

BOOK REVIEW

Gays/Justice: A Study of Ethics, Society, and Law

by Richard D. Mohr*

New York: Columbia University Press, 1988

Reviewed by Mark Reschke**

Richard Mohr begins the final chapter of his book: "Gay justice does not exist and does not nearly exist."¹ In *Gays/Justice*, the author examines the legal and ethical issues surrounding gay and lesbian rights. From the book's title to the three most substantive sections, covering sodomy laws and the right to privacy, gay civil rights, and ethics in the AIDS crisis, Mohr asserts that lesbians and gay men are held apart from justice. Like the slash mark in the book's title, institutionalized bigotry functions to bar gays from justice; lesbians and gay men are pushing against an arbitrary line created by society which separates them from participating in what can only be seen as an unattainable abstraction on the other side of that line.

Much of *Gays/Justice* rings with familiarity. Any gay person, and perhaps any non-gay interested in civil rights issues, has heard, read or felt much of what Mohr writes. Many, like Mohr, have shared the frustration at the often self-defeating "we're nice people" attitude of the current gay rights movement, abhorred the apparent willful blindness of the Supreme Court's *Bowers v. Hardwick*² sodomy decision, and cringed at the misdirected, socially evil (to use Mohr's apt label) response to the AIDS epidemic. This does not diminish the significance of Mohr's contribution to the gay rights movement, and to gay, legal, and ethical studies. In fact, the

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1. Richard D. Mohr, *Gays/Justice: A Study of Ethics, Society, and Law* 315 (1988).

2. 478 U.S. 186 (1986).

very familiarity of the book's contents enriches Mohr's contribution.

Gays/Justice is a powerful book. Its power lies in Mohr's ability to shape out of the chaotic flurry of feeling, fact, silence, and struggle, which compose most of a gay person's sense of her or his ethical dilemma, into a solid snowball. Mohr's arsenal of information and ideas — if it could only easily transform itself from paper and ink to consciousness and action — would have the force to knock down much, if not all, of the unchecked bigotry and compulsory heterosexuality blindly institutionalized by our courts, our legislators, our employers, our neighbors.

In bringing together the arguments (familiar or otherwise) for "gay justice," Mohr provides a helpful resource and a potential tool for change. Mohr outlines three aims for his work in the introduction: (1) enlightening a general (nongay) audience, (2) imparting useful knowledge through rational argument, and (3) "articulat[ing] in distilled abstract form that about gay experience which has been left fragmented."³ This third aim, he writes, is his hope for the book's gay readers and it is the goal he achieves most effectively. His distillation process encompasses divergent sources (thorough research into legal cases and the gay press) and his articulation process involves honest, engaging writing. The book emphasizes strong rational argument, but Mohr is adept at story-telling, and fortunately, does not spare us his often acerbic personal opinions.

Mohr's ability to distill and articulate information and legal and ethical theory is demonstrated in each section of the book. The first section encompasses what he titles "Gay Basics." It is a chapter intended to educate non-gay readers about theories on homosexuality, myths and stereotypes about gays, and the place of lesbians and gay men in society. But Mohr's basics are so thorough that even those who are well-read on gay issues will gain some insight. Mohr cites a study by the National Gay and Lesbian Task Force that found over ninety percent of gays and lesbians had been victimized in some form on the basis of sexual orientation. The book's first section tackles from a number of perspectives suggestions that discrimination against gays is justified because gays are "immoral" or "unnatural." Morality is not public consensus, Mohr argues:

One of our principles itself is that simply a lot of people saying something is good... does not make it so. Our rejection of the long history of socially approved and state-enforced slavery is

3. Mohr, *supra* note 1, at 2.

a good example... consistency and fairness requires that the culture abandon the belief that gays are immoral simply because most people dislike or disapprove of gays and gay acts.⁴

Mohr dismantles the charge of unnaturalness as having "no content other than its expression of moral aversion."⁵

The first chapter establishes the basic premises upon which his arguments for gay justice are built and then Mohr approaches three crucial obstacles in the next sections of the book: sodomy laws, the lack of civil rights protections and the mishandled AIDS epidemic. His approach to gay sex, privacy rights and the *Bowers v. Hardwick* decision is among the most direct, thorough and reasoned work in the book.⁶ First, the author examines the effect of sodomy laws on gays: "the evil of unenforced sodomy laws is chiefly their assault on dignity and only secondarily their unwarranted causing of unhappiness."⁷ Mohr continues by examining the true intent of sodomy laws:

When a state has unenforced sodomy laws on its books... then insult is their main purpose. If the law is virtually never enforced, the law exists not out of concern with the actions of gay people, but with their *status* . . . [S]odomy laws afford an opportunity for the citizenry to express its raw hatred of gays *systematically* and *officially* without even having publicly to discuss and so justify that hatred.⁸

In the following chapter, Mohr provides some careful theoretical work on the right to privacy, a right he believes sodomy laws violate, as guaranteed by the Constitution. He critically reviews the opinion of Justice Douglas in the case of *Griswold v. Connecticut*,⁹ which is the Court's primary attempt at explaining the right to privacy's place in the Constitution. From this analysis, Mohr builds a case for his own theory of equality-based coherence:

The guide needed and warranted to determine what rights there are implicit in the Constitution is to be found in a reflexive application of the fourteenth amendment's guarantee of equal protection of the laws to the Constitution itself taken as the primary part of 'the supreme law of the Land'.¹⁰

Mohr states that the values that inform specific guarantees within the Constitution must apply to similar unmentioned guarantees. He then outlines in detail an application of this theory to a general right to substantive privacy. Mohr argues for the inherent privacy

4. *Id.* at 32.

5. *Id.* at 35.

6. 478 U.S. 186 (1986).

7. Mohr, *supra* note 1, at 52.

8. *Id.* at 59-60 (emphasis in original).

9. 381 U.S. 479 (1965).

10. Mohr, *supra* note 1, at 82-83.

of gay sex acts by examining the nature of sex, in culture and for individuals, and by considering the necessity of a person's rights for control over his or her own body.

The next major section argues for full civil rights protection for gay men and lesbians. Mohr makes interesting use of the libertarian ideals set forth by John Stuart Mill in *On Liberty*.¹¹ Although Mill is generally seen as supporting the restriction of government powers, Mohr argues that under certain social conditions, government powers must be invoked to guarantee the values of "dignity, self-determination, and individual flourishing"¹² which Mill uses to support his constitutional principles. Civil rights legislation is, Mohr argues, a necessary form of state coercion: it is "limited restraint for the sake of general nonrestraint."¹³

Mohr also examines closely some of the issues unique to gays as an "invisible minority." Political decency should warrant gay civil rights protection, he argues, because of the paradoxical situation gays face as an invisible minority: gays cannot fight for rights unless they are open and gays cannot be reasonably open until they have the right to be open. Finally, Mohr concludes that there are no sound reasons for exempting gays from the protections provided by Title VII of the 1964 Civil Rights Act. The position of gays is consistent with other protected groups and therefore, discrimination against gays cannot be successfully defended as "good faith" discrimination.

The need to assert gays' status as a protected group has become crucial in the last decade. The outbreak of the AIDS virus in the United States has heightened the need to examine the legal and ethical position of gay civil rights. AIDS is a terrifying disease and an emotional issue for most people. Yet, Mohr, by maintaining his tone of reasoned argument coupled with appropriate example, writes a critique of current responses to AIDS and in a measured and logical way builds a case for what must be done. His AIDS discussion is also potent: "Government funding for both preventive medicine . . . and patient care . . . is . . . something society owes gay men. The former is a necessary condition for basic human good — freedom from terror and the capacity to realize central personal values; the latter is a matter of compensatory justice."¹⁴ Mohr attacks the government's paternalistic justification of its coercive AIDS policies as disguised homophobia and hysteria.

11. John Stuart Mill, *On Liberty* (1859).

12. Mohr, *supra* note 1, at 140.

13. *Id.* at 141.

14. *Id.* at 215-16.

He writes: "Governments that have written off the value of gay sex altogether by having made it illegal, largely on religious or other grounds that do not appeal to harms caused to others, should be viewed as especially suspect when they make paternalistic arguments on behalf of gays."¹⁵

In response to a more personal problem facing gay men, Mohr provides a short but important chapter on the insurance industry and AIDS. The insurance industry claims that banning the use of antibody testing to screen applicants is unfair because the rates of the majority will go up even if they are not at risk for AIDS. Mohr responds:

While it is nice if costs . . . go down as the result of some government policy, no one's rights have been violated if some legitimate government purpose has the effect of raising [costs] . . . [T]hough it may irk the majority (and the insurance industry is counting on this), the simple raising of insurance premiums does not violate anyone's rights, any more than the use of credit cards violates anyone's rights, even though their use drives up the price of goods for everyone. . . .¹⁶

He also attacks mandatory antibody testing as degrading to gays and as "the reconsecration of heterosexual supremacy as a sacred value."¹⁷ Mohr makes his case by examining the phenomena of mandatory testing as a condition for a marriage license. Since marriage is the central institution of heterosexuality and AIDS is virtually synonymous with gays in the American mind, Mohr feels that antibody testing provides a new ritual:

The new ritual . . . within the configuration of marriage . . . is to test those who are to be married to make sure that they are not polluted with the very stigma that challenges the institution itself. Here a social policy, perfectly absurd when viewed in terms of social utility, makes perfect sense when viewed as a social purification ritual.¹⁸

The final chapter of the AIDS section is more personal; Mohr looks at the death of philosopher Michael Foucault from AIDS, the suspension of a Chicago doctor with AIDS from Cook County Hospital, and the response of Mohr's own academic community, the University of Illinois, to the AIDS crisis.

The subsequent section, titled "A Liberal's Education," is the most anecdotal in Mohr's book and it may seem to some the most out of place. An associate professor of philosophy, Mohr's interest

15. *Id.* at 223.

16. *Id.* at 245.

17. *Id.* at 248.

18. *Id.* at 253.

in academia is obvious. The two essays in this section — one describing his experience teaching the first gay studies course at the University of Illinois, and the other a critical and cynical view of American higher education as it perpetuates social injustices — are useful in adding depth to the book's consideration of ethical issues pertaining to gays. Many non-gay readers may have never considered how inherent bigotry manifests itself in a powerful institution, such as a major American university. Many gay readers may be forced to question their support and participation in such institutions after reading Mohr. The essay on Mohr's gay studies class demonstrates the best of the author's anecdotal form. Mohr's class was full of surprises, many coming at his own expense. He writes of inviting an academic colleague, a lesbian separatist, to speak for one session:

I admitted that it struck me as bizarre that lesbians would take as their standard of identification that ultimate heterosexual act which is motherhood. She told me that I was too stupid to understand and basically that I should fuck off. The whole class spontaneously broke into gales of applause at this challenge to my tyrannical ways. I shook a grandmotherly finger at them, telling them they were all going to get F's. Lamentably, three of the jocks did get F's — for plagiarism.¹⁹

The second essay is particularly bleak. But Mohr's bitterness forces the reader to confront harsh realities:

Just as for the smoker the world is an ashtray, for students the world is their private sandbox, to play and piss in at will. Like tenured deadwood, students are in the academic community but not part of it . . . they drain the academic community pale . . . they are parasites on campus life, because they are parasites on social life in general . . . They drink a lot and drink a lot together; they use my yard as a pissing trough. When I ask them to leave they call me faggot. When in the village's Fourth of July parade I march with my people, they throw firecrackers at me and through my ringing ears I hear them calling out for my death from AIDS.²⁰

The author's pessimism is curbed somewhat by ending the essay with mandating how college teaching can better challenge students to break out of their cultural cocoons.

In the final section, Mohr hopes for the appearance of a gay Rosa Parks, or perhaps, for more lesbians and gay men to be like Rosa Parks. Society can deny justice but it cannot deny dignity. Mohr writes:

If . . . what is chiefly at stake in gay politics . . . is dignity, then the gay movement primarily needs to take the form of assert-

19. *Id.* at 290.

20. *Id.* at 298.

ing rights by acting in a principled manner. For proceeding in this way itself brings dignity to gays. The process of gay politics itself should be a source of dignity and pride—and it can be. For dignity as an ideal . . . is something, unlike happiness, which gays can achieve . . . independently of the goodwill of the dominant culture.²¹

Mohr is leading up to a call for civil disobedience. An appeal for civil disobedience might seem like a predictable conclusion. He believes that what worked for one oppressed group in the sixties should work for another in the nineties. It is unfortunate that Mohr fails to examine the possibility that it may not work this time. When Rosa Parks sat in the front of the bus, there was a black community in Montgomery with a stronger sense of identification to follow Parks' example²² than gays currently share in most cities.

In discussing the need for civil disobedience, Mohr criticizes the current politics of the gay rights movement. His remarks are generally valid, but he must be challenged on his insistence that gay civil rights concerns be separated from the concerns of other minority groups. Mohr is correct to imply that gays must establish their own voice and not depend on coalitions to bolster their very particular concerns:

. . . one does not fight a storm by throwing more orphans into it — to suppose success is to be had this way is just a communist fantasy. The black movement achieved its political success without coalitions of the dispossessed. And gays' repeated successes with city councils have not turned on coalitions. . . .

Rather than bothering too much about building coalitions, gays need to develop a rhetoric of principle.²³

But what Mohr overlooks is what any call for change in this culture must acknowledge: the inter-connectedness of oppression, the common sources of discrimination. Mohr is obviously sensitive to much of the oppression in our society, but as an educated white male he must acknowledge his own privilege. His arguments lack a solid attack against the clear, common source of oppression: racist capitalist patriarchy. Poet and educator Audre Lorde writes of the "politics of difference:"

Traditionally, in american society, it is the members of oppressed, objectified groups who are expected to stretch out and bridge the gap between the actualities of our lives and the con-

21. *Id.* at 321-22.

22. See generally, Jo Ann Gibson Robinson, *The Montgomery Bus Boycott and the Women Who Started It: The Memoir of Jo Ann Gibson Robinson* (David J. Garrow ed. 1987).

23. Mohr, *supra* note 1, at 329.

sciousness of our oppressor . . . those of us for whom oppression is as american as apple pie have always had to be watchers, to become familiar with the language and manners of the oppressor. . . . In other words, it is the responsibility of the oppressed to teach the oppressors their mistakes. . . . The oppressors maintain their position and evade responsibility for their own actions. There is a constant drain of energy which might be better used in redefining ourselves and devising realistic scenarios for altering the present and constructing the future.

Institutionalized rejection of difference is an absolute necessity in a profit economy which needs outsiders as surplus people . . . we have *all* been programmed to respond to human differences between us with fear and loathing . . . we have no patterns for relating across our human differences as equals. As a result, those differences have been misnamed and misused in the service of separation and confusion.²⁴

Justice cannot be a relative term; people must be free from all the injustices which imprison them. Sexuality is an integral piece of a person's life, but it is only one piece. Mohr should consider the case of Sharon Kowalski, a lesbian who is quadruplelegic and brain injured as the result of a 1983 auto accident. Kowalski has since been separated from her lover and denied full rehabilitation therapy because of her father's and the court's prejudices in dealing with issues surrounding both sexual preference and disability.²⁵

Mohr's introduction is worth reading on its own merits. While providing background and an overview on the book, Mohr skirts across many of the issues surrounding gays and society. In the introduction, Mohr admits that his book must necessarily pertain more to gay men than to lesbians. Even though a majority of what he says cuts across gender lines, Mohr cannot speak with any authority about lesbian experience. The complete presence of a lesbian perspective may be the only significant feature missing from what *Gays/Justice* so successfully distills otherwise.

Ideally, this book could have been a collaboration, between Mohr and a lesbian colleague. But perhaps that is only a suggestion for where the future of lesbian and gay studies needs to go. For now, Mohr's book is an articulate beginning to generating, as the author writes, "philosophical myths for gays — myths which ring true and yet which will be innocent as myths because they are true."²⁶

24. Audre Lorde, *Age, Race, Class and Sex: Women Redefining Difference*, in *Sister Outsider: Essays and Speeches* 114-15 (1984).

25. See John Ritter, *Kowalski Finally Moved Against Father's Objections*, 1 *Equal Time*, Feb. 1989, at 1.

26. Mohr, *supra* note 1, at 2.