Court File No. 684/00
Court File No. 39/2001

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

HALPERN et al.

Applicants

-and-

A.G. CANADA et al.

Respondents

-and-

EGALE CANADA INC. et al.

Interveners

AND

B E T W E E N:

METROPOLITAN COMMUNITY CHURCH OF TORONTO

Applicant

-and-

A.G. CANADA et al.

Respondents

-and-

HALPERN et al.

Interveners

AFFIDAVIT OF ANDREW KOPPELMAN

I, Andrew Koppelman, of the City of Chicago, in the State of Illinois, MAKE OATH AND SAY:

1. I am an Associate Professor of Law and Political Science at Northwestern University. I received my J.D. from Yale Law School and my Ph.D. in Political Science from Yale University. I was a law clerk to Ellen Ash Peters, Chief Justice

of the Connecticut Supreme Court and a fellow in the Program in Ethics and the Professions at Harvard University. A true copy of my *curriculum vitae* is attached to this affidavit as Exhibit "A".

2. I taught constitutional law at Princeton University in the Department of Politics. At Northwestern University, I teach law and political science. Among the specific courses I have taught are Constitutional Law, Fourteenth Amendment, Religion and the Law, and Conflicts of Laws.

3. My published work consists of two books (one of them forthcoming) and 21 journal articles and book chapters. The subjects of this published work are primarily anti-discrimination law and the rights of gay and lesbian people. In my research and writing, I have extensively explored the analogy between discrimination against gays and lesbians, and discrimination against interracial couples. I have presented my work in numerous different venues, as outlined in my *curriculum vitae*.

Overview

4. I have read most of the affidavits filed by the Attorney General of Canada in this litigation. The primary focus of my affidavit is to reply to Professor Sanford Katz's view that the miscegenation analogy has no applicability to the present litigation and to demonstrate that it does. In so doing, I will specifically refute the suggestion made by Professor Katz that a registered domestic partnership regime is an acceptable alternative to marriage for same-sex couples. I will also respond to Professor Katz's discussion about "backlash" and reply to concerns about the unpredictable consequences of permitting same-sex couples to marry.

The Miscegenation Analogy

5. In *Loving v. Virginia*,[1] the United States Supreme Court ruled that a Virginia statute banning interracial marriages was unconstitutional. The Court concluded that miscegenation statutes discriminated on the basis of race. Although that may seem obvious today, it had been the object of some contention.

6. In an 1883 decision, *Pace v. Alabama*,[2] the United States Supreme Court considered for the first time the constitutionality of miscegenation laws. The statute in question in *Pace* prescribed penalties for interracial sex that were more severe than those imposed for adultery or fornication between persons of the same race. The Court unanimously rejected the equal protection challenge to the statute, denying that the statute discriminated on the basis of race:

> [The section prohibiting interracial sex] prescribes a punishment for an offence which can only be committed where the two sexes are of different races. There is in neither section any discrimination against either race . . . . Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offence designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same.[3]

7. *Pace* is no longer good law. It was repudiated by the Supreme Court in the next miscegenation case it considered, *McLaughlin v. Florida*.[4] In the wake of the unanimous decision condemning segregated public schools in *Brown v. Board of Education*,[5] the Court, again unanimously, invalidated a criminal statute prohibiting an

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[1] 388 U.S. 1 (1967).

[2] 106 U.S. (16 Otto) 583 (1883).

[3] Id. at 585.

[4] 379 U.S. 184 (1964).

[5] 347 U.S. 483 (1954).

unmarried interracial couple from habitually living in and occupying the same room at night. "It is readily apparent," wrote Justice White for the Court, that the statute "treats the interracial couple made up of a white person and a Negro differently than it does any other couple."[6] In response to the state's reliance on *Pace*, White declared that "*Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court."[7] Racial classifications, he concluded, can only be sustained by a compelling state interest. Since the State had failed to establish that the statute served "some overriding statutory purpose requiring the proscription of the specified conduct when engaged in by a white person and a Negro, but not otherwise,"[8] the statute necessarily fell as an invidious discrimination forbidden by the Equal Protection Clause."[9]

8. Three years later, in *Loving v. Virginia*, the Court ruled that the "Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations."[10]

9. A number of academics have argued that there are parallels between the decision in *Loving v. Virginia* and the equality principles at issue in the debate over same-sex marriage.[11] In his affidavit, Professor Katz rejects this analogy, without ever fully articulating the specific argument he is refuting.

10. There are two aspects to the miscegenation analogy. The first, which is the primary focus of the literature cited in footnote 58 of Professor Katz's affidavit, is as

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[6] 379 U.S. 184 (1964) at 188.

[7] Id.

[8] Id. at 192.

[9] Id. at 192-93.

[10] 388 U.S. 1 (1967) at 12.

[11] See *infra* note 12.

follows. If Lucy may marry Fred, but Rick may not marry Fred, then (assuming that Fred would be a desirable spouse for either) Rick is suffering legal disadvantage because of his sex.[12] This is analogous to the discrimination perpetuated by the miscegenation statutes that were declared unconstitutional in *Loving v. Virginia*, because the denial of an individual's right to marry the partner of their choice on the basis of their sex is no less invidious than the denial of their right to marry the partner of their choice on the basis of their race.

11. The second aspect to the miscegenation analogy is that the prohibition against same-sex marriage discriminates on the basis of sexual orientation, just as prohibitions against interracial marriage discriminated on the basis of race. This second aspect has not been the focus of much academic literature in the United States, probably because, unlike Canada, where discrimination based on sexual orientation is proscribed by the *Charter of Rights and Freedoms*,[13] such discrimination has not been subject to heightened scrutiny as a suspect type of classification under United States constitutional law.

12. In attacking the miscegenation analogy, Professor Katz incorrectly reduces the argument he is refuting to the simple assertion that the *Loving* case involved the freedom to marry. In paragraph 42 of his affidavit, he states: "While it is true that

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[12] I have developed this argument at length in a number of my publications. See Andrew Koppelman, Note, "The Miscegenation Analogy: Sodomy Law as Sex Discrimination", 98 Yale L. J. 145 (1988); Andrew Koppelman, "Why Discrimination Against Lesbians and Gay Men is Sex Discrimination", 69 N.Y.U. L. Rev. 197 (1994); Andrew Koppelman, *Antidiscrimination Law and Social Equality* 146-76 (1996); Andrew Koppelman, "Three Arguments for Gay Rights", 95 Mich. L. Rev. 1636, 1661-66 (1997); Andrew Koppelman, "Why Gay Legal History Matters", 113 Harv. L. Rev. 2035, 2051-55 (2000). For other scholars holding a similar view, see, e.g., William Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 218-28 (2000); Samuel A. Marcosson, "Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII," 81 Geo. L.J. 1 (1992); Marc Fajer, "Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men", 46 U. Miami L. Rev. 511 (1992). The argument has been developed with specific reference to the Canadian *Charter* in Robert Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* 198-228 (1995).

[13] *Egan v. Canada*, [1995] 2 SCR 513; *M. v. H*, [1999] 2 SCR 3.

it [*Loving v. Virginia*] deals with marriage, basically it is a case about race-based discrimination." He fails to appreciate the point made by academics who have advanced the miscegenation analogy, namely that, while the present litigation deals with marriage, basically it is a case about sexual orientation-based discrimination and sex-based discrimination.

13. In attempting to distinguish the legislation at issue in *Loving v. Virginia* from the prohibition against same-sex marriage, Professor Katz asserts that "unlike the Virginia anti-miscegenation statute, which was based on the idea that the white race was superior, the requirement of opposite sexes is not based upon the superiority of one gender over the other" (paragraph 45). This assertion overlooks the argument that denying same-sex couples the right to marry is premised on the notion that heterosexual relationships are "superior" (to borrow Professor Katz's expression). Moreover, the assertion that the opposite-sex requirement for marriage is not based on a notion of gender inequality ignores a well-established relationship between sexism and heterosexism.[14]

The Inequality of Registered Domestic Partnerships

14. At certain points in his affidavit, Professor Katz appears to concede that there is some justice to lesbians' and gay men's claims of discrimination, but he asserts that allowing them to marry is not a necessary remedy for the inequality that they

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[14] Most people learn no later than high school that one of the nastier sanctions that one will suffer if one deviates from the behavior traditionally deemed appropriate to one's sex is the imputation of homosexuality. It is an obvious cultural fact that the stigmatization of homosexuality is closely linked to homosexuals' supposed deviation from the roles traditionally deemed appropriate to persons of their sex. Moreover, both stigmas have gender-specific forms that imply that men ought to have power over women. Gay men are stigmatized as effeminate, which means, insufficiently aggressive and dominant. Lesbians are stigmatized as too aggressive and dominant; they appear to be guilty of some kind of gender insubordination. The two stigmas, sex-inappropriateness and homosexuality, overlap. I have developed these claims at much greater length in "Why Discrimination Against Lesbians and Gay Men is Sex Discrimination", *supra*.

suffer. In particular, he suggests that registered domestic partnership regimes are a sufficient alternative remedy.

15. Professor Katz alleges that, if legislation recognizing domestic partnerships for same-sex couples is in place, and that legislation affords some of the benefits of marriage (even if most of those benefits are excluded), then same-sex couples will no longer have any valid complaint of discrimination. At paragraph 62 of his affidavit, he writes:

> [T]wo states have enacted legislation to provide same-sex couples with economic and social benefits that parallel those enjoyed by married couples. With legislation in place like the kinds in Vermont and Hawaii, same-sex couples who meet the requirements set out in the legislation will have had their claims met.

Similarly, in an article he attaches to his affidavit, Professor Katz claims that domestic partnership laws "eliminat[e] the major argument of discrimination that they [same-sex couples] present in their drive for marital status."[15]

16. Professor Katz's casual lumping together of Vermont and Hawaii is startling. Although Vermont denies same-sex couples in "civil unions" the status and title of being "married" (more on that below), it grants them all the legal rights and obligations of married couples under state law. Hawaii, on the other hand, gives few benefits to "reciprocal beneficiaries" and specifically provides that "[u]nless otherwise expressly provided by law, reciprocal beneficiaries shall not have the same rights and obligations under the law that are conferred through marriage."[16]

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[15] Sanford N. Katz, "Emerging Models for Alternatives to Marriage", 33 Fam. L. Q. 663, 674 (1999).

[16] Haw. Gen. Stat. § 572C-6.

17. The Hawaii statute in fact confers only about 45 of the approximately 400 benefits that state law gives to married couples.[17] The most important benefit that the statute did purport to confer was the ability to demand that one's employer include one's reciprocal beneficiary in one's health insurance, but this benefit was soon effectively read out of the statute by the interpretations of a federal district court and the state attorney general.[18] Perhaps for this reason, few people signed up for the benefit. When the law was passed, the state health department estimated that 20,000 people would take advantage of the law, but at the end of 1997 fewer than 300 couples had signed up.[19]

18. Even Vermont, though, expressly discriminates against same-sex couples. Same-sex couples are given access to a new "civil union" status, with the legal rights and obligations of married couples under state law,[20] but the title and status of being "married" are withheld.[21] Professor Katz suggests that Vermont lesbians and gays have nothing left to complain about, but as the following hypothetical demonstrates, the domestic partnership registry does not remedy the inequality that they continue to experience under Vermont law.

19. Suppose that, before the Court's decision in *Loving*, Virginia had created an alternative regime for interracial couples, which gave them the legal rights and

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[17] Dee Ann Habegger, "Living in Sin and the Law: Benefits for Unmarried Couples Dependent upon Sexual Orientation?", 33 Ind. L. Rev. 991, 1002 n. 56 (2000).

[18] See id. at 1003; *Hawaiian Firms Win Exemption from Reciprocal Beneficiary Law*, Business Insurance, Sept. 29, 1997 at 1.

[19] David Albertson, *Hawaii's DPB Law Serves Few but Saves Precedent for Others*, Employee Benefit News, April 1, 1998.

[20] Such unions are, however, denied recognition under federal law pursuant to the *Defense of Marriage Act*, 110 Stat. 2419, codified in pertinent part at 1 U.S.C. 7.

[21] See H.R. 847, 1999 Gen. Assemb., Adjourned Sess. (Vt. 2000 Acts & resolves 91) (to be codified in scattered sections of VT. STAT. ANN. tits. 4, 8, 14, 15, 18, 32, 33), available at http://www.leg.state.vt.us/docs/ 2000/bills/house/ACT091.htm.

obligations of marriage, but expressly denied them the status of being "married". In my opinion, the imposition of such a "civil union" registry for interracial couples would have been recognized by American courts (both in 1967 and now) as discriminatory and would have been rejected, just as the "separate but equal" doctrine was rejected in other race discrimination contexts, such as school segregation.

"Backlash"

20. Despite changes in the law, there has been, and there continues to be, considerable opposition to interracial marriage. In the United States, the number of interracial couples was and remains small.[22] Like gay couples, they have been at the mercy of political majorities. And those majorities, until very recently, have not been friendly. When *Loving v. Virginia* was decided, the overwhelming majority of Americans were opposed to interracial marriage. In 1958, 96 percent of whites surveyed by the Gallup poll disapproved of intermarriage. In 1963, the National Opinion Research Center found that 62 percent of respondents supported laws against interracial marriage.[23] A Gallup poll taken in 1968, the year after the *Loving* decision, found that only 20 percent of Americans approved of interracial marriage, while 72 percent disapproved.[24] In the same year, 56 percent still supported laws against intermarriage. Opinions shifted, but they did so slowly. In 1978, 34 percent approved and 66 percent disapproved of interracial marriage. In 1983, 39 percent approved and 61 percent disapproved. By 1991, 51 percent approved and 49 percent disapproved, and 20 percent still believed that such marriages should be

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[22] I have no data for Canada, but census figures indicate that there were only 148,000 interracial married couples in the United States in 1960. By 1981, the number had climbed, but only to 639,000. See Derrick Bell, *Race, Racism, and American Law* 65 (3d ed. 1992).

[23] See Howard Schuman, Charlotte Steeh, Lawrence Bobo, and Maria Krysan, *Racial Attitudes in America: Trends and Interpretations* 106 (rev. ed. 1997).

[24] See George H. Gallup, *The Gallup Poll: Public Opinion 1935-1971*, v. 3, p. 2168 (1972).

illegal. By 1997, 67 percent approved and 33 percent disapproved.[25] In the 1998 election, nearly 40 percent of South Carolina voters voted against deleting a provision in the state constitution that prohibited interracial marriage.[26] Controversy, "backlash", and public opposition to advances in minority rights are not uncommon in civil rights movements, but they do not constitute legitimate justifications for perpetuating discrimination.

21. Part of the reaction against the movement in support of same-sex marriage in the United States has been the recent enactment by several state legislatures of statutes indicating that their public policies forbid recognition of same-sex marriage. Professor Katz mentions these enactments in paragraphs 47 and 48 of his affidavit. This is not, however, the first time that the United States has been divided over the question of what sorts of marriages ought to be legally recognized. There were heated debates involving differences in state laws concerning interracial marriages. The divide between states that permitted and those that forbade marriage between whites and blacks is a close historical analogue to the radical moral disagreement over same-sex marriage that is currently dividing many states. I have written on this topic in detail in some of my publications.[27]

22. The miscegenation prohibition was supported by longstanding legal tradition. United States laws prohibited interracial marriages as early as 1664.[28] At one time

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[25] All these figures are drawn from Schuman et al. at 106-07.

[26] Associated Press, "Interracial marriage ban to end," *The Herald* (Rock Hill, S.C.), Nov. 4, 1998, p.9A, 1998 WL 7646273; "Opinion: Controversial Amendments", *The Herald* (Rock Hill, S.C.), Nov. 5, 1998, p.11A, 1998 WL 7646279.

[27] See for example, Andrew Koppleman, "Same-Sex Marriage, Choice of Law, and Public Policy," 76 Texas L. Rev. 921 (1998)

[28] See Andrew Koppelman, "Why Discrimination Against Lesbians and Gay Men is Sex Discrimination", at 225.

or another, forty-one American colonies and states prohibited them.[29] When the Supreme Court invalidated these laws in 1967 in *Loving v. Virginia*, they were still on the books in 16 states.[30] Southern states resisted challenges to their laws with great tenacity. The miscegenation taboo was close to the core of racism.[31]

23. When they defended the prohibition against interracial marriage, courts were at least as passionate in their denunciations as modern opponents of same-sex marriage. They invoked religious justifications and emphasized the ancient roots of the prohibition, just as the opponents of same-sex marriage do today. In *Kinney v. Commonwealth*, for example, the court upheld miscegenation legislation, describing interracial relationships as "connections and alliances so unnatural that God and nature seem to forbid them."[32] In *Green v. State*, the court held that "surely there cannot be any tyranny or injustice in requiring both [races] alike to form this union with those of their own race only, whom God hath joined together by indelible peculiarities which declare that He has made the two races distinct."[33]

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[29] See Peggy Pascoe, "Miscegenation Law, Court Cases, and Ideologies of 'Race' in Twentieth-Century America", 83 J. Am. Hist. 44, 49 (1996).

[30] See *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967).

[31] See, for example, *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955), arguing that the state's legitimate purposes in prohibiting miscegenation are "to preserve the racial integrity of its citizens" and to prevent "the corruption of the blood," "a mongrel breed of citizens," and "the obliteration of racial pride". See also W.C. Rodgers, *A Treatise on the Law of Domestic Relations* 49 (1899), describing the purpose of miscegenation laws as "to keep pure and unmixed the blood of the two races, to the end that the paramount excellence of the one may not be lowered by an admixture with the other."

[32] *Kinney v. Commonwealth*, 71 Va. (30 Gratt.) 858, 869, 32 Am. Rep. 690, 699 (1878).

[33] *Green v. State*, 58 Ala. 190, 195, 29 Am. Rep. 739 (1877). See also *State v. Gibson*, 36 Ind. 389, 404 (1871), quoting *Phil. & Westchester R.R. v. Miles*, 2 Am. L. Rev. 358, 358 (Pa. 1867): "The natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures."

Conclusion

24. As I have demonstrated in this affidavit, there is a powerful analogy between the miscegenation decision in *Loving v. Virginia* and the present litigation.

25. As I have outlined above, the arguments made against same-sex marriage are similar to the arguments that were made against interracial marriage, including:

i. that such marriages have been prohibited since antiquity and it would be a rash experiment with unpredictable consequences to permit them;
ii. that there are religious justifications for prohibiting them;
iii. that nature prohibits them;
iv. that morality prohibits them; and
v. that the majority of society doesn't approve of them.

26. I swear this affidavit in connection with the present litigation and for no other or improper purpose:

SWORN BEFORE ME AT
the City of Chicago
in the State of Illinois,
this 31st day of August, 2001

Willie J. Watkins
A commissioner for taking oaths

"OFFICIAL SEAL"
WILLIE J. WATKINS
NOTARY PUBLIC STATE OF ILLINOIS
COMMISSION EXPIRES 09/03/03

Andrew Koppelman