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Same-Sex Marriage and Sex Discrimination

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The widespread failure and dissolution of marriages appears, at first glance, to give rise to a double irony in the wrangle about same-sex marriage: (1) that anybody would want to be included in a practice that seems to mean less than it ever has; and (2) that anybody would oppose this inclusiveness on the grounds that the current (heterosexual) conception of marriage is crucial for the well-being of society.

However, on closer examination this cynical observation is seen to be only partially accurate. Marriage under the law carries with it numerous advantages, even (and, in some regards, especially) for those whose marriage ultimately fails. For example, the law makes provisions for spouses to receive health insurance, pension benefits, and worker's compensation. By granting citizenship to spouses of citizens, it protects married people from being physically separated by the state. It regulates the division of property as well as child custody and support in divorce proceedings. A partnership in life is a substantial commitment into which people can invest a great deal of emotional and financial capital. A marriage recognized by the State provides an opportunity for those who make such commitments and investments to formalize them in a way that facilitates the protection of the parties to the marriage. Where no provision is made for same-sex marriages, homosexuals (both male and female) are denied such benefits. Accordingly they have good reason to press for legal recognition of such marriages.

Within the framework of liberal theory there is a compelling argument for the recognition of same-sex marriages. According to liberalism, the state ought to be neutral between competing views of the good life (except insofar as it is necessary to prevent rights violations). By permitting only different-sex marriages the state endorses heterosexual values. It judges such life-styles to be worth-while and it implicitly condemns homosexuality. Liberals would argue that this is unacceptable and that the particular religious and moral views that condemn homosexuality ought not to be favored by the state.

The liberal argument is a powerful one. Unfortunately, the law is often not responsive to such arguments, even in states that are founded on liberal principles. Legislators and judges are rarely motivated on the basis of political

theory. Thus, as a strategic move, advocates of gay rights have suggested other arguments to counter bans on same-sex marriages. One such argument-the one that I shall consider here-is that prohibiting same-sex marriages constitutes sex discrimination.¹

The appeal of an argument of this kind, at least in the United States, is that sex (like race) has been regarded as a suspect class and thus requires heightened scrutiny in American courts. The result is that laws that discriminate against people on the basis of sex or race are far more likely to be judged unconstitutional than laws that discriminate on the basis of non-suspect classes, such as sexual orientation or age. In the latter kind of case, the standard of judicial review is much weaker and laws are allowed to stand unless it can be shown that they have no rational basis-a finding to which the courts have not been disposed.

Some might be inclined to dismiss the sex discrimination argument outright. They might say that the argument would have some plausibility if it were the case that only female (or only male) same-sex marriages were prohibited. Then it could be shown that females (or males) were being discriminated against and this kind of discrimination would clearly be sex discrimination. However, because the prohibition against same-sex marriages applies equally to men and women, they could say that the prohibition, even if discriminatory, cannot reasonably be construed as discrimination on the basis of sex.

Those who defend the view that prohibitions on same-sex marriages constitute sex discrimination argue that the presence of mirror image restrictions for men and women-a man may not marry another man, and a woman may not marry another woman-does not obviate the charge of sex discrimination. If same-sex marriages are prohibited then Reuben, but not Ruth, may marry Rachel. Ruth may not marry Rachel on the grounds of her sex and that, it is said, is why a prohibition on same-sex marriages constitutes sex discrimination.

This might sound like a semantic trick, but support for it is drawn from an analogy with laws banning interracial marriages. Such prohibitions are widely seen to be instances of racial discrimination. We are not impressed by the argument that whites are as prohibited from marrying blacks as blacks are from marrying whites. This analogy is particularly attractive in the context of US law because, in *Loving v. Virginia*,² the Supreme Court struck down a law banning interracial marriages on grounds of race discrimination. If the analogy works, then it could have considerable leverage against prohibitions on same-sex marriages.

But some doubt has been cast on the analogy.³ It has been suggested that whereas the purpose of bans on interracial marriages is the preservation of white supremacy, it is much harder to show that the purpose of bans on same-sex marriages is the preservation of male supremacy. How can it be the case, it is asked, that a prohibition on two men marrying each other is intended to foster the dominance of men over women? Although some have argued that prohibitions on same-sex marriages are tied up with gender stereotypes and that permitting people of the same sex to marry each other would weaken the gender stereotypes

that oppress women, others remain unconvinced. First, the causal connection might be much harder to demonstrate than in the case of interracial marriages which, through the offspring of such marriages, lead to a blurring of the racial distinctions that are essential to white supremacy. It is also noted that although the true intention of opponents of miscegenation and interracial marriages is the preservation of white supremacy, the opponents of same-sex marriages, if perfectly candid, would cite as their motivation, not the oppression of women but the suppression of what they take to be an immoral practice.

Moreover, there is a legal oddity that would arise in sex discrimination suits about male homosexual marriages—one that does not arise in suits against bans on interracial marriages. In the interracial marriage case, at least one of the parties to the marriage would be a suitable plaintiff. However, who would have the legal standing to be the plaintiff against a law prohibiting male homosexual marriages? It can hardly be one of the men party to the would-be marriage because they, according to the sex discrimination argument advanced, would not be the ones against whom the discrimination is practiced. But how could the suit be brought by a woman who has no direct interest in a particular male couple's being legally married?

Perhaps the analogy can be restored if we have a somewhat more refined view of sex discrimination. The assumption that has been made, both by those who endorse the analogy and by those who reject it, is that for there to be sex discrimination it must be the case that one sex is made worse off than the other. Those who endorse the analogy think that prohibiting same-sex marriages makes women worse off than they would be if there were a weakening of gender stereotypes which are buttressed by bans on gay marriage. And those who reject the analogy think that women (*qua* women) are not made worse off than they would be if same-sex marriages were permitted. But why should we make the assumption that one sex as a whole must be worse off than the other? Why can we not count as sex discrimination those cases in which a single individual is harmed or denied some benefit on the arbitrary ground of his or her sex?

Imagine a society in which there were robust equality of the sexes. Imagine further that a law were then made such that each sex were excluded from one profession to which the other were admitted. Let us imagine that the status and earning power of these professions were equivalent. For example, women were forbidden to be accountants and men were precluded from being lawyers. A law that imposed this restriction would constitute sex discrimination because it would deny people entry into particular professions merely on the grounds of their sex. Even though the sexes as a whole might enjoy equality (in the sense that neither sex is worse off than the other), individuals would be denied certain goods—entry into the profession of their choice—merely on the basis of their sex. The same is true of a prohibition on same-sex marriages. Even though the restriction applies equally to both sexes, it is still the case that, merely on the basis of their sex, individuals are denied some good—marrying the person of their choice. The existence of equivalent restrictions for each sex does not suggest the absence of sex discrimination.

If the more refined interpretation of sex discrimination is one which the courts would not embrace, restoring the analogy in the way I have suggested would constitute a strategic failure. But that would not undermine its philosophical strength.

Another objection that has been levelled against the sex discrimination argument takes the form of a reductio. It is said that if "mirror image" restrictions against same-sex marriages amount to sex discrimination then the same would apply to single-sex toilets. The assumption here is that single-sex toilets (like single-sex changing rooms and showers) clearly are not discriminatory. Hence same-sex marriages are not discriminatory.

To this Andrew Koppelman has responded that single-sex toilets, unlike single-race toilets, anti-miscegenation laws and bans on interracial and same-sex marriages, can withstand heightened judicial scrutiny. In other words, single-sex toilets are not (unfairly) discriminatory whereas single-race toilets and bans on interracial and same-sex marriages are. The explanation for this, he says, rests on the social meanings of the various practices, as well as on the nature of the burdens and benefits they produce for individuals. The social meaning of single-race toilets was that blacks were "filthy, animal-like, and too polluted to be permitted to perform intimate functions in the same space as whites" (Koppelman, 215). Single-sex toilets have no such message and do not suggest that women (or men) are inferior. Bans on interracial marriages conveyed the message that blacks were inferior because although the restriction applied equally to whites and blacks, the real purpose was to preserve the "racial purity" and superiority of whites. Professor Koppelman argues that prohibiting same-sex marriages is "tightly connected with the devaluation of women" (Koppelman, 215).

Consider next the burdens and benefits. Single-sex toilets, says Professor Koppelman, impose only minor burdens. A man may not enter a public toilet marked 'Women', but not far away he should find another toilet which he may enter. He is not "deprived of anything particularly important (except, perhaps, a wholly illegitimate opportunity to invade the privacy of others)" (Koppelman, 215). Moreover, Professor Koppelman seems to think that the strong preference many people have for single-sex toilets is worthy of consideration because "it is far from clear that this preference is a consequence of prejudice against a traditionally disadvantaged group" (Koppelman, 215). By contrast, bans on interracial and same-sex marriages do impose significant burdens. To be prevented from marrying the person of one's choice is a serious restriction. Marriage partners are not as substitutable as ablution facilities.

There is an unfortunate irony in Professor Koppelman's response to the single-sex toilet objection. The irony is that although he seeks to advance the position of homosexuals, his response turns on one of the most deep-seated obstacles to the improvement of their position—namely, the failure to take the phenomenon of homosexuality seriously. After all, the very strong personal preferences for single-sex toilets to which he refers as a legitimate consideration strike one as quite blinkered if one faces up to the fact that not everybody is heterosexual. Our society deems it acceptable that standards of privacy for members of the same

sex be protected to a lesser degree than those for members of different sexes. That is why most public toilets, which offer minimal privacy, are restricted either to men or to women. And it is why Andrew Koppelman regards men's entry into women's toilets as a "wholly illegitimate" invasion of the privacy of others, but does not pass similar judgement on the entry of two people of the same sex into the toilets designated for their sex.

The asymmetry cannot be explained satisfactorily merely by reference to anatomical differences between men and women. After all, there are anatomical differences (of another kind) between races and between adults and children. Rather the explanation must have something to do with sexual interest. It seems that the importance of bodily privacy is heightened in cases where sexual interest might be stimulated (amongst non-intimates). People's sense of shame depends in large part on how they consider them-selves to be perceived by others. For example, the shame for our exposed bodies is most acute when they are perceived by those non-intimates whom we imagine might be aroused by the sight. If this, or anything like this, is the explanation for why single-sex toilets (as well as showers and changing-rooms) are so preferred, then the defence of same-sex toilets collapses in the face of homosexuality. The same reasons of modesty that motivate the common desire for single-sex toilets should have both heterosexuals and homosexuals recoil from them.⁴ That this is not realized is attributable to the widespread failure to acknowledge genuinely that a person's sex is not an accurate means of determining which sex is the object of his or her desire.

This attitude is damaging to homosexual interests. For example, it underlies the ludicrous "Don't ask. Don't tell." policy of the US military, whereby soldiers may serve without being asked their sexual orientation in return for homosexual soldiers not displaying or admitting their sexual preferences. It is an attempt to brush homosexuality under the carpet, or into the closet, if we are to use a more common metaphor. It is to pretend that homosexuality does not exist. One gets a sense of how bizarre this denial is when one considers that, amongst the reasons the military has offered for its opposition to having homosexuals in the service, is the thesis that the absence of privacy which characterizes the life of recruits is acceptable only where those who share quarters have no sexual interest in each other. A "Don't ask. Don't tell." policy hides homosexuality so that those who would rather not have gays in the military can delude themselves into thinking that there are none.

Although many of the reasons the military have advanced for excluding homosexuals emanate from blind prejudice alone, the concern about recruits' interests in not being viewed with sexual interest by their comrades is as legitimate as any person's interest in not being viewed with sexual interest by a non-intimate of the opposite sex. The problem, though, is the military's manner of protecting these interests. It should not be to exclude homosexuals and it should not be to pretend that homosexuality does not exist. A society that truly recognizes the phenomenon of homo-sexuality will restructure itself accordingly, just as it restructures to take account of cultural and ethnic differences and of the interests of those who cannot see, hear or walk. Just as the military is altering its

structure to accommodate women, further restructuring will be necessary-in which recruits enjoy greater privacy.

Similarly, restructuring of public toilet facilities should be undertaken whereby the current standard of single-sex toilets would be replaced by more private unisex toilets. Single-sex toilets-toilets segregated by sex-tend to afford a relatively limited degree of privacy. For instance, the walls and doors of the stalls in single-sex toilets usually do not extend from floor to ceiling, but rather from calf to head. Male urinals provide even less privacy. By contrast unisex toilets are those used by people of both sexes and offer each user complete privacy from all others.

Andrew Koppelman, as we have seen, judges single- race toilets but not single sex toilets to be unacceptable, in part because he thinks that the former but not the latter carry a negative social meaning. What my observations demon-strate is that single-sex toilets also carry negative social meaning. They reflect a denial of the reality of homo-sexuality. They show that whereas our society may mouth an acceptance of homosexuality, it fails, in a fundamental way, to acknowledge the existence of this sexual orientation. Andrew Koppelman thinks that single-sex toilets impose no significant burdens on anybody. But they do impose such burdens. They subject people to the very same invasions of privacy which he thinks would be so illegitimate were men to use women's toilets (or vice versa). Thus, on both the "social meaning" and "burden" criteria, single-sex toilets fail the test of acceptability.

The response that Professor Koppelman should have given to the single-sex toilet objection, is not that single-sex toilets involve no sex discrimination, but that they too are a manifestation of a kind of discrimination-a failure to take homosexuality seriously. The defenders of many dis-advantaged groups have taken issue with society's lack of attention to the group in question. Feminists have argued that all too often women are treated as though they were invisible. And in failing to consider the needs of the disabled, many societies have effectively ignored the existence of disabled people. Similarly, homosexuals have been aware of the costs of concealing their sexual orientation. It is this awareness that underlies the importance attached to "coming out of the closet" and sometimes even to "outing" others (as the involuntary revealing of the homosexuality of another has come to be known). Systematically and structurally ignoring homosexuality thwarts the interests of homosexuals.

The debate about legal recognition for same-sex marriages is multi-faceted. Here I have focused only on the sex discrimination argument. This is neither the most straightforward nor the most compelling argument. Its value, is strategic. Strategy, as we all know, can play an important role in the advancement of a political cause. But strategies must be carefully planned lest they violate the very principles they seek to advance. Although the sex discrimination argument by itself does not do this, Andrew Koppelman's response to the single-sex toilet objection does have this defect. The objection may be raised that my alternative response has no strategic value because it is so antagonistic to common assumptions that will not readily be abandoned. If that is indeed the case then one is faced with a choice. The one option is to retain Andrew Koppelman's response, despite its conflict with

a genuine recognition of homosexuality. But this would make the strategy far less interesting and appealing from a philosophical and moral point of view. The alternative, if no other strategically and philosophically sound response to the single-sex toilet objection can be advanced, is to abandon entirely the sex discrimination argument for granting legal recognition to same-sex marriages.

Notes

1. Andrew Koppelman, "Why Discrimination Against Lesbians and Gay Men is Sex Discrimination", *New York Law Review* 69, No. 2 (May, 1994), 197; Cass R. Sunstein, "Homosexuality and the Constitution", *Indiana Law Journal* 70, No. 1 (Winter 1994), 5.


2. 388 U.S. 1 (1967).

3. Craig M. Bradley, "The Right Not to Endorse Gay Rights: A Reply to Sunstein", *Indiana Law Journal* 70, No. 1 (Winter 1994), 29.

4. Some homosexuals might have prurient interests in single-sex toilets, but such interests are no more legitimate than the interests of a heterosexual to invade the interests of those utilizing the opposite sex's toilet.

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