Marriage and Same-Sex Unions

A Debate

Edited by Lynn D. Wardle, Mark Strasser, William C. Duncan, and David Orgon Coolidge
Chapter 7

Essay One

*Discrimination Against Gays Is Sex Discrimination*

Andrew Koppelman

All laws that discriminate on the basis of sexual orientation thereby discriminate on the basis of sex and thus are subject to heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Since these laws are not substantially related to any important state interest, they are unconstitutional.

Owing to limitations of space in this volume, I cannot develop here the claim made in the second sentence of the preceding paragraph. That would require surveying the major claims made on behalf of discrimination against gays and showing that each is inadequate. Here I will merely develop the claim made in the first sentence of the preceding paragraph and thereby show that such laws are presumptively unconstitutional.

My basic argument can be stated in two syllogisms.

**FIRST SYLLOGISM**

1. Laws that make people's legal rights depend on their sex are sex-based classifications.
2. Laws that discriminate against gay people are laws that make people's legal rights depend on their sex.

**Illustrations:** If Lucy may marry Fred, but Ricky may not marry Fred, then (assuming that Fred would be a desirable spouse for either) Ricky is suffering legal disadvantage because of his sex. If a business fires Ricky, or if the state prosecutes him, because of his sexual activities with Fred, while these actions would not be taken against Lucy if she did exactly the same
things with Fred, then Ricky is suffering legal disadvantage because of his sex.

Therefore:

3. Laws that discriminate against gay people are sex-based classifications.

SECOND SYLLOGISM

1. Sex-based classifications are subject to heightened scrutiny.

2. From the first syllogism, laws that discriminate against gay people are sex-based classifications.

Therefore:

3. Laws that discriminate against gay people are subject to heightened scrutiny.

The argument has been subject to numerous objections. The most common of these is that there is no discrimination, because both sexes are treated alike. Both sexes, the argument goes, are treated alike by sanctions against homosexuality, because no one of either sex may engage in sexual conduct with another person of the same sex. Ricky cannot marry Fred, it is true, but Lucy likewise cannot marry Ethel.

This response happens to be the same one that was made on behalf of the laws against interracial sex or marriage: both races are equally forbidden to engage in the prohibited sexual conduct, so there is no race discrimination. That argument was rejected in *McLaughlin v. Florida*, in which the Supreme Court unanimously invalidated a criminal statute prohibiting an unmarried interracial couple from habitually living in and occupying the same room at night. “It is readily apparent,” the Court held, that the statute “treats the interracial couple made up of a white person and a Negro differently than it does any other couple.” Racial classifications, it concluded, can only be sustained by a compelling state interest. Since the state had failed to establish that the statute served “some overriding statutory purpose requiring the proscription of the specified conduct when engaged in by a white person and a Negro, but not otherwise,” the statute necessarily fell as “an invidious discrimination forbidden by the Equal Protection Clause.”

*McLaughlin* stated the obvious. If prohibited conduct is defined by reference to the actor’s own race or sex, the prohibition is not neutral with reference to that characteristic. Indeed, in the states that specifically prohibit homosexual sex, the defendant’s own sex would appear to be one of the essential elements of the crime that the prosecution must prove.

Another response that has been made is that parallel discriminations, while impermissible in the race context, are just fine in the sex context. Thus David Orgon Coolidge has argued that sex-discrimination doctrine should apply only to “classifications that disadvantage individuals on the basis of preferring one sex over another.” But this does not explain the Court’s hostility to, say, single-sex schools. Could a state require all girls and women to attend one set of schools, and boys and men to attend another, and then defend the law by arguing that there is no sex discrimination because members of both sexes are equally required to attend same-sex public schools?

The fact of classification itself raises constitutional difficulties. The Court has held that “the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an ‘exceedingly persuasive justification’ for the classification.” “The burden of justification is demanding and it rests entirely on the State.”

Lynn Wardle points out that the Court has upheld sex-based classifications when they are based on “physiological” or “demonstrable” differences between men and women. The laws upheld in these decisions, however, reflected accurate empirical rather than normative generalizations. More important, the generalizations they reflected were exceptionless. If it were otherwise—if a sex-based classification could be justified by what is usually the case, or what is true about most members of either sex—then the constitutional doctrine would be eviscerated, because even the most invidiously sexist laws have been justifiable in terms of some argument of this sort.

Thus, for example, in *Michael M. v. Superior Court*, the Court upheld a statutory rape law that punished the male, but not the female, participant in intercourse when the female was under eighteen and not the male’s wife. “Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female,” Justice William Rehnquist’s plurality opinion explained, “a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct.” Thus, Rehnquist claimed, the statute did not rest merely on “the baggage of sexual stereotypes.” Rehnquist nowhere suggests that such stereotyping is permissible; instead, he relies on the fact that “this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.”

Rehnquist’s reasoning relies on the fact that no young males, not even a single one, can become pregnant. This is an exceptionless generalization about the sexes. It is a long leap from the holding of *Michael M.* to the conclusion that the state can impose sex-based classification on the basis of generalizations that are only statistically accurate, such as the generalizations that many heterosexual couples produce children and same-sex couples tend to be childless. Such generalizations have been relied on by courts seeking justifications for denying gays the right to marry. But such generalizations have also been relied on to justify all forms of sex discrimination.
firmly established that generalizations of this sort, even if they are largely accurate, can never justify sex-based classifications. The Court has held that the justification for a sex-based classification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."23 [G]eneralizations about 'the way women are,' estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description."24

Some have objected that an interpretation of sex discrimination doctrine that applied heightened scrutiny to "mirror-image restrictions" would entail, absurdly, that single-sex toilets are unconstitutional.25 The Court has (to my knowledge) only considered the issue of single-sex toilets once, and that indirectly, when in United States v. Virginia it declared that admitting women to a previously all-male residential college, as the Constitution required, "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements."26 The Court thus assumed without explanation that these were innocuous, while holding that sex-based classifications were presumptively invalid as a general matter.27

Even if one accepted as an unshakable premise that single-sex toilets must be permissible, however, this hardly entails that such facilities do not classify on the basis of sex. The sign "MEN" on the door plainly indicates that only males may enter. Moreover, if it is insisted that mirror-image treatment keeps something from being a classification, then this insulates from scrutiny not only miscegenation prohibitions, but also the separate-race toilets that were one of the most insulting manifestations of segregation in the Jim Crow South.

A defense of single-sex toilets under heightened scrutiny would doubtless rely on the widespread desire for "privacy from the other sex in living arrangements." The basis for this desire is obscure, psychologically complex, and culturally contingent. (Sex-segregated toilets are not universal even in the United States.) Part of it is the felt need to preserve a sense of secrecy about the genitalia of the other sex, and women's fear of male violence also has something to do with it. Whatever the roots of this desire, single-sex toilets satisfy it at little tangible or intangible cost. The tangible burden of sex-segregated restrooms is fairly de minimis.28 Intangible costs matter as well: single-race toilets were generally understood to connote that blacks were filthy, animal-like, and too polluted to be permitted to perform intimate functions in the same space as whites. Single-sex toilets, however, do not connote the inferiority of women.29 All these considerations, taken together, should satisfy intermediate scrutiny.

No one who has raised this objection has explained just how the toilet exception to the sex-discrimination prohibition could be generalized to include antigay discrimination. Two possibilities present themselves.

One might read the exception to mean that the law should accommodate widespread, deeply felt anxieties about sexual boundaries. Sex-segregated toilets reflect these anxieties, and so does the prohibition of homosexual sex. But this principle proves far too much. All sex discrimination has sometimes reflected such anxieties. This exception would swallow the rule.

A second possibility is to say that the interest protected by sex-segregated toilets is freedom from the unwanted sexual gaze. That same interest is protected by some antigay rules, such as the exclusion of gays from the military, which shields soldiers from being seen naked by persons who might regard them as sexual objects. This argument, too, proves too much. It, like the other, has been used to justify all kinds of sex discrimination. It is impossible for any policy to shield persons from the sexual gaze, and it can be destructive to try. Humanity cannot neatly be divided into "homosexuals" and "heterosexuals." In situations in which women are unavailable for prolonged periods (such as the military in wartime), men sooner or later will start staring at each other in the shower. A policy that zealously strove to eradicate the sexual gaze would require an Orwellian regime of extraordinarily minute surveillance.30 Acceptance of sex-segregated toilets hardly entails this.

The principal difference between the segregated-toilet exception to the prohibition of sex discrimination and any form of antigay discrimination is that the toilet exception does not impose any serious burden or insult on anyone. Discrimination against gays is always stigmatizing, and it usually involves serious tangible disadvantages as well, such as the military exclusion. If sex-segregated restrooms had such consequences, they, too, would be unconstitutional.

Some concede that discrimination against gays is formally a kind of sex discrimination, but argue that it is not the kind of discrimination that sex-discrimination law prohibits, because it has nothing to do with the subordination of women. This objection depends on a false legal premise. A party challenging a sex-based classification is not required to show anything about the relation between the statute and the subordination of women. The Supreme Court has never asked anyone who challenged a sex-based statute to make such a showing; given the difficulties of demonstrating such complex propositions of social causation, no plaintiff could possibly satisfy such a demand. A requirement of this sort would be tantamount to minimal scrutiny.

Those who make this objection note that Loving v. Virginia, the case that invalidated prohibitions on interracial marriage, noted a connection between the miscegenation prohibition and racism, declaring that the prohibition was "designed to maintain White Supremacy."31 But Loving was preceded by, and relied on, McLaughlin. McLaughlin, not Loving, was the groundbreaking case that laid the equal application argument to rest, and McLaughlin, not Loving, is the crucial precedent on which the sex-discrimination argument relies.32
Still, there is a valid worry about the formal argument. Even if discrimination against gays is, as a formal matter, a kind of sex discrimination, is this argument merely a sort of clever lawyer's trick, or does protecting gays from discrimination really further the underlying purposes of sex-discrimination law? If the argument is a mere trick, then even if the rejection of the sex-discrimination argument would require the courts to carve out a new, ad hoc exception to the general rule against sex-based classifications, perhaps the exception should be made.

The answer depends on what one thinks sex-discrimination law is for. If the purpose of the law is to prevent the imposition of gender classifications on people's life choices,\(^59\) then the argument is over; this is just what the formal argument shows that antigay discrimination does. If, however, one thinks that it exists in order to end the subordination of women, then one would have to demonstrate some link between antigay discrimination and the subordination of women.

Here, as in other areas of antidiscrimination law, the facial classification reveals something important about purpose. The link between heterosexism and sexism is common knowledge if anything is. Most Americans learn no later than high school that one of the nastier sanctions that one will suffer if one deviates from the behavior traditionally deemed appropriate to one's sex is the imputation of homosexual sexuality. It is an obvious cultural fact that the stigmatization of homosexuality is closely linked to gays' supposed deviation from the roles traditionally deemed appropriate to persons of their sex. Moreover, both stigmas have gender-specific forms that imply that men ought to have power over women. Gay men are stigmatized as effeminate, which means insufficiently aggressive and dominant. Lesbians are stigmatized as too aggressive and dominant; they appear to be guilty of some kind of insubordination. The two stigmas, sex inappropriateness and homosexual, are virtually interchangeable, and each is readily used as a metaphor for the other. The findings of scholarship reinforce what common sense already tells us. Numerous studies by social psychologists have found that support for traditional sex roles is strongly correlated with (and, in some studies, the best single predictor of) disapproval of homosexuality. Historians chronicling the rise of the modern despised category of "the homosexual" have found similar connections with sexism.\(^54\)

The connection is also a particularly malign one. The homosexuality stigma is part and parcel of some of sexism's worst manifestations. Christine Korsgaard observes that

whenever individuals deviate very far from gender norms, gender ideals become especially arbitrary and cruel. Human beings are fertile inventors of ways to hurt ourselves and each other, and gender ideals are one of our keenest instruments for the infliction of completely factitious pain. People are made to feel self-conscious, inadequate, or absolutely bad about having attributes that in themselves are innocuous or even admirable.\(^35\)

If one were to search for illustrations of Korsgaard's concluding sentence, one could hardly find more telling examples than those involving the stigmatization of homosexuality. Men who are patient, aware of others' feelings, good with children, or appreciative of beauty or women who are active and competent, athletic, or good with tools are always in danger of being labeled "queer." The fear of this type of stigma plays a potent role in inducing members of both sexes to adhere to the roles traditionally assigned to their own sex—roles that are, of course, structured hierarchically.

A final worry about the sex-discrimination argument is that it marginalizes what is distinctive about the moral claims that gays are making. Jack Balkin writes that the sex-discrimination argument implies "that discrimination against homosexuals is merely a 'side effect' of discrimination against women, and therefore somehow less important."\(^37\) John Gardner writes that "those committed to the moral wrongfulness of sexuality discrimination should not be at all happy to find this wrongfulness appended to the moral margins of somebody else's grievance, namely the grievance of those who are victims of sex discrimination."\(^37\) William Eskridge writes that the sex-discrimination argument has "a transvestite quality," because "[i]t dresses a gay rights issue up in gender rights garb."\(^38\)

All these concerns are valid. One can make the same point about the interracial couple that was prosecuted under the miscegenation laws: the racist system primarily harmed blacks, but the white husband's interests were hardly unimportant.

The problem here is the problem with any legal claim. Law always picks and chooses among facts in the world, deeming some relevant and ignoring others. It thus flattens the richness of human life. Law is not literature. When we evaluate a human life, we do not just ask whether the person followed the rules. Othello and Iago both killed their wives; the law would make no distinction between them, even though any reader of Shakespeare's play knows that the two men lived in different moral universes. Facts are messy; legal categories make them clean, usually by stripping off all the living flesh. We have already seen the danger that the causal claim behind the sex-discrimination argument will be taken to be stronger than it actually is. There is a similar danger, which should always be resisted, that stories deemed irrelevant for legal purposes will be deemed irrelevant simpliciter.

The sex-discrimination argument relies on settled law that was established for the benefit of women, not of gays. It can be relied on because it is settled, but it is settled only because it was devised without thinking about—to some extent, by deliberately ignoring—the claims of gays. Accepting and relying on the sex-discrimination argument thus means accepting and relying on a view of the world in which gays are at best marginal.

On the other hand, the marginalization of gays is precisely why the argument has the comparative advantages that it does. Each of the other principal arguments for gay equality, the privacy and suspect-classification
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arguments, depends on an extension of existing law to cover gays. The sex-discrimination argument does not depend on any extension of existing rules. On the contrary, it is its opponents who must ask for legal innovation by carving out an exception to a rule that is settled.

The argument’s strengths are not accidental. The relation between the stigmatization of gender nonconformity and that of homosexuality is too close for the argument to be dismissed as a mere technical trick. But it does abstract from the particularity of gays’ lives.

It also abstracts from the particularity of some conservatives’ objections to homosexuality. The objection from the left that I have just considered, in its insistence on particularity, resembles the objection from the right that has been articulated by Lynn Wardle:

The heterosexual dimension of the relationship is at the very core of what makes marriage a unique union and is the reason why marriage is so valuable to individuals and to society. The concept of marriage is founded on the fact that the union of two persons of different genders creates a relationship of unique potential and inimitable potential value to society. The essence of marriage is the integration of a universe of gender differences (profound and subtle, biological and cultural, psychological and genetic) associated with sexual identity. . . . Legalizing same-sex marriage, on the other hand, would send a message that a woman is not absolutely necessary and equally indispensable to the socially valued institution of marriage, weakening rather than strengthening equality for the vast majority of women.\(^{39}\)

Wardle’s complaint is oddly similar to those of Balkin, Gardner, and Eskridge, all of whom are his political adversaries. He, too, complains that the sex-discrimination argument ignores social meanings that are salient in his culture. And the aspects of his culture to which the claims do not correspond should be acknowledged, even if they are legally irrelevant.

Conservative critics of the sex-discrimination argument have never addressed the evidence that heterosexism and sexism are culturally linked, just as they have never deigned to notice in print that gay people are the objects of insane hatred in the United States. It would be unfair to attribute sexism or hatred to these writers; the conservative Christianity that they all endorse condemns both the oppression of women and violence against gays. On the other hand, I do not suppose that they would attempt to deny that these vicious tendencies are at least reinforced by laws that discriminate against gays. There are men whose conceptions of heterosexual masculinity is very much bound up with rage toward women; the statistics on wife battering teach us that there are quite a few men of this sort. Violence against gays is a fact of life throughout the United States.\(^{40}\)

The conservatives’ argument must be that even if these unwelcome phenomena are made more likely by laws that discriminate against gays, and even if such laws get some of their support from people who have these immoral prejudices, these laws nonetheless reflect benign purposes. This defense of laws that reinforce invidious prejudices would resemble the doctrine of double effect in Catholic casuistry: it is morally permissible to bring about a bad result, such as someone’s death, so long as that result is not what you intend either as end or as means, but is only an unwelcome side effect of your act. Even if one accepts this doctrine, however, the doctrine requires “that the good effect or aspect, which is intended, should be proportionate (say, saving someone’s life), i.e. sufficiently good and important relative to the bad effect or aspect.”\(^{41}\) That is, the purpose being served by laws that discriminate against gays would have to be shown to be not merely rational, but so important that it justifies the reinforcement of sexism. Perhaps another way of saying this is that such laws would have to withstand heightened scrutiny. I do not think that they can survive such scrutiny, but that, as I have said, is an argument to be developed in a different place.

NOTES

6. Id. at 188.
7. Id. at 192.
8. Id. at 192–93.
to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband, and that “[i]t is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule.” Id. at 141; see also id. at 141–42 (“the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases”). In recent Supreme Court opinions, Bradley’s concurrence has repeatedly been cited as an instance of precisely the type of sexist stereotyping that the Fourteenth Amendment is now understood to prohibit. See Mississippi University for Women v. Hogan, 458 U.S. 718, 725 n.10 (1982); Dothard v. Rawlinson, 433 U.S. 321, 344 n.2 (1977) (Marshall, J., concurring in part and dissenting in part); Frontiero v. Richardson, 411 U.S. 677, 684–685 (1973) (plurality opinion).


24. Id. at 550.


26. United States v. Virginia, 518 U.S. 515, 550 n.19 (1996). This requirement was agreed to by the parties, and so the issue of its constitutionality was not before the Court, but the Court’s easy acceptance of it is nonetheless notable.

27. The Court did say that such classifications were permissible in three narrow circumstances:

Sex classifications may be used to compensate women “for particular economic disabilities [they have] suffered,” to “promot[e] equal employment opportunity,” to advance full development of the talent and capacities of our Nation’s people. 

Id. at 533, citations omitted. A footnote at the end of the quoted sentence made it clear that the last category was intended to allow evidence that single-sex schools may help to dissipate traditional gender classifications. It is not clear how single-sex toilets could fit into any of these categories, but they all seem to allow some accommodation of women’s needs, which single-sex toilets arguably do. It is, however, hard to imagine how any burden on homosexual conduct could be shoehorned into any of these categories.

28. To the extent that this is not the case, so that, for instance, lines outside women’s rest rooms are burdensomely longer than those outside men’s rest rooms, then heightened scrutiny will and should be harder to satisfy.


30. As, in fact, the military’s policy has. See Janet E. Halley, Don’t: A Reader’s Guide to the Military’s Anti-Gay Policy (1999); Andrew Koppelman, Gaze in the Military: A Response to Professor Woodruff, 64 UMKC L. Rev. 179 (1995).

31. 388 U.S. 1, 11 (1967).

32. Opponents of the sex-discrimination argument typically ignore McLaughlin and only talk about Loving. See, e.g., Wardle, A Critical Analysis, at 75–82; Baker v. State, 744 A.2d 864, 880 n.13 (Vt. 1999). I take the argument’s power to be vindicated by the fact that those who seek to refute it find it necessary first to mischaracterize it.

Response

Reply to “Discrimination Against Gays Is Sex Discrimination”

Richard G. Wilkins

Andrew Koppelman (using slightly different rhetoric) asserts,1 “If state law forbids Fred to marry Henry, aren’t they denied equal protection when the law permits Tom and Jane to marry?”2 As Judge Robert Bork has noted, “the argument is simplistic.”3

The minor premises of Professor Koppelman’s first and second syllogisms—that is, “[l]aws that discriminate against gay people are laws that make people’s legal rights depend on their sex” and “[l]aws that discriminate against gay people are sex-based classifications”—conflate, confuse, and ignore the numerous distinctions between status and conduct.4 This is a serious error. Courts do not equate sexual status with sexual conduct but, rather, distinguish between sex as an immutable biological reality (status) and sex as a personal idiosyncratic choice (conduct).5 The difference between status and conduct cannot be dismissed. Professor Koppelman’s refusal to recognize this vital distinction results not only in a complete misreading of established discrimination jurisprudence, but in the utter failure of his syllogisms to prove their conclusion: that courts should subject classifications based on sexual conduct to heightened scrutiny.

There is not—and never has been—heightened judicial scrutiny for sexual conduct. Professor Koppelman cites McLaughlin v. Florida as an example of the Supreme Court striking down a criminal statute that prohibited unmarried interracial couples from cohabiting.6 McLaughlin, however, applied strict scrutiny because the prohibition turned upon an immutable biological trait—race. Racial status is not a choice, and, stating the obvious, race is a trait that never changes. Therefore, the court in McLaughlin applied strict scrutiny to racial status and invalidated the criminal statute.

The reasoning of McLaughlin is the same as that used in Michael M. v.
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Superior Court, where Professor Koppelman correctly states, “Rehnquist’s reasoning relies on the fact that no young males, not even a single one, can become pregnant. This is an exceptionless generalization about the sexes.” Similarly, no white person has ever become black, and no black person has ever become white. Likewise, no two men (however sexually involved with each other) and no two women (whatever their sexual proclivities, and without some form of male involvement) have the potential to produce a child.

This is the very “exceptionless generalization” that supports society’s unquestionably vital interest in preferring and protecting potentially procreative heterosexual marriage over homosexual relationships.

Indeed, courts and lawmakers have always recognized the difference between status and conduct. Surely Professor Koppelman would not argue that incest laws that prohibit siblings from marrying each other should be invalidated because of sexual discrimination. Yet under his argument, siblings would have the right to enter nuptial vows, sons would have the constitutional right to marry fathers, mothers to marry sons or daughters, and groups of people to marry each other. There are also assertions in psychological and homosexual literature regarding (from the writers’ viewpoint) the advantages of man/boy sexual relationships and the unmet desires of boys and men to have sex with each other. Although Professor Koppelman would undoubtedly protest that the assertion is absurd, there are even those (including self-styled gay sex experts) who assert that sex with animals should no longer be considered taboo. Should a man, therefore, be able to marry his dog? A young man a pederast? Professor Koppelman’s argument would give positive answers to all of these questions. His argument, therefore, proves far too much. Sexual conduct, not status, is involved in all regulations of human sexuality, including marriage.

Professor Koppelman also suggests that advocates of traditional marriage are merely “homophobic” and “sexist.” But to dismiss evidence about the differences between homosexual and heterosexual behavior with such rhetoric displays an absolute lack of the rigorous analysis that must accompany sound legal argument. Sound social science evidence shows that homosexual parenting results in different outcomes for children, and homosexual conduct exposes adults to serious and unique risks. This evidence is too demanding to be dismissed with mere verbal swipes at sexism. Contrary to claims made by advocates of same-sex marriage, the homosexual lifestyle is a far cry from the lifestyle of the vast majority of married heterosexual couples.

Finally, the assertion that there is no compelling state interest validating traditional marriage is clearly erroneous and terribly shortsighted. There is no interest of greater importance to the nation than the maintenance of healthy families. As set out in my opening essay and reiterated by Judge Bork, “[T]raditional marriage and family have been the foundations of every healthy society known in recorded history.” Precedent, experience, and plain common sense show that it is in society’s best interest to preserve the traditional institution of marriage, on which the very future of human society depends. Professor Koppelman to the contrary, the perpetuation of the state unquestionably qualifies as a “compelling state interest.”

NOTES

1. Andrew Koppelman, Discrimination Against Gays Is Sex Discrimination. To be absolutely fair, Professor Koppelman states his argument in somewhat different terms: “If Lucy may marry Fred, but Ricky may not marry Fred, then (assuming that Fred would be a desirable spouse for either) Ricky is suffering legal disadvantage because of his sex.”


3. Id.


8. Andrew Koppelman, Discrimination Against Gays Is Sex Discrimination, 8.

9. I.e., through artificial insemination or in vitro fertilization. A man is involved at some point in both of these medical procedures.

10. Claims by sons of a right to marry their fathers cannot be dismissed out of hand, if one is to take the writings of professors gay sex experts seriously. See, e.g., Charles Silverstein & Felice Picanco, The New Joy of Gay Sex at 48–49 (1st Harper Perennial ed. 1993) (discussing “the importance of the erotic attachment of gay sons to their fathers”). If the “erotic attachment of gay sons to their fathers” is indeed “important,” courts and states that recognize gay marriage should brace themselves for the claims of sons and fathers who decide to demand social recognition of this “important relationship.”

11. If claims for same-sex marriage between adults are accepted now, it will only be a short time before similar claims by pederasts of a “right” to marry a young boy gain acceptance. Indeed, homosexual psychological literature already touts the purported benefits of “intergenerational sexual intimacy.” See, e.g., Edward Bronfeng, Boy-Lovers and Their Influence on Boys: Distorted Research and Anecdotal Observations, 20 Journal of Homosexuality (1990), at 145, 160.

Rossman (1976) gives several examples of social workers achieving miracles with apparently incorrigible young delinquents—not by preaching to them but by sleeping with them. Affection demonstrated by sexual arousal upon contact with the boy’s body, by obvious pleasure taken in giving pleasure to the boy, did far more good than years in reformatories. [Referring to P. Rossman, Sexual Experience Between Men and Boys (New York: Association Press, 1976).]

Amsterdam juvenile judge Cnoop Koopmans openly advocated this form of social therapy in a public speech (1982). I personally know of cases brought before this man. In one, a boy who had been arrested several times for shoplifting, who had been a terror at home and a failure in school, suddenly turned over a new leaf, gave up crime, started getting good marks at school and became a national champion in his favorite sport. All of this occurred after a boy-lover had been asked officially to take care of him.
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Homosexual conduct also has consequences for mental health. There is a well-documented correlation between homosexuality and suicide and mental illness. See, e.g., Theo B.M. Sandfort et al., Same-Sex Sexual Behavior and Psychiatric Disorders: Findings from the Netherlands Mental Health Survey and Incidence Study, 58 Archives of General Psychiatry 85 (Jan. 2001) (“The findings support the assumption that people with same-sex behavior are at greater risk for psychiatric disorders”); Richard Herrell et al., Sexual Orientation and Suicide, 56 Archives of General Psychiatry 867 (Oct. 1999) (“Same-gender sexual orientation is significantly associated with each of the suicidality measures” and “is unlikely to be due solely to substance abuse or other psychiatric co-morbidity”); David M. Ferguson et al., Is Sexual Orientation Related to Mental Health Problems and Suicide in Young People?, 56 Archives of General Psychiatry 876 (Oct. 1999) (“Findings support recent evidence suggesting that gay, lesbian, and bisexual young people are at increased risk of mental health problems, with these associations being particularly evident for measures of suicidal behavior and multiple disorder”). While some may argue that these findings are “caused by societal oppression” (J. Michael Bailey, Homosexuality and Mental Illness, 56 Archives of General Psychiatry 882, 884 (Oct. 1999), this is not the only possible explanation. The survey of findings from the Netherlands Mental Health Survey and Incidence Study found a significantly greater risk for psychiatric disorders among homosexuals, even though “the Dutch social climate toward homosexuality has long been and remains considerably more tolerant” than most of the world. Theo B.M. Sandfort et al., above, at 89. Other possible explanations include hypotheses that “homosexuality represents a deviation from normal development and is associated with other such deviations that may lead to mental illness,” and that “increased psychopathology among homosexual people is a consequence of lifestyle differences associated with sexual orientation.” J. Michael Bailey, above, at 884.

16. As one homosexual advocate recently stated, “Our culture is, at its heart and soul, a sexual one: it is what we do in bed that connects us. The rest is gravy.” Garth Kirby, The Future Is Ours to Take, Capital Xtra! Information, Aug. 1998 (last revised 27 Aug. 98) (visited Oct. 16, 2001), http://www.capitalxtra.aa.psiweb.com/queer/capital/cx/CX60/MIXED/cx_MM60_queering.html. The level of promiscuity among the gay population is also very different from that in mainstream society. The Kinsey Institute published a study showing that 28 percent of male homosexuals have had sexual encounters with 1,000 or more partners, with over half having more than 500 different sexual partners in a lifetime. Joseph Nicolosi, Reparative Therapy of Male Homosexuality 124 (Jason Aronson 1991).

17. Andrew Koppelman, Discrimination Against Gays Is Sex Discrimination, 1.
Koppelman claims that since same-sex-marriage prohibitions “are not substantially related to any important state interest, they are unconstitutional.”


Essay Two

The Constitutionality of Legal Preferences for Heterosexual Marriage

Richard G. Wilkins

Throughout the ages, marriage between man and woman has been essential to individual development, social progress, and communal prosperity. Because of the important roles it has played in the evolution of modern society, marriage has become a “highly preferred” legal relationship. Marriage’s unique status is reflected in the numerous statutory and other legal preferences that have been created for the marital relationship, ranging from special tax and employment benefits to laws dealing with property ownership and intestacy.

Today, however, the “highly preferred” status of marriage is under attack on several fronts. In the face of mounting divorce and abuse rates and the increasingly large number of children born out of wedlock, some question whether marriage has any continuing social value. Others (often building upon the increasingly low esteem in which modern marriage is held) question why the historic legal preferences conferred on husbands and wives should not be conferred upon alternative partnership arrangements, such as two men and two women, who wish to enjoy the benefits of a “marital” relationship. These advocates, in fact, often assert that federal and state constitutions mandate the conferral of marital benefits on such partnerships.

This essay answers the following question: Must the various legal preferences conferred on traditional marriage be extended to alternative partnership arrangements? The answer is no. The legal lines that have been drawn to protect and encourage the marital union of a man and a woman are principled and essential to furthering society’s compelling procreative interest. Indeed, once outside the union of a man and a woman, there is no principled constitutional basis for distinguishing between (or among) any form of consensual sexual behavior. Recognition of a constitutional right to