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### Legal Discrimination Against Lesbian, Gay, and Bisexual Employees: A Multi-Theoretical Model to Explain an Elusive Civil Rights Law

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## **Legal Discrimination Against Lesbian, Gay, and Bisexual Employees: A Multi-Theoretical Model to Explain an Elusive Civil Rights Law**

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*Using insights from historical, institutional (political-economic pluralism), critical, and values approaches to policy analysis, this manuscript seeks to explain why lesbians, gay men, and bisexuals, perhaps the most stigmatized populations in the United States, have not been awarded a very basic right: legal protection from workplace discrimination on the basis of sexual orientation. A detailed overview of the policy problem, its scope, and its significance is provided, followed by an in-depth explanation and application of the multi-theoretical model.*

*KEYWORDS* sexual orientation, discrimination, employment law, civil rights, social policy theory

The lesbian, gay, and bisexual (LGB) population has been described as one of the most stigmatized and disenfranchised groups in the United States (Boes & van Wormer, 2002). This group, distinguished by sexual orientation, faces systematic barriers to, if not outright exclusion from, many of the rights and resources widely considered entitlements of citizenship. This exclusionary pattern is simultaneously created and reinforced by a network of social policies affecting numerous facets of LGB persons' individual lives. Myriad social policies, many of which shape the legal definition of "family," present troublesome implications for LGB persons. These include immigration policies, tax and inheritance laws, and child custody and adoption laws. Even basic privacy guarantees were denied to same-sex couples in several

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states until 2003, when the so-called “sodomy laws” were struck down by the U.S. Supreme Court.

Although the issue of “same-sex marriage” has stolen the limelight in recent years, the fact that LGB persons still lack basic civil rights protections in many states has received less notice. This article explores one area of civil rights law—legal protection from workplace discrimination on the basis of sexual orientation—which has yet to be secured for all LGB persons in the United States. Without such protections, it remains legal to fire, refuse to hire, or deny promotion on the basis of an employee’s actual or perceived sexual orientation in many areas of the nation (Human Rights Campaign Foundation [HRCF], 2006; Lambda Legal, 2006). The recent debates in Congress over the Employment Nondiscrimination Act (ENDA) make this a timely issue.

How is it that such a basic civil right has yet to be legally protected for LGB persons? This article attempts to answer that very question by offering a multi-theoretical model through which to conceptualize this policy problem in the United States. In the model, a values perspective forms the background against which majority-minority power struggles (critical theory) and institutional responses (political-economic pluralism) have played out over time (historical perspective). A detailed overview of the policy problem, its scope, and its significance is provided, followed by an in-depth explanation and application of the multi-theoretical model.

## OVERVIEW OF THE POLICY PROBLEM

Civil rights laws are commonly understood to protect persons from discrimination in the areas of housing, employment, and public accommodations based on race, sex, religion, national origin, and other attributes (Gamble, 1997). These are the core areas addressed by the Civil Rights Act of 1964 and its amendments. Currently, however, sexual orientation is not included in the list of protected statuses under federal civil rights law; federal policies do not overtly prohibit discrimination based on sexual orientation in either private or federal employment (Burstein, 1985, as cited in Klawitter & Flatt, 1998, p. 659). Since the 1970s, federal employees have been only marginally protected from sexual orientation discrimination through the use of a vague Presidential Executive Order (Lewis, 1997), and even this was weakened during the administration of George W. Bush (Log Cabin Republicans, 2004).

In 34 states, private employees have no legal protection from sexual orientation discrimination (HRCF, 2006). Only 16 states have statewide sexual orientation nondiscrimination laws protecting both public and private employees, and another nine states have protections for public employees only by executive order or administrative regulations (HRCF). As many as 167 local

jurisdictions (cities and counties) across the nation have instituted nondiscrimination ordinances (HRCF). These local nondiscrimination ordinances are positive steps toward social justice for LGB individuals, but because they lack the enforcement power available through state- or federal-level civil rights laws, LGB persons remain vulnerable to employment discrimination (Cahill & Jones, 2002).

The exact number of persons affected by this missing civil rights law is unknown. One complicating factor is that heterosexual persons perceived to be LGB are not protected from discrimination on the basis of sexual orientation. Other factors influence the difficulty in measuring the size of the LGB population due to issues of invisibility, self-identification, and a lack of comprehensive social measurement mechanisms. The U.S. Census, for example, does solicit some data about same-sex couples but does not explicitly include questions about sexual orientation (Cahill & Jones, 2002). Gay and lesbian activists have commonly claimed 10% of the population is LGB, but others suggest 5% is more accurate (Smith & Gates, 2001). Others place the percentage of self-identified gay men and lesbians in the population at 2.8% and 1.4%, respectively (Black, Gates, Sanders, & Taylor, 2000). In general, demographers estimate the LGB population represents between 2 and 10% of the U.S. population (Cahill & Jones, 2002).

The lack of employment protection leaves LGB persons vulnerable to direct discrimination (e.g., firing, harassment) and indirect discrimination (e.g., reduced productivity, compensatory workaholicism) (Badgett, 1995). It creates a situation in which LGB persons expend energy managing their workplace identities and carefully weighing the costs and benefits of coming out. The benefits of living authentically may be offset by the potential loss of income or career advancement (Badgett, 1995). "Financial success often depends upon one's willingness and/or ability to 'pass' as heterosexual" (Lind, 2004, p. 31). The threat of discrimination upon disclosure has been shown to be real, with one meta-analysis finding between 16–46% of self-identified LGB persons having experienced workplace discrimination on the basis of sexual orientation (Badgett, Donnelly, & Kibbe, 1992, as cited in Badgett, 1995, p. 728).

Various stakeholders, including Chambers of Commerce, LGB advocacy groups, policy makers, and religious groups have attempted to define the problem presented by employment discrimination toward LGB persons. At its core, the lack of comprehensive legal protections from employment discrimination based on sexual orientation represents an institutionalized obstacle to full social and economic participation for LGB persons. Embedded here is the notion that this policy concern may be thought of as either a problem of economic inequality or of social inequality. Predictably, the lack of employment protection for LGB citizens has been alternately framed as an economic problem or human rights problem, depending partly on the agenda of the party defining the problem.

An economic conceptualization of the issue would suggest that non-discrimination measures are needed because lack of protection places the economic well-being of LGB persons at risk. Employment discrimination could result in economic inequality for LGB individuals and their families through loss of income (due to firing or refusal to hire) or income stagnation (due to unequal pay or denial of promotion) (Levine & Leonard, 1984). It may also create broader economic losses for the community in the form of “brain drain” or failure to attract the “creative class” (Florida, 2002). As a point of comparison, federal nondiscrimination policies, such as those springing from the Civil Rights Act of 1964 have been successful in generating measurable improvements in income for women and ethnic minorities (Burstein, 1985; Donohue & Heckman, 1991; and Gunderson, 1989, as cited in Klawitter & Flatt, 1998, p. 659). The data comparing the earnings of LGB persons to those of heterosexuals are somewhat mixed, however, casting doubt on the viability of a purely economic justification for nondiscrimination laws.

The economic perspective has been distorted and actually used against LGB equality. It has been suggested that gay persons, being less likely to have children, are actually wealthier than heterosexuals. In this way, LGB people are framed as an elite class who do not need further legal protections. If LGB persons are seen not as an economically deprived class, but actually as an elite, wealthy class, then it is easy to see employment protections as “special rights” rather than basic rights (Lind, 2004). These arguments have convinced some powerful individuals, including Supreme Court Justice Antonin Scalia, who justified his support for an antigay referendum by stating that “those who engage in homosexual conduct tend to have high disposable income” (Badgett, 1998, p. 4).

However, the stereotype of gay affluence does not hold. Overall, there is economic diversity within the LGB population (Lind, 2004), but extensive multivariate analyses have shown that LGB persons do not necessarily earn more than heterosexual counterparts (Badgett, 1998). Gay men have been consistently found to earn less than heterosexual men, but the same cannot be said for lesbians compared to heterosexual women (Badgett, 1998; Black et al., 2000). However, lesbians are typically worse off economically than gay men. This suggests gender has greater salience than sexual orientation in explaining wage differences overall, but also that sexual orientation plays a more significant role in explaining the earnings of men than women (Badgett, 1995). Wages for both gay and lesbian couples, and heterosexual couples for that matter, are typically higher in localities with nondiscrimination laws (Klawitter & Flatt, 1998). This may be less due to the law itself than to general population characteristics (e.g., education level, population size) that offered fertile ground for passing the nondiscrimination law in the first place. In any case, a simple economic argument for LGB civil rights is incomplete.

The problem of a lack of employment protection for LGB persons may be better understood as a human rights issue. The Universal Declaration of Human Rights (United Nations, 1948), based on the ideal that global peace, freedom, and justice depend on “the recognition of the inherent dignity and equal and inalienable rights of all members of the human family,” (Preamble) maintains that “all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration” (Article 7). Viewed in this light, the problem becomes one of valuing the dignity and full citizenship of LGB persons in U.S. society. The lack of workplace protections contributes to a social context in which the segregation, dehumanization, and disenfranchisement of LGB citizens is condoned.

Nondiscrimination policies can do more than equalize wages and grant individuals a means of recourse in cases of unfair treatment. Perhaps more important, they contribute to valuable social outcomes. These include affirming “a sense of citizenship” among LGB persons and allowing them to “be open about their lives and to participate more fully as citizens in their communities” (Klawitter & Flatt, 1998, p. 677). The policies demonstrate inclusiveness and convey that LGB persons and their contributions are valued by their communities (Button, Rienzo, & Wald, 1995). Nondiscrimination policies are a basic means of affirming the human rights of LGB citizens, a group that historically has faced disenfranchisement and discrimination. This basic civil rights policy may make an enormous difference to a small number of LGB individuals who are able to prove direct discrimination, but the policy’s greatest power is as “a symbol of full citizenship and legitimacy” (Klawitter & Flatt, 1998, p. 658). Still, a variety of factors have resulted in a general lack of legitimacy and protection for LGB workers. These intertwined factors are explicated now within the framework of a multi-theoretical model.

### THE MULTI-THEORETICAL MODEL

As previously suggested, the nondiscrimination policy problem facing LGB citizens may be better understood from a values perspective than an economic one. However, historical, institutional, and critical analyses further enrich an understanding of the issue. Therefore, a multi-theoretical model is proposed here. The model weaves together the insights from each of these perspectives—historical, institutional (political-economic pluralism), critical, and values—to comprehensively explain the current lack of employment protections for LGB individuals.

## Historical Analysis of LGB Employment Protections

Since the Victorian era, same-sex sexuality has been regulated and controlled through an array of policies and institutions (Foucault, 1978; Lind, 2004). Not until the birth of an organized “gay rights movement”, sparked by the Stonewall riots in 1969, did sexual orientation gain widespread consideration as a human attribute worthy of legal protections against discrimination (Poindexter, 1997). From that point on, the gay rights movement modeled itself largely on the strategies of the African-American civil rights movement, which led to the passage of the Civil Rights Act of 1964 and its numerous subsequent amendments.

At the federal level, the Civil Rights Act, its revisions, and other equal employment opportunity laws, prohibit employment discrimination based on race, color, religion, national origin, sex, age, and disability (Badgett, 1995). Prior to the passage of the landmark 1964 act, approximately half of the states had nondiscrimination laws protecting race and national origin, but the federal legislation eliminated inconsistencies by guaranteeing equal treatment under the law in states resistant to extending civil rights protections and greatly enhanced enforcement capacity (Klawitter & Flatt, 1998). Historical analyses have shown that taken alone, this federal legislation has not created total equality, but it has made many minorities legal equals regardless of the particular state in which they live or work (Lind, 2004). Currently, the same cannot be said for LGB individuals; federal law does not prohibit discrimination on the basis of sexual orientation.

The gay rights movement has utilized the general pattern of the movements for racial and gender equality: in the absence of federal employment protections, incremental changes to local civil rights ordinances and state civil rights laws have been sought (Klawitter & Flatt, 1998). The typical strategy has been to add “sexual orientation” to existing civil rights statutes. History suggests these are critical steps toward the ultimate goal of national employment discrimination protection, but that LGB persons will not be full citizens in the U.S. until a federal policy is in place. In the meantime, the successes at the state and local levels have created a fragmented civil rights picture for the LGB community (Lind, 2004).

In the 1970s, the U.S. saw the first wave of state and local policy-makers begin protecting private- and/or public-sector employees from discrimination based on sexual orientation (Klawitter & Flatt, 1998). At the forefront of this new civil rights movement were university towns and larger cities with considerable gay and lesbian communities (Button et al., 1995). As of 1980, two states and approximately 30 localities had added “sexual orientation” to their human rights ordinances covering private-sector employees (Button et al., 1995; Klawitter & Flatt). This trend slowed somewhat during the more conservative era of the late 1970s and 80s, but expanded again during the 1990s (Button et al., 1995). Nine states and nearly 90 local entities had passed



private employment protections by the mid-1990s, and another dozen states and 50 localities protected public employees (Klawitter & Flatt). These local ordinances differed somewhat from place to place, but were generally enacted by adding “sexual orientation” to existing nondiscrimination policies. They typically enabled persons to file complaints or lawsuits if they felt discriminated against due to sexual orientation in the arenas of employment, public accommodations, or housing (Button et al., 1995). Significantly, protections for public employees typically have come from executive orders or administrative regulations, not legislation, ordinances, or statutes (Klawitter & Flatt).

During the 1990s, a conservative backlash emerged, engendering initiatives to repeal or block state and local LGB civil rights policies (Lind, 2004). A prime example occurred in Colorado, where right-wing political activists were successful in passing a state constitutional amendment banning any city or county from passing legislation protecting civil rights on the basis of sexual orientation. Although approved by popular referendum, the amendment was struck down by the U.S. Supreme Court before it could take full effect (Klawitter & Flatt, 1998). Shortly after the ruling against “Amendment 2,” ENDA was narrowly defeated in the Senate. ENDA would have provided nationwide protection against sexual orientation discrimination in public and private employment (Cahill & Jones, 2002), including the 39 states in which such discrimination remained legal (McCreery, 1999). ENDA was reintroduced in 2007. One version of the bill (which addressed “sexual orientation” but not “gender identity”) passed the House of Representatives and was awaiting consideration by the Senate at the time of this writing.

The backlash in the 1990s was not necessarily a new phenomenon. Popular support for Colorado’s Amendment 2 seems to have been symbolic of a larger trend in which civil rights extensions are defeated when opened to popular vote. Gamble (1997) illuminated this trend in her research of LGB civil rights issues presented directly to voters in the form of referenda. Beginning in 1977 and tracking all popular votes on LGB civil rights issues through the mid-1990s, Gamble found that voters approved less than one-third of all pro-civil rights proposals, whereas approving approximately 75% of all anti-civil rights measures. These anti-civil rights policies repealed or prevented future extensions of civil rights protections to the LGB community. Oregon voters, for example, overturned the governor’s executive order granting workplace protections to LGB state employees. Cincinnati voters repealed that city’s gay rights ordinance and approved a measure preventing any future gay rights policies (Gamble, 1997).

This analysis shows the need for an overarching federal policy protecting the civil rights of LGB citizens. However, federal support has been unreliable, and it has eroded further during the administration of George W. Bush. Lewis (1997) offers a comprehensive analysis of federal workplace discrimination protections. He points to the federal government’s long-standing prejudice against homosexual employees. Before 1975, the federal government

explicitly banned homosexual employees. Throughout the 1950s and 1960s, gay federal employees were intentionally “weeded out . . . for being moral weaklings” (Lewis, p. 387). The majority of State Department firings in the 1950s were due to security restrictions against homosexuals (Lewis). Ironically, cross-dressing FBI Director J. Edgar Hoover led government-wide initiatives to oust gay employees from government jobs. Lewis describes an antigay sentiment so deep that not even the American Civil Liberties Union would advocate fair treatment. Civil Service Commission Chair John Macy (1966, as cited in Lewis) exemplified this attitude:

. . . the revulsion of other employees by homosexual conduct and consequent disruption of service efficiency, the apprehension caused other employees by homosexual advances, solicitations, or assaults, the unavoidable subjection of the sexual deviate to erotic stimulation through on-the-job use of common toilet, shower, and living facilities. (pp. 390–391)

Attitudes toward LGB persons began to shift in the wake of the 1969 Stonewall riots in New York City, and this became apparent in federal employment policy as well (Lewis, 1997). By 1978, the Civil Service Commission (CSC) officially ended employment discrimination based on attributes unrelated to job performance (Lewis, 1997; Tuller, 1994). White House employees received sexual orientation discrimination protection through a 1974 Executive Order (Log Cabin Republicans, 2004), and President Carter later interpreted the CSC policy to include sexual orientation protections for the entire Executive Branch of government (Tuller, 1994). Although Presidents Reagan and Bush ignored Carter’s precedent, Executive Branch employees were once more protected during the Clinton Administration (Tuller, 1994). The Office of Personnel Management banned sexual orientation discrimination in 1980, and several federal agencies have followed their lead (Lewis, 1997).

The administration of George W. Bush, however, has eroded protections for federal employees. In 2003, the White House Office of Special Counsel (OSC) removed all references to protections on the basis of sexual orientation from their Website and other materials (Log Cabin Republicans, 2004). The OSC is the office charged with *enforcing* federal prohibitions against discrimination within the Executive Branch (Equal Employment Opportunity Commission, 2006; United States OSC, 2006). The Special Counsel’s argument in removing sexual orientation content was based on a narrow interpretation of the CSC policy: the OSC claimed no legal authority to investigate claims of sexual orientation discrimination (United States OCS, 2004).

### The Political-Economy of LGB Employment Protections

This brief historical review does much to explain today’s “mixed bag” of LGB employment protection laws in the United States. When compared to the civil

rights struggles of African Americans, it would seem that a federal extension of civil rights is the ultimate answer to ensuring civil rights for LGB Americans. Any other arrangement amounts to a piecemeal approach, rife with contradictions and loopholes. Consequently, the U.S. currently has a pluralist approach (Gilbert, 2000) to LGB civil rights protections. Given the public sector's failures to protect LGB civil rights in a broad and meaningful way, the private sector is stepping forward. Eighty-six percent of all Fortune 500 companies now include sexual orientation in their internal anti-discrimination personnel policies (HRCF, 2006). The percent improves even more among the elite corporations of the Fortune 100 and Fortune 50, 98% of which protect their LGB employees from discrimination in matters of hiring, firing, and promotion.

This suggests that the economic market is responding to certain incentives to treat LGB persons equally. Some observers have explained the private sector's response by noting that gay employees create fewer expenditures for employers because they are typically ineligible for family insurance or medical leave benefits (Badgett, 1995). Therefore, companies face a cost incentive to present themselves as welcoming to gay employees. This may be occurring, as only 51% of Fortune 500 companies currently offer domestic partner benefits (HRCF, 2006). At the same time, it appears that local ordinances, internal groups of vocal employees, and external consumer groups have had some positive influence on corporate policies (Badgett, 1995).

When a company adds a sexual orientation nondiscrimination policy, this should in fact mean that employers must extend equal benefits to all employees, thereby equalizing costs of hiring an employee regardless of sexual orientation. However, this logical function of nondiscrimination policies is not infrequently overlooked. Many nondiscrimination policies are either written or interpreted as applying only to a company's hiring, firing, promotion, and anti-harassment procedures. The benefits package is more easily ignored.

Despite these imperfections, the economic sector is taking initiative to protect the civil rights of LGB employees beyond the efforts of the public sector. This phenomenon begs the question of why the public sector has failed to guarantee the civil rights of LGB citizens. For an answer, one can more closely analyze the issue through the lens of power differentials and competing values among various subgroups in U.S. society.

### Critical Perspectives on LGB Employment Protections

Analyzing societies through their constituent hierarchies and power differentials has long been the realm of critical theorists (Iatridis, 2000). These thinkers see injustices borne of various oppressions as instrumental in shaping the current world order. Critical theorists strive for social liberation through an advanced understanding of society's power relations. Through this lens, institutions are assumed to reflect the values and interests of the dominant

class (Iatridis; Jansson, 2000). Advanced nations show their oppressive natures when they “systematically encourage the development of certain societal groups at the expense of others” (Iatridis, 2000, p. 399). This point is highly relevant to the cause of LGB employees in the United States, who are not only at risk of exclusion from economic participation due to workplace discrimination, but also face barriers to the development of full human potential because of laws narrowly defining “family,” “spouse,” and other fundamental concepts (Lind, 2004). The latter are predominantly beyond the scope of this paper, but the former policy issue will be analyzed through a critical lens.

Critical feminist theorists have infused an analysis of the gendered nature of power relations in society, social policy, and the distribution of rights and resources (Hyde, 2000). Their arguments have direct relevance for LGB civil rights. LGB persons are punished in society for violating patriarchal gender roles, which define “appropriate” sexuality for women and men as being opposite-sex behavior only (Pharr, 1997). This punishment is expressed politically by the state through laws which give differential treatment to citizens based on their sexual orientation. Preferential treatment is given to heterosexual citizens, demonstrating a heterosexist bias in policies intended to improve social welfare (Lind, 2004). The lack of workplace protections for LGB persons is a clear outcome of broader power relations in society in which LGB persons are a relatively less powerful group oppressed by the hegemony of heterosexism, including the sociopolitical structures that reinforce and normalize heterosexuality (McCreery, 1999).

Due to the hegemony of heterosexism in U.S. society, the LGB community has not had the necessary power to set far-reaching political agendas. This would partially explain the historical failure to frame workplace discrimination based on sexual orientation as a serious social problem in need of federal- and state-level solutions. While unable to foresee today’s debates over sexual orientation, the framers of the U.S. Constitution were aware of the dynamics of injustice and oppression. Therefore, they built into U.S. political institutions mechanisms meant to protect minority groups from oppression from other citizen groups—from what Madison called “the tyranny of the majority” (Gamble, 1997, p. 247). These mechanisms include the representative system, which acts as a filter of the majority’s intentions. The importance of the representative system is obvious when one considers Gamble’s findings that when given the direct opportunity, the voting populace is frequently all too willing to approve oppressive ballot measures aimed at limiting the civil rights of LGB citizens. This is disconcerting in a society that assumes maximum democracy is the best path to maximum freedom. Also significant, between 1959 and 1993 LGB civil rights issues were put to popular vote more often than those of any other minority group (Gamble, 1997). From a critical perspective, it seems the oppressors knew precisely where to find the most likely forum in which to gain approval for their agenda.

A common argument against LGB civil rights is the “special rights” argument (Rubin, 1998). This argument maintains that passing explicit workplace protections and other civil rights guarantees on the basis of sexual orientation would amount to granting “special” rights to LGB citizens. Even though U.S. citizens consistently state on surveys that individuals should not be penalized in employment for characteristics unrelated to employment, the special rights argument has held its ground, as suggested by its effectiveness in localities that have limited LGB civil rights (Rubin, 1998). The mere existence of such an argument, however, illuminates quite precisely the continued need for LGB civil rights protections. Nondiscrimination law is no stranger to American life, yet the special rights argument surfaces solely within the context of sexual orientation. This makes the motives of its purveyors fairly suspect. It may be that these rights *feel* like special rights because those who argue against them truly wish to be allowed to discriminate against LGB persons (Rubin, 1998). In other words, the members of the “special rights” camp hold the desire to discriminate so strongly that to be prevented from doing so feels like an infringement on their own liberties. Equality seems to be special treatment because it is different from the treatment they would ordinarily give their LGB neighbors.

In a throwback to Elizabethan notions of the “worthy” and “unworthy” poor (Day, 2000), other proponents of the “special rights” school may view LGB persons as simply undeserving of the same civil rights protections others enjoy. These individuals may believe it is in society’s best interest to limit the rights of LGB persons, and to do otherwise—to treat LGB persons as equals—seems like granting special privileges (Rubin, 1998). Finally, those who consider homosexuality or bisexuality to be a simple lifestyle choice may find a rhetorical home in the special rights camp (Rubin, 1998). After all, if someone “chooses” to be in an oppressed group, they are considered responsible for their own oppression and not entitled to legal protection against majority rule. They do not have an “unavoidable condition,” such as a disability or certain skin color, which would make them “worthy” of legal protection (Button et al., 1995).

The “special rights” rhetoric appears to be a distortion put forth by privileged members of society of the actual state of affairs. It is disturbingly clever in the way it frames the issue as if LGB people—and not the heterosexual majority—are “over-privileged.” This analysis illuminates the tensions between oppressor and oppressed and the mechanisms used by oppressors to maintain their privileged status. However, such a critical analysis quickly gives way to a discussion of underlying social values. If the nation values equality, then a primary goal should be to end the segregation of its citizens into various classes and statuses as is currently done in regard to the LGB population. As Rubin (1998) states, “If popular support for the principle of nondiscrimination erodes, the national goal of equality for all individuals without regard to their membership in certain groups will be pushed further from our grasp” (p. 565).

## Value-Based Perspectives on LGB Employment Protections

Values come to the forefront in the U.S. debates over LGB civil rights. They shape the rhetoric that is in constant play between dominant and minority groups, thus carrying direct relevance for any critical analysis of the issue. Civil rights issues can inflame deep and enduring value divisions in U.S. society (Gamble, 1997). In the U.S., contradictory social values such as liberty, equality, supremacy, and conformity are relevant to the LGB civil rights debate.

Dallmayr (1981) called for a blending of empirical and ethical discourse in policy analysis, suggesting that values are embedded within any critical analysis of policy. As he saw it, policy decisions aimed at attaining “the good life” must include discussions of the meaning and nature of civil society. How a society defines “civil society” and “the good life” will be shaped by the values held by its members. Jansson (2000) draws attention to the ubiquitous role individual and communal values play in every stage of policy formulation by guiding the construction of reality. Regardless of calls to be rational or scientific in policy-making, values often override empirical arguments throughout the process.

The LGB civil rights controversies seem a clear example of this. Opponents of LGB civil rights routinely ignore or reject scientific evidence (e.g., of the mental stability of LGB persons, normalcy of children of LGB parents, biological foundations of sexual orientation) in favor of continued arguments against equal protection under law for LGB persons (Rubin, 1998). It has further been demonstrated that legislators’ ideology, religious views, and partisanship are stronger determinants of voting behavior on LGB issues than scientific evidence (Haider-Markel, 1999). One reason values take precedence in LGB civil rights debates may be that people see “experts” as irrelevant to this particular decision (Haider-Markel, 1999); “citizens do not need experts to tell them how they feel about issues like . . . homosexuality” (Gamble, 1997, p. 249).

Another reason for the infusion of value-laden language into the LGB civil rights debates is the ability of conservative (primarily religious [Rubin, 1998]) groups to frame the issue in terms of “values” or “morality” (Klawitter & Flatt, 1998, p. 665). However, “values” and “morality,” as used by these groups, are intentionally defined quite narrowly. Their intended connotation is that traditional, patriarchal notions of gender and sexuality are to be preferred and privileged above other human experiences of gender and sexuality. In other words, the term “values” seems to have been co-opted by the religious right. Haider-Markel (1999) suggests that in framing issues in terms of morality, these groups are attempting to use government to redistribute their own values throughout all society, thus reinforcing their own dominance and privilege. Other issue-relevant values, such as liberty, equality, and human dignity are excluded by the term “values” as it has come to be

used in recent political discourse. These fundamental American values have become obscured from the LGB civil rights debates due to power differentials between over-privileged and under-privileged groups in society. The power to frame the issues has a clear impact on resulting civil rights laws, as LGB civil rights ordinances have been most successful in localities where the issue is framed in terms of incremental expansion of civil rights, rather than as an issue of community values or morals (Klawitter & Flatt, 1998).

Citizens express their values regarding minorities through supporting or opposing policies such as civil rights protections. When put to popular vote, LGB civil rights issues have typically amounted to declarations of collective devaluation of LGB persons by those who have already secured their own civil rights (Gamble, 1997). The result can be a social context of increased divisiveness and rhetorical—if not physical—violence toward LGB persons (Button et al., 1995). If this is the result, and relatively small numbers of citizens actually benefit directly from LGB workplace protections, why should society bother with them (Button et al., 1995)?

Society should bother with these civil rights protections because of the shared values of justice, equality, and human dignity—precisely those values which are too often sidelined during political debates. Justice has been defined as the provision and distribution of rights within a society (Rawls, 1967), and equality follows from this definition. In the context of LGB civil rights, this leads to an examination of how rights to equal treatment in the workplace and equal opportunity to engage in the work of one's choice are distributed in society on the basis of sexual orientation. Rawls criticized discrimination for its tendency to waste the resources represented in groups of workers. He also maintained that differential treatment was just as long as all members of society benefit. In the current context, it is difficult to see how social inequality between LGB persons and heterosexual persons benefits everyone. Rawls considered the “policing of business behavior and prohibiting the establishment of barriers to desirable positions and markets” (p. 141) to be an appropriate function of government. It is fitting then for government to implement policies ensuring the equality of opportunity within economic markets for LGB persons.

A further exploration of the concepts of justice and equality leads to consideration of the value society places on human dignity. Mohr (2004) argues that equality must go beyond mere guarantees of equal opportunity. It should also encompass the notion that all persons have equal worth and dignity. “Equality is the authoritative claim that a person will not be held in lesser regard—as having less worth” (Mohr, p. 30). The second-class status of LGB persons, as created and reinforced by a lack of comprehensive civil rights protections, amounts to a violation of the principle of equality. Subsequently, policies also violate the principle of equality if they perpetuate the idea that certain groups are of lesser worth (Mohr). The denial of inclusive civil rights laws (as well as myriad policies in family law, immigration, etc.)

contribute to a broader social context in which LGB persons can be more easily viewed as being of lesser worth. After all, this amounts to the differential distribution of inalienable rights across the human family (United Nations, 1948). Therefore, to ensure human dignity for LGB citizens, thereby upholding the principles of equality and justice, comprehensive federal civil rights protections are required.

## CONCLUSION

Lesbian, gay, and bisexual individuals remain second-class citizens in the United States due to a lack of comprehensive civil rights protections. This article has focused on one category of civil rights law: employment nondiscrimination policies. In many parts of the nation, it remains legal to fire, deny promotion, or refuse to hire employees based on their perceived sexual orientation. This sociopolitical reality violates core principles of justice, including equality and human dignity, as it leaves LGB persons at risk for economic deprivation and social segregation. A multi-theoretical conceptual model has been proposed to capture the interplay among the many factors that have shaped the current status of LGB civil rights policies.

It should be noted that this analysis has not specifically addressed the serious problem of the lack of employment protections for transgendered individuals. That injustice has a different history and literature, and is, therefore, beyond the scope of this article, but the issue should not be overlooked. A trans-inclusive version of ENDA is most compatible with social work's values and ethics, and the decision whether to include gender identity in the bill may have consequences for the cohesiveness of the lesbian, gay, bisexual, and transgender (LGBT) community.

Regarding employment protections for LGB workers, the model presented here offers a realistically complex conceptualization of this important policy issue and gives direction to LGB rights advocates by identifying cultural and institutional targets for their change efforts. Implications for social work policy practice revolve around the ongoing need for social workers to become advocates in their states and local communities for the passage of more civil rights ordinances which include protections on the basis of sexual orientation. A central lesson from this model is that LGB advocates must learn the local context before initiating policy changes. This includes understanding the historical context into which they are stepping, the values at play in the discourse, power differentials between stakeholders, and the institutional functions shaping the playing field. The model also suggests "pressure points" at which advocates can leverage maximum power. For example, taking advantage of opportunities to frame the discourse in terms of broadly defined shared values could help advocates deconstruct the dominant discourse of "family values." Finally, the model suggests



targeting representative bodies at the local level for short-term change while continuing to work for civil rights expansions at the state and federal levels. Equipped with a sophisticated theoretical understanding of this policy problem, social workers can play a vital role in securing civil rights protection for all citizens regardless of sexual orientation, a prospect which so far has proven most elusive.

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