

EQUAL SEX

Commentary on: *The Advantage of Having a Female Partner*:

Suppose that a state prohibits women from having orgasms. (Let's put the enforcement issues to one side.) It is clear that the discriminatory prohibition would violate the equal protection clause; how could the state possibly justify that kind of de jure discrimination? The analysis would not be much different if the state offered financial inducements rather than criminal punishment. Suppose that a state said that women would have to pay a small civil fine (say, \$3) for every orgasm, or that women would be paid a small subsidy (say, \$2) for every day, or every sex act, without an orgasm. Here too the state would be engaging in a form of sex discrimination, one that would be unacceptable under the equal protection clause.

In her imaginative paper, Shaudy Danaye-Elmi exploits intuitions of this kind to suggest that by forbidding women from having female partners, states violate the equal protection clause. In terms of constitutional law, her argument does not seem to me convincing. But in terms of sex equality more generally, she makes a number of illuminating and instructive points, with implications for many questions involving both sex and sex discrimination.

To see the legal problem, it may be helpful to begin with a little science fiction, in a way that will, I hope, bring out Danaye-Elmi's argument in its simplest and starkest form. Imagine a parallel world, one that is a bit bleak, but in many ways similar to our own. In this world, women are able to obtain a good—"orgasm during the same session" amidst sexual relations with women, but they are *literally* unable to do so with men. Imagine

that the disadvantage of having a male partner is a simple product of biology: Men climax very quickly, almost immediately; and then they go right to sleep. Imagine too that in this world, women are *literally* unable to climax before all this happens. Imagine finally that the state, in this parallel world, bans same-sex relationships. Under these assumptions, is this ban a form of sex discrimination?

To answer this question, we are not entitled to rely on the argument, made by Andrew Koppelman and others, that the ban on same-sex relations is formally sex discriminatory and also associated with male supremacy. We are assuming that this argument is not going to be accepted—that our focus is on Danaye-Elmi's novel and independent argument, also involving sex discrimination, but finding such discrimination in the denial of a particular right, the right to "orgasm in the same session," that women can enjoy only or mostly in sexual relations with women. As a matter of law, I doubt that the novel argument is correct unless the older argument is correct as well. In other words, Danaye-Elmi's argument does not seem to me convincing on its own.

It is true that in our parallel world, women are denied a benefit that men receive, but it is not clear that this is a form of sex discrimination. Suppose that in this admittedly peculiar world, all athletic competitions include both men and women; there are no women-only events. Since this is so, (relevant) women are denied a benefit that (relevant) men receive—which is a reasonable chance, in certain sports, to win. Is this a form of sex discrimination? That would be an unusual conclusion (at least for the constitutional law of our world; perhaps it fits with the constitutional understandings of this parallel world). So long as there is no formal sex discrimination—so long as the state does not draw lines on the basis of sex—it is constitutionally legitimate to create a practice, or to impose a burden, that results in a situation in which men receive a good which women are denied.¹ (Note that Danaye-Elmi does not discuss gay men; do their sexual practices strengthen or weaken her argument?)

Or suppose that in yet another parallel world, men and women enter academic competitions, and women generally win, thus ensuring that men are denied a benefit that women receive (all, almost all, or most of the time). Suppose too that men would receive that benefit if competitions were segregated by sex. Is there an equal protection problem? Under existing doctrine, there is not.

In our world, of course, it is simply a social fact that in heterosexual relationships, men achieve climax more often than women do.² The differ-

ence is not mandated by biology. It is tempting to think that the social nature of the fact undermines Danaye-Elmi's argument: Since women *could* receive the same benefit (on which more below), why is it constitutionally unacceptable that they do not? But this is not a convincing objection. What matters is what women do get, not what they could get. The real problem with Danaye-Elmi's argument is that unless we accept the older argument, the one that she means to supplement, there is no sex discrimination here. Instead of sex discrimination as the law sees it, we have a social practice, like same-sex athletic competitions, which (contingently) ensures that women will not receive a benefit as often as men do.

I think the apparent force of Danaye-Elmi's argument comes from the intuitive plausibility of the older argument. If the ban on same-sex relations means that women do not receive a benefit that men get, and that women *could* get if they were permitted to be with female partners, then it does seem clear that there is sex discrimination. But the apparent clarity is a product of a rapid judgment that formal discrimination is involved. Very plausibly, there is, as the older argument insists; but as Danaye-Elmi notes, Justice Scalia has rejected the argument and to date, the Supreme Court has shown no interest in accepting it. My conclusion is that strictly as a matter of law, Danaye-Elmi has not made out an independent argument that the ban on same-sex relations, or more particularly the ban on lesbian relations, is a form of discrimination against women.

But we should not allow legal doctrine to obscure the interest of Danaye-Elmi's argument. Drawing on fiction and on real life, she contends that there is a "climax asymmetry," in which three-quarters of men, and 29% of women, "always" achieve orgasm with their partners. That is a truly stunning disparity. What is going on here? Evidently, couples all over the nation are not entirely different from Lawrence's lovers Connie and Michaelis, with the latter "like so many modern men, ... finish[ing] almost before he had begun..." (A parenthetical query: What is Lawrence doing with the words "like so many modern men"? Were ancient men different?)

Danaye-Elmi thinks that this asymmetry is unlikely to be found within lesbian couples. Suppose that she is right—that when two women are having sex, there is no such asymmetry, in the sense that no one is at a kind of statistical disadvantage. (Would the analysis be different if people in the place of Sandy, the stone butch among the Buffalo lesbians, usually or often did not come? Would the analysis be different if the fems usually or often did not come?) What accounts for the difference between heterosexual and lesbian couples? (Again there is a question about gay male couples.)

Some people might think that the difference has a lot to do with biology. In Danaye-Elmi's words, "women are physically able to persist in sexual intercourse even immediately after having climaxed. As a result, a woman's orgasm during sex does not diminish the probability that her partner will reach orgasm during the same session, nor does it necessarily shorten the duration of the session itself." One reading of this passage is indeed about physiology: Men are simply tired after climaxing, women are not, and that's that. End of story.

But it should be clear that this physical fact, to the extent that it is a fact, cannot possibly be an adequate explanation of the climax asymmetry. In heterosexual couples in which the man is going to be tired, the woman might climax first (and possibly second, and third, etc.). Even if the man climaxes first, he's unlikely to be dead. If he is alive but unable to "persist in sexual intercourse," he can nonetheless help the woman to climax, one way or another; as Danaye-Elmi emphasizes, sexual intercourse is not usually the cause of female orgasm in any event. In short, the climax asymmetry is not only a social practice but also a discriminatory one.

This is the sense in which Danaye-Elmi seems to me to have cast a distinctive light on the issue of sex equality. Suppose that heterosexual men are nearly three times as likely as heterosexual women to have orgasms during sex; suppose too that within gay male couples, there is no such disparity between members of couples; suppose that lesbian couples also show no such disparity. If so, heterosexual women are clearly being subject to a form of (private) discrimination. Indeed, heterosexual women can make out a claim of unacceptable discrimination simply on the basis of the climax asymmetry itself.

Whether or not Danaye-Elmi has established a successful constitutional argument, she is, I think, entirely convincing in her broader claim. I speculate that the form of discrimination that she identifies is closely connected with other kinds of discrimination in both private and public life.

NOTES

- 1 A discriminatory purpose, of course, would doom a facially neutral law, but Danaye-Elmi does not contend that there is a discriminatory purpose here. It is most unlikely that current law would recognize any such purpose.
- 2 I am putting to one side the fact that many women, heterosexual as well as lesbian and bisexual, have multiple orgasms. I am not sure how, if at all, this complicates Danaye-Elmi's argument.