# Cardozo Law School
## Jacob Burns Institute for Advanced Legal Studies

January 2002

Working Paper Series No. 43


# EVALUATING THE SEX DISCRIMINATION ARGUMENT FOR LESBIAN AND GAY RIGHTS


Edward Stein

# EVALUATING THE SEX DISCRIMINATION ARGUMENT FOR LESBIAN AND GAY RIGHTS

Edward Stein*

*The sex discrimination argument for lesbian and gay rights analyzes laws that discriminate on the basis of sexual orientation in terms of sex discrimination. For example, sodomy laws that prohibit only same-sex sexual activities are analyzed as discriminating on the basis of sex because they prohibit women from doing something men are permitted to do, that is, have sex with women. This argument has been championed by some scholars and litigators, and it has persuaded some judges. Edward Stein shows that there are sociological, theoretical, moral, and practical problems facing the sex discrimination argument. He suggests that there are better ways to make the case for lesbian and gay rights.*



---

* Associate Professor of Law, Benjamin N. Cardozo School of Law; Clerk for Judge Dolores Sloviter, U.S. Court of Appeals for the Third Circuit. Ph.D., Massachusetts Institute of Technology; J.D., Yale Law School; B.A., Williams College. Thanks to Cheshire Calhoun, Jules Coleman, William Eskridge, Janet Halley, Elizabeth Hillman, Paul Kahn, Morris Kaplan, Andrew Koppelman, Melanie Leslie, Steve Lin, Brett McDonnell, Judith Resnick, Rose Saxe, Scott Shapiro, Reva Siegel, Stewart Sterk, Robert Wintemute, and Kenji Yoshino for help at various stages of writing this Article. Versions of this Article were presented at University of Chicago Law School, Harvard Law School, Arizona State University College of Law, Benjamin N. Cardozo School of Law, Conference on Women and the U.S. Constitution: History, Interpretation and Practice, at Baruch College (CUNY), American Philosophical Association Eastern Division Conference, and LeGAL Conference at Columbia University. Romilda Crocamo and Lisa Tuntigian provided valuable research assistance.

## INTRODUCTION

Various advocates of lesbian and gay rights have argued that laws that discriminate on the basis of sexual orientation constitute a form of sex discrimination. According to this argument, which I call the *sex discrimination argument for lesbian and gay rights* (the sex discrimination argument, for short), any form of discrimination against lesbians, gay men, and bisexuals[1] constitutes sex discrimination. This argument, for example, says that a law prohibiting oral sex between two women, but *not* between one man and one woman, discriminates on the basis of sex because it prohibits a woman from doing something (namely, having oral sex with a woman) that it allows a man to do.[2]

1. Henceforth, I only sometimes mention bisexuals when discussing nonheterosexual people and I use the phrase "lesbian and gay rights" to refer to the rights of nonheterosexuals generally. I mention bisexuals with some frequency because it is important to include them among those who are discriminated against on the basis of sexual orientation. When I do not explicitly mention them, it is primarily for the sake of felicitousness. Even when I do not mention bisexuals specifically, I intend to include them implicitly in my discussion throughout.

2. *See* Picado v. Jegley, No. CV-99-7048 (Ark. Cir. Ct. Mar. 23, 2001), *available at* http://www.lambdalegal.org/sections/library/decisions/picadodecision.pdf (finding the state's sodomy law unconstitutional both on privacy grounds and on sex discrimination grounds); State v. Walsh, 713 S.W.2d 508, 510 (Mo. 1986) (en banc) (considering and rejecting the sex discrimination argument applied to Missouri's sodomy law); Lawrence v. State, 41 S.W.3d 349 (Tex. App. 2001) (en banc) (same); Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988) (applying the sex discrimination argument to sodomy laws). In *Lawrence*, the Texas appellate court, sitting en banc, withdrew and overturned a three-judge panel opinion that *accepted* the sex discrimination argument as applied to the state's sodomy law. *Lawrence v. State*, Nos. 14-99-00109-CR & 14-99-00111-CR, 2000 WL 729417 (Tex. App. June 8, 2000), *opinion withdrawn and overruled by* 41 S.W.3d 349.

A handful of courts in the United States[3] and in other jurisdictions[4] have granted legal claims to lesbians, gay men, and bisexuals on the basis of the sex discrimination argument. This argument was first advanced in the early 1970s by feminist theorists and activists[5] as well as by opponents of the proposed Equal Rights Amendment.[6] The argument seems to have been first advanced in a U.S. court around the same time that two men claimed that the state of Washington's refusal to grant them a marriage license constituted

3. *See, e.g.*, Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding that prohibitions against same-sex marriage constitute sex discrimination). Although the Hawaii Supreme Court held that Ninia Baehr's challenge to Hawaii's marriage law was rendered moot by an amendment to the state's constitution, *see* HAW. CONST. art. I, § 23, *Baehr v. Lewin* was explicitly *not* overruled by this decision. *See* Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391 (Haw. Dec. 9, 1999); *see also infra* text accompanying notes 171–176. For other American courts that have accepted the sex discrimination argument, see *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998), which, in dicta, found that prohibitions against same-sex marriage constitute sex discrimination; *Picado*, No. CV-99-7048; *Engel v. Worthington*, 23 Cal. Rptr. 2d 329 (Cal. Ct. App. 1993), which held that a photographer who refused to publish yearbook pictures of same-sex couples invidiously discriminated on the basis of sex; and *Lawrence*, 2000 WL 729417, which held that the Texas sodomy law (which applied only to people of the same sex) violated the state's equal rights amendment because it impermissibly discriminated on the basis of sex. Of these four cases, only *Picado* remains good law (and it has been appealed). The holding of *Brause*, like the holding in *Baehr*, was rendered moot by a constitutional amendment. *See* ALASKA CONST. art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman."). The *Engel* opinion was withdrawn by order of the court, *see* Engel v. Worthington, No. S036051, 1994 Cal. LEXIS 558 (Cal. Feb. 3, 1994) (denying review and withdrawing the opinion by order of the court). And the opinion in *Lawrence* was not released for publication in law reports and was subsequently overruled. *See Lawrence*, 41 S.W.3d 349. The sex discrimination argument was also accepted by one judge in *Baker v. State*, 744 A.2d 864 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part), but was explicitly rejected by the other four judges. *See infra* text accompanying notes 92–95.

4. *See* Toonen v. Australia, Communication No. 488/1992, 1 Int'l H.R. Rep. 97 (1994) *available at* http://www1.umn.edu/humanrts/undocs/html/vws488.htm (holding that the sodomy laws of the Australian province of Tasmania violated the International Covenant on Civil and Political Rights because they discriminated "on the ground . . . of sex"). For discussion of the sex discrimination argument in some international contexts, see generally ROBERT WINTEMUTE, SEXUAL ORIENTATION AND HUMAN RIGHTS: THE UNITED STATES CONSTITUTION, THE EUROPEAN CONVENTION, AND THE CANADIAN CHARTER (1995), and Robert Wintemute, *Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes*, 60 MOD. L. REV. 334, 344–53 (1997).

5. *See* ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW ch. 3 (forthcoming 2002) (citing AMAZON EXPEDITION: A LESBIANFEMINIST ANTHOLOGY (Phyllis Birkby et al. eds., 1973); TI-GRACE ATKINSON, AMAZON ODYSSEY (1974); FOR LESBIANS ONLY: A SEPARATIST ANTHOLOGY (Sarah L. Hoagland & Julia Penelope eds., 1988); JILL JOHNSTON, LESBIAN NATION: THE FEMINIST SOLUTION (1973); Anne Koedt, *Lesbianism and Feminism*, *in* RADICAL FEMINISM 246 (Anne Koedt et al. eds., 1973); and Radicalesbians, *The Woman Identified Woman*, *in* RADICAL FEMINISM, *supra*, 240).

6. *See* WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 218–19 (1999) (citing 118 CONG. REC. 9096–97, 9314–17 (1972) (testimony of Prof. Paul Freund & Sen. Sam J. Ervin, Jr. against the Equal Rights Amendment)).

sex discrimination in violation of that state's equal rights amendment.[7] More recently, starting in the late 1980s, various legal scholars have developed the argument in greater detail.[8] In this Article, I consider whether legal questions relating to sexual orientation should be—both as a principled and a practical matter—addressed under the rubric of sex discrimination.

My discussion proceeds as follows. In Part I, I survey the legal situation in the United States for lesbians and gay men, and the various legal arguments concerning lesbian and gay rights that have been made as an effort to improve this situation. In Part II, I elaborate the sex discrimination argument. In Part III, I offer three related principled objections to it. I show that, as an argument for lesbian and gay rights, the sex discrimination argument is sociologically, theoretically, and morally flawed. In Part IV, I show that these flaws lead to pragmatic problems for the argument. Although the argument has had some practical success, it is by no means without practical pitfalls. These pitfalls, combined with the principled flaws of the sex discrimination argument, suggest that this argument does not offer a strong legal strategy for obtaining lesbian and gay rights and that it should be used with caution. I conclude by briefly sketching what I think are more promising directions for making the case for lesbian and gay rights, approaches that surely will not lead to the immediate attainment of lesbian and gay rights in most legal contexts, but that avoid the problems facing the sex discrimination argument.

## I. LESBIAN AND GAY RIGHTS

### A. Three Types of Claims for Lesbian and Gay Rights

Claims for lesbian and gay rights fit into three somewhat overlapping categories: claims for the decriminalization of same-sex sexual activity, claims for protection against discrimination on the basis of sexual orientation, and claims for the recognition of lesbian and gay relationships and institutions.[9]

---

7. *See* Singer v. Hara, 522 P.2d 1187, 1193–94 (Wash. Ct. App. 1974). For discussion, see WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 162 (1996).

8. *See, e.g.*, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187; Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1 (1992); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994); Koppelman, *supra* note 2.

9. *See, e.g.*, MORRIS B. KAPLAN, SEXUAL JUSTICE: DEMOCRATIC CITIZENSHIP AND THE POLITICS OF DESIRE 14–17 (1997); EDWARD STEIN, THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY AND ETHICS OF SEXUAL ORIENTATION 304 (1999).

In the United States, fifteen states, as well as the military (which is a separate criminal jurisdiction), have laws that criminalize most forms of same-sex sexual activity.[10] Decriminalization involves repealing such laws (collectively known as sodomy laws) and other laws that regulate consensual same-sex sexual activity. Proponents of decriminalization of same-sex sexual activity argue that such laws violate the right to privacy,[11] that they are examples of "victimless crimes" that should not be criminalized, and that even when not enforced, such laws harm sexual minorities in unjustifiable ways.[12]

Currently, thirty-nine states lack protection against discrimination on the basis of sexual orientation. In these states it is legal, for example, for a nonstate entity to discriminate in hiring and housing against a person on the basis of sexual orientation.[13] Further, Title VII, the federal statute that

10. Of these states, three (Kansas, Oklahoma, and Texas) have laws that criminalize certain sexual acts only when they are committed by two people of the same sex. *See* KAN. STAT. ANN. § 21-3505 (1995); OKLA. STAT. tit. 21, § 886 (West 1983 & Supp. 2001); TEX. PENAL CODE ANN. § 21.06 (Vernon 1994). The Missouri sodomy law, MO. ANN. STAT. § 566.090.1 (West 1999), which is also of this form, remains on the books, although a state appellate court, in *State v. Cogshell*, 997 S.W.2d 534 (Mo. Ct. App. 1999), held that the law cannot be used to prosecute consensual sexual activities. In *Picado v. Jegley*, No. CV-99-7048 (Ark. Cir. Ct. Mar. 23, 2001), a state trial court in Arkansas found Arkansas's sodomy law, ARK. CODE ANN. § 5-14-122 (Michie 1997), which is also of this form, to be unconstitutional on the basis of the sex discrimination argument and a privacy-based argument. The state has appealed this ruling. For a fairly current list of states that have sodomy laws (some of which also criminalize sex acts between people not of the same sex), see the state sodomy law update published by Lambda Legal Defense and Education Fund, *available at* http://www.lambdalegal.org/cgi-bin/pages/states/sodomy-map (last visited Nov. 13, 2001). Although no state regularly enforces sodomy laws, such laws are selectively enforced in some states, especially against lesbians, gay men, and bisexuals. Even in states where such laws are not generally enforced, the mere existence of laws against sexual activity between people of the same sex is used to support and justify other laws and social practices relating to homosexuality. *See, e.g.*, Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (defending the constitutionality of the ban on lesbians and gay men serving in the FBI on the grounds that "[i]t would be quite anomolous [sic], on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause"); *see also* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000).

11. *See infra* text accompanying notes 25–42.

12. *See, e.g.*, Leslie, *supra* note 10.

13. Currently, twelve states and the District of Columbia have antidiscrimination laws that protect against discrimination on the basis of sexual orientation. *See* CAL. GOV'T CODE § 12,940 (2001) (prohibiting discrimination on the basis of sexual orientation in the context of employment); CONN. GEN. STAT. § 46a-81c (West 1995 & Supp. 2001) (same), -81d (same in the context of public accommodations), -81e (housing), -81g (state practices); D.C. CODE ANN. §§ 1-2512 (2001) (employment), -2515 (real property), -2519 (public accommodations), -2520 (education), 36-1008 (2001) (employment services); HAW. REV. STAT. §§ 368-1 (1999 & Supp. 2000) (employment, housing, public accommodations, and state assistance) & 378-2 (1999 & Supp. 2000) (employment); 2001 Md. Laws ch. 340 (S.B. No. 205) (employment, housing, and public accommodations); MASS. ANN. LAWS ch. 151B, §§ 3 (Law Co-op. 2001) & 4 (Law Co-op. 2001) (employment, housing, commercial space, and credit services); MINN. STAT. § 363.03 (1991 & Supp. 2001) (employment) & .12 (employment, housing, public accommodations, public

prohibits discrimination in employment on the basis of race, sex, and other characteristics, does not prevent employers from discriminating on the basis of sexual orientation.[14] In sum, a gay man or lesbian—even if he or she can prove that sexual orientation was the only reason he or she was not hired for or was fired from a job—has no legal recourse in most states. Lesbians and gay men argue that just as the state protects against discrimination on the basis of race and other characteristics, so too the state should act as a "civil shield"[15] against discrimination on the basis of sexual orientation.[16]

The third category of claims for lesbian and gay rights is less straightforward. Lesbians and gay men argue their relationships and institutions deserve recognition they do not receive under the current legal regime. Most notably, no state allows same-sex couples to get married and thereby obtain the wide range of rights, benefits, and privileges that are associated with marriage.[17] Vermont, however, following the landmark case of *Baker*

---

services, and education); NEV. REV. STAT. ANN. 610.020 (Michie 2001) & 613.330 (Michie 2001) (employment); N.H. REV. STAT. ANN. §§ 21 (1995 & Supp. 2000), 354 (1995 & Supp. 2000) (employment, housing, and public accommodations); N.J. STAT. ANN. § 10:5-3 to -5 (West 1993 & Supp. 2001) (employment, public accommodations, education, and housing); R.I. GEN. LAWS §§ 11-24-2 (2000) (public accommodations), 28-5-7 (2000) (private employment), 34-37-2 & -4 (2000) (housing); VT. STAT. ANN. tit. 3, § 961 (2001), tit. 21 § 495 (2001) (employment), tit. 9 §§ 4502 (2001) (public accommodations), 4503 (2001) (housing); WIS. STAT. ANN. §§ 106.52 (West 2000), 111.31 (West 1997 & Supp. 2000) (equal rights policy). Other states have executive orders in effect that prohibit discrimination only in public employment. *See Summary of States Which Prohibit Discrimination Based on Sexual Orientation*, *available at* http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=185 (last visited Nov. 13, 2001).

14. *See, e.g.*, Dillon v. Frank, No. 90-2290, 1992 WL 5436, at *4 (6th Cir. Jan. 15, 1992); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329–32 (9th Cir. 1979); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326–27 (5th Cir. 1978); *see also infra* text accompanying notes 156–158.

15. RICHARD MOHR, GAYS/JUSTICE: A STUDY IN SOCIETY, ETHICS AND LAW 137–87 (1990).

16. Some critics of laws that protect against discrimination on the basis of sexual orientation have argued that such laws give gay men and lesbians special rights. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 637 (1996) (rejecting the claim that the amendment at issue merely undercuts the claim by homosexuals for "special rights"). *But see id.* at 647–49 (Scalia, J., dissenting) (embracing the view that the amendment merely rejects homosexuals' claims for special rights). In the United States, the underlying rationale of the antidiscrimination provisions of civil rights legislation is the recognition that, if pervasive social inequalities exist, formal legal equality is inadequate to provide for full citizenship. In certain contexts, states may need to protect unpopular minorities against retaliation for the exercise of their basic rights of citizenship. For example, African Americans were oppressed under Jim Crow laws not only by state laws mandating segregation but also by the deployment of white supremacist social and economic power to punish any citizen, black or white, who attempted to change the status quo through political means. It is precisely the intensity and extent of the prejudice against homosexuality that justifies the claims of lesbian and gay citizens for protection against discrimination. Lesbians and gay men are entitled to protection against discrimination to ensure basic rights of citizenship and of political participation. Protections against discrimination attempt to guarantee basic and fundamental rights that all citizens are supposed to enjoy but that some unpopular minorities have to struggle to obtain.

17. *See, e.g.*, ESKRIDGE, *supra* note 7, at 2.

*v. State*,[18] does allow same-sex couples to enter civil unions, which provide them with the full range of rights, benefits, and responsibilities that come with marriage in Vermont.[19] However, even if a state were to allow same-sex couples to marry, few if any U.S. jurisdictions would recognize this marriage, despite the Full Faith and Credit Clause of the U.S. Constitution.[20] In addition to being unable to have their intimate relationships legally recognized and sanctioned, lesbian and gay employees of state agencies, and lesbian and gay students in government-funded schools, are often denied funding for their organizations.[21] In addition, plays, photographs, and other forms of artistic expression that reflect lesbian and gay culture have been banned from receiving government support. In fact, representations of and by lesbians, gay men, and bisexuals have played a central role in debates over government funding of the arts and over public standards of "decency."[22] Further, when the state attempts to regulate speech in cyberspace, the speech

18. 744 A.2d 864, 867 (Vt. 1999) (holding that same-sex couples must receive the same "benefits and protections" that the state provides for married male-female couples).

19. *See* VT. STAT. ANN. tit. 15, §§ 1201–1207 (2000). As this Article was going to press, California adopted a law granting additional benefits to the state's registered domestic partners. While not as extensive as the benefits that accrue to same-sex couples who enter civil unions in Vermont, under the new law, domestic partners in California, as of January 1, 2002, can adopt a partner's child through the state's stepparent adoption procedure, sue for the wrongful death of a partner, be exempt from state income tax on a partner's health benefits, file for disability and make important medical decisions on behalf of an incapacitated partner, and take sick leave to care for a partner or for a partner's child. *See* 2001 Cal. Legis. Sev. Ch. 893 (A.B. 25) (West).

20. The Full Faith and Credit Clause says that "Full Faith and Credit shall be given in each State to the Public Acts, Records, and Judicial Proceedings of every other State." U.S. CONST. art. IV, § 1. The Defense of Marriage Act (DOMA) of 1996, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7.8, 28 U.S.C. § 1738C (Supp. V 1999)), exempts same-sex marriage from receiving full faith and credit by saying that no state "shall be required to give effect to any public act, record or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship." *Id.* As of this date, thirty-five states have passed laws like DOMA (sometimes called mini-DOMAs) that explicitly refuse to recognize same-sex unions. *See* Nat'l Gay & Lesbian Task Force, *Specific Anti-Same-Sex Marriage Laws in the U.S.* (Jan. 2001), *available at* http://www.ngltf.org/downloads/marriagemap0201.gif (last visited Nov. 12, 2001). The broadest of these laws is in Nebraska, which explicitly refuses to recognize domestic partnerships, civil unions, and same-sex marriages. *See* NEB. CONST. art. I, § 29 (2000); *see also infra* note 174.

21. For example, students in public schools in Orange County, California and Salt Lake City, Utah who wanted to start groups for lesbian and gay students and their allies (so-called gay-straight alliances) were initially prohibited from doing so. The students in both schools brought federal lawsuits to allow their groups to meet in school. For now, at least, these suits have been settled. *See, e.g.*, Barbara Whitaker, *School Board, Facing Suit, Agrees to Recognize Gay Club*, N.Y. TIMES, Sept. 7, 2000, at A18.

22. *See, e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998) (upholding a "decency" clause in the NEA's governing statute against a First Amendment challenge by some artists, including lesbian and gay artists).

of sexual minorities is among the speech that is typically subject to tighter restriction.[23]

## B. Two Types of Arguments for Lesbian and Gay Rights

In the United States, legal arguments[24] for lesbian and gay rights can be divided, for the most part, into two types: *equality*-based arguments and *privacy*-based arguments. In the mid-1980s, privacy-based arguments seemed more promising. A line of cases starting in 1965 with *Griswold v. Connecticut*,[25] and including *Roe v. Wade*,[26] found a right to privacy in the U.S. Constitution. In this line of cases, various Justices found the right to privacy in different places. In *Griswold*, the zone of privacy was identified within the "penumbras" and "emanations" of the Bill of Rights,[27] in the Ninth Amendment's reservation to the people of certain unenumerated fundamental rights,[28] or as "implicit in the concept of ordered liberty."[29] Eight years later, *Roe* more definitively located the right to privacy in "the Fourteenth Amendment's concept of personal liberty and restrictions on state action."[30] By the late seventies and

23. Gay and lesbian groups were among the plaintiffs in three noteworthy cases concerning the regulation of cyberspace: *Reno v. ACLU*, 521 U.S. 844 (1997), which found unconstitutional the Communications Decency Act; *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999), *aff'd*, 217 F.3d 162 (3d Cir. 2000), *cert. granted sub nom.* Ashcroft v. ACLU, 121 S. Ct. 1997 (2001) (No. 00-1293), which granted a preliminary injunction due to the probable unconstitutionality of the Child On-Line Protection Act; and *Mainstream Loudoun v. Board of Trustees of the Loudoun County Library*, 24 F. Supp. 2d 552 (E.D. Va. 1998), which found unconstitutional the use of filtering software by a public library that provided access to the World Wide Web. For discussion, see Edward Stein, Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace (unpublished manuscript, on file with author).

24. This Article does not explicitly discuss general moral and ethical arguments for lesbian and gay rights. I do, however, discuss moral and ethical problems with some legal arguments for lesbian and gay rights. *See infra* text accompanying notes 135–145. For many of the moral arguments, see, for example, HOMOSEXUALITY AND ETHICS (Edward Batchelor, Jr. ed., 1980), MOHR, *supra* note 15, DAVID A.J. RICHARDS, IDENTITY AND THE CASE FOR GAY RIGHTS: RACE, GENDER, RELIGION AS ANALOGIES (1999), MICHAEL RUSE, HOMOSEXUALITY: A PHILOSOPHICAL INQUIRY (1988), Jeremy Bentham, *An Essay on "Paederasty," in* PHILOSOPHY & SEX (Robert Baker & Frederick Elliston eds., rev. ed. 1984), John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049 (1994), Andrew Koppelman, *Homosexual Conduct: A Reply to the New Natural Lawyers*, *in* SAME SEX: DEBATING THE ETHICS, SCIENCE AND CULTURE OF HOMOSEXUALITY (John Corvino ed., 1997), and Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267 (Carole S. Vance ed., 1984).

25. 381 U.S. 479 (1965) (overturning law prohibiting birth control devices as violating the right to privacy of married couples).

26. 410 U.S. 113 (1973) (overturning antiabortion statutes on privacy grounds).

27. *Griswold*, 381 U.S. at 484.

28. *See id.* at 486–87 (Goldberg, J., concurring).

29. *Id.* at 500 (Harlan, J., concurring) (citation omitted); *see id.* at 502 (White, J., concurring).

30. *Roe*, 410 U.S. at 153.

early eighties, buttressed by these and other decisions, the right to privacy seemed broad and robust. Some legal theorists argued that it included a right to "intimate association."[31]

In this context, many advocates of lesbian and gay rights expected that it was only a matter of time until the privacy line of cases would be extended to encompass the right to engage in sexual activities with people of the same sex, and that privacy arguments would take the lead in making the case for lesbian and gay rights generally.[32] In fact, this was the primary argument[33] made before the U.S. Supreme Court by lawyers for Michael Hardwick, an openly gay man who was arrested for engaging in consensual sodomy (specifically, oral sex) with another man in his own bedroom.[34] In a five-to-four decision, the Supreme Court rejected this argument, holding in *Bowers v. Hardwick*[35] that the privacy right articulated in earlier cases only applies when there is a connection to "family, marriage or procreation."[36] According to the *Bowers* majority, the right to privacy, as it appears in the Constitution, does not entail that "any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription"[37] or that there is a "fundamental right to engage in homosexual sodomy."[38]

After *Bowers*, litigators and legal theorists advocating lesbian and gay rights mostly abandoned privacy arguments—with the exception of using the argument in state courts[39]—and began the task of "arguing around

31. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

32. *See, e.g.*, WALTER BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION 52–73 (1973); David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 HASTINGS L.J. 957 (1979); David A.J. Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281 (1977); Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613, 1637 (1974) ("The privacy argument is clearly the best argument and one that should succeed in securing constitutional protection for the private exercise of consensual adult homosexual activity."); Comment, *Constitutionality of Sodomy Statutes*, 45 FORDHAM L. REV. 553 (1976).

33. *See* Brief for Respondent, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140) (arguing that U.S. Supreme Court precedent regarding the right to privacy demands a substantial justification for criminalizing consensual sexual intimacies between adults engaged in one's bedroom).

34. *See* PETER IRONS, *What Are You Doing in My Bedroom?*, *in* THE COURAGE OF THEIR CONVICTIONS 392 (1988) (featuring an interview of Michael Hardwick).

35. 478 U.S. 186 (1986).

36. *Id.* at 190–91.

37. *Id.* at 191.

38. *Id.*

39. Before *Bowers*, privacy-based arguments were successful in persuading some state courts to overturn their state's sodomy laws. *See, e.g.*, People v. Onofre, 51 N.Y.2d 476 (1980), *cert. denied*, 451 U.S. 987 (1981); Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980). After *Bowers*, some state courts have construed their state constitutions to include privacy rights that prohibit sodomy laws. *See, e.g.*, Powell v. State, 510 S.E.2d 18 (Ga. 1998) (overturning the sodomy law that was upheld in *Bowers*); Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992); Williams v. State, No. 98036031/cc-1059, 1998 Extra LEXIS 260 (Md. Cir. Ct. Oct. 15, 1998); Mich. Org. for Human

[*Bowers v.*] *Hardwick*."[40] To do so, they turned to equality-based arguments that draw on the Equal Protection Clause of the Fourteenth Amendment, and moved away from privacy-based arguments that draw on the Due Process Clauses of the Fifth and Fourteenth Amendments.[41] This move was coupled with one away from a focus on repealing laws that criminalize same-sex sexual activities to a focus on repealing laws that discriminate on the basis of sexual orientation.[42]

Over one hundred years ago, in discussing equal protection, the Supreme Court expressed doubts that the Fourteenth Amendment could be used to invalidate any sort of discrimination except discrimination by a state against African Americans.[43] Since that time, the Court has interpreted the Fourteenth Amendment as requiring skepticism towards statutes that make use of classifications other than race.[44] Litigators and legal scholars attempting to argue around *Bowers* have argued that statutes that make use of sexual orientation classifications, like those that make use of racial and other suspect classifications, should be subject to exacting scrutiny. The hope is that if courts give heightened scrutiny to statutes that make use of sexual orientation classifications, then such statutes will be found to violate equal protection doctrine.

One of the most frequently made arguments appeals to the alleged fact that sexual orientations are either not chosen or are immutable or both. Intuitively, the argument is that a person should not be punished, or in any

---

Rights v. Kelly, No. 88-815820 (Mich. Cir. Ct. July 9, 1990); Gryczan v. State, 942 P.2d 112 (Mont. 1997); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. Ct. App. 1996). For further discussion of state court rulings in sodomy cases, see Melanie D. Price, *The Privacy Paradox: The Divergent Paths of the United States Supreme Court and State Courts on Issues of Sexuality*, 33 IND. L. REV. 863 (2000).

40. Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1640 (1993).

41. Some have argued that, *Bowers* aside, privacy-based arguments are limited in what they can offer lesbians and gay men. *See, e.g.*, KAPLAN, *supra* note 9, at 17–46, 211–27; Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431 (1992).

42. For a discussion of the complicated relationship between sexual acts and sexual identities, see Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After* Bowers v. Hardwick, 79 VA. L. REV. 1721 (1993).

43. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872).

44. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723–24 (1982) (interpreting the Fourteenth Amendment as requiring heightened scrutiny for sex classification); Plyler v. Doe, 457 U.S. 202, 218–24 (1982) (same with respect to alienage); Levy v. Louisiana, 391 U.S. 68, 71–72 (1968) (legitimacy); Hernandez v. Texas, 347 U.S. 475, 479 (1954) (national origin); Yick Wo v. Hopkins, 118 U.S. 356, 363 (1886) (ethnic classifications). Some scholars have argued that the enacting Congress intended the Fourteenth Amendment to apply to other classifications besides race. *See, e.g.*, Nina Morais, Note, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 YALE L.J. 1153 (1988).

way discriminated against, for a characteristic that he or she did not choose.[45] Advocates of this intuitive argument appeal to scientific research that suggests sexual orientations are innate or biologically determined.[46] Legal scholars and litigators sympathetic to lesbian and gay rights have tried to fit this intuitive argument into U.S. constitutional jurisprudence,[47] but it is not clear this argument is supported by U.S. case law. The Supreme Court sometimes considers whether a characteristic is immutable as part of its consideration of whether a classification warrants heightened scrutiny. This seems to create

45. *See, e.g.*, BRUCE BAWER, A PLACE AT THE TABLE: THE GAY INDIVIDUAL IN AMERICAN SOCIETY (1993); SIMON LEVAY, QUEER SCIENCE: THE USE AND ABUSE OF RESEARCH INTO HOMOSEXUALITY 231–54 (1996); ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY (1995). For a critical discussion of this intuitive argument, see STEIN, *supra* note 9, at 286–93, and Edward Stein, *Law, Sexual Orientation and Gender*, *in* HANDBOOK OF JURISPRUDENCE AND LEGAL PHILOSOPHY (Jules Coleman & Scott Shapiro eds., forthcoming 2002).

46. The three most widely cited scientific studies on the origins of sexual orientation are J. Michael Bailey & Richard Pillard, *A Genetic Study of Male Sexual Orientation*, 48 ARCHIVES GEN. PSYCHIATRY 1089 (1991), Dean H. Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCIENCE 321 (1993), and Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCIENCE 1034 (1991). For more accessible defenses of scientific research on sexual orientation, see DEAN H. HAMER & PETER COPELAND, THE SCIENCE OF DESIRE: THE SEARCH FOR THE GAY GENE AND THE BIOLOGY OF BEHAVIOR (1994), LEVAY, *supra* note 45, and J. Michael Bailey, *Biological Perspectives on Sexual Orientation*, *in* LESBIAN, GAY AND BISEXUAL IDENTITIES OVER THE LIFESPAN: PSYCHOLOGICAL PERSPECTIVES (Anthony R. D'Augel'i & Charlotte J. Patterson eds., 1995). For critical discussion of this research, see ANNE FAUSTO-STERLING, MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT WOMEN AND MEN (rev. ed. 1992), STEIN, *supra* note 9, at 164–228, William Byne, *Biology and Homosexuality: Implications of Neuroendocrinological and Neuroanatomical Studies*, *in* TEXTBOOK OF HOMOSEXUALITY AND MENTAL HEALTH (Robert P. Cabaj & Terry S. Stein eds., 1996), and Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994). Whatever the merit of scientific research on sexual orientation, the evidence is overwhelming for the claim that an adult's sexual orientation is almost impossible to change. *See, e.g.*, Douglas C. Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. CONSULTING & CLINICAL PSYCHOL. 221 (1994); Douglas C. Haldeman, *Sexual Orientation Conversion Therapy for Gay Men and Lesbians: A Scientific Examination*, *in* HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 139 (John C. Gonsiorek & James D. Weinrich eds., 1991); Timothy F. Murphy, *Redirecting Sexual Orientation: Techniques and Justifications*, 29 J. SEX RES. 501 (1992); Charles Silverstein, *Psychological and Medical Treatments of Homosexuality*, *in* HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY, *supra*, at 101. This evidence alone should be adequate to establish that sexual orientations are immutable for relevant legal and ethical purposes. Recently, some courts considering immutability have focused on the difficulty of changing sexual orientations rather than on whether or not sexual orientations are innate. *See, e.g.*, Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000); Tanner v. Or. Health Sci. Univ., 971 P.2d 435 (Or. Ct. App. 1998). For a sophisticated version of the immutability argument, see Samuel Marcosson, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646 (2001).

47. *See, e.g.*, LISA KEEN & SUZANNE B. GOLDBERG, STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL 43–73 (1998) (discussing the decision of litigators to include testimony from scientists at the trial court in *Romer v. Evans*); WINTEMUTE, *supra* note 4, at 61–83; Richard Green, *The Immutability of (Homo)Sexual Orientation: Behavioral Science Implications for a Constitutional (Legal) Analysis*, 16 J. PSYCHIATRY & L. 537 (1988).

an opening for the relevance of the immutability of sexual orientations in making the case for lesbian and gay rights. However, the Supreme Court has, on some occasions, discussed heightened scrutiny without mentioning immutability.[48] Further, various legal scholars have argued that immutability is not and should not be important in determining whether a classification is suspect.[49]

The Supreme Court has not directly ruled on the question of whether statutes that make use of sexual orientation classifications deserve heightened scrutiny. Most U.S. courts that have considered this question have held that sexual orientation classifications do *not* deserve heightened scrutiny.[50] The few courts that have held that sexual orientation classifications warrant heightened scrutiny have had their decisions overruled or vacated.[51] Generally, the Supreme Court has articulated several factors that should be considered in assessing when more than a rational basis is required to evaluate the constitutionality of a statute that invokes a classification. These factors include whether the classification has historically been used to intentionally discriminate against a particular group,[52] whether the use of this classification bears any "relation to ability to perform or contribute to society,"[53] whether any groups demarcated by this classification lack the political power to combat the discrimination,[54] and whether groups demarcated by this classification

48. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440–42 (1985); Plyler v. Doe, 457 U.S. 202, 218–23 (1982); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312–14 (1976).

49. *See, e.g.*, RICHARDS, *supra* note 24, at 6–38; Halley, *supra* note 46; Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485 (1998).

50. *See, e.g.*, Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (refusing to grant heightened scrutiny for sexual orientation classifications in the context of military's policy on homosexuality); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (same); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (same in the context of the FBI); *see also* Thomasson v. Perry, 80 F.3d 915, 927–28 (4th Cir. 1996) (en banc) (same in the context of military's "don't ask, don't tell" policy). The exception is *Tanner*, 971 P.2d 435, which holds that lesbians and gay men are "members of a suspect class to which certain privileges and immunities are not made available." *Id.* at 447.

51. *See, e.g.*, Watkins v. U.S. Army, 847 F.2d 1329, 1348 (9th Cir. 1988) (holding that sexual orientation classifications deserve heightened scrutiny and, under this standard of review, that the U.S. military's pre-1992 policy of discharging homosexuals was unconstitutional), *vacated and aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc); Jantz v. Muci, 759 F. Supp. 1543, 1546–51 (D. Kan. 1991), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992) (holding that homosexuals or those perceived as homosexuals deserve heightened scrutiny under equal protection doctrine); High Tech Gays v. Def. Indus. Sec. Clearance Office, 668 F. Supp. 1361, 1368–70 (N.D. Cal. 1987), *rev'd on other grounds*, 895 F.2d 563 (9th Cir. 1990) (same).

52. *See* Frontiero v. Richardson, 411 U.S. 677, 684–88 (1973).

53. *Id.* at 686.

54. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445 (1985).

"'exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete [and insular] group.'"[55]

The closest the Supreme Court has come to addressing the question of whether sexual orientation discrimination by the state deserves heightened scrutiny in a way that carries precedential weight[56] is *Romer v. Evans*.[57] In this widely discussed case, a six-Justice majority overturned an amendment to the Colorado Constitution. The amendment, which was approved by a voter referendum, prohibited any state action that protected lesbians, gay men, and bisexuals from discrimination and, further, repealed various city ordinances that prohibited sexual orientation discrimination.[58] The court explicitly did not reach the question of whether sexual orientation deserves heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment; rather, it held that the proposed amendment failed to pass constitutional muster even under rational review, a weaker standard of judicial scrutiny:

> First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.[59]

Some scholars have read *Romer* as suggesting that the Court is in fact applying a somewhat heightened standard of review to sexual orientation classifications, one either equivalent to the intermediate scrutiny standard of review it applies to sex classifications,[60] or a standard in between mere rational review and intermediate scrutiny ("rational review with bite"[61]).[62] Traditionally, the requirement that a statute or state action be rational is very

55. Bowen v. Gilliard, 483 U.S. 587, 602 (1987) (quoting Lyng v. Castillo, 477 U.S. 635, 638 (1986)).

56. Note, however, that in a dissent to a denial of a writ of certiorari (which has no precedential value) Justice William Brennan, joined by Justice Thurgood Marshall, argued that "discrimination against homosexuals . . . raises significant constitutional questions under . . . equal protection analysis." Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting).

57. 517 U.S. 620 (1996).

58. *See* COLO. CONST. art. II, § 30b.

59. *Romer*, 517 U.S. at 632.

60. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (striking down a state law concerning the sale of low-alcohol beer that had different age requirements for males and females).

61. Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987).

62. *See, e.g.*, Lynn A. Baker, *The Missing Pages of the Majority Opinion in* Romer v. Evans, 68 U. COLO. L. REV. 387 (1997); Matthew Coles, *The Meaning of* Romer v. Evans, 48 HASTINGS L.J. 1343 (1997); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 53–71 (1996); Kevin H. Lewis, Note, *Equal Protection After* Romer v. Evans*: Implications for the Defense of Marriage Act and Other Laws*, 49 HASTINGS L.J. 175 (1997).

weak and highly deferential: Almost any justification is enough to establish rationality.[63] Given how weak the mere rationality requirement is, the Court in *Romer* must have had more in mind. Supporters of this reading of *Romer* can point to an early sex discrimination case, *Reed v. Reed*,[64] in which the Court overturned a state law under which men were, all else being equal, chosen over women as executors of estates on the grounds that the law was not rational. (In earlier decisions, the Court had held sex-based preferences to satisfy the standard of rational review.) After *Reed*, the Court has held that a statute that makes use of sex classifications demands more than mere rational review; the use of such classifications requires that there are "important government objectives" behind the use of sex classifications and that the use of such classifications is "substantially related" to these objectives.[65] The requirement of important governmental objectives is weaker than the very strict scrutiny that is applied to classifications based on race, but it is significantly stronger than mere rational review.[66]

Just as *Reed* indicated that heightened scrutiny for sex was imminent, perhaps *Romer* indicates that somewhat heightened scrutiny for sexual orientation is just around the corner.[67] For now, some federal courts use the rational review standard to scrutinize state action relating to sexual orientation. Using this standard, some courts will sometimes invalidate sexual orientation discrimination,[68] while other courts, applying the same standard,

63. *See, e.g.*, Heller v. Doe, 509 U.S. 312, 319 (1993) (explaining that the rational review standard is highly deferential). This remains true for some cases decided after *Romer*, for example, *Washington v. Glucksberg*, 521 U.S. 702 (1997).

64. 404 U.S. 71 (1971).

65. *Craig*, 429 U.S. at 197.

66. In recent years, the Court's formulation of the test for laws that make use of sex classifications has gotten stronger, and it now seems to be only marginally weaker than strict scrutiny. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531 (1996) (holding that the justification for laws that make use of sex-based classifications must be "exceedingly persuasive"). For discussion, see Sunstein, *supra* note 62, at 74–76. *But see* Miller v. Albright, 523 U.S. 420 (1998) (upholding, in a fractured decision, an immigration and naturalization provision that made a distinction between men and women on the physiological factors involved in establishing maternity compared to paternity).

67. An alternative understanding of the effect of *Romer* combined with *United States v. Virginia* and *Miller* might be that the "hard edges of the tripartite division [rational review, intermediate scrutiny, and strict scrutiny] have thus softened" and, in its place, the Court has adopted an approach of "general balancing of relevant interests." Sunstein, *supra* note 62, at 77.

68. Among the courts that have used the rational review standard to overturn a sexual orientation classification are *Stemler v. City of Florence*, 126 F.3d 856, 873–74 (6th Cir. 1997), which held that selective prosecution based on sexual orientation fails rational review; *Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996), which held that there was no "rational basis for permitting one student to assault another based on the victim's sexual orientation"; *Weaver v. Nebo School District*, 29 F. Supp. 2d 1279, 1289 (D. Utah 1998), which held that the decision not to renew a public school teacher's coaching position based on her sexual orientation fails rational review; and *Glover v. Williamsburg Local School District Board of Education*, 20 F. Supp. 2d 1160, 1174 (S.D. Ohio 1998), which held that the decision not to rehire a teacher based solely on sexual orientation fails rational review.

at least in name, will find some instances of discrimination on the basis of sexual orientation to be constitutionally legitimate.[69]

Advocates for lesbian and gay rights are right not to rest on their laurels with the victory in *Romer*. First, it is not clear whether *Romer* will be like *Reed*, or whether the principles articulated in *Romer* will apply to other fact patterns relevant to lesbian and gay rights. Second, *Romer* left unresolved the status of *Bowers*. In his dissent in *Romer*, Justice Antonin Scalia argued:

> If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct. . . . And *a fortiori* it is constitutionally permissible for a State to adopt a provision *not even* disfavoring homosexual conduct, but merely prohibiting all levels of state government from bestowing *special protections* upon homosexual conduct.[70]

However, Scalia notes that the brief in favor of repealing the Colorado Amendment does not ask the *Romer* court to overturn *Bowers* and that the *Romer* majority failed to even mention *Bowers*. For now, unfortunately, *Bowers* remains good law. Advocates of lesbian and gay rights need to look beyond *Romer* to some future case and for additional arguments that might overrule *Bowers* and provide a stronger basis for claims relating to lesbian and gay rights. The sex discrimination argument promises to deliver a strong and persuasive legal argument for lesbian and gay rights by piggybacking arguments for lesbian and gay rights on well-established sex discrimination jurisprudence. As such, the sex discrimination argument warrants serious consideration.

## II. THE SEX DISCRIMINATION ARGUMENT FOR LESBIAN AND GAY RIGHTS

### A. The Formal Sex Discrimination Argument

The basic idea of the sex discrimination argument for lesbian and gay rights is that any law that discriminates on the basis of sexual orientation

69. *See, e.g.*, Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 300–01 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998) (upholding, under rational review, the constitutionality of a city charter that eliminated antidiscrimination protections for lesbians, gay men, and bisexuals); Jantz v. Muci, 976 F.2d 623, 628–30 (10th Cir. 1992) (finding the federal government's old policy on the employment of homosexuals to be constitutional under rational review); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990) (finding the military's old policy on homosexuality to be constitutional under rational review); Beller v. Middendorf, 632 F.2d 788, 811–12 (9th Cir. 1980) (same).

70. Romer v. Evans, 517 U.S. 620, 641 (1996) (Scalia, J., dissenting).

will also necessarily discriminate on the basis of sex.[71] The argument is simple, formal, and straightforward. If a person's sexual orientation is a dispositional property that concerns the sex of people to whom he or she is attracted,[72] then, to determine a person's sexual orientation, one needs to know the person's sex and the sex of the people to whom he or she is primarily sexually attracted.[73] For example, if *A* is sexually attracted exclusively to men, then *A*

71. The distinction between sex and gender is a hotly contested one. The standard way of making this distinction is that sex (male or female) is biologically determined (that is, related to one's chromosomes, internal genitalia, external genitalia, and so on), while gender (man or woman) is determined by the characteristics and traits that members of a culture see as associated with a particular sex (hair length, choice of clothing, personality characteristics, and so on). *See, e.g.*, ROGER BROWN, SOCIAL PSYCHOLOGY: THE SECOND EDITION 313–14 (1986); STEIN, *supra* note 9, at 24–38. Justice Antonin Scalia said that "[t]he word 'gender' . . . connot[es] . . . cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes." J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting). For a critique of the legal application of Scalia's way of making and using this distinction, see Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 9–13 (1995), which argues against the standard sex gender distinction and, more generally, for exploding the essentialized category of sex. *See also* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995) (arguing that, given the standard sex/gender distinction, gender discrimination is sex discrimination under the proper understanding of Title VII). In recent years, courts have construed sex discrimination to encompass gender discrimination. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 237 (1989) (holding Title VII's prohibition of sex discrimination reaches "giving credence and effect" to sex stereotypes, specifically, in this case, the view that females should be feminine, not masculine).

If sex discrimination is construed expansively to include gender discrimination (as I believe it should be), one might try to develop a *gender* discrimination version of the sex discrimination argument. According to this argument, which I shall call the *gender discrimination argument for lesbian and gay rights* (the gender discrimination argument, for short), a law that discriminates on the basis of sexual orientation discriminates on the basis of gender, by virtue of discriminating in terms of gender role stereotypes (that is, gay men and lesbians are treated differently by virtue of their gender deviance). For an optimistic and simple statement of the gender discrimination argument for lesbian and gay rights, see, for example, Jess Bravin, *Courts Open Alternate Route to Extend Job-Bias Laws to Homosexuals*, WALL ST. J., Sept. 22, 2000, at B1. The gender discrimination argument suffers from the same theoretical and pragmatic problems discussed *infra* Parts IV–V and notes 134 and 179. Further, this argument seems open to the practical objection that far from all gay men and lesbians are, respectively, feminine or masculine, and thus some homosexuals might not be covered by the gender discrimination argument. Alternatively, an advocate of the gender discrimination argument might try to argue that, in general, gay men and lesbians are members of a third and/or fourth gender. While this argument may have some theoretical and some sociological support, *see, e.g.*, STEIN, *supra* note 9, at 34–35; THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY (Gilbert Herdt ed., 1994), it is highly unlikely that judges will accept the claim that homosexuals belong to a different gender and, on that basis, count laws that discriminate on the basis of sexual orientation as a type of gender—and hence sex—discrimination.

72. *See* STEIN, *supra* note 9, at 39–49.

73. This is a bit of a simplification, especially with respect to some models of sexual orientation. Consider, for example, the *bipolar* model of sexual orientation, according to which a person's degree of attraction to men varies inversely to his or her degree of attraction to women. This model of sexual orientation allows for the existence of a "true" bisexual—a person who is equally attracted to men and women. On this model, the sexual orientation of a true bisexual can be determined

is a heterosexual only if *A* is a woman, and *A* is a homosexual only if *A* is a man. By virtue of what a sexual orientation is, it seems that any law that discriminates on the basis of sexual orientation necessarily discriminates on the basis of sex.

To see the formal version of the sex discrimination argument in action, consider two laws that affect lesbians and gay men, both of which make explicit use of sex classifications: a law prohibiting same-sex sodomy and a law permitting only opposite-sex marriage. First, consider the Missouri sodomy law that makes it a crime for a person to have "deviant sexual intercourse with another person of the same sex."[74] The law defines "deviant sexual intercourse" as

> any act involving the genitals of one person and the mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person.[75]

Under this law, it is illegal, for example, for a woman to insert her finger into another woman's anus, while it is legal for a man to insert his finger into a woman's anus. As this law prohibits a woman from doing things that it permits men to do, the law thus discriminates on the basis of sex.

Second, consider the Hawaii marriage law that limits marriages to couples consisting of one man and one woman.[76] According to the sex discrimination argument, this law discriminates on the basis of sex because it allows a man to marry a woman while prohibiting a woman from marrying a woman. These two examples show how laws that discriminate on the basis of sexual orientation can be seen through the lens of sex discrimination.

Persuading courts that laws that discriminate on the basis of sexual orientation thereby discriminate on the basis of sex may not be enough to convince courts to overturn such laws. The Supreme Court has held that racial classifications warrant strict scrutiny, which is almost always fatal,[77]

---

without knowing his or her sex. However, it is unclear that the bipolar model of sexual orientation is an adequate model of sexual orientation. *See id.* at 51–54 (discussing problems with the bipolar model). Further, it is not clear that all or most bisexuals are true bisexuals. *See* MARTIN WEINBERG ET AL., DUAL ATTRACTION: UNDERSTANDING BISEXUALITY (1994). For a theoretical legal discussion of bisexuality, see Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000).

74. MO. ANN. STAT. § 566.090 (West 1999); *see supra* note 10.

75. *Id.* § 566.010.

76. *See* HAW. REV. STAT. § 572-1 (1999 & Supp. 2000); *see also supra* note 3; *infra* text accompanying notes 171–176.

77. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring); Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); Yoshino, *supra* note

but it has not held that sex classifications warrant strict scrutiny.[78] Sometimes, courts may find that a law is justified in making use of sex classifications.[79] Although I argue that the sex discrimination argument is not a strong argument for lesbian and gay rights, I admit that if it can persuade judges to apply heightened scrutiny[80] to laws that discriminate on the basis of sexual orientation, this would be a major accomplishment for lesbian and gay rights. However, this Article raises doubts about whether the sex discrimination argument will be successful in obtaining heightened scrutiny for laws that discriminate on the basis of sexual orientation.

### B. Is There *Really* Sex Discrimination?

The sex discrimination argument as presented thus far faces a straightforward objection. One can deny that statutes that discriminate on the basis of sexual orientation also discriminate on the basis of sex. According to this objection, laws that discriminate on the basis of sexual orientation apply to both sexes equally.

Consider, as an example of this objection, a European court decision that directly addressed the sex discrimination argument.[81] Several years ago, Lisa Grant took a job working for South-West Trains (SWT), a railroad company in England, replacing a man who had held the job for several years and who had received, among other benefits, a travel pass for his nonmarital female partner. Grant applied to SWT for the same travel benefits for her nonmarital female partner. SWT refused to provide Grant's partner with such benefits on the grounds that Grant and her partner were of the same sex.[82]

---

49, at 488 n.5. *But cf.* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995) (finding strict scrutiny not fatal).

78. Note, however, that several states explicitly prohibit discrimination on the basis of sex, either as part of the state constitution's equivalent of the Equal Protection Clause or as part of a distinct constitutional prohibition on sex discrimination. *See* ESKRIDGE, *supra* note 7, at 163 & n.d. The states that explicitly prohibit sex discrimination are Alaska, Colorado, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Montana, New Hampshire, New Mexico, Pennsylvania, Texas, Utah, Virginia, Washington, and Wyoming. *See id.* Many of these states would apply strict scrutiny to laws that make use of sex classifications.

79. *See, e.g.*, Miller v. Albright, 523 U.S. 420 (1998); Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding male-only draft registration system); Michael M. v. Superior Court, 450 U.S. 464 (1981) (plurality opinion) (upholding use of sex classification in a statutory rape law that made sexual intercourse between a male and a female both under the age of eighteen a crime for the male but not for the female).

80. I use the term "heightened" scrutiny to encompass both strict scrutiny and intermediate scrutiny. By doing so, I do not deny that these two levels of scrutiny can be differentiated. *See, e.g.*, Yoshino, *supra* note 49, at 488 n.6.

81. Grant v. South-West Trains, Case C-249/96, 1998 E.C.R. I-261 (1998).

82. The relevant portions of SWT's policy said, "Privilege tickets are granted to a married member of staff . . . for one legal spouse . . . [or to an unmarried staff member] for one common law

Grant then sued, arguing that SWT violated Article 119 of the Treaty Establishing the European Community (EC Treaty), which says, in part, that "men and women should receive equal pay for equal work."[83] In particular, Grant argued that SWT failed to provide equal pay because it denied her the benefits that it gave to a man who occupied the same position. SWT defended itself saying that, first, there is nothing in the EC Treaty that prohibits discrimination on the basis of sexual orientation and, second, it was not guilty of sex discrimination because its policy was sex-neutral: No one, regardless of sex, was eligible for travel benefits for a same-sex partner.

The case eventually reached the European Court of Justice (ECJ) to determine whether the principle of equal pay for men and women articulated in the EC Treaty prohibits discrimination based on an employee's sexual orientation. The ECJ held that SWT's policy does not constitute sex discrimination because its policy "applies the same way to female and male workers [and therefore] cannot be regarded as constituting discrimination directly based on sex";[84] both men and women receive the same benefits for their partners under precisely the same circumstances, namely, only if they have an opposite-sex partner.[85] With this decision, the ECJ denied that discrimination on the basis of sexual orientation constitutes sex discrimination.

This same response to the sex discrimination argument can be used to defend the Missouri sodomy law. Missouri's sodomy law applies equally to men and women: Both are prohibited from engaging in "deviant sexual intercourse" with people of the same sex and both are permitted to engage in "deviant sexual intercourse" with people of the opposite sex. This is precisely how the Missouri Supreme Court ruled on a sex discrimination challenge to the state's sodomy law in *State v. Walsh*:[86] It held that the sodomy law did not discriminate on the basis of sex because it prohibited both men and women from having sex with a person of the same sex and permitted both men and women to have sex with a person of the opposite sex.[87] An appellate court in the State of Washington adopted this same approach with respect to a sex discrimination challenge to its marriage law in *Singer v. Hara*:[88] it held that the marriage law does not discriminate on the basis of sex because both

---

opposite sex spouse . . . subject to a statutory declaration being made that a meaningful relationship has existed for a period of two years or more . . . ." *Id.* at I-639 to -640.

83. Treaty Establishing the European Community, Nov. 10, 1997, art. 141, 1997 O.J. (C 340) 242.

84. *Grant*, E.C.R. I-261, -646.

85. The railroad company subsequently changed its policy to extend benefits to same-sex partners of employees. *See, e.g.*, *Gay Rail Workers Win Travel Perks*, EVENING STANDARD (London), Oct. 5, 1999, at 5.

86. 713 S.W.2d 508 (Mo. 1986) (en banc).

87. *See id.* at 510.

88. 522 P.2d 1187 (Wash Ct. App. 1974).

men and women are prohibited from marrying a person of the same sex and both are permitted to marry a person of the opposite sex.[89]

The problem facing the sex discrimination argument for lesbian and gay rights is that statutes that use sex classifications to limit lesbian and gay rights can be interpreted in two ways: They can be seen as treating men and women *equally* or they can be seen as treating men and women *differently*.[90] The Missouri sodomy law, for example, can be seen as prohibiting women from engaging in certain sexual acts that men are permitted to engage in, or it can be seen as prohibiting both men and women from engaging in certain sexual acts with people of the same sex. Deciding whether a statute that discriminates on the basis of sexual orientation discriminates on the basis of sex seems, in light of this problem, like deciding whether a glass is half empty or half full.

When presented with the sex discrimination argument, many courts—even those sympathetic to lesbian and gay rights—hold that laws that restrict lesbian and gay rights apply equally to men and women and thus do not constitute sex discrimination. In fact, in *Baker*, the Supreme Court of Vermont, although it held that the failure to provide spousal benefits to same-sex couples violated the Vermont state constitution, rejected the sex discrimination argument in the same way as did the *Walsh* and *Singer* courts.[91] In an opinion joined by three of five justices, the court addressed the sex discrimination argument, which was raised by the plaintiffs,[92] holding that Vermont's "marriage laws are facially neutral; they do not single 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."[93] All but one of the justices found that sex discrimination is not "a useful analytic framework"[94] for analyzing discrimination on the basis of sexual orientation.[95]

89. *See id.* at 1191; *see also* Baehr v. Lewin, 852 P.2d 44, 70–72 (Haw. 1993) (Heen, J., dissenting) (endorsing the *Singer* court's approach to the same question).

90. See STEIN, *supra* note 9, at 54–61, for a discussion of this problem in a different context.

91. *See* Walsh, 713 S.W.2d at 510; Baker v. State, 744 A.2d 864, 880 n.13 (Vt. 1999) (citing *Singer*, 522 P.2d at 1191–92).

92. *See* Mary Bonauto et al., *The Freedom to Marry for Same-Sex Couples: The Opening Appellate Brief of Plaintiffs Stan Baker et al. in* Baker et al. v. State of Vermont, 5 MICH. J. GENDER & L. 409 (1999); Mary Bonauto et al., *The Freedom to Marry for Same-Sex Couples: The Reply Brief of Plaintiffs Stan Baker et al. in* Baker et al. v. State of Vermont, 6 MICH. J. GENDER & L. 1 (1999).

93. *Baker*, 744 A.2d at 880 n.13.

94. *Id.*

95. *See id.* at 889 (Dooley, J., concurring) (accepting implicitly the three-judge majority's rejection of the sex discrimination argument); *id.* at 897 (Johnson, J., concurring in part and dissenting in part) (applying the sex discrimination argument to Vermont's marriage law and finding that law to be unconstitutional because it discriminates on the basis of sex).

## C. The *Loving* Analogy

Advocates of the sex discrimination argument for lesbian and gay rights are aware of this problem facing their argument and they have a strong reply: The mere equal application of a law with respect to two different groups (for example, whites and blacks) does not mean the law does not discriminate on the basis of membership in such a group. In the United States, this reply involves the principle that the mere equal application of a law is not enough to show that the law passes muster under the Equal Protection Clause of the U.S. Constitution. Whether laws that discriminate on the basis of sexual orientation really involve sex discrimination is a form of a general problem not unique to laws concerning sexual orientation. The same type of problem arose in the context of racial discrimination. In considering laws against interracial marriage and against various forms of interracial "familial" and sexual activity, courts had to grapple with proponents of the laws who claimed that these laws applied equally to all races and, thus, did not constitute racial discrimination.[96]

In *Loving v. Virginia*,[97] the Supreme Court considered a Virginia law prohibiting interracial marriages. Virginia defended its law by claiming that the law applied equally to all individuals regardless of their race: Both whites and nonwhites were prohibited from marrying outside of their race.[98] The Supreme Court rejected this reasoning, holding that even if the law prohibiting interracial marriage applied equally to whites and to nonwhites, it was unconstitutional because it made use of racial classifications that could not be given an exceedingly compelling justification.[99] The Court's holding involved two main parts. First, the Court "reject[ed] the notion that the mere equal application of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription

96. *See, e.g.*, Pace v. Alabama, 106 U.S. 583 (1882) (upholding a law prohibiting interracial adultery or fornication on the grounds that such a law applies equally to blacks and to whites, and hence is consistent with the Equal Protection Clause). *But cf.* Loving v. Virginia, 388 U.S. 1 (1967) (rejecting this argument and overturning Virginia's laws prohibiting interracial marriage); McLaughlin v. Florida, 379 U.S. 184 (1964) (overturning a law against interracial cohabitation).

97. 388 U.S. 1 (1967).

98. This was a bit of a simplification because the law only prohibited whites from marrying "colored" people; a "colored" man and a "colored" woman of different races were, under Virginia law, permitted to marry each other (for example, a "Negro" woman and an "American Indian" man could marry). Further, the law also stated "persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons" for purposes of the marriage law. *Loving*, 388 U.S. at 5 n.4.

99. *See id.* at 11. In addition to appealing to an equal protection argument, *Loving* also appealed to a fundamental rights argument. *See id.* at 12. In *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Supreme Court further developed the fundamental rights analysis of *Loving*.

of all invidious racial discriminations."[100] Second, the Court held that "Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races."[101] Even granting that Virginia's marriage law applied equally to all races, the state was required to provide an especially strong justification for the law because the law made use of racial classifications. The Court held that the law violated the Equal Protection Clause because the state failed to provide such a justification for its use of racial classifications.[102]

*Loving* stands, in part, for the principle that the mere equal application of a statute that makes use of a suspect classification is not enough for the statute to pass muster under the Equal Protection Clause. Rather, insofar as a statute makes use of a suspect classification, to satisfy the Equal Protection Clause, the state must show that there is a compelling justification for the use of that classification. Advocates of the sex discrimination argument for lesbian and gay rights make use of this principle from *Loving*. These advocates note that simply showing that a law that makes use of sex classifications applies equally to men and women is not enough to establish that this law is constitutional under the Equal Protection Clause. That mere equal application is not enough to satisfy the Equal Protection Clause provides an answer to the objection to the sex discrimination argument discussed above. Despite this answer, there remain serious problems facing the sex discrimination argument. I now turn to one such problem.

### D. The Cultural Claim of the Sex Discrimination Argument

In *Baehr v. Lewin*,[103] the Hawaii Supreme Court said its conclusion—that Hawaii's marriage law made use of sex classifications in such a way as to require a compelling state interest—followed from a simple adaptation of *Loving*: "Substitution of 'sex' for 'race' and article I, section 5 [of Hawaii's constitution] for the fourteenth amendment [in *Loving*] yields the precise case before us together with the conclusion that we have reached."[104] However, in comparing the sex discrimination argument for lesbian and gay rights with the central argument of cases like *Loving*, a potential disanalogy appears. In cases like *Loving*, involving the equal application of a statute that makes use of racial classifications, there is a fit between the class disadvantaged

100. *Loving*, 388 U.S. at 8 (internal quotation marks omitted).
101. *Id.* at 11.
102. *See id.* at 11–12.
103. 852 P.2d 44 (Haw. 1993).
104. *Id.* at 68.

by the law and the suspect classification the law employs.[105] The Virginia antimiscegenation law employed racial classifications and disadvantaged blacks and other nonwhites. Similarly, the law at issue in *Reed v. Reed*[106]—under which men were, all else being equal, chosen over women as executors of estates—employed sex classifications and disadvantaged women. In contrast, as characterized by the sex discrimination argument, laws that discriminate on the basis of sexual orientation lack this fit: Such laws make use of sex classifications, but they seem to disadvantage lesbians, gay men, and bisexuals. Table 1 depicts this disanalogy: In the first two rows, there is a fit between the suspect classification used in the law and the class disadvantaged by the law; in the third row, there is no such fit.[107]

Table 1: The Analogy at the Heart of the Sex Discrimination Argument for Lesbian and Gay Rights

| **Law** | **Suspect classification used in the law** | **Class disadvantaged by the law** |
|---|---|---|
| Virginia's anti-miscegenation law | Race | People of color |
| The law at issue in *Reed v. Reed* | Sex | Women |
| Missouri's sodomy law | Sex | Gay men, lesbians, bisexuals |

Advocates of the sex discrimination argument have addressed this potential disanalogy in great detail, arguing that in order to understand the discrimination involved in laws that limit lesbian and gay rights, we must look to the theoretical underpinnings of discriminatory laws generally, and of laws that discriminate on the basis of sexual orientation in particular.[108] This will reveal that the underlying justification for discrimination against lesbians, gay men, and bisexuals is sexism and the related idea that men and women should play different roles in our society. This aspect of the sex discrimination argument supplements the formal argument with cultural evidence. The

105. This is a somewhat simplified analysis of *Loving*. Arguably, the class disadvantaged by the law at issue in *Loving* was the class of people, regardless of race, who wanted to marry outside of their race. I consider this point *infra* text accompanying note 113. *See also* ESKRIDGE, *supra* note 6, at 220.

106. 404 U.S. 71 (1971). Recall from my discussion of *Reed*, *supra* text accompanying notes 64–67, that this case was decided on rational review. I gloss over this fact in my subsequent use of *Reed*.

107. Table 1 is a somewhat modified and abbreviated form of tables used in ESKRIDGE, *supra* note 6, at 220, and in ESKRIDGE, *supra* note 7, at 167.

108. *See supra* note 8.

formal claim is that any law that makes use of or involves sexual orientation necessarily involves sex because a person's sexual orientation is indexed to a person's sex and the sex of the people to whom he or she is sexually attracted. The cultural claim is that sexism and homophobia[109] are intimately interconnected.

In a detailed articulation of the sex discrimination argument, Andrew Koppelman offers evidence from sociology, anthropology, social psychology, and history relating to homophobia and its origins in order to develop the analogy between the role of racial classifications in antimiscegenation laws, on the one hand, and the role of sex classifications in laws that discriminate on the basis of sexual orientation, on the other.

> Much of the connection between sexism and [homophobia] lies in social meanings that are accessible to everyone. It should be clear from ordinary experience that the stigmatization of the homosexual has something to do with the homosexual's supposed deviance from traditional sex roles. . . . *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 for one's sex is the imputation of homosexuality*. . . . There is nothing esoteric or sociologically abstract in the claim that the homosexuality taboo enforces traditional sex roles.[110]

He concludes that

> the homosexuality taboo . . . is crucially dependent on sexism, without which it might well not exist. . . . [W]hen the state enforces that taboo, it is giving its imprimatur to sexism. . . . [T]he effect that the taboo against homosexuality has in modern American society is, in large part, the maintenance of illegitimate hierarchy; the taboo accomplishes this by reinforcing the identity of the superior caste in the hierarchy, and this effect is at least in large part the reason why the taboo persists. Laws that discriminate against gays are the product of a political decision-making process that is biased by sexism. They implicitly stigmatize women, and they reinforce the hierarchy of men over women.[111]

Koppelman's sociological claim that laws restricting lesbian and gay rights are crucially dependent on sexism is central to the sex discrimination

109. The word "homophobia" was coined by GEORGE WEINBERG, SOCIETY AND THE HEALTHY HOMOSEXUAL (1972), to describe a psychological disorder involving fear of homosexuals and of homosexuality (as manifested in people of all sexual orientations). Over time, this word has taken on a broader meaning referring to all forms of prejudice, hatred, and fear of homosexuals. I follow the broader, more current usage of the term.

110. Koppelman, *supra* note 8, at 234–35.

111. *Id.* at 255–57 (citation omitted).

argument. Table 2 depicts the structure of the sex discrimination argument that appeals to sociological evidence about sexism and homophobia.[112]

Table 2: A More Sophisticated Way of Understanding the Analogy at the Heart of the Sex Discrimination Argument for Lesbian and Gay Rights

| **Law** | **Group whose behavior is regulated by the law** | **Class disadvantaged by the law** | **Belief system that justifies the law** |
|---|---|---|---|
| Virginia's anti-miscegenation law | Miscegenosexuals[113] (people who want to marry outside of their race) | People of color and miscege-nosexuals | Racism |
| The law at issue in *Reed v. Reed* | Women who are potential executors of estates | Women | Sexism |
| Missouri's sodomy law | People who have (or who want to have) sex with people of the same sex | Women, gay men, lesbians, and bisexuals | Sexism |

Table 2 depicts three features of a law: the group whose behavior the law regulates, the class the law disadvantages, and the belief system that justifies the law. Looking at the first row, the claim is that the law at issue in *Loving* regulated miscegenosexuals (more precisely, *heterosexual* miscegenosexuals) by preventing them from marrying the people they want to, it disadvantaged people of color and miscegenosexuals, and it was justified by racism. The law at issue in *Loving* disadvantaged people of color even though it applied equally to whites and to nonwhites because it enforced the separation of the races and the idea that whites are better than nonwhites. Looking at the second row, the law at issue in *Reed* regulated how executors are chosen (men were preferred over women), disadvantaged women, and was justified by sexism.

According to the sex discrimination argument as depicted in the third row of Table 2, Missouri's sodomy law regulates lesbians, gay men, and bisexuals (that is, people who have or who want to have sex with people of the same sex), disadvantages women, lesbians, gay men, and bisexuals,

112. Table 2 is an adaptation and modification of tables from ESKRIDGE, *supra* note 7, at 171, and ESKRIDGE, *supra* note 6, at 220–21.

113. *See* Marcosson, *supra* note 8, at 6 (coining the term "miscegenosexual" for people who want to marry outside of their race).

and is justified by sexism. The Missouri sodomy law disadvantages women because, even though the law applies equally to men and women, it perpetuates the notion that men and women should play different social roles and thereby reinforces gender stereotypes. In *United States v. Virginia*[114] (the Virginia Military Institute (VMI) case), the Supreme Court argued forcefully against laws that enforce sex stereotypes.[115] Applying the logic of the VMI case, because laws that discriminate on the basis of sexual orientation enforce rigid sex roles, such laws should be subject to heightened scrutiny.

Table 2 reveals the structure of the strongest form of the sex discrimination argument. This argument builds on the formal version of the sex discrimination argument: Not only do laws that discriminate on the basis of sexual orientation formally involve sex classifications but, more significantly, as a cultural fact such laws are justified and maintained by sexism. The sex discrimination argument, even in its strongest form, remains open to serious objections, as the next two parts will show.

## III. THREE OBJECTIONS TO THE SEX DISCRIMINATION ARGUMENT

### A. A Hypothetical Sex Discrimination Argument for Racial Equality

In order to elucidate the problems with the sex discrimination argument, consider a hypothetical argument that could be made against antimiscegenation laws. Various scholars have noted that there were sex hierarchies implicit in antimiscegenation statutes—a significant purpose of such laws was to protect white women from black men.[116] Sex classifications clearly played a role in the development and articulation of antimiscegenation laws. In light of this fact, one could make a sex discrimination argument against antimiscegenation laws,[117] pointing out that women were disadvantaged by

114. 518 U.S. 515 (1996).

115. *See id.* at 531 (holding that the justification for laws that make use of sex-based classifications must be "exceedingly persuasive").

116. *See, e.g.*, Eva Saks, *Representing Miscegenation Law*, 8 RARITAN 39, 42–43 (1988) (noting that the first antimiscegenation statute in the United States, passed in Maryland in 1661, prohibited black men from marrying white women but *not* white men from marrying black women).

117. I am not suggesting that such an argument could have actually been made in the United States against antimiscegenation laws. This would have been historically improbable because sex-discrimination doctrine was not as well developed as race discrimination doctrine when *Loving* and *McLaughlin* were decided. Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & POL'Y 397, 410–11 (2001), criticizes my analogy between the sex discrimination argument against antimiscegenation laws and the sex discrimination argument for lesbian and gay rights, noting that antimiscegenation laws did not, in contrast to laws that discriminate on the basis of sexual orientation, draw a distinction based on sex on their face. *See id.* The function of this analogy in my argument is to use the problematic aspects of the sex discrimination argument against

antimiscegenation laws and that such laws were justified by sexism. Table 3 depicts the analogy that is central to the hypothetical sex discrimination argument against racial discrimination.

Table 3: The Analogy at the Heart of the Hypothetical Sex Discrimination Argument Against Antimiscegenation Laws

| **Law** | **Group whose behavior is regulated by the law** | **Class disadvantaged by the law** | **Belief system that justifies the law** |
|---|---|---|---|
| The law at issue in *Reed v. Reed* | Women who are potential executors of estates | Women | Sexism |
| Virginia's anti-miscegenation law | Miscegenosexuals | Women, people of color, and miscegenosexuals | Sexism |

Something is, however, seriously wrong with Table 3 and the hypothetical argument that is based on it. Overturning antimiscegenation laws because they discriminate on the basis of sex would mischaracterize the core of the problem with such laws.

To put a finer point on my claim, there are three related problems with the sex discrimination argument against antimiscegenation laws in particular and against racially discriminatory laws in general. First, this argument misidentifies the class disadvantaged by antimiscegenation laws. Nonwhites, more than women, are disadvantaged by such a law. Call this the *sociological* mistake of the sex discrimination argument against antimiscegenation laws. The sex discrimination argument against antimiscegenation laws overemphasizes the ways these laws disadvantage women as compared to the ways they disadvantage people of color. Looking at Table 3, the sociological mistake of the hypothetical sex discrimination argument is that antimiscegenation laws are better depicted if the word "women" is taken out of the third cell of the last row. Antimiscegenation laws are more accurately characterized as primarily disadvantaging people of color.

Second, the sex discrimination argument against antimiscegenation laws misidentifies the belief system that justifies antimiscegenation laws. Even granting that racism and sexism complement each other in providing the justification for antimiscegenation laws, racism, not sexism, is the belief system that primarily underlies these laws. Call this the *theoretical* mistake of

antimiscegenation laws to introduce and highlight parallel problems with the sex discrimination argument for lesbian and gay rights, nothing more.

the sex discrimination argument against antimiscegenation laws. Returning to Table 3, the antimiscegenation laws would be more accurately characterized if "racism" rather than "sexism" appeared in the fourth column of the last row.

Third, a court that overturned an antimiscegenation law on the grounds that the law discriminated on the basis of sex would, in so doing, fail to take a stand on the central moral issue underlying the legal questions about antimiscegenation laws, namely that racial discrimination is morally wrong. If the *Loving* Court, in overturning Virginia's antimiscegenation law, had focused on the sexist rather than the racist assumptions that justified the law, it would have made a moral mistake, not just a theoretical one. Call this the *moral* mistake of the sex discrimination argument against antimiscegenation laws. The three mistakes of the sex discrimination argument against antimiscegenation laws—the sociological, the theoretical, and the moral—are interconnected. The theoretical mistake builds on the sociological mistake: If women are in fact greatly disadvantaged by antimiscegenation laws, then it would make sense to say that sexism plays a role in the justification of such laws. The moral mistake builds on the other two: It is tempting to see the moral issue of antimiscegenation laws in terms of mistaken and unjust views of women because of the sociological and theoretical claims linking racism and sexism.

The three problems with the sex discrimination argument against antimiscegenation laws parallel problems with the sex discrimination argument as applied to laws that discriminate against lesbians, gay men, and bisexuals. I turn now to these parallel problems with the sex discrimination argument for lesbian and gay rights.

### B. The Sociological and Theoretical Mistakes of the Sex Discrimination Argument

In Part II, I showed that the strongest form of the sex discrimination argument not only makes a formal claim about the connection between sex and sexual orientation, but it also makes a sociological claim and a theoretical claim. The sociological claim is that laws that discriminate on the basis of sexual orientation disadvantage women as well as lesbians, gay men, and bisexuals because these laws perpetuate a social system in which women play different social roles than men. The theoretical claim is that these laws are justified by sexism. In this subpart, I argue that both the sociological claim and the theoretical claim are mistaken because sex and sexual orientation are culturally and conceptually distinct. This poses a serious problem for the sex discrimination argument.

Various scholars have argued for the need to analyze sexual orientation and sex separately.[118] For example, Cheshire Calhoun, in her article *Separating Lesbian Theory from Feminist Theory*,[119] says that

> patriarchy and heterosexual dominance are two, in principle, separable systems. Even where they work together, it is possible conceptually to pull the patriarchal aspect of male-female relationships apart from their heterosexual dimensions. . . . [E]ven if empirically and historically heterosexual dominance and patriarchy are completely intertwined, it does not follow from this fact that the collapse [or weakening] of patriarchy will bring about the collapse [or weakening] of heterosexual dominance.[120]

While an advocate of the sex discrimination argument might admit that sexual-orientation inequality and homophobia could continue to exist even if there were sex equality and no sexism,[121] I want to make a stronger claim. Building on the work of Calhoun and of others,[122] I claim that there are actual and significant differences between sexism and homophobia in contemporary American and other western societies. Simply put, sexism and homophobia are coming apart. Consider, for example, the dramatic changes in family law in the past century. Whereas women were once viewed as the property of their husbands and had few rights as wives, today the legal status of women and men in the context of the family are basically equal.[123] In contrast, with the notable exception of the creation of civil unions in Vermont,[124] the legal recognition for lesbian and gay relationships and families lags dramatically behind those of heterosexuals. This one example illustrates how homophobia, though it has gradually become disentangled from sexism, remains entrenched in our society. While many laws that discriminate on the basis of sexual orientation have their origins in sexism,

118. *See, e.g.*, RUTHANN ROBSON, LESBIAN (OUT)LAW 85 (1992); EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 27–35 (1990); Cheshire Calhoun, *Separating Lesbian Theory from Feminist Theory*, 104 ETHICS 558 (1994); Halley, *supra* note 46, at 506; Rubin, *supra* note 24.

119. Calhoun, *supra* note 118.

120. *Id.* at 562 (bracketed phrases are my elaborations of Cheshire Calhoun's points).

121. "Note the culturally specific nature of my claim: my evidence is confined to contemporary American culture and its antecedents, and my claim about the function of the taboo pertains only to this culture. I am not claiming that the stigmatization of homosexuality is indispensable to [the subjugation of women]." Koppelman, *supra* note 8, at 249.

122. *See supra* note 118.

123. *See, e.g.*, MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA (1986); Scott Greene, *Comparison of the Property Aspects of the Community Property and Common-Law Marital Property Systems and Their Relative Compatibility with the Current View of the Marriage Relationship and the Rights of Women*, 13 CREIGHTON L. REV. 71 (1979); Carole Shammas, *Re-Assessing Married Women's Property Acts*, 6 J. WOMEN'S HIST. 9 (1994).

124. *See supra* notes 18–19.

these laws are maintained because of homophobia and despite the repeal of many sexist laws. That homophobia and sexism have come apart presents a serious problem for the sex discrimination argument.

The existence of these differences calls into question whether sexism—rather than homophobia—is at the core of laws that limit lesbian and gay rights and whether such laws disadvantage women as much as they disadvantage lesbians, gay men, and bisexuals. While sexism plays a role in the justification of laws that discriminate against lesbians, gay men, and bisexuals, homophobia plays a more central role. Sexism and homophobia are mutually supporting but distinct belief systems. It mischaracterizes the nature of laws that discriminate against lesbians and gay men to see them as primarily harming women (or even as harming women as much as they harm gay men, lesbians, and bisexuals). Further, it mischaracterizes laws that discriminate on the basis of sexual orientation to see them as primarily justified by sexism rather than by homophobia.

Looking back at Table 2, above, the *sociological* mistake of the sex discrimination argument is that "women" should not appear in the third cell of the last row.[125] Laws like Missouri's sodomy law disadvantage lesbians, gay men, and bisexuals. Such laws prohibit them from sexually expressing their intimate relationships and from having sex with the people to whom they are sexually attracted. Relatedly, the *theoretical* mistake of the sex discrimination argument is that "homophobia"—not "sexism"—should appear in the last cell of the last row. Sodomy laws that single out same-sex sexual activity for prohibition[126] are primarily motivated by homophobia. Despite the fact that sexism played a role in their development, such laws are now maintained primarily by animus towards lesbians and gay men, and by repulsion towards them and the sexual activities they engage in (as well as by repulsion towards sexual activities generally).

Therefore, to simply deploy the sex discrimination argument against sodomy laws would, for example, ignore the central role that conceptions of sexual desire play in such laws. Making the sex discrimination argument

125. By this, I do not mean that women are not disadvantaged by laws that discriminate on the basis of sexual orientation. Many women (and men) are disadvantaged by such laws. Further, I do not mean to deny that women as a class—compared to men as a class—are disproportionately disadvantaged by such laws. Rather, what I claim is that laws that discriminate on the basis of sexual orientation have as their primary target lesbians, gay men, and bisexuals; that the primary impact of such laws is on lesbians, gay men, and bisexuals; and that such laws should be attacked by focusing on these aspects of such laws.

126. *See supra* note 10.

also overlooks the distinctive role that "the closet,"[127] and the associated invisibility of lesbians, gay men, and bisexuals,[128] play in the justification and maintenance of sodomy laws and of sexual orientation discrimination generally. Various theorists have shown how the element of secrecy, sometimes in the form of an "open secret," is a central aspect of the experience of lesbians, gay men, and bisexuals.[129] The centrality of the closet can be seen in such legal policies as the military's "don't ask, don't tell" policy[130] and the varied policies of public school districts towards teachers who are open about their homosexuality or bisexuality.[131]

An advocate of the sex discrimination argument might respond to the sociological and the theoretical objections raised here by pointing out that there can be many problems with a law; that one can identify one thing wrong with a law does not mean that nothing else is wrong with it. Specifically, there might be more than one class disadvantaged by a law and there might be more than one belief system that justifies a law. In particular, in response to the sociological objection, one might say that gay men, lesbians, bisexuals, *and* women are disadvantaged by laws that discriminate on the basis of sexual orientation.[132] Similarly, in response to the theoretical objection, one might say that *both* homophobia and sexism provide the theoretical justification for laws like Missouri's sodomy law.

I agree that some laws that disadvantage one group may also disadvantage another and that more than one belief system may undergird some laws. Sometimes, however, one group may be more disadvantaged than another and one belief system may play a much more central role than another. Granting that women were more disadvantaged than men by antimiscegenation laws does not entail that *Loving* was decided on the wrong grounds because it failed to discuss the harm to women involved in

127. For discussion of the centrality of the closet to the lives of lesbians, gay men, and bisexuals, see, for example, SEDGWICK, *supra* note 118, and Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989).

128. *See* Yoshino, *supra* note 49; Yoshino, *supra* note 73.

129. *See supra* notes 127–128.

130. 10 U.S.C. § 654 (1994). For discussion, see *supra* text accompanying notes 163 to 164.

131. *See, e.g.*, Rowland v. Mad River Local Sch. Dist., 730 F.2d 444 (6th Cir. 1984) (holding that a public school employee could be fired for communicating her bisexuality to her coworkers because her sexual orientation was not a matter of public concern); Acanfora v. Bd. of Educ., 491 F.2d 498 (4th Cir. 1974) (affirming district court because, although teachers have a First Amendment right to speak about homosexuality, in this instance, the teacher was denied relief because he hid his homosexuality when he applied to be a teacher); Acanfora v. Bd. of Educ., 359 F. Supp. 843 (D. Md. 1973) (holding that the mere knowledge of a public school teacher's homosexuality is not, in itself, a permissible reason to fire him; also holding that a teacher could be fired for inappropriately sparking controversy by discussing homosexuality).

132. KOPPELMAN, *supra* note 5, ch. 3, makes precisely this reply, saying "discrimination can[] be based on sex and on sexual orientation at the same time." *Id.*

antimiscegenation laws. Granting that sexism played a role in justifying antimiscegenation laws does not entail that the Supreme Court's reasoning in *Loving* was incomplete because it failed to discuss the sexism implicit in antimiscegenation laws. Rather, the *Loving* Court rightly focused on the harm to people of color and on the central role of racial hierarchies (specifically, white supremacy) that justified the Virginia law.

A parallel point can be made concerning the sex discrimination argument for lesbian and gay rights: Women, compared to men, may be more disadvantaged by laws that discriminate on the basis of sexual orientation,[133] but lesbians, gay men, and bisexuals are more significantly disadvantaged by such laws than are women in general. Similarly, while sexism plays a role in maintaining laws relating to sexual orientation, homophobia plays a much more central role.

Both the sociological and the theoretical objections to the sex discrimination argument relate to the observation that sexism and homophobia have become disentangled. The sociological objection is that, as a cultural fact, lesbians and gay men, not women, suffer the greatest harm from laws that discriminate on the basis of sexual orientation. The theoretical objection is that laws that discriminate on the basis of sexual orientation are primarily maintained by homophobia, not by sexism. Together, the sociological and the theoretical objections create a serious problem for the sex discrimination argument.[134]

---

133. As a general empirical claim, this is far from obviously true. In fact, it seems that some laws that discriminate on the basis of sexual orientation might harm gay men more than lesbians (examples include state sodomy laws, *see, e.g.* ROBSON, *supra* note 118, at 47–59, and military sodomy laws, *see* Elizabeth Lutes Hillman, Cold War Crime and American Military Culture: Courts-Martial in the United States Armed Forces, 1951–1973, at 291–306, 337–40 (2001) (unpublished Ph.D. dissertation, Yale University) (on file with author)), some might harm lesbians more than gay men (for example, the military's various policies concerning homosexuality, *see* Michelle M. Benecke & Kristin S. Dodge, *Military Women in Nontraditional Job Fields: Casualties of the Armed Forces' War on Homosexuals*, 13 HARV. WOMEN'S L.J. 215 (1990)), and some might harm gay men and lesbians roughly the same amount.

134. The gender discrimination argument for lesbian and gay rights, *see supra* note 71, is subject to similar theoretical and sociological objections. Although it may have been the case at one time that gay men and lesbians were understood to be sex or gender inverts, *see, e.g.*, STEIN, *supra* note 9, at 34–37, this view has now been discredited on theoretical grounds, *see id.* at 202–05, and on sociological grounds. It is widely acknowledged that some lesbians are feminine (among them, the so-called "lipstick lesbians") and that some gay men are masculine (among them, the so-called "hyper-masculine" gay men). In light of these observations, the gender discrimination argument will, at best, help protect only some gay men and lesbians from discrimination, but it will do so on the basis of their gender nonconformity, *not* their sexual orientation. These theoretical and sociological problems lead to moral problems for the gender discrimination argument of the type discussed with respect to the sex discrimination argument. *See infra*, text accompanying notes 135–145.

## C. The Moral Mistake of the Sex Discrimination Argument

In an essay written before *Loving* but after *Brown v. Board of Education*,[135] Herbert Wechsler argued that the questions posed by state-enforced segregation (in both education and marriage) do not primarily concern discrimination or equal protection but rather primarily concern freedom of association.[136] He argued that the prohibition of miscegenation affected both whites and nonwhites; the prohibition, properly understood, did not discriminate against blacks and did not violate the Equal Protection Clause but rather restricted the freedom of association of everyone, regardless of race.[137]

Charles Black, in response, said that as a member of this society, he has no doubt why segregation laws exist. He argued that Wechsler ignored the obvious ways in which segregation (in marriage, education, and other contexts) clearly offends equality.[138] It was ridiculous to claim that such laws were unconstitutional because they restrict the right to free association.

> [I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated "equally," I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter.[139]

Black convincingly—and presciently (in light of the Court's decision in *Loving*)—argued that segregation was designed to keep African Americans "in their place" and to sustain white supremacy.[140]

The moral objection to the sex discrimination argument is similar to Black's objection to Wechsler's argument against segregation: Laws that discriminate against lesbians, gay men, and bisexuals should be overturned on the grounds that they make invidious distinctions on the basis of sexual orientation, not on other grounds. Overturning laws that discriminate on the basis of sexual orientation because they discriminate on the basis of sex (or gender) mischaracterizes the core wrong of these laws.[141] Laws restricting the rights of gay men and lesbians violate principles of equality primarily because such laws discriminate on the basis of sexual orientation, *not* because they discriminate on the basis of sex. By failing to address arguments about

135. 347 U.S. 483 (1954) (holding that racially segregated public schools are unconstitutional).

136. *See* Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, *in* PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 3, 43–47 (1961).

137. *See id.* at 46.

138. *See* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

139. *Id.* at 424.

140. *Id.* at 430.

141. For a similar argument, see John Gardner, *On the Ground of Her Sex(uality)*, 18 OXFORD J. LEGAL STUD. 167 (1998).

the morality of same-sex sexual acts and the moral character of lesbians, gay men, and bisexuals, the sex discrimination argument "closets," rather than confronts, homophobia.

While the connection between sex discrimination and laws that restrict the rights of lesbians, gay men, and bisexuals is closer than Wechsler's connection between segregation and the restriction on free association, my objection to the sex discrimination argument for lesbian and gay rights is a variant of Black's objection to Wechsler: As members of this society, we understand, for example, the goal of Hawaii's constitutional amendment restricting marriage to only opposite sex couples and the goal of sodomy laws that prohibit same-sex—but not opposite-sex—sexual activities. Such laws restrict the rights of lesbians, gay men, and bisexuals and should be overturned for this reason.

The sex discrimination argument is not the only argument for lesbian and gay rights that avoids addressing the actual wrong of discrimination on the basis of sexual orientation. Arguments that appeal to the biological basis of homosexuality and to the right to privacy are subject to the same objection. More than a decade ago, Michael Sandel noted that arguments for lesbian and gay rights that appeal to the right to privacy and, generally, to "liberal toleration" of homosexuality avoid the difficult moral issues.[142] Various legal scholars have made a similar objection to arguments for lesbian and gay rights that appeal to the supposed biological basis of sexual orientation.[143] Such arguments say that lesbians and gay men are "born that way" and therefore should not be punished for their sexual orientations. Like the sex discrimination argument, biological and privacy-based arguments for lesbian and gay rights fail to address the actual wrong with discrimination on the basis of sexual orientation. In doing so, they fail to claim that same-sex sexual desire is of the same moral status as opposite-sex sexual desire, that same-sex sexual acts are of the same moral status as opposite-sex sexual acts, and that relationships between people of the same sex have the same moral status as relationships between people of the opposite sex. Arguments for lesbian and gay rights that avoid engaging the relevant moral issues effectively concede the moral arguments to opponents of lesbian and gay rights.[144]

142. Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521 (1989).

143. *See, e.g.*, STEIN, *supra* note 9, at 277–304; sources cited *supra* note 49; *see also* WINTEMUTE, *supra* note 4. *But see* Green, *supra* note 47.

144. For further discussion of moral arguments concerning lesbian and gay rights, see RICHARDS, *supra* note 24, Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871 (1997), and Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237 (1996).

In addition to showing that certain arguments for lesbian and gay rights fail to make significant moral claims, Sandel claims that such arguments will at best produce weak, short-term gains for lesbian and gay rights.[145] In the next part, I argue that, not only does the sex discrimination argument make a moral mistake, but that this moral mistake has serious practical limitations for lesbian and gay rights.

D. Summary

The sex discrimination argument for lesbian and gay rights, even in its strongest form, faces three serious and related objections. By focusing on the harm to women and on the sexist assumptions of laws that discriminate against lesbians and gay men, this argument rests on a cultural mis-characterization and a theoretical misalignment. Collectively, these mistakes lead the sex discrimination argument to provide the wrong analysis of laws that discriminate on the basis of sexual orientation. For these reasons, Table 4, rather than Table 2, correctly depicts the analogy that should be made concerning laws that discriminate against lesbians, gay men, and bisexuals. As Table 4 indicates, lesbians, gay men, and bisexuals constitute the class disadvantaged by laws that discriminate on the basis of sexual orientation, and homophobia is the belief system that justifies such laws. In Part IV, I consider the practical legal implications of the mistakes of the sex discrimination argument.

Table 4: The More Apt Analogy for Understanding Lesbian and Gay Rights

| **Law** | **Suspect classification used in the law** | **Class disadvantaged by the law** | **Belief system that justifies the law** |
|---|---|---|---|
| Virginia's anti-miscegenation law | Race | People of color and miscegenosexuals | Racism |
| The law at issue in *Reed v. Reed* | Sex | Women | Sexism |
| Missouri's sodomy law | Sex | Gay men, lesbians, and bisexuals | Homophobia |

145. *See* Sandel, *supra* note 142, at 537.

## IV. A PRAGMATIC EVALUATION OF THE SEX DISCRIMINATION ARGUMENT

An advocate of the sex discrimination argument for lesbian and gay rights might agree with everything I have said thus far while maintaining that this argument is a viable litigation strategy. Such an advocate might grant that the sex discrimination argument may not be a strong *principled* argument for lesbian and gay rights, while insisting that it is a strong *practical* argument. The thought is that given the limited success that arguments for lesbian and gay rights have had with judges, legislatures, and executives, as a practical litigation strategy, the sex discrimination argument should be deployed in courts and in other contexts.

### A. The Virtues of the Sex Discrimination Argument

I concede that there are various practical advantages to the sex discrimination argument. First, the argument does sometimes persuade judges. The Hawaii Supreme Court embraced this argument in 1993,[146] even though the argument was, for the most part, not mentioned in the briefs on behalf of the plaintiffs challenging Hawaii's marriage law.[147] The Human Rights Committee of the United Nations embraced this argument in considering a challenge to Tasmania's sodomy law[148] even though the argument was not raised by any of the parties to the case.[149] Second, the sex discrimination argument, in contrast to many other legal arguments that have been made for lesbian and gay rights,[150] has the potential to deliver heightened scrutiny to laws that restrict the rights of lesbians and gay men. Third, given the current legal and social climate facing lesbians, gay men, and bisexuals, it may simply be easier for courts and legislatures to make decisions on the grounds that they are protecting women and combating sexism than on the grounds

146. *See* Baehr v. Lewin, 852 P.2d 44, 63–68 (Haw. 1993).

147. *See* Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391, at *4 n.3 (Haw. Dec. 9, 1999) (Ramil, J., concurring); Koppelman, *supra* note 8, at 209 n.40.

148. *See* Toonen v. Australia, Communication No. 488/1992, 1 Int'l H.R. Rep. 97 (1994), *available at* http://www1.umn.edu/humanrts/undocs/html/vws488.htm.

149. For other cases that accept the sex discrimination argument, see *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998), *Picado v. Jegley*, No. CV-99-7048 (Ark. Cir. Ct. Mar. 23, 2001), *Engel v. Worthington*, 23 Cal. Rptr. 2d 329 (Ca. Ct. App. 1993), *review denied and opinion withdrawn by order of the court*, No. S036051, 1994 Cal. LEXIS 558 (Cal. Feb. 3, 1994), and *Lawrence v. State*, Nos. 14-99-00109-CR & 14-99-00111-CR, 2000 WL 729417 (Tex. App. June 8, 2000), *opinion withdrawn and overruled by* 41 S.W.3d 349 (Tex. App. 2001) (en banc). *See also* Baker v. State, 744 A.2d 864, 904–12 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part).

150. *See supra* Part I.B.

that they are protecting lesbians, gay men, and bisexuals and combating homophobia. For these practical reasons, some advocates of lesbian and gay rights continue to make the sex discrimination argument.[151]

There are, however, some practical problems with the sex discrimination argument, each of which is related to the principled problems with the argument discussed in the previous part. I consider four such problems in turn.

## B. The Problem of "Actual Differences" Between Men and Women

Several courts that have considered the sex discrimination argument for lesbian and gay rights responded to the argument by saying there are "actual differences"[152] between men and women (such as their different roles in reproduction or their supposed difference in physical strength) that justify making use of sex classifications, especially in laws related to sexual activity, marriage, procreation, and the like.[153] Although it is not clear how many "actual differences" really exist between men and women,[154] or how much significance courts are willing to accord these differences, it is clear that courts will frequently appeal to differences between men and women to justify the use of sex classifications in the face of the sex discrimination argument for lesbian and gay rights. That some courts are willing to allow "actual differences" between men and women to justify the use of sex classifications, combined with the practice of giving laws that make use of sex classifications less than strict scrutiny,[155] creates a substantial practical problem for the sex discrimination argument.

Relatedly, most courts have been unwilling to interpret protections against sex discrimination as covering discrimination on the basis of sexual orientation. This pragmatic weakness of the sex discrimination argument is

151. I do not mean to imply that legal scholars or the leaders of the lesbian and gay advocacy groups simply get to decide which arguments get made in court. The litigants in cases concerning lesbian and gay rights may also make some of these decisions. *See* William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997).

152. See *supra* note 79 for some cases in which the Court has held that actual differences between men and women justify the use of sex classifications.

153. The "actual differences" response has been used against versions of the sex discrimination argument in various cases. *See, e.g.*, Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971) (upholding Minnesota's marriage law on the grounds that "[t]he institution of marriage as a union of man and woman uniquely involv[es] the procreation and rearing of children within a family"), *appeal dismissed*, 409 U.S. 810 (1972); Singer v. Hara, 522 P.2d 1187, 1195–97 (Wash. Ct. App. 1974) (focusing on the reproductive capacities of male-female couples compared to same-sex couples). For a useful discussion of the "actual differences" problem for the sex discrimination argument, see KOPPELMAN, *supra* note 5, ch. 3.

154. *See, e.g.*, FAUSTO-STERLING, *supra* note 46.

155. *See supra* notes 64–67 and accompanying text.

evident in the failure of courts to interpret Title VII's prohibition of sex discrimination[156] as prohibiting discrimination on the basis of sexual orientation.[157] The Ninth Circuit's discussion in *DeSantis v. Pacific Telephone & Telegraph Co.* is typical:

> The cases interpreting Title VII sex discrimination provisions agree that they were intended to place women on an equal footing with men. Giving the statute its plain meaning, this court concludes that Congress had only the traditional notions of "sex" in mind. Later legislative activity makes this narrow definition even more evident. Several bills have been introduced to *amend* the Civil Rights Act to prohibit discrimination against "sexual preference." None have been enacted into law. . . . [W]e conclude that Title VII's prohibition of "sex" discrimination applies only to discrimination on the basis of gender and

156. Title VII makes it an "unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e–2(a) (1994 & Supp. V 1999).

157. *See, e.g.*, Dillon v. Frank, No. 90-2290, 1992 WL 5436 (6th Cir. Jan. 15, 1992) (stating that Title VII does not prohibit discrimination on the basis of sexual orientation); Ruth v. Children's Med. Ctr., No. 90-4069, 1991 WL 151158 (6th Cir. Aug. 8, 1991) (same); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69 (8th Cir. 1989) (per curiam) (same); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979) (same); Smith v. Liberty Mut. Ins. Co., 569 F.2d 325 (5th Cir. 1978) (holding that Title VII does not prohibit discrimination on the basis of effeminacy). Various scholars have argued against this interpretation of Title VII. *See, e.g.*, Marcosson, *supra* note 8, at 3–10; I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158 (1991). In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the Supreme Court held that same-sex sexual harassment is actionable under Title VII, but this holding does not seem to undermine the strength of the *Dillon* line of cases. In fact, *Oncale* is itself ambiguous. *Compare, e.g.*, Price v. Dolphin Servs., Inc., No. Civ. A. 99-3888, 2000 WL 1789962, at *5 (E.D. La. Dec. 5, 2000) (holding that, in light of *Oncale*, harassment "because of . . . sexual preference" is encompassed by harassment because of sex and thus is actionable under Title VII), *and* Nichols v. Azteca Rest., 256 F.3d 864 (9th Cir. 2001) (holding that the plaintiff had established sex discrimination based on homophobic harassment due to perceived gender nonconformity), *with* Spearman v. Ford Motor Co., 231 F.3d 1080 (7th Cir. 2000) (holding that harassment because of sexual orientation is *distinct* from harassment because of sex, and thus, harassment because of sexual orientation is not actionable under Title VII), *and* Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000) (same). For now, legislative change seems like the most promising strategy for protecting against employment discrimination on the basis of sexual orientation. *See* Employment Non-Discrimination Act of 2001, S. 19, 107th Cong., Title V (2001) (proposing to supplement Title VII by prohibiting sexual orientation discrimination in most employment contexts).

> should not be judicially extended to include sexual preference such as homosexuality.[158]

Every court that has considered the sex discrimination argument in the context of Title VII has ruled that sexual-orientation discrimination is not sex discrimination.

### C. Some Antigay Laws Do Not Make Use of Sex Classifications

In virtue of the fact that sex and sexual orientation are conceptually and culturally distinct, not all laws that discriminate on the basis of sexual orientation in fact make use of sex classifications. In his book, *Gaylaw*,[159] William Eskridge distinguishes among three different types of laws that discriminate on the basis of sexual orientation: (1) laws that explicitly discriminate on the basis of sexual orientation (*type-1 laws*; an example would be the military's policy concerning homosexuality[160]); (2) laws that discriminate on the basis of sex but that have their primary effect on gay people (*type-2 laws*; an example would be marriage laws that prohibit same-sex couples from marrying); and (3) other laws that do not facially discriminate against either sex or sexual orientation but that have discriminatory effects on lesbians and gay men (*type-3 laws*).[161]

As an example of a type-1 law, consider the military's policy concerning homosexuality.[162] This law and the regulations that implement it,[163] often referred to collectively as the "don't ask, don't tell" policy, do not facially discriminate on the basis of sex or even mention sex classifications. Under this policy, one of the several ways that lesbians, gay men, and bisexuals can be discharged is if they engage in sexual activities with people of the same-sex. This policy does not, however, discharge *heterosexuals* who engage in same-sex sexual acts (as some heterosexuals do). Specifically, the law provides for an exemption from discharge of a member of the armed forces who "engage[s] in a homosexual act . . . [if] such conduct is a departure from the member's usual and customary behavior; such conduct . . . is unlikely to recur; . . . and the member does not have a propensity or intent to engage in homosexual

158. *DeSantis*, 608 F.2d at 329–30 (citations and footnotes omitted).
159. ESKRIDGE, *supra* note 6.
160. *See* 10 U.S.C. § 654 (1994).
161. *See* ESKRIDGE, *supra* note 6, at 205.
162. *See* 10 U.S.C. § 654.
163. *See* Separation of Regular Commissioned Officers, Dep't of Def. Directive 1332.30 (Feb. 5, 1994); Qualification Standards for Enlistment, Appointment, and Induction, Dep't of Def. Directive 1304.26 (Feb. 5, 1994); Enlisted Administrative Separations, Dep't of Def. Directive 1332.30 26 (Feb. 5, 1994).

acts."[164] In other words, heterosexuals who occasionally engage in same-sex sexual acts might not be discharged for engaging in such acts, even if such acts are discovered. Only lesbians, gay men, and bisexuals will be discharged for engaging in same-sex sexual acts, because, by virtue of their sexual orientations, only they have the propensity to engage in such acts. In light of this exemption, the military policy is a type-1 law: It does not discriminate on the basis of sex, but it discriminates on the basis of sexual orientation—it discharges lesbians, gay men, and bisexuals for engaging in a behavior for which heterosexuals are not discharged.

Although the sex discrimination argument could be applied to type-1 laws as well as to type-3 laws, the sex discrimination argument has its greatest potential applied to type-2 laws, that is, laws that discriminate on the basis of sex. The sex discrimination argument will be much harder for judges to accept when it is applied to type-1 laws or to type-3 laws, that is, laws that discriminate on the basis of sexual orientation that do *not* make use of sex classifications. This is a significant practical limitation of the sex discrimination argument.

### D. Immunizing Antigay Laws Against the Sex Discrimination Argument

Legislatures that wish to restrict lesbian and gay rights will try to immunize themselves against the sex discrimination argument by not using sex classifications in laws relating to sexual orientation and by explicitly stating that such laws do not discriminate against sex. In other words, legislatures

164. 10 U.S.C. § 654(b)(1). The exemption from discharge for heterosexuals is known as the "queen-for-a-day" exemption. According to *The Survival Guide*, made available on the web and published by the Servicemembers Legal Defense Network, an organization that helps service members harmed by the military's policy against homosexuality, some members of the armed forces have successfully used the queen-for-a-day exemption to avoid discharge from the military. The organization notes that although "the chances of being retained are very low, service members facing discharge for gay acts should ask their attorney" about making the queen-for-a-day argument if they might satisfy the terms of the exception. Servicemembers Legal Defense Network, *Queen for a Day*, *in* THE SURVIVAL GUIDE, *at* http://www.sldn.org/templates/get/record.html?section=19&record=68 (last visited Nov. 1, 2001). Versions of the queen-for-a-day exemption have existed in some form in the U.S. military for much of the twentieth century and some service members facing discharge have, historically, taken advantage of exemptions of this form to remain in the military. *See* JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY 39–48 (1999); William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961–1981*, 25 HOFSTRA L. REV. 817, 918–20 (1997); William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946–1961*, 24 FLA. ST. U. L. REV. 703, 782–83 (1997). For an alternative view of the military's queen-for-a-day exemption, see Diane H. Mazur, *The Unknown Soldier: A Critique of "Gays in the Military" Scholarship and Litigation*, 29 U.C. DAVIS L. REV. 223, 257–61 (1996). For a discussion of judicially created queen-for-a-day rules outside the military context, see Yoshino, *supra* note 73, at 376–77.

will recast type-2 laws as type-1 (or type-3) laws. As an illustration, consider the 1993 plurality opinion in *Baehr v. Lewin*.[165] In this decision, at the time widely touted by advocates of lesbian and gay rights, the court made a distinction between *same-sex* marriage (a marriage between two people of the same sex) and *homosexual* marriage (a marriage between homosexuals): "'Homosexual' and 'same-sex' marriages are not synonymous; . . . a 'heterosexual' same-sex marriage is, in theory, not oxymoronic. . . . Parties to 'a union between a man and a woman' may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals."[166] In light of this distinction, *Baehr v. Lewin* can be understood as holding that prohibitions on same-sex marriages require a strong justification because they discriminate on the basis of sex, while prohibitions on homosexual marriages do not require such a strong justification.

Consistent with the 1993 decision in *Baehr v. Lewin*, a legislature could pass a marriage law that allows same-sex couples to marry but prohibits homosexuals from doing so. The rationale for this hypothetical law would be to allow same-sex marriage in order to avoid the charge of sex discrimination while still prohibiting homosexual marriages. While this may seem an odd law, it is actually similar to laws prohibiting homosexuals from adopting children,[167] and to the "don't ask, don't tell" policy, which permits heterosexuals, but not lesbians, gay men, and bisexuals, to engage in same-sex sexual activities.[168] A legislature might also argue are that marriage is related to childrearing (and that it believes lesbians and gay men are bad parents compared to heterosexuals), that lesbians and gay men are less able to sustain the sort of long-term commitments the state wants to encourage in its citizens,

165. 852 P.2d 44 (Haw. 1993).

166. *Id.* at 52 n.11.

167. *See, e.g.*, FLA. STAT. ANN. §63.042(3) (2001) ("No person eligible to adopt under this statute may adopt if that person is homosexual."). This law was held constitutional in *Lofton v. Kearney*, 157 F. Supp. 2d 1372 (S.D. Fla. 2001).

168. It is also similar to the Fourth Circuit's understanding of same-sex sexual harassment under Title VII—which was at least formally overruled by *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998)—under which same-sex harassment would be actionable only when the harasser was a homosexual. *See* McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191 (4th Cir. 1996); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138 (4th Cir. 1996). Although the Supreme Court ruled in *Oncale* that same-sex sexual harassment is covered by Title VII when such harassment is discrimination "because of sex," the Court seemed to leave open the possibility that a harasser's sexual orientation could be relevant to determining whether the harassment is actionable. *Oncale*, 523 U.S. at 80.

Hunter, *supra* note 117, at 411, says laws that explicitly prohibit homosexuals from marrying are "improbab[le]." But precisely these types of laws have been enacted in some instances, and my concern here is that more such laws will be enacted in the face of the sex discrimination argument.

and that the incidence of sodomy can be reduced by preventing homosexuals from marrying.[169]

Assuming a legislature enacts this hypothetical marriage law, it would be constitutional so far as the sex discrimination argument for lesbian and gay rights is concerned because it does not discriminate on the basis of sex.[170] That a law that discriminates on the basis of sexual orientation can be immune to the sex discrimination argument for lesbian and gay rights follows from the fact that sexual orientation and sex, though related, are conceptually distinct. This discussion shows that not all laws (or cultural practices) that adversely affect lesbians, gay men, and bisexuals can be analyzed as involving sex discrimination.

The moral of this hypothetical marriage law is that it is possible for a legislature to craft a law (or for a court to interpret a law) in such a way that it discriminates on the basis of sexual orientation but not on the basis of sex. The hypothetical shows how a law that discriminates on the basis of sexual orientation through the use of sex classifications can be easily reworked to discriminate on the basis of sexual orientation without making use of sex classifications. (In other words, type-2 laws can be converted into type-1 laws.) This shows that victories obtained by the sex discrimination argument for lesbian and gay rights might very well be short-lived. If the sex discrimination argument is deployed, we can expect to see more laws like the "don't ask, don't tell" policy, namely, laws that discriminate on the basis of sexual orientation without discriminating on the basis of sex.

The Hawaii Supreme Court's recent decision upholding the constitutionality of the state's marriage law provides an example of a more blunt way of immunizing laws that discriminate on the basis of sexual orientation against the sex discrimination argument.[171] In 1998, through a state referendum, Hawaii amended its constitution to allow the state legislature to limit marriages to male-female couples.[172] The Hawaii Supreme Court held that this amendment rendered moot the challenge to Hawaii's marriage law. In effect, the court ruled that the constitutional amendment declared that a law

169. Some of these are among the reasons offered by Hawaii and Vermont in defense of their marriage laws. These reasons were rejected, respectively, by the trial court in *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), and by the Supreme Court of Vermont in *Baker v. State*, 744 A.2d 864, 881–95 (Vt. 1999). For discussion of some of these issues, compare Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, with Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253.

170. It is not, however, clear whether the Supreme Court's reasoning in *Romer v. Evans*, 517 U.S. 620 (1996), would overturn my hypothetical marriage law. *See supra* text accompanying notes 57–69.

171. *See* Baehr v. Miike, 994 P.2d 566 (Haw. 1999).

172. *See* HAW. CONST. art. 1, §23. A similar scenario played out in Alaska. *See supra* note 3.

that discriminates on the basis of sexual orientation, even in the form of a law that facially makes use of sex classifications, does not impermissibly discriminate on the basis of sex, at least not for the purposes of Hawaii's constitution.[173] This failure of the sex discrimination argument to obtain lesbian and gay rights, combined with the existence of laws like Florida's ban on adoptions by gay men and by lesbians (but not, strictly speaking, by bisexuals) and the "don't ask, don't tell" policy, shows that the sex discrimination argument, as a practical matter, can and will be short-circuited.

### E. The Risk of Backlash

The fourth practical problem for the sex discrimination argument for lesbian and gay rights is that any practical successes for the sex discrimination argument could lead to a weakening of protections against sex discrimination. This is because a strong backlash typically occurs when lesbians, gay men, and bisexuals make legal and political advances.[174] In fact, some have argued that the link to lesbian and gay rights, especially to same-sex marriage, had a deleterious effect on the Equal Rights Amendment.[175] A backlash to any success of the sex discrimination argument could undermine both women's

173. Specifically, the Hawaii Supreme Court held that the constitutional amendment took Hawaii's marriage law "out of the ambit of the [state's] equal protection clause . . . insofar as the statute . . . limit[ed] access to the marital status to opposite-sex couples." Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391, at *6 (Haw. Dec. 9, 1999). Although some commentaries—for example, Matt Alsdorft, *What's the Legal Status of Gay Marriage?*, SLATE (Dec. 23, 1999), *at* http://slate.msn.com/?id=1004250—have described this decision as inevitable in light of Hawaii's constitutional amendment. The Hawaii Supreme Court *could* have overturned the state constitutional amendment on *federal* constitutional grounds by joining the sex discrimination argument of *Baehr v. Lewin* with the Fourteenth Amendment and applying the U.S. Supreme Court's reasoning in *United States v. Virginia*, 518 U.S. 515, 531 (1996), which held that the justification for laws that make use of sex-based classifications must be "exceedingly persuasive." Alternatively, the Hawaii Supreme Court could have overturned Hawaii's constitutional amendment on the same type of rationale on which *Romer* overturned an amendment to Colorado's constitution.

174. The mere *possibility* that Hawaii or Vermont might allow same-sex couples to marry so enflamed many people that over half of the state legislatures enacted measures to ensure that same-sex marriages would not be recognized in their jurisdictions, *see supra* note 20, and Congress enacted the Defense of Marriage Act, which reassured states that they had the power to avoid such recognition and ensured that the 1049 federal statutes that deal with marriage would not be construed to apply to same-sex couples married in Hawaii (or elsewhere). *See* Defense of Marriage Act (DOMA) of 1996, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7.8, 28 U.S.C. §1738C (Supp. V 1999)). Whether courts will find these measures to be constitutional remains uncertain. *See, e.g.*, James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamentalist Christianity*, 4 MICH. J. GENDER & L. 335 (1997); Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1 (1997); Mark Strasser, *Ex Post Facto Laws, Bills of Attainder, and the Definition of Punishment: On DOMA, the Hawaii Amendment, and Federal Constitutional Constraints*, 48 SYRACUSE L. REV. 227 (1998).

175. *See, e.g.*, JANE J. MANSBRIDGE, WHY WE LOST THE ERA 128–29, 144–45 (1986).

rights and lesbian and gay rights. In effect, this is what happened in Hawaii. The 1999 decision of the state's supreme court construed the 1998 constitutional amendment as taking Hawaii's marriage law "out of the ambit of the equal protection clause of the Hawaii constitution," thereby weakening sex discrimination jurisprudence in Hawaii.[176]

To summarize, the sex discrimination argument for lesbian and gay rights has the potential to persuade courts with respect to only one of the three types of laws that discriminate on the basis of sexual orientation.[177] It is unlikely to persuade judges, even those sympathetic to lesbian and gay rights,[178] particularly because judges may appeal to actual differences between men and women. Further, any victories obtained by the sex discrimination argument are likely to be short-lived and may well have deleterious effects on sex-discrimination jurisprudence. In light of these practical problems and the sociological, theoretical, and moral problems discussed in the previous part, advocates of lesbian and gay rights should avoid relying on the sex discrimination argument.[179]

### F. Sex Discrimination as an Argument in the Alternative

Some advocates of lesbian and gay rights have suggested making the sex discrimination argument in the alternative, coupling it with other arguments for lesbian and gay rights.[180] Given that the sex discrimination argument sometimes does persuade judges, why not offer this argument in the alternative, especially when this "double-barreled" approach has proven effective?[181] I have argued that the sex discrimination argument faces both

176. Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391, at *6 (Haw. Dec. 9, 1999).

177. *See supra* text accompanying notes 160–164.

178. *See, e.g.*, Baker v. State, 744 A.2d 864 (Vt. 1999); *supra* text accompanying notes 91–95.

179. The gender discrimination argument, *see supra* note 71, is also subject to some of the pragmatic objections that face the sex discrimination argument. Additionally, at least in the Title VII context, courts have rejected attempts to understand discrimination on the basis of sexual orientation in terms of gender deviance. *See, e.g.*, Smith v. Liberty Mut. Ins. Co., 569 F.2d 325 (5th Cir. 1978) (holding that Title VII does not prohibit discrimination on the basis of effeminacy). In light of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which held that Title VII's prohibition of sex discrimination reaches discrimination against a woman who exhibits masculine traits, there may be some hope for overturning cases like *Smith* (although no court has been willing to explicitly move in this direction). *But cf.* Nichols v. Azteca Rest., 256 F.3d 864, 875 (9th Cir. 2001) (finding that *Price Waterhouse* overrules, in part, *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979)). However, even an expansive reading of *Price Waterhouse* will at best help gender-nonconforming homosexuals.

180. *See, e.g.*, ESKRIDGE, *supra* note 7, at 182 (advocating a "double-barreled" approach to making the case for same-sex marriage); KOPPELMAN, *supra* note 5 (manuscript at 48, on file with author) (stating that the "sex discrimination argument is . . . only . . . one arrow in the quiver").

181. *See, e.g.*, Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) (holding that school administrators violated the Equal Protection Clause when they discriminated on the basis of *both*

practical pitfalls and principled objections. I have *not*, however, argued that the sex discrimination argument for lesbian and gay rights should *never* be made. Especially when a law that discriminates on the basis of sexual orientation makes explicit use of sex classifications (a type-2 law) and when the sexual-orientation discrimination involved in such a law is closely related to sex-role stereotypes, some judges may be persuaded to overturn laws that restrict lesbian and gay rights. Similarly, the sex discrimination argument might provide a welcome alternative to some judges who are sympathetic to lesbian and gay rights but who are hesitant to break new doctrinal ground.

While I agree with these points, my view is that the sex discrimination argument, given its practical and theoretical pitfalls, if presented at all, should be used with caution. Making this argument in conjunction with other sorts of arguments for lesbian and gay rights might mitigate some of the practical problems with the sex discrimination argument, but some serious worries would remain. A law that discriminates on the basis of sexual orientation that is overturned in the face of the sex discrimination argument could reappear in a slightly different form, recast so that it does not make use of sex classifications. Further, when a law that discriminates on the basis of sexual orientation is overturned in the face of the sex discrimination argument, the central moral debates about homosexuality are bracketed. Perhaps Herbert Wechsler's argument that appealed to the freedom of association[182] could have worked to persuade judges who would have otherwise upheld racial segregation, but such an argument would have lacked the moral force of the Supreme Court's opinion in *Loving*. When the basic human rights of a despised minority are at issue, the judiciary needs to speak in a strong moral voice.

## CONCLUSION

The legal situation for lesbians and gay men in the United States, while better than it has been in the past and better than the legal situation in some other countries, is hardly rosy. Given this situation, advocates of lesbian and gay rights may be tempted by any argument that might prove successful for obtaining lesbian and gay rights. The sex discrimination

sex and sexual orientation by doing nothing to prevent the repeated abuse of an openly gay student); *Baker*, 744 A.2d 864 (making the sex discrimination argument as an argument in the alternative both in the briefs and in the oral arguments with the result that one of the five judges was persuaded by the sex discrimination argument and the remaining four judges were persuaded by other arguments for lesbian and gay rights). For discussion of the *Baker* decision, see *supra* text accompanying notes 92 to 95.

182. *See* Wechsler, *supra* note 136.

argument for lesbian and gay rights is one such tempting argument, especially in light of its seemingly straightforward character, its practical virtues, and its occasional success. In this Article, I have argued that the sex discrimination argument is flawed in many ways. There exist, however, other arguments for lesbian and gay rights that have greater potential than the sex discrimination argument. While legal strategies, social movements, and legislative proposals that draw on these arguments rest on contested constitutional theories and face certain pragmatic problems, and while no single argument is likely to persuade all or most judges, policy makers, or others, these arguments do have practical promise. I do not have the space to evaluate such alternative arguments at length, but I will briefly sketch some of them. Although such arguments may rest on some contentious underlying premises about rights, the Constitution, and the like, they do not face the theoretical, sociological, and moral objections that undermine the sex discrimination argument.

Fifteen years after *Bowers v. Hardwick*,[183] privacy arguments for lesbian and gay rights have some continued viability. Many state courts have overturned sodomy laws on privacy grounds,[184] and by so doing, made way for extending privacy arguments beyond the context of decriminalization, to other claims for lesbian and gay rights.[185] Also, that the majority of the Supreme Court in *Romer* signed an opinion concerning gay rights without mentioning *Bowers* (despite being chastised for this omission by Justice Scalia[186]), suggests there are at least some doubts about the continued viability of *Bowers*. Further, privacy-based arguments for lesbian and gay rights have an even greater potential when made in conjunction with equality-based arguments.[187]

Various forms of equality-based arguments for lesbian and gay rights are also promising. Rather than claiming that sexual-orientation discrimination is an instance of some other type of prohibited discrimination (as the sex discrimination argument does), some promising equality-based arguments for lesbian and gay rights build on analogies with classifications to which equality-based arguments have been successfully applied. Typically, such equality-based arguments for lesbian and gay rights draw on analogies to race and sex.[188] While there are significant disanalogies between sexual orientation discrimination, on the one hand, and sex and race discrimination

183. 478 U.S. 186 (1986).

184. *See supra* note 39.

185. *See supra* text accompanying notes 9–23 (discussing three types of claims for lesbian and gay rights—namely claims for decriminalization, antidiscrimination, and recognition of relationships and institutions).

186. *See* Romer v. Evans, 517 U.S. 620, 640–41 (Scalia, J., dissenting).

187. *See, e.g.*, KAPLAN, *supra* note 9, at 17–22.

188. *See, e.g.*, RICHARDS, *supra* note 24.

on the other,[189] there are strong enough parallels to other types of past and present discrimination and political disenfranchisement that these analogies may have some pull as part of equality-based arguments.[190]

Perhaps better analogical equality-based arguments for sexual orientation draw on an analogy to the rights of religious groups. One attempt to make use of religion in the context of equality-based arguments argues that the basic principles that underlie the U.S. Constitution's protection of religious liberty (namely, freedom of conscience, freedom of association, and the rights to free speech and free assembly) also provide a robust defense of lesbian and gay rights.[191] Another equality-based argument compares lesbians and gay men to Jews, and tries to make the case for lesbian and gay rights based on the rights afforded Jews as a religious minority.[192] Although the Supreme Court in *Romer v. Evans* did not draw heavily on any particular analogy for lesbians and gay men, and although the decision is limited in various ways (because it used rational basis rather than heightened scrutiny analysis and perhaps also because of its focus on animus[193]), *Romer* represents an important step in the development of equality-based arguments for lesbian and gay rights[194] and shows the promise of this general approach (in contrast to some specific versions of this approach, which are quite problematic[195]). Indeed, *Romer*'s promise has been realized in how some—though not all—courts have applied *Romer*.[196]

189. *See, e.g.*, Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467 (2000); Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other-Isms)*, 1991 DUKE L.J. 397; Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283 (1994).

190. *See, e.g.*, Tanner v. Or. Health Sci. Univ., 971 P.2d 435 (Or. Ct. App. 1998) (granting heightened scrutiny to sexual orientation classifications), *review denied*, 994 P.2d 129 (Or. 1999); Baker v. State, 744 A.2d 864 (Vt. 1999) (holding that prohibitions on same-sex marriage violate Vermont's Common Benefits Clause, the Vermont Constitution's primary source of equal protection claims).

191. *See, e.g.*, RICHARDS, *supra* note 24, at 92–101; David A.J. Richards, *Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives*, 55 OHIO ST. L.J. 491 (1994); *see also* William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Pubic Law*, 106 YALE L.J. 2411 (1997).

192. *See* Mark A. Fajer, *A Better Analogy: "Jews," "Homosexuals," and the Inclusion of Sexual Orientation as a Forbidden Characteristic in Antidiscrimination Laws*, 12 STAN. L. & POL'Y REV. 37 (2001).

193. *See supra* notes 66–69 and accompanying text.

194. *See supra* note 62.

195. Besides the sex discrimination argument, I also have in mind the immutability argument for lesbian and gay rights, another specific equality-based argument that has little promise. *See supra* notes 45–47 and accompanying text.

196. *See supra* note 68. *But see supra* note 69.

In this Article, I have argued that the sex discrimination argument mischaracterizes both the nature of the harm of sexual orientation discrimination and the underlying belief system that supports it and, further, that these problems with the sex discrimination argument lead to serious practical problems. Additionally, the sex discrimination argument sidesteps the central moral questions concerning lesbian and gay rights. Even if avoiding these moral issues makes short-term practical sense for advancing lesbian and gay rights, it is precisely these questions that need to be faced to obtain and maintain robust rights for bisexuals, lesbians, and gay men. Other equality-based arguments and some privacy-based arguments (for example, the sort of privacy-based argument that Justice Harry Blackmun made in his *Bowers* dissent[197]) engage the moral issues and avoid the sociological and theoretical mistakes of the sex discrimination argument.

At this social, political, and legal juncture, advocates of lesbian and gay rights need to aggressively make their case using both previously tried and newly developed arguments. We need to remember, however, that there are risks to making weak arguments, even arguments that might sometimes succeed. The sex discrimination argument for lesbian and gay rights is one such risky argument. Advocates of lesbian and gay rights would do better to focus their efforts on other arguments.

197. *See* Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting) ("The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many right ways of conducting those relationships . . . .").