

July 14, 2006  
Op-Ed Contributor

## Too Good for Marriage

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LAST week, New York's highest court voted 4-to-2 that a legislative ban on same-sex marriage did not violate the state Constitution. In doing so, it added to the patchwork of state rulings on the issue, including those of Indiana and Arizona (which similarly upheld legislative bans) and Massachusetts (which struck down a legislative ban).

What's noteworthy about the New York decision, however, is that it became the second ruling by a state high court to assert a startling rationale for prohibiting same-sex marriage — that straight couples may be less stable parents than their gay counterparts and consequently require the benefits of marriage to assist them.

The critical question, expressed in a plurality opinion by three members of the New York court, is whether a "rational legislature" could decide that the benefits of marriage should be granted to opposite-sex couples but not to same-sex couples. The opinion then answered in the affirmative with two different arguments. While both related to the interests of children, they differed significantly in vintage and tone.

The more traditional argument stated that the Legislature could reasonably suppose that children would fare better under the care of a mother and father. Like most arguments against gay marriage, this "role model" argument assumes straight couples are better guides to life than gay couples.

And like other blatantly anti-gay arguments, it falls apart under examination. In a decision last month in a case concerning gay foster parents, the Arkansas Supreme Court found no evidence that children raised by gay couples were disadvantaged compared with children raised by straight couples.

But the New York court also put forth another argument, sometimes called the "reckless procreation" rationale. "Heterosexual intercourse," the plurality opinion stated, "has a natural tendency to lead to the birth of children; homosexual intercourse does not." Gays become parents, the opinion said, in a variety of ways, including adoption and artificial insemination, "but they do not become parents as a result of accident or impulse."

Consequently, “the Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples.”

To shore up those rickety heterosexual arrangements, “the Legislature could rationally offer the benefits of marriage to opposite-sex couples only.” Lest we miss the inversion of stereotypes about gay relationships here, the opinion lamented that straight relationships are “all too often casual or temporary.”

When an Indiana court introduced this seemingly heterophobic logic last year in upholding a state ban on same-sex marriage, I thought it was a cockeyed aberration. But after both New York City and New York State presented similar logic in oral arguments, and the court followed suit, I began to understand the argument’s appeal: it sounds nicer to gays.

It also sounds more desperate. New York’s ban on same-sex marriage is based on provisions enacted in 1909. It is preposterous to suggest the Legislature promulgated and retained the law because it believed gays to be better parents. Moreover, as New York’s chief judge, Judith Kaye, pointed out in her dissent, even if marriage were a response to the dangers of “reckless procreation,” excluding gay couples from marriage in no way advances the goal of responsible heterosexual child-rearing. “There are enough marriage licenses to go around for everyone,” Judge Kaye noted.

This is not the first time courts have restricted rights with a flourish of fond regards. In 1873, the United States Supreme Court upheld an Illinois statute prohibiting women from practicing law. Concurring in that judgment, Justice Joseph Bradley observed that the “natural and proper timidity and delicacy” of women better suited them to “the noble and benign offices of wife and mother.”

Hostile rulings delivered in friendly tones can take longer to overturn, as evidenced by the century that passed before members of the Supreme Court reversed their thinking about women and, in a 1973 opinion in a sex discrimination case, recognized that confining women in the name of cherishing them put them “not on a pedestal, but in a cage.”

We should not need a century to unmask the “reckless procreation” argument as a new guise for an old prejudice. The “reckless procreation” argument sounds nicer — and may even be nicer — than the plainly derogatory “role model” argument. But equality would be nicer still.

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