

A large, light pink triangle pointing downwards, centered on the page. The word "GAYS" is printed in a light blue-grey color, partially overlapping the top of the triangle. The word "JUSTICE" is printed in a dark blue-grey color, also overlapping the triangle. A horizontal line of the same dark blue-grey color runs across the page, positioned below the word "JUSTICE".

# **GAYS JUSTICE**

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**A STUDY OF ETHICS, SOCIETY, AND LAW**

**RICHARD D. MOHR**

# GAYS/JUSTICE

A Study of Ethics, Society, and Law

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Richard D. Mohr



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# GAYS/JUSTICE

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*BETWEEN MEN ~ BETWEEN WOMEN*

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*Lesbian and Gay Studies*

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*for*  
*Robert W. Switzer*

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# Introduction

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Society at large does not know what to think about gays. Social taboos on discussing sexuality, especially gay sexuality, have left a void in society's understanding of gays. This void in understanding, though, has been filled to overflowing with stereotypes, prejudices, and unexamined fears, which in concert have largely governed the development of social policy toward gays. Conversely, because of the socially and legally enforced invisibility of gay people, gays themselves have not been able to develop to any significant degree a public discourse about themselves. Save through the beginnings of a gay literature in the last decade and a half, gays have little sense of the significance of their own experience for themselves; still less do they have a sense of what the significance of their experience might be for society; and they are, in any case, little able to defend themselves or advance their distinctive interests in the forums of social policy. Both social policy on gay issues and the gay rights movement itself have been nearly empty of ideas and so too of their concatenations into arguments. The moral, social, and legal inquiries and arguments of this book are aimed at remedying these two gaps in social knowledge—that of gays and nongays alike.

The book aims to inform the general audience of gay experience, about which it is likely to know little. It is my hope, though not my expectation, that for nongays the annotated essays that make up this volume might have an effect similar to Gunnar Myrdal's masterwork of moral sociology, *An American Dilemma*. That book, written by a foreigner, forced white America in the 1940s to confront the evils of its racism and formed the intellectual backdrop which emboldened the Supreme Court in the 1950s to begin dismantling government sponsored segregation. Even if nongays ultimately find some of the arguments in this book unpersuasive, it will at least introduce them to some of the daily indignity and not infrequent brutality which they inflict upon gays but of which, due to their willful ignorance and the thickly layered social veils that hang around gays, they are largely unaware. Much in the book aims to enlighten. Some enlightenment is unpleasant. Yet, should non-

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gays learn from and act upon some of the book's recommendations, they might find that someone upon whom they now unwittingly tread, but who might then be spared their marks, is someone they love. A recurring theme of the book is that gay rights are, in diverse ways, good for everyone.

For the gay reader, the book aims to help dignify him or her by giving voice to gay experience and expressing for gays social thoughts that have existed only in inchoate form. It is my hope, though not my expectation, that for gay readers the book might have the same effect that, upon first hearing, the trio from Elgar's First Pomp and Circumstance March had on the English, presenting, as it did, not a mere image of the English soul but an exemplar of it. The piece, in a way, is England. But in any case, the point is that at least sometimes character and vision are best captured in distillations having abstract formulation, rather than in pictures of particulars. For gays, my aim is to articulate in distilled abstract form that about gay experience which has been left fragmented or has gotten lost between the back of the mind and the tip of the tongue—that which has been sensed but unsaid. My aim in part then is through argument to generate philosophical myths for gays—myths which will ring true and yet which will be innocent as myths because they are true. The first spoken thing may appear larger than life simply because it is the only thing on the field. (In *Rubyfruit Jungle*, Rita Mae Brown's foursquare lesbian protagonist Molly Bolt appeared so because so.)

Beyond this rarified hope, I have another—that some people will find in my arguments useful knowledge. One of the most remarkable features of the black civil rights movement, as now made clear by subsequent profound social confusion over affirmative action programs, was that its legal successes were achieved without anything remotely resembling an articulated, ramified pattern of reason and argument, let alone a political theory. In practice, it turned out that theory and argument were not needed. There was no articulated, substantive, argumentative opposition to that movement, and religious sentiment and appeal filled in where words failed or were lacking altogether. For the gay movement, such a fortuitous configuration of props and fissures will not be forthcoming—something more is needed. Perhaps nothing will work, but rational argument may have some positive effect in some areas. It is at least worth a go in areas where prejudice is merely a powerful social force but has not risen to the level of a social lens through which all is categorized,

interpreted, and assessed. At that level, where reality, meaning, and value are preconfigured in society's hardwiring, argument will not work.

Such necessary failures of argument are explored in a number of the essays on AIDS, the Supreme Court, and, most discouragingly to this academic, academe. The failure of reason in these areas has led me to lose my once-large faith in America. It took social architect Myrdal a lifetime to become disillusioned with his own hopes and blueprints for social progress. It took Martin Luther King Jr. only four quick years from 1964 to 1968. I have followed King rather than Myrdal in this pattern. Yet, for those who have not lost faith, my recommendations for social policies, based on a belief that the best argument should win, will perhaps be of some help in their quest, by offering models for what might be said generally and in offering particular reasoned arguments on a number of specific, live legislative issues.

Part of the problem in arguing for social change, at least on civil rights issues, is that one's opponent usually does not debate in good faith. For the bigot, "arguments" are simply filler for the print media—he has to have something to say. Bigots in America are doing so well now in part because on television and radio one does not need to have anything to say. And on those occasions when connected ideas are called for, it turns out that the bigot's herd of stalking horses is large beyond counting and self-perpetuating. For the bigot, "reason" and "reasons" are pretexts. There is no hope that he will be caught out. The most that can be hoped for is that an impartial person would observe the bigot shifting ground so many times that eventually the bigot can hardly help but appear disingenuous.

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To date, gay studies, such as it is, has been the nearly exclusive preserve of historians, sociologists, and anthropologists, who are able to wrap their subjects in the intellectual safety of tales of the past, the numerology of statistics, and the exotics of distance. A book of philosophical essays might run a similarly safe danger, by dealing with gays as mere abstractions and so again as, in a way, dismissible. I have taken pains to avoid such mere abstraction in the book's content, approach, and style. True, the essays appeal to general moral and political principles developed in and precipitated from our civilization, its institutions, culture,

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and history. But at least equally often, the political discussion is governed by appeal to the ways gays live their everyday lives. The essays are about here and now, and are informed by an insider's perspective.

In content, the political orientation of the book is of a piece with classical liberalism—the belief that the focus of value in society is the individual, rather than groups, classes, or society as a whole, and that the coercive power of the state exists primarily to enhance prospects for individual flourishing and choice—the individual's creating for herself a plan of life and carrying it out in ways compatible with the ability of others to do the same. Usually this ideal will be realized by the state blocking coerced interactions between individuals, and simply withdrawing from the field of those that are voluntary. Government in this view is not, as in socialist countries, to serve paternalistic ends—caring for, but also coercing, its citizens in the way parents look after and coerce their child for its own good as they in their wisdom see it. If on occasion, however, state coercion of voluntary interactions can promote the general background conditions in and through which people come to be in a position to make up their own minds and seek out, in harmonious tolerance of each other, each their own end, as the state does in the case of compulsory, tax-financed education, then a more robust role for government is warranted than merely the provision of civil defense and the enforcement of civic right—the right to the equitable enforcement of protections for persons and property. In this view, then, the state is not purely libertarian. The proper power of the state is not limited merely to enforcing contracts and protecting the right to contract. The book cleaves between socialism and libertarianism.

In method, though, the book does not attempt to deduce the proper nature and powers of the state from axioms and first principles of political philosophy, and then in turn attempt to apply these derived verities to particular circumstances in the world. Such principles, deductions, and verities would likely be, as indeed they have so far proven in philosophical practice to be, vague and disputable, and such applications would likely be mechanical to the point of missing the nature of their objects, all the more so in the case of gays, since their social circumstances so far have, on their own, tended at least to chill, if not also completely arrest, thought on gay issues. Rather than relying on grand theory, the book proceeds in a more moderate, less controversial, admittedly piecemeal, yet, it is to be hoped, more persuasive manner. The

book takes a “good reasons” approach to social policy. It gives good reasons to believe that classical liberalism is right in various local contexts, on diverse particular issues. In turn, the book contributes to liberalism generally, by showing this perspective to have an explanatory power rich enough to reveal new and interesting ideas in the previously unexplored areas of political thought raised by gay issues. Liberalism makes moral sense of gay issues; gay issues make moral sense of liberalism.

As a result of the book’s general approach to its subject, the specific philosophical styles and techniques used in the book have no common algorithm. No single technique generates all or even the most important results. Different points made have required different modes of argumentation. Frequently, the book proceeds by appeal to fairness or moral consistency—the treating of similar cases similarly. It shows that some moral idea worked out and widely accepted in one area of moral experience also holds true of gay experience because the two are relevantly similar. Many comparisons are made between the circumstances of gays and our culture’s developed views on religion and race. Beyond consistency, many other styles and techniques are used. There is, here and there, old-fashioned conceptual analysis, which tries to sort out the various possible senses of a term to avoid ambiguity and which tries to trace a term’s conceptual network to get clear on what sense and force the term might legitimately carry. At one point—an analysis of the role of the body in the possession of rights—very old-fashioned Aristotelian metaphysics is even brought into play. There is textual interpretation and analysis of basic documents of our civilization and of lesser law. There is moral rummaging in the normative dimensions of law, religion, and the social sciences. There is cultural critique. Here and there the argument advances through a phenomenological analysis of human activities, like having sex. There is the use of telling examples and story telling. Where an area is totally new, I have resorted to those tried and true, ancient and modern, philosophical methods of personal reflection, meditation, and intellectual autobiography as sources and vehicles for ideas.

The book consists of fourteen essays arranged in six groups. The first, single-member, group—“Gay Basics”—is an introductory essay on the current social status of gays and on current social attitudes about gays. It was originally sketched to fulfill a commission from an anthology

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editor who requested a piece on gay issues for an audience of what he termed “bonehead bigots.” Others too may usefully read it. It gives the reader basic information, analyzes and assesses stereotypes, and discusses and rejects some of the most common and deeply held criticisms of gays. The chapter sets themes for the whole and tries to sweep away moral confusion about and social misperceptions of gays, so that subsequent positive arguments about gays can proceed on a field cleared of irrelevant, misleading, or needlessly arresting cultural impediments.

The next three chapters, taken together with an appendix on privacy caselaw and collectively titled “Mr. Justice Douglas at Sodom: Gays and Privacy,” address what in a liberal view the state ought not to be doing, indeed ought to be barred from doing: the state ought not to be able to invade the activities of life which can be reasonably argued are private—including gay sex acts. The first chapter in the set argues that even though sodomy laws are virtually never enforced against gays, their mere presence is an assault on the dignity of gays. It is in this rather than in harms which they may indirectly generate that the evil of unenforced sodomy laws lies. The second chapter in the set offers a methodology for broadly interpreting fundamental constitutional immunities against state coercion. The method I call equality-based coherence. It generates a right to privacy which is broad and substantive, but not so broad as to be equivalent to a right protecting all voluntary agreements—a right to independence or a right to contract. The final chapter in the set gives four separately sufficient arguments for why—if there is a general, substantive right to privacy—gay sex should be seen as falling under it. The arguments turn, one each, on the cultural obligations surrounding sex acts, the inherently world-excluding nature of sex acts, the importance of sex in life, and the role of the body in the possession of rights in the first place. An appendix sets out reasons why the Supreme Court’s ruling in 1986 that gays have no privacy rights does not even square with its own development of the scope of the right to privacy in its past cases. Over all, I argue that the Court’s holdings on gay issues are so far off the mark morally and in every other intellectually respectable way that gays should be having grave doubts—layered with justified bitterness as America marks the Constitution’s bicentennial—that the rule of law applies to them.

The third part, consisting of three essays—“The State as Civil Shield”—turns from a discussion of the proper scope of immunities against

government to a discussion of the proper ways in which government ought to deploy its powers. The part addresses the most persistent gay social issue of the times: whether gays are to be afforded the same civil protections against discrimination in private sector employment, housing, and public accommodations as have been afforded other groups traditionally subject to discrimination in these areas.

The set begins with an essay that suggests civil rights legislation is one of the few areas in which the deployment of state coercion contributes to rather than squelches independence. Such legislation promotes independence in a variety of ways—by making possible and enhancing individual dignity, self-reliance, individual flourishing, and general prosperity understood as the aggregated happiness of individuals. The arguments are those to which any traditionally downtrodden group might well appeal. This essay attempts to remedy for all groups the curious gap in the history of social thought left by the black civil rights movement and its argument-free successes. The essay shows that the arguments which justify civil rights legislation for groups currently covered by the 1964 Civil Rights Act also justify the extension of civil rights protections to gays—sometimes with special force.

The second essay focuses on arguments for civil rights legislation that are peculiar to gays as an invisible minority. It argues that civil rights protections in the private sector are necessary if gays are to have reasonably guaranteed access to an array of fundamental rights—both civic and political—which virtually everyone would agree are supposed to pertain equally to all persons. The principles appealed to in this essay are so broad that its argument should be persuasive even to conservatives who find themselves unpersuaded by the ideas of the prior essay.

The third essay examines arguments by which opponents of gay rights attempt to show that discrimination against gays is, in general, discrimination in good faith—attempt to show that traditional discrimination against gays in areas otherwise reasonably protected by civil rights is indeed justified. The essay shows that, on examination, the presumptions behind such attempts fall into general patterns of thought all of which have been widely rejected by society as foundations of social policy or which are morally flawed in other ways.

The fourth part consists of four pieces, two long, two short, on the AIDS crisis. Gays may be dismayed to find that I treat AIDS as a gay disease. I do so in the same way that it makes sense to speak of sickle



cell anemia as a black disease. Not all blacks get it, not only blacks get it; but the overwhelming number of cases of it do involve blacks and this fact has determined how society has responded to the disease—*pari passu* gay men and AIDS. The first two essays reintroduce in a new context the twin themes of the previous two parts: what the state ought not to be allowed to do and what the state should do. They recommend what the immunities from state coercion and what the proper deployments of state power should be in trying to stem the spread of the disease and in attending to those with it. All too frequently, the use of the vague concept “public health” to justify this or that state action has been the night in which socialism and fascism are one and the same. I argue that the mode of transmission of the disease ought to void the use of state coercion of the means of its possible transmission as a way of trying to stop the spread of the disease. I offer diverse arguments, which avoid socialist premises, principles, and conclusions, to justify state funding for patient care and medical research, and state regulation of the insurance industry.

The second pair of essays turns from brave to brooding. Through sociological analysis and telling stories, the essays suggest that the AIDS crisis has raised a configuration of social forces and perceptions that will defeat any positive role that reason might play in the development of social policy on AIDS. The first indeed suggests that arguments from the medical and public policy communities which show that various coercive measures being tried in the crisis are irrational, since socially inefficient, actually contribute to social evil, by clearly marking the coercive acts as what they really are—not means of stopping the spread of disease but purification rituals and self-sacrifices which reaffirm heterosexuality as society’s central sacred value.

The second piece examines a philosopher with AIDS, a doctor with AIDS, and a university with AIDS, and draws a skeptical conclusion on the probable effectiveness of reason in changing individual and collective behavior. Progress, if it occurs, will be in spurts and starts, marred with setback, tangled and messy.

The fifth set of essays—“A Liberal’s Education”—is more personal and portrays thought in action, the life of the mind as embedded in the cussedness of culture. The pair of essays too shifts from brave to brooding, and does so along the same lines as the AIDS papers. The pair shifts from guarded optimism on the role of reason in effectuating justice to a