

Through the *Price Waterhouse*–Looking Glass: Dominance and Oppression Revealed

By CAMERON CLOAR*

[I]t should be permissible for the General Assembly to find *as a legislative fact* that homosexual sodomy leads to other deviate practices such as sado-masochism, group orgies, or transvestism, to name only a few. Homosexual sodomy is often practiced outside the home such as in public parks, restrooms, “gay baths,” and “gay bars” and is marked by the multiplicity and anonymity of sexual partners, a disproportionate involvement with adolescents, and, indeed, a possible relationship to crimes of violence.¹

Introduction

TAKEN FROM THE STATE of Georgia’s brief in *Bowers v. Hardwick*,² this passage reflects how many people view homosexual behavior in today’s society.³ Those who love people of their own sex encounter constant hatred, exclusion, and subordination.⁴ Gay men and lesbians

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1. Brief of Petitioner Michael J. Bowers, Attorney Gen. of Ga. at 36–38, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 45-140) (footnotes omitted).

2. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003). Justice White concluded: “No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated.” *Id.* at 191.

3. See James Allon Garland, *The Low Road to Violence: Governmental Discrimination as a Catalyst for Pandemic Hate Crime*, 10 *LAW & SEXUALITY* 1, 3–4 (2001) (noting that antigay sentiment still exists in states that no longer have laws prohibiting homosexual intimacy).

4. See Michael Joseph Gross, *Gay is the New Black?*, *ADVOCATE*, Dec. 16, 2008, at 30 (“At present[,] [homosexuals] are the most socially acceptable targets for the kind of casual hatred that American society once approved for habitual use against black people. Gay is the dark pit where our society lets people throw their fears about what’s wrong with the world.”).

are too often defined by, and obsessed with, sexual activity.⁵ They are commonly considered promiscuous, predatory, generally unable to form monogamous relationships, and antithetical to the idealized notion of family.⁶ Perhaps most viciously, gay men in particular are portrayed as child molesters.⁷ Though *Bowers* was eventually overturned,⁸ homosexual persecution continues.⁹

Notably, many states turn their backs on true equality by excluding gay men and lesbians from the institution of marriage and adopting children.¹⁰ Equally as suspect, the United States government excludes gay men from donating blood.¹¹ Society proclaims same-sex

5. See Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protections for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 514 (1992) (noting the belief that “gay people experience sexual activity differently than non-gays,” and that “[g]ay sexuality, according to this common understanding, is all encompassing, obsessive, and completely divorced from love, long-term relationships, and family structure”).

6. ALLAN BERUBE, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR II*, at 118 (1990) (reporting the popular World War II era belief that homophiles were “‘perverts’ obsessed with sex who could not love and were not worth loving”); see also WARREN J. BLUMENFELD & DIANE RAYMOND, *LOOKING AT GAY AND LESBIAN LIFE* 376 (1988) (commenting that gay bars are often criticized “as dens of hedonism and unbridled sexuality”); see also *Gay Student Servs. v. Texas A & M Univ.*, 737 F.2d 1317, 1320 n.4 (5th Cir. 1984) (noting that the university argued that a gay student group designed to provide information and exchange of ideas was likely to “incite, promote and result” in sexual activity).

7. Fajer, *supra* note 5, at 541 (“This stereotype exists despite evidence that the vast majority of child abuse incidents involve men abusing girls, and that many men who abuse boys self-identify as heterosexual or have no interest in adult males.”).

8. *Lawrence v. Texas*, 539 U.S. 558, 560 (2003) (“*Bowers* was not correct when it was decided, . . . is not correct today[,] . . . and now is overruled.”).

9. See Jesse McKinley & Laura Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1 (reporting that voters in Arizona, California, and Florida passed initiatives to ban same-sex marriage); see also Dan Savage, *Anti-Gay, Anti-Family*, N.Y. TIMES, Nov. 12, 2008, at A31 (reporting that Arkansas voters passed a state initiative to ban gay men and lesbians from adopting children).

10. The United States Supreme Court determined that the promise of true equality is breached by the act of separation, which serves no other purpose than to exclude and isolate. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954).

11. The document that gave official imprimatur to the lifetime exclusion of sexually active gay male blood was issued by the Food and Drug Administration in 1992. FOOD & DRUG ADMIN., DEP’T OF HEALTH & HUMAN SERVS., REVISED RECOMMENDATIONS FOR THE PREVENTION OF HUMAN IMMUNODEFICIENCY VIRUS (HIV) TRANSMISSION BY BLOOD AND BLOOD PRODUCTS 3 (1992), available at <http://www.fda.gov/cber/bldmem/hiv042392.pdf>. This policy was “clearly intended to discriminate against gay and bisexual men . . . because the class was considered to be promiscuous.” Michael Christian Belli, *The Constitutionality of the “Men Who Have Sex With Men” Blood Donor Exclusion Policy*, 4 J.L. Soc’y 315, 368 (2003). This policy is consistent with 21 C.F.R. § 640.3(a)–(c) (2006), which regulates donor suitability, and 21 C.F.R. § 640.120 (2008), which grants the FDA the authority to alter regulations regarding blood, blood components, and blood products.

couples and homosexual lifestyles inferior to those of heterosexuals. These laws echo rhetoric traditionally used by the majority to subordinate minority groups¹² and to justify officially declaring gay men and lesbians unworthy based on stereotypes. As a practical matter, these social laws and policies place homosexuals in a double bind¹³ by punishing their promiscuity while preventing their participation in stable, long-term relationships. This double bind thus illustrates a broader social system of domination and hierarchy along lines of sexuality.

Gay men and lesbians are not, however, the only class of persons subject to marginalization through an unfair "Catch 22."¹⁴ For instance, women professionals tend to experience negative reactions when they depart from traditional feminine stereotypes and adopt masculine authoritative work styles, under a perception that such behavior is deviant and unbecoming.¹⁵ The United States Supreme Court, in *Price Waterhouse v. Hopkins*,¹⁶ first recognized such arbitrary double binds placed on women through gender stereotypes and the resultant subordination.¹⁷ This Comment employs *Price Waterhouse* as a "Looking Glass," to identify similar double binds that suggest oppression. While analyzing all arguments for the repeal of such oppressive

12. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (concluding that if the black race is inferior to the white race, the Constitution cannot put them in the same plane); *Scott v. State*, 39 Ga. 321, 323 (1869) (holding that the state anti-miscegenation statute prevents the mixing of races that produced deplorable results); *Naim v. Naim*, 87 S.E.2d 749, 755-56 (Va. 1955) (holding that anti-miscegenation statutes preserve the racial integrity of Virginia citizens).

13. One scholar defines a double bind as a no-win situation in which a person or class of people are placed. See KATHLEEN HALL JAMIESON, *BEYOND THE DOUBLE BIND* 3 (1995). Female military personnel, for example, do not often report sexual harassment for fear that their peers may label them as lesbians, and that they may face discharge from the service under the gay military ban. *Id.* at 4. Alternatively, they will submit to the unwanted heterosexual activity simply to prove their heterosexuality. *Id.*

14. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (using the term "Catch 22" to describe the unlawful behavior of defendant Price Waterhouse). The Oxford English Dictionary defines "Catch 22" as "a circumstance that presents a dilemma because of mutually conflicting or dependent conditions." OXFORD ENGLISH DICTIONARY 146 (1999). The term was postulated in Joseph Heller's novel *Catch-22*. *Id.*

15. See JAMIESON, *supra* note 13, at 4 (noting that the history of Western culture is populated with evidence of traps for women). Racial minorities also fall victim to unfair double binds. In universities, for instance, a lack of diversity creates a racial Catch 22 where the "token" black students face competing demands to become more representative of "their race" and also more assimilating into the dominant race. Devon W. Carbado & Mitu Gulati, *What Exactly is Racial Diversity?*, 91 CAL. L. REV. 1149, 1157-58 (2003).

16. 490 U.S. 228 (1989). Another holding of the Court, not addressed in this Comment, was overruled in part by 42 U.S.C. § 2000e-2(m) (1994).

17. *Price Waterhouse*, 490 U.S. at 251.

laws and policies is beyond the scope of this Comment, I extend a *Price Waterhouse*–Looking Glass to argue that the laws examined here perpetuate a similar system of human hierarchy that privileges heterosexuality and the heterosexual relationship.¹⁸ Not surprisingly, such a societal structure correspondingly condemns the same-sex intimate and familial relationship.

I explicate my thesis in two parts. Part I recounts the now classic narrative of Ann Hopkins in *Price Waterhouse*. Specifically, Part I analyzes the Court's identification of the classic double bind on women and its deconstruction that revealed a system of gender stratification through unfair female stereotypes. Viewing through the *Price Waterhouse*–Looking Glass, Part II documents another Catch 22, drawn from unfair stereotypes, which establishes a similar social system of superiority and subordination of gay men and lesbians. I conclude that though the Court denounced the gender stratification in *Price Waterhouse*, gay men and lesbians continue to experience subordination as second-class individuals in a heterosexist society. And, as taught through the equivalent deconstruction of race and gender domination, I stress that society will never experience true freedom until we are also free from oppression on the basis of sexual orientation.

I. Defining the *Price Waterhouse*–Looking Glass: The Story of Ann Hopkins

After nearly four decades since society recognized the harmful effects of sex-based discrimination,¹⁹ the overriding gender issue in professional workplaces is persistent stereotypes.²⁰ For instance, women who are too passive are dismissed while women who are too aggressive are disliked.²¹ *Price Waterhouse v. Hopkins* provides the

18. Heterosexism is defined as the pervasive cultural presumption of heterosexual relationships and the corresponding condemnation of homosexual familial and communitarian relations. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 195 (1988).

19. See ABIGAIL C. SAGUY, WHAT IS SEXUAL HARASSMENT? FROM CAPITOL HILL TO THE SORBONNE 29 (2003) (noting that legal feminists began to argue in the late 1970s that sexual harassment constituted a form of sex discrimination).

20. See HOLLY ENGLISH, GENDER ON TRIAL: SEXUAL STEREOTYPES AND WORK/LIFE BALANCE IN THE LEGAL WORKPLACE 6 (2003).

21. *Id.* (“[P]eople still assume that women aren’t as competent as men. Speculation abounds that successful women ‘sleep their way to the top’ rather than advancing due to merit, whereas men have to protect themselves from assumptions that they are potential sexual predators who will harass the women they supervise.”).

Court's first recognition of an unfair Catch 22 used to solidify arbitrary gender stereotypes against women.

The *Price Waterhouse* narrative defines the classic double bind that one scholar described as particularly severe.²² Ann Hopkins was the only female nominee for partnership at Price Waterhouse, a large professional services firm, among a considerable field of eighty-eight.²³ Her record at the firm was exceptional: Hopkins excelled at generating new business and was described as “‘an outstanding professional’ who had a ‘deft touch,’ a ‘strong character, independence and integrity.’”²⁴ She was not, however, elevated to partner.²⁵ Hopkins sued the firm under Title VII of the Civil Rights Act of 1964, alleging gender discrimination.²⁶

Interestingly, the negative comments on Hopkins's partnership review suggest her masculine qualities doomed her partnership chances at Price Waterhouse. One partner, for example, advised Hopkins to “[w]alk more femininely, talk more femininely, dress more femininely, wear make-up and jewelry [and] have [her] hair styled.”²⁷ Some suggested she enroll in “a course at charm school,”²⁸ and others noted that she was “macho” and “overcompensated for being a woman.”²⁹ Still more complained of her use of profanity, although one admitted noticing her swearing “[j]ust because it's a lady using foul

22. See Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 916 (2002). Professor Yoshino posits a similar judicial treatment of pregnancy and other “covering” activities, including grooming and homosexual sodomy. *Id.* Yoshino defines covering as an individual's attempt to keep their stigmatized trait from looming large. *Id.* at 772. Yoshino, therefore, suggests that women are similarly situated to homosexuals and racial minorities. *Id.* at 916.

23. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 233 (1989). At the time Ann Hopkins was up for partnership, only 7 of the 662 partners at the firm were women. *Id.*

24. *Id.* at 234. Hopkins's clients agreed and described her as “extremely competent, intelligent, strong and forthright, very productive, energetic and creative.” *Id.* (internal quotation marks omitted).

25. *Id.* at 233. Of the eighty-eight candidates, forty-seven were elevated to partner, twenty-one were rejected, and twenty—including Hopkins—were to be reconsidered the following year. *Id.* Though Hopkins was not elevated to partner, thirteen of the thirty-two partners submitted favorable reviews on her bid. *Id.* Three partners recommended her bid be placed on hold, eight did not have an informed opinion, and eight partners moved to deny her bid for partner. *Id.*

26. *Id.* at 232.

27. ANN BRANIGAR HOPKINS, *SO ORDERED: MAKING PARTNER THE HARD WAY* 148 (1996).

28. *Price Waterhouse*, 490 U.S. at 235 (internal quotation marks omitted).

29. *Id.* (internal quotation marks omitted).

language.”³⁰ At first glance, Price Waterhouse expected female partners to come across as soft and effeminate.³¹

Or did they? Hopkins’s narrative reveals that she was also restricted from acting in accordance with female stereotypes in her professional life. At her first employer, Deloitte & Touche (“Deloitte”), Hopkins became pregnant with her first child.³² Hopkins believed childbirth, a medical procedure, would keep her out of work for a few weeks.³³ Deloitte, however, believed Hopkins would quit the firm, labeling her pregnancy a “professional crisis.”³⁴ Later, while working for Price Waterhouse, Hopkins was similarly criticized for occasionally bringing her children to work.³⁵ Hopkins was expected to conform to common feminine behavior, but her employers simultaneously demanded she hide her role as a mother.

In *Price Waterhouse*, feminine stereotypes were used to create an intolerable and unfair double bind.³⁶ Susan Fiske, a psychologist and expert witness for Hopkins, explained the stereotype: “The overall stereotype for feminine behavior is to be socially concerned and understanding, soft and tender, and the overall stereotype for a man, all other things being equal, is that [he] will be competitive, ambitious, aggressive, independent, and active.”³⁷ Because stereotypical male traits are valued at the workplace, women are bound in a conflict “between the assertiveness and aggressiveness required to get the job done and the image required to fit the female stereotype.”³⁸

Though no formal company rule excluded Hopkins from partnership because she was a woman, the Court held the firm illegally discriminated on the basis of sex.³⁹ The Court thus prohibited sex

30. HOPKINS, *supra* note 27, at 209.

31. *Id.* at xiii (noting that previous female partner candidates were criticized for acting like boys or feminists).

32. *Id.* at 43.

33. *Id.* at 44.

34. *Id.*

35. *Id.* at 225.

36. Gowri Ramachandran, *Intersectionality as “Catch 22”: Why Identity Performance Demands Are Neither Harmless Nor Reasonable*, 69 ALB. L. REV. 299, 318–19 (2005) (arguing that the demand to be aggressive or the demand to act according to one’s gender are acceptable alone, but are unacceptable when imposed at the same time).

37. HOPKINS, *supra* note 27, at 234.

38. *Id.* at 236; *see also* *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (citing the demands placed on Hopkins by the dominant male establishment); Yoshino, *supra* note 22, at 916–17 (“Fiske maintained that because stereotypically male traits are valued in many work environments, women who seek to succeed in such environments are placed in a double bind.” (internal quotation marks omitted)).

39. *Price Waterhouse*, 490 U.S. at 251.

stereotyping: “[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group”⁴⁰ In addition, the Court opined that Price Waterhouse placed Hopkins, and all women, in an “intolerable and impermissible [C]atch 22: out of a job if they behave aggressively and out of a job if they do not.”⁴¹ Thus, *Price Waterhouse* held that the treatment of Hopkins was illegal, because (1) it was based on sex stereotypes; and (2) it placed her in a Catch 22.⁴²

Since the Court’s ruling, scholars have commented that “the double bind is a strategy perennially used by those with power against those without.”⁴³ Evidence shows that, historically, women are usually the target and experience devastating results.⁴⁴ Scholars argue that men’s departures from gender norms are accepted, while women’s differences are correspondingly devalued.⁴⁵ Women often internalize the devaluation of their feminine traits, view themselves less deserving of rewards for the same performance as men, and are less likely to view themselves as leaders.⁴⁶ This, in turn, produces low self-esteem and additional stress within women’s personal and professional lives.⁴⁷ According to one scholar, the conflict created by the Catch 22 affects women’s mental health because it becomes a constant reminder of the inequality between men and women.⁴⁸

Price Waterhouse remains a landmark decision for the gains achieved by formal recognition of the Catch 22. For the first time, the Court recognized that women consistently face contradictory identity performance demands by the dominant male establishment.⁴⁹

40. *Id.*

41. *Id.*

42. Yoshino, *supra* note 22, at 917 (discussing the two theories under which the Court found Price Waterhouse’s treatment of Hopkins illegal).

43. JAMIESON, *supra* note 13, at 5.

44. *Id.*; see also Andrea Macerollo, *The Power of Masculinity in the Legal Profession: Women Lawyers and Identity Formation*, 25 WINDSOR REV. LEGAL & SOC. ISSUES 121, 137 (2008).

45. Naomi R. Cahn, *Styles of Lawyering*, 43 HASTINGS L.J. 1030, 1046 (1992) (noting that women and men use different lawyering styles at different times, but that women are perceived as using a female style when they depart from traditional patterns of advocacy).

46. See Macerollo, *supra* note 44, at 137.

47. See *id.* at 133 (concluding that social messages of gender conformity create undue stress and uncertainty for women).

48. See Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 500 (1990). Professor Radford explains that women who pursue careers face a constant reminder that they chose a “different” path than most women. *Id.* at 500–01. These women are deemed “tokens” and often experience alienation or isolation from colleagues and are pressured into acting in stereotypical ways. *Id.*

49. See generally Ramachandran, *supra* note 36, at 313–14 (noting that women experience gender performance requirements that are a form of negative class subordination).

Though many partners at Price Waterhouse did not articulate an animus toward women, they did object to a certain type of woman.⁵⁰ That is, Ann Hopkins posed a formidable threat to the classic gender script. Recognition of this Catch 22 made courts and others attempting to end discrimination cognizant that the demand to perform gender-appropriately is nothing more than gender subordination.⁵¹ At its core, the *Price Waterhouse* decision recognized that double binds based on unfair stereotypes were used to reinforce the secondary status of women. It legitimized the notion that women are equal, rather than subservient to men. The greater acceptance of this concept has, in turn, validated and enforced gender equality.

Using *Price Waterhouse* as a Looking Glass offers useful insight into the marginalization of similarly situated minority groups, specifically gay men and lesbians.⁵² Professional women challenge the notion that social traits, like dominance and nurturance, are naturally linked to one sex or the other. Homosexuals similarly challenge the notion that heterosexuality is a natural sexual quality; they reject the social institutions of family that are premised on gender inequality and difference.⁵³ They, like Ann Hopkins, do not fit.

II. Applying the *Price Waterhouse*–Looking Glass: Heterosexism and Subordination Revealed Through Bans on Marriage, Adoption, and Blood Donation

A. Marriage

Same-sex marriage, for many gay men and lesbians, illustrates an extreme mechanism of subordination. The Supreme Court of the United States has repeatedly recognized the importance of the emotional and symbolic nature of marriage.⁵⁴ It is a fundamental institu-

50. Yoshino, *supra* note 22, at 911 (“[M]any partners unwilling to articulate categorical animus toward women were quite comfortable voicing objections to a certain *kind* of woman.”); *see also id.* (“This was the woman who did not perform her gender in the middle band between hypermasculinity and hyperfemininity. Thus when Hopkins’s friend and colleague . . . was asked in court whether Price Waterhouse treated women fairly, she perceptively responded that it had treated *her*, as an individual woman, fairly.”).

51. *See* Ramachandran, *supra* note 36, at 318.

52. *See* Yoshino, *supra* note 22, at 916.

53. *See* discussion *infra* Part II.B (addressing homosexual adoption).

54. *See* *Turner v. Safely*, 482 U.S. 78, 95 (1987) (recognizing that marriage is an “expression [] of emotional support and public commitment”); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (stating that marriage is the “foundation of the family in our society”); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (“[M]arriage involves interests of basic

tion that signifies to family, friends, the community, and the world a moral commitment between two people and society's promise to respect the sanctity of that relationship.⁵⁵ Marriage occupies a unique space in our society, central to the formation of human relationships for centuries.⁵⁶ The contours of the institution have dramatically changed over time, but the core idea of marriage—the loving commitment of two individuals—has not.⁵⁷

Twenty-seven states, however, deny same-sex couples the right to marry.⁵⁸ The breadth of states' policies on marriage varies. For instance, Alaska defines marriage as between a man and a woman but allows the possibility for alternative legal arrangements like domestic partnerships.⁵⁹ Nebraska prohibits same-sex marriage, civil unions, domestic partnerships, and all other like legal statuses.⁶⁰ Louisiana and Oklahoma not only ban same-sex marriage, but also forbid the legal incidents of marriage—specifically the benefits and protections that accompany marital status—from being conferred on same-sex couples.⁶¹ All told, forty-two states have laws prohibiting same-sex rela-

importance in our society.”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (discussing marriage as a fundamental freedom); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (characterizing marriage as a basic civil right and fundamental to human existence); *Maynard v. Hill*, 125 U.S. 190, 205 (1888) (describing marriage as “the most important relation in life”).

55. See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (“Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.”).

56. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003) (“Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family.”).

57. Traditional law, for example, reinforced gender and commitment norms in marriage. See Elizabeth Scott, *Social Norms and the Legal Recognition of Marriage*, 86 VA. L. REV. 1901, 1904 (2000). Gender norms prescribed varying roles for each sex, while commitment norms defined marriage as a cooperative and lifelong relationship. *Id.* “[T]he legal responsibilities of marriage, the barriers to exit, and the substantive fault grounds for divorce made marriage a serious business.” *Id.* The legal framework has changed over time. *Id.* at 1905.

58. “Twenty-seven states have passed ‘defense of marriage’ amendments in the last decade.” Brodie M. Butland, *The Categorical Imperative: Romer as the Groundwork for Challenging State “Defense of Marriage” Amendments*, 68 OHIO ST. L.J. 1419, 1419 (2007). Among these twenty-seven states, seventeen outlaw other similar legal relationships. Human Rights Campaign, *Statewide Marriage Prohibitions*, http://www.hrc.org/documents/marriage_prohibit_20070919.pdf (Sept. 19, 2007).

59. See Butland, *supra* note 58.

60. NEB. CONST. art. I, § 29.

61. See Butland, *supra* note 58.

tionship recognition,⁶² and opponents of these unions present both religious and secular arguments.

Though not every religion opposes same-sex marriage or same-sex unions,⁶³ many religious institutions in the United States denounce these relationships.⁶⁴ Christian followers ground their opposition to same-sex marriage in their belief that homosexuality is a sin⁶⁵ and because it “involves sex that doesn’t create life.”⁶⁶ Implicitly, these arguments criticize homosexuality as unnatural, sexually immoral, and threatening to children—all stereotypes used to vilify homosexuals in *Bowers* over twenty years ago.

Scholars divide secular arguments against same-sex marriage into three categories: (1) the definitional argument; (2) the stamp of approval argument; and (3) the defense of marriage argument.⁶⁷ Under the definitional argument, same-sex marriage opponents demand society limit marriage to between a man and woman because that is how it has always been.⁶⁸ For example, in 1970 a lesbian couple seeking a marriage license from Jefferson County, Kentucky, was formally de-

62. Stateline.org, State Policies on Same-Sex Marriage, http://archive.stateline.org/flash-data/2007_May_31-CivilUnions/Social_Policy.pdf (last visited Apr. 11, 2009) [hereinafter State Policies on Same-Sex Marriage]. On Friday, April 3, 2009, the Iowa Supreme Court unanimously ruled its state law limiting marriage to a man and woman unconstitutional. See Monica Davey, *Iowa Court Clears Way for Same-Sex Marriage*, N.Y. TIMES, Apr. 4, 2009, at A1. On April 7, 2009, the Vermont legislature overruled the state governor’s veto to allow same-sex marriage. Abby Goodnough, *Rejecting Veto, Vermont Backs Gay Marriage*, N.Y. TIMES, Apr. 8, 2009, at A1, A16.

63. For instance, Quakers, Unitarians, Buddhists, and Reform and Reconstructionist Jews do not institutionally oppose same-sex marriages or unions. Mark Strasser, *Same-Sex Marriages and Civil Unions: On Meaning, Free Exercise, and Constitutional Guarantees*, 33 LOV. U. CHI. L.J. 597, 605 (2002).

64. Press Release, Pew Research Ctr., Republicans Unified, Democrats Split on Gay Marriage: Religious Beliefs Underpin Opposition to Homosexuality 1 (Nov. 18, 2003), available at <http://pewforum.org/publications/surveys/religion-homosexuality.pdf>.

65. See *Leviticus* 20:13 (King James) (“If a man also lie with mankind as he lieth with a woman, both of them have committed an abomination.”); see also *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring) (“Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.”).

66. See Steven Waldman, *A Common Missed Conception: Why Religious People Are Against Gay Marriage*, SLATE, Nov. 19, 2003, <http://www.slate.com/id/2091413/>. These religious arguments, backed by centuries of tradition and interpretation, are found in early judicial opinions regarding same-sex marriage. See *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (“The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.”); see also *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980).

67. See WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE’VE LEARNED FROM THE EVIDENCE* 21 (2006) (describing the evolution of arguments against same-sex marriage).

68. *Id.* at 21–22.

nied by the District Attorney because the couple represented “the pure pursuit of hedonistic and sexual pleasure.”⁶⁹ The couple sued and the Kentucky Supreme Court rejected their constitutional argument: “[The] appellants are prevented from marrying . . . by their incapability of entering unto a marriage as that term is defined.”⁷⁰

The stamp of approval argument posits that any legislation endorsing same-sex marriage encourages homosexuality by placing a stamp of approval on unnatural conduct.⁷¹ For instance, Judge Richard Posner tolerates sexual variance, yet refuses to accept same-sex marriage because it would condone homosexuality.⁷² The most homosexuals can expect, he argues, is noninterference in their relationships, but not positive support or approval.⁷³ A New York state senator agrees: “Sexual orientation is their choice and I don’t think it’s our place to force people that might have a moral opposition to it to have to put up with it and condone it.”⁷⁴

The defense of marriage argument decries same-sex marriage because it undermines the sanctity of traditional marriage and, therefore, results in a moral collapse.⁷⁵ During congressional consideration of the federal Defense of Marriage Act (“DOMA”), the House Judici-

69. *Id.* The district attorney later testified that the couple’s marriage would “lead to a breakdown in the sanctity of government,” would jeopardize the country’s morality, and “could spread all over the world.” *Id.* at 21.

70. *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973). The Kentucky Supreme Court continued: “[M]arriage has always been considered as the union of a man and a woman and we have been presented with no authority to the contrary.” *Id.* In 1971, the Minnesota State Supreme Court rejected a similar case for same-sex marriage. *Baker*, 191 N.W.2d at 186.

71. *ESKRIDGE & SPEDALE*, *supra* note 67, at 25–26. Many parents love their homosexual sons and daughters, yet oppose state recognition of same-sex marriage because they do not approve of the homosexual lifestyle, or think that it is the best life path for their children. *Id.*

72. RICHARD A. POSNER, *SEX AND REASON* 311 (1992).

73. *ESKRIDGE & SPEDALE*, *supra* note 67, at 26.

74. Kevin Sack, *Albany G.O.P. Grappling with Gay Rights*, N.Y. TIMES, Feb. 6, 1993, at L+27 (quoting John Kuhl). United States Senator Trent Lott relied on the stamp of approval argument in refusing to fund the District of Columbia’s domestic partnership legislation in 1993. *ESKRIDGE & SPEDALE*, *supra* note 67, at 26. Parents are the main audience for the stamp of approval argument, “who love their children and want what’s best for them.” *Id.* “Even if ‘gay is good,’ they think, straight is great. Parents, their churches, their communities, and, yes, even the state ought to express this moral and lifestyle preference, especially by refusing to recognize same-sex marriages.” *Id.*

75. *ESKRIDGE & SPEDALE*, *supra* note 67, at 28. Defense of Marriage advocates view marriage as an altruistic space, where adults sacrifice self-interest to commit to one another and to raise their children. *Id.* at 29. They therefore believe that same-sex marriage would devalue the institution of marriage as an altruistic space and “undermine its ability to advance the community values it has long promoted.” *Id.*

ary Committee concluded “civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest to encourage responsible procreation and child rearing. Simply put, government has an interest in marriage because it has an interest in children.”⁷⁶

The *Price Waterhouse*–Looking Glass exposes a severe double bind in the formal exclusion of gays and lesbians from marriage. Marriage would theoretically counsel stability, monogamy, and commitment between same-sex partners.⁷⁷ Because marriage has a special significance in society, the institution has a signaling effect that alters how individuals within a marriage behave toward one another.⁷⁸ Married couples intuitively understand they are to be emotionally and financially supportive, honest, and faithful.⁷⁹ Though couples may alter those behavioral expectations, they benefit by beginning from a common understanding of the core marital relationship, gleaned from a lifetime of observation of, and experience with, others who are married. They therefore understand respective duties within a marriage, even if they choose to alter them.

Marriage also affects society’s behavior towards the couple.⁸⁰ Because marriage is universally recognized, society treats married couples in a manner that reflects their legal and social status.⁸¹

76. H.R. REP. NO. 104-664, at 13 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2917.

77. See Mark Strasser, *Same-Sex Marriage and Civil Unions: On Meaning, Free Exercise, and Constitutional Guarantees*, 33 LOY. U. CHI. L.J. 597, 603 (2002) (arguing that marriage provides stability for adults, making them happier and more productive); see also Kim Vo, *Marital Blitz Before Hearings*, SAN JOSE MERCURY NEWS, Feb. 17, 2004, at 1A (“It’s different being married. Saying those words really meant something to me.” (quoting Kathy Knowles)).

78. See J.M. Adams et al., *The Conceptualization of Marital Commitment: An Integrative Analysis*, 72 J. PERSONALITY & SOC. PSYCHOL. 1177, 1177–78 (1997). Although commitment is an important factor in many dating relationships, it tends to be more salient within marriage because of the interpersonal, social, and legal complexity that is absent in most dating relationships. *Id.* at 1177.

79. Married spouses understand that commitment reflects the degree to which they intend to maintain their marriage. *Id.* Committed spouses therefore tend to better accommodate each other, communicate and problem solve more effectively, and consider commitment to be one of the most important factors contributing to a successful marriage. *Id.*

80. For example, many couples remain married to avoid the disapproval of family and friends that often accompanies a divorce. *Id.* at 1178.

81. See *Lewis v. Harris*, 908 A.2d 196, 226 (N.J. 2006) (Poritz, C.J., dissenting) (quoting a litigant who stated: “When I am asked about my relationship, I want my words to match my life, so I want to say I am married and know that my relationship with [my same-sex partner] is immediately understood, and after that nothing more needs be explained”); see also *In re Marriage Cases*, 183 P.3d 384, 448–49 (Cal. 2008) (recognizing that the right to marry obligates the state to grant official recognition to the couple’s relationship and to protect them from certain types of improper interference by others).

When they go into a bank and open a joint account, or check into a hotel, or apply for a credit card or a telephone number, or jointly attend a parent-teacher conference, or accompany a child on a plane flight, there is no need for explanation or documentary proof of the familial relationship.⁸²

This recognition and understanding of marriage strengthens these relationships. And, because couples understand marriage is a lifetime commitment, they may be more willing to work through difficult times, and family and friends are likely to encourage this.⁸³

The marriage of same-sex couples would seem to counsel against unfavorable gay and lesbian stereotypes. Marriage would strengthen the homosexual couple's relationship as it does for heterosexual couples. As a result, same-sex partners would have fewer sexual partners, thus minimizing perceived promiscuity.⁸⁴ Under the argument's premise, that same-sex couples are sexual deviates and more prone to fewer long-lasting relationships, it would seem the stabilization marriage provides would benefit them more than opposite-sex couples.⁸⁵ Without marriage, some same-sex couples might continue to engage in many safe and unsafe relationships,⁸⁶ and, therefore, might remain subject to the same stereotypes.

Society thus condemns homosexuals to a life of promiscuity, while refusing to allow gay couples to enter the civilizing institution of marriage. As one scholar said it best: "So which is it? Do same-sex couples get to live lives of stability, monogamy, and commitment, or

82. Brief for Bay Area Lawyers for Individual Freedom et al. as Amici Curiae Supporting Respondents at 44–45, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999).

83. See *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003) ("Marriage . . . bestows enormous private and social advantages on those who choose to marry. Civil Marriage is . . . a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family.").

84. See Justin T. Wilson, *Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us into Establishing Religion*, 14 DUKE J. GENDER L. & POL'Y 561, 663 (2007) (concluding that because marriage has stabilizing effects, the belief that allowing same-sex marriage will decrease the number of sexually transmitted diseases is rational).

85. See Brief for Bay Area Lawyers for Individual Freedom et al. as Amici Curiae Supporting Respondents at 30, *supra* note 82 ("Being married is the only universally understood way we have of expressing the depth and permanence of our commitment to each other." (internal citations omitted)).

86. See Wilson, *supra* note 84, at 663 ("Without marriage, same-sex couples will presumably continue to engage in both safe and unsafe sexual intercourse. Without marriage, it is reasonable to assume that STI rates among homosexuals will remain the same or increase. Without marriage, it is reasonable to assume that partners will continue to infect one another at about the same rates, and that those individuals and couples who are predisposed to engage in extra-relationship intercourse . . . will continue to do so at about the same rates.").

are they to be continually shunted into the second-best category, where the very relationship attributes they seek are the ones they are faulted for not already possessing?"⁸⁷ Thus, state and federal laws implicitly suggest gay men and lesbians, no matter how they act, are not morally worthy enough to enter marriage.⁸⁸

Unraveling the double bind reveals irrational underlying stereotypes of gay men and lesbians that work to oppose equal access to marriage. States exclude homosexuals from marriage, refusing to condone their lifestyle because of the stereotype that gays and lesbians are obsessed with sex and unable to maintain lasting relationships. Thus, on the surface, the heterosexist majority seeks to prohibit same-sex unions under a notion that society must not reward bad or unnatural behavior. Despite advances for homosexuals in some states, all of these arbitrary stereotypes have successfully prevented recognition of same-sex marriage.⁸⁹

Left only with arbitrary stereotypes, official homosexual exclusion from a social institution long considered fundamental to human freedom and dignity can rest only on a heterosexist social hierarchy. The Catch 22 therefore serves as a vehicle to further society's heterosexist system of domination.⁹⁰ Such institutionalized ideologies operate to marginalize and devalue gay men and lesbians.⁹¹ Just as *Price Waterhouse* revealed that Hopkins' status as a woman was deeply discrediting at Deloitte and Price Waterhouse,⁹² many view homosexuality as deeply discrediting.⁹³ Excluding same-sex couples from marriage segregates gay men and lesbians from the rest of society and rein-

87. *Id.*

88. *See id.*

89. *See* State Policies on Same-Sex Marriage, *supra* note 62 (showing that in 2009, nearly all states prohibit same-sex marriages, and only four states permit civil unions).

90. *Cf.* JAMIESON, *supra* note 13, at 5 (discussing the strategic use of the double bind against powerless women).

91. *See* Strasser, *supra* note 77, at 628 ("Same-sex marriage opponents do not even attempt to mask their view that society must not view same-sex unions as on a par with different-sex unions."); *see also* William N. Eskridge, Jr., *Challenging the Apartheid of the Closet*, 25 HOFSTRA L. REV. 817, 946 (1997) ("[P]ermitting gay marriages seem[s] like a recognition of complete equality, when virtual equality was all society was willing to offer or accept").

92. If Hopkins' status as a woman was not deeply discrediting, Hopkins would not have felt pressure to act masculine. Neither would Deloitte have considered Hopkins' pregnancy a "professional crisis." *See* HOPKINS, *supra* note 27, at 44.

93. *Cf.* R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 818 (2004) (noting that race is deeply discrediting because, "[e]ven today[,] it continues to stand out as an unfortunate basis on which individuals or groups are discriminated against or otherwise differentiated from others in society").

forces stereotypes that homosexuals are “different” from—and inferior to—the heterosexual majority.⁹⁴

Few can dispute the importance of marriage in our culture.⁹⁵ By denying homosexual couples “one of the basic civil rights of man, fundamental to our very existence,”⁹⁶ state laws send a message to gay men and lesbians that their relationships are not worthy of the highest and most respected recognition of a committed relationship.⁹⁷ This, in fact, discourages long-term relationships.

Our culture expects, even celebrates, formal recognition of relationships that involve a man and a woman. Our laws, however, employ unfair stereotypes to condemn those same relationships when they involve two people of the same sex. We presume that “real men are and should be sexually attracted to women, and real women invite and enjoy that attraction.”⁹⁸ As such, the heterosexual couple forms the nucleus of our interpersonal relationships, which are both socially supported and privileged.⁹⁹ Ann Hopkins challenged societal gender norms and, therefore, her exclusion from partnership reinforced a male dominant hierarchy. Same-sex marriage formally rejects the notion that heterosexual attraction is natural and universal; it denies the traditional belief that stable relationships require the hierarchy of male and female gender norms.

Hence, this heterosexist society determines that life as a heterosexual couple is generally easier and more pleasant because dominant prevailing social structures make it so. Legal exclusion of same-sex couples from marriage institutionalizes an ideology that homosexual

94. See *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004) (holding that requiring same-sex couples to enter into the separate institution of civil unions relegates them to “second-class status”).

95. One recent article noted:

The most important day of your life was when you got married. It was on that day that all your friends and all your family got together to celebrate the most important thing in life: your happiness—your ability to make a new home, to form a new but connected family, to find love that put everything else into perspective.

Andrew Sullivan, *Why the M Word Matters to Me: Only Marriage Can Bring a Gay Person Home*, TIME, Feb. 16, 2004, § 7.

96. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (internal quotation marks omitted).

97. The New Jersey Supreme Court determined that the State must extend either marriage or civil unions to same-sex couples. *Lewis v. Harris*, 908 A.2d 196, 224 (N.J. 2006). Chief Justice Poritz argued that “[b]y excluding same-sex couples from civil marriage, the State declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples.” *Id.* at 226–27. Continued the Chief Justice: “Ultimately, the message is that what same-sex couples have is not as important or as significant as ‘real’ marriage” *Id.*

98. Law, *supra* note 18, at 196.

99. *Id.*

unions are less worthy, less stable, and less valid than their heterosexual counterparts.¹⁰⁰ Like social systems of domination along lines of race and gender, rigid sexual hierarchies stigmatize gay men and lesbians: an individual's sexual orientation eventually overshadows all aspects of a person's identity.¹⁰¹ When homosexuals disclose their relationships, others are likely to view them as gay and treat them in accordance with those stereotypes they seek to avoid. The *Price Waterhouse*-Looking Glass thus suggests that the challenge might be concerned less with establishing an explicit right to marry than with dismantling an overt social system of oppression and subordination.

B. Adoption

Adoption is an important part of life for many homosexuals, but, like marriage, presents an insidious Catch 22. As human beings, many gay men and lesbians want to experience the joys of parenting. Often this must come through adoption.¹⁰² Generally, courts hearing adoption cases apply the "best interests of the child" standard,¹⁰³ often to effectively proscribe adoption options for gay men and lesbians.¹⁰⁴ States such as Florida, Mississippi, and Utah statutorily prohibit adoption by gays and lesbians.¹⁰⁵ Most, if not all, states that refuse homo-

100. See *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 571 (Mass. 2004).

101. At least one scholar concludes that race eventually eclipses all aspects of a person's identity and becomes all that anyone sees. Lenhardt, *supra* note 93, at 819 ("Race becomes a sort of mask, a barrier that both makes it impossible for the stigmatized person's true self to be seen and fixes the range of responses that others will have to that person."). A large body of scholarship links the synergistic relationship between racism and homophobia, including their effects. See, e.g., Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 15 (1999) (arguing that despite the similarities between racism and homophobia, anti-racist legal theorists have failed to challenge heterosexist oppression).

102. Homosexuals may also seek assistive reproductive techniques. For a discussion on this topic, see John A. Robertson, *Gay and Lesbian Access to Reproductive Technology*, 55 CASE W. RES. L. REV. 323 (2004).

103. See JOSEPH GOLDSTEIN ET AL., *THE BEST INTERESTS OF THE CHILD* 71-90 (1996); see also Jane S. Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 936 (2000) (noting that adoption law most often requires a judicial determination that the adoption would be in the best interests of the child).

104. See generally Christopher Carnahan, *Inscribing Lesbian and Gay Identities: How Judicial Imaginations Intertwine with the Best Interests of Children*, 11 CARDOZO WOMEN'S L.J. 1 (2004) (arguing that a variety of judicial decisions unfairly portray gay men and lesbians to find their lifestyle not in the best interests of children).

105. FLA. STAT. § 63.042(3) (2003) (prohibiting adoption by a "homosexual"); MISS. CODE ANN. § 93-17-3(5) (2003) (prohibiting adoption by couples of the same gender); UTAH CODE ANN. § 78-30-1(3)(b) (2003) (prohibiting adoption by unmarried individuals residing with, and sexually involved with, another person). A state trial court in Florida

sexual adoption, whether by court decision or statute, assume gay and lesbian parents cause enormous harm.¹⁰⁶

A recent case from Florida illustrates a stark reality for many gay men and lesbians who wish to start a family.¹⁰⁷ The applicable Florida statute explicitly states, "No person eligible to adopt under this statute may adopt if that person is a homosexual."¹⁰⁸ In 1999, Steven Lofton, Douglas Houghton, and other gay foster parents sued to make their parental rights permanent for children under their care.¹⁰⁹ A registered nurse, Lofton raised three HIV-positive children for over ten years.¹¹⁰ The Children's Home Society awarded Lofton the Outstanding Foster Parenting award for his extraordinary care of these children.¹¹¹ Lofton submitted an adoption application for one of the children, but, as a homosexual, was automatically denied.¹¹²

Houghton, a registered nurse like Lofton, fostered one child.¹¹³ Houghton became the legal guardian after the child's father, an unemployed alcoholic, deserted the four-year-old boy.¹¹⁴ Houghton decided to adopt the child, but the state refused to grant a favorable evaluation of him because of his homosexuality.¹¹⁵ The Florida statute thus precluded Houghton's adoption of the child.¹¹⁶

Denied their right to adopt, the parents challenged the constitutionality of the Florida law.¹¹⁷ The United States District Court for the Southern District of Florida, however, upheld the law under an equal

recently ruled the adoption ban unconstitutional, but the state Attorney General filed a notice of appeal. Yolanne Almanzar, *Florida Gay Adoption Ban is Ruled Unconstitutional*, N.Y. TIMES, Nov. 26, 2008, at A21. The case will likely end up before the Florida Supreme Court. *Id.*

106. See Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 853-55 (1997) (arguing that homosexual parents cause emotional harm to their children by increasing the likelihood of homosexual interest, lowering self images of masculinity in boys raised by lesbians, and increasing symptoms of stress and defensive behavior).

107. *Lofton v. Kearney*, 157 F. Supp. 2d 1372 (S.D. Fla. 2001), *aff'd*, *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004).

108. FLA. STAT. § 63.042(3) (2003). In 1977, Florida became the first state to prohibit homosexuals from adopting, and is currently the only state that explicitly retains this prohibition. See Eskridge, *supra* note 91, at 950-51.

109. *Lofton*, 157 F. Supp. 2d at 1376.

110. *Id.* at 1375.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 1376.

116. *Id.*

117. *Id.* at 1377.

protection analysis.¹¹⁸ Though the court adopted a rational basis standard of review for homosexual classifications,¹¹⁹ it rejected the state's first justification for the law.¹²⁰ The state did not have a legitimate interest in the moral disapproval of homosexuality: "[T]he government cannot merely justify singling out a group of citizens for disfavor simply because it morally disapproves of them."¹²¹

The state, however, also argued its interest to have children "raised in a home stabilized by marriage, in a family consisting of both a mother and father."¹²² The court determined that denying gay men and lesbians adoption rights was rationally related to this interest and upheld the provision.¹²³ By legitimizing the state's stabilized family argument, the court insinuated that homosexuals are emphatically unstable.

To uphold the ruling, the Eleventh Circuit Court of Appeals subscribed to the state of Florida's arguments against gay and lesbian adoption.¹²⁴ Though the state could not provide evidence to support its conclusion that children best benefit from a mother and a father, the court determined it to be an "unprovable assumption" that nevertheless surmised a rational basis to prevent gay and lesbian adoption.¹²⁵ More still, the court concluded single heterosexual parents make better parents than similarly situated homosexual parents: "[T]he legislature could rationally act on the theory that heterosexual singles, even if they never marry, are better positioned than homosexual individuals to provide adopted children with education and guidance relative to their sexual development throughout pubescence and adolescence."¹²⁶ The court provided judicial effect to the state's argument that gay and lesbian parents are unable to adequately provide such guidance.¹²⁷ In fact, the court accepted the belief that gay

118. *Id.* at 1385. The court also upheld the law on substantive due process grounds. *Id.* at 1380.

119. *Id.* at 1382.

120. *Id.* at 1382-83.

121. *Id.* at 1383.

122. *Id.*

123. *Id.* at 1384.

124. *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004).

125. *Id.* at 819-20.

126. *Id.* at 822.

127. *Id.* at 823 (concluding the legislature could rationally rely on the assumption that gays and lesbians are unable to educate or guide children concerning relationships with the opposite sex); *see also* *Lofton v. Sec'y of the Dep't. of Children & Family Services*, 377 F.3d 1275, 1276 (11th Cir. 2004) (Birch, J., concurring in the denial of en banc review) ("Can it be seriously contended that an arguably rational basis does not exist for placing

and lesbian parents are unable to relate to heterosexuals and, therefore, cannot assist heterosexual children to hetero adulthood.¹²⁸

State laws that exclude gays and lesbians from adopting children, like laws against same-sex marriage, impose an unfortunate double bind. One noted scholar concludes that rearing children psychologically affects parents.¹²⁹ That is, new parents experience a psychological shift in self that comes with parenthood.¹³⁰ For instance, new fathers identify increased feelings of responsibility for their families, both financially and in caregiving. Within months, new parents often relax socially and become less selfish.¹³¹ One mother emphatically stated: "Becoming a mother changed every fiber, every feeling, and every relationship for me. I am constantly in the process of evaluating, recognizing, and repudiating the upheaval of motherhood."¹³² Thus, research proves the child rearing experience fosters dramatic increases in maturity and stability within parents.

The eradication of discriminatory laws that prevent gays and lesbians from adopting would encourage stability and maturity within homosexual parents. Research indicates that forty-one percent of gay and lesbian parents raising children have been together five years or longer as compared to twenty percent of unmarried heterosexual couples.¹³³ The normalization of gay and lesbian adoption would likely lead to less promiscuity and would promote fidelity in homosex-

adoptive children in the *mainstream* of American family life? And that to do so is irrational? I think not."); Carlos A. Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages*, 76 *FORDHAM L. REV.* 2733, 2758 n.109 (2008) (noting that the *Lof-ton* court deemed rational the argument that heterosexual parents are better suited to provide sexual development guidance to children).

128. Ball, *supra* note 127, at 2758 n.109.

129. ANNE-MARIE AMBERT, *THE EFFECT OF CHILDREN ON PARENTS* 13 (2001) (noting that children do impact their parents, which is a way of thinking neglected in most scholarship).

130. CAROLYN COWAN & PHILIP COWAN, *WHEN PARTNERS BECOME PARENTS* 78–79 (1992).

131. *Id.* One male parent commented:

Well, it's not that I look in the mirror every morning wondering who's looking back. It's still me. But I'm different since Zak was born. I'm more aggressive in recruiting new business for my consulting firm. I'm more organized at work and at home. But I'm also loosening up a little socially; I even enjoy a party every now and then—I hated them before. I'm enjoying being a father. I'd recommend it to anybody.

Id.

132. Toni C. Antonucci & Karen Mikus, *The Power of Parenthood: Personality and Attitudinal Changes During the Transition to Parenthood*, in *THE TRANSITION TO PARENTHOOD: CURRENT THEORY AND RESEARCH* 62, 62 (Gerald Michaels & Wendy Goldberg eds., 1988).

133. See James G. Pawelski et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-Being of Children*, 188 *PEDIATRICS* 349, 351 (2006).

ual relationships,¹³⁴ just as adoption does in heterosexual relationships.¹³⁵ Therefore, laws that prohibit adoption by homosexuals place gays and lesbians into an intolerable double bind—criticized for their inability to maintain family relationships but legally unable to enter such settings.

Under a *Price Waterhouse*–Looking Glass, exposing such an unfair Catch 22 again reveals irrational stereotypes and anti-homosexual rhetoric.¹³⁶ For instance, the *Lofton* court implicitly concludes heterosexual singles have a greater probability of establishing married households and stable environments.¹³⁷ Though this is partly due to Florida’s refusal to recognize same-sex couples, it no doubt insinuates gays and lesbians are unable to form lasting relationships. That is, as sexual deviates and unnatural individuals, homosexuals offer only instability and cannot relate to the superior heterosexual majority.¹³⁸

134. Richard E. Redding, *It’s Really About Sex: Same-Sex Marriage, Lesbigan Parenting, and the Psychology of Disgust*, 15 DUKE J. GENDER L. & POL’Y 127, 165 (2008).

135. Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 AM. PSYCHOLOGIST 607, 615 (2006) (citing research studies that show that “[b]y creating barriers and constraints on dissolving the relationship, marriage can be a source of relationship stability and commitment”).

136. See *Ex parte* H.H., 830 So. 2d 21, 26 (Ala. 2002) (Moore, C.J., concurring). Chief Justice Moore stated emphatically:

Homosexual conduct is, and has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature’s God upon which this Nation and our laws are predicated. Such conduct violates both the criminal and civil laws of this State and is destructive to a basic building block of society—the family. The law of Alabama is not only clear in its condemning such conduct, but the courts of the State have consistently held that exposing a child to such behavior has a destructive and seriously detrimental effect on the children. It is an inherent evil against which children must be protected.

Id. He thus accepted the unfair stereotype that gay relationships are inherently evil and a threat to society.

137. See *Lofton v. Sec’y of the Dep’t. of Children & Family Servs.*, 358 F.3d 804, 822 (11th Cir. 2004). The Alabama Supreme Court similarly found that allowing a gay or lesbian parent to raise a child might deprive the child of “extremely valuable developmental experience and the opportunity for optimal individual growth and interpersonal development.” *Ex Parte* J.M.F., 730 So. 2d 1190, 1196 (Ala. 1998) (quoting Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 895 (1997)); see also *id.* (“[T]he degree of harm to children from the homosexual conduct of a person is uncertain[,] . . . and the range of potential harm is enormous.” (quoting Wardle, *supra*, at 895)).

138. The *Lofton* court noted:

It is in the best interests of a child if his or her parents can personally relate to the child’s problems and assist the child in the difficult transition to heterosexual adulthood [I]t is perhaps more important for adopted children than other children to have a stable heterosexual household during puberty and the teenage years.

Lofton, 358 F.3d at 822.

Thus, gay men and lesbians are presumed unfit to raise children.¹³⁹

Removed from rationality, such negative assumptions are used to perpetuate a heterosexist society and oppress gay men and lesbians. Consider that the Alabama Supreme Court, in *Ex parte H.H.*,¹⁴⁰ used negative gay stereotypes to rule against awarding custody to a child's lesbian mother, even where individualized evidence of physical abuse by the father was present.¹⁴¹ The court refused to compare the harm of assault and the potential harm of indirect exposure to homosexual conduct, though both were illegal in Alabama at the time the opinion was finalized.¹⁴² Assault, however, subjects children to physical harm. The court's decision to award custody to an alleged heterosexual child abuser over an otherwise fit lesbian parent, without weighing the evidence, thus offers explicit evidence of a heterosexist agenda used to prejudice gay men and lesbians.¹⁴³

Such overt subordination negatively impacts the daily lives of gay men and lesbians.¹⁴⁴ Because many minority groups are accustomed to societal exclusion and often experience high rates of discrimination, their members often internalize society's disapproval and suffer feelings of inadequacy and self-loathing.¹⁴⁵ Scholars refer to these feelings within homosexuals as "internalized homophobia," that accompany the stigma associated with being identified as gay or les-

139. A body of legal scholarship rebuts such negative stereotypes. See Carlos Ball & Janice Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 256 (1998) (arguing that "the law should evaluate the parenting skills of gay and lesbian litigants individually, without relying on stereotypes gleaned from their sexual orientation or relationships"); Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191, 191 (1995) (presenting social science research that confirms that children of lesbian and gay parents develop as successfully as children of heterosexual parents).

140. 830 So. 2d 21, 26 (Ala. 2002).

141. *Id.* at 23 (discussing evidence that the father slapped his son, causing his nose to bleed, and whipped his children with a belt).

142. Chief Justice Moore's opinion was written prior to *Lawrence v. Texas*, 539 U.S. 558 (2003), which called into question the constitutionality of Alabama's sodomy statute. *Id.* at 562.

143. Chief Justice Moore cannot, in fact, identify any specific harm to the children living with a lesbian mother, nor does he use any psychological mechanism to explain how future harm might occur. See Carnahan, *supra* note 104, at 10–11. Because he chose to overlook possible future physical harm that might result from the children living with their father, his opinion reflects more upon the stereotypes and assumptions used to subordinate homosexuals than it does the best interests of the children. *Id.*

144. See Eskridge, *supra* note 91, at 955 (arguing that public law shapes the daily lives of gay men and lesbians).

145. See, e.g., Kenneth L. Karst, *The Supreme Court 1976 Term Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 6–7 (1977).

bian.¹⁴⁶ This internalization can lead to lowered self-esteem, depression, and increased rates of suicide.¹⁴⁷ In addition, laws that prohibit gay men and lesbians from adopting children cause homosexuals to fixate on their sexual identity to the exclusion of other aspects of their personality.¹⁴⁸

Feelings of negative self-image are not unique to homosexuals. In fact, Hopkins also experienced such pernicious feelings when reminded of her status as a woman.¹⁴⁹ Sociologists find that “most victims of stigma . . . tend to accept the version of their identities imposed by the stigma.”¹⁵⁰ Stigmatized classes can experience extreme uncertainty which causes the group to question their ability to fit in with the rest of society and may cause them to view problems and frustrations as resulting from their stigmatized status.¹⁵¹ This, in turn, leads to lessened personal and professional achievement.¹⁵² Viewed under the *Price Waterhouse*–Looking Glass, the prohibition on gay adoption thus reveals yet another legal mechanism used to uphold a social system of oppression against gay men and lesbians.

C. The Gay Male Blood Ban

Outside of the family context, the federal policy preventing gay men from donating blood presents yet another form of prejudice. As a general rule, anyone over the age of seventeen, who weighs at least 110 pounds, and is in good health may donate blood.¹⁵³ An exception to this rule, however, prevents many gay men from donating. “Under a 15-year-old policy, all male blood donors are asked if they have had

146. See Michael W. Ross & B.R. Simon Rosser, *Measurement and Correlates of Internalized Homophobia: A Factor Analytic Study*, 52 J. CLINICAL PSYCHOL. 15 (1996).

147. See *id.*; see also Redding, *supra* note 134, at 164 (concluding that gays and lesbians have higher rates of depression, anxiety, and substance abuse than the general population, due in part to the effects of stigma and prejudice).

148. See Redding, *supra* note 134, at 164 (noting that it would be surprising if gay men and lesbians did not suffer from an impaired self image and some degree of unhappiness with their stigmatized status).

149. HOPKINS, *supra* note 27, at 44 (“[S]even months [into my pregnancy], I had to deal with the humiliation of trying to buy maternity clothes [People] think because I’ve lost my shape, I’ve lost my mind.”).

150. Karst, *supra* note 145, at 7 (concluding that stigma victims feel less valued by society than those who are granted full legal rights).

151. See Gregory M. Walton & Geoffrey L. Cohen, *A Question of Belonging: Racial, Social Fit, and Achievement*, 92 J. PERSONALITY & SOCIAL PSYCHOL. 82 (2007).

152. *Id.* at 94.

153. New York Blood Center, Who Can Give Blood, http://www.nybloodcenter.org/whocangiveblood/index.do?sid0=2&sid1=16&page_id=18 (last visited Apr. 11, 2009).

sex, even once, with another man since 1977.”¹⁵⁴ If a donor answers yes, he is sent home and entered on a national deferral database of people banned from donating for life.¹⁵⁵ Though “[d]onating blood is one of the few things we can all do to directly help another human being,”¹⁵⁶ this policy eliminates gay men from the pool of eligible donors regardless of their promiscuity or sexual behavior.

In 1981, the first instances of the Adult Immune Deficiency Syndrome (“AIDS”) outbreak were observed in homosexual men. Clusters of young and generally healthy men began to develop cases of a rare disease from unexplained causes. “The fact that homosexual men constituted the initial population in which AIDS occurred in the United States led some to surmise that a homosexual lifestyle was specifically related to the disease.”¹⁵⁷ One 1981 federal government study of 116 homosexual patients with immune deficiency related illnesses concluded the patients were sexually promiscuous, each having an average of 1100 sexual contacts.¹⁵⁸

By 1982, epidemiologists suspected that blood and sexual fluids transmitted whatever caused AIDS.¹⁵⁹ The nation’s blood supply, therefore, posed a major vector for the disease.¹⁶⁰ In response, the Center for Disease Control (“CDC”) hosted a meeting where it supported donor deferral guidelines.¹⁶¹ Suspected high-risk groups, specifically gay men, were asked to refrain from donating blood.¹⁶²

154. Christopher Heredia, *Panel Upholds Ban on Gays Giving Blood; Advisers to FDA Call Risk of AIDS Too Great*, S.F. CHRON., Sept. 15, 2000, at A1.

155. *FDA Plans to Review Ban of Gay Male Blood Donors*, TIMES UNION (Albany), Sept. 11, 2000, at A2.

156. Belli, *supra* note 11, at 315 (internal quotation marks omitted).

157. NAT’L INST. OF ALLERGY & INFECTIOUS DISEASES, NAT’L INSTS. OF HEALTH, THE RELATIONSHIP BETWEEN THE HUMAN IMMUNODEFICIENCY VIRUS AND ACQUIRED IMMUNODEFICIENCY SYNDROME, <http://www3.niaid.nih.gov/topics/HIVAIDS/Understanding/How+HIV+Causes+AIDS/relationshipHIVAIDS.htm> (last visited Apr. 13, 2009).

158. Robin Marantz Henig, *AIDS: A New Disease’s Deadly Odyssey*, N.Y. TIMES, Feb. 6, 1983, at 28.

159. See Francis A. Hochberg, *HIV/AIDS Blood Donation Policies: A Comparative Study of Public Health Policies and Individual Rights Norms*, 12 DUKE J. COMP. & INT’L L. 231, 243–44 (2002); see also Belli, *supra* note 11, at 330 (documenting a theory that overexposure to sperm might cause HIV infection).

160. Harvey M. Sapolsky & Stephen L. Boswell, *The History of Transfusion AIDS: Practice and Policy Alternatives*, in *AIDS: THE MAKING OF A CHRONIC DISEASE* 170, 172 (Elizabeth Fee & Daniel M. Fox eds., 1992).

161. See Adam Pulver, *Gay Blood Revisionism: A Critical Analysis of Advocacy and the “Gay Blood Ban,”* 17 LAW & SEXUALITY 107, 111 (2008).

162. See RANDY SHILTS, *AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC* 170 (1987). The CDC has no regulatory power, but provides epidemiologic information and support to regulatory agencies, medical providers, and the public. Sherry Glied, *Markets Matter: U.S. Responses to the HIV-Infected Blood Tragedy*, 82 VA. L. REV. 1493,

Opposition to the CDC proposal was widespread, as many feared being labeled with the stigma of a gay disease.¹⁶³ The CDC, therefore, adopted a wait-and-see approach.¹⁶⁴

After two confirmed cases of transfusion AIDS were reported in New York and San Francisco,¹⁶⁵ in 1983, the CDC again urged some method of screening the blood donor pool.¹⁶⁶ Gay groups vehemently opposed screening, describing the proposal as “scapegoating homosexuals,” “reminiscent of miscegenation blood laws that divided black blood from white.”¹⁶⁷ Nevertheless, the Food and Drug Administration (“FDA”) issued non-mandatory guidelines, urging groups at increased risk for AIDS to refrain from donating blood.¹⁶⁸ The policy included gay men who were sexually active with multiple partners, had “overt symptoms of immune deficiency,” or previously engaged in sexual relations with men who now did.¹⁶⁹ The policy was revised throughout 1984, and gay community groups grudgingly accepted the now mandatory policy with the understanding that once an AIDS test was developed, the screening would stop.¹⁷⁰ Although a reliable test for the AIDS virus was developed in 1985,¹⁷¹ the FDA sought to permanently exclude sexually active gay men from the blood donor pool.¹⁷²

The FDA has reconsidered the gay male blood deferral policy only twice.¹⁷³ In September 2000, the Blood Products Advisory Committee considered altering the lifetime ban for gay men to a five-year deferral from the time of last male-to-male contact.¹⁷⁴ Ultimately, the

1495 (1996). The CDC relies on the FDA and Public Health Service agencies to implement its recommendations. *Id.* at 1495–96.

163. *See id.* at 1496.

164. *See* SHILTS, *supra* note 162, at 171.

165. *See Epidemiologic Notes and Reports Possible Transfusion-Associated Acquired Immune Deficiency Syndrome (AIDS)—California*, M.M.W.R. (Ctr. for Disease Control, Atlanta, Ga.), Dec. 10, 1982, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/00001203.htm>.

166. *See* Pulver, *supra* note 161, at 112.

167. SHILTS, *supra* note 162, at 220 (quoting Pat Norman, Chair of the San Francisco Coordinating Committee of Gay and Lesbian Services).

168. RONALD BAYER, PRIVATE ACTS, SOCIAL CONSEQUENCES 85 (1989).

169. SHILTS, *supra* note 162, at 242–43.

170. *See* BAYER, *supra* note 168, at 86.

171. Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1708 (1993).

172. *See* Hochberg, *supra* note 159, at 247–48.

173. *See* Pulver, *supra* note 161, at 118; *see also generally* U.S. Food and Drug Administration, Blood Products Advisory Committee Meeting, March 15–16, 2001, <http://www.fda.gov/ohrms/dockets/ac/cber01.htm#Blood%Products> (collecting documents from the 2001 meeting).

174. Derek Lind, *Should Gay Men Be Allowed to Donate Blood?*, GAY MEN’S HEALTH CRISIS, Nov./Dec. 2000, <http://www.thebody.com/content/art13321.html>.

move failed once the American Red Cross came out in opposition to any such change.¹⁷⁵ The FDA thus continues to view gay men as a biological threat and prohibits their blood donations.¹⁷⁶

The *Price Waterhouse*–Looking Glass reveals another instance of the pernicious Catch 22. Our laws create a legal barrier of entry to prevent gay men and lesbians from same-sex marriage and adoption due to their perceived promiscuity and inability to develop or maintain long-term relationships.¹⁷⁷ Hence, gay men and lesbians often participate in less lengthy and more frequent relationships.¹⁷⁸ At the same time, the FDA excludes gay male blood as dirty and unsafe. Our laws therefore punish gay men and lesbians for promiscuity yet restrict their ability to form monogamous and stable relationships. These laws, combined, force inconsistent demands on gay men and lesbians that *Price Waterhouse* ruled discriminatory.¹⁷⁹

The law thus punishes the promiscuous homosexual, yet prevents gay men and lesbians from forming lasting relationships that maintain stability. So, again, which is it? Can gay men and lesbians form committed and stable relationships, or should homosexuals accept their exclusion from such relationships to enjoy less committed and punishable lifestyles? Just as Ann Hopkins felt oppression through inconsistent demands, gay men and lesbians also feel inconsistent pressures to lead both promiscuous and monogamous lives.

Here too, the law employs an irrational Catch 22 to subordinate homosexuals in a heterosexist society. One commentator noted that AIDS offered society an opportunity to propagate the belief that homosexuality was itself a disease and a threat to human survival.¹⁸⁰ The

175. The committee cited uncertainty in the scientific evidence about the efficacy of blood testing procedures. Another factor in the failed attempt to amend the policy stemmed from the fact that, by age forty, human herpes virus-8, an indicator of unprotected sexual activity trends, infects one third of gay men in the United States. See *F.D.A. Panel Rejects Bid to Ease Ban on Blood Donations by Gays*, N.Y. TIMES, Sept. 15, 2000, at A29.

176. Though the Red Cross silently reversed its stance in 2005 to support a one-year deferral period for sexually active gay men, the most recent consideration again failed. See Rob Stein, *FDA to Review Ban on Gay Men Donating Blood*, WASH. POST, Mar. 18, 2006, at A06; see also Department of Health and Human Services, Food and Drug Administration, FDA Workshop on Behavior-Based Donor Deferrals in the NAT Era <http://www.fda.gov/cber/minutes/nat030806t.pdf> (Mar. 8, 2006) (workshop minutes).

177. See Wilson, *supra* note 84, at 661 (noting that many people oppose gay marriage due to a perceived increased risk of sexually transmitted diseases).

178. See Redding, *supra* note 134, at 162 (noting that homosexuals do have higher rates of promiscuity and non-monogamy than heterosexuals).

179. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

180. Richard Poirier, *AIDS and Traditions of Homophobia*, 55 SOC. RES. 461, 463–64 (1988).

antibody test became a mechanism to identify and exclude gay men from various other parts of society. The United States military, for example, began mass HIV testing of all recruits and active duty personnel.¹⁸¹ Those who tested positive were rejected for service and often informed of their HIV status without counseling or information about the disease.¹⁸² In 1987, Congress passed the Helms Amendment which forbade the use of any CDC funds "to provide AIDS education, information, or prevention materials and activities that promote or encourage, directly, homosexual sexual activities."¹⁸³ The AIDS stigma has since proven nearly unstopplable.

A significant shift in AIDS infection rates offers additional evidence that this policy is unfair and used only to effectuate a heterosexist social system. In the 1980s, the public perceived AIDS as a disease of gay men, a perception that led to the FDA policy.¹⁸⁴ More recently, however, research has documented AIDS seroprevalence among homosexual men at only eight percent.¹⁸⁵ Early in the AIDS epidemic, women were portrayed as either absent from the disease or victims of bisexual male partners.¹⁸⁶ By 1990, however, more women were diagnosed with AIDS than men,¹⁸⁷ and AIDS was the leading cause of death for African American women between the ages of 15 and 44.¹⁸⁸ The risk is also heavily skewed by economic class as enormously high infection rates correlate to poverty.¹⁸⁹ One scholar concludes that infection rates among the poor and women of color have reached "epidemic proportions."¹⁹⁰

181. *Id.* at 1708 n.54.

182. *Id.* Military use of the test was soon followed by adoption of mandatory testing programs by the Foreign Service and the Job Corps. *Am. Fed'n of Gov't Employees v. Dep't of State*, 662 F. Supp. 50 (D.D.C. 1987) (rejecting an injunction against the Foreign Service's mandatory AIDS testing).

183. United States Institute of Peace Act, Pub. L. No. 100-202, § 514(a), 101 Stat. 1329-287, 1329-289 (1987).

184. See NAN D. HUNTER & WILLIAM B. RUBENSTEIN, AIDS AGENDA: EMERGING ISSUES IN CIVIL RIGHTS 3 (1994).

185. See Hochberg, *supra* note 159, at 249.

186. *Id.* at 6-7 (noting that women were primarily depicted as vectors of transmission).

187. *Id.* at 5. AIDS also became one of the five leading causes of death for all women between the ages of 15 and 44. *Id.*

188. *Id.*

189. *Id.* at 6 (noting that intravenous drug use dramatically increases the risk of infection, and is commonly associated with poverty).

190. *Id.* According to a *New York Times* article:

There is the inner-city epidemic, the rural epidemic, the epidemic among women, among intravenous drug users, among gay men, among blacks, among non-Hispanic whites and among Hispanics. But the most powerful determinant of how an HIV patient fares is not race or gender or sexual orientation It is class. In

The FDA does not, however, ban African American women or individuals living in poverty from donating blood. Hence, if the FDA excluded societal classes from donating based on higher infection rates, current facts establish that gay men should not represent the only affected group.¹⁹¹ Gay men excluded under this substantially over- and under-inclusive policy are, therefore, placed into second-class status.

Such oppression may prove particularly severe on gay men and lesbians because their exclusion from the institutions of marriage, adoption, and blood donation is state sponsored. Courts recognize that when governments bring the full weight of their power down onto a disadvantaged class, the resultant stigma can be more crushing than that arising from private discrimination.¹⁹² As a result, laws that exclude homosexuals through unfair stereotypes allow private individuals to treat homosexuals in accordance with associated sexual orientation stereotypes.

Additionally, state-sponsored exclusion or discrimination invites private discrimination. The Supreme Court recognized that the criminalization of sexual intimacy between same-sex persons was “an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”¹⁹³ Thus, excluding gay men and lesbians from traditional public institutions can lead to further private prejudice.

Conclusion

Stereotypes subordinate, and the Catch 22 represents a powerful vehicle to enforce such oppression of the minority. *Price Waterhouse v. Hopkins* recognized for the first time that women are often caught in the middle of two opposing female gender stereotypes. The Supreme Court, in ruling for Ann Hopkins, concluded that society should treat

that respect there are just two epidemics: the one among people who, by virtue of their education and income, lead stable lives and the one among people who do not.

Sheryl Gay Stolberg, *In AIDS War, New Weapons and New Victims*, N.Y. TIMES, JUNE 3, 2001, at A24.

191. See Hochberg, *supra* note 159, at 248 (noting that many scientists believe that the measures have not satisfied the FDA’s goal of specifically targeting high risk behaviors rather than stereotypes).

192. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954); see also *Lewis v. Harris*, 908 A.2d 196, 226 (N.J. 2006) (“By excluding same-sex couples from civil marriage, the State declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples.”).

193. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

women and men as individuals, not as members of a sexually determined class. *Price Waterhouse* thus represents a formal legal rejection of an ideology that women accept exclusion and subservience in public and economic life.¹⁹⁴ As such, the *Price Waterhouse*–Looking Glass offers a unique method to reveal arbitrary stereotypes and to deconstruct ideological manifestations of oppression.

In *Bowers*, the Supreme Court approved the use of unfair stereotypes and reinforced cultural discrimination against, and ostracism of, homosexuals.¹⁹⁵ Though *Bowers* was eventually overturned, this Comment has attempted to show that the law continues to play an important role in expressing and reinforcing heteronormativity.¹⁹⁶ The three legal regimes I describe—same-sex marriage, homosexual adoption, and the gay male blood ban—rest on unjust generalizations that deprive gay men and lesbians of individual liberty and equal personhood. Such similar double binds fly in the face of what *Price Waterhouse* ruled discriminatory. That is, these policies punish gay men and lesbians for their instability and prohibit actual stability.

At least one scholar has argued that heterosexism relates to a broader social system of subordination through race, class, gender, and sexuality.¹⁹⁷ Used here, the *Price Waterhouse*–Looking Glass deconstructs three axes of overt subordination to reveal only irrational stereotypes. It demonstrates that indiscriminate means of social domination continue to exist. The everyday lives of gay men and lesbians experience prejudice under rigid sexuality hierarchies and under a social system used to stigmatize their non-heterosexual identities and practices.

I seek to remind legal advocates and scholars that our nation made a commitment to protect human equality for all.¹⁹⁸ We should

194. See Law, *supra* note 18, at 206–07 (1988) (noting that, for centuries, women accepted exclusion and subservience in public and economic life, and state control of their reproductive capacity).

195. See *id.* at 194 (concluding that the *Bowers* decision reinforced silence and isolation, which breed negative stereotypes and prejudice).

196. One scholar defines “heteronormativity” as “both those localized practices and those centralized institutions which legitimize and privilege heterosexuality and heterosexual relationships as fundamental and ‘natural’ within society.” Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*, 3 GLQ 437, 440 (1997), available at <http://glq.dukejournals.org/cgi/reprint/3/4/437>.

197. See Darren Lenard Hutchinson, *Dissecting Axes of Subordination: The Need for a Structural Analysis*, 11 AM. U. J. GENDER SOC. POL’Y & L. 13, 14 (2002) (discussing how a structural analysis of judicial bias can uncover subtle, hidden, and ideological manifestations of oppression).

198. See U.S. CONST. amend. XIV, § 5; see also Derek W. Black, *The Contradiction Between Equal Protection’s Meaning and Its Legal Substance: How Deliberate Indifference Can Cure It*, 15

subscribe to the idea that “all human beings are precious, deserving of respect and support, and that the worth of all human beings is equal.”¹⁹⁹ We must therefore remain steadfast in a mission to stamp out irrational stereotypes and inequality wherever they may arise, including with regard to sexual orientation.

WM. & MARY BILL RTS. J. 533, 562 (2006) (concluding that equal protection can be reduced to one fundamental concept—that “all are equally entitled to the consideration and protection of the law”).

199. Martha C. Nussbaum, *Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4, 10 (2006).

