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Of Gods and Gays: Proportionality and Sexual Orientation Discrimination

This paper will consider the conflict between freedom of religion and the right not be discriminated against on the grounds of sexual orientation. It will start from the basis that both claims involved in this conflict should normally be seen as valid and important and that any solution must recognize the complexity and nuance involved. It will be argued that the concept of proportionality, used in much British and European law (both that coming from the European Union and the European Convention on Human Rights), can be an ideal mechanism for resolving these cases.

It will be argued that there are two major benefits for using a proportionality test in this context. The first is its fact specific nature. As both claims have value, it is not appropriate for one always to win over another. At the balancing stage, the relevant question is only whether the marginal benefit of a particular measure is sufficient compared to the interference caused by the measure and not whether 'gay rights' or 'religious rights' are more important. This is important not only because it highlights the actual dispute in issue, but also because this narrow focus itself helps to reduce tension. Negotiation theory draws attention to the benefits of 'fractionating' conflicts. If conflicts over a large issue can be broken down into smaller issues, progress is more likely. Furthermore since a decision is likely to depend on a number of factors, this means that winners and losers are not created permanently, thus potentially reducing tensions.

Proportionality's second benefit is that it intrinsically requires justification when rights are restricted. It must be demonstrated to an outside arbiter that the burden on an individual is justified because of the benefit it brings, again based on a particular set of facts. It will be argued that this is evidently important practically in ensuring that rights are not unnecessarily restricted, but that it is also important less tangibly in that it treats people as *worthy* of justification: as people who can be expected to accept the process of justification, even though they disagree with the result.