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Vincent J Samar, Chicago-Kent College of Law

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Vincent J. Samar, MPA, JD, PhD
Chicago, Illinois

SUMMARY. This essay explores, in two parts, the problems of justifying civil rights legislation for gays, lesbians, and bisexuals. Part I shows that discrimination against gays and lesbians at least in respect to employment, housing, and public accommodations is an evil unsupported by ethical traditions in utilitarianism, rights theory, and communitarianism. It also shows that two theories, Kantian theory and natural law theory, which do support such discrimination on the claim that homoerotic behavior is universally or objectively immoral only do so because of a failure to make precise the concept of “natural” which underlies those theories. Part II argues that anti-discrimination legislation is both an appropriate and effective means to promote the idea that discrimination against lesbians and gays in respect to most employment, housing, and public accommodations is sufficiently injurious to both individuals and society that it should not be tolerated. The section also explains how such legislation might succeed practically in eliminating discrimination in these areas.

Vincent J. Samar is Adjunct Professor of Philosophy at Loyola University of Chicago and Instructor of Law at Illinois Institute of Technology, Chicago/Kent College of Law. He is a practicing attorney and the author of The Right to Privacy: Gays, Lesbians and the Constitution (Temple University Press, 1991). Samar has run for local political office and been a long-time activist in Chicago’s gay and lesbian communities. Correspondence may be addressed to the author at Philosophy Department, Loyola University, 820 N. Michigan Ave., Chicago, IL 60611.

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The past ten years have seen dozens of municipalities and seven states pass civil rights legislation aimed at protecting gays and lesbians from discrimination in employment, housing, and places of public accommodation such as banks, hotels, mortgage companies, restaurants, retail establishments, and schools.\(^1\) The past fifteen years have seen several federal bills introduced to protect lesbian and gay civil rights, including one currently pending in Congress.\(^2\) President Bill Clinton has openly supported a federal civil rights bill to protect gays and lesbians.\(^3\)

In part, the successes in enacting legislation in this area at the state and local levels and in garnering support at the federal level for such legislation have been due substantially to the willingness of gay men and lesbians to come out of the closet and to join with other ostracized or marginalized groups such as women, the disabled, and racial minorities in order to claim publicly equal rights of citizenship.\(^4\) One consequence of this development has been to draw public attention to lesbian and gay contributions in various occupations that had been thought mistakenly to be exclusively heterosexual.\(^5\) These successes may also have been due to increased public awareness of empirical studies suggesting that homosexuality is neither a chosen nor a learned response.\(^6\) Finally, the American public has been made aware through various news reports of the prevalence of anti-gay and anti-lesbian discrimination.\(^7\) All of this has led some politicians, military officials, the media, and various other groups in the United States to engage in a debate at the federal, state, and local levels about whether discrimination against lesbians and gays is morally justified, and, if not, whether laws should be enacted to prevent this form of discrimination.\(^8\)

Any legislation that seeks to limit the freedom of private citizens to hire, house, or serve whom they want in their business establishments requires a moral justification. This is because a free society is predicated on the belief that individuals can choose to associate with whomever they wish. This does not mean that the existence of any restrictions necessarily renders a society unfree. What it does mean is that such restrictions must complement the freedom that the society holds dear under an applicable moral theory. Moreover, because at least some lesbians and gay men can avoid discrimination only by remaining in the closet, the justification for anti-dis-
discrimination legislation protecting this group must go beyond considerations of affiliative or affectional orientation to protect some homosexual behavior. In this sense, anti-discrimination legislation for gays and lesbians will depart from prior justifications involving racial, gender, ethnic, and age statuses by having to take into account statements or perceptions related to conduct. Consequently, the justification for such legislation does not run the easy mile of "they could not help what they are," for there is always the counter-argument that one does not have to act upon any desire one may have, as well as the counter-argument that society does not have to support any and all such desires.

In this essay, I will take up some of the typical arguments that have been used to try and justify discrimination against gays and lesbians in employment, housing, and public accommodations. I will, then, address them one by one, demonstrating that they are irrational or based on irrelevant information. In doing this, I will show how some of these arguments reflect ethical views under utilitarianism, rights theory, communitarianism, and natural law. Absent from this discussion will be analyses of purely religious texts and traditions since I am presupposing the existence of a society which values personal, ethical, and religious pluralism. Without deciding among the theories to be discussed which is the right foundation for the structure of a democratic society, I will nevertheless show how each theory, on its own merits, would decide whether such discrimination is justified, and how together utilitarianism, rights theory, and communitarianism provide a minimal moral content that supports enacting statutes aimed at preventing discrimination.

**GAY/LESBIAN DISCRIMINATION IS UNJUSTIFIED**

Typical arguments proffered in favor of discrimination against gays and lesbians include the following:

1. In order to maintain social stability, society needs to exclude from the mainstream those groups that the majority deems to be too far different or "deviant."
2. At least in respect to the private sector, people have the right to hire, house, or serve in their business establishments whenever they want.

3. The overall good of society (as defined by its most dominant values) may be enhanced if discrimination is allowed.

4. Protecting gays and lesbians from discrimination undermines morality.

5. Protecting lesbians and gays encourages role models harmful to children.

6. Protecting gays and lesbians against discrimination opens the door to affirmative action programs for lesbians and gays.

7. The right to the free exercise of religion may conflict with the right to nondiscrimination.

Reasons one through five are theoretical. In particular, reasons one through four are purely normative in that they rely for their justification on one or another ethical theory. Reason one, for example, is usually offered in a utilitarian context whereas reason two presupposes a rights theory. Reason three tends to be asserted from a communitarian point of view, and reason four is most often asserted on the basis of natural law. Depending on how one interprets the claim, reason five is an admixture of ethical theory and causal psychology. By contrast, reasons six and seven are practical in that they question how (if at all) legislation could be structured to avoid a broader consequence than what a minimal justification for nondiscrimination would allow.

Clearly, some discrimination in employment such as favoring persons who are appropriately educated to practice law or medicine over those not so educated is justified while most discrimination based on race, religion, gender, or disability is not justified. (I am assuming here that the control of education—via controlling accreditation, curriculum or admissions policies—is neither designed nor has the effect of keeping power unfairly distributed only in the hands of one group of people.) So the question is: What is it that makes some kinds of discrimination justified but not other kinds? Obviously, context plays a role, as when the religion of the person is relevant to whether he or she becomes a member of a particular clergy. But exactly what role context plays must itself be justified.
Although it may seem like a truism to say that discrimination based on irrational prejudice or matters unrelated to the opportunity sought (called “invidious” discrimination) is unfair, it is nevertheless true. (From hereon in I will use “discrimination” to mean only the invidious sort.) And this truth can be seen to cut across boundaries of utilitarianism, rights theory, and communitarianism once we make clear what we mean by “irrational” and “irrelevant.”

By “irrational” I mean that the claim cannot be proved either by reference to physical evidence or by deduction from a noncontroversial premise or at least one that is plausible. Belief that the stars control our activities is irrational because we cannot devise an astrological test that predicts the future with a degree of accuracy higher than would be expected by random chance. The reason for the requirement of a noncontroversial premise is to recognize that the theory adopted should apply in a society that approves of pluralism in personal values and religious beliefs. By “irrelevant” I mean that the evidence chosen does not support the claim at hand. That a person knows how to drive does not prove either that he or she is a good or bad driver. “Irrational” thus attaches to a claim while “irrelevant” goes to the evidence supporting the claim.

At this point, it should be noted that I am treating “rational” and “relevant” not as theory-specific but as ethical-area-specific—that is, what would be rational and relevant within a particular ethical tradition. My rationale for doing this is not that individual theories within a particular area might not provide more specific criteria for what is rational and relevant. Rather, it is that across the areas considered there is enough certitude on (at least) the grosser interpretations of these concepts to suggest their overall application.

In the case of gay and lesbian discrimination in housing, employment, and public accommodations much of the debate turns on irrational claims (such as “homosexuality is an abomination to God”) or irrelevant evidence (such as gay sex is inferior because it cannot produce children). The few allegedly rational and potentially relevant claims made (such as the charge that gay people are more inclined to molest children and spread disease) are easily refuted by available evidence.

Applying the concepts of rationality and relevancy to the three ethical theories referred to above, we discover the grounds upon
which lesbian and gay discrimination in employment, housing, and public accommodations is unjustified. We also begin to unpack some of the arguments that are often used against claims that the state has an obligation to avoid such discrimination. The affirmative argument for a state obligation to end discrimination in this area will be taken up in the next section.

From a utilitarian standpoint, discrimination would be justified if it serves to maximize utility (i.e., if it serves to aggregate utility by affording the greatest happiness to the greatest number).\textsuperscript{14} Since utilitarianism specifies no preordained ‘good’ to be achieved, the greatest happiness principle is satisfied when, in light of the various competing goods that the members of society take to be important, there is more satisfaction to be obtained in meeting some particular social good (hopefully, in light of thought and reflection) than there is dissatisfaction from the loss of other competing goods. However, as will be argued, any form of discrimination is not to be tolerated. If the discrimination is irrational or irrelevant, then allowing the discrimination may create more unhappiness and less utility than would otherwise be the case. This is especially true where what is at stake is of central importance to the individual as is where one lives or how one earns a living.\textsuperscript{15} Denying lesbians and gays access to housing, jobs, and places of public accommodation based on irrational prejudice or irrelevant evidence needlessly creates unhappiness for the persons whose desires are frustrated, and loss of benefits to the society from its gay and lesbian members.

First, it is economically inefficient for the society to limit anyone from buying property or participating in those professions to which they are most suited. Regarding this latter point, there may also be a loss of creativity from discriminatory barriers.

Second, being free of the fear that one might be discriminated against because they are gay encourages openness, which itself is positively beneficial both to the individual and to the society. It is positively beneficial to the individual when the person can feel good about him- or herself because he or she no longer has to suppress that central element of personal identity which is the basis for decisions about whom one might love, be with, or share a life with.\textsuperscript{16} (In this same vein, coming out to parents and friends ensures that the love one feels—or, unfortunately, sometimes does not
feel—from them is honest and not based on an artificial image of the self.)\textsuperscript{17} It is positively beneficial to the society when large numbers of its members begin to accept gays and lesbians because the coming out decision has shortened the social and political distance that previously separated lesbians and gays from the rest of society.\textsuperscript{18} Shortening the social and political distance may mean more attention to the battle over AIDS funding and related sex-education, which until recently has had a disproportionate impact on the gay male community.\textsuperscript{19} It may also mean more attention to issues like gay-bashings.\textsuperscript{20} No longer can we speak of "those people over there," for now we must also include "these people over here." This latter point is not only beneficial to the individual's need to overcome feelings of isolation but to society's interest in overcoming prejudicial and irrational fear. For the more lesbian and gay people come out in many different walks of life, the more will stereotypes be broken down and replaced with a more realistic view about the actual makeup of society. All of these potential gains are undermined, however, so long as discrimination may result in losing one's home, career, or other important public accommodations.

Still, it might be argued that adopting a policy of discrimination against gays and lesbians would provide the society with a needed scapegoat, especially at times of trouble. That is because ostracizing openly gay or lesbian persons is easier than ramming contrived accusations through a court. Moreover, the existence of such a policy would not be likely to cause non-gay members of society to become concerned that the policy might eventually be applied to them.

The problem with this attempt at justifying anti-gay/anti-lesbian discrimination is the level of abstraction at which the argument is offered. Discrimination against lesbians and gays is either irrational or irrelevant when there is no hard evidence that such persons as a class actually cause physical or mental harm to others. Consequently, a third utilitarian reason for not allowing such discrimination is that such discrimination may breed anxiety in society generally since no one will ever be certain that a similar prejudice will not evolve against them. That is to say, no one will ever be certain that they will not be made part of some class judged worthy of discrimi-
nation. Even if the presence of gays and lesbians in the minds of people is currently underestimated, given the efforts by many activists to obtain public forums on questions of rights, there is no reason to assume that this state of affairs will continue. Thus, if not now, certainly in the future, whenever one hears of someone being discriminated against, he or she will not know whether the discrimination was justified (in the sense that it was based on more than a mere perception of harm) or not. Consequently, it is difficult to detect any social utility in discriminating against gays and lesbians in employment, housing, and public accommodations, when such a practice encourages an atmosphere of paranoia and irrationality harmful to society as a whole.

It might also be argued that if Western society has allowed gay/lesbian discrimination for hundreds of years, why should it change now? This argument, however, ignores the fact that benefits are additive and that both society and the individual benefit more when the potential of each person is tapped to the maximum extent. For example, racial separation was for a long time (and to a lesser but more insidious extent still is) practiced in the schools of this country. One of the drawbacks of racial separation in the school is that the potential of most African-American youth is stifled by a poorer quality of education and lack of self-esteem vis-à-vis the broader society. A similar response could be made to the military’s policy of discharging openly gay and lesbian persons from the services in order to ensure the morale of the troops. Surely, educating the troops about what homosexuality is, who gay people are, and what types of interpersonal conduct are appropriate while on duty could go a long way toward resolving morale problems (not only in respect to gays and lesbians but also indirectly in respect to military women) without having to engage in this form of discrimination. This is, indeed, what happened when the armed services were ordered racially integrated.

Under rights theory, invidious discrimination is never justified because it undermines individual autonomy. However, not all cases of discrimination need be invidious. Consequently, cases in which people appear to be justified in discriminating against gays and lesbians are not really cases of invidious discrimination because the affectional orientation is relevant. An example would be a hetero-
sexual male who chooses to marry a heterosexual female. Where rights theory becomes problematic is where there are two or more rights in conflict. For example, how should one resolve the conflict between a claim to manage one's business or housing as one pleases and the right not to be discriminated against? Here, the right to freedom should be tolerated unless autonomy generally (in the sense of each person to decide for him- or herself what is in his or her own interest) is better served by not allowing it than by allowing it. This is because protecting liberty protects autonomy generally. More specifically, the right of freedom to do with one's business or housing as one chooses ought to win out over the right not to be discriminated against if the result would better promote overall individual autonomy for the society generally than not allowing it. On the other hand, if allowing the right to freedom would inhibit or restrict more autonomy generally than not allowing it, then the right to freedom is not justified. Where the latter is true, the maximum allowance of interference with liberty is the minimum necessary to protect autonomy generally. This appeal to maximal autonomy does not undercut any claim to a deontological basis for the right at stake. For the question here (unlike for the utilitarian) is not the good to be achieved, but affirmation of the underlying principle (in this case autonomy) that justifies the right in the first place. Thus, where the right to freedom is based in individual autonomy, a principle of equality (that seeks to further the promotion of autonomy generally) can limit exercise of that right.

Here it is important to distinguish two different extremes of rights theory: classical liberalism (or libertarianism) and egalitarian liberalism. Under the classical liberal or libertarian view, an individual's freedom to do what he or she wants with his or her own property (whether in their persons as to whom to associate with or other objects) is the most important value. The only limitation is that one cannot use his or her freedom so as to deprive another of a similar freedom. Consequently, under a libertarian rights theory, there is never a justification for limiting one individual's freedom to use his or her property merely for the sake of advancing the welfare of another. In contrast, the egalitarian liberal values equality above freedom. Consequently, the egalitarian liberal would support a scheme of civil liberties (as well as social and economic rights) that
affords all persons the same opportunities. This difference between
the two views can be seen in the different ways they would ap-
proach the question of discrimination. Because the libertarian wants
to maximize individual freedom, the right not to be discriminated
against (even if it is based on irrational or irrelevant criteria) is
overridden in the private sector although not in the public sector. In
contrast, for the egalitarian liberal, the right not to be discriminated
against, when based on irrational and irrelevant criteria, always
undercuts human dignity and respect for persons and, therefore, is
not overridden by the right to freedom.

Both libertarians and egalitarian liberals alike would recognize
that irrational discrimination or discrimination based on irrelevant
evidence against openly gay or lesbian persons restricts the au-
tonomy of this group by limiting its opportunities to compete for the
essential goods of society on the same basis as society offers to its
other members.29 Such denial has two basic components. On the
objective level, it denies lesbian and gay individuals the freedom to
be openly gay and still participate in receiving the same benefits
afforded other members of society. Such exclusion also has the
effect of skewing occupational patterns of gay men who are unable
or unwilling to hide their sexual orientation toward certain profes-
sions which are stereotypically viewed to have less immediate,
direct impact on the important questions of life or the important
value aspect of property and are often labeled “unmanly.”30 At the
subjective level, irrational discrimination or discrimination based
on irrelevant information denies some gay and lesbian individuals a
means to express publicly their uniqueness in a way that is self-ful-
filling and likely to promote their own happiness, while no:
threatening the objective interests of any other person. Furthermore,
fail to allow open expression can lead to development of self-
doubt, lost self-esteem, and self-hatred.31

Libertarians and more egalitarian liberals disagree over what
should be done to correct such prejudice. Libertarians would say
that laws cannot be used to restrict the use of private property or
employment practices in the private sector whereas egalitarian theo-
rists would allow the law to prevent discrimination (based on irra-
tional or irrelevant views about sexual orientation). This seeming
impasse between libertarians and egalitarian liberals should not lead
one to the conclusion that rights theory can develop no firm position on this topic. If one separates out liberty (as a system of rights defining equal citizenship) from the worth of liberty (as the capacity to advance one’s ends within a system of equal rights), then one must endeavor to resolve the problem in terms of more basic principles—principles underlying both libertarian and egalitarian views—which rational persons would want guaranteed as a minimal condition for the advancement of the responsible pursuit of their ends.

Here two theories serve as possible bases for a solution. The intuitionist approach of John Rawls, for example, asks what persons would choose if they were in a position of not knowing anything about themselves but only in a position of knowing general economic and psychological facts about human beings. Clearly, they would choose not to allow arbitrary discrimination, for they would be afraid of discovering that they were themselves the objects of discrimination once the veil of personal ignorance was lifted from them. A rationalist approach, as developed, for example, by Alan Gewirth, argues that every rational agent (a person who can act voluntarily for his or her own purposes) must logically accept on pain of contradiction that every other agent has the same rights as oneself to freedom and well-being because these are the proximate necessary conditions of human agency. Here, arbitrary prejudice is avoided because such prejudice assumes that certain features (not in the definition of agency) are relevant when all that is at stake for the establishment of moral rights is that one be a moral agent. Thus, both of these theories would condemn arbitrary discrimination especially where individual well-being is threatened. However, both of these theories are controversial because they raise deep philosophical questions about the nature of moral theory justification. Pending an ultimate resolution of this controversy, one might tentatively (because it starts from a value-laden assumption) adopt the following approach toward solving the problem of discrimination.

It would seem that our democratic society generally accepts the idea that all persons should have the opportunity to discover, amidst numerous competing interests and compatible with a like freedom for all, what is in their own interests. If this is true, then gay and lesbian persons should have the same rights to discover what is in their interests as every other person at least where there is no ra-
tional and relevant reason for their being denied these rights. But clearly lesbians and gays are deterred from discovering who they are by the possibility of loss of job, housing, and other important public accommodations. If society believes that people ought to be allowed to discover what is in their own interests, then it must grant to gays and lesbians the level of autonomy (in the sense of freedom from arbitrary discrimination) that would allow this discovery to occur.

From a communitarian position, discrimination should be allowed only when it serves the interests of society treated as an organic whole. Here the individual is seen as constituted by society rather than as constituting society. Discrimination is not allowed where denying someone full citizenship will produce, on balance, more of a detriment to society (perhaps in the form of a lost resource) than not. Thus, the question of whether one can discriminate from a communitarian standpoint (even as to essential elements of well-being) cannot be answered independent of a conception about the overall good of the society at stake. In this sense, a communitarian view need be neither liberal nor conservative. Modern communitarians often differ from their classical fore-runners (philosophers like Plato, Rousseau, and Marx) in that the "good" to be obtained is not something eternal or outside the society but is, rather, a constitutive element of the society in question. This does not mean that communitarians ignore at a fundamental level the influence of who holds power. Rather, they see the actions of those who hold power as often reflecting the society's deeper values. For example, certain forms of discrimination that may be allowed in a society of fundamentalist Christians may not be allowed in a more pluralistic society, especially one which values tolerance of differing personal moral and religious points of view. The only exception to the latter would be discrimination necessary to support the very existence of the society, such as providing laws against murder, theft, and insurrection. On the other hand, why should anyone need to start from so narrow a premise in a society that avows personal religious and moral freedom? Clearly in a pluralistic society one should hope to avoid supporting such discriminatory claims.

Discrimination against gays and lesbians in employment, housing,
and public accommodations can create an artificial image of a homogenous society that is not true to life, thereby sowing the seeds of discontent which could in the long run undermine social stability. (An excellent example of this problem is Patrick Buchanan’s homophobic denunciation at the 1992 Republican National Convention of “the” gay and lesbian “lifestyle” as inimical to traditional American “family values.” That speech played a role in galvanizing many citizens to vote Democratic.) This is especially true if gay/lesbian discrimination becomes a testing ground (because of the unpopularity of the group) for a broader-based social/political agenda for society at large. Such a domino theory of moral views exhibits itself when justifications for discriminating against lesbians and gays are based on the view that these groups fail to engage in procreative sex (a view which in addition to its questionable claim to moral authority is not always even factual). From here, it is only a short step to a more generalized criticism of the rights of women to choose abortion or even to enter into nontraditional professions. Additionally, allowing this discrimination against gays and lesbians ignores the fact that at least part of this group’s contribution to a pluralistic society might lie in setting examples for how persons of different sexual orientations (much like persons of different genders, races, and ethnic groups) can live and work together. At a more sophisticated level, the removal of sanctions against the acknowledgement and expression of affectionate emotional responses would contribute significantly toward “a repudiation of stereotypical gender roles” which feminists, and more recently proponents of male liberation, have advocated.39

Looking at the issue from an approach framed by natural law theory, discrimination is justified when it promotes the inherent (or divine) purpose of nature as discovered from nature’s laws. According to Aquinas, for example, the inherent purpose of nature is discovered from the order of natural inclinations.40 It is in this sense that natural law theory makes a claim to moral objectivity. Specifically, three inclinations provide, in the order stated, the basis for evaluating the morality of human acts. First, since everything in nature has substance (i.e., continues to exist over time), survival is the first and foremost tenet. Hence, we have laws against violence and murder, and a claim from some for laws prohibiting abortion.
Next, because human beings share with all other animals a desire to procreate and rear offspring, procreation becomes a second important inclination. Herein lies natural law’s traditional prohibition against all forms of sexual expression/activity (especially homosexuality) which are not procreative. Finally, human beings have as part of their unique nature the desire to seek knowledge of God. This is natural law’s claimed moral basis for freedom of worship.

Natural law theory, however, does not suffice to show that the homosexuality of a person is immoral per se. This is because the kinds of things that should count as relevant arguments in natural law theory are themselves problematic. First, acceptance of a divinely-ordered plan of nature is a controversial claim as indicated by the fact that modern science may proceed without any assumption about the teleological design of its objects of study. Second, what constitutes the ‘natural’ in natural law is not precise (at least) under Aquinas’s formulation. For example, why is it natural to have heterosexual intercourse during an infertile period while it is unnatural to have intercourse using a contraceptive. Why is heterosexuality more natural than homosexuality? Is ‘natural’ just a substitute for ‘statistically average,’ in which case the question might be why one would want to be statistically average? Is natural supposed to mean, not found in nature other than in humans? If so, then it must be recognized that many of the actions that natural law is supposed to prohibit—such as homosexuality—are found in nature. It is also unclear why the concept of the natural (when employed in moral theory) should embody any broader conception of nature than what is unique to human beings. Or is natural supposed to mean morally right, in which case, the concept of the natural begs the question of what is morally right? A similar criticism applies against Kant’s view of homosexuality. Kant argued, from the second version of the categorical imperative (“Act so that you treat humanity, whether in your own person or that of another, always as an end and never as a means only”), that homosexuality was universally wrong because it violates the end of humanity in respect of sexuality which is to preserve the species without debasing the person. Kant thought that the homosexual self is degraded below the level of animals and, thus, degraded in itself. No violation of the second version of the categor-
tical imperative occurs, however, once one drops the anti-natural thesis. The flaw in Kant’s approach can be seen in the fact that gay and lesbian people fall in love with partners and, under any meaningful sense of that term, treat those persons as ends and not simply as means.45

Obviously, not every moral theory will succumb to the same sorts of criticism. Nevertheless, regardless of the theory one chooses, discrimination against lesbians and gays in housing, employment, and public accommodations, because it is usually based on either irrational or irrelevant grounds or on a loose use of concepts, causes serious suffering to the individuals involved and a detriment to the society that loses the benefits of the full and unfettered contributions of its lesbian and gay members. This, then, leads us to the minimal moral content, if morality (in the broad sense of the combined three traditions discussed above) is to be satisfied, that supports eradicating gay and lesbian prejudice. That content derives from a conjunction of values found in the three ethical traditions of utilitarianism, rights theory, and communitarianism. Conjunction is sought here in order to guarantee a level of agreement among the three ethical traditions on arbitrary discrimination. Thus, any form of discrimination which simultaneously restricts social utility, inhibits individual autonomy, and does not foster cooperative arrangements within a pluralistic society is morally unjustified and must be avoided. Since gay and lesbian discrimination most often involves these evils, it morally must not be allowed.

Finally, we take up an objection that seems more related to a misunderstanding of a psychological cause than the inappropriate-ness of a particular ethical theory. Here it might be objected that (at least) in respect to teaching in schools and supervising children at day-care centers, discrimination against gays and lesbians is necessary to offset a child’s desire to take adults as role models.46 However, this objection is too loose. If it means that children exposed to an openly gay and lesbian teacher or guidance counselor would likely adopt that person’s sexual orientation, it is factually false. Much evidence points away from this means of how sexual orientation is acquired and toward either a biological or early developmental model which is not based in learning theory, let alone chance encounters with teachers of whatever sexual orientation.47 If it
means that a person who is on the borderline between being gay or straight might be encouraged to be gay, it conflates choice with discovery and ignores the fact that most of the people whom a child will have for role models will be straight. If the objection means that a child should not be exposed to an “immoral lifestyle,” then it once again begs the question. Obviously, all of these interpretations are too facile to provide even a psychological reason for believing that interaction with gays and lesbians is harmful to children. More generally, what this objection shows is that irrationally-based prejudice against gays and lesbians is deeply ingrained in some of society’s most fundamental biases.

A JUSTIFICATION FOR CIVIL RIGHTS LEGISLATION

Thus far, I have argued that discrimination against persons who are gay or lesbian (or, perhaps more to the point, “who are perceived to be gay, lesbian, or bisexual”) in employment, housing, and public accommodations is not ethically justified. But how far should society go to eliminate this kind of discrimination? Would society, for example, be justified in passing statutes that would make sexual orientation discrimination in these areas illegal, analogous to the 1964 Federal Civil Rights Act that made discrimination based on race, creed, and national origin illegal? (Incidentally, such statutes would also have the effect of making discrimination against heterosexuals—perhaps by a disgruntled gay person—illegal in the same way they sanctioned discrimination against gays and lesbians.) How, moreover, would such statutes be enforced? How would one prove discrimination? Would there not have to be the defense “I did not act based on the fact that he/she was gay?” Clearly, if such statutes are to be useful, answers to all of these questions are necessary. Such answers bear, moreover, on the propriety of passing such legislation in the first place. For if a statute cannot be enforced or enforced fairly, then to enact it into law may undercut the value of law as a protection against social harm. Additionally, if such a statute could be enforced too easily (whenever the claimant turned out to be gay) without adequate allowance for the possibility of a defense (the employer may not in fact have acted against an employee on the basis of sexual orientation), then it could place the
legal system in the position of unduly supporting the interests of one group over another. Obviously, we are led to question whether law is the best vehicle to avoid discrimination, even if gay/lesbian discrimination is wrong.

The law is indeed the best vehicle to protect the rights of gay, lesbian, and bisexual individuals for at least one reason. Law has the ability to help form social attitudes. That is, if one lives in a society where the belief is strong that what the law requires (at least in respect to interpersonal conduct) is what morality requires, then the fact that gay/lesbian discrimination is illegal is one reason to think that the probabilities favor it being immoral as well. Moreover, the benefit of having such laws to attack the problem of social injustice that attends sexual orientation discrimination (as previously discussed) well offsets the (surmountable) enforcement problems just mentioned.

Law plays the role (in a society where the institutions of government are thought to operate with a modicum of justice) of setting the norms for social behavior that in the long run operate to correct social inequities by at least eliminating the most egregious forms of such inequities from institutions. Much of the derogatory language that used to be associated with racial minorities has fallen out of fashion because the varied institutions of society, including the law, and possibly because of it, have deemed such usage to be morally and sometimes legally unacceptable. This does not mean, of course, that such discrimination does not occur under a more covert form of language and acts. It does mean, however, that there is something wrong with the overt practice of discriminatory behavior. So law treats the evil of discrimination by driving it out of “nice” places where people can feel free to discriminate overtly.

What should a law look like that would protect against anti-gay, anti-lesbian discrimination? Because this essay has not sought a foundation for anti-gay, anti-lesbian discrimination in any particular ethical tradition but has considered several competing traditions, it can at most state the minimal moral content that such anti-discrimination laws must meet.

First, since much of the discrimination that occurs in this area is the result of perceptions rather than actual information about persons’ sexual orientation, the law must prohibit discrimination
against persons whose real or perceived affectional desire is heterosexual, homosexual, or bisexual.\textsuperscript{54}

Second, such a law should apply to the private as well as the public sector since both areas have the same potential for affecting individual and social well-being.

Third, the best form for such a law would be a statute setting a blanket prohibition against discrimination in employment, housing, and public accommodations. Since the private sector is being included (there being no constitutional protections and only limited tort protections in this sector), a statute is necessary. The areas of employment, housing, and public accommodations are the ones most likely to affect persons’ decisions to come out and to be free in the affectional expression of their sexual orientation.

Fourth, because many businesses operate in interstate commerce, there is a need for uniformity of enforcement across state lines. Thus, federal legislation is needed along with concurrent state and local protections. The rationale for the latter is first to set politically obtainable examples for how such legislation might work in order to advance a political climate where federal legislation is possible, and second to remove the full burden of enforcement from one level of government. This latter point also provides a check that discrimination will not be covertly allowed because any particular political view dominates one level of government at a given time.

Fifth, such a statute should provide for both criminal and civil penalties against individuals or companies. The rationale for providing criminal penalties of high fines (especially against companies) and possible imprisonment (against individuals) is to create a strong deterrent to persons engaging in harmful discriminatory acts. Moreover, stating society’s strong disapproval for this form of discrimination by the use of criminal sanctions helps undermine the prejudice that gives rise to these acts. The rationale for allowing civil remedies is, first, that most cases of discrimination (especially covert discrimination) will probably not be provable beyond a reasonable doubt even though there may be a preponderance of evidence suggesting the discrimination and, second, to redress more directly the economic (as in lost wages) and emotional harms caused the victims of discrimination by a direct form of compensation. Thus it is sufficient in terms of meeting minimal moral content
that legislation be passed prohibiting sexual orientation discrimination in employment, housing, and public accommodations in both the public and private sectors and placing the burden of proof on those who would seek to bring a charge of discrimination. However, the fact that such legislation might meet these minimal moral requirements should not be taken to prevent agencies of the government from imposing higher standards not specifically required by statute in contexts where benefits are being distributed (e.g., awarding of contracts or special incentives to firms practicing affirmative action, instituting educational programs aimed at dispelling homophobia, etc.). This follows from the duty government has to treat all persons without regard to irrational or irrelevant prejudice under all three moral traditions.

For example, to offset racial discrimination, federally insured institutions that take mortgage applications (like banks, savings and loans, and some other institutions) are required by the Treasury Department to ask the race of the applicant.\textsuperscript{55} If the applicant refuses to answer, then the interviewer is supposed to put down what he or she believes the race to be and the reasons why.\textsuperscript{56} By analogy, should an applicant for a mortgage loan be asked his or her sexual orientation? If the applicant refuses to answer, should the interviewer put down what he or she believes to be the sexual orientation? Surely it is reasonable to allow such a question to be on the application form provided that it is optional (like the race question) in order to discourage lenders from discriminating and to create a climate that encourages gay people to come out of the closet.

The question of whether interviewers should be required to put down what they believe to be the sexual orientation of the applicant is more problematic. This is because stereotyping according to “traits” (including racial traits) is both inaccurate and itself contributes to the social construction of discrimination. Indeed, the very selection of traits may carry with it the derogatory attitudes that create a climate of fear and oppression that is the cause of the oppression in the first place. In the case of sexual orientation, there is no certain means by which to link particular traits with specific affectional desire, let alone specific behavior. On the other hand, certain actions—such as two men applying for a loan on a one-bedroom condominium that they plan to hold as their primary resi-
dence—do suggest sexual orientation. The same may be said of a man and a woman. Consequently, while stereotyping should not generally be encouraged, one can easily imagine situations in which an interviewer could be asked to choose from a relatively limited set of statistically reliable options as a basis for identifying the applicant’s sexual orientation. Given that this requirement would ensure the availability of mortgage loans to gay and lesbian persons without depriving anyone else of such loans, it is not morally objectionable.

Of course, nothing here is meant to suggest that stereotypical statements made about gay people should not play a role in proving discrimination elsewhere. In that instance, perception may be part of the discrimination itself; in the regulation area, however, reliance on perception is more difficult because one must avoid creating the very prejudice one is trying to eliminate.

Other federal departments and agencies may, of course, maintain compliance regulations in excess of basic protections in order to insure a true change in attitudes toward equality. For example, a contractor who receives a financial award from the Department of Transportation to perform some community service might be required to set aside twenty-five percent of its subcontracts for placement with minority-owned businesses and five percent with businesses owned by women. What percentage of contract placements should be reserved for gay-, lesbian-, or bisexual-owned businesses is unclear. One approach would be to look at the total number of such businesses in the area to be served by the contractor and to base the percentage on that figure. This might have the effect of encouraging more gays and lesbians to come out of the closet in order to develop and be employed by such businesses.

Along a related line, the Internal Revenue Service requires any non-public educational institution (such as private colleges, universities, secondary and primary schools, and technical instruction schools) with a tax-exempt status to include in its student-recruitment advertisements, at least once a year, a non-discrimination statement listing the categories of race, color, creed, and national origin in a space of no less than three column inches in newspapers that are reasonably likely to be read by all racial segments of the community and in a section of the newspapers likely to be read by
prospective students and their families. Presumably, if anti-gay, anti-lesbian discrimination legislation were passed, then the IRS would probably amend its requirement to include “sexual orientation” among the other categories. This would be a relatively minor alteration to an already existing procedure.

It should be noted that absent from this analysis is an argument for affirmative action programs to require (independent of a receipt of a governmental benefit) employers and landlords to hire or rent apartments to proportionate numbers of gays and lesbians as exist in society. This is because the analysis is based only on minimal moral requirements that such antidiscrimination legislation must meet. Were discrimination to continue, however, then, as more and more gays and lesbians come out of the closet, such programs might become necessary.

The administration of mandatory affirmative action programs is likely to be costly both for the parties being regulated and the society which must do the regulation. Additionally, while particular private sector firms might find government incentives for affirmative action enticing, the possibility of a general consensus developing as to how much affirmative action is necessary to offset current discrimination is doubtful. Consequently, the least intrusive solution for the private sector would be immediate anti-discrimination legislation so that the need for a more expansive moral argument favoring affirmative action policies would not have to be countenanced.

Finally, nothing in the kind of statute proposed here is meant to impose an unconstitutional burden on the free exercise of religion as protected by the first amendment. This is because, again, we are dealing only with minimal moral requirements, and certainly the first amendment is itself supported on moral grounds. Indeed, a rationale for protecting the free exercise of religion is that individual autonomy and social stability are best served where government does not step into matters so personally affecting individual conscience as is centrally displayed by religious institutions. A similar rationale for allowing in some instances infringement on religious exercise is that such measures are necessary as the only means available by which individual autonomy or social stability can be protected. Thus the first amendment has been interpreted to
permit the government to regulate religious exercise in certain compelling circumstances. Where such a compelling interest is shown, the maximum amount of intrusion on religious freedom is the minimum necessary to satisfy the state's interests. Certainly, from all that has been said above, the eradication of sexual orientation discrimination is a compelling interest of the state. So one must ask, what can the statute prescribe with respect to limiting religious freedom? Clearly, the statute cannot force an endorsement by a religious institution contrary to its values. But, insofar as the statute is applied to institutions like schools, hospitals, and universities that have mixed sectarian and religious purposes, it can require equal distribution of the facilities and services that would normally accompany a purely sectarian purpose.

As to the matter of enforcement, we need to know whether a particular act was motivated by a discriminatory intent or not. Since, unlike being African-American, in which case racial statistics (such as who holds the better-paying jobs in a company) can be fairly conclusive evidence of discrimination, gay people who remain in the closet are not as readily identifiable as to their sexual orientation. In this sense, anti-gay/anti-lesbian discrimination is more analogous to discrimination based on religion than to racial or sex discrimination. So the question arises: To what evidence can a judge or jury turn where the alleged discrimination is at least not overt? Usually, the employer will not say, for example, "We don't hire gays." The answer lies in the very feature that identifies one's sexual orientation—namely, the behavior that manifests the affectional desire to be with another person of the same sex rather than someone of the opposite sex. Discrimination based on affectional desire may manifest itself overtly in a company's policy against hiring or renting an apartment to gays or lesbians, or covertly in language, as when an interviewer asks, "Are you married or dating?" Overt discrimination arises in a housing context where the lease or condominium regulations provide a rule against renting an apartment to two persons of the same sex or to two persons not legally married, or where a mortgage company fails to approve a loan for the purchase of a single family dwelling by two or more persons because they are not related by blood or marriage. In the employment context, fear of discrimination can arise where a job
application form asks the name of a person to contact in case of an emergency or the name of a beneficiary for the company's life insurance policy. It can also arise when one has to decide how to respond to a company invitation to a holiday party for employees and their spouses, or if one has to fear being seen walking down the street holding hands with another person of the same sex because the town in which they live is relatively small and everyone is well known. In the context of public accommodations, schools, restaurants, camp sites, and short-term housing establishments may have a policy not to serve perceived lesbian or gay persons or to allow persons of the same sex to share a bedroom. In some of these situations, the decision to discriminate may be made on very subtle criteria (a person's looks, style of dress) that are also not very precise. Even so, the object of the discrimination is the individual's freedom to express the same affectional behavior to another of the same sex that is expressed between opposite-sex couples and this behavior is very precise. Consequently, discovering discriminatory limits on the freedom to practice affectional behavior should be the key to discovering anti-gay and anti-lesbian discrimination.63 Obviously, of course, not all forms of affectional behavior need be tolerated provided that the differences do not separate out gays and lesbians from heterosexual couples.

How might such discrimination be proved? In anti-gay discrimination cases, the means for making evidentiary determinations are very similar to the means currently employed in race, sex, and age discrimination cases except that the identifying criterion is a behavior and not just a trait.64 For example, at the overt level, if the employer has a company manual, does it declare there is no discrimination based on sexual orientation or marital status? If there is a social function for employees and spouses, has the employer indicated that same-sex couples are invited? In companies in which there are a number of known gay employees and based on their years of employment, education, and training, do their numbers in the different ranks match what would be statistically expected if discrimination were not occurring? Has there been harassment on the job either by fellow employees of which management is aware but does nothing about, or is there harassment by management itself?
In preparing a defense, behavioral considerations should also play a key role. Does the employer regularly encourage openly gay and lesbian employees to play active roles in the social life of the company? If a company has a large number of openly lesbian and gay employees, are they in all ranks of management or are they statistically gathered at the bottom? Is disparaging and harassing language not only disapproved of but, when directed at specific employees, seriously sanctioned? If these conditions are met, then the employer should have a good defense against unjustified charges of sexual orientation discrimination.

At this point it might be questioned: Why should an employer have any affirmative duty to create an open environment for gays and lesbians? Why is it not sufficient that the employer simply not discriminate? The problem is in knowing whether discrimination has occurred. Since behavior is the determining factor and gay, lesbian, and bisexual behavior can be kept in a closet, there are few means to weed out this form of discrimination in any comprehensive way, other than by requiring positive efforts by an employer to create an open environment for analogous manifestations of such behavior that would be permitted to heterosexuals. Of course, there are limits to just how far an employer should have to go in order to create an open environment. Does an employer, for example, have to advertise jobs in a gay newspaper just because they are advertised in a newspaper of general circulation? Is there an educational issue here: employers learning openness to persons of different sexual orientation and gays and lesbians learning to trust certain employers not to discriminate if they come out of the closet? Is it sufficient that wherever the employer states its policy of nondiscrimination, it include among the several categories “sexual orientation?” The answer cannot be stated with precision because the discrimination alleged can be very insidious. What can be stated is that the complaining party should have the burden to prove the discrimination.

In civil cases, the claimant should bear the burden to prove the discrimination by a preponderance of the evidence because it is the claimant who asserts that the employer has not met the law’s requirement not to engage in sexual orientation discrimination. Once this element is met, we would say that the claimant has established a
Prima facie case of discrimination. Next, the employer who claims not to have discriminated would respond in a way that would persuade a court that sexual orientation discrimination did not transpire. This is the second element of the discrimination test. At this point, what and how much evidence would be needed depends on what evidence was initially offered to prove discrimination and the context in which the discrimination was alleged to occur. Was the claimant fired after it became known that he or she was gay or lesbian? Was the claimant passed over for a promotion? Was the work environment hostile and harassing and was anything done to try to create a more peaceful employment situation? Since the questions here concern the evidence proffered, there is simply no absolute standard against which they can be judged independent of context. A similar approach applies in a criminal case except that the standard of proof is beyond a reasonable doubt and the complaining party is the state.

Similarly, in the case of housing or public accommodations, a prima facie case is established if there is a provision in a lease or condominium rules prohibiting same-sex households or a policy of a hotel or motel against providing a room to two persons of the same sex when they would do so for opposite-sex couples. It is also established by a school policy prohibiting admittance of gay students and by policies like that of the Boy Scouts of America prohibiting gay persons from becoming scouts. (The latter, however, may be protected on first amendment grounds if no state action or government money is involved.) But here too, such discrimination need not be so overt, and a prima facie case might be established if an informal screening process accomplishes the same end. In either case, the burden would shift to the landlord or owner or manager of the public accommodation to prove by a preponderance of the evidence that discrimination was not the driving element. In the case of rental housing at least where a large rental complex is concerned, a statistically significant number of rentals to same-sex couples would be some evidence to offset a claim of discrimination. In the case of mortgage or other lending companies, showing that an individual’s financial status provides the reason for failing to grant the loan should help in overcoming a claim of discrimination. For some public accommodations like schools, hotels, and restaurants,
the frequency and variety of persons accommodated should similarly refute an unjustified charge of discrimination. Obviously, each case will differ and evidentiary issues are acute. Nevertheless, resolving these issues is certainly not impracticable. And given the serious harm to individuals and society that discrimination creates, the benefits would seem to be well worth the effort.

CONCLUSIONS

This essay has argued that discrimination against gays, lesbians, and bisexuals in employment, housing, and public accommodations is not justified from utilitarian, rights theory, or communitarian points of view. It has also shown that traditional approaches of natural law theory and Kantian ethics to the topic are wrongheaded. Finally, it has demonstrated why legislation is an appropriate means for resolving the problem of such discrimination and has painted a general picture of what such legislation should look like and how it might be enforced. The essay has been thus attentive both to the theoretical issues and to the practical difficulties that are likely to attend legislation of this kind. In so doing, the essay has shown that a primary focus for such legislation must be the protection of affectational behavior on the same basis as is normally afforded to heterosexual persons. If this essay has succeeded in its fundamental goal, it demonstrates that legal protections for gays, lesbians, and bisexual persons are both morally obligatory and practically enforceable.

AUTHOR NOTE

Few people truly earn the appellation “friend.” I dedicate this article to David, my friend.

Special thanks to Timothy Murphy, Bruce Barton, Ted Grippo, and Howard Kaplan for their editorial suggestions on an earlier draft of this article.

NOTES

1. Given that the next generation of gay and lesbian civil rights activists will aim their efforts primarily at the federal and state levels, it is worth noting that anti-discrimination laws covering (at least some) housing, employment, and public accommodations have already been passed in California, Connecticut, Hawaii, Massachusetts, New Jersey, Vermont, and Wisconsin.

4. Recent referenda on ballots in Oregon and Colorado have sought to amend their state constitutions to allow anti-gay discrimination. The Oregon measure, which many think would have required schools to teach that homosexuality was a perversion and unnatural, went down to defeat; but the Colorado measure, which prohibited making gay persons a protected class, was passed. The latter (if not held unconstitutional) nullifies local civil rights ordinances such as exist in Denver. Bill Behrens, “Anti-Gay State Initiatives Mixed,” *Windy City Times*, Nov. 5, 1992, p. 1.

5. “We are everywhere” is not just a catchy slogan, it is the truth! By most estimates roughly 10 percent of the population is homosexual. In the United States this translates to over twenty-five million men and women. Whether this figure should be higher or lower is unimportant to me. What is significant is that lesbians and gay men are present in virtually every extended family, friendship circle, ethnic group, religion, organization, field of employment, political party, economic strata, town, city, state, and country.” Rob Eichberg, *Coming Out: An Act of Love* (New York: Plume, 1990), pp. 156-157.

6. The evidence suggests that sexual orientation—viz., affectional/sexual desire toward a member of the same sex—is established either before birth or very shortly thereafter but not by any process of learning. See Sharon Kingman, “Science/Nature, not Nurture?” *The Independent: The Sunday Review Page*, Oct. 4, 1991, p. 56 (“Science may, it seems, be about to furnish proof that homosexuality has a biological basis, that it is part of the spectrum of normal human behavior, as common or garden [variety] as being extrovert or left-handed”); Janet Shibley Hyde, *Understanding Human Sexuality*, 3rd ed. (New York: McGraw-Hill, 1986), p. 425 (citing research indicating that homosexuality is not a learned response); A. Bell, M. Weinberg, and S. Hammersmith, *Sexual Preference—Its Development in Men and Women* (Bloomington, IN: Indiana University Press, 1981). Perhaps it is the fact that studies of these kinds have received increasing attention in the mainstream press that accounts in part for society’s seemingly greater tolerance (if not acceptance) of lesbian and gay people, following Kant’s ‘ought implies can’ principle.

7. In an employment survey of 386 gays and lesbians living or working in New York City, 61% reported it would be a problem if they were to become known as gay on the job; 39% said it was probable or very probable that they would have difficulty getting a promotion or transfer; 32% indicated it was unlikely that they would have the same level of job security as heterosexuals; and 21% said they had experienced an actual instance of job discrimination. See National Gay Task Force, *Employment Discrimination in New York City: A Survey of Gay Men and Women* (Washington, DC: National Gay and Lesbian Task Force, formerly National Gay Task Force, 1980). Also telling of the probability of dis-
Crimination is a memorandum from the Office of the General Secretary to all U.S. Catholic Bishops, which included a statement from the Vatican Congregation for the Doctrine of the Faith, which stated in part that "There are areas in which it is not unjust discrimination to take sexual orientation into account, for example, in the consignment of children to adoption or foster care, in employment of teachers or coaches, and in military recruitment." See Congregation for the Doctrine of the Faith, "Some Considerations Concerning the Catholic Response to Legislative Proposals on the Non-Discrimination of Homosexual Persons," reprinted in National Catholic Reporter, July 31, 1992, p. 10.


8. See generally, Boxall, “Gays Alter Dynamics of Politics.”


10. As for the question of adjudicating among ethical areas, issues of rationality and relevance are no longer as certain. However, I need not venture into this area of metaethics since by and large most metaethical systems would seek to justify one of the four areas I do discuss.


13. See Hyde, Understanding Human Sexuality, p. 425, indicating that most child molesting is done by heterosexual men with young women. In particular with respect to the spread of disease, in which the greatest concern centers on AIDS: it is now known that HIV cannot be spread by casual contact (John G. Bartlett and Ann K. Finkbeiner, The Guide to Living with HIV Infection [Baltimore: Johns Hopkins University Press, 1991], p. 10) and that the gay community has been in the forefront in seeking to halt the spread of this disease through education. See Dick Thompson, "A Losing Battle with AIDS: On the Streets of San Francisco, Victims Cry for Attention and Help," Time, June 2, 1990, p. 42; cf. Michael M. Phillips, States News Service, June 27, 1990 ("Health officials at Centers
for Disease Control, hoping to immunize the agency against attacks from congressional conservatives, have adopted new rules limiting how explicit federally-funded-AIDS education materials can be”). As for other sexually communicable diseases, they can also be protected against through education, and most are treatable, though some are virulent and some have no cure.

14. The issues under discussion apply whether one is an act utilitarian like Jeremy Bentham, rule utilitarian like Stephen E. Toulmin, or an ideal utilitarian like John Stuart Mill.


16. Sigmund Freud pointed out that civilization has always caused human beings to repress their sexual desires which are a constitutive part of their personality. See Civilization and Its Discontents (New York: Norton, 1961).


18. Although sometimes himself giving in to stereotypes, Richard A. Posner, in Sex and Reason (Cambridge, MA: Harvard University Press, 1992), pp. 301-302, nevertheless makes an important point in explaining how stereotypical traits such as “effeminacy” tend to get exaggerated in intolerant societies.


21. Here I follow Plato in the Republic (4.433a) when he states that the city is just when “each one man must perform one social service in the state for which his nature was best adapted.”

22. Plessy v. Ferguson, 163 U.S. 537 (1896), established the principle that separate but equal education for the races was constitutional.


26. For example, the freedom to discriminate cannot be allowed to undermine the state’s obligation to equalize the right to well-being which is essential to the very freedom at issue. See Alan Gewirth, Reason and Morality (Chicago: University of Chicago Press, 1978), pp. 324-325.

27. For an example of how this approach might resolve conflicts of rights where one of the rights is to privacy, see Vincent J. Samar, The Right to Privacy: Gays, Lesbians and the Constitution (Philadelphia: Temple University Press, 1991), pp. 104-112.

28. Samar, Right to Privacy, pp. 112-117.

29. Mohr, Gays/Justice, pp. 140-141.
38. See, e.g., Jeb Rubenfeld, “The Right to Privacy,” *Harvard Law Review* 102 (1989): 765 (noting that “the intolerant heterosexual can claim, on personhood’s own logic, that crucial to his identity is not only his heterosexuality but also his decision to live in a homogeneously heterosexual community”).
41. Michael Ruse, *Homosexuality*, pp. 188-192 (arguing against a number of unnatural theses including that homosexuality is unique to human beings and is not found in nature generally and homosexuality is contrary to human evolution); see also Hyde, *Understanding Human Sexuality*, p. 20 (referencing studies indicating that homosexual behavior is exhibited by animals other than humans).
42. Mohr, *Gays/Justice*, pp. 37-38, n. 30. In Aquinas’s formulation of natural law, there are internal inconsistencies. On the one hand, Aquinas says that the precept that one must not kill is a derivation from the natural law precept that one should do no harm to anyone (*Summa Theologica*, vol. II, Q. 95, AA.4.). On the other hand, one specification of the natural law allows for capital punishment. Since Aquinas has no way to distinguish between these two outcomes on the basis of his theory, the theory is internally inconsistent. See Gewirth, *Reason and Morality*, pp. 279-280.
Part III. Civil Rights and Social Justice

46. Despite evidence that homosexuality is not a learned response (see note 5 above), schools continue to discriminate against known gays and lesbians. See Rowland v. Mad River Local School District, Montgomery County, Ohio, 730 F. 2d 1272 (10th Cir. 1984) (upholding constitutionality of statute permitting a teacher to be fired for engaging in public homosexual activity—i.e., committed with a person of the same sex and indiscriminate and not practiced in private); Gaylord v. Tacoma School District No. 10, 88 Wash. 2d 286, 559 P. 2d 1340 (1977) (allowing dismissal of a male teacher when he admitted he was gay).

47. See note 5 above.


49. A similar argument can be made in the area of gay and lesbian parenting. However, because this article is focused primarily on employment, housing, and public accommodation discrimination, I do not treat this issue here. For a discussion of the privacy dimensions to gay and lesbian parenting see Samar, The Right to Privacy, pp. 148-152.


52. Mohr, Gays/Justice, p. 25.

53. See Mohr, Gays/Justice, p. 24; see also Tom L. Beauchamp, “The Justification of Reverse Discrimination,” in W. T. Blackstone and Robert Heslop, eds., Social Justice and Preferential Treatment (Athens, GA: University of Georgia Press, 1976) (showing how metaphorical associations and even choice of active or passive verbs can be used to degrade women).


56. Ibid.

57. See 49 C.F.R. pt. 23, subpt. D, app. A. It should be noted that in Richmond v. Croson Co., 488 U.S. 469 (1989), the U.S. Supreme Court held unconstitutional, as violative of the fourteenth amendment’s equal protection clause, a city’s set-aside program for construction contracts for racial minorities where there was no proof of actual discrimination by the city’s construction industry. However, three of the five justices who voted to overturn the local set-aside program indicated that Congress may have the right to create such programs under the fourteenth amendment’s enforcement provision.

59. One of the counterarguments to affirmative action programs involving race has been that there is no general consensus as to when adequate reparations will have been made for past discrimination. See Lisa H. Newton, “Reverse Discrimination as Unjustified,” *Ethics* 85 (1973): 308-312.


61. Ibid., p. 38.

62. It should be noted that I am focusing on human freedom rather than persons because the nature of this form of discrimination is such that it can force one into a closet in which one retains the face of a person while truly being denied expression of a substantial, fundamental, and unique aspect of personality and a right to be one’s self.

63. Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment practices based on “race, color, religion, sex, or national origin” if the employer is “engaged in an industry affecting commerce” and has twenty-five or more employees. The phrase “industry affecting commerce” is defined as “any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce.” 21 U.S.C § 2000-2000e-2 (1964).

64. Even in government employment, where there are due process protections, there is a substantive need for direct, equal protection of homosexual conduct. This is shown by the dismissal of an Equal Employment Opportunity Commission typist when it was discovered that prior to his being hired, he publicly flogged and kissed a male by the elevator in the building in which he worked, and that since being hired, he had applied for a marriage license for a same-sex relationship, helped organize the Seattle Gay Alliance and, as a result, was the subject of extensive television, magazine, and newspaper publicity. Singer v. United States Civil Service Commission, 530 F. 2d 247 (9th Cir. 1976) (holding that whatever protection there might be for a gay civil service employee under Norton, that protection ceases when his or her conduct becomes notorious); Childers v. Dallas Police Department, 513 F. Supp. 136 (N.D. Tex. 1969) (known gay man was denied transfer/promotion to “shopkeeper” in police department despite satisfactory job record and high test score); cf. Norton v. Macy, 477 F. 2d 1161 (D.C. Cir. 1969) (mere possibility of embarrassment from private homosexual activity is insufficient to support a dismissal from government employment). Military regulations that require separation from the service for gays and lesbians will identify the individual according to whether or not he or she engages in, desires to engage in, or intends to engage in bodily contact between members of the same sex for the purpose of satisfying sexual desires. See, e.g., U.S. Army Reg. 135-175, § 2-36 through 2-39 (1992).