

voluntary efforts in the public interest, and our willingness to face common problems with collective resolve.

That the poor are exploited is unarguable. That their poverty seems intractable is a continuing tragedy of our unprecedentedly affluent society. I hope that history will be able to judge us as a society that never abandoned its struggle to eliminate that poverty, that strove always to enhance its respect for individuals and for their capacity for mutual aid, and that faced the problems of an awesome new technology with humanity and efficiency both,

rather than as merely another commercial opportunity. I believe there is a legitimate public interest in striving to bring this about.

— Samuel Gorovitz

This article is based on testimony presented to the Subcommittee on Investigations and Oversight, Committee on Science and Technology, United States House of Representatives, November 9, 1983. HR5580 was passed by the House on June 21, 1984.

Gays and the Civil Rights Act

When gays themselves speak of "gay rights," they generally refer to the sort of protections found in the 1964 Civil Rights Act rather than to a host of other possible legal and constitutional protections which they do not now possess (for example, the reform of sodomy and solicitation laws and the drive for domestic partner legislation). For gays, gay rights are viewed primarily as protections against discrimination in the private sphere in regard to housing, public accommodations, and especially employment — protections which the Civil Rights Act currently affords racial, ethnic, gender, and religious classes.

Gays have not been particularly successful in acquiring even those limited rights. Only 40 or 50 municipalities have some form of civil rights protections for gays. Wisconsin is the only state to have such protections. In March of 1984 the California legislature passed a gay employment bill only to have it vetoed. The federal gay rights bill has but 74 cosponsors in the House and 8 in the Senate. Gays are now at about the same place blacks were in 1945.

The arguments in favor of gay civil rights cluster into three main groups. The first is a recognition that the general arguments for civil rights legislation indeed apply to gays, sometimes with special force. Second, the status of gays as an invisible minority has the practical consequence that in the absence of these protections, gays are effectively denied access to civic and political rights. Third, gays appear to be relevantly similar to classes already protected by the Civil Rights Act, so that considerations of fairness call for extending its protections to gays.

General Arguments for Civil Rights

It is unfortunate that the original general motives for civil rights legislation have been forgotten in discussions of gay issues. And yet the original reasons continue to provide good and powerful engines in justifying civil rights

restrictions on the private sector and apply at least as well to gays as anyone. There are four such general justifications, some interrelated.

First, civil rights legislation promotes human dignity. Vague as this reason may initially sound, it is the reason the Supreme Court found most compelling as a ground for state action when it unanimously upheld the constitutionality of the Civil Rights Act. No one can maintain a solid sense of self if he is, in major ways affecting him, subject to whimsical and arbitrary actions of others. Jobs, housing, and entertainment are major modes through which people identify themselves to themselves and to others. That these major vehicles of character, personality, and identity can be taken away from a person without regard to any characteristic that is relevant to his possessing them is an outrage against personal integrity deserving remedies from the state. To fire an employee, for instance, on the basis of some trait that has no bearing on his ability to do his job — such as his sexual preferences — is one way to degrade someone and make him feel worthless. Given widespread discrimination (actual or merely perceived) against gays, it is not surprising that gays manifest many of the same self-destructive, self-deluding, self-oppressing patterns of behavior as are shared by other historically oppressed minorities.

Second, there is a general expectation in a non-socialist society like our own that each person is primarily responsible for meeting his own basic needs; employment is the chief means of doing so. Civil rights legislation helps people discharge their obligation to be self-sufficient, without placing any comparable burden on those who are restricted by the legislation (employers, retailers, etc.).

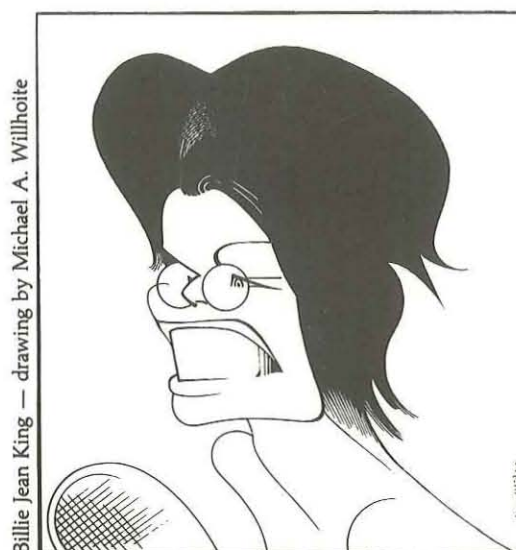
Third, civil rights legislation tends to increase the overall output of goods and services in society, thus contributing to general prosperity. By eliminating extraneous factors in employment decisions, it tends to promote the best fit between a worker's capacities, talents, and skills and the bona fide occupational qualifications of his prospective work. Many gays take dead-end jobs, which do

not use their full talents, in order to avoid reviews that might reveal their minority status. Such people's talents are simply wasted both to themselves and to society. Further, human resources are wasted if one's energies are constantly diverted and devoured by fear of arbitrary dismissal. In the absence of gay civil rights legislation, society is squandering the human resources that closeted gays expend in the day-to-day anxiety involved in leading lives of systematic disguise as a condition for continued employment.

These three preceding general arguments can be pooled into a fourth. Government is generally recognized to have an obligation to enhance those conditions that promote the flourishing of individual lives. Thus, for example, the general rationale for compulsory liberal education is that it ultimately issues in autonomous individuals capable of making decisions for themselves from a field of alternative opinions. Analogously, civil rights legislation promotes those conditions in virtue of which people can begin to lead their own lives guided by their own lights. And because the activities protected by such legislation are so central to people's lives, it achieves this result again without any comparable loss on the part of those whom it restrains. The frustrated desire (or even right) to act whimsically to a disfavored group is easily outweighed by the frustrated desire (or even right) of the disfavored minority to lead self-determining lives. This justification has special import for gays. Imagine the lives of those gays who systematically forgo sharing emotional intimacy and the common necessities of life as the price for putting bread on their table. With the lessening of fear from threat of discovery, gays no longer will need to make trade-offs between the components that go into making a full life.

An Invisible Minority

The status of gays as an invisible minority generates a second cluster of important arguments for gay rights. By invisible minority I mean a minority whose members can be identified only through an act of will on someone's part rather than merely through the observation of a person's appearance or his day-to-day acts in the public domain. Invisible minorities require civil rights protections as a necessary background condition for having reasonably



Billie Jean King — drawing by Michael A. Willhoite

guaranteed access to judicial or civic rights and to the political rights of the First Amendment — rights which are supposed to pertain equally to all.

Civil or judicial rights are rights to the impartial administration of civil and criminal law in defense of property and person. One of the greatest virtues of the American legal system is that its workings are open to scrutiny by public and press. Here trials are not star chamber affairs. But this has the unfortunate side-effect that trials frequently cast the private into the public realm. Those who may face unemployment if their life style is publicized will simply not have available to them as a live option the full remedies of justice. It is unreasonable to expect anyone to give up that by which he lives — his employment, his shelter, his access to goods and services — in order for judicial procedures to be carried out equitably.

Further, in the absence of civil rights legislation, gays as an invisible minority are in practice denied the effective use of the political rights of the First Amendment: freedom of speech, of press, of assembly, of petition, and especially the right of association — the right to join and be identified with other persons for common (political) goals.

In the absence of civil rights protections, even if gays are free from government interference in their political activity, nevertheless they remain effectively denied the freedom to act politically. All effective political strategies involve public action. And a person who is a member of an invisible minority and who must remain invisible in respect to his minority status as a condition of maintaining the wherewithal to live is not free to be public about his minority status or to incur suspicion by publicly associating with others who are open about their similar status. He will be denied the opportunity to express his views in a public forum and to lobby with others of like views to influence political change. By being effectively denied the public procedures of democracy, gays are incapable of defending their own interests on substantial issues of vital concern.



Noel Coward — drawing by Michael A. Willhoite

Treating Like Cases Alike

A third class of arguments for gay rights can be generated if gays are relevantly similar to classes already under the protection of the Civil Rights Act. Considerations of whether gays are or are not relevantly similar have made up the lion's share of the popular and political debate on this issue. The opponent of extending civil rights to gays is confronted with a dilemma here. For if it turns out that being gay is something over which one has little or no control, then being gay will be similar to having an ethnic status. And if being gay is largely a matter of personal moral choice, then it will be like having a religion. And both ethnic and religious groups are protected classes.

If it turns out that being gay is something over which one has little or no control, then being gay will be similar to having an ethnic status. And if being gay is largely a matter of personal moral choice, then it will be like having a religion. And both ethnic and religious groups are protected classes.

If sexual orientation is something over which an individual — for whatever reason — has virtually no control, then discrimination against gays is deplorable, as it is against racial and gender classes, because it holds a person accountable without regard for anything he himself has done. And to hold a person accountable for that over which he has no control is one of the central forms of prejudice.

Looking at the actual lived experience of gays in our society, it becomes fairly clear that sexual orientation is not likely a matter of choice. For coming to have a homosexual identity in our culture simply does not have the structure of decision-making.

On the one hand, the "choice" of the gender of a sexual partner does not seem to express a trivial desire that might be as easily fulfilled by substituting some other object for the desired one. Picking the gender of a sexual partner is decidedly dissimilar, that is, to picking a flavor of ice cream. If an ice cream parlor is out of one's favorite flavor, one simply picks another. And if people were persecuted, threatened with jail terms, shattered careers, and the like for eating rocky road ice cream, everyone would pick another easily available flavor. But gay sex seems not to be like that. If sexual orientation were an easy choice, no one, given society's persecution of gays, would ever be gay.

On the other hand, establishing a sexual orientation does not seem relevantly like making the central and serious life choices by which individuals try to establish who they are. We never see anyone setting out to become a homosexual, in the way we do see people setting out to become doctors and lawyers and bricklayers. We do not see gays deciding, "At some point in the future I want to become a homosexual," and then planning and acquiring the ways and means to that end, in the way we do see people deciding that they want to become lawyers and then planning what courses to take, and what temperaments, habits, and skills to develop in order to practice law. Typically the gay-person-to-be just finds himself having homosexual encounters while initially resisting quite strongly the identification of being a homosexual; only with time, luck, and great personal effort — but sometimes never — does he gradually come to accept his orientation. The experience of coming out to *oneself* has for a gay person the basic structure of a discovery, not the structure of a choice.

Nevertheless, one group of self-identified homosexuals — politically motivated lesbians — holds that sexual orientation, at least in their case, is a matter of choice. If this is so, then sexual orientation becomes relevantly similar to religion, a protected category. A personal moral choice is not a reasonable ground for discrimination even when the private belief in and practice of it has very public manifestations, as when a religious person becomes involved in politics with a religious motive. And to claim that gay sex is in some sense immoral will not suffice to establish a relevant dissimilarity here. For the non-religious and the religious may consider each other immoral in this same sense and the various religious sects may consider each other immoral, and yet all religious belief is protected.

These various arguments have a compelling accumulative force. What is needed is more courage on the part of gays to advance them to legislators and more courage on the part of legislators to rise above popular prejudices to make minority rights against social and government coercion a realized part of our cultural ideals.

— Richard D. Mohr

Richard D. Mohr is Associate Professor of Philosophy at the University of Illinois—Urbana. Some material in this article is drawn from the author's "Gay Rights," Social Theory and Practice 8 (1982) and from an unpublished paper, "Invisible Minorities, Civic Rights, Democracy: Three Arguments for Gay Rights."

Correction

In "Tobacco Smoke: The Double Standard," by James Repace (QQ, vol. 4, no. 1, Winter 1984), the figures on page 7 for comparative risks of death by tornado, pregnancy, drowning, and so forth should be given as cases per hundred million, not per million, as erroneously printed.

THE NEXT ISSUE OF QQ WILL BE THE FALL 1984 ISSUE, VOLUME 3, NO. 3. THERE WILL BE NO SUMMER 1984 ISSUE.

Twenty Years After the Civil Rights Act— Can Consensus Be Restored?

A Conference on the Moral Foundations of Civil Rights Policy
October 18, 19, 20, 1984
University of Maryland

The Civil Rights Act of 1964 has become one of the most influential pieces of legislation this century. It and its progeny were meant to attack and dismantle a legal and institutional system that deliberately excluded minorities and women from full economic and political participation. The rationale for this attack was framed in fundamentally moral terms: to secure equality of rights and opportunity.

Continuing developments in the understanding and enforcement of civil rights law have generated deep controversies about the meaning of those terms. Issues like quotas, comparable worth, bilingual education, and ERA reveal serious divisions of opinion about what it means to secure equality of rights. The ideas of equal opportunity and equal access, once used to animate and propel civil rights policy, get appealed to by both sides of current controversies and seem powerless to generate a common moral understanding that would defuse these debates. Legal tools for attacking

deliberate and exclusionary barriers seem less effective in addressing the overall social disfigurement produced by a history of segregation and subordination. There is no commanding view of how social reconstruction should proceed nor consensus about who should bear the costs of such reconstruction.

The Center for Philosophy and Public Policy, with support from the Ford Foundation, is sponsoring a public conference on the foundations of civil rights policy which will bring together reflective and experienced theorists about, and participants in, civil rights policy to explore why consensus has broken down. Is there no longer agreement about basic values and ends, or does disagreement derive from other sources? Are there grounds for resolving different understandings about the nature and extent of discrimination, disputes about the efficacy of different remedies, and disagreements about the meaning of principles of equal opportunity and social justice?

Thursday evening, October 18

1. Keynote Address — Drew Days III, Yale Law School

Friday morning, October 19

2. Symposium — "Looking at the Principles: Why Can't We Find Consensus on Affirmative Action?"

introduction: Robert K. Fullinwider, Center for Philosophy and Public Policy

speaker: Richard Wasserstrom, philosophy, University of California at Santa Cruz

speaker: William Bradford Reynolds, U.S. Assistant Attorney General for Civil Rights

speaker: Christopher Edley, Harvard Law School

speaker: Orlando Patterson, sociology, Harvard University

Friday afternoon, October 19

3. "Are Our Theories of Justice Gender Neutral?"
speaker: Susan Moller Okin, politics, Brandeis University
commentator: Nancy Hartsock, political science, University of Washington

Friday evening, October 19

4. "Men, Women and Equality: How Should the Law Deal with Gender Difference?"

speaker: Catharine MacKinnon, University of Minnesota Law School

commentator: Leigh Beinen, Office of the Public Advocate, New Jersey

commentator: Rachel Flick, Office of Planning and Evaluation, The White House

Saturday morning, October 20

5. "Hispanics, Bilingualism, and Cultural Integration"
speaker: Jose Cardenas, Director, Intercultural Development Research Association
commentator: Judith Lichtenberg, Center for Philosophy and Public Policy
6. "Pay Equity for Women: Wage Discrimination and the Comparable Worth Controversy"
speaker: Heidi Hartmann, National Academy of Sciences
commentator: Mark Killingsworth, economics, Rutgers University

Saturday afternoon, October 20

7. "Civil Rights in 2004: Where Will We Be?"
speaker: Derrick Bell, Dean, University of Oregon Law School

For further information call or write: Lori Owen, Conference Coordinator, Center for Philosophy and Public Policy, University of Maryland, College Park, MD 20742, (301) 454-6604.