

# Affirmative Action for Lesbians and Gay Men: A Proposal for True Equality of Opportunity and Workforce Diversity

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The status quo that privileges certain groups over others cannot be changed, except self-consciously. . . . We cannot ensure that our institutions reflect the ideals of equality, fairness, and equal opportunity which are part of our culture without affirmative action.<sup>1</sup>

[Gay and lesbian people] don't need affirmative action—we're already here. We need the freedom to be visible.<sup>2</sup>

Despite the prominence of both “affirmative action” and “gay and lesbian rights”<sup>3</sup> at the center of the civil rights debate in the United States, remarkably little thought has been given to affirmative action for lesbians and gay men.<sup>4</sup> When the issue of affirmative action for gay and lesbian people is raised at all, it is almost always mentioned as a feared result of enacting antidiscrimination laws,<sup>5</sup> is occasionally cited briefly in a footnote,<sup>6</sup> or is simply presented

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1. Stephanie M. Wildman, *Integration in the 1980s: The Dream of Diversity and the Cycle of Exclusion*, 64 TUL. L. REV. 1625, 1658-59 (1990).

2. Thomas A. Stewart, *Gay In Corporate America*, FORTUNE, Dec. 16, 1991, at 42, 43 (quoting attorney John Wofford).

3. At the risk of over-generalizing the experiences of gay men and lesbians, I use phrases such as “gay and lesbian workers” and “lesbians and gay men” throughout this article. This grouping reflects the general societal line-drawing between heterosexuals and gay and lesbian people; it is not intended to discount the diversity or gender-specific experiences within the gay and lesbian community. For a discussion about defining the group “lesbians and gay men,” see *infra* text accompanying notes 179-83. I also use these phrases as inclusive of bisexual people, who are generally on the same side of the line drawn by society and so share the same struggle against inequality. See *infra* text accompanying notes 188-91.

4. Indeed, of the vast number of writings addressing affirmative action and the growing number addressing lesbian and gay rights, almost none mention affirmative action based on sexual orientation. See, e.g., BAR ASS'N OF S.F., CREATING AN ENVIRONMENT CONDUCIVE TO DIVERSITY: A GUIDE FOR LEGAL EMPLOYERS ON ELIMINATING SEXUAL ORIENTATION DISCRIMINATION (Aug. 1991) [hereinafter BASF GUIDE] (presenting twenty-three recommendations for achieving the goals of equality and workplace diversification, but not recommending, or even discussing as an option, voluntary affirmative action).

5. See *infra* text accompanying notes 109-10.

6. See, e.g., Frank Deale, *Affirmative Action: Unresolved Questions Amidst a Changing Judiciary*, 18 N.Y.U. REV. L. & SOC. CHANGE 81, 81 n.4 (1990-91) (mentioning the National Lawyers Guild's “hiring preferences for those of gay or lesbian sexual orientation”).

alongside affirmative action for racial minorities and women, without any attention drawn to the novel issues raised by the sexual orientation component of such affirmative action.<sup>7</sup> Even the National Gay and Lesbian Task Force, a leading gay and lesbian civil rights and public education organization, has no position on affirmative action for lesbians and gay men.<sup>8</sup> Perhaps proponents of affirmative action simply do not welcome the additional controversy that would likely accompany inclusion of lesbians and gay men; perhaps gay and lesbian community leaders fear alienating potential supporters by appearing to demand "special rights" or preferential treatment over heterosexual workers; perhaps employers, affirmative action supporters, and society at large are still too homophobic even to broach the subject of affirmative action for lesbians and gay men.<sup>9</sup>

Whatever the reason for the lack of attention thus far given to affirmative action based on sexual orientation, this article explores the substantive issues and possible arguments both for and against private employers' voluntary adoption of affirmative action for gay and lesbian workers.<sup>10</sup> "Affirmative action" denotes policies generally designed to achieve equality of opportunity and workplace diversity. My thesis is that to ensure true equality of opportunity for lesbians and gay men, employers must create a workplace environment free of antigay<sup>11</sup> discrimination and harassment, in which gay and lesbian

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7. *See, e.g.*, First Amended Complaint at 32-41, Harvard Law Sch. Coalition v. President and Fellows of Harvard College (Mass. Super. Ct. Middlesex County) (No. 90-7904) (filed 1990) [hereinafter CCR Complaint] (seeking goals and timetables for the hiring of tenure-track women, women of color, Latinos, African Americans, Asian Americans, Native Americans, lesbian or gay or bisexual persons, and persons with physical disabilities); Wildman, *supra* note 1, at 1659-62.

8. Telephone Interview with Robin Kane, Spokesperson, National Gay and Lesbian Task Force (Feb. 24, 1993).

9. Another, more benign possibility is that most employers simply have not thought of adopting affirmative action for lesbians and gay men, and have not been made to understand the discrimination and inequality of opportunity facing this minority group. Telephone Interview with Richard DeNatale, Law Partner, Heller, Ehrman, White & McAuliffe (San Francisco office) (Mar. 31, 1992).

10. Throughout the discussion, examples are provided from the experiences of Heller, Ehrman, White & McAuliffe ("Heller, Ehrman"), the American Friends Service Committee ("AFSC"), and the National Lawyers Guild—three of the few employers that have adopted affirmative action plans for lesbians and gay men.

11. At the risk of over-generalizing and perpetuating sexist language, the adjective "antigay" is used throughout this article as including bias against gay, lesbian, and bisexual people.

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employees can feel free to come out and be out of the closet.<sup>12</sup> Affirmative action for self-identified lesbians and gay men is a powerful means to achieve this goal. As both a strategy for increased workforce representation and, more importantly, an unequivocally gay-supportive policy commitment, the voluntary adoption of an affirmative action plan based on sexual orientation will encourage gay and lesbian workers to be out at work. Being out at work, in turn, will help combat workplace and societal prejudice, facilitate the mentoring of other gay and lesbian employees, and accrue to an employer the benefits of workforce diversity. As greater numbers of openly gay and lesbian workers integrate into the workplace as a result of such a plan, their presence will continue to transform that workplace—and society—into one that is welcoming of other openly gay and lesbian people.

Defining “affirmative action” for the purposes of this article is essential, since the vehement affirmative action debate has in some measure been fueled by a confusing lack of consensus on the meaning of the term.<sup>13</sup> “Affirmative action” broadly refers to “policies that provide preferences based explicitly on membership in a designated group.”<sup>14</sup> Though such policies vary widely in terms of purpose, legal authorization,<sup>15</sup> application,<sup>16</sup> and beneficiary

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12. I must make two points concerning my limited purpose in writing this article. First, this article is not designed to convince people who generally oppose affirmative action of the merits of either affirmative action or workforce diversity. Neither is it designed to convince those who oppose the civil rights of gay and lesbian people of the merits of nondiscrimination and equality. Although such tasks may be possible, they are beyond the scope of this work.

Second, this article expresses only my own perspective as a gay man and is intended to be a catalyst for both academic policy debate and more practical policy implementation. The gay and lesbian community, like the broader society, is an extremely diverse group of people with often sharply diverging views. My hope is primarily that this article may spark thoughtful debate concerning the merits of affirmative action based on sexual orientation.

For a discussion of whether it is ill-advised or beneficial to the gay and lesbian community to even discuss such affirmative action, see Jeffrey S. Byrne & Bruce R. Deming in 5 STAN. L. & POL'Y REV. (forthcoming Fall 1993).

13. David B. Oppenheimer, *Distinguishing Five Models of Affirmative Action*, 4 BERKELEY WOMEN'S L.J. 42 (1988-89).

14. Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1327 n.1 (1986). These policies are sometimes referred to as “preferential treatment,” “affirmative (or benign or reverse) discrimination,” and “managing diversity.”

My usage of the term “affirmative action” reflects a belief that something properly called “affirmative action” does exist, despite oppositionist rhetoric designed to inflame controversy and euphemistic terminology designed to avoid association with quota programs. See, e.g., MICHEL ROSENFELD, AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY 2 (1991); Kennedy, *supra*, at 1327 n.1; Wildman, *supra* note 1, at 1629 n.16; Bruce D. Butterfield, *Affirmative Action at a Crossroad*, BOSTON GLOBE, Apr. 4, 1992, at 1; Barbara Wickens, *Fighting Sex Discrimination*, MACLEAN'S, Sept. 3, 1990, at 38 (describing the Canadian government's recommendation to use the term “employment equity” instead of the often misunderstood term “affirmative action”).

15. While most federal contractors are required to examine the composition of their work force and adopt goals and timetables if necessary, Affirmative Action Programs, 41 C.F.R. § 60-2 (1992), other employers may implement affirmative action voluntarily, see, e.g., *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), or pursuant to an executive order, see, e.g., Mass. Exec. Order No. 227 (Feb. 25, 1983), statute, see, e.g., *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding a federal statute requiring that at least 10% of federal funds designated for local public works projects be used to purchase services or supplies from minority-owned business

groups,<sup>17</sup> confusion over the meaning of “affirmative action” turns primarily on the substantive variety of policies typically included within its ambit. Types of affirmative action programs may roughly be grouped into five models: basic nondiscrimination,<sup>18</sup> outreach plans, goals and timetables, preference plans, and quotas.<sup>19</sup>

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enterprises); ME. REV. STAT. ANN. tit. 5, § 781-791 (West 1989 & Supp. 1992) (civil service affirmative action utilizing goals and timetables); OR. REV. STAT. § 243.305-.315 (1991) (affirmative action in public employment), or resolution of an employment discrimination suit, *see, e.g.*, *United States v. Paradise*, 480 U.S. 149, 185 (1987) (affirming a court-ordered 50% quota for state trooper promotions); Oppenheimer, *supra* note 13, at 47 (citing the consent decree approved of in *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), as an example of adopting goals and timetables pursuant to a settlement).

16. Affirmative action policies may exist in employment and educational settings, both public and private. In the employment context, affirmative action policies may apply to hiring, promotions, and layoffs. *But see* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (holding school board's use of racial affirmative action in layoffs violative of the Equal Protection Clause).

17. Affirmative action programs typically grant preferential treatment to members of racial and ethnic minority groups and women. Such programs sometimes also include veterans and persons with disabilities. Only rarely does an affirmative action program include lesbians and gay men (as such) or other minorities.

In addition, the preferential treatment accorded to the well-connected, the affluent, children of alumni, and other persons of privilege has been recognized as a long-standing system of *de facto* affirmative action that has predominantly benefitted white men. *See, e.g.*, Deale, *supra* note 6, at 81 n.4; Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to be a Role Model?*, 89 MICH. L. REV. 1222, 1225 (1991); Oppenheimer, *supra* note 13, at 43 n.3.

18. “Nondiscrimination” has been identified as one model of affirmative action. *See* Oppenheimer, *supra* note 13, at 48-50; Geoffrey C. Hazard, Jr., *Permissive Affirmative Action for the Benefit of Blacks*, 1987 U. ILL. L. REV. 379, 390-91. This article nevertheless treats nondiscrimination as a separate, more fundamental principle of equal treatment about which there remains little interesting debate. Federal law, for example, already prohibits employment discrimination on the basis of race, color, religion, sex [gender], national origin, age, and disability. *See* Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (1988); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1988); Rehabilitation Act of 1973, 29 U.S.C. §§ 790-796i (1988); Americans with Disabilities Act of 1990, 42 U.S.C.A. §§ 12111-12117 (Supp. 1991).

Indeed, the affirmative action debate itself seems to recognize the nondiscrimination principle as a civil rights “floor,” with affirmative action’s opponents demanding blindness to race and gender while its proponents demand that more positive steps be taken to achieve justice and ensure equality of opportunity.

“Nondiscrimination” and “antidiscrimination” are used interchangeably in this article to refer to the principle, practices, or effects of treating people fairly by distinguishing among them solely on the basis of relevant qualifications, and not on the basis of factors (such as race, ethnicity, national origin, gender, age, religion, disability, marital status, veteran status, and sexual orientation) unrelated to their qualifications. *Cf.* David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1621-24 (1991) (offering two economic models of discrimination and a legal definition of discrimination). Far from minimizing the importance of nondiscrimination policies in the protection of minorities’ and women’s rights, I simply seek to avoid further confusion by focusing on a particular subset of affirmative action policies that more closely represents the content of the contemporary debate.

19. *See* Oppenheimer, *supra* note 13, at 42-50 (discussing the five models of affirmative action).

Quotas are policies by which “a certain number of jobs, or promotions, or classroom seats, are set aside to be occupied only by women or minorities.” *Id.* at 43. Despite the fact that quota plans are most often equated with the term “affirmative action” by the general public, *see id.* at 55, 43, such policies have become increasingly rare. Because quota plans are so disfavored and uncommon in the employment context, they are excluded from this article’s consideration of affirmative action. For a general discussion of quota plans, *see* MELVIN I. UROFSKY, *A CONFLICT OF RIGHTS: THE SUPREME COURT AND AFFIRMATIVE ACTION* 25-27 (1991). For one state’s attempt to distance its civil service affirmative action plan from quotas, *see* WASH. REV. CODE ANN. § 41.06.020(11) (West 1991) (“It shall not mean any sort of quota system.”).

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This article focuses on the “goals and timetables” model. “Goals” are numerical targets for the hiring or promotion of qualified members of a particular group; “timetables” are the deadlines for achieving the goals.<sup>20</sup> An employer may adopt written goals and timetables as a result of a self-examination that reveals a significant disparity between its number of minority and female employees and the number of qualified minorities and women in the labor market.<sup>21</sup> A program of goals and timetables monitors progress toward a more proportionate workforce representation of a particular group, while assuming that proper balance will be achieved once discrimination is eliminated.

Goals and timetables, as more flexible, temporary,<sup>22</sup> and less overtly preferential affirmative action programs, generally meet with greater approval than the more controversial preference plans or quotas.<sup>23</sup> Because employers committed to nondiscrimination and workplace diversity are more likely to adopt this type of affirmative action plan, I chose to focus on this model of affirmative action.<sup>24</sup>

To summarize, this article discusses affirmative action as *goals and timetables* adopted *voluntarily* by *private employers* to ensure true equality of opportunity for *lesbians and gay men* in their work forces. Although this article concentrates on private employers’ voluntary affirmative action, much of the discussion could also apply to public employers and to court-ordered affirmative action for lesbians and gay men. I focus on *voluntary* affirmative action because I believe it is the most likely means of implementing affirmative action for lesbians and gay men. Some of the nation’s employers will be persuaded by the fairness, benefits, and administrative ease of voluntarily expanding their already-existing affirmative action programs more readily than courts will be persuaded to order remedial affirmative action for gay and lesbian workers. Further, voluntary implementation of affirmative action for lesbians and gay men will more likely occur in the *private* sector. Though the workplace significantly affects the lives of both public and private employees, private employers simply have more discretion in their employment practices

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20. Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, 5 YALE L. & POL’Y REV. 402, 402 n.1 (1987).

21. Oppenheimer, *supra* note 13, at 46-47; *see infra* text accompanying notes 173-78.

22. Though goals and timetables are expressly temporary by design, they are not, however, necessarily more temporary than preference plans since new goals and timetables may be voluntarily implemented after reaching the original target year.

23. *See, e.g.*, Oppenheimer, *supra* note 13, at 50. I believe, however, that employers keeping an eye on targets for workforce representation of minorities and women do essentially provide preferences at some level of the decision-making process. The greater acceptability of goals and timetables may only be a fairly recent response to a formulation of affirmative action more detailed and apparently less redistributive—and therefore more palatable—than preference plans and quotas.

24. Of the three employers used as examples throughout this article, the AFSC and Heller, Ehrman have goals and timetables. The National Lawyers Guild has a preference plan, from which examples will be included only where illustrative of arguments or issues common also to goals and timetables.

than do state actors. Private employers can implement affirmative action based on sexual orientation immediately, whereas government employers' adoption of such a policy will realistically occur only after Congress includes sexual orientation among the impermissible bases for discrimination under Title VII or courts afford lesbians and gay men protection as a suspect (or quasi-suspect) class under Equal Protection doctrine.

Part I of this article analyzes the possible justifications for affirmative action for lesbians and gay men, recasting the traditional affirmative action debate in light of the prejudice facing lesbians and gay men in the workplace and in society at large. Part II considers several issues uniquely related to the implementation of an affirmative action plan based on sexual orientation.

As the gay and lesbian community's movement for equality grows stronger in the workplace,<sup>25</sup> and as the diversity movement breathes new life into voluntary affirmative action,<sup>26</sup> I hope that affirmative action for lesbians and gay men will soon be recognized as an innovative proposal worthy of serious consideration.

## I. JUSTIFYING AFFIRMATIVE ACTION FOR LESBIANS AND GAY MEN

### A. *Lesbians and Gay Men in the Workplace*

In a society that has grown more diverse and, arguably, more tolerant of its diversity, antigay prejudice remains a publicly acceptable and expected form of bigotry and systematic subordination.<sup>27</sup> One strong indication of wide-

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25. See Stewart, *supra* note 2, at 42 ("In the company closet is a big, talented, and scared group of men and women. They want out—and are making the workplace the next frontier for gay rights."); Keith H. Hammonds, *Lotus Opens A Door For Gay Partners*, BUS. WK., Nov. 4, 1991, at 80 (describing several high-profile responses to sexual orientation discrimination, efforts to achieve greater workplace tolerance, and lobbying for domestic partner insurance benefits, "as gay groups target the workplace as a setting ripe for change").

26. See *infra* text accompanying notes 99-108.

27. Despite great strides made by the gay and lesbian community in recent years—or, indeed, because of such open progress—the continued acceptability of antigay prejudice has been vividly illustrated all too often. During the 1992 presidential campaign, for example, Republican Pat Buchanan directly attacked gay men and lesbians throughout his campaign, yet his remarks and advertisements were initially met with absolute silence not only by the President of the United States, but also by the Democratic challengers and almost every political commentator. See *The Other Minority*, NEW REPUBLIC, Mar. 30, 1992, at 7. The antigay rhetoric reached a fever pitch at the "family values"-themed Republican National Convention in Houston, with signs reading "Family Rights Forever, 'Gay' Rights Never!" See, e.g., *Gays Under Fire*, NEWSWEEK, Sept. 14, 1992, at 34, 38. Another striking example was the outcry against President Clinton's efforts to end the military's ban on openly gay and lesbian servicepeople, a policy defended in large measure by the disruptive potential of heterosexual military personnel's deep-seated antigay prejudice. See, e.g., Eric Schmitt, *Military Cites Wide Range of Reasons for Its Gay Ban*, N.Y. TIMES, Jan. 27, 1993, at A1.

Other recent representative incidences of public antigay prejudice include Boston's 1992 St. Patrick's Day Parade, demonstrations against an inclusive school curriculum in New York City, and Colorado's antigay constitutional amendment. See Don Aucoin & Andy Dabilis, *Jeers, threats greet gays in South*

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spread prejudice is the hostile reaction of many to proposed legislation that would make antigay employment discrimination unlawful.<sup>28</sup> When local legislatures do pass nondiscrimination laws protecting lesbians and gay men, antigay groups often attempt to repeal the laws.<sup>29</sup> Indeed, gay and lesbian people are said to be the most despised minority and are routinely subjected to dehumanizing acts of cruelty ranging from hurtful jokes to lethal violence.<sup>30</sup> Given such widespread antigay prejudice in society at large, it is perhaps inevitable that antigay bigotry also manifests itself in two arenas of central importance to society: the workplace and the legal system.

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*Boston Parade*, BOSTON GLOBE, Mar. 16, 1992, at 1 (describing protestors' screams of "We hate you," "faggots," and "I hope you all die of AIDS, homos," and signs reading "God Hates Fags"); Josh Barbanel, *Under 'Rainbow,' a War: When Politics, Morals and Learning Mix*, N.Y. TIMES, Dec. 27, 1992, § 1, at 34; Dirk Johnson, *Colorado Homosexuals Feel Betrayed*, N.Y. TIMES, Nov. 8, 1992, § 1, at 38.

There are several indications, however, that antigay prejudice is becoming less acceptable. The Republicans' antigay attack strategy backfired, and two post-convention polls reported that the number of people who believe in equal employment opportunity for lesbians and gay men has grown to between 78 and 80%. See *Gays Under Fire*, *supra*, at 34, 36, 40 (78% in Newsweek poll); Jeffrey Schmalz, *Gay Politics Goes Mainstream*, N.Y. TIMES MAG., Oct. 11, 1992, at 18, 29, 41 (80% in New York Times/CBS News poll). A boycott of the State of Colorado and a legal challenge to the antigay amendment are having an impact. See Michael Specter, *Anger and Regret in Aspen as Boycott Grows*, N.Y. TIMES, Dec. 30, 1992, at A1. Finally, the military was losing court battles over its ban before President Clinton took steps toward ensuring openly gay and lesbian people's equal opportunity to serve in the military. *Meinhold v. United States Dep't of Defense*, 808 F. Supp. 1455 (C.D. Cal. 1993).

28. See, e.g., Peter M. Cicchino et al., *Sex, Lies and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill*, 26 HARV. C.R.-C.L. L. REV. 549 (1991); MARSHALL KIRK & HUNTER MADSEN, *AFTER THE BALL: HOW AMERICA WILL CONQUER ITS FEAR AND HATRED OF GAYS IN THE '90S* 83-84 (1989); Marcida Dodson, *Group Looks Beyond Goals of Excluding Gays from Law*, L.A. TIMES (Orange County ed.), Sept. 6, 1988, Pt. 2, at 1 (outraged residents of Irvine, California, opposing a proposal to include gay and lesbian people in the city's antidiscrimination ordinance); see also *Bush says gay rights laws aren't necessary*, BOSTON GLOBE, Apr. 22, 1992, at 4 (President Bush assuring evangelical Christian leaders that he opposes laws that protect the rights of lesbians and gay men).

29. See, e.g., Cicchino et al., *supra* note 28, at 590-99; KIRK & MADSEN, *supra* note 28, at 84.

In 1992, for example, Colorado voters amended the state's constitution to invalidate local anti-discrimination ordinances in Denver, Boulder, and Aspen, and to prohibit establishment of "protected status" based on homosexual, lesbian, or bisexual orientation. See Jeffrey Schmalz, *The 1992 Elections: The States—The Gay Issues*, N.Y. TIMES, Nov. 5, 1992, at B8. An even more extreme Oregon measure, which would have classified homosexuality as "abnormal" and "perverse" and allowed discrimination against lesbians and gay men, was defeated. See *id.* Voters in Portland, Maine rejected a referendum that would have overturned that city's sexual orientation anti-discrimination ordinance. See *id.*; *Gays Under Fire*, *supra* note 27, at 35. A similar ordinance in Tampa, Florida was repealed. See Schmalz, *supra*.

30. See, e.g., Daniel Goleman, *Homophobia: Scientists Find Clues To Its Roots*, N.Y. TIMES, July 10, 1990, at C1 ("Gay men and women in America face a hatred that is often more open and intractable than that directed at any other minority group . . ."); also describing the steady increase in antigay violence through 1989's total of 7000 incidents of violence and harassment in the United States, including 62 bias-motivated murders); Cicchino et al., *supra* note 28, at 624 n.356 (observing that one difficulty in attempting to document the oppression of lesbians and gay men is that "the evidence is so substantial it is difficult to know where to begin").

### 1. *Antigay Prejudice and the Importance of Being "Out"*

Ignorance, intolerance, and antigay sentiment contribute to pervasive societal discrimination against lesbians and gay men, including discrimination in the workplace.<sup>31</sup> Because sexual orientation—unlike, generally speaking, race and gender<sup>32</sup>—is not visually identifiable, the subordination of lesbians and gay men can be understood as a type of cyclical oppression in which homophobia and heterosexism are both facilitated by and further coerce gay and lesbian invisibility and silence. "Coming out" as an openly gay or lesbian person, therefore, not only essentially contributes to the individual's psychological well-being, but also plays a central political role in the gay and lesbian community's liberation.

The paramount importance—personally and politically—of coming out and being out is essential to the thesis of this article. The decision to be out or not is an intensely personal one that implicates fundamental rights of privacy, autonomy, and individual dignity. Without denying the importance of respecting human dignity and autonomy, my thesis assumes that being open about one's sexual orientation is better than being secretive and deceptive. This judgment rests upon psychological studies, basic moral and philosophical principles of seeking truth and being truthful, and my own belief that gay and

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31. Many use the terms "homophobia" and "heterosexism" to describe and explain the variety of ways in which people oppress and react negatively to lesbians and gay men. Homophobia "involves active fear and loathing of homosexuality [and/or lesbians and gay men]." Gregory M. Herek, *The Social Psychology of Homophobia: Toward a Practical Theory*, 14 N.Y.U. REV. L. & SOC. CHANGE 923, 925 (1986). The term "homophobia" is used throughout this paper interchangeably with the term "antigay prejudice." Heterosexism, on the other hand, "wishes away lesbian and gay people or assumes that they never really existed" and is described less as active prejudice and more as "a world-view, a value-system that prizes heterosexuality, assumes it is the only appropriate manifestation of love and sexuality, and devalues homosexuality and all that is not heterosexual." *Id.*; see also WILLIAM H. MASTERS ET AL., *HUMAN SEXUALITY* 422-23 (3d ed. 1988) (describing homophobia); HOMOPHOBIA: AN OVERVIEW (John P. De Cecco ed., 1984) (originally published as 10 J. HOMOSEXUALITY (Fall 1984)); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (arguing that antigay social and legal attitudes are related to the desire to preserve traditional concepts of masculinity and femininity); Judith L. Dillon, Note, *A Proposal to Ban Sexual Orientation Discrimination in Private Employment in Vermont*, 15 VT. L. REV. 435, 441-48 (1991) (discussing homophobia as coerced adherence to rigid gender roles, and its effects on lesbians and gay men); I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1159-67 (1991) (discussing heterosexism as a sexism-related patriarchal insistence upon a binary gender system, and its effects on lesbians, gay men, and heterosexual women).

In his insightful recent article on gay-rights advocacy, Professor Marc Fajer uses the term "non-gay pre-understanding" rather than "antigay prejudice" to describe prevalent assumptions and ideas about gay and lesbian people. Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 513-516, 524 n.65 (1992). Though perhaps less descriptively accurate in many instances, the "antigay prejudice" terminology used throughout this article is generally inclusive of negative stereotypes and pre-judgments, as well as assumptions about lesbians and gay men that are not necessarily negative.

32. Most women cannot easily hide the fact of their gender because of their visible physical characteristics. Similarly, most people cannot easily hide their race, though some have pigmentation or facial features that make their race difficult to ascertain visually. Some ethnic minorities, religious minorities, and persons with disabilities, on the other hand, can hide their minority status. See, e.g., Dirk Johnson, *Census Finds Many Claiming New Identity: Indian*, N.Y. TIMES, Mar. 5, 1991, at A1.



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lesbian people who decide to be closeted only face that decision, and, ultimately, reach their particular conclusion, because of societal oppression.

On the personal level, coming out and being out is psychologically beneficial to individual lesbians and gay men. "Psychological studies indicate that gay persons who are forced to be secretive about their sexuality, or are isolated from larger gay or lesbian communities, experience significant emotional and psychological distress. . . . By contrast, gay persons who have come out show the highest degree of adjustment and self-esteem."<sup>33</sup>

On the societal level, lesbians and gay men can change individual attitudes and prejudices by coming out and interacting with heterosexuals as openly gay and lesbian people.<sup>34</sup> The idea that "the personal is political" informs this theory of social change: coming out is a powerful personal and political act of expression that overcomes invisibility and provides a vital step toward group emancipation by both raising gay and lesbian consciousness and educating the

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33. Evan Wolfson, *Civil Rights, Human Rights, Gay Rights: Minorities and the Humanity of the Different*, 14 HARV. J.L. & PUB. POL'Y 21, 32 n.46 (Winter 1991) (comparing the relationship between ALAN P. BELL & MARTIN S. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* (1978), and Alan K. Maylon, *Psychotherapeutic Implications of Internalized Homophobia in Gay Men*, 7 J. HOMOSEXUALITY 59 (1982), with that between BELL & WEINBERG, *supra*, and Jennifer Crocker & Brenda Major, *Social Stigma and Self-Esteem: The Self-Protective Properties of Stigma*, 96 PSYCHOL. REV. 608 (1989)); see also Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 LAW & SEXUALITY 133, 146-47 (1991) (citing works concerning the pain and psychological distress associated with discrepancies between gay and lesbian people's public and private identities); Fajer, *supra* note 31, at 595-98 (discussing the costs of concealment to individuals' mental health).

34. Lack of experience or interaction with lesbians or gay men is one factor that enables many people to remain hostile to gay and lesbian people. Knowing and having positive experiences with openly gay or lesbian individuals who are friends, co-workers, or family members can change antigay attitudes that were based on a lack of interaction. Herek, *supra* note 31, at 927-29 (citing public opinion polls showing that people who say they know someone who is openly gay are more likely to hold positive attitudes concerning gay and lesbian people as a group, though only approximately 30% of Americans claim they know gay people). See generally *Gays Under Fire*, *supra* note 27, at 36 (citing an August 1992 poll in which 43% of people had a gay or lesbian friend or acquaintance, 20% worked with a gay or lesbian person, and 9% had a gay or lesbian relative).

Similarly, coming out and being out can challenge antigay attitudes that view lesbians and gay men as unfavorable symbols and antigay attitudes within groups that were previously believed to be exclusively heterosexual. Herek, *supra* note 31, at 929-31, 933 (discussing "value-expressive" and "social-expressive" attitudes); see also Wolfson, *supra* note 33, at 38 n.69; *Gay Law Students Ass'n v. Pacific Tel. & Tel.*, 24 Cal. 3d 458, 488 (1979) (finding that the gay and lesbian community's civil rights struggle "must be recognized as [statutorily protected] political activity" and that being openly gay or lesbian is an important part of that struggle); cf. JOHN H. ELY, *DEMOCRACY AND DISTRUST* 163, 255 n.91 (1980) (despite the "serious social costs" involved in coming out as gay or lesbian, "gays [and lesbians] are increasingly willing to bear the brunt of our prejudices in the short run in order to diminish them in the long run"); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 729-31 (1985) (as an "anonymous" minority, gay and lesbian people have an organizational problem in that individual members of the group can "exit" and avoid discrimination rather than come out, as is necessary in order to engage in effective political activity).

rest of society.<sup>35</sup> Indeed, for gay and lesbian people, coming out is the key political strategy for changing attitudes and overcoming oppression.<sup>36</sup>

The subordination of lesbians and gay men—active discrimination against those who are known or believed to be gay or lesbian and the consequent pressure on others to remain closeted—depends upon the continued invisibility and silence of members of the gay and lesbian community. Because of what Professor Kenneth Karst describes as “the vicious circle of labeling and silencing,” the personal costs of coming out in a still largely heterosexist and often violently homophobic society serve to ensure the continued invisibility of lesbians and gay men and thereby perpetuate a system of domination and subordination.<sup>37</sup>

## 2. *Discrimination at Work*

Because the workplace is central to most people’s lives and typically mirrors conditions present in society at large, it is not at all surprising that societal discrimination against lesbians and gay men manifests itself in the workplace. A 1987 survey, for example, found that “66% of major-company CEOs said they would be reluctant to put a homosexual on management committees.”<sup>38</sup> Homophobia and heterosexism may largely explain another survey’s finding that between 37% and 59% of lesbians and gay men had not

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35. See Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 115-20.

36. See *id.* at 107 (“In these processes of domination and subordination, public expression is not just a by-product; it is a crucial means to a central goal.”); see also *id. passim*.

See also John D’Emilio’s articulation of the political power of coming out, observing that when gay people came out “[t]hey relinquished their invisibility, made themselves vulnerable to attack, and acquired an investment in the success of the movement in a way that mere adherence to a political line could never accomplish. Visible lesbians and gay men also served as magnets that drew others to them. Furthermore, once out of the closet, they could not easily fade back in. Coming out provided gay liberation with an army of permanent enlistees.” JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970*, at 236 (1983); see also Fajer, *supra* note 31, at 598-99 (discussing the costs of concealment to the gay and lesbian community).

37. Karst, *supra* note 35, at 118. For documentation and discussion of the historical subordination of lesbians and gay men, see Wolfson, *supra* note 33. See also RANDY SHILTS, *AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC* (1987) (documenting the history of the AIDS epidemic and the dramatic lack of attention paid to it by our society and government when it appeared that only gay men were being afflicted); RUTHANN ROBSON, *LESBIAN (OUT)LAW: SURVIVING UNDER THE RULE OF LAW* (1992) (discussing lesbian invisibility and oppression).

38. Stewart, *supra* note 2, at 45.

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come out to any co-workers.<sup>39</sup> Employment discrimination is itself one of the most powerful tools of subordination, denying and threatening to deny otherwise qualified gay and lesbian workers equal employment opportunities.<sup>40</sup>

For those lesbians and gay men who do decide to have one consistent and integrated life, such dignity and honesty carries as its price the risk of workplace discrimination and harassment. Openly gay or lesbian workers may face substantial discrimination in hiring and, once hired, may find that employers and co-workers are not nearly as hospitable to openly gay and lesbian people as had been hoped.<sup>41</sup> Openly gay and lesbian employees may face overt discrimination based on clients' or customers' actual or perceived antigay bias or "preferences."<sup>42</sup> Such employees may also suffer indirect discrimination, such as certain supervisors avoiding working with them or consistently assigning the most important projects to other workers.

a. *The Glass Ceiling Facing Openly Gay and Lesbian Workers.* More often, openly gay and lesbian workers face the more subtle forms of employment discrimination and invisible barriers to advancement collectively known as the "glass ceiling." Labor authorities and experts have increasingly acknowledged

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39. Herek, *supra* note 31, at 146 (citing results of a survey of 400 lesbians and gay men nationwide and 400 gay and lesbian residents of San Francisco, reported at *Results of Poll*, S.F. EXAMINER, June 6, 1989, at A-19).

For many of the surveys cited in this article, the active concealment by many gay and lesbian people of their sexual orientations creates research difficulties. Data is typically analyzed using methods designed to study "unknown" populations, and the findings, therefore, tend to under-report the problems identified when applied to the general gay and lesbian population. See, e.g., NATIONAL GAY TASK FORCE, EMPLOYMENT DISCRIMINATION IN NEW YORK CITY: A SURVEY OF GAY MEN AND WOMEN 1-2 (1980) [hereinafter NGTF].

40. See generally Martin P. Levine & Robin Leonard, *Discrimination Against Lesbians in the Work Force*, 9 SIGNS 700 (1984); Levine, *Employment Discrimination Against Gay Men*, 9 INT'L REV. MODERN SOC. 151 (1979) (cited in Wolfson, *supra* note 33, at 31 n.43).

Several major surveys and polls have demonstrated the degree of employment discrimination faced by lesbians and gay men. See, e.g., NGTF, *supra* note 39 (1980 survey of employment discrimination against lesbians and gay men in New York City); KIRK & MADSEN, *supra* note 28, at 82 (presenting the results of national opinion polls showing a high degree of antigay prejudice among American workers); see also *id.* at 90-92 (noting that fear of the AIDS epidemic has exacerbated antigay discrimination in employment and housing).

41. While, for example, it is praised as "family-oriented" for a heterosexual worker to have a spouse's picture on the desk and "civic-minded" to be publicly involved in outside community activities, often the gay employee who has his partner's picture on the desk is perceived as "flaunting" his homosexuality and the lesbian employee who is involved in gay and lesbian community activities is considered a "radical homosexual activist."

42. See, e.g., Vicki Quade, *The Struggle To Be a Gay Lawyer*, BARRISTER MAG., Winter 1991-92, at 29, 34 ("One of the interesting ways homophobia plays itself out is that people guess that others are going to be a lot more homophobic than they really are. . . . You hear about law firms saying 'We don't mind you're a lesbian or gay man. Our clients won't want to work with you.'") (quoting William Rubenstein). Note that neither actual nor perceived customer bias is an acceptable defense to claims of discrimination on the basis of race, national origin, or gender. See Title VII, 42 U.S.C. § 2000e-2(e) (no "bona fide occupational qualification" (BFOQ) exception to Title VII is permitted for race or color); see also *Diaz v. Pan Am. World Airways*, 442 F.2d 385 (5th Cir.) (customer preference for female flight attendants does not establish a BFOQ), *cert. denied*, 404 U.S. 950 (1971); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981) (stereotyped customer preference cannot justify gender discrimination).

and studied the glass ceiling facing women and racial and ethnic minorities in the work force.<sup>43</sup> However, scant attention has been given to the glass ceiling facing openly gay and lesbian workers.

The glass ceiling blocking openly gay and lesbian employees' advancement is a more complex form of employment discrimination than overt discrimination or termination. Because evaluative criteria for promotions to mid- and upper-level management positions are highly subjective, there is greater opportunity for heterosexism and homophobia to influence such decisions. Moreover, the heterosexual "old-boy's network" does little to assist openly gay or lesbian employees in their climb up the corporate ladder. One openly gay assistant vice president of a large bank in Boston, for example, thinks he has hit a glass ceiling because the bank's higher-level managers never invite him to all-important social functions with colleagues and clients.<sup>44</sup> Referring to educational employers, another observer has noted that "[t]here is a glass ceiling for lesbian and gay employees . . . [demonstrated by the fact that] you rarely see openly gay [or lesbian] senior faculty or upper-level administrators. People working in educational institutions often get a very clear message that if they are going to go anywhere in that school they need to be discreet."<sup>45</sup> Indeed, the very existence of the glass ceiling may keep many gay and lesbian workers from pursuing employment opportunities in certain careers or corporate environments.

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43. Surveys show that racial and ethnic minorities and women encounter arbitrary barriers to advancement and are underrepresented in management-level positions. See, e.g., Howard Gleckman et al., *Race in the Workplace*, BUS. WK., July 8, 1991, at 50; Jaclyn Fierman, *Why Women Still Don't Hit the Top*, FORTUNE, July 30, 1990, at 40; Peter T. Kilborn, *Labor Dept. Wants to Take On Job Bias in the Executive Suite*, N.Y. TIMES, July 30, 1990, at A1. The Labor Department's Office of Federal Contract Compliance Programs completed a preliminary study to determine why, despite a rapidly growing presence in the workplace, women and racial and ethnic minorities remain underrepresented in executive, management, and senior decision-making positions. See *DOL Commended for Glass Ceiling Report But Some Question Lack of Enforcement Strategy*, Daily Lab. Rep. (BNA) No. 154, at A-9 (Aug. 9, 1991); Barbara Franklin, *Hitting the Glass Ceiling: Study Finds Women, Minorities in Low-Level Jobs*, N.Y. L.J., Aug. 15, 1991, at 5. Finally, the Glass Ceiling Act of 1991 established a Glass Ceiling Commission to further study this problem as it relates to racial and ethnic minorities and women. Glass Ceiling Act of 1991, Pub. L. No. 102-166, § 203, 105 Stat. 1071, 1082 (1991) (to be codified at 42 U.S.C. § 2000e).

44. Rebecca L. Walkowitz, *Gay Executives: Despite Law, Many Say Job Security Still Precarious*, BOSTON GLOBE, Aug. 26, 1991, at 12.

45. Anthony Flint & Kay Longcope, *Kennedy School Shows Caution on Gay Initiative*, BOSTON GLOBE, Feb. 28, 1991, at 25 (quoting Kevin Cathcart, then-executive director of Gay and Lesbian Advocates and Defenders in Boston).

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b. *Costs of the Closet.* To avoid the antigay prejudice, overt discrimination, and glass ceiling discrimination prevalent in the work force,<sup>46</sup> many gay and lesbian workers remain closeted at work, passing as heterosexual in order to achieve a modicum of job security and success.<sup>47</sup> These and other workers, however, may still suffer the effects of sexual orientation discrimination based on their employers' beliefs or suspicions of homosexuality.

Even if closeted lesbians and gay men do avoid the economic disadvantage caused by discriminatory employment practices, they are nonetheless subjugated and denied the opportunity to live full and meaningfully integrated lives.<sup>48</sup> The subordination of lesbians and gay men is most insidious in this coercion of individuals into silence, invisibility, and deceit. True equality of opportunity cannot exist for individuals who must lie about their identities—"pass" as heterosexual—in order to be hired and to advance at work. Indeed, one commentator has charged that "[t]here is something profoundly immoral—belonging to a vice without a name—about a society that requires as the price of living in it that a person necessarily dissimulate all the time about himself in every dimension of the public, social, workaday world."<sup>49</sup> Another writer agrees that "[i]t is both irrational and wrong to require gay people to live lives conditioned on a disgraceful bargain whereby they exchange self-betrayal

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46. This antigay discrimination is legal throughout most of the United States. *See infra* text accompanying notes 58-74.

47. In actuality, many "closeted" workers are out to one or more co-workers. Being only partially out has its own complexities and produces its own anxieties: these individuals must continually evaluate whether to come out, under what circumstances, and to whom. They typically live in apprehension about whether information about their sexual orientation will be further disclosed or used against them. *See Quade, supra* note 42, at 32.

48. The societal—and employment—discrimination suffered by gay and lesbian people is often different in *type* from that suffered by other minorities and women. Describing the subordination of lesbians and gay men as operating at the fundamentally important level of an individual's life, identity, and relationships is in no way intended to diminish the importance of economic well-being to that individual's life or to undervalue the severe economic harm often suffered by racial minorities and women. Referring to the different kinds of discrimination, one lesbian activist has said simply that "[a] lot of people would say that economic injustice is not really our issue. . . . [But gay and lesbian] economic clout is often dependent on people denying or hiding their sexual orientation. So how free is that?" Clarence Johnson & Rick DelVecchio, *Minorities, Gays in Uneasy Alliances*, S.F. CHRON., June 25, 1991, at A1 (quoting Carmen Vazquez, co-chair of Lesbian Agenda for Action).

It is important to note, however, that lesbian workers, because they are both women and gay, suffer both economic harm and disproportionate denial of the opportunity to live integrated lives. Many gay men come out only upon attaining high-level, high-paying positions with status that helps deflect the risk of workplace bias. The glass ceiling blocking women's advancement, therefore, works doubly against lesbians, diminishing their opportunity to achieve the same professional status that enables gay male executives to come out. Lesbian workers tend to remain not only economically disadvantaged as women in lower-level, lower-paid positions, but also disadvantaged as closeted lesbians without the professional clout that makes it easier for gay men to be out at work. Similarly compounding disadvantage faces gay and lesbian people of color, blocked by the racial glass ceiling from achieving the types of high-status jobs that help others come out at work.

49. RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* 160 (1988) (arguing for gay civil rights laws based on society's proper interests in promoting "individual flourishing").

through self-concealment for security."<sup>50</sup> In addition to the psychological and communitarian costs of the concealment, therefore, closeted lesbians and gay men—like openly gay and lesbian workers and those suspected of being gay or lesbian—suffer from unequal employment opportunity.

Though the risks of being out at work are considerable, being closeted at work imposes serious costs upon gay and lesbian employees. Closeted gay and lesbian workers must monitor constantly their reactions to homophobic comments and censor their contributions to casual conversations regarding politics, vacations, dating, or families.<sup>51</sup> Closeted gay and lesbian employees worry about secretaries or co-workers noticing mysteriously anonymous personal telephone calls, cannot put pictures of lovers or domestic partners on their desks, and cannot bring their partners (or any same-gendered guests) to social functions.<sup>52</sup>

Rather than simply fade into the background, however, gay and lesbian workers who remain closeted by maintaining rigid barriers between their personal and professional lives often appear aloof, detached, and disinterested in establishing anything beyond merely superficial, professional relationships with co-workers. These same individuals typically feel "segmented" and "isolated,"<sup>53</sup> having compartmentalized their lives while their heterosexual co-workers and supervisors talk freely about spouses, families, charitable activities, and outside interests without the omnipresent fear of being discriminated against—or at least reprimanded—for demonstrating poor judgment in "flaunting their sexuality" at work. Hiding and remaining silent requires tremendous effort and creates daily stress. By being perceived as "not team players," closeted gay and lesbian employees often have difficulty forming important mentoring relationships and risk receiving negative work evaluations and unfavorable promotion consideration. In short, whether we make known or conceal our sexual and affectional orientations, antigay prejudice can limit gay and lesbian workers' opportunities for advancement and professional fulfillment.<sup>54</sup>

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50. Ian Kramer, Book Note, 91 COLUM. L. REV. 1259, 1266 (1991) (reviewing MOHR, *supra* note 49).

51. One researcher has characterized closeted gay and lesbian employees as either "counterfeiters," who fabricate heterosexual identities, or "avoiders," who mislead and respond with half-truths to anxiety-producing questions concerning their personal lives. Stewart, *supra* note 2, at 45 (describing researcher James Woods' studies of corporate gay men's coping strategies). Most closeted workers are avoiders, hoping that no one will ask what they did over the weekend or whether they are dating anyone special. *Id.*

52. See generally Nicholas Varchaver, *The Invisible Minority*, MANHATTAN LAW., Dec. 1991, at 13; Lynn Miller, *The Legal Closet*, STUDENT LAW., Feb. 1988, at 13; Lucy E. Bettis et al., *Gay and Lesbian Attorneys in San Francisco: Is There Bias?*, S.F. ATT'Y, June/July 1991, at 20; Quade, *supra* note 42, at 30.

53. Bettis et al., *supra* note 52, at 20; see also Varchaver, *supra* note 52, at 13.

54. Bettis et al., *supra* note 52, at 20.

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The costs of being closeted at work accrue to employers as well. Added anxieties and a low sense of camaraderie undoubtedly decrease employee productivity, and the oppressive atmosphere that often leads to the departure of gay and lesbian workers creates costs in employee turnover and loss of talent.<sup>55</sup> Firms<sup>56</sup> that have created workplace environments in which gay and lesbian employees feel able to come out, by contrast, reap the benefits associated with a happier and more diverse work force.<sup>57</sup>

### 3. Legal Protections for Lesbians and Gay Men

Despite pervasive societal prejudice and discrimination, lesbians and gay men lack legal protection from discrimination throughout most of the United States.<sup>58</sup> In employment, gay and lesbian people in many states face lawful discrimination by private employers,<sup>59</sup> public school districts and other public employers<sup>60</sup>, and are lawfully subject to stricter standards for security clearances by government defense contractors.<sup>61</sup> Furthermore, states may permit discrimination against gay and lesbian citizens in housing and places of public accommodation,<sup>62</sup> deny us custody and unrestricted visitation of children,<sup>63</sup>

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55. See, e.g., NGTF, *supra* note 39, at 8; Stewart, *supra* note 2, at 46 (describing what James Woods calls "entrepreneurial flight"); Amy Gage, *Gays and Lesbians Stay Silent in the Corporate Suite*, MINNEAPOLIS-ST. PAUL CITYBUSINESS, June 5, 1985, § 1, at 1.

56. The term "firm" is used throughout this article to refer to all types of employers, including corporations, partnerships, agencies, and not-for-profit enterprises.

57. See *infra* text accompanying notes 105-08.

58. Indeed, the absence of legal protection is itself a manifestation of the widespread acceptability of antigay prejudice in our society.

For a thorough summary of the law as it relates to lesbians and gay men, see generally *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508 (1989) [hereinafter *Developments—Sexual Orientation*]; LESBIANS, GAY MEN AND THE LAW (William B. Rubenstein ed., forthcoming 1993); NATIONAL LAWYERS GUILD ANTI-SEXISM COMM. OF S.F. BAY AREA CHAPTER, *SEXUAL ORIENTATION AND THE LAW* (Roberta Achtenberg ed., 1985); see also MOHR, *supra* note 49.

59. See *DeSantis v. Pacific Tel. & Tel.*, 608 F.2d 327 (9th Cir. 1979) (holding that Title VII's prohibition of discrimination based on "sex" does not include "sexual orientation").

60. See, e.g., *Gaylord v. Tacoma Sch. Dist.* No. 10, 559 P.2d 1340 (Wash.) (dismissal of gay school teacher), *cert. denied*, 434 U.S. 879 (1977); *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444 (6th Cir. 1984) (dismissal of bisexual school guidance counselor), *cert. denied*, 470 U.S. 1009 (1985); *Singer v. United States Civil Serv. Comm'n*, 530 F.2d 247 (9th Cir. 1976) (dismissal of openly gay civil servant), *vacated and remanded*, 429 U.S. 1034 (1977); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (F.B.I. refusal to hire lesbian applicant).

61. See, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990) (upholding Department of Defense policy requiring expanded investigation of homosexuals seeking security clearances).

62. In the absence of state or local prohibitions against discrimination on the basis of sexual orientation, antigay housing and public accommodation discrimination are legally permissible.

63. See, e.g., *In re Jane B.*, 380 N.Y.S.2d 848 (Sup. Ct. 1976) (denying lesbian mother custody of her daughter and restricting visitation on the grounds that mother's lesbian relationship created an improper home environment for the child); *In re J.S. & C.*, 324 A.2d 90 (N.J. Super. Ct. Ch. Div. 1974), *aff'd*, 362 A.2d 54 (N.J. Super. Ct. App. Div. 1976) (restricting openly gay father's visitation rights in order to prevent children's exposure to homosexual people, places, and activism); *In re Alison D.*, 77 N.Y.2d 651 (1991) (lesbian co-parent is not a "parent" for purposes of standing to bring a custody claim).

deny us the opportunity to become foster or adoptive parents,<sup>64</sup> deny us the opportunity to marry,<sup>65</sup> and can imprison us for engaging in private consensual sex.<sup>66</sup> As of this writing, lesbians and gay men are still legally banned from serving in the military.<sup>67</sup>

Unlike racial minorities and women, gay and lesbian people are not considered a "suspect class" or even "quasi-suspect class" deserving of strict or intermediate scrutiny under the Fourteenth and Fifth Amendments' Equal Protection Clauses.<sup>68</sup> Thus, we generally cannot rely on the Constitution or the courts to shield us from discrimination. Only our First Amendment speech and associational rights have been somewhat consistently upheld by courts.<sup>69</sup>

Title VII, the federal statute protecting racial minorities and women from private employment discrimination, does not protect gay and lesbian workers.<sup>70</sup> Presently, legal protection from private employment discrimination based on sexual orientation arises primarily from state statute or local

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64. See, e.g., *In re Opinion of the Justices*, 530 A.2d 21 (N.H. 1987) (prohibiting openly gay and lesbian people from becoming adoptive or foster care parents).

65. See, e.g., *Dean v. District of Columbia*, No. 90-13892 (D.C. Super. Ct. Dec. 30, 1991) (appeal pending); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App.), *appeal denied*, 84 Wash. 2d 1008 (1974); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

66. *Bowers v. Hardwick*, 478 U.S. 186 (1986). As of September 24, 1992, twenty-three states and the District of Columbia prohibited homosexual sodomy. See *Developments—Sexual Orientation*, *supra* note 58, at 1519-20; *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992) (striking down Kentucky's sodomy law).

67. See, e.g., *Enlisted Administrative Separations*, 32 C.F.R. pt. 41, app. A, pt. 1, H (1992) ("Homosexuality is incompatible with military service."); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989); *Watkins v. United States Army*, 847 F.2d 1329 (9th Cir. 1988), *vacated*, 875 F.2d 699 (9th Cir. 1989) (en banc), *cert. denied*, 498 U.S. 957 (1990); see also ALLAN BERUBE, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* (1990); MARY A. HUMPHREY, *MY COUNTRY, MY RIGHT TO SERVE: EXPERIENCES OF GAY MEN AND WOMEN IN THE MILITARY, WORLD WAR II TO THE PRESENT* (1990).

68. See, e.g., *Ben-Shalom*, 881 F.2d at 454; *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987). *Contra Watkins*, 847 F.2d at 1329 (Norris, J.); *Jantz v. Muci*, 759 F. Supp. 1543 (D. Kan. 1991) (holding that gay men and lesbians constitute a suspect class for equal protection analysis), *rev'd*, 976 F.2d 623 (10th Cir. 1992); *but cf.* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 154-55 (1976) (arguing that the Equal Protection Clause protects any "specially disadvantaged group," characterized as a social group that has been in a position of perpetual subordination and has only circumscribed political power).

69. See, e.g., *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980) (protecting act of attending high school prom with same-gendered date as political speech); *Gay Lib v. University of Mo.*, 558 F.2d 848 (8th Cir. 1977) (upholding gay student group's right of free association), *cert. denied sub nom. Ratchford v. Gay Lib*, 434 U.S. 1080, *reh'g denied*, 435 U.S. 981 (1978); *One Eleven Wines & Liquors, Inc. v. Division of Alcoholic Beverage Control*, 235 A.2d 12 (N.J. 1967) (striking down flat prohibition of all gay bars as nuisances).

70. See DeSantis v. Pacific Tel. & Tel., 608 F.2d 327 (9th Cir. 1979). *But cf.* Capers, *supra* note 31, at 1175-87 (arguing that, after *Hopkins v. Price Waterhouse*, 109 S. Ct. 1775 (1989), Title VII can be interpreted to protect gay and lesbian employees from discrimination based on sex stereotyping); Fajer, *supra* note 31, at 607-50 (arguing that sexual orientation discrimination is a form of gender discrimination); Samuel A. Marcossan, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1 (1992) (arguing that Title VII prohibits sexual orientation harassment); Dillon, *supra* note 31, at 452-71 (arguing that Title VII should be amended to prohibit sexual orientation discrimination); MOHR, *supra* note 49, at 137-211 (arguing for the inclusion of sexual orientation in laws protecting civil rights).



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ordinance.<sup>71</sup> Eight states—Wisconsin, Massachusetts, Hawaii, Connecticut, New Jersey, Vermont, California, and Minnesota—and the District of Columbia prohibit discrimination against lesbians and gay men in private employment,<sup>72</sup> while more than one hundred municipalities have enacted anti-discrimination ordinances that include sexual orientation.<sup>73</sup> In addition, many private employers have adopted nondiscrimination policies that include sexual orientation, which may provide a contract-based cause of action in the event of discrimination.<sup>74</sup>

Failures by Congress and state legislatures to enact laws that would directly protect lesbians and gay men are often compounded by judicial hostility toward whatever statutory or common law claims lesbians and gay men are able to articulate. Inaccurate stereotypes and antigay prejudice on the part of judges are detectable in an unfortunately large number of published court opinions.<sup>75</sup> At best, the courts are an unstable and unpredictable source of justice for

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71. Several states have executive orders prohibiting discrimination against gay men and lesbians in public employment. *See, e.g.*, N.Y. Exec. Order No. 28, N.Y. COMP. CODES R. & REGS. tit. 9, § 4.28 (1983); La. Exec. Order No. EWE 92-7, La. Reg. vol. 18, no. 3 (1992); *see also* NATIONAL GAY AND LESBIAN TASK FORCE, *LESBIAN & GAY CIVIL RIGHTS IN THE U.S.* (Feb. 1993).

State constitutional law may also provide gay and lesbian workers with a source of protection against sexual orientation discrimination.

72. WIS. STAT. ANN. §§ 111.31, .32, .36 (West 1988); MASS. GEN. LAWS ANN. ch. 151B (West 1993); HAW. REV. STAT. §§ 368-1, 378-1 (1992); 1991 Conn. Legis. Serv. 106-19 (West); 1991 N.J. Sess. Laws Serv. 519, § 8 (West); VT. STAT. ANN. tit. 21, § 495(a)(1) (1992); CAL. LAB. CODE ch. 5, § 1102.1 (West 1992); *Minnesota Law Backs Homosexual Rights*, N.Y. TIMES, Apr. 4, 1993, § 1, at 16 (law to take effect Aug. 1, 1993); D.C. CODE ANN. §§ 1-2501, 1-2512 (1992).

73. LESBIAN & GAY LAW ASS'N OF GREATER N.Y., 1992 LESBIAN/GAY LAW NOTES 9 (Arthur S. Leonard ed.). Not all of these municipalities, however, prohibit private employment discrimination.

74. Between 1976 and 1981, the National Gay Task Force surveyed 850 companies and found that approximately 30% of the 238 responding companies included sexual orientation in their nondiscrimination policies. NATIONAL GAY TASK FORCE, *THE NGTF CORPORATE SURVEY (1981)* (cited in Robert L. Elbin, Note, *Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)*, 51 OHIO ST. L.J. 1067, 1068 n.9 (1990)).

75. Evidence of antigay prejudice is not hard to find within the judiciary: one federal judge repeatedly referred to gay men as "homos," while another has referred to gay inmates as a "bunch of queers." *See* Steffan v. Cheney, No. 88-3669(OG), 1991 U.S. Dist. LEXIS 4852, at \*9-11 (D.D.C. Apr. 12, 1991) (U.S. District Judge Oliver Gasch denying plaintiff's motion for disqualification because of Judge Gasch's earlier use of the term "homo" when hearing a discovery motion); Gary Taylor, *Time for Explanations*, NAT'L L.J., Aug. 12, 1991, at 2 (reporting that, in response to a complaint, the Chief Judge of the Fifth Circuit had asked U.S. District Judge Sam B. Hall, Jr., of Texas, to explain why he made the "bunch of queers" remark).

lesbians and gay men,<sup>76</sup> while at worst they are a frustrating reminder of societal intolerance and official endorsement of antigay bigotry.

A further problem in those jurisdictions that do prohibit sexual orientation discrimination is that victims must come out as gay or lesbian in order to assert their rights.<sup>77</sup> Given the risks and negative consequences of coming out in our society, some gay and lesbian workers may be as deterred from filing discrimination complaints as they are discouraged from coming out at work.<sup>78</sup> State agencies charged with enforcing civil rights laws can encourage victims of sexual orientation discrimination to step forward by demonstrating a commitment to investigate and aggressively prosecute these claims. Private employers, on the other hand, can assure gay and lesbian workers that openly gay and lesbian people are welcome in their workplaces by implementing policies that demonstrate a commitment to true equality of opportunity and workforce diversity.

### B. *Recasting the Affirmative Action Debate in the Context of Sexual Orientation*

Vehement debate over the legitimacy and wisdom of affirmative action in general has raged for the past two decades, its intensity best understood as a reflection of "the shared belief of all participants that they are engaged in an important moral debate concerning fundamental notions of justice and equality."<sup>79</sup> Uniquely divisive, the affirmative action debate finds impassioned

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76. See, e.g., William B. Rubenstein, *We Are Family: A Reflection on the Search for Legal Recognition of Lesbian and Gay Relationships*, 8 J.L. & POL. 89, 100-05 (1991) (discussing the situation in a section entitled "The Instability of Relying Upon the Judiciary for Recognition of Lesbian and Gay Relationships"); Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073 (1988) (exploring the connection between the Supreme Court Justices' understandings of homosexuality and their political values as expressed in their *Hardwick* opinions); Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979) (examining unsympathetic judicial response to gay and lesbian legal issues).

77. See, e.g., Lorena Dumas, Comment, *The Sexual Orientation Clause of the District of Columbia's Human Rights Act*, 1 LAW & SEXUALITY 267, 282-83 (1991) (speculating that the potential costs of coming out may explain why very few official complaints had been filed under the D.C. statute); Joyce P. Cain, Comment, *Massachusetts' 1989 Sexual Orientation Nondiscrimination Statute*, 1 LAW & SEXUALITY 285, 313 (1991) (identifying potential negative consequences of coming out as a disincentive to file sexual orientation discrimination complaints). Not surprisingly, lesbians and gay men working in jurisdictions where sexual orientation discrimination is not prohibited are also reluctant to take any action in response to discrimination, typically out of fear of exposure or retaliation. See, e.g., NGTF, *supra* note 39, at 5-6; Caryle Murphy, *Rights Protection Urged For Gays in Alexandria; Survey Indicated Discrimination*, WASH. POST, Nov. 29, 1984, at Va. 1 (Virginia Weekly).

78. *But see* Frederic M. Biddle, *Boston's Gay Business Groups Gaining Strength*, BOSTON GLOBE, Apr. 26, 1992, at 81, 87 (Michael Duffy, chairman of the Massachusetts Commission Against Discrimination, citing approximately 150 sexual orientation discrimination complaints brought since Massachusetts' gay and lesbian civil rights law took effect in December 1990).

79. ROSENFELD, *supra* note 14, at 2.

For one indication that affirmative action is still a volatile issue, see reaction to Sen. John Kerry's speech critical of affirmative action's costs and limitations, at Teresa M. Hanafin & Don Aucoin, *Affirmative Action: Perception, Policy*, BOSTON GLOBE, Apr. 2, 1992, at 1; Butterfield, *supra* note 14, at 1.

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advocates and fervent opponents both devoted to the ideal of equality, each convinced of their moral rightness.<sup>80</sup>

Against the background of this more traditional affirmative action debate,<sup>81</sup> the following discussion presents the case for affirmative action for lesbians and gay men, then presents likely objections to such affirmative action and, finally, attempts to rebut those objections.

### 1. *Arguments For Affirmative Action for Gay and Lesbian Employees*

Ensuring true equality of opportunity requires that employers create work environments in which lesbians and gay men can come out without fear of retaliatory employment discrimination, harassment, or violence.<sup>82</sup> Given the history of entrenched oppression and coerced invisibility of gay and lesbian people, it is just and perhaps necessary that employers seeking to remedy the effects of past discrimination, challenge stereotypes and prejudice, and foster workforce diversity affirmatively encourage gay and lesbian employees to come out.

Affirmative action is not the only option available to employers seeking to ensure true equality of opportunity for lesbians and gay men or foster workplace diversity. Employers trying to eliminate workplace homophobia and antigay discrimination should first include "sexual orientation" in the firm's written and distributed antidiscrimination, equal employment opportunity, and antiharassment policy statements.<sup>83</sup> "Outreach" efforts, such as sending recruitment letters to gay and lesbian groups,<sup>84</sup> reaching the gay and lesbian community with notices of employment opportunities,<sup>85</sup> providing lesbian- and gay-sensitive contacts within the firm, and indicating in recruitment materials any lesbian- and gay-related community service activities, are additional ways to encourage openly gay and lesbian people to apply for job

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80. ROSENFELD, *supra* note 14, at 2 (describing the affirmative action debate as "an intramural debate among partisans of equality").

81. The traditional affirmative action debate has produced an impressive body of philosophical, sociological, and legal scholarship. For a recent and particularly thorough philosophical and constitutional analysis of affirmative action, see *id.* In this article, however, I am concerned less with the affirmative action debate or the relative merits of its arguments, generally, than I am with the ways in which the rationales for and criticisms of affirmative action for women and racial and ethnic minorities may apply to a debate over affirmative action for lesbians and gay men.

82. To be sure, lesbians and gay men decide to make public or conceal, to whatever degree, their sexual orientations for a variety of personal reasons. Employers can only ensure that fears of employment discrimination or workplace harassment are not among those reasons.

83. See, e.g., BASF GUIDE, *supra* note 4, at 5, 13; Quade, *supra* note 42, at 32; Gage, *supra* note 55, at 1.

84. Heller, Ehrman and other law firms, for example, send recruitment letters to gay and lesbian student organizations. BASF GUIDE, *supra* note 4, at 15.

85. American Friends Service Committee, for example, tends to recruit in places and in publications that will likely reach the gay and lesbian community when recruiting for positions that involve programming for that community. Telephone Interview with Madeline Haggans, Affirmative Action Secretary, American Friends Service Committee (Mar. 16, 1992).

openings with a particular employer.<sup>86</sup> Another way that management can make the workplace more hospitable to openly gay and lesbian people is by encouraging the formation of gay and lesbian employee groups and actively supporting such groups.<sup>87</sup> Conducting and participating in diversity training programs or workshops can also create a more positive working environment.<sup>88</sup> Finally, employers can adopt a variety of other policies that help ensure equality of employment opportunity for openly gay and lesbian workers, including family leave policies and employee benefits plans.<sup>89</sup>

While all of these steps are important, none is more effective than establishing goals and timetables for the hiring and promotion of lesbians and gay men. Goals and timetables send the message that management is affirmatively committed to creating an atmosphere in which gay and lesbian employees feel valued and free to be out. Certainly, protection from discrimination is essential to such an atmosphere. Moreover, given society's often active denial of gay and lesbian relationships and families, domestic partner health care benefits and family leave policies are of vital practical and symbolic importance to lesbians and gay men. Including lesbians and gay men in an affirmative action plan, however, sends the most powerful message that a firm is striving to ensure equality of opportunity for gay and lesbian workers. Such a policy plainly welcomes and values gay and lesbian workers and, in effect, counters the longstanding injustice of workers bearing the full burden of coming out (typically without legal protection) by now inviting gay and lesbian workers out of the closet.

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86. See, e.g., BASF GUIDE, *supra* note 4, at 15-16.

87. Gay and lesbian employee groups now exist within many major corporations, providing both an important sense of fellowship for gay and lesbian employees who otherwise often feel isolated and a vital point of contact that facilitates discussion between management and employees on workplace issues of concern to lesbians and gay men. Stewart, *supra* note 2, at 50.

88. Diversity programs can help reduce workplace homophobia and heterosexism by communicating basic information regarding gay and lesbian people to managers and co-workers, and by giving employees—both heterosexual and gay and lesbian—an opportunity to voice their feelings and experiences. As the trend toward capitalizing on workplace diversity grows, more and more employers are using diversity consultants and conducting diversity programs that go far beyond managerial nondiscrimination training to engendering positive attitudes throughout the work force. See Stewart, *supra* note 2, at 50, 54.

89. By including domestic partners and non-biological children in parenting leave, caretaking and bereavement leave, and health insurance policies, employers can eliminate the economic discrimination against their gay and lesbian employees that results from the legal ban on same-sex marriage and can respectfully acknowledge the existence of its gay and lesbian employees' families. A growing number of private employers and municipal government employers currently offer health insurance coverage to employees' domestic partners, including Lotus Development, Ben & Jerry's Homemade, the *Village Voice*, Montefiore Hospital in New York, American Friends Service Committee, and the cities of Berkeley, West Hollywood, Santa Cruz, Laguna Beach, and Seattle. See Elbin, *supra* note 74, at 1072-78; Stewart, *supra* note 2, at 50; Hammonds, *supra* note 25, at 80 (Lotus' policy and others'); James Barron, *Bronx Hospital Gives Gay Couples Spouse Benefits*, N.Y. TIMES, Mar. 27, 1991, at A1 (Montefiore hospital case).

For another indication that the issue of employee benefits is becoming a battleground for gay and lesbian equality in the workplace, see VT. STAT. ANN. tit. 21, § 495(f) (1992) ("The provisions of this section prohibiting discrimination on the basis of sexual orientation shall not be construed to change the definition of family or dependent in an employee benefit plan.").

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The success of an affirmative action plan for gay and lesbian workers inevitably depends on top management's commitment to the program.<sup>90</sup> By adopting hiring and promotion goals, the employer demonstrates its commitment to include members of this minority group in the firm and encourages gay and lesbian employees to come out at work by removing the fear of overt and glass ceiling forms of retaliatory sexual orientation discrimination. In return, the employer benefits from the increased productivity of gay and lesbian employees who are more contented and integrated into the work force.

As with affirmative action for other minorities and women, affirmative action for gay and lesbian workers is generally premised on the belief that adherence to the principle of nondiscrimination is an insufficient response to years of pervasive discrimination. One commentator has suggested, for example, that "[i]n a society that has systematically denied the rights of women and minorities by operation of law and custom, it is folly to expect a principle of non-discrimination alone to remedy the problem of inequality."<sup>91</sup> While vigorous enforcement of antidiscrimination norms ultimately offers the best

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90. "The most effective affirmative action plan is neither documented in forms nor expressed in the [employer's] formal policy statements. Instead, the most effective affirmative action plan relies on the [employer's] commitment to use every reasonable means available to eliminate discrimination from its workforce." David C. Ankeny, Comment, *Creating the Statistical Portion of an Affirmative Action Plan*, 65 TUL. L. REV. 1183, 1205 (1991).

See also Cindy Skrzycki, *Standing Up for Affirmative Action*, WASH. POST, Mar. 25, 1990, at H3; Morrison Shafroth, *We Are the Work Force*, S.F. BUS. MAG., Sept. 1990, at 10 ("What sets [successfully diverse] companies apart, say observers, is a commitment to running a workplace that is free of bias, and a top management team that provides the leadership. 'If management doesn't appreciate diversity, it won't trickle down through the ranks. . . . Management has to walk their talk.'"); Telephone Interview with Haggans, *supra* note 85 (crediting the success of AFSC's affirmative action plan, in part, to the Board of Directors' unwavering commitment); BASF GUIDE, *supra* note 4, at 13 ("In order to effectively move the entire institution toward adoption of these goals as important business and management objectives, the managing partner/chief counsel, or a formally and publicly designated high-profile attorney with authority and clout, should assume an active leadership role in the organization's efforts.").

91. Oppenheimer, *supra* note 13, at 61; see also *Constitutional Scholars' Statement on Affirmative Action After City of Richmond v. J.A. Croson Co.*, 98 YALE L.J. 1711, 1711 (1989) ("Where discrimination has been so pervasive that it has prevented many Americans from enjoying the basic privileges of citizenship . . . serious progress can be achieved only through strong efforts to include minorities in areas from which historically they have been excluded."); Wildman, *supra* note 1, at 1630-31 ("The reality of American democracy and the institutions within it is that social privileges are accorded based on race, sex, class, and sexual preference and will continue to be so allocated, unless members of society act affirmatively to change the status quo."); *supra* text accompanying note 1.

Similarly, legislatively mandated antidiscrimination is often viewed as merely a starting point for equality of opportunity. As at least one commentator has recognized, "[t]urning legislative rights into social realities has been a constant struggle." Ronald Ellis, *Victim-Specific Remedies: A Myopic Approach to Discrimination*, 13 N.Y.U. REV. L. & SOC. CHANGE 575, 601 (1984-85) (reflecting sentiment expressed by President Lyndon Johnson: "We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result." (quoting *Commencement Address at Howard University: To Fulfill These Rights*, in 2 PUB. PAPERS OF THE PRESIDENTS 636 (June 4, 1965))).

hope for a society free of discrimination, mere nondiscrimination would continue to leave suffering generations of minorities unless given an affirmative push.<sup>92</sup>

As long as employers use affirmative action to advance the cause of equality of opportunity for other groups, these plans should include lesbians and gay men. Lesbians and gay men meet the same criteria used to justify affirmative action for women and racial and ethnic minorities. These justifications are (1) remedying past and ongoing discrimination, (2) providing role models to combat prejudice and facilitate mentoring, and (3) fostering diversity in the workplace.

a. *Remedying Past and Ongoing Discrimination.* Remedying the harms of past discrimination is the paradigmatic justification for affirmative action. When either identifiable past discrimination or an historic pattern of discrimination has disadvantaged members of a particular group, affirmative action has been used to counter the effects of discrimination toward achieving a work force more representative of the relevant labor pool.<sup>93</sup> Though employers' past discrimination has often resulted in manifest economic disadvantage for members of subordinated groups, "disadvantaged" in the context of justifying affirmative action more precisely refers to the significant violation of individuals' equal opportunity rights, often as a result of broader societal discrimination.<sup>94</sup>

It cannot ingenuously be denied that lesbians and gay men have suffered from systemic discrimination and significant violation of equal opportunity rights. We have suffered and continue to suffer the effects of both employment discrimination and pervasive societal discrimination, relatively powerless to remedy politically the legislatures' and legal system's failures to protect our

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92. In other words, "[u]nless society takes affirmative steps to alter the status quo, treating minorities 'equally' (in the sense of giving them no special consideration) will merely perpetuate inequality." Ellis, *supra* note 91, at 584-85.

93. See, e.g., Burt Neuborne, *Notes for the Restatement (First) of the Law of Affirmative Action: An Essay in Honor of Judge John Minor Wisdom*, 64 TUL. L. REV. 1543, 1546-49 (1990).

This backward-looking justification for affirmative action has been described by one commentator as a "sin-based" theory designed "as precise penance for the specific sins of racism a government, union, or employer has committed in the past." Kathleen M. Sullivan, *The Supreme Court, 1985 Term—Comment: Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 80 (1986). Another perspective views such affirmative action as "a brief departure from the free market system, a departure designed to correct a malfunction caused by irrational . . . discrimination and to restore free-market, profit-maximizing rationality." Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1550 (1983).

94. See ROSENFELD, *supra* note 14, at 292 ("Once it is understood that societal discrimination may be pernicious and that it may seriously curtail equal opportunity rights . . . the need to compensate the victims of such discrimination clearly seems compelling . . . . Ultimately, the crucial fact is whether first-order discrimination is systemic and pervasive and whether it has significantly violated equal opportunity rights.").

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most fundamental rights.<sup>95</sup> Moreover, lesbians and gay men satisfy the three criteria posited by Professors Richard Fallon and Paul Weiler that justify preferential treatment of a particular group and help identify those groups that should be included within affirmative action programs based on remedying past discrimination: (1) we have endured “an historic pattern of legally sanctioned, group-based discrimination”; (2) the effects of this discrimination include “a current condition of group disadvantage”—namely, ongoing subordination as reflected by heterosexism, homophobia, and gay and lesbian invisibility and silence—which creates “social problems at least partly remediable through affirmative [action]”; and (3) “social and psychological factors give current meaning to the group as more than an arbitrary collection of individuals,” as reflected by the existing recognition of the gay and lesbian community.<sup>96</sup>

Remedying the effects of antigay discrimination requires affirmative action beyond simple nondiscrimination. If employers are to help lesbians and gay men overcome group subordination and invisibility, they first must create workplace environments that welcome and respect openly gay and lesbian workers.

b. *Role Models: Combatting Prejudice and Facilitating Mentoring.* The role model justification for affirmative action emphasizes the communicative value of minority and female representation. This rationale rests on the theory that women and minority employees will symbolically challenge stereotypes and will convey to their communities information both as mentors and as exemplars of success, “without which [other members of these communities] might conclude that certain social roles and professional opportunities are closed to them.”<sup>97</sup>

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95. Some courts and individuals take issue with the gay and lesbian community’s claim of political powerlessness. *See, e.g., High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) (“[L]egislatures have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orientation through the passage of anti-discrimination legislation. Thus, homosexuals are not without political power; they have the ability to and do ‘attract the attention of the lawmakers,’ as evidenced by such legislation.”) (footnote and citations omitted).

Simply looking at the gay and lesbian community’s limited success in procuring basic civil rights protections, however, suggests that protestations about gay and lesbian people’s supposed political power verge on the absurd. *See, e.g., Jantz v. Muci*, 759 F. Supp. 1543, 1550 (D. Kan. 1991) (“The Ninth Circuit’s position in *High Tech Gays* not only exaggerates the significance of recent anti-discrimination efforts, it suffers from a more fundamental error. It mistakenly assumes that scattered, piecemeal successes in local legislation are proof of political power . . . .”), *rev’d*, 976 F.2d 623 (10th Cir. 1992).

96. Richard H. Fallon, Jr. & Paul C. Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1, 47.

Though some people may question the legitimate existence of any group defined by its affectional and sexual identities, it is interesting to note that even vehemently antigay individuals implicitly recognize the existence of the group called “gay and lesbian people.”

97. Delgado, *supra* note 17, at 1223 n.5.

The role model theory is often used in support of affirmative action—or increased diversity—for university faculties. *See, e.g., CCR Complaint, supra* note 7, at 4, 23-24, 30-32 (Harvard law students bringing a discrimination suit against Harvard University and Harvard Law School, seeking affirmative action for women and minorities in faculty hiring based on, *inter alia*, a role model argument); Ian Haney-

The inclusion of openly gay and lesbian people in the work force combats prejudice and stereotypes and promotes acceptance through daily interaction among heterosexual employees and their openly gay and lesbian co-workers.<sup>98</sup> Furthermore, the lack of role models for openly gay and lesbian workers is a genuine problem because few gay and lesbian employees of even recent generations have been out at work. It is likely that gay and lesbian employees have great difficulty establishing mentoring relationships with more experienced heterosexual workers. At worst, homophobia makes unlikely the possibility of a truly beneficial mentoring relationship; at best, the mentoring offers little guidance on how to pattern a professional gay or lesbian identity. Inclusion of openly gay and lesbian employees benefits both workers and employers by providing role models with whom other gay and lesbian workers may develop significant mentoring relationships or workplace friendships.

*c. Diversity in the Workplace.* Diversity adds a distinctly forward-looking rationale to the list of possible justifications for affirmative action.<sup>99</sup> The term “diversity” reflects a general goal of including “outsiders” in society’s institutions, and “describe[s] the importance of our institutions being representative of all citizens and truly democratic, rather than picturing one group as dominant. Diversity affirms the notion that different groups need not conform to the dominant culture, need not mix into it to be an accepted and important part of it.”<sup>100</sup> At a fundamental level, therefore, diversity-based affirmative action involves literally affirming members of an excluded group as valued, contributing members of the work force and society.<sup>101</sup>

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Lopez, *Community Ties, Race, and Faculty Hiring: The Case for Professors Who Don't Think White*, 1 RECONSTRUCTION 46, 46, 50-53 (1991).

98. See *supra* note 34. These beneficial effects of inter-group contact occur “[1] [w]hen [the contact] is encouraged by the institution in which it occurs, makes shared goals salient, and fosters inter-group cooperation; [2] when the contact is ongoing and intimate rather than brief and superficial; and [3] when members of the two groups are of equal status and share important values.” Herek, *supra* note 31, at 171. In other words, employer-fostered contact between heterosexual and gay and lesbian co-workers is the means most likely to reduce antigay prejudice in the workplace.

Further, the workplace as a cornerstone of society and as a fundamentally important contact point for interaction can also provide openly gay and lesbian workers an opportunity indirectly to effect positive social change throughout the local community.

99. Professor Kathleen Sullivan has written the leading commentary arguing that forward-looking goals, including “increasing the diversity of a work force,” should be legally sufficient to justify at least voluntary affirmative action plans. See Sullivan, *supra* note 93, at 96. Moreover, Justice Stevens specifically endorsed this rationale for voluntary affirmative action in *Johnson v. Transportation Agency*, 480 U.S. 616, 646-47 (1986) (Stevens, J., concurring).

100. Wildman, *supra* note 1, at 1629 n.16. Diversity, therefore, is also inclusive of heterosexual white males, though their history of inclusion typically makes it unnecessary to act affirmatively to increase their representation.

101. Diversity-based affirmative action also affirms the group itself as an excluded minority worthy of inclusion.



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The diversity justification requires no directly compensatory purpose, but rather seeks to challenge harmful stereotypes, combat intolerance,<sup>102</sup> and realize intellectual and competitive benefits by creating inclusive workplaces and educational institutions. Though terms such as “exclusion” and “outsiders” almost invariably relate to a history of subordination and discrimination, affirmative action justified by diversity focuses solely on the benefits derived from inclusion.<sup>103</sup> Indeed, the many practical benefits of diversity in the workplace have become increasingly popular justification for nonremedial, voluntary affirmative action.<sup>104</sup>

The benefits derived from workplace diversity often improve a company’s competitive position, profitability, and growth. These benefits accrue not only to the company, but also to its entire work force and even to society in general.<sup>105</sup> A diverse work force creates a competitive advantage for a company by “often produc[ing] a diversity of ideas in new product development,

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102. See, e.g., Karst, *supra* note 35, at 125 (citing affirmative action based on inclusion as one of the best “remedies for the expression that labels people as subordinate”).

103. Note that the diversity rationale justifies affirmative action for a group regardless of the legal sufficiency of the group’s claim of societal or institutional discrimination. This is obviously of particular importance to lesbians and gay men because we have almost no opportunity to articulate legal claims of discrimination in employment, housing, or public accommodations, and because our ongoing, legally sanctioned history of being excluded often means that majoritarian institutions refuse to see us as an illegitimately subordinated minority group.

104. See Note, *Rethinking Weber: The Business Response to Affirmative Action*, 102 HARV. L. REV. 658 (1989); see also Lynne Duke, *Employer Puts Pluralism First*, WASH. POST, Aug. 4, 1991, at A1 (US West Inc. uses affirmative action to reach goal of “pluralism” in their work force).

Many other companies that have recognized the value of workplace diversity have instituted programs in support of diversity that do not constitute “affirmative action” as used in this article. See, e.g., Shafrath, *supra* note 90, at 10 (widespread corporate trend of hiring consultants and establishing diversity management departments in response to an increasingly diverse labor force); Duke, *supra* (US West Inc. encourages the formation of employee resource groups and conducts in-house diversity training workshops); *Digital Named Recipient of Opportunity 2000 Award by Secretary of Labor Elizabeth Dole*, PR Newswire, Oct. 23, 1990, available in LEXIS, Nexis Library, PRNEWS File (Digital Equipment Corp. promotes workforce diversity through its “Valuing Differences” program); Marlene C. Piturro, *Responding to a Diverse Work Force*, N.Y. TIMES, Aug. 26, 1990, § 12WC, at 18 (“managing diversity” programs adopted by many corporations in the Westchester County area of New York).

105. Note, *supra* note 104, at 668, 670.

The benefits of affirmative action have accrued not only to individuals of all creeds, colors, and sexes, but also to business and society. Diversity in work force participation has produced new ideas, opinions, and perspectives in management, product development, and marketing. Efforts in the areas of recruitment, hiring, and promotion by corporations have led to improvement in job satisfaction, labor-management communication, productivity, and community relations.

*Id.* at 668 n.57 (quoting BUREAU OF NAT’L AFFAIRS, AFFIRMATIVE ACTION TODAY 161 (1986)).

[The stated benefits of affirmative action based on diversity] all make the entire company and economy stronger while making the work force a better place for *all* individuals, not just women and minorities. All employees benefit from employment with a successful company; thus, even whites and males benefit from affirmative action to the extent that the program leads to their company’s success.

*Id.* at 670.

strategic planning, and general problem-solving.”<sup>106</sup> Other benefits realized through affirmative action plans designed to increase workplace diversity include increased productivity, more efficient human resources management, improved customer relations, marketing innovations, and more successful recruitment.<sup>107</sup> Employers adopting affirmative action for lesbians and gay men, therefore, can realize these benefits, including improved recruitment and retention of not only talented gay and lesbian employees but also heterosexual employees.<sup>108</sup>

## 2. Arguments Against Affirmative Action based on Sexual Orientation

Opponents of proposed gay and lesbian antidiscrimination laws invariably allege that such laws will require or lead to “affirmative action,” “special rights,” “preferential treatment,” or “quotas” for lesbians and gay men.<sup>109</sup>

106. *Id.* at 668-69.

107. *Id.* at 669-70.

108. See, e.g., BASF GUIDE, *supra* note 4, at 9 n.17 (“Both gay and heterosexual students from the country’s most well-regarded law schools are beginning to look to a firm’s handling of lesbian and gay employment issues as a key ‘quality of life’ indicator.”) (citations omitted); Telephone Interview with Michael Faber, Hiring Partner, Heller, Ehrman, White & McAuliffe (San Francisco office) (Mar. 31, 1992) (stating that diversity is an increasingly important concern of both minority applicants and non-minority applicants (and clients), and that the recruiting and retention benefits of diversity constituted a business justification that was a significant factor in deciding to add “self-identified gays and lesbians” to Heller, Ehrman’s goals and timetables); Telephone Interview with DeNatale, *supra* note 9 (verifying that Heller, Ehrman’s affirmative action goals are a demonstrated commitment to including lesbians and gay men that has resulted in more successful recruitment of gay and lesbian attorneys); Stewart, *supra* note 2, at 54 (“I know students who actually turned down higher salaries to go with companies that aren’t homophobic.”) (quoting Douglas Plummer, president of the Gay and Lesbian Student Association at Harvard Business School); Jana Eisinger, *Firms Step Up Hiring of Gay and Lesbian Lawyers*, N.Y. TIMES, Feb. 7, 1992, at B6.

109. See, e.g., Joyce Purnick, *Rights Measure Ready for Vote After 12 Years*, N.Y. TIMES, Mar. 20, 1986, at B1 (opponents of New York City’s bill feared that it would lead to, among other things, “affirmative action hiring for homosexuals”); *Regional News, Washington, Oregon*, UPI, Feb. 23, 1987, available in LEXIS, Nexis Library, UPI File (opponents of Oregon state bill “fear that the bill would grant homosexuals minority status, require employers to include gays in affirmative action hirings and contribute to the AIDS epidemic”); Paul Taylor, *Houston Divided by Gay Rights Ordinance*, WASH. POST, § 1, at A3 (quoting Houston Councilman Goodner, opposing Houston’s proposed public employment anti-discrimination ordinance: “If they win this time, they’ll be back asking for affirmative action . . . .”); *Regional News, Nebraska*, UPI, Mar. 12, 1982, available in LEXIS, Nexis Library, UPI File (reporting the concerns of a leading opponent of Lincoln, Nebraska’s ordinance: “Paul Cameron said gays also want the same kind of affirmative action programs provided for Mexican-Americans and blacks. Such programs ‘would be an advantage in hard times’ and would pressure children, teenagers and job seekers to consider homosexuality in order to get jobs, he said.”).

While these concerns may be partially attributable to confusion over the meaning of the term “affirmative action,” bad faith and politics are also likely explanations for equating antidiscrimination with affirmative action for lesbians and gay men. For more obvious illustrations of bad faith in the context of political campaigning, see Schmalz, *supra* note 27, at 20 (describing a pro-George Bush religious group’s television ad: “Bill Clinton’s vision for a better America includes job quotas for homosexuals,” the voice-over says, inaccurately. “Is this your vision for a better America?”); Paul Taylor, *Electron ‘84 Texas*, WASH. POST, Sept. 28, 1984, § 1, at A7 (U.S. Senate candidate Rep. Phil Gramm characterizing challenger Lloyd Doggett’s support of protecting lesbians and gay men from employment discrimination as endorsement of affirmative action).

## Affirmative Action for Lesbians and Gay Men

In order to get the antidiscrimination statutes passed, proponents of the legislation must repeatedly assure the affirmative action alarmists that laws protecting lesbians and gay men from employment discrimination will not require affirmative action.<sup>110</sup> These legislative debates reflect our society's extremely well-established, but seldom explained or challenged, disfavor of affirmative action for gay and lesbian people.

This opposition likely reflects not only a general opposition to affirmative action but also the special societal hostility reserved for lesbians and gay men. For example, persons who impliedly oppose affirmative action for lesbians and gay men also typically campaign against any legislation that may constitute endorsement of something they call "the homosexual life-style," a term that often veils deep animosity toward gay and lesbian people.<sup>111</sup> For many people, however, the notion of a singular, homogeneous gay or lesbian life-

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110. See, e.g., Frank Phillips, *Gay Rights Bill Goes Before House Today*, BOSTON GLOBE, Mar. 27, 1989, at 49 (reporting that an advocate of Massachusetts' bill "plans to make the proponents' much-repeated case that the bill merely protects homosexuals from discrimination and does not extend them any further rights, such as affirmative action"); MASS. GEN. LAWS ANN. ch. 151B, § 4(18) (West 1992) (precluding any interpretation of the antidiscrimination law that would impose affirmative action requirements); Conn. Public Act No. 91-58, § 36, 1991 Conn. Legis. Serv. 119 (West) ("Nothing in this act shall be deemed or construed to authorize or permit the use of numerical goals or quotas, or other types of affirmative action programs, with respect to homosexuality . . ."); Joyce Purnick, *Koch To Seek Amendments To Homosexual Rights Bill*, N.Y. TIMES, Mar. 22, 1986, § 1, at 29 (attempting to calm opposition to a bill passed by the New York City council that already expressly did not require or permit the use of quotas on the basis of sexual orientation, by adding an amendment that the bill also would not require or permit affirmative action goals or timetables); *House Hearings Address Legislation To Ban Job Discrimination Against Homosexuals*, Daily Lab. Rep. (BNA) No. 18, at A-5 (Jan. 27, 1982) [hereinafter *House Hearings*] (testimony that proposed amendments to Title VII would not require affirmative action for lesbians and gay men); H.R. 423, 103d Cong., 1st Sess. § 2(f) (1993) ("Nothing in this Act shall be construed to permit or require . . . the use of any quota as a remedy for discrimination on the basis of affectional or sexual orientation.")

However, efforts to clarify the distinction between affirmative action and nondiscrimination are not always successful. The language of the antigay constitutional amendment that passed in Colorado, for example, prohibits legal protection from sexual orientation discrimination but emphasizes prohibition of minority status claims and quotas. See Jana Mazanec, *Anti-gay rights amendment galvanizes both sides in Colo.*, USA TODAY, Jan. 11, 1993, at 10A. Though misleading, the rhetoric of "special rights" was used effectively by Amendment 2's proponents. See John Gallagher, *Colorado Goes Straight to Hell*, ADVOCATE, Feb. 23, 1993, at 34, 36-37. Oregon's unsuccessful, more extremely antigay proposed constitutional amendment similarly emphasized prohibition of quotas, minority status, and affirmative action based on sexual orientation. See Timothy Egan, *Oregon Measure Asks State to Repress Homosexuality*, N.Y. TIMES, Aug. 16, 1992, § 1, at 1 (reporting on text of proposed amendment).

111. See, e.g., Purnick, *supra* note 109, at B1 ("[W]hat they really want to do is come out of the closet and flaunt their life style.") (quoting New York City Councilman Dear, opponent of the anti-discrimination legislation); Dodson, *supra* note 28, at 1 (quoting Irvine, California Mayor Larry Agran as saying that individuals who oppose gay and lesbian civil rights legislation on the grounds that it attempts to extend "special rights" for a "chosen life-style" remind him "of the people during the civil rights movement. They weren't opposed to black folks, but they didn't think they should have the same rights as white folks. That's what this boils down to.>").

This fundamentally homophobic argument is sometimes asserted as a "right" to discriminate against lesbians and gay men, who are perceived to be not "a legitimate minority." See, e.g., *House Hearings*, *supra* note 110, at A-5 ("We are not urging employers to be forbidden to hire homosexuals. . . . What we are advocating is our right to privacy be respected: that the homosexual lifestyle not be flaunted.") (quoting Connie Marshner, an opponent of federal civil rights protections for gay and lesbian people).

style derives from unchallenged myths and inaccurate stereotypes.<sup>112</sup> No “homosexual life-style” exists any more than a “heterosexual life-style” exists.<sup>113</sup> Furthermore, affirmative action need not endorse or promote anything beyond equality of opportunity, acceptance of society’s diversity, and respect for the dignity of all human beings.

Beyond the rhetoric, however, there are valid arguments to be made against affirmative action for lesbians and gay men. The following discussion presents the most likely arguments<sup>114</sup> and reasoned responses.

a. *Objections to the Discrimination Justification.*

i. *Antigay discrimination is not the same as race and gender discrimination.* Opponents of affirmative action for lesbians and gay men would likely criticize a “remedying past discrimination” justification on the ground that discrimination against lesbians and gay men differs from discrimination against racial minorities and women. Race and gender discrimination create economic disadvantage, whereas sexual orientation discrimination most often creates gay and lesbian invisibility. Remarkably, opponents may also rely on the fact that race and gender discrimination are impermissible, whereas sexual orientation discrimination is generally permitted by law.

The central question, however, is whether discrimination has significantly violated a group’s equal opportunity rights. That the form of gay and lesbian inequality and subordination differs from that of traditional affirmative action beneficiary groups ought to obscure neither the seriousness of the discrimination nor the equities of including lesbians and gay men in voluntary affirmative action plans. While economic disadvantage may be the most obvious manifestation of pervasive discrimination, it should not and must not be understood as the defining indicator of “inequality of opportunity.” As a preliminary matter, openly gay and lesbian workers and those suspected of being gay or lesbian do suffer economic disadvantage when sexual orientation discrimination results in employment termination, lost job offers, or lost promotions. More importantly, however, avoidance of economic disadvantage at the price of silent complicity in one’s own subordination cannot possibly be understood as an act borne of equality of opportunity.

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112. See, e.g., Fajer, *supra* note 31, at 537-46 (discussing the inaccurate “sex-as-lifestyle” assumption that gay and lesbian people are defined by and obsessed with sexual activity).

113. Indeed, gay and lesbian people are as diverse a group as heterosexuals, existing within all categories of race, religion, geographic area, educational background, and social and economic class. See *Developments—Sexual Orientation*, *supra* note 58, at 1511 n.1; ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 625-31 (1948) [hereinafter KINSEY ET AL., MALES]; ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 459-61, 463-66, 478 (1953) [hereinafter KINSEY ET AL., FEMALES].

114. Most of the objections discussed are gay- and lesbian-specific arguments. Others are standard affirmative action objections applied to the context of sexual orientation-based affirmative action.

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With respect to the legality of discrimination against gay and lesbian people, sexual orientation is clearly irrelevant to workplace performance, and discrimination based on such a factor must be wrong regardless of the variable strictures of current law. That lesbians and gay men are still so politically disfavored as to lack the statutory and constitutional protections afforded women and racial minorities serves only as a reminder that, while our society denounces racism and sexism at least officially, it still tolerates overt antigay prejudice. Indeed, the popular oppression of lesbians and gay men may be the most compelling reason for a just private employer to include gay and lesbian people within its affirmative action plan.<sup>115</sup>

ii. *Lesbians and gay men are not a true "minority" group.* Opponents of affirmative action for lesbians and gay men would also likely criticize the "remedying past discrimination" justification by asserting that lesbians and gay men are not a true "minority group," and therefore should not be included among the beneficiaries of affirmative action.

Lesbians and gay men, however, do constitute a "minority group" different from, though comparable to, racial and ethnic minorities under most definitions or standards.<sup>116</sup> Though sexual orientation may not be transmitted to succeeding generations as race and ethnicity are transmitted,<sup>117</sup> gay and lesbian people form a self-conscious community based on our sexual orientation.<sup>118</sup> Moreover, lesbians and gay men satisfy what social scientists have identified as the most important criterion for minority group status: that a minority group's members "manifest a characteristic that is held in low esteem by the dominant segments of society and is used as the basis for discrimination."<sup>119</sup>

Some members of racial minority groups, concerned that gay and lesbian people could become competitors for affirmative action benefits, have expressed a different line of argument against viewing lesbians and gay men as a minority group. They argue that the ability to avoid discrimination by "passing as heterosexual" makes gay and lesbian people distinguishable from

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115. Private efforts to ensure equality for gay and lesbian people are essential in light of the absence of nationwide protection from antigay discrimination. Affirmative action for racial and ethnic minorities and women is often characterized as a needed "push" toward equality and justice (given the slow working of antidiscrimination laws' power to transform society), but gay and lesbian people do not even have nationwide antidiscrimination laws upon which to rely. Thus if any group needs an affirmative "push" from private employers toward equality of opportunity, it is lesbians and gay men.

116. For instance, gay and lesbian people comprise a subordinated "social group" whose political power is "severely circumscribed." Fiss, *supra* note 68, at 148-49, 154-55 (describing the characteristics of "specially disadvantaged groups," and further characterizing a "social group" as an entity with an identity and existence apart from its members but with an interdependent relationship with its members). From a purely quantitative perspective, lesbians and gay men are also plainly a minority group in that only approximately 10% of the population is believed to be gay or lesbian. See KINSEY ET AL., MALES, *supra* note 113, at 651.

117. Compelling scientific research, however, suggests that genetics does play a role in homosexuality. See Chandler Burr, *Homosexuality and Biology*, ATLANTIC MONTHLY, Mar. 1993, at 47, 64-65.

118. Herek, *supra* note 31, at 165, 166.

119. *Id.* at 165; see also *id.* at 165-66.

racial minorities and women.<sup>120</sup> The ability to “pass,” however, and the enormous societal pressure to do so, is both a political liability and a profound form of subordination.<sup>121</sup> This should not be perceived as an advantage. Remaining closeted is itself a grievous form of societal discrimination through which society pressures individuals into denying publicly their true identities and lives. Indeed, it is as insulting to the dignity of lesbians and gay men for others to suggest that we are fortunate in being able to conceal our minority status as it would be insulting to consider “lucky” an African American person who could pass as white in a white-dominated, racist society, or a woman who could pass as a man in a male-dominated, sexist society.<sup>122</sup> No person should feel coerced into lying and, certainly, not about an integral part of his or her identity. Closeted lesbians and gay men actively conceal their sexual orientation, often expending remarkable amounts of emotional energy to maintain a dynamic facade to family, friends, and co-workers. This facade of heterosexuality (or asexuality) may include denial of important long-term relationships.

As for concerns about competition for affirmative action, there is no reason to envision affirmative action as a “zero-sum game,” which can create equality of opportunity for only a finite number of minority groups. In deciding whether to adopt an affirmative action program, employers need not determine which group has suffered the most exclusion or prior discrimination.<sup>123</sup> Arguments

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120. See Johnson & DeVecchio, *supra* note 48, at A1. Other members of racial minority groups view (as do members of the heterosexual white majority) homosexuality as a choice or perversion, and feel insulted by the comparison. See *id.*

Some within the gay and lesbian community also believe that we should not be defined as a “minority group” because (1) identification of people on the basis of their sexual orientation is a relatively recent social construct, and (2) gay and lesbian people would do better to work toward eliminating the sexual categories upon which the system of oppression depends. See John D’Emilio, *Making and Unmaking Minorities: The Tensions Between Gay Politics and History*, 14 N.Y.U. REV. L. & SOC. CHANGE 915 (1986). See generally D’EMILIO, *supra* note 36. In response to the argument that no “homosexual identity” or “minority community” existed until relatively recently, I suggest that the historical lack of a self-conscious gay and lesbian community is merely an earlier manifestation of the problem of gay and lesbian subordination and invisibility. Although gay and lesbian people existed and were everywhere, they were then even more oppressed in that their invisibility to one another, combined with silence coerced through discrimination, ensured that individual lesbians and gay men could not even see beyond their isolation to become aware of their collective existence or of their individual identities in relation to membership within a larger group.

121. See, e.g., Ackerman, *supra* note 34, at 728-31 (political and organizational disadvantages of passing); Dillon, *supra* note 31, at 436, 445-48 (personal costs of passing); Herek, *supra* note 31, at 146-47 (personal costs); Wolfson, *supra* note 33, at 33 n.46 (personal costs).

122. Many Native Americans were historically pressured by prejudice and discrimination into “passing” as white. Though bigotry against Native Americans persists, the increasing number of people willing to self-identify as Native American is helping this minority group struggle against subordination as it reclaims and celebrates its proud heritage. See Johnson, *supra* note 32, at A1; cf. Karst, *supra* note 35 (self-identification and expression as essential means of group liberation).

123. Adding lesbians and gay men to an existing affirmative action plan would not necessarily mean decreasing the opportunities for racial minorities and women. An employer could continue to ensure equality of opportunity for members of all included minority groups by creating separate targets for each minority group or by increasing overall targets. See *infra* text accompanying notes 215-20.

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based on competing claims of worse oppression may serve merely to drive a wedge between the racial minority communities and the gay and lesbian community at a time when efforts could be focused on joining together our non-mutually exclusive communities in a common struggle.<sup>124</sup>

b. *Objections to the Role Model Justification: Tokenism and the Burdens of Being a Role Model.* The role model justification for affirmative action has received much criticism.<sup>125</sup> Thus, a likely objection to affirmative action for lesbians and gay men would hold that those included as a result of such a program will be mere tokens. As the few openly gay or lesbian employees at a firm, these affirmative action beneficiaries will come under pressure as role models and as the people to whom management turns to discuss every tangentially gay and lesbian issue that arises in the workplace.

Though these concerns are valid, any individual who decides to self-identify as gay or lesbian at work will necessarily have decided that the benefits of being out outweigh the potential burdens. Some workers will voluntarily participate in affirmative action based on sexual orientation because they have determined that the potential burdens of being out—educating co-workers, serving as role models, discussing gay and lesbian issues with management—are less severe than the costs of being closeted. Others will voluntarily participate *in order to* educate co-workers, serve as role models, and provide management with input concerning gay and lesbian issues. Unlike racial minorities and women, therefore, gay and lesbian affirmative action participants make a deliberate, personal decision to disclose their minority status and thereby assume the perceived benefits and burdens of being out in the workplace.

Moreover, even if a firm's goal is to hire just one openly gay or lesbian worker, that employee's experience at the firm as a token will differ signifi-

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124. Recognizing the common struggle against racism and other forms of oppression, Professor Derrick Bell has stated as a rule that "[t]he injustices that diminish the rights of blacks because of race also diminish the rights of many whites, particularly those who lack money and power or are part of an unpopular minority group or movement." Derrick Bell, *Civil Rights; To Make A Nation Whole*, N.Y. TIMES, Sept. 13, 1987, § 6, at 43, 54. One observer suspects that opponents of gay and lesbian civil rights may use arguments concerning "dilution" of affirmative action for racial and ethnic minorities to create dissension among minority groups, when working together could be most profitable. Telephone Interview with Terry Stewart, Former Co-Chair, San Francisco Bar Association Committee on Lesbian and Gay Issues (Mar. 5, 1992).

125. See, e.g., Delgado, *supra* note 17, at 1226-31 (describing the burdens placed upon an individual serving as a role model to an entire community and the pressure on role models to encourage members of their communities to adopt majoritarian social mores); *Scholars' Reply to Professor Fried*, 99 YALE L.J. 163, 164 n.11 (1989) (describing the Supreme Court's rejection of the role model theory of affirmative action in the context of the *Croson* case); see also Haney-Lopez, *supra* note 97, at 60 (discussing the burdens placed on scholars of color by the role model theory).

At least one neo-conservative critic of affirmative action nevertheless recognizes the continuing importance of serving as role models for those who will come later. STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 32 (1991).

cantly from the experiences of female or racial minority tokens—there will almost invariably be other gay and lesbian workers already at the firm. Those who are not out, or are out only to a few co-workers, will gravitate toward the openly gay or lesbian employee,<sup>126</sup> and may themselves be encouraged to come out to a greater extent at work. Whether the firm's other gay and lesbian employees come out only to the openly gay or lesbian token or to others in the workplace, having just one openly gay or lesbian employee will bring tangible results: an improved support network for gay and lesbian employees, an enhanced degree of mentoring, and perhaps a greater number of people willing to discuss gay and lesbian issues and concerns with management.

Even if the openly gay or lesbian token remains the company's sole visible representative of the gay and lesbian community, the company benefits by having at least one employee with whom to consult on firm policies or workplace practices that implicate gay and lesbian issues. More importantly, because the continued oppression of all gay and lesbian people depends upon coerced invisibility, even a solitary openly gay or lesbian token strikes a blow against discrimination and inequality in a way that an African-American token or a female token does not.

c. *Objections to the Diversity Justification.* The diversity justification for affirmative action has also received a substantial amount of criticism. Three arguments against forward-looking affirmative action for lesbians and gay men are summarized below.

i. *Social engineering.* Opponents of affirmative action for lesbians and gay men might challenge such a program as a dangerous exercise in "social engineering,"<sup>127</sup> in which an employer is striving to create a work force that includes a particular number of openly gay and lesbian people. Employers seeking increased minority representation, however, are not engineering a balanced work force as an end in itself, but are promoting a variety of goals dependent on workforce balance.<sup>128</sup> When passive nondiscrimination achieves no measurable progress toward changing negative workplace attitudes, inviting the inclusion of openly gay and lesbian employees is within private employers' discretion. Employers are not prohibited from voluntarily instituting lawful policies designed to improve equal employment opportunity and increase

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126. Many openly gay and lesbian people relate the common experience of having gay and lesbian co-workers and supervisors, who may not be out to anyone else at work, come out to them privately. Indeed, having at least one visible contact person may be the most common way that informal networks develop among gay and lesbian employees, who were not previously identifiable to one another.

127. See, e.g., Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312 (1986).

128. Sullivan, *supra* note 93, at 80-81.



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productivity.<sup>129</sup> Moreover, a policy of inclusion does not force other employees out of the work force.

ii. *Stereotyping*. A second leading criticism of the diversity theory is that it perpetuates inaccurate stereotypes that all members of a particular group are alike or think alike.<sup>130</sup> Proponents of this view would argue that gay and lesbian people are an extremely diverse group with many differing viewpoints and should not be stereotyped as possessing an essentially gay or lesbian perspective.<sup>131</sup>

Diversity-based affirmative action, however, emphasizes not stereotypes but the fact that minority individuals with significant and self-consciously held ties to their traditionally excluded communities exist and deserve to be included in the work force.<sup>132</sup> Generalizations based on such group affiliation, moreover, are not inherently unjust or stereotypical<sup>133</sup>—self-identification with the gay and lesbian community does validly correspond to generalizable common goals such as elimination of sexual orientation discrimination, repeal of sodomy laws, and recognition for gay and lesbian families.<sup>134</sup> Finally, acknowledging and valuing group affiliation does not promote cultural separatism, as some critics charge.<sup>135</sup> Indeed, critics who insist on achieving stereotype-free “cultural neutrality” often intend only to vindicate cultural norms that are white, male, and heterosexual.<sup>136</sup>

iii. *Limits of inclusion*. The third type of criticism of diversity-based affirmative action values inclusion but questions the scope of the diversity rationale’s inclusion of subordinated groups. What has been termed the “ridiculousness critique” questions the potentially unlimited expansiveness of the principle of inclusion.<sup>137</sup> In short, this critique would maintain that inclusive-

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129. But see discussion of possible legal challenges to affirmative action for lesbians and gay men, *infra* text accompanying notes 232-39.

130. See, e.g., CARTER, *supra* note 125, at 32; Haney-Lopez, *supra* note 97, at 59.

131. See generally D’EMILIO, *supra* note 36.

132. Haney-Lopez, *supra* note 97, at 49; see also Wildman, *supra* note 1, at 1630 n.17; Haney-Lopez, *supra* note 97, at 56 (self-identification, whether express or implied by one’s public life, constitutes a reasonable basis to infer sufficient community identification).

133. Haney-Lopez, *supra* note 97, at 59.

134. Cf. Donna Minkowitz, *Forward, march!*, ADVOCATE, Dec. 1, 1992, at 17 (citing the platform for the 1993 March on Washington for Gay, Lesbian, and Bi Equal Rights and Liberation); CCR Complaint, *supra* note 7, at 25 (stating that sexual orientation is one of several “useful proxies for an entire collection of experiences and aspirations [that] play a critical role in shaping an individual’s identity”).

135. See Haney-Lopez, *supra* note 97, at 57.

136. See, e.g., *id.* (describing cultural neutrality as vindication of white cultural norms).

137. See *id.* at 56-57; cf. Fallon & Weiler, *supra* note 96, at 47-50 (applying their three proposed criteria for justifying a group’s entitlement to preferential treatment to arguments for affirmative action for Japanese and Chinese Americans, other racial and ethnic groups, and the poor); Michael H. Gottesman, *Twelve Topics to Consider Before Opting for Racial Quotas*, 79 GEO. L.J. 1737, 1762-67 (1991) (applying Fallon & Weiler’s three criteria to women).

Opponents typically deploy “slippery slope” arguments, asking who else will have to be included if gay and lesbian people are included. Transsexuals, for example, may be expected to be one of the groups marched out in the feared “parade of horrors” that will result from inclusion of lesbians and gay men.

ness is generally a good idea but should stop before including lesbians and gay men. A contrary critique would suggest that inclusion of lesbians and gay men does not go far enough toward fostering workforce diversity.<sup>138</sup>

Perhaps in theory the diversity movement should embrace all excluded groups. In reality, however, progress is more readily achieved incrementally than by attempting to establish perfect egalitarianism immediately. Moreover, the merits of including one particular group are not diminished by the anticipated claims of other groups. An employer, therefore, can decide to include one excluded group without first determining whether other groups are equally deserving.<sup>139</sup> The relative merits of the arguments for including other groups in affirmative action programs need not be considered in order to justify affirmative action for lesbians and gay men.

d. *Privacy Objections.*

i. *Protecting gay and lesbian individuals' privacy rights.* Some supporters of gay and lesbian civil liberties argue that affirmative action on the basis of sexual orientation would violate the privacy rights of gay and lesbian workers.<sup>140</sup> This criticism, however, typically rests on a view of affirmative action in which applicants or present employees are asked about their sexual orientation.

The immediate purpose of adopting affirmative action goals for lesbians and gay men is not to pressure individuals to come out or to violate their privacy, but rather to invite them out into a safe work environment. Employers can simply ensure that all applicants and employees are made aware of the

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138. For instance, why are Orthodox Jews not included as an oppressed group within the usual discourse concerning diversity? See, e.g., NATIONAL STRIKE FOR DIVERSITY DAY (pamphlet from event at Harvard Law School, Apr. 2, 1992) (mentioning only women, people of color, gays, lesbians, bisexuals, and disabled persons in the context of faculty diversity).

139. See Gottesman, *supra* note 137, at 1762.

140. See, e.g., Laurie Asseo, *Regional News*, *New York*, UPI, June 19, 1984, available in LEXIS, Nexis Library, UPI File (Governor Mario Cuomo opposed quotas for gay or lesbian state contracts because it "would require homosexuals to identify themselves, which some may not be willing to do."); Purnick, *supra* note 109, at B1 (quoting Andrew Humm, a leader of the Coalition for Lesbian and Gay Rights, as calling the "concept of affirmative action for homosexuals 'preposterous' because it would require people to state their sexual orientation—an 'invasion of privacy'"); Flint & Longcope, *supra* note 45, at 25 (noting potential privacy issues related to recruiting openly gay and lesbian faculty and students to Harvard's Kennedy School of Government).

Although the National Gay and Lesbian Task Force presently has no official statement concerning affirmative action for lesbians and gay men, in past years the group has opposed such affirmative action because of privacy violations and "the fear that we'll be found out and fired." Constance D'au Vin, *Quakers Adopt Program to Support "Atmosphere for Gay Persons" on Staff*, WASH. POST, May 12, 1978, at C18 (quoting an unnamed spokesman for the then-National Gay Task Force); see also Victoria Irwin, *N.Y.C. bill on gay rights caps 15-year debate*, CHRISTIAN SCI. MONITOR, Mar. 24, 1986, at 3 ("The National Gay Task Force does not endorse quotas or affirmative action, because this would mean declaring a person's private life in public. 'Most gays are very, very private people.'") (quoting spokesman Ronald Najman).

For a general discussion of privacy rights that includes consideration of sexual orientation, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* ch. 15 (2d ed. 1988).

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policy and have an opportunity to participate voluntarily as self-identified, openly gay or lesbian persons.<sup>141</sup> By attempting to counter the burden and existing risks of coming out at work, employers can only make certain that individual workers' decisions to remain closeted at work do not arise from concerns about possible employment discrimination or workplace harassment.

A more problematic version of this privacy-based objection to affirmative action asserts that pressure nonetheless felt by closeted employees to come out may unacceptably encroach upon the free exercise of their privacy rights. This experience may be particularly troublesome for gay and lesbian supervisors who concealed their sexual identities as they rose through the ranks and for workers who came of age during a period of even less societal tolerance of lesbians and gay men.<sup>142</sup>

While it is essential that employers offer full workplace respect to all gay and lesbian workers, out or closeted, respect for the privacy rights of closeted workers should not override efforts to encourage gay and lesbian employees to feel safe about being out at work. Companies would otherwise reject proposed changes to any workplace policies that would benefit self-identified lesbians and gay men, such as changes in family leave, health insurance, and even nondiscrimination policies, on the ground that others' coming out in order to benefit from the policies would make closeted workers feel anxious.<sup>143</sup> Respect for all employees does not require opposition to policies that benefit openly gay and lesbian people most directly, but only that management not be intrusive in implementing such policies. Furthermore, adopting affirmative action for self-identified lesbians and gay men is the most direct way to assure closeted workers that they need not remain closeted for fear of work-related disadvantage. Such policies can also help change homophobic and heterosexual corporate cultures that make closeted gay and lesbian employees' workplace lives especially distressful.

ii. *Keeping (homo)sexuality out of the workplace.* Other opponents of affirmative action for lesbians and gay men may object on the grounds that employers should not adopt workplace policies related to private sexual conduct

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141. See also *infra* text accompanying notes 195-201.

142. See, e.g., Rita H. Jensen, *The Private Life And Public Death Of David Schwartz*, NAT'L L.J., Jan. 25, 1993, at 1, 30 ("Disclosing one's sexual orientation or leading others to suspect that one is gay can cause great distress for an older person who hasn't had an opportunity to participate in the gay rights movement.") (quoting Thomas B. Stoddard).

143. Another example is when law firms decline to provide applicants with information regarding their number of openly gay and lesbian attorneys. These firms believe that simple distribution of an unintrusive memo, inviting those who wish to be considered openly gay or lesbian to self-identify for the purposes of providing this information to interested applicants, would disrespect the privacy of those lesbians and gay men who would choose to conceal their sexual orientation. Though well-meaning, these firms perpetuate gay and lesbian invisibility by implying that we do not exist. More importantly, this sort of "respect for privacy" continues to deny lesbians and gay men the equal right to live publicly, often masking a belief that any public mention of sexual orientation is inappropriate.

or identity, and/or should not have any policy that would “promote homosexuality.”<sup>144</sup>

Policies that strive to protect gay and lesbian workers from discrimination and enable us to be out at work, however, are no more about sex or “promoting homosexuality” than family leave and health benefit policies for heterosexual employees are about sex or “promoting heterosexuality.” Affirmative action for lesbians and gay men does not address private sexual matters, but merely supports gay and lesbian people’s basic right to live just as heterosexuals live—having one public self consistent with the private self, “flaunting” our lives no more than heterosexuals flaunt theirs.<sup>145</sup> Similarly, affirmative action based on sexual orientation does not endorse homosexuality per se.<sup>146</sup> It endorses tolerance and appreciation of diversity. What affirmative action promotes is only equality of opportunity, which, for lesbians and gay men, means the ability to be open about who we are without retribution.

*e. Standard Objections to Affirmative Action.* There are several other arguments routinely used against traditional affirmative action which can also apply to affirmative action based on sexual orientation.

*i. Commitment to the principle of nondiscrimination.* Many opponents of affirmative action recognize the effects of systematic discrimination, but believe that employers should limit their efforts to remedying proven cases of past discrimination and not focus on every applicant’s race or gender<sup>147</sup> or sexual orientation. Antidiscrimination as a principle and equal opportunity as a goal require that employers absolutely not consider such irrelevant attributes

144. Religious conviction may animate this type of opposition to affirmative action and other workplace policies that include gay and lesbian workers as equals. For a brief account of religion-based antigay prejudice and action, see KIRK & MADSEN, *supra* note 28, at 28-29, 100-01. See generally JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY (1980).

Because the workplace is an essentially secular environment, however, employers generally do not consider employees’ religion-based objections to workplace policies. Adopting affirmative action for lesbians and gay men does not require that workers change their religious beliefs while at work, only that their behavior and conduct in the workplace be courteous and productive. Religion-based objections to affirmative action, therefore, should not be considered. Cf. ROSENFELD, *supra* note 14, at 254 (rejecting religion-based arguments that are incompatible with the postulate of equality).

145. See Fajer, *supra* note 31, at 570-91, 602-05 (demonstrating that unfair charges of “flaunting homosexuality” reflect a common belief that gay and lesbian issues are inappropriate for public discussion, whereas public discussion of heterosexuality is considered appropriate and expected).

146. It should go without saying that no workplace policy can encourage a person to change his or her sexual orientation. Cf. *id.* at 541-42 (debunking the myth of gay and lesbian recruitment).

147. See, e.g., Thomas, *supra* note 20, at 410-11. Justice Scalia is perhaps the most adamant opponent of straying beyond absolute nondiscrimination, routinely castigating the Court for its interpretation of Title VII: “A statute designed to establish a color-blind and gender-blind workplace has thus been converted into a powerful engine of racism and sexism.” Johnson v. Transportation Agency, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting). Writing prior to his ascension to the Supreme Court, then-Professor Scalia characterized affirmative action as “the most evil fruit of a fundamentally bad seed.” Antonin Scalia, *The Disease As Cure: “In Order To Get Beyond Racism, We Must First Take Account Of Race,”* 1979 WASH. U. L.Q. 147, 157.

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when evaluating individuals.<sup>148</sup> Moreover, these critics argue, the affirmative use of individuals' race, gender, or sexual orientation to remedy societal discrimination will only delay the coming of the day when such irrelevant factors are simply not considered.

While adherence to such an ideal would work in a society free of discrimination, the premise that "the nondiscriminatory future is now" is simply false.<sup>149</sup> Expressly prohibiting discrimination and harassment on the basis of sexual orientation, for example, merely furnishes a necessary floor of protection for gay and lesbian workers. The enactment of antidiscrimination legislation does not immediately effect societal changes,<sup>150</sup> nor does an employer's formal adoption of a nondiscrimination policy translate immediately into actual changes in the workplace. Indeed, the few firms that have adopted affirmative action for gay and lesbian employees agree that antidiscrimination policies are necessary but insufficient. These firms recognize that adherence to a principle of nondiscrimination in the workplace does not solve the problem of underrepresentation.<sup>151</sup> Adoption of affirmative action for lesbians and gay men, however, indicates that a firm "is absolutely committed to having a diverse staff and has a much stronger commitment to employees and to their ability to be open,"<sup>152</sup> going beyond mere nondiscrimination to suggest that there are in fact safe places for lesbians and gay men inside the firm.<sup>153</sup>

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148. See, e.g., Thomas, *supra* note 20, at 403 n.3; see also Wildman, *supra* note 1, at 1659-60.

Some opposition to sexual orientation-based affirmative action from within the gay and lesbian community, for example, is simply a consistent opposition to affirmative action generally. Interview with Andrew Sullivan, Editor of *The New Republic*, in Cambridge, Mass. (Mar. 6, 1992) (opposing affirmative action for anyone, including lesbians and gay men).

The neo-conservative critique of affirmative action also appeals to the stated liberal goal of a discrimination-free society, revealing the inherent paradox of affirmative action: according preferences to women and minorities now, in order to eliminate discrimination on the basis of gender and minority status in the future. Using specific timetables, however, is one way to reassure those who fear that preferential treatment will become the perceived norm and not an extraordinary measure.

149. Wildman, *supra* note 1, at 1660; see also Ellis, *supra* note 91, at 576 ("One cannot preach color-blindness in a color-conscious society and claim moral sanction."); UROFSKY, *supra* note 19, at 23-24; Neuborne, *supra* note 93, at 1544-45 ("In a perfect world, the [Supreme] Court has held that neither race nor gender is a permissible criterion for the allocation of a valuable benefit. . . . But the Court's affirmative action cases recognize that we do not live in a perfect world.").

150. See, e.g., MOHR, *supra* note 49, at 160-61 & n.37 (pointing to Norway as an example of the idea that "legislation alone will not open closet doors": despite the most progressive gay laws in the world, Norway also has the most closeted gay men and lesbians in Western Europe) (citing Robert Silver, *Norway*, *ADVOCATE*, Aug. 5, 1986, at 28-29).

151. Nondiscrimination was described, for example, as too slow-moving a response to recruitment and retention problems. Telephone Interview with Faber, *supra* note 108; Telephone Interview with DeNatale, *supra* note 9.

152. Telephone Interview with Paula Ettlbrick, Legal Director, Lambda Legal Defense and Education Fund (Apr. 14, 1992).

153. Telephone Interview with Haggans, *supra* note 85.

ii. *Stigma*. Critics of affirmative action plans typically contend that such programs stigmatize their supposed beneficiaries by presuming that women and minorities cannot compete on an equal basis with white men.<sup>154</sup> Indeed, some criticism from within the gay and lesbian community likely reflects concern about the stigma attached to affirmative action beneficiaries.<sup>155</sup>

Women and many racial and ethnic minorities, however, are vulnerable to affirmative action stigmatization based on inaccurate stereotypes of being less qualified (i.e., less intelligent or competent than white men) in a way that lesbians and gay men (as gay persons) are not. Even the most homophobic opponents of affirmative action based on sexual orientation do not raise the argument that lesbians and gay men actually lack necessary employment qualifications or fail to meet established meritocratic standards.<sup>156</sup> Because stereotypes of inferior intelligence and competence have not generally been part of gay and lesbian oppression, lesbians and gay men may be less likely to suffer the kind of stigma experienced by beneficiaries of affirmative action based on race, ethnicity, and gender.

Gay and lesbian people apprehensive about the stigma of affirmative action, therefore, may be expressing a more complicated concern. Already suffering cultural stigma from society's existing stereotypes about being gay, these individuals may fear that affirmative action will subject them to the additional stigma of being perceived as less qualified.

Gay and lesbian workers who voluntarily participate in an affirmative action program will do so, however, because the benefits of affirmative action

154. See, e.g., CARTER, *supra* note 125, at 47-69 (describing the "best black syndrome" by which minorities can be only the best in their group, and not the best, period); Thomas, *supra* note 20.

Opponents of affirmative action argue that preferential treatment devalues the accomplishments of women and minorities by suggesting that any success arises pursuant to a less demanding standard, and thereby undermines the morale of women and minorities by casting doubt on their abilities. A recent example of this critique was proffered by Harvard Law School Dean Robert C. Clark in response to increasing student activism in support of faculty diversity:

We have the highest percentage and absolute number of minority students of any of the top 20 law schools. At some level, they are worrying about what role affirmative action played in getting them here. The minority students need a sense of validation and encouragement, with the fundamental problem being a need for self-confidence that plays itself out as, "Why doesn't Harvard Law School have more teachers that look like me?" . . . In a sense, we're dealing here with one of the symptoms of affirmative action.

L. Gordon Crovitz, *Harvard Law School Finds Its Counterrevolutionary*, WALL ST. J., Mar. 25, 1992, at A13 (quoting Dean Clark).

155. See, e.g., Stewart, *supra* note 2, at 43 ("We don't need affirmative action—we're already here. We need the freedom to be visible.") (quoting John Wofford); see also *Other cities looking at San Francisco's gay rights laws*, UPI, Feb. 9, 1986, available in LEXIS, Nexis Library, UPI File ("The gay [and lesbian] community is not asking for special treatment. They are [asking] to be left alone.") (quoting Chuck Forester, an assistant to San Francisco Mayor Dianne Feinstein).

156. See Wildman, *supra* note 1, at 1661 n.156. Instead, prejudice against lesbians and gay men is typically based upon stereotypes of cross-gender behavior, unrestrained and deviant sexual activity, mental illness, and immorality.

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outweigh the potential cost of added stigma.<sup>157</sup> For many, being out and stigmatized as less qualified will nevertheless be better than suffering in the closet. For others, the communitarian benefits of affirmative action based on sexual orientation will further persuade them to participate. Even if affirmative action for qualified lesbians and gay men creates some new stigma of being less qualified, the increased visibility resulting from such a program will directly combat the severe societal stigmatization of gay and lesbian people that depends upon our invisibility. Finally, affirmative action's stigma ultimately derives from claims of purely meritocratic standards, which themselves have been sharply criticized and should be viewed with considerable skepticism.<sup>158</sup>

iii. *Divisiveness*. A third standard criticism of affirmative action is that it entrenches divisiveness and creates resentments.<sup>159</sup> Accordingly, one likely argument against affirmative action for lesbians and gay men is that it would entrench divisiveness between heterosexuals and gay and lesbian people. This argument, however, falsely assumes that actions based on recognized differences necessarily create or entrench negative attitudes toward those differences. Adopting affirmative action based on appreciation of the race, ethnicity, gender, or sexual orientation differences in the labor force can encourage positive attitudes toward diversity. When implemented with sensitivity and resolve, workplace policies that recognize the pre-existing differences among people and value minorities as equals do not entrench divisiveness.

Gay and lesbian criticism of affirmative action may also reflect concern about heterosexual resentment of lesbians and gay men. Widespread homophobia and current statistics on antigay violence suggest that this should be a serious concern of any program benefitting lesbians and gay men.<sup>160</sup> Yet, the threat of retaliatory violence or harassment—itsself an instrumental part of the ongoing subordination and silencing of lesbians and gay men—should not

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157. See Kennedy, *supra* note 14, at 1331; see also *supra* text accompanying notes 125-26.

At Heller, Ehrman, for example, the stigma issue was raised by gay and lesbian attorneys during a discussion of whether to add hiring and promotion targets for self-identified gay men and lesbians. The firm decided that the need to address existing problems outweighed any potential stigma, and also recognized that promotion to partnership remains challenging enough to ensure the integrity of a merit-based system. Telephone Interview with DeNatale, *supra* note 9.

158. See, e.g., Ellis, *supra* note 91, at 591-94 (debunking the myths of meritocracy and lowered standards); Kennedy, *supra* note 14, at 1332-33 (challenging the existence of meritocratic standards); Wildman, *supra* note 1, at 1659, 1660-62 (revealing the "societal default assumptions" intertwined with the construct of merit); Linda S. Greene, *Multiculturalism as Metaphor*, 41 DEPAUL L. REV. 1173, 1173 (1992) (describing the term "multiculturalism" as a metaphor for claims of inclusion and "opposition to institutional rules that reframe in meritocratic terms the historical exclusion" of women and minorities); *Critiques of Stephen Carter's Reflections of an Affirmative Action Baby*, 4 RECONSTRUCTION 114, 121 (1992) [hereinafter *Critiques*] (comment of Richard Delgado: "Merit ideas always reflect and favor those powerful enough to formulate them."); *id.* at 126 (comment of Martin Kilson: "Jobs and promotions are and must be allocated not on the basis of meritocratic indicia alone, but on the basis of extra-meritocratic considerations as well.").

159. See, e.g., Kennedy, *supra* note 14, at 1330; Thomas, *supra* note 20; Wildman, *supra* note 1, at 1659; UROFSKY, *supra* note 19, at 30-31.

160. See *infra* text accompanying notes 225-31.

discourage steps toward liberation. Majoritarian resentment inevitably accompanies efforts to end the subordination of women and minorities, and fear of racist or sexist—or antigay—backlash should not bar the adoption of affirmative action.<sup>161</sup> This concern illustrates the need for strong and unequivocal endorsement of affirmative action by top management to ensure the policy's broadest possible acceptance.

Though an affirmative action plan that includes lesbians and gay men may stir antigay prejudice and hostility, it is nevertheless difficult to imagine divisiveness about sexual orientation greater than that which currently exists in the typical workplace, where all workers are assumed to be heterosexual and risk discrimination and harassment upon challenging that assumption. It is similarly difficult to imagine animosity toward lesbians and gay men more widespread than that which currently exists in this country, where most states still refuse to protect lesbians and gay men from discrimination.

iv. *Innocent majority.* A fourth general objection to affirmative action focuses on the innocence of heterosexual white men not hired under a plan that accords preferences to women, racial and ethnic minorities, and lesbians and gay men.<sup>162</sup> The “innocent white men” argument, however, ignores the reality that heterosexual white men have long benefited from both decades of preferential treatment and the exclusion of women and minorities.<sup>163</sup> If heterosexual white men are passed over for a job, they are still more likely to be hired for the next job opening and do not suffer the same psychological harm that would be experienced by members of subordinated groups.<sup>164</sup> Indeed, “to claim that innocent whites are singled out for unfavorable treatment *because* of their race is unwarranted except from the standpoint of a purely abstract perspective that remains completely ahistorical and acontextual.”<sup>165</sup> To claim that heterosexual people would be singled out for unfavorable treatment and would suffer because of their sexual orientation is equally unwarranted. Finally, heterosexual white males, too, have an interest in improving the welfare of society.<sup>166</sup> In this democratic society, we continually make decisions that benefit certain groups over others and we cannot

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161. See, e.g., Kennedy, *supra* note 14, at 1330.

162. See, e.g., ROSENFELD, *supra* note 14, at 304-28; Ellis, *supra* note 91, at 595; UROFSKY, *supra* note 19, at 27-30.

163. See ROSENFELD, *supra* note 14, at 307-08; Ellis, *supra* note 91, at 595.

164. See ROSENFELD, *supra* note 14, at 306-07, 310.

165. *Id.* at 306. “In short, whereas racism and sexism intend to maintain the members of their targeted groups as outcasts or as inferiors, affirmative action seeks to reinstate those previously excluded because of their group affiliations into the mainstream of society.” *Id.* at 306.

166. See Ellis, *supra* note 91, at 595; Wildman, *supra* note 1, at 1662 (arguing that the societal good of inclusion warrants potential costs to the majority).



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ignore our responsibility to make some sacrifices toward greater social justice.<sup>167</sup>

*v. Helping those who need it the least.* A final argument against affirmative action is that it often benefits those within the targeted group who least need help—typically, the middle class—while diverting attention from those who are neediest.<sup>168</sup> Affirmative action for lesbians and gay men, according to this argument, will likely benefit only those who are already more acceptable to majoritarian establishments: white male assimilationists who do not challenge traditionally white male corporate mores, as opposed to women, people of color, and those whose appearances depart from the perceived cultural norm. Because many people believe that gay men are generally affluent, affirmative action based on sexual orientation might also be criticized as benefiting predominantly upper-middle-class professionals. Finally, critics might charge that such a policy would primarily benefit those who would be out at work even without affirmative action.

Though existing affirmative action programs are not designed to solve all of the problems facing all women and minorities, they have generally had a positive impact on the non-corporate sector of the work force and do not preclude programs to help the poor.<sup>169</sup> Affirmative action based on sexual orientation cannot cure all of the problems facing lesbians and gay men. However, an employer's voluntary adoption of such affirmative action does benefit all gay and lesbian people as a powerful symbol that we are a minority group that should be valued. Furthermore, the popular myth of gay affluence ignores not only lesbians but also the reality that gay and lesbian people exist across all lines of socioeconomic class. Finally, not all workers who would come out under an affirmative action plan would have felt safe enough to be out absent such strong assurances of nondiscrimination and acceptance.

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167. Examples of these decisions and sacrifices abound in our tax codes and government spending programs: we give tax credits which encourage investment in targeted industries or geographic areas, childless people pay property taxes which finance public schools, and individuals pay federal taxes which fund medical research on diseases such as AIDS, sickle cell anemia, and breast cancer, which may not afflict them directly.

168. See, e.g., CARTER, *supra* note 125, at 80 (in the context of university admissions); Kennedy, *supra* note 14, at 1333; UROFSKY, *supra* note 19, at 21-23.

169. See, e.g., Book Note, *When Victims Happen to be Black Neoconservatives*, 105 HARV. L. REV. 773, 776 (1992) (reviewing CARTER, *supra* note 125); *Critiques*, *supra* note 158, at 115 (comments of Stephen Steinberg); *id.* at 124 (comments of Jerome Culp); Kennedy, *supra* note 14, at 1333. The AFSC, for example, is a national community service organization committed to respect for all human beings, including gay, lesbian, and bisexual people. AMERICAN FRIENDS SERV. COMM., AFFIRMATIVE ACTION PLAN 1 (1982) [hereinafter AFSC PLAN] (available from Affirmative Action Office of AFSC, 1501 Cherry Street, Philadelphia, Pennsylvania 19102).

### 3. Summary

Lesbians and gay men suffer inequality of opportunity through both overt sexual orientation discrimination and oppressively homophobic and heterosexist workplace environments that pressure gay and lesbian workers to stay in the closet. Ensuring true equality of employment opportunity for lesbians and gay men means creating a workplace free of discrimination and harassment, in which gay and lesbian employees can feel able to come out and be out.

Having openly gay and lesbian employees is the single most important means of achieving a "gay-friendly" workplace. The presence of openly gay and lesbian people and their interaction with heterosexual co-workers is vital to reducing antigay prejudice, overcoming heterosexism, and promoting acceptance in the workplace. If a firm has few or no openly gay or lesbian employees, therefore, the key short-term strategies toward creating a work environment in which gay and lesbian employees can come out are to hire openly gay and lesbian workers and to implement strong employment policies and practices that encourage currently closeted employees to come out at work.<sup>170</sup>

Fostering diversity is entirely consistent with the goal of ensuring equality of opportunity. While the invisibility of lesbians and gay men has enabled unwitting inclusion in most firms, society has successfully coerced lesbians and gay men into helping effect the systematic exclusion of *openly* gay and lesbian workers from the workplace. Goals and timetables for the inclusion of openly gay and lesbian workers make tangible an employer's commitment to diversity and can be instrumental in creating an environment in which all gay and lesbian workers feel valued.<sup>171</sup>

Heterosexual executives and officers who are committed to meaningful equality must go beyond passive statements of nondiscrimination and take an active, vocal stance against the oppression of lesbians and gay men.<sup>172</sup> By affirming the dignity of gay and lesbian employees in a way that invites openness while protecting individuals' privacy rights, employers can help overcome the subordination of a large minority group that has received inadequate legal protection. By fostering diversity, these employers can also achieve

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170. Cf. Johnson, *supra* note 32, at A1 (availability of special benefits, including governmental preferences for minority-owned contractors, has motivated many Native Americans who had previously passed as white to assert their Native American identity).

171. Paula Ettelbrick observes that, for lesbians and gay men, "it is very affirming to have an employer say that it wants gay and lesbian people to be open about who they are." Telephone Interview with Ettelbrick, *supra* note 152 (discussing the National Lawyers Guild's affirmative action plan, which includes lesbians and gay men).

172. See generally Bruce Ryder, *Straight Talk: Male Heterosexual Privilege*, 16 QUEEN'S L.J. 287 (1991) (discussing heterosexual men's participation in ending sexist and heterosexist oppression).

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the benefits of increased workforce productivity and improved recruitment and retention of talented lesbians, gay men, and heterosexuals.

Therefore, private employers who are morally committed to doing justice and fiducially committed to improving their competitive positions should voluntarily adopt an affirmative action policy for gay and lesbian employees. The narrow goals are the hiring and promotion of openly gay and lesbian workers. The broader goals are the reduction of pervasive societal discrimination and the creation of true equality of opportunity. Affirmative action for lesbians and gay men is, in short, the right policy for management to adopt from both a utilitarian and a deontological perspective.

### II. ISSUES UNIQUE TO IMPLEMENTING AFFIRMATIVE ACTION FOR LESBIANS AND GAY MEN

#### A. *General Guidelines for Designing a Voluntary Affirmative Action Plan*

Though a comprehensive explanation of how to create and implement a voluntary affirmative action plan is beyond the scope of this article, it may be useful to highlight some general guidelines for designing voluntary affirmative action plans. Although the following principles have been developed in the context of race-based and gender-based affirmative action programs under Title VII, they provide guidance for creating similar affirmative action programs for lesbians and gay men.<sup>173</sup>

Private employers may voluntarily adopt an affirmative action plan for women or minorities in order to remedy workforce underrepresentation or exclusion that constitutes a "manifest imbalance,"<sup>174</sup> as determined statistically by comparing relevant percentages of the current work force with percentages of qualified workers in the area labor market.<sup>175</sup> Under general principles of federal law, the plan:

- (1) may establish flexible and reasonable goals, not quotas, for qualified workers, thereby not automatically including or excluding any applicant on the basis of a particular characteristic;<sup>176</sup>

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173. For more thorough guidelines for creating an affirmative action plan, see DOUGLAS S. MCDOWELL, *AFFIRMATIVE ACTION AFTER THE JOHNSON DECISION* (1987); Ankeny, *supra* note 90. For a more in-depth analysis of the permissible scope of affirmative action, see generally UROFSKY, *supra* note 19; Note, *supra* note 104; ROSENFELD, *supra* note 14.

174. See *Johnson v. Transportation Agency*, 480 U.S. 616 (1987) (gender-based plan); *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (race-based plan).

175. See *Johnson*, 480 U.S. at 631-32.

176. See *id.* at 635-38, 641; *cf. Regents of the Univ. v. Bakke*, 438 U.S. 265 (1978) (invalidating a fixed racial quota for minority admissions to medical school).

(2) may establish goals for hiring and promotion, but not for layoffs;<sup>177</sup> and

(3) may be a temporary plan designed to attain, rather than maintain, a balanced work force,<sup>178</sup> and should therefore include a timetable for achieving its goals.

To the extent that affirmative action for lesbians and gay men resembles affirmative action for other minorities and women, these guidelines, in conjunction with employers' experience with existing affirmative action plans, can supply the foundation for programs that include lesbians and gay men. Some issues involved in affirmative action for lesbians and gay men, however, will be unfamiliar even to firms that have long been committed to traditional affirmative action.

#### B. *Issues Related to Affirmative Action for Lesbians and Gay Men*

The invisibility of sexual orientation and the low status of gay and lesbian people in our culture raise a series of interrelated issues unique to the design and implementation of affirmative action plans for lesbians and gay men.

##### 1. *Defining "Gay" and "Lesbian"*

Definition of the target group plays a central role in any affirmative action plan. In the context of sexual orientation, the question of how to define the group of individuals to be benefited is unusually complex.

In his landmark works on human sexual behavior, Alfred Kinsey exhorted society to consider that human beings cannot be divided into two discrete groups, heterosexual and homosexual.

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177. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of future employment opportunity is not as intrusive as loss of an existing job.

*Id.* at 282-83 (Powell, J., writing for plurality) (holding impermissible the use of affirmative action in layoffs); see also *United States v. Paradise*, 480 U.S. 149, 182-83 (1987) (finding that a promotion plan is similar to hiring goals, in that it imposes only a diffuse burden); *Johnson*, 480 U.S. at 638 (holding that a promotion plan does not upset legitimate employee expectations because non-minority applicants have no absolute entitlement to job openings or promotions, and workers denied a promotion remain employed and eligible for other promotions).

178. See, e.g., *Johnson*, 480 U.S. at 639-40; *Sheet Metal Workers Local 28 v. EEOC*, 478 U.S. 421, 479 (1986) (quoting *Weber*, 443 U.S. at 216 (Blackmun, J., concurring)).

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The world is not to be divided into sheep and goats. . . . Only the human mind invents categories and tries to force facts into separated pigeon-holes. The living world is a continuum in each and every one of its aspects. The sooner we learn this concerning human sexual behavior the sooner we shall reach a sound understanding of the realities of sex.<sup>179</sup>

Kinsey and others since have also debated whether “homosexual” refers to conduct or to status, that is, whether someone simply “has” lesbian sex or can actually “be” a lesbian.<sup>180</sup>

Beliefs about whether “homosexual” refers to a status or an act—as well as the very meanings and uses of the terms “homosexual,” “heterosexual,” “gay,” and “lesbian”—largely depend upon historical and social context.<sup>181</sup> Indeed, the terms “gay” and “lesbian” have fairly well-acknowledged meanings in contemporary American society: these terms refer to persons who are conscious of their sexual and affectional inclination toward persons of their own gender as a distinguishing characteristic.<sup>182</sup> As a conscious awareness,

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179. KINSEY ET AL., MALES, *supra* note 113, at 639.

Kinsey focused modern debate on the idea that most people are not either heterosexual or homosexual, but rather have sexual histories, comprised of both overt sexual experiences and psychosexual reactions, that can be located along a seven-point scale from “0”—exclusively heterosexual—to “6”—exclusively homosexual. *Id.*; KINSEY ET AL., FEMALES, *supra* note 113. Kinsey’s findings that relatively few people are either exclusively heterosexual or exclusively homosexual throughout their lives challenged popular understandings of sexual orientation.

180. Prior to recent policy changes, the U.S. military chose to resolve this distinction by discharging all openly gay or lesbian individuals regardless of conduct and only those persons actually found engaging in homosexual conduct who did not also deny being gay or lesbian. *See, e.g.*, William B. Rubenstein, *Challenging the Military’s Antilebian and Antigay Policy*, 1 LAW & SEXUALITY 239, 257-59 (1991) (citing Army Reg. 135-175, § VII (Separation for Homosexuality); Transcript of Oral Argument Before the United States Court of Appeals for the Ninth Circuit, Aug. 5, 1988, at 26-32, *Pruitt v. Cheney*, 943 F.2d 989 (9th Cir. 1991) (No. 87-5914), *modified*, 963 F.2d 1160 (9th Cir.), *cert. denied*, 113 S. Ct. 655 (1992)).

181. *See generally* JONATHAN N. KATZ, GAY/LESBIAN ALMANAC 1-19 (1983); HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST (Martin B. Duberman et al. eds., 1989); BOSWELL, *supra* note 144, at 58-59.

In our present-day society, it is unclear who among Kinsey’s non-exclusively heterosexual “1”s through “6”s would qualify as “gay or lesbian” for the purposes of affirmative action. Would only “5”s and “6”s count, those predominantly or exclusively gay or lesbian? What about “3”s, equally heterosexual and homosexual? And why not include “1”s, who may well be perceived as gay or lesbian and subsequently discriminated against due to deviation, however slight, from the presumed heterosexual “norm”?

Other theories do not help resolve the problem of inclusion/exclusion. They variously claim that there is a “lesbian continuum” embracing the widest range of woman-identified experiences, and that what is referred to as “sexual orientation” is really about socially-constructed gender role differentiation or refers to a political ideology. *See* Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 177 (Ann Snitow et al. eds., 1983) (lesbian continuum); Ellen Ross & Rayna Rapp, *Sex and Society: A Research Note from Social History and Anthropology*, in POWERS OF DESIRE, *supra* (social constructs); *see, e.g.*, Urvashi Vaid, *Let’s Put Our Own House In Order*, OUT/LOOK 857, 859 (Fall 1991) (describing the “lesbian agenda” as radical social change, embracing the causes of civil rights, the family, social and economic power, the environment, and an end to sexism, racism, homophobia, and ableism). Finally, many scientists today suggest that sexual orientation is a biologically based or determined characteristic. *See* Burr, *supra* note 117.

182. *See* BOSWELL, *supra* note 144, at 44; Fajer, *supra* note 31, at 533-35.

Use of the terms “gay” and “lesbian” is a relatively recent development. *See generally* D’EMILIO, *supra* note 36 (pointing to World War II, Kinsey, and the appearance of gay bars in the 1940s and 1950s as catalysts for the emergence of a modern gay and lesbian consciousness, sense of identity, and sense of

being "gay" or "lesbian" is a self-assigned identity which obviates the problem of determining who would be included for the purposes of "homosexual" affirmative action.<sup>183</sup>

Thus, affirmative action for lesbians and gay men should be considered affirmative action for lesbians and gay men who self-identify as such to the employer.<sup>184</sup> The law firm of Heller, Ehrman, White & McAuliffe ("Heller, Ehrman"), for example, has a policy referring to "self-identified gay men and lesbians,"<sup>185</sup> and the American Friends Service Committee's ("AFSC") plan refers to "declared gay men, lesbians, and bisexuals."<sup>186</sup> Though not as specific, the National Lawyers Guild's affirmative action plan necessarily implies some degree of self-identification by those who seek to participate in the program.<sup>187</sup>

## 2. Bisexual Employees

The movement for bisexual recognition has grown significantly in the past two decades, as men and women who identify themselves as "bisexuals" have struggled to achieve visibility.<sup>188</sup> The oppression of bisexuals, however, remains pervasive and contributes to their continuing invisibility. In a society

community). See also KATZ, *supra* note 181, at 15 (noting the use of separate terms "gay" and "lesbian" since the mid-1970s "to stress the different social experience of women-loving women and men-loving men").

Yale historian John Boswell distinguishes this usage of "gay" from the term "homosexual," which has several perceived faults. "Homosexual" refers to all same-gender eroticism and genital activity, implies a distorted degree of interest in sex, and is a term "popularized in the context of pathology." BOSWELL, *supra* note 144, at 42-46.

Significant, too, is the fact that "gay" and "lesbian" are the terms that we in this group use to describe ourselves. See Fajer, *supra* note 31, at 530-37 (underscoring the importance of self-denomination for gay and lesbian people); see also Karst, *supra* note 35, at 116 ("A group's escape from subordinate status is accomplished primarily through persuasion . . . [including] the expression through which individual members of subordinated groups work out their own self-definition."). While recognizing recent efforts by some groups of gay people to co-opt the term "queer" to describe themselves, I continue to use "lesbian" and "gay" as the terms more widely accepted within our community. See Fajer, *supra* note 31, at 534 n.111.

183. BOSWELL, *supra* note 144, at 43-44.

The concept of self-assigned gay or lesbian identity is reconcilable with Kinsey's research. Self-identified lesbians and gay men may simply be those close enough to the "homosexual" end of Kinsey's scale to identify themselves—either privately or publicly—as "lesbian" or "gay." *Id.* at 44 n.8. Boswell does acknowledge Kinsey's concern that people tend to classify according to imperfect reductionist dichotomies such as "heterosexual" or "homosexual." He suggests, however, that even acceptance of a "spectrum-model" of sexual orientation does not threaten the concept of "gay and lesbian people": "That many persons cannot be classified as either strictly blond or strictly brunet does not demonstrate that 'blonds' and 'brunets' do not exist." *Id.*

184. See *infra* text accompanying notes 195-203.

185. See HELLER, EHRMAN, WHITE & MCAULIFFE, AN INTRODUCTION TO OUR FIRM FOR NEW ASSOCIATES AND SUMMER ASSOCIATES 16 (1991-92) [hereinafter HELLER, EHRMAN INTRODUCTION].

186. See Telephone Interview with Haggans, *supra* note 85.

187. See Telephone Interview with Ettelbrick, *supra* note 152.

188. See generally BI ANY OTHER NAME: BISEXUAL PEOPLE SPEAK OUT (Loraine Hutchins & Lani Kaahumanu eds., 1991).

## Affirmative Action for Lesbians and Gay Men

plagued by heterosexism and homophobia, bisexual persons often are perceived to be lesbians and gay men. Within a gay and lesbian community occasionally marked by "heterophobia," bisexuals sometimes are perceived as allied with heterosexual oppressors.<sup>189</sup> Both heterosexuals and gay and lesbian people can feel threatened by bisexuals' challenge to the heterosexual/homosexual dichotomy, and therefore may tend to deny that bisexuality is a legitimate sexual orientation or to direct hostility toward bisexuals.

Bisexual persons have suffered oppression and invisibility such that the justifications articulated for affirmative action for lesbians and gay men warrant inclusion of bisexual persons in the beneficiary group.<sup>190</sup> In particular, bisexual women and men face the same widespread societal and employment discrimination faced by lesbians and gay men.<sup>191</sup> At the risk of appearing to deny the existence of bisexuality, this article has included bisexual persons in the phrase "lesbians and gay men" when discussing discrimination, prejudice, heterosexism, and affirmative action based on sexual orientation. For the sake of convenience alone, the phrase "lesbians and gay men" will continue to be used herein and is intended to be inclusive of bisexuals.

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189. See, e.g., Ara Wilson, *Just Add Water: Searching for the Bisexual Politic*, OUT/LOOK 22 (Spring 1992); Carol A. Queen, *Strangers At Home: Bisexuals in the Queer Movement*, OUT/LOOK 23, 31 (Spring 1992) ("Some gays and lesbians wonder at many bisexuals' angry emphasis on biphobia in the gay community: Don't we know who our real enemies are? The answer is yes, and the dismal truth is that we expect homophobia. . . . Bisexual anger has a simple genesis: We expected more of others who have faced homophobia.").

190. Kinsey's studies, however, indicate that bisexuals are less a statistical minority than lesbians and gay men because many people are bisexual to some degree. See, e.g., KINSEY ET AL., MALES, *supra* note 113, at 656 ("nearly half (46%) of the male population engages in both heterosexual and homosexual activities, or reacts to persons of both sexes, in the course of their adult lives"); KINSEY ET AL., FEMALES, *supra* note 113, at 472-74 (approximately 15% of the adult female population rated 1 to 5 on the Kinsey scale); see also SAMUEL S. JANUS & CYNTHIA L. JANUS, *THE JANUS REPORT ON SEXUAL BEHAVIOR* 69 (1993) (22% of men and 17% of women had had same-gender sexual experiences). Even if these findings are accurate, the extensiveness of bisexual oppression is reflected by the fact that so few bisexuals are willing to self-identify, to heterosexuals, lesbians, or gay men. This indicates that bisexual invisibility and silence is comparable to, or greater than, gay and lesbian invisibility. Moreover, affirmative action is not entirely dependent on being a statistical minority: women are a non-minority group whose subordination often justifies affirmative action.

The AFSC's voluntary affirmative action program expressly includes bisexual individuals within the defined target group. See AFSC PLAN, *supra* note 169, at 5, 6. Heller, Ehrman, on the other hand, offers an example of bisexual invisibility among even those sensitive to gay and lesbian issues: the issue of whether to affirm "self-identified bisexuals" as distinct from lesbians and gay men was never considered by or presented to the firm. Telephone Interview with Faber, *supra* note 108; Telephone Interview with DeNatale, *supra* note 9.

191. Some non-bisexuals may argue that bisexuals can either easily assimilate within the majority and benefit from "heterosexual privilege" or justifiably identify with the gay and lesbian community for purposes that include benefitting from affirmative action. While many bisexuals do identify as "gay" or "lesbian," passing as something other than what they are is as painful for bisexuals as it is for lesbians and gay men. See, e.g., Sharon F. Sumpter, *Myths/realities of bisexuality*, in *BI ANY OTHER NAME: BISEXUAL PEOPLE SPEAK OUT*, *supra* note 188, at 12, 13.

### 3. *Privacy Concerns*

a. *Identifying Gay and Lesbian Employees.* One of the most common arguments against affirmative action for lesbians and gay men is that such a program would necessitate an improper and infeasible invasion of individuals' privacy rights.<sup>192</sup> This concern, however, assumes a model of affirmative action in which the employer somehow seeks to determine an applicant's or employee's sexual orientation. At its most benign, the firm would ask the individual about his or her sexual orientation. At its most totalitarian, the firm would investigate the individual's public and private life, although it is unclear how the employer would interpret or use whatever data it received. In another context, for example, as little as one sixty-fourth or even one two-thousandth Native American ancestry can satisfy tribal membership requirements.<sup>193</sup> What degree of discovered homosexual experience or homoerotic psychosexual response might constitute being gay or lesbian?

This comparison is not meant to denigrate the importance of blood heritage to Native Americans, but rather to highlight the absurdity of employer inquiry into individuals' sexual orientations. Employers administering an affirmative action plan should no more ask applicants their sexual orientation than they would ask their race or ethnicity. Such an inquiry would violate standards of privacy and any laws prohibiting discrimination on the basis of sexual orientation.<sup>194</sup> Self-identification offers the only feasible means of implementing an affirmative action plan for lesbians and gay men.

The invisibility of sexual orientation and respect for individual privacy require that affirmative action for lesbians and gay men be, more precisely, affirmative action for *openly* (or *self-identified*) gay and lesbian people.<sup>195</sup> Far from outing people or inquiring as to applicants' and employees' sexual orientations, affirmative action provides an incentive to self-identify as it affirms the minority status of lesbians and gay men. Affirmative action func-

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192. See *supra* text accompanying notes 140-45.

193. See Johnson, *supra* note 32, at A1. For a thorough discussion of racial categories and classification schemes, see Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 23-36 (1991); see also Chris Ballentine, Note, "Who is a Negro?" Revisited: *Determining Individual Racial Status for Purposes of Affirmative Action*, 35 U. FLA. L. REV. 683 (1983).

194. Where "sexual orientation" is a characteristic protected by antidiscrimination law, inquiries into an applicant's sexual orientation is prohibited to the same extent as inquiries into an applicant's race, ethnicity, religion, national origin, age, or marital status. In a conversation regarding the National Lawyers Guild's affirmative action policy, Paula Eitelbrick explained that affirmative action does not mean that an employer can ask about applicants' sexual orientations during interviews, "but it means that I can mention that I'm a lesbian and it will help, or at least not hurt me, with that employer." Telephone Interview with Eitelbrick, *supra* note 152.

195. Affirmative action for self-identified lesbians and gay men also has the consequence of most directly affirming openly gay and lesbian people, who have been most vigorously discriminated against in employment and other areas. Historically, individuals who have dared to speak of their homosexuality have been subject to society's most vitriolic condemnation. Affirmative action helps redress this injustice by encouraging lesbians and gay men to come out publicly.



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tions this same way when benefiting racial and ethnic minorities and persons with disabilities.<sup>196</sup>

Employers, therefore, must create opportunities for applicants and employees to come out and participate voluntarily in affirmative action programs. The AFSC, for example, provides applicants with literature detailing its commitment to equality of opportunity and affirmative action, and invites members of the targeted groups to self-identify on the application's affirmative action supplement form if they wish to be considered for participation in the program.<sup>197</sup> The individual decides whether to self-identify at the time of application, prior to the interview stage.<sup>198</sup> Heller, Ehrman provides applicants with information about the firm's legal practice areas and employment policies prior to interviews. Though recruits are never asked about their sexual orientation, they are asked whether they would like to interview with self-identified gay or lesbian attorneys or with other attorneys who are members of particular minority groups.<sup>199</sup> Most of the individuals who self-identify to the firm do so at the interview stage.<sup>200</sup> Some, however, self-identify only after working at the firm for a period of time, having grown comfortable enough to come out.<sup>201</sup> Employers, therefore, can protect employees' privacy while successfully administering affirmative action by clearly communicating information regarding the existence and operation of the affirmative action plan, and providing an opportunity to self-identify.

Some critics may be concerned that "self-identification" presents an opportunity for dishonest workers to claim fraudulently a gay or lesbian identity in order to benefit from affirmative action based on sexual orientation.<sup>202</sup> Ongoing societal discrimination and the stigma attached to being gay or lesbian, however, provide significant deterrence for dishonest heterosexual workers. Even if the fear of fraud cannot fully be mitigated, self-identification remains the most valid—and the only practicable—means of identifying lesbians and gay men for the purposes of affirmative action. Verification of gay or lesbian self-identification would be an obvious invasion of privacy. Self-

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196. Even when individuals appear to be members of an affirmative action target group, such as Latinos, Native Americans, Asian Americans, African Americans, or persons with disabilities, an employer should neither presume minority status based on appearance nor inquire into possible minority identification. Rather, the employer should allow individuals to self-identify as members of a target group after being informed of the firm's policy.

197. Telephone Interview with Haggans, *supra* note 85.

198. *Id.*

199. Telephone Interview with Faber, *supra* note 108. Because many non-minority applicants are concerned about a firm's diversity and treatment of minority employees, this question is neither presumptuous nor intrusive.

200. *Id.*

201. *Id.*

202. Inclusion of bisexuals within the affirmative action target group may exacerbate this potential problem by enabling deceitful heterosexual individuals to claim a bisexual identity and still date and marry opposite-gendered people.

identification appropriately incorporates a self-conscious identification with the targeted subordinated group in a way that an abstracted Kinsey rating does not.<sup>203</sup>

b. *Maintaining Affirmative Action Records.* Maintenance of affirmative action records raises a second type of privacy concern. How are the self-identified gay and lesbian employees' names recorded, and are they listed in affirmative action reports? Employers should record information regarding openly gay and lesbian workers in the same way they record data regarding other targeted groups. At a minimum, voluntary self-identification ought to imply that the firm's human resources department or affirmative action officer be permitted to record the names of employees participating in the program.

For reporting purposes, however, both Heller, Ehrman and the American Friends Service Committee publish only aggregate numbers for each target group, not individual names.<sup>204</sup> The hiring partner at Heller, Ehrman noted that there is no general need for others to know which attorneys are gay or lesbian, since any questions or concerns are directed to the firm's "minority concerns committee."<sup>205</sup>

But if one of the intermediate goals of affirmative action for openly gay and lesbian people is increased workplace interaction between heterosexual workers and those known to be openly gay or lesbian, why should the employer not distribute the names of the openly gay and lesbian employees in affirmative action progress reports or announce the arrival of "our new openly lesbian employee"? What does "openly gay" and "openly lesbian" mean if not that the person's sexual orientation is known at work? These questions surrounding affirmative action record-keeping closely relate to another issue concerning affirmative action for lesbians and gay men: the meaning and practical implications of being an "openly" or "self-identified" gay or lesbian person at work.

#### 4. *The Meaning and Practical Implications of "Openly" or "Self-identified"*

An openly gay or lesbian employee initially waives certain privacy rights when he or she steps out of a closet that is oppressive yet often functional as protection against overt discrimination. But to what extent is information regarding this person's sexual orientation thereafter subject to distribution either within the workplace or without?

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203. For example, a Kinsey "4" or "5"—or conceivably even a "6"—may not necessarily identify himself or herself in his or her own mind as "gay" or "lesbian," let alone identify as such publicly.

204. Telephone Interview with Faber, *supra* note 108; Telephone Interview with Haggans, *supra* note 85.

205. Telephone Interview with Faber, *supra* note 108.

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The employer's goal of creating a consciously diverse and tolerant work force requires that the employer be permitted to communicate the presence of its openly gay and lesbian employees to their co-workers, while simultaneously attempting to insure against a homophobic backlash. For affirmative action to be anything more than a modest "reward" for being an "out" lesbian or gay man, an employer must be allowed to indicate the presence of its openly gay and lesbian workers in a way that makes them equivalent to visually identifiable minorities who also benefit from affirmative action. The voluntarily self-identified gay and lesbian employees should neither be presumed to represent any particular political viewpoint nor required to participate in recruitment activities, but should simply be identified as gay or lesbian within the firm.

Others undoubtedly hold a contrary view, based on the belief that lesbians and gay men who voluntarily self-identify for the purposes of affirmative action should not be perceived as having waived absolutely their privacy. These critics would argue that just as some members of racial and ethnic minorities are allowed to disclose their unapparent minority status gradually to co-workers, and just as some heterosexual workers might not immediately disclose their sexual orientation, openly gay and lesbian workers should have the right to disclose their sexual orientation to co-workers and others over time.<sup>206</sup> In this view, according preference does not give employers the right or responsibility to inform co-workers or the larger community of workers' sexual orientations.<sup>207</sup> Even those who hold this contrary view, however, can likely imagine that some openly gay or lesbian employees might want the employer to tell everyone at the firm about their sexual orientation prior to or at the time of their arrival at the firm, so that they need not face heterosexist assumptions or the awkwardness of coming out.<sup>208</sup> Those who hold the con-

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206. Implicit in this contrary view, however, is the idea that as self-identified lesbians and gay men come out to co-workers, they will do so openly and not swear their co-workers to secrecy. This further implies that openly gay and lesbian employees will become visible as their sexual orientations eventually become known throughout the workplace.

207. This is evidenced by the refusal of both Heller, Ehrman's hiring partner and AFSC's affirmative action secretary to provide me with the name of one of their self-identified gay or lesbian employees. Telephone Interview with Faber, *supra* note 108; Telephone Interview with Haggans, *supra* note 85.

208. An employer can inform the work force that a new worker is gay, for example, by announcing his gay and lesbian community activities, the name of a domestic partner, or simply the fact that he is an openly gay new employee.

Lesbians and gay men who are less than completely out at work often suffer through brief experiences of heterosexism and homophobia that can arise unexpectedly: not just the obvious "fag" or "dyke" joke, but the male co-worker who makes a sexual remark about a woman to a presumed-heterosexual gay male employee, or the supervisor who assumes that a female employee's guest at an informal social function is her friend or sister. These awkward and anxious moments can pass as suddenly as they arise, leaving the lesbian or gay man disoriented, tense, and wishing that she or he had responded with the clever, self-identifying, heterosexism-challenging reply that will usually not be thought of until many hours later. Coming out to the entire workplace through an announcement, memo, or newsletter is an easy and effective way to avoid such experiences.

trary view simply emphasize that employers should not assume the authority to facilitate the flow of information absent individual employees' consent.

I agree that employers should not presume authority to disclose any worker's sexual orientation. Nevertheless, given that one of the narrow goals of affirmative action based on sexual orientation is to promote gay and lesbian visibility, I propose that employers implementing such a program should clearly communicate to prospective participants that part of the affirmative action plan involves managerial disclosure of the participants' identities. Management would identify gay and lesbian employees included in the affirmative action program in intra-firm announcements, progress reports, or newsletters, but individual gay and lesbian workers retain the right to decide whether to self-identify for the plan. Admittedly, this voluntary plan could undermine the goals of affirmative action by discouraging participation. Some may disagree with this proposal on the ground that it does not help lesbians and gay men feel empowered and safe to come out, but rather invites submission to a type of institutionalized outing. However, there are several benefits to having employer and employee voluntarily agree that the firm will indicate that the new employee is openly gay or lesbian. First, the affirmative action participant will be absolutely committed to being out at work. Second, she or he will be out to co-workers from the very first day. Finally, the employer can implement this policy without fear of violating workers' privacy due to the ambiguity of a worker's process of coming out, or degree of being out, at work.

Employers should not, however, presume that gay and lesbian workers who are out at work are also out everywhere else.<sup>209</sup> While being out at work may affect being closeted in other aspects of life, and while as a practical matter it may be impossible for employers to have much control over the extended flow of information disclosed in the workplace,<sup>210</sup> employers implementing this affirmative action proposal should be sensitive to this issue. Perhaps the best solution is to provide two options to self-identifying gay and lesbian participants in the program: the employer will consider them out and identifiable only within the workplace; or out and identifiable within society in general. This option preserves somewhat the gay and lesbian workers' ability to differentiate, if desired, the degree to which they are out in various spheres of their lives.

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209. At the AFSC, for example, "[a] declared lesbian or gay person is an individual who is willing to identify herself or himself publicly *within the AFSC* as lesbian or gay." AFSC PLAN, *supra* note 169, at 6 (second emphasis added); *see also* Telephone Interview with Haggans, *supra* note 85 (describing the AFSC's recognition of and respect for the fact that their openly gay and lesbian employees may not be out in every aspect of their lives).

210. Because most gay and lesbian people willing to be out at work will already be out in the non-work spheres of their lives, the distinction between the workplace and other aspects of life may be less troubling in practice than it is in theory.

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Finally, voluntary self-identification, whether at work or in the broader community, should not be presumed a proxy for “political liberalness” or any other viewpoint beyond a reasonably inferable, self-consciously held connection to the gay and lesbian community.

### 5. Determining Appropriate Goals and Timetables

An affirmative action plan designed to eliminate workforce underrepresentation of openly gay and lesbian people ultimately raises the issues of determining what hiring goals will accurately reflect the proportion of qualified lesbians and gay men in a particular labor force, and how much time will reasonably be needed to attain those goals.

Approximately ten percent of the population is believed to be gay or lesbian.<sup>211</sup> Given that lesbians and gay men exist across racial, class, geographic, and occupational lines, it is reasonable to assume that approximately ten percent of the labor force qualified for any particular job is gay or lesbian.<sup>212</sup>

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211. See KINSEY ET AL., MALES, *supra* note 113, at 650 (approximately 13% of the adult male population is primarily or exclusively homosexual for at least a three-year period of their lives; 37% of the male population has at least some overt same-gender experience to the point of orgasm); KINSEY ET AL., FEMALES, *supra* note 113, at 473-75 (between 3% and 8% of the adult female population is primarily or exclusively lesbian from the ages of twenty to thirty-five; 13% of the female population has at least some overt same-gender experience to the point of orgasm). Taken as a whole, Kinsey's statistics lead to the conservative conclusion that “at least 10% of the populace has demonstrated its homosexual proclivities so extensively that that proportion may reasonably be called ‘gay.’” KIRK & MADSEN, *supra* note 28, at 15 (emphasis omitted).

“When the *Los Angeles Times* conducted a national poll by telephone in December 1985, fully 10% of those who answered the question described themselves as ‘gay’; one can only imagine how many more actually saw themselves as gay but declined to admit this to a complete stranger, under suspicious circumstances, on the telephone.” *Id.* (describing results from poll reported at *American View of Gays: Disapproval, Sympathy*, L.A. TIMES, Dec. 20, 1985).

Some have criticized the estimate of 10%, however, as an overestimate. See, e.g., JANUS & JANUS, *supra* note 190, at 69-71 (finding that 9% of men and 5% of women in the United States may be considered homosexual on the basis of having frequent or ongoing homosexual experiences). When the authors of *The Janus Report* asked respondents to self-identify their sexual orientation, however, 9% of all men and 9% of women working outside of the home identified themselves as either homosexual or bisexual. *Id.* at 70-71. These recent findings, therefore, suggest that 10% is a fair estimate for the purpose of approximating gay, lesbian, and bisexual representation in the labor force.

212. The percentage of lesbians and gay men in the relevant labor force may be greater where the local gay and lesbian community is known to exceed 10% of the population. The gay and lesbian population of San Francisco, for example, “is believed to be approximately 20%.” BASF GUIDE, *supra* note 4, at 2 n.5.

It is unclear what effect, if any, inclusion of bisexual persons would have on the affirmative action goals. Perhaps the target proportion would need to be increased to reflect the increased diversity. More likely, however, people now identifying themselves as “bisexual” were sufficiently identified by past researchers as gay or lesbian so as to warrant inclusion in the stated 10% goal for “lesbians and gay men.” Cf. JANUS & JANUS, *supra* note 190, at 70-71 (finding that 9% of women working outside the home and 9% of men were self-identified gay, lesbian, or bisexual people). The following discussion assumes that bisexual people are included in any stated goal for lesbians and gay men.

Determining goals for the hiring and promotion of lesbians and gay men, and timetables for achieving those goals, may present the most difficult issues involved in implementing affirmative action based on sexual orientation. Ten percent may be an accurate measure of the gay and lesbian population within society, but some may argue that the relevant community for workforce composition comparison is openly gay and lesbian people, since the affirmative action plan will only involve these workers. Establishing goals based on the relatively small number of openly gay and lesbian workers already present in the labor force, however, would seem only to validate the status quo of oppression and obfuscate affirmative action's central purpose of helping gay and lesbian people escape our subordinated status through *increased* visibility and opportunity.

Affirmative action goals should be "significant, attainable, and flexible."<sup>213</sup> Although the ideal workforce representation of gay and lesbian people would approach ten percent, an employer should talk to local gay and lesbian organizations and to any openly gay or lesbian employees in order to develop reasonable goals tailored to its particular geographic and workplace situation.<sup>214</sup> Absent helpful input from local sources, I propose a goal of five percent for openly gay and lesbian employees within five years. This target is both significant and more readily attainable than the ideal ten percent, and reflects the reality that many lesbians and gay men remain closeted for reasons that will not be changed by workplace policies. Whatever the specific goal, it should be used flexibly: as an unmet target, a goal that can be adjusted upward in response to early success, or an existing threshold for workforce diversity.

Another important consideration is whether to establish separate goals for each target group or aggregate goals. At the AFSC, "declared lesbians, gay men, and bisexuals" comprise a separate affirmative action target group.<sup>215</sup> Conversely, the law firm of Heller, Ehrman includes self-identified gay and lesbian attorneys within the definition of "minorities" for whom there are overall hiring and advancement goals.<sup>216</sup> Though the firm does not have goals specific to any particular minority group, it increased the aggregate goals by

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213. Ankeny, *supra* note 90, at 1203.

214. A goal of 5%, for example, may be unrealistically high in some communities, but too low in others.

215. See AFSC PLAN, *supra* note 169, at 6, 8. The five-year goals originally established by the AFSC in 1978 sought a minimum of one openly gay or lesbian person in each of the ten regional offices, five in the national office, and two on each of the more than sixteen committees nationally, separate from the goals established for women, people of color, and persons with disabilities. See *id.*; D'au Vin, *supra* note 140, at C18. The timetables were eventually extended, and as of 1992, the national office and some regional offices had reached their goals, and some offices had raised their goals to reflect more accurately their local "demographics." Telephone Interview with Haggans, *supra* note 85.

216. See HELLER, EHRMAN INTRODUCTION, *supra* note 185, at 16; Telephone Interview with Faber, *supra* note 108.

## Affirmative Action for Lesbians and Gay Men

five percent for associate attorneys and two percent for partners when it expanded the plan to include lesbians and gay men.<sup>217</sup> These percentage increases were not intended to reflect implicit goals for gay and lesbian attorneys, but, rather, were added to avoid “diminishing [the firm’s] objective of insuring adequate representation of racial and ethnic minorities as associates and partners in the firm.”<sup>218</sup> The number of openly gay and lesbian associates since expanding the plan, however, has grown to more than five percent of the firm’s associates—in effect, making it easier for the firm to reach its overall minority goals despite having increased those goals to account for the inclusion of lesbians and gay men.<sup>219</sup>

Heller, Ehrman’s experience illustrates the risk that establishing aggregate goals for all minorities may lead to reaching those goals with disproportionate representation of a particular group.<sup>220</sup> Such a result hinders equality of opportunity for members of all included groups. Despite greater administrative burdens created by requiring employers to determine and monitor separate goals for each group, establishing separate goals would help employers avoid this undesirable result. For this reason, and because some within racial and

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217. The Bar Association of San Francisco has adopted a resolution urging legal employers to adopt the following minimum goals with respect to minorities, defined to include African Americans, Asians/Pacific Islanders, Hispanics/Latinos, and Native Americans: 15% of associates and 5% of partners by 1995, and 25% of associates and 10% of partners by the year 2000. When Heller, Ehrman voluntarily adopted these goals and decided to include lesbians and gay men within the plan, it increased its minimum goals to: 20% of associates and 7% of partners by 1995, and 30% of associates and 12% of partners by the year 2000. *See* Telephone Interview with Faber, *supra* note 108; HELLER, EHRMAN INTRODUCTION, *supra* note 185, at 16.

San Francisco-based Heller, Ehrman’s other California offices—in Los Angeles and Palo Alto—have also adopted these minority hiring and advancement goals, including lesbians and gay men within the definition of “minorities.” The firm’s Seattle office is presently developing different goals to reflect its reportedly different population. Telephone Interview with Faber, *supra* note 108.

218. HELLER, EHRMAN INTRODUCTION, *supra* note 185, at 16.

219. Telephone Interview with Faber, *supra* note 108. Progress toward the firm’s partnership goal, however, has not been disproportionately due to gay and lesbian advancement. Telephone Interview with DeNatale, *supra* note 9.

It is interesting to note that if Heller, Ehrman had established a separate, flexible goal of 5% for gay and lesbian associates, that goal would have already been attained. The firm could have then increased this goal, and would already be more than halfway toward achieving an ideal goal of 10% for lesbian and gay associates.

220. Heller, Ehrman is concerned about this imbalance and does not want to reach its goals disproportionately with any one target group. The firm is reexamining the issue of proportionate representation and will be working harder to recruit and retain racial and ethnic minorities. Telephone Interview with Faber, *supra* note 108; Telephone Interview with DeNatale, *supra* note 9. In the meantime, however, partners at the firm do not view their associate goals as a “pie of limited size, to fight over,” and readily admit that they would like to surpass the minimum goals toward a more diverse workplace, albeit proportionately. Telephone Interview with DeNatale, *supra* note 9; Telephone Interview with Faber, *supra* note 108. In order to continue to foster diversity and ensure equality of opportunity for other minorities given the successful recruitment and retention of openly gay and lesbian attorneys, however, the firm will likely increase further the overall goals for minority associates. Telephone Interview with Faber, *supra* note 108. As of April 1992, the disproportionate number of gay and lesbian associates had not resulted in any plans to drop lesbians and gay men from the affirmative action program. *Id.*

ethnic minority communities already perceive lesbians and gay men as potentially competing for already scarce affirmative action benefits, I propose that employers create separate affirmative action goals for each target group.

#### 6. *Affirming Individuals with Multiple Minority Identifications*

Employers face a distinct issue when recruiting and accounting for employees who belong to more than one affirmative action target group.<sup>221</sup> An African American openly gay man, for example, would identify with two targeted groups in some affirmative action plans. To the extent that members of each of these minority groups are accorded some preference in the hiring process, fairness requires that this applicant receive more of a preference than a similarly qualified white gay man.<sup>222</sup> Likewise, because an Asian American lesbian is a woman, a member of a racial minority, and a member of the gay and lesbian community, it is just that her multiple identifications be considered as “three factors” in the hiring decision of an employer who favorably considers as “one factor” an applicant’s femaleness or minority race or minority sexual identity. Affirming this individual as a member of each of these groups conforms with the justifications for affirmative action, as she has likely suffered inequality of opportunity due to societal sexism, racism, and homophobia and heterosexism. Moreover, she may substantially enhance a firm’s workforce diversity.

For the purpose of measuring progress toward affirmative action goals, whether the Asian American lesbian is counted once or three times will depend on whether there are separate or aggregate goals for women, Asian Americans, and lesbians and gay men. Under the recommended “separate goal” plan, such as the AFSC’s, she would be reported in all three targeted groups of which she is a member.<sup>223</sup> Under an “aggregate goal” plan such as Heller, Ehrman’s, on the other hand, she would be listed as a member of all three groups, but would only be counted as one person for the purpose of overall minority target assessment.<sup>224</sup>

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221. This issue has already been considered by many employers, as it is obviously not unique to affirmative action plans that include lesbians and gay men.

222. A firm’s progress toward its various hiring goals may also affect employment decisions. The calculus of “preference” may be more complicated, for example, if the similarly qualified applicants are a Latina lesbian and a Native American heterosexual man where the employer is much further from its goal for Native Americans than from its goals for Latinos, gay and lesbian people, and women, combined.

223. See Telephone Interview with Haggans, *supra* note 85.

224. See Telephone Interview with Faber, *supra* note 108. Note that this hypothetical example assumes that women are included in Heller, Ehrman’s affirmative action policy, whereas, in reality, they are not.



## Affirmative Action for Lesbians and Gay Men

### 7. Risks of Antigay Antipathy and Violence

As affirmative action certainly has not rid our society of racism and sexism,<sup>225</sup> affirmative action for lesbians and gay men obviously will not single-handedly defeat antigay prejudice and heterosexism or ensure perfect equality of opportunity. Indeed, some will regard affirmative action plans that include gay and lesbian people as unwelcome and unfair.

Homophobia and widespread hostility to the idea of lesbians and gay men being treated as heterosexuals' equals—let alone being accorded “special rights”—strongly suggest that voluntary affirmative action will be threatening to some heterosexuals. Verbal expressions of antigay prejudice will likely increase in frequency and severity in response to increased gay and lesbian visibility. Antigay animosity in the workplace may initially be exacerbated by adoption of hiring goals for lesbians and gay men. Co-workers and clients may react negatively to a firm's adoption of affirmative action based on sexual orientation, though outward expression of such reaction may be subtle.<sup>226</sup> Management can reduce the risk of antigay backlash by expressly communicating to all employees its nondiscrimination and antiharassment policies, by intervening and firmly enforcing these policies when problems arise, and by conducting diversity workshops that facilitate increased mutual understanding and respect.

Though the likelihood of violent responses attributable to affirmative action is uncertain, the connection between increased visibility and antigay bias and violence is clear. According to Kevin Berrill, Director of the Anti-Violence Project of the National Gay and Lesbian Task Force, “[g]reater visibility and activism have opened doors to understanding and acceptance. However, our

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225. Reports of the “glass ceiling” indicate that affirmative action has not even ensured equality of employment opportunity for women and racial and ethnic minorities. See *supra* text accompanying notes 43-45.

226. At Heller, Ehrman, for example, some co-workers publicly opposed inclusion of lesbians and gay men in the hiring and advancement goals primarily due to concerns about the potentially detrimental effect on hiring other minorities included in the aggregate goals. Some probably still question its wisdom or are simply homophobic. See Telephone Interview with Faber, *supra* note 108; Telephone Interview with DeNatale, *supra* note 9. Any client-related backlash due to the program, however, has either been subtle or nonexistent. Telephone Interview with Faber, *supra* note 108 (though he imagines some clients have reacted negatively, Heller, Ehrman's hiring partner does not know of any such reaction).

Intraorganization critics of the AFSC's affirmative action plan for lesbians and gay men have also voiced their opposition, but the organization's Board of Directors has been firmly committed to the plan since its adoption in 1978. Telephone Interview with Haggans, *supra* note 85.

The community at large will predictably exhibit a variety of reactions to affirmative action for lesbians and gay men. Cf. Hammonds, *supra* note 25, at 80 (citing the hostile reaction of religious fundamentalist groups to Digital Equipment's 1987 inclusion of sexual orientation in its antidiscrimination policy, and the thousands of critical letters received by AT&T after sponsoring an internal “Gay Awareness Week”; but after announcing inclusion of domestic partners in gay and lesbian employees' benefits, Lotus received 300 letters of which 80% were positive, and some “even promised to buy more Lotus software”).

increasingly open and unapologetic existence has triggered hostility and made us a more identifiable target for potential assailants."<sup>227</sup>

The steady increase in antigay violence,<sup>228</sup> or "gay bashing," undoubtedly relates to growing efforts by lesbians and gay men to escape our subordination through visibility and expression.<sup>229</sup> Though the struggle for emancipation may initially result in increased antigay violence and bigotry,<sup>230</sup> increased visibility will ultimately help stop this violence and should not be deterred by threats "'intended to drive us back to the invisibility and isolation of the closet.'"<sup>231</sup>

### 8. "Reverse Discrimination": Possible Legal Challenges

Finally, some disgruntled heterosexual workers not hired or promoted by a firm that has affirmative action based on sexual orientation may turn to the courts to express their opposition, challenging the legality of voluntary affirmative action for lesbians and gay men. Because Title VII does not speak to discrimination on the basis of sexual orientation, however, such a "reverse

227. Nadine Brozan, *Rise in Anti-Gay Crimes is Reported in New York*, N.Y. TIMES, Mar. 7, 1991, at B3 (quoting Kevin Berrill).

228. See, e.g., *id.* at B3; Goleman, *supra* note 30, at C11; NATIONAL GAY & LESBIAN TASK FORCE POLICY INST., ANTI-GAY VIOLENCE, VICTIMIZATION AND DEFAMATION IN 1992 (1993); *Gays Under Fire*, *supra* note 27, at 36 ("[A]nti-gay harassment and violence increased 31 percent last year in five major U.S. cities (New York, San Francisco, Chicago, Boston and Minneapolis-St. Paul). . . . But [gay and lesbian advocates] also say that the escalating numbers don't describe the qualitative change in the violence. Drive-by slurs and egg-tossings have given way with more frequency to nail-studded baseball bats and switchblades. 'You've got people who get picked up outside of a bar and tied up with duct tape and are beaten. They are sliced with razors . . . .'").

229. See Karst, *supra* note 35, at 115.

Today, too, the freedom of expression is closely linked with group status. There is no surprise when a subordinated group's claim to equal citizenship stirs passions within the group and among those who are culturally dominant. Such a claim challenges deeply rooted assumptions about proper roles, and thus touches everyone's sense of self.

*Id.*

230. "In the years to come, I think that lesbian and gay people will experience both increased acceptance and increased violence." Goleman, *supra* note 30, at C11 (quoting Kevin Berrill).

231. *Id.* (quoting Kevin Berrill).

This general hope that increased visibility will promote tolerance, however, may underestimate the severity of the current potential backlash against sexual orientation-based affirmative action. Antigay violence has erupted in the wake of political battles in Oregon and Colorado, for example, and antigay violence has been committed by members of the military both before and after President Clinton's announced intention to lift the military's ban on openly gay and lesbian service personnel. See, e.g., Gallagher, *supra* note 110, at 40 (bias-crime complaints made to the Gay and Lesbian Community Center of Colorado increased 275% after passage of Amendment 2); James Sterngold, *Navy Plans Murder Charge in Death of Gay Sailor*, N.Y. TIMES, Feb. 4, 1993, at A16 (gay sailor who had come out to his commanding officer was battered to death by shipmates in a public restroom in October 1992); *3 Marines Accused in Gay-Bar Attack*, N.Y. TIMES, Feb. 2, 1993, at A15 (three marines beat a gay man while shouting "Clinton must pay"). The efficacy of affirmative action for lesbians and gay men at this time in our society may need to be reevaluated if our efforts to secure equality continue to be both perceived as "seeking special rights" and met with escalating violence.

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discrimination” claim could only be brought under state or local law in those jurisdictions that prohibit discrimination in private employment on the basis of sexual orientation.<sup>232</sup> Current Title VII doctrine provides guidance for state courts interpreting similar state law.

Voluntary affirmative action goals and timetables in private employment have been held permissible under Title VII to remedy statistical disparities due to past societal discrimination, regardless of the individual employer’s potential liability for discrimination.<sup>233</sup> Little evidence of societal discrimination is required as long as the plan is temporary, constitutes a flexible, gradual approach to include qualified members of underrepresented groups “consistent with Title VII’s purpose of eliminating the effects of employment discrimination,”<sup>234</sup> and thereby does not “unnecessarily trammel the interests of [non-minority workers].”<sup>235</sup> Broadly interpreted, the Supreme Court’s affirmative action decisions “permit employers who have not discriminated, but who desire to do social justice or to benefit from a racially and sexually diverse work force, to achieve their goals through voluntary affirmative action.”<sup>236</sup> Under this doctrine, the plan proposed in this article is legal in its justification and implementation.<sup>237</sup>

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232. See *supra* text accompanying notes 72-73.

Public employers, on the other hand, would have to defend against state and possibly federal constitutional challenges to an affirmative action plan for lesbians and gay men. Because heterosexuals are not recognized as a protected class, state actors would likely be held only to the easily satisfied “rational relation” standard. Even under this standard, however, arguments inaccurately conflating sexual orientation and criminalizable sodomy could possibly succeed in invalidating an affirmative action plan for lesbians and gay men.

233. See *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).

234. *Johnson*, 480 U.S. at 632.

235. *Weber*, 443 U.S. at 208.

236. *The Supreme Court, 1986 Term—Leading Cases*, 101 HARV. L. REV. 119, 310 (1987) (analyzing *Johnson*); see also *Johnson*, 480 U.S. at 646-47 (Stevens, J., concurring) (arguing that forward-looking, nonremedial considerations can justify affirmative action for excluded groups); *id.* at 667-68 (Scalia, J., dissenting) (complaining that the Court permits societal discrimination, or “the alteration of social attitudes, rather than the elimination of discrimination,” to justify affirmative action); Note, *supra* note 104, at 665 n.48 (pointing out that the Court found societal discrimination a valid basis for affirmative action). *But see* Book Note, *A Conflict of Rights: The Supreme Court and Affirmative Action*, 104 HARV. L. REV. 967, 969 (describing Urofsky’s analysis of the *Johnson* Court’s avoidance of directly addressing the question of whether societal discrimination alone is sufficient justification for affirmative action).

237. The volatile nature of the affirmative action debate leaves vulnerable to reconsideration the Court’s past opinions. See, e.g., Kathleen M. Sullivan, *City of Richmond v. J.A. Croson Co.: The Backlash Against Affirmative Action*, 64 TUL. L. REV. 1609 (1990) (fearing *Croson* forebodes a potential Supreme Court backlash against affirmative action). Indeed, the Court’s affirmative action jurisprudence could shift as a result of its presently conservative composition.

From now on, the major peril to affirmative action is not, I believe, that we shall see outright judicial rejection of the decisions on record. Rather, the danger lies in the scraping, trimming and chipping away that could reduce the potency of these decisions as they are interpreted in future cases.

Eleanor H. Norton, *Step By Step, the Court Helps Affirmative Action: A Preliminary Assessment*, N.Y. TIMES, May 13, 1987, at A27; see also Robert Belton, *The Civil Rights Act of 1991 and the Future of*

Opponents may challenge this proposal on the ground that the addition of "gay and lesbian people" to affirmative action plans increases to an impermissible level the trammelling of non-minority workers' interests. In other words, many white males will now also be discriminated against because they are heterosexual, and that simply goes too far. The plan discussed in this article, however, is not designed to exclude heterosexual white men or to treat them unfavorably because of their race, gender, or sexual orientation. It is simply designed to increase the representation in the work force of qualified members of disadvantaged groups, including lesbians and gay men.<sup>238</sup>

Just as sexual orientation discrimination is beyond the reach of Title VII, affirmative action for lesbians and gay men cannot be challenged under a Title VII "reverse discrimination" claim. The Supreme Court has never considered sexual orientation-based affirmative action and Congress has never granted lesbians and gay men Title VII protection from employment discrimination. Therefore, it is reasonable to conclude that employment practices related to workers' sexual orientation remain completely within the province of managerial discretion, except where regulated by state or local law. Further, there is no reason to believe that state or local prohibition of sexual orientation discrimination prevents voluntary adoption of affirmative action goals for gay and lesbian people any more than Title VII prevents adoption of goals for women and racial minorities.<sup>239</sup>

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*Affirmative Action*, 41 DEPAUL L. REV. 1085, 1115-16 (1992) (questioning whether the current Supreme Court will erode the doctrinal and policy underpinnings of affirmative action reaffirmed by the Civil Rights Act of 1991).

238. See, e.g., ROSENFELD, *supra* note 14, at 201, 306-07.

239. One possible exception arises when the state or local statute specifies, as does Connecticut's, for example, that "[n]othing in this act shall be deemed or construed . . . to authorize or permit the use of numerical goals or quotas, or other types of affirmative action programs, with respect to homosexuality or bisexuality in the administration or enforcement of the provisions of this act." Public Act No. 91-58, § 36, 1991 Conn. Legis. Serv. 119 (West) (emphasis added); see also CAL. LAB. CODE § 1102.1(d) (West Supp. 1993) ("Nothing in this section shall require or permit the use of quotas or other such affirmative action.").

This language raises several issues. These statutes typically define "sexual orientation" to include heterosexuality, homosexuality, and bisexuality, thereby facially protecting heterosexuals from sexual orientation discrimination along with lesbians, gay men, and bisexuals, and presumably giving them standing to challenge affirmative action for lesbians and gay men. See, e.g., Pub. Act No. 91-58, § 1, 1991 Conn. Legis. Serv. 119 (West); VT. STAT. ANN. tit. 1 § 143 (1992); 1991 N.J. Sess. Law Serv. 519, § 3 (West 1992). Though many judges would not be inclined to look beyond this language, the arguable ambiguity of these statutory provisions requires an inspection of their legislative histories. Did the legislature actually intend to protect heterosexual people from employment discrimination on the basis of heterosexuality? Did they actually consider private employers' voluntary goals and timetables for the hiring of lesbians and gay men and decide that such policies would violate public policy? Or, as is more likely, were they only proscribing court-ordered affirmative action as a remedy pursuant to claims brought under these statutes? Cf. 1991 N.J. Sess. Law Serv. 519, § 9 (West 1992) ("With respect only to affectional or sexual orientation, nothing contained herein shall be construed to require the imposition of affirmative action, plans or quotas as specific relief from an unlawful employment practice or unlawful discrimination.").

Even if the legislature had fully considered and decided to prohibit private hiring goals for lesbians and gay men, employers could argue for a "business justification" exception to the provision based on documented recruitment and competitive advantages attributable to diversity. Although firms typically

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The likely effects of affirmative action for lesbians and gay men are increased equality of opportunity, gay and lesbian visibility, workforce diversity, and business advantage. Employers implementing this type of affirmative action plan are best advised to focus on the more pressing issues involved in creating and administering hiring goals for gay and lesbian workers and solidifying management's commitment to the program's success.

### III. CONCLUSION

Ensuring equality of opportunity for all workers and fostering workforce diversity are goals that ultimately benefit individual workers, subordinated groups, employers, and society at large. Ensuring true equality of opportunity for lesbians and gay men requires that management make a sincere commitment to creating a work environment in which gay and lesbian employees can safely be open about who we are. Most fundamentally, all employers should expressly prohibit antigay discrimination and harassment.

Private employers who presently have affirmative action plans should voluntarily expand these programs to include self-identified lesbians and gay men. Other employers should consider adopting affirmative action goals and timetables for appropriate beneficiary groups, including self-identified lesbians and gay men. Gay and lesbian workers should be given sufficient opportunity to self-identify, and should have the option of being considered "out" within the workplace or the broader community as well. I propose the reasonably attainable goal of five percent workforce representation within five years, though this goal should be flexible in light of local circumstances. The goal should also be separate from goals for other target groups, and an individual belonging to more than one beneficiary group should be recorded within each respective group for the purpose of monitoring the firm's progress toward its goals. The success of this plan depends upon strong management support, including strict enforcement of nondiscrimination and harassment policies.

Although affirmative action has well-known limitations and imperfections, it is a valuable instrument of economic and social justice that holds great promise as one means of making the workplace more hospitable to those of

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possess broad "business justification" discretion, the tenacity of prejudice against gay and lesbian people suggests that some courts would favorably consider legal arguments to invalidate any employment policy that affirms lesbians and gay men as valuable members of the work force—perhaps by falsely characterizing affirmative action for lesbians and gay men as encouragement of criminalizable sexual conduct.

Finally, though the possibility of "reverse discrimination" challenges to affirmative action for lesbians and gay men raises interesting legal issues, its probable practical unimportance is reflected in the fact that neither Heller, Ehrman nor the AFSC had even considered the possibility of heterosexuals suing them under state or local antidiscrimination law. Telephone Interview with Faber, *supra* note 108; Telephone Interview with DeNatale, *supra* note 9; Telephone Interview with Haggans, *supra* note 85.

us for whom lying to friends and co-workers is unacceptably time-consuming and painful. Affirmative action for lesbians and gay men is a means of countering the often overwhelming pressure to stay closeted for fear of losing our incomes, our families, and our safety. Indeed, affirmative action both tangibly and symbolically affirms gay and lesbian visibility and our struggle toward liberation and equality.