

Sexual Orientation as a Justice Issue: Issues of Postmodern Social Philosophy and Religion for Civil Rights

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This essay theoretically explores three core concerns for social justice research and analysis in the transition from social and legal philosophical foundations based upon Enlightenment categorical universals to a postmodern context that recognizes concurrent globalization and the constructed nature of particular status identities. Utilizing sexual orientation as a case study, the concerns are, what constitutes a civil right in a postmodern context, how useful are categories versus behaviors in protecting civil rights, and how does religion affect the civil morality that justifies and legitimates justice criteria? The argument is made that a justice construct for sexual orientation must rely both on behavioral freedoms and ontological status for adequate protection of human dignity and equality. It also is argued that interreligious discourse is essential to reparticularize reliomoral assumptions that have justified inequality and to provide an adequate negotiated grounding to legitimate shared norms upon which postmodern justice philosophy can be built.

KEY WORDS: civil rights; human rights; postmodern; religion; sexual orientation.

An issue of international contemporary political and popular concern involves the struggle between civil rights and prejudicial actions toward people either claiming or assumed to have a nonheterosexual orientation. Whether individuals are targeted and victimized by neoconservative youth gangs in Europe, by military personnel stationed in Asia, by police of Middle Eastern theocratic governments, or by proposed legislation barring civil rights protections in the United States, the conflicts over both sexual orientation and practice are deeply embedded within complex layers of so-

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cioeconomic, religious, philosophical, political, and cultural concerns that complicate how solutions are negotiated. At the most basic level, the strife juxtaposes those committed to maintaining heterosexist tradition, whereby homosexual or bisexual behavior are regarded as morally illegitimate, and those committed to expanding, formalizing, and clarifying human rights through ensuring civil rights protections against discrimination based on sexual orientation. This essay is a theoretical exploration of central philosophical and religious presuppositions that must inform empirical work on moral conflict related to sexual orientation issues. The implications for social justice research extend beyond the issue of sexual orientation to the ideological struggle over the construction, development, and validation of other empirical categories such as gender, race, or ethnicity.

Sexual orientation is an important case study for justice analysis because it manifests the precise dilemma that empirical research as well as sociolegal philosophy faces: movement into postmodern understandings and definitions that relativize or nuance categories that have been taken as *a priori* by both researchers and human rights litigants. Where contemporary understandings and appropriations of rights and categories are based upon Enlightenment foundations, how adequate are these concepts in an era where substantial shift has occurred toward postmodern perspectives embracing contextualism and social constructionism?

The following discussion of sexual orientation utilizes a 1996 defining decision by the U.S. Supreme Court regarding an amendment to the State of Colorado's constitution prohibiting protected civil rights status on the basis of sexual orientation to raise three important issues for social justice research in a social milieu where backlash against affirmative action and strides toward human equality have resulted in various legislative proposals to make illegal the preferential treatment of any distinct constituency. This case represents a landmark decision that is likely to be utilized in various other legal debates around the world.² The issues consist of (i) what constitutes a civil right in a postmodern era, (ii) how useful do the categories continue to be which have been utilized to determine protected civil rights status, and (iii) how might religious views shape and delimit our presuppositions and resultant understanding of this debate in a secular context? Taken together, these three concerns are critical to examining changing interpretations in civil rights from fixed categories which define and delimit oppressed status groups to more permeable constructs that can decompose from *group to individual* as the unit of justice analysis.

²Over the past 5 years, political and legislative battles over sexual orientation have grown substantially in North and South America, and in Europe. In the U.S. alone, over 45 attempts have been made to pass Amendment Two type legislation since 1992 ("Almost Home Free But Not Quite," 1996).

POSTMODERN CONDITION, MORALITY, AND CIVIL RIGHTS

Contemporary notions of equity and equality, as well as the bifurcation of religious and civil morality, rest upon Enlightenment foundations. The universalization of fundamental principles, exemplified by the widespread application of Kant's categorical imperative, had presupposed a grounding civil morality (Kant, 1960; cf. Rousseau, 1973). Heterocentric men of European heritage were both the foundational norm for this morality and its accompanying social philosophy and the locus of its application in both constitutional and legal civil rights contexts. Socioeconomic and political modernization in the 19th and 20th centuries resulted in additional categorical justice claims based upon race and gender after both women and racial minorities had gained sufficient voice, power, and support to publicly challenge the legitimacy of governing narratives or principles that had justified their inequality. Such challenges pointed to an historical construction of justice among underlying vested interests who ruled and sought to retain dominance. This, in turn, began a process of redactive awareness and particularization, opening the way for what Lyotard (1984) has characterized *the postmodern condition* whereby fixed, overarching categories become decomposed into a "justice of multiplicities," with various groups contingently constructing and modifying the norms of their respective constituency (Fraser and Nicholson, 1990, pp. 22-23).

The notion of sexual orientation, defined as the propensity to be drawn to one gender or another, to both genders or to neither, for emotional and sexual partnership (cf. Wintemutte, 1995, pp. 6-7), itself emerged as a status in the late 19th century as a discrete medical and psychiatric category (Blumstein and Schwartz, 1983; Editors of the *Harvard Law Review*, 1989). As such, it was perceived as pathologically deviant behavior. Building on the legacy of U.S. Civil Rights and Women's Rights activity during the 1960s, the 1969 emergence of the Gay Rights movement has been widely regarded as the genesis of widespread public discussion in the U.S. over recognizing sexual orientation as a category rather than from behavioral grounds alone, and whether it should receive legitimate protection from discrimination as have other civil rights categories that have emerged, namely, race and gender.

The very concept of sexual orientation as an historically recent construction that is culturally particular in its definition³ suggests that as a status group its boundaries are delineated and maintained by a shared likelihood

³Some cultures would not recognize such a category; in others, such as in parts of Latin America or Africa, how "homosexual" is defined differs from most First World cultures where sexual orientation is less closely linked with a particular role identity pertaining to sexual acts than to integrative identity overall.

of experiencing discrimination, prejudicial intimidation, and violence, on the basis of status attribution by those who do not perceive themselves to share the same set of critical characteristics, rather than by internal cohesion in identity definition. Yet the function of civil rights has been to establish the political and moral equality of people who have been denied protection because of their unavoidable identification with a discriminated constituency. For those who can choose to "pass" as part of the dominant group, as in the situation of persons having mixed race or homosexual orientation, the ability to do so fails to address much less justify the discriminatory intention of stigmatizing attitudes or actions toward the target group.

Millet (1971, pp. 24, 38) and others (e.g. Barrett, 1980, p. 11; Cockburn, 1988, p. 251) have posited that the core division of social organization depends upon men's political power over women, with the regulation of sexuality being the means by which such domination is legitimated and maintained. (Although this thesis minimizes the role of racial stratification, it implies that race is sexualized as a means to justify subordination and violence against both minority-race men and women.) Homosexual activity within the context of this thesis would be leveraged through a heterosexual framework. Same-gender couples would present competing justice claims to a heterocentric structure upon which both Enlightenment-based social norms and constitutional protections were established, and thereby would erode the efficacy of heterocentric male power. Problematically, a heterocentric framework cannot withstand postmodern pressures of increasingly differentiating gendered claims and the resulting articulation of new social categories such as sexual orientation. Although the argument can be made that all heterosexual men benefit from a sexual division of society, not all men have sought to preserve that benefit at the expense of justice claims from competing status groups. A postmodern understanding of justice capably can explain that categorical benefit actually can be decomposed into particularized or individual benefits, net of costs such as moral conscience, religious orientation and tradition, or social psychological traits such as self esteem, need for power or dominance, or sense of political efficacy in the face of widespread social change. A utilitarian analysis suggests that, for example, white heterosexual male cost-benefit ratios could be distributed along an axis subject to fluctuation by social change pressures such as socioeconomic status and identity status group claims. Change would affect the particular cost-benefit ratios which then would become recalculated. Heterosexual men willing to embrace postmodern social transformation including the reduction of entitlement over women predictably would be more likely to hold a greater benefit-to-cost ratio, from a utilitarian perspective, or a surplus of resources, from a materialist standpoint, for socioeconomic, political, and psychological identity negotiation.

The logical response for those with a high cost coefficient to postmodern understandings of sexual orientation would be a regressive backlash so as to reconsolidate, restratify, and reuniversalize their justice claims. To acknowledge new categories such as sexual orientation further opens possibilities of ways to limit the dominance of those who perceive their status group to be at risk. For instance, those men whose primary self-understood access to socioeconomic and political power was by virtue of racial, gender, and heterosexual categorical dominance rather than through other qualifications or resources have faced additional competition where protections to others have challenged their entitlement. Any significant accommodation of same-gender sexual behavior as nondeviant, or a widening of the definition of sexual orientation, with heterosexuality being only one of several competing identity claims, would manifest a reaction either to deny sexual orientation's very claim to exist as a category *sui generis*, or to stratify and limit the rights of those with nonheterosexual orientations.

What constitutes a civil right in a postmodern era challenges the very rights notion grounded in Enlightenment philosophy. The postmodern demands of multiple category construction, and more fluid identity claims as the basis of categorical formation, as well as the simultaneous need to ensure equity for those who had been previously marginalized or politically invisible, entail transforming the very presuppositions of modernism itself whose universalized values have fit so well with both socioeconomic imperialism and *laissez faire* liberalism. To reduce the notion of civil rights to one of competing individualized civil claims is to trivialize the disparity between violence against human life, or being, and the exercise of personal freedoms. The relativization of Enlightenment-based immutable status categories, identified as essential criteria for civil rights, or the attempt to construct new categories based upon relative data, unfortunately erodes the power of civil rights protections of constitutions and legislation developed from Enlightenment foundations. Can civil rights justice as we know it be constructed upon the relativity of postmodern philosophical foundations? How might justice claims be negotiated and protected in a postmodern context?

CIVIL RIGHTS AND SEXUAL ORIENTATION

Prior to the development of sexual orientation as a categorical construct, legal concerns related to homosexuality had been treated as behavioral actions. In the U.S., the justice basis for such behavioral prohibitions had been a presumed violation of public morality, articulated through interdictions against sodomy. But from the late 1960s to the early 1970s, cases involving federal civil service dismissals and various state antihomosexual

actions were successfully challenged, primarily on the behavioral grounds of right to privacy, which nullified arguments justifying discrimination based on public morality (Editors of the *Harvard Law Review*, 1989, pp. 12-13). However, in the 1980s, the notion of morality was reintroduced into U.S. deliberations, superseding the right to privacy, highlighted in the *Bowers v. Hardwick* (1986) case which sustained a Georgia sodomy statute with a ruling that, "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching" (Editors of the *Harvard Law Review*, 1989, p. 4). The debate remained in the context of behavior even though orientation, or status classification, was the issue. But by the end of the 1980s, antisodomy laws had been repealed in about half the states and more than 60 municipalities had implemented antidiscrimination ordinances addressing sexual orientation as a status (Editors of the *Harvard Law Review*, 1989, p. 7). Currently, eight states provide at least some civil rights protection based on sexual orientation. This transition has produced a cumulative shift toward articulating sexual orientation in terms of categorical civil rights rather than on behavioral terms. The U. S. *Hardwick* case has been utilized in sexual orientation discrimination litigation in other countries such as Ireland, as well (Wintemutte, 1995, pp. 230-231).

But how useful categories utilized to determine protected civil rights status continue to be in a postmodern context becomes a core concern in the continuing conflicts over sexual orientation. Civil rights, as understood in the context of the U. S. Constitution's Fourteenth Amendment equal protection clause, have been affirmed for rationally classified status groups having immutable traits that result in lack of choice over membership in that group—a group that has been unduly burdened by prejudice and discrimination, which is politically powerless, and where the state has a material interest or objective in protecting it (Zamansky, 1993, pp. 224-228). However, since the early 1970s, U.S. Supreme Court determinations appear to have considered immutability to include forced physical or identity change having traumatic consequences, and seem to have relied less on the immutability criterion overall as a necessary aspect for discrimination status (cf. Zamansky, 1993). Furthermore, cases from 1973 onward tend to have been decided in a manner that relativizes immutability or ignores it altogether as a criterion for strict scrutiny, reflecting a critical shift toward postmodern understandings of category construction. (Compare U.S. Supreme Court determinations before 1973 to those in the 1980s and 1990s, e.g., Zamansky, 1993, pp. 225-228.) The result has been increased flexibility in eligibility as a status group meriting strict scrutiny, but the very relativism that has been introduced also makes it easier for the opposition to argue against this criterion. For instance, sexual orientation in U.S. Circuit Court

determinations has never been granted a suspect classification meriting strict scrutiny (Coukos, 1994, pp. 590-591).

The U.S. Supreme Court decision on the referendum to amend the Colorado state constitution represented a determination on the first passage of public legislation drafted explicitly to counter civil rights guarantees on the basis of sexual orientation in the United States. The amendment had been approved by a 53% margin in a November 1992 state election. Known as "Amendment Two," this landmark legislation revoked all existing local and state statutes prohibiting discrimination on the basis of sexual orientation, forbade any individuals or class to claim minority or protected status on the basis of either homosexual or bisexual orientation, and prohibited the creation of any future legislation or policies granting protection to such persons from discrimination. The genesis of the Colorado amendment had stemmed from the 1987 passage of a local ordinance prohibiting sexual orientation discrimination, the 1990 success of a similar measure in the state's capital, Denver, and a Governor's Executive Order that year forbidding discrimination on the basis of sexual orientation. The ensuing bitter debates served to galvanize those opposed to homosexuality to launch a ballot measure drive in 1991. The proponents were fronted by a grass-roots group closely linked with conservative Christian constituencies, Colorado for Family Values, an organization which subsequently offered a grass-roots package called "The Colorado Model" for proponents in other states and municipalities seeking to counter what it termed a "militant homosexual agenda" (Booth and Bettelheim, 1993). Subsequent to the passage of Colorado Amendment Two, acts of violence against homosexuals more than doubled in that state (Booth and Bettelheim, 1993). Similar amendments were narrowly defeated in other states such as Oregon and Idaho, although local ordinances passed in dozens of cities.

Following the amendment's passage, the Colorado State Supreme Court issued an injunction arguing for a new fundamental human right to not have the state support private biases. However, the ensuing ruling on an appeal to the injunction declared that the amendment breached an existing fundamental right—that of not excluding particular classes of voters—and that the state neither showed a compelling interest to justify the amendment, nor that it had been drafted to serve compelling interests (Coukos, 1994, p. 583; Pankratz, 1994). The latter argument framed the direction of the Supreme Court's decision which, in 1996, upheld the amendment's unconstitutionality on the basis that it sought to classify persons for its own sake, imposing disability on the ensuing group and thereby making homosexuals unequal to everyone else so as to "deem a class of persons a stranger to its laws" ("A state cannot so deem a class of persons a stranger to its laws . . .," 1996). Although it relied upon a discrimination

argument, the court also took a minimalist approach by arguing that sexual orientation in this case was constructed as a category for purposes of selective discrimination, and thereby reduced fundamental protections "taken for granted by most people either because they already have them or do not need them" ("A state cannot so deem . . .," 1996). As such, the determination does not provide positive categorical protection. The Court's decision is expected to affect future legislative efforts, and regulatory policies in business, the military and other institutional settings.

While the immutable status argument, representing an Enlightenment notion of category construction, has broken down in efficacy to provide legal protection, reliance on sex discrimination arguments that take a more minimalist approach such as Amendment Two, also are limited in providing protections in that those victimized must prove that as a constituency, or rather, as a constructed category, that they have unequal rights to everyone else. In short, the burden of proof is placed upon the individual or constructed group, which opens up not only the likelihood of increased discriminatory acts but also the prospect that they may not reach a court of justice or, if they do, that a plaintiff's argument might not be winnable.

The ascendancy of sexual orientation as a public issue has extended across the world. European countries, known to be more socially and legally permissive to homosexuals and bisexuals, have in recent years faced pressures to restrict their rights through court determinations related to employment discrimination, public housing, immigration, and guardianship over minors (Wintemutte, 1995, pp. 95-96). Like the U.S. and Canada, European and other nations have been afflicted with ultraconservative groups targeting homosexuals as a constituency against which violence can be legitimated.⁴

In 1993, the new South Africa Constitution became the first to incorporate sexual orientation into its equality provision, along with race, gender, and sex. In so doing, it had rejected arguments that sexual orientation be subsumed into a "natural characteristics" provision. However, the conflict over categorical civil rights versus legislated morality based upon private behavior is apparent with the continued criminality of male anal intercourse (Cameron, 1993; cited in Wintemutte, 1995, p. 5).

⁴In 1990, a Lesbian and Gay Anti-Violence Project was established in New South Wales, Australia, to respond to increasing levels of violence based on sexual orientation. The contemporary linkage between sexual orientation and discriminatory violence also was explicit in the early 1993 controversy over the U. S. military policy of dismissing homosexuals solely on the basis of admitting their orientation, the Clinton Administration's backing away from an egalitarian policy, and resultant outbreaks of violence against Gay men within the military. The National Gay and Lesbian Task Force reported nearly 100% increase in anti-Gay homicides between 1992 and 1994 ("GLAAD Alarmed by hate web sites on the Internet," 1996).

In much of international human rights law, behavioral arguments against nonheterosexual orientation have been challenged by right to privacy provisions, through Article 17 of the International Covenant on Civil and Political Rights, which as of 1994 had been ratified by 128 countries (Wintemutte, 1995, p. 5). However, although documents such as the International Covenant and the U.N. Declaration of Human Rights provide exemplary guidance and definitional authority, they lack sufficient legitimating authority to set policy in national or regional contexts.

Comparatively, while the European Convention's treatment of sexual orientation civil rights relies upon fundamental choice arguments, through right to "private and family life" (Article 8) and right to "marry and found a family" (Article 12), Article 14, however, forbids discrimination only regarding the "enjoyment of the rights and freedoms set forth" in the Convention (Wintemutte, 1995, p. 91). As a result, sexual orientation per se has no status for the prohibition of discrimination beyond specific rights or freedoms set forth in the Convention.

When sexual orientation is reduced to behavioral freedoms alone, it is easier to challenge on the basis of morality than when it is recognized as a categorical status. At the same time, existing human rights law cannot adequately address categorical statuses that are permeable in their constructs, such as identity, or that are based upon choice. This is the dilemma that postmodernism presents in a justice context.

The justice concern over civil rights and sexual orientation status suggests several questions. Does evidence or admission of a minority sexual orientation which has been shown to be subject to prejudice and discrimination, independent of any behavior, qualify for civil rights protection? If so, how would such a category be constituted or constructed? Would it include bisexuals or asexuals? And how is this issue clouded with both explicit and implicit moral judgments about the legitimacy and social integrity of homosexual status—assessments that perhaps may be based upon religiomoral presuppositions? In short, sexual orientation as a category seems not to be effective or useful for current justice determinations beyond its public construction for purposes of discrimination. Similarly, behavioral arguments when used alone as social justice criteria do not provide ontological protections.

RELIGION, SEXUAL ORIENTATION, AND CIVIL RIGHTS

The controversy surrounding the status of sexual orientation is symbolic of a deeper clash that cuts to the core of the interrelationship of religious

and secular morality, involving how gender categories, identities, and behavior are understood and manifested. Interacting with this morality is the very historicity of social justice philosophy. Religiomoral presuppositions, civilized of their explicitly doctrinal content, have been argued to have sharply influenced foundational principles of American and European Enlightenment notions of justice (Tocqueville, 1969; Bellah, 1975; Neuhaus, 1984). In Enlightenment discourse, religious assumptions of a universalized nature were perceived to provide the substance and impulse for moral deliberation and behavioral norms for the wider society (Rousseau, 1973; Kant, 1960; cf. Durkheim, 1965). Expressions or practices that deviated sharply from moral universals were relegated either to private life through separation of religion and state or they were attacked as publicly "immoral," with assumptions underlying the pronouncement left largely unexplained.

Such secularized universals have been augmented by the outspoken participation of religious groups, most recently on the sexual orientation issue. While the structure of current legislative and litigious movements surrounding sexual orientation has been set forth with a demeanor of secular objectivity, the proponents' linkages to conservative religious organizations suggest that the morality aspect of the conflict, including arguments that sexual orientation is precluded as a legitimate civil rights status, indeed is grounded in religious presupposition. Of particular interest is the extent of networking that organizations such as Colorado for Family Values and the Christian Coalition have done to press forth their views about the moral undesirability of sexual behavior other than heterosexuality. James Dobson's Focus on the Family, calling the conflict a "civil war of values' raging across North America" (*Helping You Build a Healthier Home*, 1993) has provided moral support grounded in conservative evangelical Christianity for overtly political grass-roots groups such as Colorado for Family Values, and the development of parallel organizations in other states. Rev. Pat Robertson's National Legal Foundation has been deeply involved in support of the proponents for the Colorado Amendment Two (Booth, 1992, December 10). Religious zeal undergirding restrictive sexual orientation fervor has been equated to a "New Holy War." (This was the title of a 1993 Bill Moyers PBS documentary exploring the Colorado amendment genesis and aftermath.)

Although essentialist notions of sexual orientation which treat homosexual status or behavior as deviant have stemmed from psychological and philosophical as well as religious perspectives, the *moral* assessment that such behavior, when occurring between consenting adults, is wrong, evil, or sinful can be interpreted as rational only from a religious context.⁵ Within the religious right, ho-

⁵The theological notion of sin has been articulated in relation to human free will and its consequences, which places the primary moral valuation on behavioral acts.

homosexuality has been perceived as a propensity from which people can be converted or can avoid through conversion, religious faith, counseling and conformity to doctrine or discipline (cf. Harkavy, 1995; White, 1994).

In the United States, reputed to be the most religious of all First World countries ("95% of Americans Believe in God," 1994), with 84% perceiving themselves as religious, compared, for example, to 31% of the Swedish adult population (Ester *et al.*, 1993; Hamberg and Pettersson, 1994), the likelihood is quite high that particular religious assumptions about human sexuality shape civil morality in the U.S. and, at least to some extent, civil morality in other countries. This probability raises a question over how much particular religious assumptions underlie justice determinations, especially in societies with constitutional separation of church and state.

With the 1980s reintroduction of morality into civil rights determinations marked by the *Bowers v. Hardwick* (1986) consideration over homosexual right to privacy, the basis of the "millennia of moral teaching" that was used to justify denying rightful freedom of expression to homosexual sexuality and its subsequent use by courts to rule that same-sex orientation does not merit equal protection status has not been given close scrutiny, including religious assumptions which may be undergirding it. To justify laws based purely on morality, the U.S. Court had further stated that, "the law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed" (Zamansky, 1993, p. 238). Are assumptions defining civil morality coming out of an essentialist perspective grounded in an historical and consequently relativist context of knowledge which, in the case of sexual orientation as well as postmodern categorical analysis, may be evident by current disputation over the basis—or existence—of sexual orientation as a category? Or are they emanating directly from assumptions grounded in discrete religious world views as to what is the right, the good, and consequently the moral?

Since anti-Gay Rights proponents argue that sexual orientation is a behavioral or life-style choice and therefore not eligible for protection as a status group, a dilemma arises where justice advocates hold social constructionist rather than essentialist understandings of what constitutes a strict scrutiny category. This dilemma cuts to the heart of the conflict: The behavioral, or *life-style choice* argument when grounded in religious assumptions presumes an essentialist understanding of gender whereby all but heterosexual orientation represents behavioral deviance based upon choice. Consequently, homosexual or bisexual orientation becomes conflated with behavior, and therefore does not represent a status in itself. For the relig-

ious right, which has undertaken this argument, the very act of choice results in moral sinfulness. For defendants to set forth an argument of status group membership based upon essentialist or immutable criteria, the arguments of those for whom sexual orientation may be either a political choice or otherwise not innate must be suppressed, which raises a concern over the ethical integrity and consequently the legitimacy of the category being defined. Conversely, for defendants to argue that sexual orientation is anything but unilaterally essential makes them vulnerable to both the proponents' life-style argument and implicit religiomoral assumptions that a behavioral change to heterosexuality is both possible and desirable. Furthermore, such an argument dilutes the strength of U.S. Fourteenth Amendment civil rights protections, and those of other constitutions, that are based upon essentialist categories.

The deep divisions of public opinion over whether sexual orientation is an immutable trait, the proliferation of initiatives to limit civil rights based on sexual orientation, and the intense involvement of religious right organizations in these grass-roots campaigns all contain basic philosophical and religious differences over the rightful social organization of gender, the relationship of gender status or identity to both gender role and role behavior, and whether deviance and diversity are morally neutral or value-laden concepts. For this reason, issues of sexual orientation are seldom far apart from moral conflicts over gender roles, feminism, and what through the Colorado amendment campaign was highlighted as "family values."

Such struggles become acute in the transition to a postmodern condition where particularization challenges the legitimacy of moral universals. Appeal to religious ideology allows a constituency to objectify authority so as to legitimate the social dominance of their moral ideals, or to minimize their erosion. The emphasis upon publicly rearticulating sexual orientation as a moral debate over homosexual behavior, drawing upon essentialist theological justifications which had served to uphold moral universals in past times can be said to come from particular status groups that have much at risk in the transition to postmodern understandings, not unlike religious involvement in the U.S. Temperance movement a century ago which Gusfield (1970) has characterized as a status group conflict.⁶ In testimony for the State of Colorado during the 1993 Amendment Two trial, Hunter (Pankratz, 1993; cf. Hunter, 1991) argued that the legal struggle was grounded in conflicting systems of moral under-

⁶The conservative evangelical-based Traditional Values Coalition, in fund-raising materials, had conflated homosexuals with what it calls the "liberal elite," and attributed them to instigating a "cultural war" against traditional heterosexual families (Booth, 1992, December 9).

standing. Where religious ideology explicitly or implicitly has legitimated the basis for gender identity, the prospective relativization of its legitimating authority by other religious views presents a crisis for that constituency in how social relations are maintained. Particular religious assumptions, when enacted into legislation governing social morality can seek to stabilize those relations but also to legitimate violence against the targeted group(s), as the increase in legitimated violence in the aftermath of the passage of Amendment Two attested.⁷

The movement toward utilizing constitutional amendments by the religious right in the U.S. has been attributed to seeking to embed morality in law, which represents a departure from traditional use of the amendment process for protecting liberties or formalizing procedural matters (Biskupic, 1995). To what extent does the public expression of a particular religious morality through legislation effectively establish a religion that inhibits or prohibits the free exercise of conflicting morality on other—religious or secular—grounds? This was precisely the concern which led to the injunction against the Colorado amendment from being implemented. Ruled Denver District Judge Bayless,

In the present case, the religious belief urged by defendants (supporters of Amendment Two) is that homosexuals are condemned by Scripture and therefore discrimination based on that religious teaching is protected within freedom of religion. The competing interest in the present case is the right to participate in the political process as outlined by the Colorado Supreme Court. ("Amendment Two," 1993, p. 17A)

Those seeking to block the amendment from taking effect had done so on grounds which included prohibition against establishing a religion (Wagner, 1993, p. 525).

The political nature of religious justifications becomes apparent when examining the wide variance within religion of diverse attitudes toward gender, sexual orientation, and human sexuality (Swidler, 1993).⁸ When the sexual orientation conflict is cast into a debate of competing moral theolo-

⁷In the wake of the passage of Colorado Amendment Two, posters appeared, reading, "DEATH PENALTY for HOMOSEXUALS is Prescribed in the BIBLE" (Gibney, 1993). Focus on the Family, grounded in conservative evangelical theology, has acknowledged the issue as one constituting a "civil war of values" (*Helping You Build a Healthier Home*, 1993), and its political cognate, the Family Research Council, has publicly called the legitimation of homosexual orientation for government security clearances "a moral slap in the face to American families" (Rankin, 1995). Some Christian radio talk programs also serve as a forum for prejudicial hostilities toward homosexuals and feminists.

⁸Some religious denominations—the United Church of Christ, the Unitarian Universalist Association, and Reform Judaism—ordain clergy without restriction on sexual orientation, providing further evidence that negative morality represents the hegemony of particular religious assumptions that limit or harm the free religious, as well as secular, expression of homosexual and bisexual individuals who do not share those assumptions (cf. Swidler, 1993).

gies, a stronger challenge can be made to any particular religious interest seeking to dominate or monopolize civic morality by relativizing the religious assumptions. For example, within many moderate and progressive religious organizations, theological positions have been stated which morally uphold both homosexual status and sexual behavior; moral sinfulness, rather, lies in actions independent of sexual orientation such as infidelity, promiscuity, lust, or lasciviousness (e.g., *Breaking the Silence*, 1989; Melton, 1991; Williams, 1990; Spong, 1988; Winterrowd, 1992). With the religious right's current commitment to manifest sexual orientation as a matter of public and legislative concern (Esterberg *et al.*, 1994), the addition of religious perspectives that affirm the integrity and equality of human diversity allows the moral ground to be debated and negotiated in a manner that relativizes and neutralizes oppression justified by any particular religious theology.

Sexual orientation as a construct has been equated with that of religion (Wintemutte, 1995, p. 9). Both have ontological beliefs and practices motivated by those beliefs. When beliefs are conceptualized as a status, they can be protected by a liberty, or "freedom" argument. It is the "practices" aspect of both religion and sexual orientation that become so controversial, subject to moral debate and social control. Practices, based on one's religion or one's sexual orientation, stem from what is held of deep value, virtually sacred as a component of one's identity and existential basis. Therefore they must be protected by a fundamental equality argument. An integrated interaction between belief and practice—status and behavior—which also represent two divided approaches to justice, provides an opportunity to construct a foundation for postmodern justice.

JUSTICE REQUISITES FOR POSTMODERN SOCIETY

Wintemutte (1995, pp. 16-17) distinguished three core arguments related to sexual orientation and international human rights: *immutable status*, where sexual orientation is an innate rather than chosen status, *fundamental choice*, where all sexual orientation and sexual conduct are perceived as chosen, and granted protection both as a fundamental freedom and as fundamental to one's happiness, and *sexual discrimination*, whereby sexual orientation discrimination is a derivative form of sex discrimination. He argues that governments should not use immutable status criteria without particularly argued justification. Nor should they interfere with fundamental choices, such as religion or political opinion, including choices involving right to privacy, without special justification. Nor should they make distinctions with regard to gender without specific justification. Al-

though the grounding of this argument within an Enlightenment tradition is evident through the notion of *laissez faire* liberalism, it does provide some normative guidance for the further development of civil rights, or civil freedom claims, in the postmodern social globalization context. Equality arguments, however, interfere with the protected freedoms so foundational to liberty arguments. At the same time, liberty without equality provisions do not make an adequate justice construct. Right to privacy provisions protect behaviors, while sex discrimination provisions protect sexual orientation status.

Postmodern notions of justice have yet to develop and implement status group criteria that are flexible and contextual in place of those currently interpreted as essential and universal, and at the same time concurrently ensure protection against discriminatory and prejudicial harm.⁹ Although widespread pressures for the globalization of human rights have continued to increase the categories or constituencies subject to consideration, such as the case of sexual orientation, at the same time the particular historical culture of each constituency challenges and ultimately seeks to redefine what such norms ought to be. Could a category support a constituency that self-selected itself through explicit choice rather than ascription? If not, what would be the implications for bisexual individuals? Or, put another way, if people can choose a status identity as a conscious commitment, as in cases where lesbians have claimed their sexual orientation as a political decision, are they equally entitled to justice through civil rights protections as those whose status is understood as essential or ascribed? If so, then civil rights based upon categorical status group constituency effectively risks decomposition into individual rights, or freedoms. By denying or abolishing categories without concurrent equal justice guarantees, including freedom of expression which does not incur harm on others, social justice becomes an arbitrary process. If a society whose public discourse does not recognize that racial or sexual orientation status exists, there can be no charges of racism or heterosexism despite whatever discrimination may be enacted. Although the individualistic ideal might presuppose equally just treatment of all persons, status politics involving identity construction and maintenance, socioeconomic and political considerations nonetheless affect how equality is defined and legitimated.

The debate over sexual orientation promises an opportunity for a wider philosophical resolution of civil rights issues, especially those related to gen-

⁹For example, "don't ask, don't tell" policy regarding sexual orientation theoretically has been seen as a mediating solution between the denial and granting of civil rights, exemplified in the 1993 U.S. military policy. This behavioral policy has been perceived as unjust because it sidesteps the human integrity of homosexual and bisexual status, and implies that behavior appropriate to that status is morally wrong.

der and human sexuality. In religious and secular constituencies where gender identity, role, and sexual behaviors are related to social dominance, any shifts in sharing power or control potentially threaten identity construction and maintenance. The research challenge is to develop alternative understandings of identity, in this case gender identity and sexual orientation identity, which do not violate cultural or religious integrity and yet do not undermine the human equality and rights of any particular constituency. Where status and behavior become constructed as composite or factored aspects of a single category, they provide the means not only for a justice framework that can account for both liberty and nondiscrimination, but for the possibility to construct postmodern notions of identity that can be operationalized and utilized in a justice context.

The movement toward a postmodern understanding of justice, while inevitable in contemporary society, becomes viable from a human rights standpoint in the context of globalized culture only where shared norms of human rights undergird the autonomy and particularization of status group constituencies (cf. Havel, 1995; Beyer, 1994; Meyer, 1980). As Neuhaus (1984, pp. 21, 79, 82) has observed, a shared or public ethic must be informed by values shaped by religious understanding, primarily because public virtue finds its strength in the efficacy of religion as a mediating agent to the political and socioeconomic ambitions of governments. Religious dialogue provides an ongoing forum where the establishment of basic norms can be desecularized, reparticularized, renegotiated, and shaped. The 1993 World Parliament of Religions, confronted with the economic, political, and human rights implications of globalization, forged the beginning of a shared norm negotiated by diverse voices. The fundamental demand, upon which representatives of diverse religious traditions could agree, was that all people must be treated humanely, based upon the principle that has persisted across religious and ethical traditions:

What you do not wish done to yourself, do not do to others! (Kung and Kuschel, 1993)

Or in positive terms,

What you wish done to yourself, do to others! (Kung and Kuschel, 1993)

Any coherent social organization which represents a postmodern valuation of individualized rights and multiple constituencies ultimately must depend upon some form of shared or negotiated norms as to what is considered moral, and which norms and values should form the basis for human rights (cf. Havel, 1995). Without the protection of mutually agreed upon norms, the potential remains for tyranny capable of denying human rights to individuals at-will.

Including a religiomoral aspect in the negotiation and reconstruction of postmodern notions of justice also has to do with the foundational func-

tion that gender attribution, roles, and identity hypothetically play in the organization of societies, how religion has been utilized as an objectified justification for the dominance of particular patterns of gender relations, how these are manifested both through family and kinship constructs and their underlying values that perpetuate what is defined as normative and moral. For instance, if not all heterosexual couples procreate, there can be no basis other than morality grounded in religious presuppositions either to deny marriage to nonheterosexual couples or to permit it for those with no evidence of children. The situation becomes yet more complex when matters of adoption, guardianship, or, with the advent of cloning technology, making possible childbirth among nonheterosexual couples. The particularity of religious presuppositions universalized as civil morality arguing against such behaviors on moral grounds and denying such freedoms because of sexual orientation status, must be identified, reparticularized, and negotiated as explicit religious frameworks. At that point, then, they can be countered and neutralized with other religiomoral perspectives that affirm human diversity. This represents a fresh and important approach to the justice debate, and a significant opportunity to develop justice foundations capable of supporting postmodern yet globally interdependent communities and societies. Therein lies the possibility and promise of postmodern justice exploration.

CONCLUSION

Both the sexual orientation debate and social justice research need to be concerned with what constitutes a right in a postmodern era and how useful previous categories continue to be. Civil rights justice can be constructed upon the relativity of postmodern philosophical foundations by taking into consideration and negotiating both behavioral norms and ontological status, as well as negotiating the religiomoral foundations upon which constituencies at risk are affected. As postmodern justice moves from categorical universals to categorical constructs, putting at risk the decomposition of the very notion of "category" that has been so crucial to both social justice research and human rights, the danger lies in ignoring the notion of constituency or status group while embracing the individual as the unit of justice analysis. Postmodernism must sustain this tension while refuting the arrogance of particular religiomoral assumptions whose truth claims infringe on both individual and collective rights. At the same time, it also must be sufficiently flexible to accommodate cultural particularities. Where equality and liberty arguments are held in interactive tension along with the religiomoral basis legitimating foundational assumptions, this triad

provides an interrelated basis for dealing with status politics involving identity and socioeconomic concerns.

Social justice research, empirically integral to the broader development of human rights and responsibilities, has a particularly important contribution to make on the sexual orientation issue as well as other realms where humans receive discriminatory treatment. By operationalizing and testing various postmodern variable constructs that account for ontological status as part of the protected construct as well as fluid choice in identity or behavior, it may be possible to offer guidance on new ways to configure human and legal rights discourse. The addition of interreligious discourse offers moral and authoritative social legitimation for new constructs. Social justice research both theoretically and methodologically can develop paradigms and processes that can move formerly essential categories as justice criteria into relative configurations capable of postmodern sensitivity, and thereby provide the basis for a fresh, interactive framework for human rights and legal philosophy.

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