Saint Louis University Law Journal

Volume 46
Number 4 *(Fall 2002)*

Article 4

9-24-2002

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"THE MERE ALLUSION TO GENDER": ANSWERING THE CHARGE THAT MARRIAGE IS SEX DISCRIMINATION

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The Many Questions of Civil Unions
A Symposium Addressing the Impact of Civil Unions
February 15, 2002

I. INTRODUCTION

The argument that marriage is used as a form of sex discrimination has been made for a long time. Significantly, however, no court accepted the claim until 1993 when the Hawaii Supreme Court agreed in *Baehr v. Lewin* with this sex discrimination argument.[1] The court held that (1) under the Hawaii Constitution, any sex distinction is subject to strict scrutiny; and (2) since the marriage statute took the sex of the parties into consideration, it violated the Constitution.[2] The court remanded *Baehr* to trial to give the State an opportunity to prove a compelling interest in order to justify the discrimination.[3] Since *Baehr*, only one other trial court has accepted the sex discrimination argument.[4] Both decisions, however, were overruled by a constitutional amendment.[5] More interestingly, in *Baker v. Vermont*, the Vermont Supreme Court refused to base its decision on equal protection grounds.[6]

Vermont's approval of civil unions has raised the possibility of many states soon being faced with the issue of whether to legally recognize same-sex unions. Since some advocates claim that marriage is a form of sex discrimination, this argument may soon gain new momentum. For example,

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1. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).
2. *Id*. at 62.
3. *Id*.
4. Brause v. Bureau of Vital Statistics, No. 3AN-95-6562CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).
5. *See id.*; *see also Baehr*, 852 P.2d 44.
6. Baker v. Vermont, 744 A.2d 864, 880 n.13 (Vt. 1999).

the question is also presently being discussed in Massachusetts. A lawsuit is currently pending before the Massachusetts Court of Appeals in which seven same-sex couples have sued the State in an attempt to force the Department of Public Health to issue marriage licenses to them.[7] An identical suit is pending before the New Jersey Superior Court. Such a decision would redefine the concept of marriage in the Commonwealth.

Paul Linton has made a helpful contribution in the effort to answer the charge that marriage is a form of sex discrimination.[8] His article provides a very detailed description of the current legal status of this issue in jurisdictions where the state constitution contains an "Equal Rights Amendment" ("ERA") forbidding sex-based discrimination.

From the law of these states, as Mr. Linton describes, I have identified at least three alternatives through which a marriage statute or policy can escape the charge of sex discrimination. Each option supports the claim that marriage is not a form of sex discrimination. The same arguments also apply to laws or policies that provide marriage benefits only to married couples. Thus, these options respond to requests for recognition of quasi-marital statuses such as Vermont civil unions. Of course, while these concepts overlap, each concept will be discussed in turn for purposes of organization.

II. INHERENT DIFFERENCES

Caselaw in states having constitutional Equal Rights Amendments ("ERAs") often recognize that a law or policy employing a sex classification does not constitute sex discrimination if based on real, physical differences between the sexes.[9] For example, a Texas court said: "For us to adjudicate that women are men would be as futile as it would be absurd. Neither the ERA nor the rights established by it require us to construe it so as to deny sexual or reproductive differences between the sexes."[10]

For example, a number of state courts have heard challenges to statutory rape laws that apply only to males or for which males are given a more severe punishment. These challenges, however, have been rejected. The physical differences between men and women make them not similarly situated since

7. Goodridge v. Dep't of Pub. Health, No. 01-1647-A (Sup. Ct. Mass. County 2002); *Gays Sue N.J. for Marriage*, NEWSDAY, June 27, 2002, at A17. The trial court decision of the Massachusetts case summarily dismissed the plaintiffs' sex discrimination claim. *Goodridge*, No. 01-1647-A at *15 n. 6.

8. Paul Linton, *Same-Sex "Marriage" Under State Equal Rights Amendments*, 46 ST. LOUIS U. L.J. 911 (2002).

9. *See* People v. Salinas, 551 P.2d 703, 706 (Colo. 1976) (en banc) (noting that the ERA "does not prohibit differential treatment among the sexes when . . . that treatment is reasonably and genuinely based on physical characteristics unique to just one sex").

10. Mercer v. Bd. of Trs., 538 S.W.2d 201, 206 (Tex. Civ. App. 1976).

women stand to suffer more as a result of an unwed pregnancy.[11] Similarly, courts have recognized definitions of rape that implicate only men as perpetrators.[12]

Physical differences between men and women have also been cited as reasons for upholding statutes that prohibit "topless" dancing by women but not men.[13] Sex differences have also been used to justify laws providing different punishments for the crime of incest for men and women,[14] differences in inheritance depending on whether a child was inheriting from her mother or father,[15] restrictions on abortion funding,[16] distinctions in ages of majority,[17] restrictions on unemployment benefits offered to pregnant persons,[18] requirements of consent for mothers but not fathers of illegitimate children prior to adoption,[19] and allowance of initiating paternity actions by mothers but not fathers.[20]

Existing marriage laws are likewise based on inherent differences between men and women. Courts and judges recognized the nature of marriage as a male-female community that results from these sex differences and that makes same-sex marriage impossible. A Washington court, in rejecting a claim for the constitutional right to a same-sex marriage, stated that plaintiffs were "not being denied entry into marriage because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex."[21] A Kentucky case also rejected the right to a same-sex marriage, holding that "appellants are prevented from marrying, not by the statutes of Kentucky . . . but rather by their own incapability of entering into a marriage as that term is defined."[22] A Minnesota marriage case

11. *See Salinas*, 551 P.2d at 703; State v. Bell, 377 So. 2d 303 (La. 1979); State v. Housekeeper, 588 P.2d 139 (Utah 1978); *see also* Michael M. v. Super. Ct., 450 U.S. 464 (1981).

12. *See* People v. Medrano, 321 N.E.2d 97 (Ill. App. Ct. 1974); State v. Fletcher, 341 So. 2d 340 (La. 1976); Brooks v. State, 330 A.2d 670 (Md. Ct. Spec. App. 1975); State v. Craig, 545 P.2d 649 (Mont. 1976); Finley v. State, 527 S.W.2d 553 (Tex. Crim. App. 1975).

13. *See* Dydyn v. Dep't of Liquor Control, 531 A.2d 170 (Conn. App. Ct. 1987); MJR's Fare of Dallas, Inc. v. City of Dallas, 792 S.W.2d 569 (Tex. App. 1990); Messina v. State, 904 S.W.2d 178 (Tex. App. 1995); City of Seattle v. Buchanan, 584 P.2d 918 (Wash. 1978) (en banc).

14. *See, e.g.*, People v. Boyer, 349 N.E.2d 50 (Ill. 1976).

15. *See, e.g.*, Lowell v. Kowalski, 405 N.E.2d 135 (Mass. 1980).

16. *See, e.g.*, Fischer v. Dep't of Pub. Welfare, 502 A.2d 114 (Pa. 1985).

17. *See, e.g.*, Stanton v. Stanton, 517 P.2d 1010 (Utah 1974), *rev'd on other grounds*, 421 U.S. 7 (1975).

18. *See, e.g.*, Turner v. Dep't of Employment Sec., 531 P.2d 870 (Utah 1975), *vacated and remanded on other grounds*, 423 U.S. 44 (1975).

19. *See, e.g.*, Swyane v. L.D.S. Soc. Serv., 795 P.2d 637 (Utah 1990); *cf.* Nguyen v. Immigration & Naturalization Serv., 533 U.S. 53 (2001).

20. *See* A v. X, Y, & Z, 641 P.2d 1222 (Wyo. 1982).

21. Singer v. Hara, 522 P.2d 1187, 1192 (Wash. Ct. App. 1974).

22. Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973).

contrasts the marriage statute at issue with anti-miscegenation laws on the basis that the latter is a "marital distinction based merely upon race" while the former is "based upon the fundamental difference in sex."[23] Finally, a judge in the D.C. Court of Appeals noted that "same-sex 'marriages' are legally and factually—i.e. definitionally—impossible."[24]

As recognized in many ERA cases, one of the most significant manifestations of these sex-based differences is reproductive capacity. As a Utah court noted, "[i]n the matter of pregnancy there is no way to find equality between men and women."[25] Indeed some courts have pointed to the unique procreative capacity of male-female sexual relations as the basis for the inherent opposite-sex nature of marriage. One Washington court specifically points to reproductive capacity as a "unique physical characteristic of the sexes" that protects marriage from the claim of sex discrimination.[26] In a federal case asking for recognition of same-sex marriage for immigration purposes, the court recognized procreation as the source of the state's interest in marriage and the reason why the "legal concept and definition of . . . marriage" precludes same-sex couples.[27]

The inherent difference between men and women is abundantly clear in the reality of reproduction. A sexual relationship between a man and a woman can naturally (even if contrary to the intention of the participants) lead to the conception of a child. A same-sex relationship never can.[28] As Professor Teresa Collett has observed, women have a vulnerability in an opposite-sex relationship that does not exist in a same-sex relationship due to the impossibility of procreation resulting from sexual relations in the latter. Similar to the laws and policies reflecting sex differences upheld under state ERAs, marriage laws take this procreative reality into account.

The reality of the dual-sex nature of procreation and other differences between the sexes underscore the fact that marriage cannot be a form of sex discrimination. Rather, marriage is based on real differences between the sexes. As Justice Ginsburg has noted: "Physical differences between men and women, however, are enduring: '[T]he two sexes are not fungible; a

23. Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971).

24. Dean v. Dist. of Columbia, 653 A.2d 307, 361 (D.C. 1995) (Terry, J., concurring).

25. Turner v. Dep't of Employment Sec., 531 P.2d 870, 871 (Utah 1975), *vacated and remanded on other grounds*, 423 U.S. 44 (1975).

26. *Singer*, 522 P.2d at 1195.

27. Adams v. Howerton, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980).

28. *Singer*, 522 P.2d at 1195 ("[I]t is apparent that no same-sex couple offers the possibility of the birth of children by their union. Thus the refusal of the state to authorize same-sex marriage results from such impossibility of reproduction rather than from invidious discrimination 'on account of sex.'").

community made up exclusively of one [sex] is different from a community composed of both.'"[29]

Objections have been made to this argument, however. For example, some argue that the weakened link between marriage and procreation lessens the difference between same and opposite-sex couples. The problem with this objection is that the weakened link does not (and cannot) erase that difference. The biological reality that the two kinds of couples do not have equal procreative capacities cannot be altered by assisted reproductive technology or changing sexual mores. Nor is the relevance of this difference defeated by the fact that opposite-sex couples are allowed to marry even if not capable of having children, since an effort to determine an opposite-sex couple's fertility would surely raise other constitutional concerns.[30]

The other objection is really not an objection, but an imputation of bad faith. It relies on the fact that the Virginia courts, reversed by the U.S. Supreme Court in *Loving v. Virginia*,[31] rested their decision on the false ground that marriage was inherently a single race institution.[32] In *Loving*, the Supreme Court did not, though, rule that marriage was without an inherent nature, since it correctly held that *race* was not intrinsic to marriage. The law reasonably rejects racial distinctions while it accepts sex distinctions based on biological sexual differences. The bald absurdity of the Virginia courts' argument is indicated by the fact that the law at issue in *Loving* did not prohibit all interracial marriages, only those involving whites.[33]

A more fundamental problem with the *Loving* analogy is that, in treating race and sex as completely analogous, it treats men and women as fungible. As such, this approach ignores an appropriate concept, as articulated by a Texas court, that "[t]he mere allusion to gender is not a talisman of constitutional invalidity."[34] The Hawaii Supreme Court, however, does treat gender as such a constitutional trigger. Simply because a marriage law mentioned sex was enough for the court to automatically judge it as discriminatory. This assumption is a severe misunderstanding of the concept of sex discrimination and of the reality of sex differences, as discussed above. Most courts seem to realize this.

29. United States v. Virginia, 518 U.S. 515, 553 (1996) (quoting Ballard v. United States, 329 U.S. 187, 193 (1946)) (internal citations omitted).

30. *Adams*, 486 F. Supp. at 1124-25 (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).

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

32. In this regard, the Hawaii Supreme Court plurality opinion characterizes the Attorney General's argument regarding the inherent nature of marriage as "circular." Baehr v. Lewin, 852 P.2d 44, 63 (Haw. 1993).

33. Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Motion for Summary Judgment at 49, Goodridge v. Dep't of Pub. Health, (Sup. Ct. Mass. County 2001) (No. 01-1647-A).

34. Lawrence v. State, 41 S.W.3d 349, 359 (Tex. App. 2001) (en banc).

One commentator claims that the marriage statutes are discriminatory because they are based on stereotypes about the proper roles of men and women.[35] This also ignores the real sex differences which marriage laws reflect. The sex differences that underlie marriages, such as procreative capacity, are not just social constructs.

III. EQUAL APPLICATION

A statute or policy might also avoid being challenged as providing for sex discrimination if applied equally to both sexes.[36] For instance, in states with ERAs, courts have rejected challenges to laws that may have a disparate impact on one sex, even if the statute is nonetheless neutral regarding sex.[37] Thus, a law that did not provide for a presumption in favor of an even property division upon divorce was upheld even though it was allegedly harmful to women.[38] A challenge to the classification of certain diseases for purposes of Worker's Compensation benefits reached the same result.[39] A similar decision was made in cases challenging a ban on public funding for abortions.[40] Moreover, in another case, the Seventh Circuit held that a "separate but equal" policy in regards to boys and girls school sports teams would not likely violate the state ERA.[41] Finally, at least two state courts have upheld bans on massage parlors that allow opposite-sex massages.[42]

A few cases have held that in order for an ERA challenge to be successful, the plaintiff must show a discriminatory intent. For instance, the Montana Supreme Court said, "it is a basic equal protection principle that the invidious quality of a law claimed to be discriminatory must ultimately be traced to an impermissibly discriminatory purpose."[43] A Texas court of appeals likewise

35. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 218 (1994).

36. *See* Steffa v. Stanley, 350 N.E.2d 886 (Ill. App. Ct. 1976) (upholding interspousal tort immunity); *see also* Turner v. Dep't of Employment Sec., 531 P.2d 870, 871 (Utah 1975), *vacated and remanded on other grounds*, 423 U.S. 44 (1975) ("It is just as bad to treat unequal things as equals as it is to treat equal things unequally."); Skinner v. Oklahoma, 316 U.S. 535, 540 (1942) ("The Constitution does not require things which are different in fact or opinion to be treated in law as if they were the same.").

37. *See* Commonwealth v. King, 372 N.E.2d 196 (Mass. 1997) (rejecting equal protection challenge to prostitution statute based on argument that most prostitutes are female).

38. *See* Wendt v. Wendt, 757 A.2d 1225 (Conn. App. Ct. 2000).

39. *See* Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

40. *See* Fischer v. Dep't of Pub. Welfare, 502 A.2d 114 (Pa. 1985).

41. *See* O'Connor v. Bd. of Educ., 645 F.2d 578 (7th Cir. 1981); *see also* Att'y Gen. v. Mass. Interscholastic Athletic Ass'n, Inc., 393 N.E.2d 284 (Mass. 1979).

42. *See* Laspino v. Rizzo, 398 A.2d 1069 (Pa. Commw. Ct. 1979); Redwood Gym v. Salt Lake County Comm'n, 624 P.2d 1138 (Utah 1981).

43. State v. Spina, 982 P.2d 421, 437 (Mont. 1999).

upheld a sodomy statute against an equal protection challenge by noting a lack of any discriminatory intent on the basis of sex in the legislation.[44]

Laws that define marriage as a relationship between a man and a woman also treat both sexes equally and do not constitute sex discrimination. The most serious problem with challenging the definition of marriage as a form of sex discrimination is the failure of those making the claim to identify the class victimized by the discrimination since the concept of "victimless discrimination" is untenable. Putting aside the separate claim of "sexual orientation" discrimination, there is no clear class that is being harmed by marriage laws. Both men and women are treated equally by marriage laws since both have an equal opportunity to contract into marriage and neither sex is disadvantaged. Sometimes a charge of discrimination is made in an imprecise way that seems to identify *the couple* as the relevant class. Thus, one of the most significant statements related to sex discrimination is, as follows: "If Lucy is permitted to marry Fred, but Ricky may not marry Fred, then (assuming that Fred would be a desirable spouse for either) Ricky is being discriminated against because of his sex."[45] Of course, identifying the affected class as a couple does not accord with the traditional analysis of constitutional claims, which are pursued in terms of individual rights. In addition, such a classification is not responsive to the question of which sex, men or women, is disadvantaged by the marriage law. Unless same-sex couples, *as couples*, are identified as a discrete sex, one cannot help but think that this argument is really just a way of disguising a "sexual orientation" discrimination claim as a sex discrimination claim.[46]

Many early cases rejecting claims in favor of same-sex marriages noted the equal treatment of men and women by marriage laws as a reason for not finding the law to discriminate on the basis of sex. The Washington case noted that neither men nor women were allowed by its marriage statute to marry a person of the same-sex.[47] In the D.C. case, Judge Steadman noted that "[t]he marriage statute applies equally to men and women."[48] Even the Vermont civil unions case noted that "marriage laws are facially neutral; they do not single

44. Lawrence v. State, 41 S.W.3d 349 (Tex. App. 2001) (en banc).

45. *See* Koppelman, *supra* note 35, at 208. It is interesting to note the parenthetical comment which may be suggesting an "inappropriateness of spouse" exception to the proposed sex discrimination standard.

46. At least one court has specifically held that sex discrimination does not include "sexual orientation" discrimination since "sexual orientation" is not tied to a particular gender. *In re* Opinion of the Justices, 530 A.2d 21, 24 (N.H. 1987).

47. Singer v. Hara, 522 P.2d 1187, 1190-91 (Wash. Ct. App. 1974) (agreeing with the state that since marriage licenses were denied equally to both male and female couples that there was no ERA violation).

48. Dean v. District of Columbia, 653 A.2d 307, 363 n.2 (D.C. 1995) (Steadman, J., concurring).

out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex . . . each sex is equally prohibited from precisely the same conduct."[49]

The main objection to the use of the equal application doctrine in the marriage context, again, is an attempt to classify those who make it as bigots by analogizing the sex difference inherent in marriage with the discredited racial restrictions of past marriage laws in some states (the *Loving* analogy). This has become a particularly significant charge since it was endorsed by the Hawaii Supreme Court in its decision accepting the sex discrimination argument.[50] The argument is simple: marriage laws may treat men and women equally, but defenders of miscegenation statutes said that those laws treated both races equally. The distinction between sex and race is thus ignored by the court, though other courts have noted that *Loving* primarily regards race discrimination and so is not appropriate to the discussion of same-sex marriage.[51] In addition, as noted above, the statute at issue in *Loving* did not treat all races equally, but singled out whites as a superior class.

IV. INTENT OF AMENDMENT

A final category of defenses to a sex discrimination claim is the argument that the ERA was not intended to create the right asserted in these cases. For instance, the Illinois Supreme Court held that "the purpose of the [ERA] was to guarantee rights for females equal to those of males."[52] A sponsor of the Illinois ERA said, "I don't see any significant change that will disturb one's way of life brought about by this amendment."[53] Similar statements of intent have been made in reference to the ERAs introduced in New Mexico,[54] Pennsylvania[55] and Washington.[56]

The purpose of state ERAs is also consistent with marriage laws that define marriage as the union of a man and a woman, since there is no reason to believe that the laws reflect any intent to discriminate against either men or women. In the Washington same-sex marriage case, the court held that the state ERA could not be construed to allow for the redefinition of marriage because the purpose of the law was "to overcome discriminatory legal

49. Baker v. Vermont, 744 A.2d 864, 880 n.13 (Vt. 1999); *see also* Baehr v. Lewin, 852 P.2d 44, 71 (Haw. 1993).

50. *Baehr*, 82 P.2d at 63.

51. *See* Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971); *Singer*, 522 P.2d at 1191.

52. People v. Ellis, 311 N.E.2d 98, 100 (Ill. 1974).

53. V RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 3672 (1972).

54. N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841 (N.M. 1998).

55. *See* Hopkins v. Blanco, 320 A.2d 139 (Pa. 1974); Henderson v. Henderson, 327 A.2d 60 (Pa. 1974).

56. *See* Marchioro v. Chaney, 582 P.2d 487 (Wash. 1978), *aff'd* 442 U.S. 191 (1979).

treatment as between men and women 'on account of sex.'"[57] Thus, to hold that marriage is a form of sex discrimination under that provision would "subvert the purpose" of the amendment.[58]

In addition, some states specifically disavowed any intention to create a right to same-sex marriage when they enacted their ERA. Such was the case in Florida, where official commentary noted that the language of the amendment was adopted so that "the proposal would not be deemed in any way to countenance same-sex marriages."[59] Likewise, the Special Commission appointed to study the effects of the Massachusetts ERA, noted that it would have "no effect upon the allowance or denial of homosexual marriages."[60] A Virginia Attorney General's opinion regarding the proposed ERA argued that the amendment would not require recognition of same-sex marriages.[61]

V. CONCLUSION

The lack of legal support for the proposition that marriage is used as a form of sex discrimination, no less than the logical absurdity of the proposition will not likely prevent the argument from being raised in the future. The temptation to gain a desired result by legal fiat rather than through the uncertain legislative process will likely be yielded to again as in the past. Notwithstanding, a careful consideration of the law will, I believe, make clear that courts ought to be hesitant to accept the argument for the sake of preserving the logic and integrity of marriage and of constitutional law.

57. Singer v. Hara, 522 P.2d 1187, 1194 (Wash. Ct. App. 1974).

58. *Id*.

59. FLA. CONST. art. I, § 2 commentary (West Supp. 2001).

60. SPECIAL COMMISSION AUTHORIZED TO STUDY THE EFFECT OF THE RATIFICATION OF THE PROPOSED [ERA] UPON THE LAWS, BUSINESS COMMUNITIES AND PUBLIC IN THE COMMONWEALTH, INTERIM REPORT, S. DOC. NO. 1689, at 20-21 (1976).

61. 154 Va. Op. Att'y Gen. 2 (1977); *see also* 84 Me. Op. Att'y Gen. 20 (1984).