court of Australia, then the "mainstream" will accept sexual diversity. The mainstream might accept people like you, or

myself as a law professor. But the judge and the professor or other respectable people are very different from the “freaks” at the Mardi Gras parade, or at the Gay Pride parade, or at the local bar. Still.

So I think one thing in terms of trying to work forward is to make that space for people who are not so respected in our communities. And sometimes I think about this in terms of lesbians as a super-dyke syndrome. It’s fine to be a lesbian if you are excellent at everything, or if not everything, at least one thing. A star.

Now, I was not very good at softball, so I went into law school, as my chance to be an exemplar. What I am saying is that we really have to have room for mediocre gay and lesbian, and trans people, and bisexuals amongst us, right? We want to have those people to be able to live their lives and be happy, to not have to strive always to be the best, so no one will ever attack them.

MICHAEL KIRBY: That is brought out in one of the essays in the book in your honor, by a Latina, who, first of all, rather objected to the use of the word “lesbian.” She thought that was a very European approach, a European type of word.<sup>59</sup> It didn’t really relate to her reality. And basically she was just asking to be let to live her life as she is. And I do think familiarity at every level of society, and feeling safe as a citizen, to be familiar, and to be open, is a help to the change that will come.

However I certainly agree it has to be in different positions. But I think one of the interesting points was sparked by your last comment, it is what Professor Kenji Yoshino has said in his book, *Covering*.<sup>60</sup> We have to be careful, in pursuing goals like marriage or even domestic partnership, that we don’t thereby try to force peoples’ sexual lives into a paradigm which they may not entirely fit. He says in his book, in essence, that male gay sexuality, perhaps male sexuality in general, isn’t easily squeezed into this paradigm of marriage or civil union. And that the goal should be a greater willingness to accept the diversity and individuality of sexual expression, so long as the participants are adults and if is not affecting anybody who is vulnerable or dependent, it is really their business and not the state’s interest or concern to interfere.

I’m sure there would be quite a lot of people, maybe some in this room, who would be shocked at gay bars and bath houses and of all that sexual expression that goes on. Some would be horrified to think that’s happening. It may be upsetting to them. But that is what lay at the root of the anti-sodomy laws. That somewhere out there somebody is having a great time. And it has got to be stopped because it upsets me. That was the approach that Jeremy Bentham, John Stuart Mill and eventually Dr. Kinsey challenged.

RUTHANN ROBSON: Because it is not me.

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59. Carmen Vazquez, *Through the Looking Glass*, 8 N.Y. CITY L. REV. 463, 464 (2005); see also Elvira R. Arriola, *Encuentro en el Ambiente de la Teoría: Latina Lesbians and Ruthann Robson’s Lesbian Legal Theory*, 8 N.Y. CITY L. REV. 519 (2005).

60. See generally KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006).

MICHAEL KIRBY: My brothers used to say to me, “Gee, if only there was that sexual freedom in the heterosexual world. It would make such a difference to our lives.” I hasten to say that this was said when they were young, before they became married and terribly respectable.

RUTHANN ROBSON: There is that. But maybe there needs to be more heterosexual liberation? The Canadian Supreme Court case about “swingers” is an interesting one.<sup>61</sup> Or depending upon your notion of identity politics, it is not about “swingers,” as an identity category, but about people who swing.<sup>62</sup> Anyway, it is derived from a prosecution of a member-only sex club in Montreal. The Canadian Supreme Court, under the name of sexual freedom, said, “No, these have to be okay, these have to be legal, that there is a liberty interest in doing this.”<sup>63</sup> The same sort of thing, adults not really hurting anyone, mutual consent. The Court leads us to believe that all these apparently heterosexuals are having a great time.

MICHAEL KIRBY: Why don’t you Americans, squeeze that somehow into the First Amendment? You seem to squeeze everything else into it.

RUTHANN ROBSON: Well, the sexual freedom argument hasn’t been so successful under the First Amendment.<sup>64</sup>

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61. See *R. v. Labaye*, [2005] 3 S.C.R. 728, 2005 SCC 80 (Can.).

62. I owe this insight to Brenda Cossman and her discussion of the case at the *Queer/Empire Workshop* in Montreal. See Brenda Cossman, *Address at the Queer/Empire Workshop* (Apr. 2009).

63. See generally *R. v. Labaye*, [2005] 3 S.C.R. 728, 2005 SCC 80 (Can.). The majority of the Court found that the Crown failed to satisfy the requirement that

[T]he conduct at issue causes harm or presents a significant risk of harm to individuals or society in a way that undermines or threatens to undermine a value reflected in and thus formally endorsed through the Constitution or similar fundamental laws by (a) confronting members of the public with conduct that significantly interferes with their autonomy and liberty, (b) predisposing others to anti-social behavior, or (c) physically or psychologically harming persons involved in the conduct.

*Id.* The Court reasoned:

The autonomy and liberty of members of the public was not affected by unwanted confrontation with the sexual conduct in question. On the evidence, only those already disposed to this sort of sexual activity were allowed to participate and watch. There is also no evidence of anti-social acts or attitudes toward women, or for that matter men. No one was pressured to have sex, paid for sex, or treated as a mere sexual object for the gratification of others. The fact that the club is a commercial establishment does not in itself render the sexual activities taking place there commercial in nature. The membership fee buys access to a club where members can meet and engage in consensual activities with other individuals who have similar sexual interests. Finally, with respect to the third type of harm, the only possible danger to participants on the evidence was the risk of catching a sexually transmitted disease. However, this must be discounted as a factor because it is conceptually and causally unrelated to indecency.

*Id.*

64. See James A. Garland, *Sex as a Form of Gender and Expression after Lawrence v. Texas*, 15 COLUM. J. GENDER & L. 297, 303 (2006) (noting lack of First Amendment protection for homosexual expression); James Garland, *Breaking The Enigma Code: Why The Law Has Failed To Recognize Sex As Expressive Conduct Under The First Amendment, And Why Sex Between Men Proves That It Should*, 12 LAW &

Although we do have a new case coming up, and it seems like it's an animal case, so it's about animal cruelty, and the Supreme Court has just taken certiorari on it.<sup>65</sup> Congress passed this law, it's about animal cruelty, and it is expressed as animal cruelty, but the Congressional statement, is about, let me get this right, "crush porn." And it is about a kind of pornography that apparently some people like to watch, that mostly involves a woman's leg either in high heels or barefoot, I guess flats are not porn, squishing little animals, so from bugs to, I don't know, I think there are a couple of hamsters.<sup>66</sup>

MICHAEL KIRBY: Now, this is another very American story.

RUTHANN ROBSON: But apparently, as in most things, the lower court opinions are much more into the facts than the high court opinions.

MICHAEL KIRBY: Well, I know in a University in Australia, three people who are gay, and they have been living together as three people for many years. I must admit that my first reaction to their relationship was partly based on the aesthetic. I think a lot of this debate is aesthetic. It's not what you are used to. It's not what looks good and normal to you. Therefore, you react negatively to it. However, first of all, these three men are highly intelligent people. They have for twenty years enjoyed this very fulfilling and loving relationship. They come to university functions together. What business is it of mine to judge what works in their lives? And if that works well for them, "Well, good for them, as far as I'm concerned."

However, I'm not so sure about animals and squishing. I mean, I think that's a bridge too far. Yet you do learn from experiences, like the gay man from Tasmania, who came to me and asked for support, and you turn them from your door. Or Justice Ted Thomas, who writes an opinion, which by today's standard

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SEXUALITY 159 (2003) (recognizing no court has extended First Amendment protection to sexual conduct).

65. U.S. v. Stevens, 533 F.3d 218 (3d Cir. 2008), cert. granted 129 S. Ct. 1984 (2009).

66. *Id.* at 222 (describing Congress's purpose in enacting the statute). Stevens, the defendant, was convicted under 18 U.S.C. § 48, which provides that "Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both." 18 U.S.C. § 48(a). But, as the Third Circuit noted, Congress was not necessarily primarily interested in the protection of animals:

Resort here to some legislative history is instructive, not as a device to help us construe or interpret the statute, but rather to demonstrate the statute's breadth as written compared to what may originally have been intended. The legislative history for § 48 indicates that the primary conduct that Congress sought to address through its passage was the creation, sale, or possession of "crush videos." A crush video is a depiction of "women inflicting . . . torture [on animals] with their bare feet or while wearing high heeled shoes. In some video depictions, the woman's voice can be heard talking to the animals in a kind of dominatrix patter. The cries and squeals of the animals, obviously in great pain, can also be heard in the videos." Testimony presented at a hearing on the Bill, and referenced in the House Committee Report, indicates that "these depictions often appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting."

Stevens, 533 F.3d at 222 (quoting H.R. REP. No. 106-397, at 2-3 (1999)).

is not all that threatening, or even terribly adventurous. You learn to have *not* an empty mind, but to question your reactions and your intuitive judgments. As a lawyer, you have to go back to basic principles and fundamental norms, and try to fit new ideas within them. If you are anywhere but the United States you try to measure the new circumstance against an international human rights norms perspective. And then you have a semi-stable foundation for conceptualizing the problem.

Of course, in the United States, you can't think about these international human rights norms. You like only to think about those civil rights stated in your Bill of Rights. But that is the subject of the Donahue Lecture. If you have not had enough tonight, you all have to come to the Donahue Lecture tomorrow night. It is going to be about American intellectual isolationism in comparative constitutional law. It is a subject, like even federal tax law that can be very exciting, even riveting.

ALFRED C. AMAN: Thank you. Thank you, both. I would like to, if I may, call up Christina Miller to make some closing remarks.

CHRISTINA MILLER: Thank you so much for this opportunity. As a practitioner, and as law students, really, we look at a case, we look at an event, we look at our outlines, and we forget that thought and conversation is really where action comes from, where we evolved to think and challenge ourselves, and so I am encouraged by the conversation today to think about how a case, a fact, a situation fits into a paradigm, fits into an area of law in which we all operate.

We need to think about how our laws and the application speak for us as a society. Where are we, but a group of laws, and a society that regulates ourselves? And where can we take action? One submission and one thought that has come forward in the Massachusetts Lesbian and Gay Bar Association is transgender rights. We have a bill on the Hill right now, but that came out of a lot of conversations, a lot of thought, and a lot of action.<sup>67</sup>

I encourage you, whether it is today or ten years from now, after you have practiced, to think, and then to create conversations, and then to make that action, and to take action, and be part of a community that respects all persons, not just those who maybe we feel comfortable with, or who are like us. A very large thanks to the Queer Law Association here. Thanks to the *Law Review*. And I know you will all join me in thanking, Dean Aman, Justice Kirby, and Professor Robson for conversing with us and for us today.

ALFRED C. AMAN: Many thanks to everyone as well. This was a very stimulating conversation, and we will now continue it with all of you, as we mix informally to discuss some of the very important issues that have been raised this afternoon. But before we do that—again special thanks to our

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67. An Act Relative to Gender-Based Discrimination and Hate Crimes, H.B. 1728, 2009 Leg., Reg. Sess. (Mass. 2009).

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participants, Justice Kirby and Professor Robson and our commentator Christina Miller.