

EQUAL RIGHTS, NOT GAY RIGHTS

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After the semi-successful campaign to reduce the age of consent for homosexuals, gays are debating what should be the next campaign. Many are advocating that the priority should be anti-discrimination laws. Such a policy ignores the essential distinction between equal rights with straights and special rights for gays. This article advocates the former, and opposes the latter. The term 'Gay Rights' blurs this significant distinction. To the extent that gay rights simply means that gays should be afforded the same rights as straights, it should be strongly supported, but when it implies rights that belong only to gays but not to all straights, it should be vigorously opposed. 'Equal Rights, not Special Rights' has unfortunately become a slogan of the Christian Right. However they do not mean it, as is demonstrated by their opposition to an equal age of consent. Gays, and all those committed to equality under the law, must restate and recapture this principled position.

Equal rights would mean:

- an equal age of consent for gays and straights
- the right of gays to serve in the military
- the legal recognition of same sex unions, preferably marriage

- the right of adoption by gay families
- the right of inheritance for a gay partner if the other dies intestate, without a will

A philosophy of equal rights would oppose:

- hate crime legislation, which creates an additional penalty if the crime was an expression of hatred against gays
- legal prohibitions on anti-gay speech, unless it is threatening, in which case it is covered by the existing laws that apply to all
- laws making discrimination against gays illegal for private persons in employment, housing and so-called public places

The three principles that underpin this approach will be presented, followed by the case against anti-discrimination laws. It should be emphasised that state discrimination against gays should be ended and gays should be entitled to the same rights in law as straights, the principle of Civil Equality, while private discrimination should be condemned but not outlawed.

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FOR LIFE, LIBERTY AND PROPERTY

THREE PRINCIPLES

1. *'Gay Rights' are neither Human Rights nor Civil Rights.*

A Right is a moral entitlement. A Human Right means that it belongs to all human beings, regardless of nationality, gender, race, religion, or sexual orientation. Human Rights must meet three criteria:

- 1) They must be universal, applying to every human being, wherever and whenever they live.
- 2) They are absolute, except when they come into conflict with each other.
- 3) They are inalienable, and so cannot be surrendered, e.g. no-one can sell themselves into slavery.

These human rights were expressed by John Locke as "life, liberty and property", in the French Declaration on the Rights of Man as "liberty, property and security", and in the American Declaration of Independence as "life, liberty and the pursuit of happiness".

Civil Rights, or Civil Liberties, seek to embody these human rights into law, turning them into positive rights that can be claimed. Every person has an equal right to be free from interference by the state and others, in aspects such as freedom of speech, freedom of contract and freedom of association.

If Gay Rights are rights that only belong to gay people by virtue of being gay, i.e. they belong only to members of a particular group rather than to all individual human beings, they cannot be human rights because they do not meet the necessary criteria, notably the universality principle. Thomas Sowell has discussed how the black civil rights movement shifted from demanding equal rights to special rights in his book *Civil Rights*.

2. *It is not the role of the law to impose morality.*

This has been one of the biggest debates in political philosophy, between liberals and moral majoritarians. John Stuart Mill in *On Liberty* articulated the principle that people should be allowed to do as they pleased unless they do harm to others: the harm principle. This principle has been used extensively to promote equal rights for gays, e.g. in the Wolfenden Report. As the time Mill was strongly opposed by James Fitzjames Stephens. A more recent debate was between Lord Patrick Devlin, who thought that the law should express condemnation of that deplored by the majority of people, against Oxford philosopher H. L. A. Hart, who took a more liberal position. In such debates, gays have sided with the liberal view that it is not the role of the state to impose a particular conception of the good, even one endorsed by the majority. The law exists to enable people to go about their business, as long as they do not interfere with the rights of others. Ronald Dworkin expressed this principle of liberal

neutrality as: No person is entitled to elevate his/her beliefs about how others should act above those of anyone else. It is very important to emphasise that for the state to allow an action is not to favour it.

3. *Maximise the private.*

The distinction between private and state (usually expressed as 'public') is extremely important in a free society. Unfortunately the definition of the private has become narrowed to include only the person's home, and sometimes not even that. The distinction between private and public should be ownership, not who goes there. 'Public' should mean government owned, not open to the public as in a bar or club. Private property means that government has no right to interfere with that property unless someone's rights are being denied. A wide definition of private and a narrow definition of public (state) is the best protection for gays. The alternative is that government can legislate and interfere in areas open to the public, e.g. at the Stonewall Inn, or sexual activity in cinema clubs, or sado-masochistic sex on private property (Operation Spanner). Those who control the power of the state will use it for their own purposes and preferences.

ANTI-DISCRIMINATION LAWS

Anti-discrimination laws would outlaw discrimination on grounds of sexual orientation in employment, housing and 'public' areas. This was proposed in the US federal Employment Non-Discrimination Act (ENDA), and exists in many US states and local jurisdictions. The Labour party conference in 1983 endorsed the idea, and many gay activists want this proposal to be at the forefront of gay campaigns.

Such laws should be opposed on the grounds that they would threaten civil liberties, society in general, and gays.

I The Threat to Civil Liberties

Firstly, they attack freedom of association, the freedom to associate, and not to associate, with whomever we choose for whatever reason, good, bad or none. These reasons can be criticised but if some motives are made illegal, then one is no longer free. Anti-discrimination laws would force a Catholic to rent his property to someone whose activities he views as abhorrent. A fundamentalist school would have to hire homosexuals against their deepest beliefs (the cause that brought Anita Bryant into anti-gay crusades). A gay bar owner could not employ only gay barmen and women. Gay clubs could not exclude straights. Do not believe that these laws would only apply against straights. In Provincetown, Massachusetts, a male gay bar was refused a renewal of its alcohol licence because it excluded women and straight men, as was a lesbian bar in New York for its policy. In San Francisco a gay landlord was prosecuted for preferring gay men to women as tenants. The principle of freedom of associ-

ation does not defend anti-gay discrimination, but recognises that bigots have rights too.

Secondly, they undermine freedom of expression. Anti-gay discrimination will occur, but employers and workers will not be allowed to express their true motives and will find other excuses to act. Employers would become legally responsible for the speech of their own employees, as in the case of the Irish worker compensated for the anti-Irish jibes of his fellow workers. Of course employers should seek to create an environment in which all workers feel able to carry out their works in a relaxed and comfortable environment, but it should not be the job of the employer to seek to regulate the speech of his or her workers unless it affects the business.

Thirdly, they are an attack on private property rights. One should set own one's rules on one's own property. In the famous US Supreme Court case, *Hardwick versus Bowers*, Hardwick was found guilty of anti-sodomy laws in his own home. Local anti-gays tried to prevent a lesbian retreat in Mississippi. Freedom of association and respect for privacy can only be protected by property rights, which allow individuals to carry out acts between consenting adults free from invasion. The recognition of private property rights is one of the great safeguards for gays, which they threaten at their peril.

Fourthly, they deny the free exercise of religion. A church which believes that homosexuality is a sin should not be forced to employ someone who does not accept a basic principle of the church. Church members and others of course could (and should) advocate that the church should change its position on homosexuality. However the church should be allowed to exercise its religious principles, as long as it does not seek to translate them into law simply because they are its principles. Laws would bring the state into the doctrinal affairs of the different churches and cause intense resentment amongst them.

II The Threat to Society

Firstly, it will damage the economy. Unemployment is the biggest economic problem facing not only Britain but every western society. Most economists agree that a major factor in unemployment is what they call rigidities in the labour market. These are things which discourage employers offering work and workers accepting it. Anything which raises the cost of employment reduces the number of employment opportunities. One example is the minimum wage which will discourage employers from taking on inexperienced workers whose job productivity is difficult to predict. Another discouragement is employment legislation which makes it more difficult to sack a worker. If it is difficult to remove workers, then employers will be more cautious in taking on new workers. The fear of litigation if a gay claims to have been sacked on

grounds of sexuality will discourage employers from offering employment.

This is not to advocate or defend discrimination. Discrimination has a price in the labour market because the employer is not employing the best, and will lose out to his competitors. This argument is developed in detail by the Chicago economist Gary Becker in *The Economics of Discrimination*.

Secondly, it undermines the political system. Such laws will contribute to what Arthur Schlesinger describes as the Balkanisation of politics. Government becomes a battleground between special interests seeking to use the power of the state to further their own interests. In the process, the public interest is ignored. Every group seeks to get its nose in the public trough, regardless of the cost to the rest of society. Special interest legislation divides society by emphasising differences in interests rather than common interests. This argument is developed more fully by public choice writers such as the Nobel Prize winner James Buchanan, and Mancur Olson in *The Rise and Decline of Nations*.

Thirdly, they will make the UK a more litigious society. There is now considerable concern in the US about the massive costs in litigation, which raises the cost of products, services and employment considerably. See Walter Olson, *The Litigation Explosion*. There is now a strong movement for tort reform to reduce the problem. Anti-discrimination laws create yet another basis for additional litigation. Already considerable sums have been awarded in the UK to those who claim some sort of discrimination, but little attention is given to who pays and the broader costs to society.

Fourthly, such laws will lead inevitably to quotas, government mandated preferences for government favoured groups. Despite claims to the contrary, and sometimes explicit references in legislation banning quotas, they are an almost inevitable consequence of such legislation. Why? These laws penalise motive, but motives are difficult to establish. If the motive is illegal, discriminators will not admit it. Those seeking to implement the laws move from a concern with 'disparate treatment', i.e. with intent, to 'disparate impact' i.e. with effects. The question then becomes how many blacks or women or gays are employed.

To avoid costly litigation, compensation, and bad publicity, employers impose quotas. Even without legislation, the Bar Council is demanding 5% ethnic representation in barristers' chambers. This destroys equal treatment because prospective employees are not treated equally on the grounds of merit but because of certain characteristics. It is this which has created resentment and backlash against affirmative action. It may not be the intent of the law to create quotas but it is an unintended consequence.

III The Threat to Gays

Firstly, they will perversely reduce employment and housing prospects for gays. If you are an employer making an appointment, you are aware that you may have to sack the worker in the future, because he or she is unsatisfactory, or because business requires it. The employer may be reluctant to employ someone gay, or who appears to be gay, because the employer faces the prospect that the employee would claim that he or she was dismissed because of his/her sexuality. Better to avoid the risk and not employ the person in the first place. Similarly, one of the biggest fears of any one renting out property is how difficult it may be to remove the tenants if they fail to pay the rent or damage the property. Anti-discrimination laws adds another potential obstacle to removing them. This creates an incentive to the owner to favour renting to a straight rather than a gay, providing he/she can find another reason to favour the straight. It would be yet another example of the perverse effects of laws leading to the opposite of that which was intended.

Secondly, they will contribute to a backlash against gays. In 1992 there were two referendums on gays in the states of Oregon and Colorado. The former was defeated, while the latter passed. The difference was that the Oregon proposition sought to condemn homosexuality in the state constitution, while the Colorado one sought to ban local authorities from passing anti-discrimination laws for gays. The moral majoritarian slogan against special rights for gays resonated with ordinary straights because there was an element of truth in it, whatever the motivation of its promoters. Appeals to equal rights will appeal much more to straights than appeals to special rights, and anti-gays will be quick to blur the distinction.

Thirdly, they reduce the self-esteem of gays by creating a victim mentality: that gays have no power but are dependent on the state to protect them. There is now a debate between victim and power feminism, between those who portray women as victims who need protection against men, and these who emphasise the power and potential power of women. The power approach would be best for gays. The psychology of the victim leads to resentment, not betterment. As Andrew Sullivan of the *New Republic* noted, "By legislating homosexuals as victims, it sets up a psychological dynamic that too often only perpetuates cycles of inadequacy and self-doubt." Gays are then led to assume that they cannot succeed without special protection, and straights will assume gays are successful because of preference not merit. The difference between power and victim approaches is reflected in the debate on the existence of the Pink Pound. On the one side are those who emphasise the existence of substantial economic resources in the hands of gays, and view gays as success stories. On the other, the victim gays seek to deny the power of the pink pound and prefer to present gays as poor and down-trodden.

Fourthly, anti-discrimination laws rely on the power of government, yet government has been the chief oppressor of gays. Gays will always be a minority. It is very dangerous to rely on laws passed by the majority to protect them. These laws would legitimise interference in private matters. These are more likely to be used against gays in the longer term. The state should be seen as a threat to gays, not an ally.

CONCLUSION

Discrimination against people simply because of their sexual orientation exists and is wrong, but it is not the role of the law to correct every wrong. Law is not, and has not been, the solution to sex and racial discrimination and will not be for sexual orientation.

There is no easy or permanent solution to anti-gay discrimination. Gays can however seek:

- equality before law
- maximum freedom of association
- social disapproval of discrimination.

Gays must have equal rights to straights. They are entitled to nothing less — but also nothing more.

SUGGESTED READING

Bruce Bawer, *A Place at the Table: The Gay Individual in American Society*, Simon and Schuster, New York, 1994.

Gary Becker, *The Economics of Discrimination*, University of Chicago Press, 1974.

Richard Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws*, Harvard University Press, 1992.

Sean Gabb, *What To Do About Aids*, Pamphlet No. 12, Libertarian Alliance, London, 1989.

Brian Micklethwait, *Gay and Lesbian Rights: Property is Better Than Politics*, Political Notes No. 69, Libertarian Alliance, London, 1992.

Mancur Olson, *The Rise and Decline of Nations*, Yale University Press, 1982.

Walter Olson, *The Litigation Explosion*, Truman Talley Books/E. P. Dutton, New York, 1991.

Richard Posner, *Sex and Reason*, Harvard University Press, 1992, chapter 11.

Jonathan Rauch, *Kindly Inquisitors*, Chicago University Press, 1993, chapters 5, 6.

Thomas Sowell, *Civil Rights: Rhetoric or Reality*, William Morrow, New York, 1984.

Andrew Sullivan, "The Politics of Homosexuality", *New Republic*, May 10 1993.

"Gay Rights or Human Rights?", *Economist*, February 6 1993, pp. 15-16.