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## Ending Marriage Discrimination: A Work in Progress\*

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### I. INTRODUCTION

The Gay and Lesbian Advocates and Defenders (GLAD) seeks to end privileged places in law based on sexual orientation. The first Justice Harlan, dissenting in *Plessy v. Ferguson*,<sup>2</sup> stated that we do not have classes of citizens in our Constitution.<sup>3</sup> But of course we do. We eventually recognize those classes and then seek to dismantle laws reinforcing those distinctions. As Justice Ginsburg explained in *United States v. Virginia*,<sup>4</sup> “the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded.”<sup>5</sup> Some people—most notably African-Americans and women—have had the opportunity to challenge laws and practices denying the Constitution’s promises of equality and liberty, and

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\* This article is based on the invited lecture that Mary Bonauto, Civil Rights Project Director, GLAD, delivered on October 12, 2006, as part of the Donahue Lecture Series. The Donahue Lecture Series is a program instituted by the *Suffolk University Law Review* to commemorate the Honorable Frank J. Donahue, former faculty member, trustee, and treasurer of Suffolk University. The Lecture Series serves as a tribute to Judge Donahue’s accomplishments in encouraging academic excellence at Suffolk University Law School. Each lecture in the series is designed to address contemporary legal issues and expose the Suffolk University community to outstanding authorities in various fields of law.

1. I thank the Suffolk University Law Review for inviting me to speak in the Donahue Lecture Series. I thank all of my colleagues at Gay & Lesbian Advocates & Defenders for their dedication to “equal justice under law.” In helping to convert my remarks into an article, I am exceedingly grateful to Sarah E. Morton, Kate Strangio, Jessica Young, and Amanda Hainsworth.

2. 163 U.S. 537 (1896).

3. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). This passage was quoted in the first paragraph of *Romer v. Evans*, 517 U.S. 620, 623 (1996), when the Supreme Court struck down a state constitutional amendment foreclosing non-discrimination protections to gay people while allowing such non-discrimination laws for others. *Romer*, 517 U.S. at 623. In this article, references to “gay people” are meant to be lesbian, gay, bisexual and transgender persons who are also sometimes referred to as LGBT.

4. 518 U.S. 515 (1996).

5. *Id.* at 557.

in so doing created the legal and cultural architecture of civil rights. We are now grappling with another group of Americans—gay, lesbian, bisexual, and transgender Americans—who are asking this country to live up to its foundational constitutional promises of “liberty and justice for all,” and to provide formal equality under the law without regard to whether one has a same-sex or different-sex sexual orientation.

While this Article is titled “Ending Marriage Discrimination: A Work in Progress,” it is important to understand the marriage issue in a broader landscape. The marriage discussion is not only about marriage, but about the place of gay people in our civil society in the context of a century’s worth of official anti-gay discrimination. That history shows the roads already traveled, and those yet to be, to achieve full citizenship under the law for gay, lesbian, bisexual, and transgender people, of which marriage is an important part. This Article will also review in summary the trajectory of marriage cases in the U.S., the *Goodridge v. Department of Pub. Health*,<sup>6</sup> and post-*Goodridge* cases. Finally, the Article will discuss some ideas about how the marriage issue will develop in the years ahead.

## II. THE PAST AND PERSISTENCE OF DISCRIMINATION

Before looking ahead, it is important to learn from the past. As historian George Chauncey argues, the history of discrimination must inform the current debate or else it is “easier to argue that gay people do not need or deserve the most basic civil rights protections,” and “makes it easier to vilify gay people as a powerful, conspiratorial class whose struggle for full equality threatens the American dream instead of fulfilling it.”<sup>7</sup> Much of this history has been forgotten, and many, but not all, of the most obvious examples have been eradicated. This Article cannot do justice to the burgeoning field of gay and lesbian history, but even this cursory review will show that some of the premises supporting past discrimination remain with us.<sup>8</sup>

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6. 798 N.E.2d 941 (Mass. 2003).

7. GEORGE CHAUNCEY, *WHY MARRIAGE?* 12 (Basic Books, 2004) [hereinafter CHAUNCEY, *WHY MARRIAGE*].

8. See generally GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890-1940* (Basic Books, 1994) [hereinafter CHAUNCEY, *GAY NEW YORK*]; JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970* (The University of Chicago Press, 1983); JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* (Harper & Row Publishers, 1988); WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (Harvard University Press, 1999) [hereinafter ESKRIDGE, *GAYLAW*]; LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA* (Penguin, 1991); JONATHAN KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.* (Thomas Y. Crowell Company, 1976); Patricia A. Cain, *Litigating For Lesbian And Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993); William N. Eskridge, Jr., *Law And The Construction Of The Closet: American Regulation Of Sexual Intimacy, 1880-1946*, 82 IOWA L. REV. 1007 (1997) [hereinafter Eskridge, *Construction of the Closet*].

### A. Personal liberties

Consider the kinds of freedoms we all take for granted: the right to gather in a public place, or even the famed “right to be let alone.”<sup>9</sup> Fifty years ago, gay people faced a “degree of policing and harassment that is almost unimaginable to us today.”<sup>10</sup> Gay men and lesbians faced criminal prosecution under disorderly conduct, vagrancy, lewdness, and loitering laws for no reason other than socializing with their peers.<sup>11</sup> Some laws disallowed “homosexuals” from working or congregating in places of public accommodation, leading to police targeting and arresting patrons of bars and restaurants that catered to gay people.<sup>12</sup> Even in Massachusetts in the late 1970s, police harassment orchestrated by the Suffolk County District Attorney led to GLAD’s founding as a defense organization for those targeted gay people.<sup>13</sup> While the current situation for gay people is surely better, it is also true that to this day GLAD fields inquiries from people driven away from public places by police.<sup>14</sup>

### B. Sodomy Laws

The criminalization of a gay person’s self-expression and affection was possible because until 1961 all fifty states outlawed sodomy, rendering it illegal to engage in intimate acts with loved ones.<sup>15</sup> Historian Chauncey argues that gay people were treated relatively well until the late 1920s.<sup>16</sup> At this time, the medical community began pathologizing gay people, which led to an increase in laws directed and enforced on the basis of sexual identity.<sup>17</sup> Laws criminalizing same-sex intimate sexual conduct were finally declared unconstitutional in *Lawrence v. Texas*<sup>18</sup> in 2003.<sup>19</sup>

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9. See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); see also *Aptheker v. Sec’y of State*, 378 U.S. 500, 505-06 (1964) (providing individual has “right to freedom of movement”).

10. CHAUNCEY, WHY MARRIAGE, *supra* note 7, at 11 (describing police harassment directed towards gay people).

11. See CHAUNCEY, WHY MARRIAGE, *supra* note 7, at 10 (pointing to discriminatory laws targeting gay people).

12. CHAUNCEY, WHY MARRIAGE, *supra* note 7, at 7 (noting businesses punished for serving or employing gay people). Eventually, gay people fought back. The 1969 Stonewall Rebellion marks what popular culture sees as the beginning of the lesbian and gay civil rights movement. See Cain, *supra* note 8, at 1580-84. However, long before Stonewall, groups like the Daughters of Bilitis and The Mattachine Society brought gay people together for socializing, and later for political action. *Id.* at 1556-64.

13. See generally MITZEL, THE BOSTON SEX SCANDAL (Glad Day Books 1980) (detailing level of police harassment and prosecution of gay people).

14. *Doe v. DiFava*, No. 99-4037, slip op. at 5-6 (Mass. Super. Ct. filed Oct. 27, 1999). GLAD obtained a preliminary injunction against the Massachusetts State Police for rousting a gay man from a public area.

15. Yao Apasu-Gbotsu, et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 526 (1986) (noting universal prohibition of same-sex sexual activity).

16. See CHAUNCEY, WHY MARRIAGE, *supra* note 7, at 14.

17. CHAUNCEY, WHY MARRIAGE, *supra* note 7, at 17 (indicating medical and psychological community considered homosexuality a “disorder” or “defect”).

18. 539 U.S. 558 (2003).

19. *Id.* at 578-79.

By making private, consensual sexual conduct a crime, states intruded “upon the most private human conduct, sexual behavior, and in the most private of places, the home.”<sup>20</sup> State laws criminalizing (often as a felony) such behavior reverberated in all aspects of a gay person’s life. By criminalizing homosexual conduct, or as later courts put it, the conduct that defines the class, virtually any legal imposition on gay people because of their sexual orientation was permissible—whether in employment, access to benefits, or maintaining custody of one’s own children.<sup>21</sup> Unhelpfully, the U.S. Supreme Court added its imprimatur to this line of thinking in the 1986 case *Bowers v. Hardwick*,<sup>22</sup> specifically noting that the claimed right of privacy by the two men in that case for “homosexual sodomy” was “at best, facetious.”<sup>23</sup>

Astute commentators have identified *Lawrence* as a case about “equal liberty.”<sup>24</sup> The Court resolved the case “by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.”<sup>25</sup> The Court reviewed its key cases on personal autonomy and found no gay exception to the guarantees of liberty we all enjoy: “adults may choose to enter upon this [same-sex] relationship . . . and still retain their dignity as free persons . . . . The liberty protected by the Constitution allows homosexual persons the right to make this choice.”<sup>26</sup> *Lawrence* now stands for

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20. *Id.* at 567.

21. *See id.* at 583. The *Lawrence* Court explained “sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class. ‘After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.’” *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 641 (1996) (Scalia, J., dissenting)). The Supreme Court’s opinion in *Lawrence* observed the “collateral effects” of sodomy laws on the lives of gay people with respect to employment, family relationships, and housing. *Id.* at 582; *see also* Brief of Petitioners at 42, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (noting collateral effects and citing cases). The brief also noted that employers have invoked sodomy laws to justify the denial of public employment to gay people. Brief of Petitioners at 42, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (citing *Shahar v. Bowers*, 114 F.3d 1097, 1105 n.17 (11th Cir. 1997)); *see also* *Walls v. City of Petersburg*, 895 F.2d 188, 193 (4th Cir. 1990). Finally, the Petitioner’s Brief also noted that sodomy laws in Utah were used to block protection of gay citizens under hate-crime legislation. Brief of Petitioners at 42, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

22. 478 U.S. 186 (1986).

23. *Id.* at 194. The *Lawrence* Court later stated, “*Bowers* was not correct when it was decided, and it is not correct today . . . and now is overruled.” *Lawrence*, 593 U.S. at 578.

24. Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103 (2004); Jane S. Schacter, *Lawrence v. Texas and the Fourteenth Amendment’s Democratic Aspirations*, 13 TEMP. POL. & CIV. RTS. L. REV. 733, 749-53 (2004) (emphasizing link between liberty and equality in Justice Kennedy’s concurrence in *Lawrence*); Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1945 (2004) (identifying right to dignity and equal respect for intimate relations as distinctive tenet of *Lawrence*).

25. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

26. *See id.* at 567. As to the inherent dignity of LGBT people and LGBT relationships, the Court commented,

[t]he petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to

the proposition that gay people, just like everyone else, have a right to make personal decisions relating to families and intimacy without state interference.<sup>27</sup> The *Lawrence* Court identified the relevant legal tradition as one that “afford[s] constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education[,]” and that “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”<sup>28</sup> Although courts and legislators have ignored the *Lawrence* decision for the most part, if followed, it should change the legal terrain in everything from the military ban to child custody decisions for years to come.<sup>29</sup>

### C. Pathologizing

The medicalizing, or more precisely, the pathologizing of “the homosexual” hit an important low in 1952, when the American Psychiatric Association published its first *Diagnostic and Statistical Manual of Mental Disorders* (DSM), and “homosexuality” was included as a disorder.<sup>30</sup> Most states subsequently passed laws that permitted any number of state actions against gay people or people thought to be gay, including arrest, confinement, jail, and involuntary medical “treatments” to “cure” afflicted persons.<sup>31</sup> United States immigration laws have long equated homosexuality with a mental illness, or later, a psychopathic personality.<sup>32</sup>

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liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.

*Id.* at 578.

27. *Id.* at 574 (explaining constitutional demands for personal autonomy).

28. *Id.* (setting out rights for gay people).

29. See *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232, 1236 (11th Cir. 2004) (noting *Lawrence* uses rational basis and its facts are not applicable to state law challenge criminalizing sale of sexual devices); see also *Standhart v. Superior Court*, 77 P.3d 451, 457 (Ariz. Ct. App. 2003) (accepting *Lawrence* dissent that *Lawrence* is minimum scrutiny case). In *Standhart*, a marriage case, the court concluded that “intimate expression of the bond securing a homosexual relationship” is not a protected liberty. *Standhart*, 77 P.3d at 457. But see *State v. Limon*, 122 P.3d 22, 38 (Kan. 2005) (holding state law punishing heterosexuals less severely than gay people unlawful under reasoning in *Lawrence*).

30. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxxi (4th ed. Am. Psychiatric Ass’n, 2001) (originally including “homosexuality” as mental disorder). A mental disorder is “a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom.” *Id.*

31. See ESKRIDGE, GAYLAW, *supra* note 8, at 61-62 (noting states began criminalizing sodomy out of fear of child molestation); see also Eskridge, *Construction of the Closet*, *supra* note 7, at 1067-68 (describing “sexual psychopath” laws).

32. See *Boutilier v. INS*, 387 U.S. 118, 122 (1967) (upholding exclusion of gay people on the basis that they had “psychopathic personality”); *aff’d*, *Hill v. INS*, 714 F.2d 1470, 1472 (9th Cir. 1983) (noting Congress excluded gay people from entry to United States because “homosexuality is . . . mental illness”); see also *Lesbian/Gay Freedom Day Comm., Inc. v. INS*, 541 F. Supp. 569, 571-72 (N.D. Cal. 1982) (noting gay people were excluded by laws forbidding entry to those of “constitutional psychopathic inferiority”). Sexual

Eventually, doctors and social science researchers on homosexuality persuaded medical and mental health providers to change their views because there was no empirical or scientific basis for regarding homosexuality as a disorder or abnormality, rather than a normal and healthy sexual orientation.<sup>33</sup> Homosexuality was removed from the DSM in 1973, and the American Psychiatric Association stated that “homosexuality *per se* implies no impairment in judgment, stability, reliability, or general social or vocational capabilities . . . .”<sup>34</sup> After a thorough review of the scientific data, the American Psychological Association adopted the same position in 1975, and all mainstream medical organizations now agree that being gay is not a disorder or impairment, but simply a sexual orientation.<sup>35</sup> The vast majority of gay and

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orientation was a factor in denying immigration to the United States until Congress changed the law in 1990. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); *see also* ESKRIDGE, GAYLAW, *supra* note 8, at 132-34 (recounting history of immigration laws and sexuality); Cain, *supra* note 8, at 1593 (discussing immigration and naturalization service treatment of homosexuals).

33. *See* CHAUNCEY, WHY MARRIAGE, *supra* note 7, at 36-37 (detailing collaboration between doctors and gay activists to change views on homosexuality); *see also* GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, HOMOSEXUALITY AND THE MENTAL HEALTH PROFESSIONS: THE IMPACT OF BIAS 6 (2000) [hereinafter GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, BIAS] (explaining cultural stereotypes led in part to pathologizing homosexuals).

During the years after World War II until the 1970s, American psychiatry’s formulations of homosexuality were largely based on psychoanalytic models and common cultural stereotypes of human behavior. In the *American Psychiatric Association Diagnostic and Statistical Manual*, homosexuality was classified as a sociopathic personality disorder.

GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, BIAS, *supra*, at 6 (internal citations omitted).

By the 1970s scientists realized there was no empirical data to support diagnosing homosexuality as a mental or medical disorder. *See generally* John C. Gonsiorek, *The Empirical Basis for the Demise of the Illness Model of Homosexuality*, in HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 115 (Sage Publications, 1991); B.F. Reiss, *Psychological Tests in Homosexuality*, in HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL 296-311 (J. Marmor ed., 1980); John C. Gonsiorek, *Results of Psychological Testing On Homosexual Populations*, 25 AM. BEHAV. SCI. 385 (1982); Maureen Hart, et al., *Psychological Adjustment of Nonpatient Homosexuals: Critical Review of the Research Literature*, 39 J. CLINICAL PSYCHIATRY 604 (1978). “In the DSM-II (American Psychiatric Association, 1968), [homosexuality] was reclassified as a sexual deviation. The DSM-II was revised in 1973 and homosexuality *per se* was removed as a diagnostic category.” GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, BIAS, *supra*, at 6 (internal citation omitted).

34. American Psychiatric Association, *Adoption and Co-Parenting of Children of Same-Sex Couples: Position Statement*, APA REFERENCE NO. 200214 (November, 2002).

35. *See, e.g.*, AMERICAN MEDICAL ASSOCIATION, POLICY REGARDING SEXUAL ORIENTATION (opposing “reparative” or “conversion” therapy based on assumption that homosexuality is mental disorder), available at <http://www.ama-assn.org/ama/pub/category/14754.html> (last visited Apr. 13, 2007) (H-160.991 Health Care Needs of the Homosexual Population); AMERICAN PSYCHIATRIC ASSOCIATION, HOMOSEXUALITY POSITION STATEMENT (1992) (disputing assumption that homosexuality is mental disorder), available at [http://www.psych.org/psych\\_pract/coptherapyaddendum83100.cfm](http://www.psych.org/psych_pract/coptherapyaddendum83100.cfm); AMERICAN PSYCHOANALYTIC ASSOCIATION, POSITION STATEMENTS, available at <http://www.apsa.org/AboutAPSAA/PositionStatements/tabid/191/Default.aspx> (last visited May 26, 2007) (opposing discrimination based on sexual orientation); AMERICAN PSYCHOLOGICAL ASSOCIATION, SEXUAL ORIENTATION AND HOMOSEXUALITY 2 (2004) (opposing homophobia and promoting unbiased treatment of all individuals), available at <http://www.apahelpcenter.org/articles/pdf.php?id=31>. “Psychologists, psychiatrists, and other mental health professionals agree that homosexuality is not an illness, a mental disorder, or an

lesbian people function well in all aspects of life, including forming stable relationships and raising children.<sup>36</sup> Simply put, the problem is not being gay; the problem is discrimination against gay people.

#### D. Employment

Some employers have and continue to fire or deny employment to gay people.<sup>37</sup> As the largest employer in the country, the federal government deserves special mention. A 1947 ruling from the U.S. Civil Service Commission led to a de facto ban on gay people having federal jobs.<sup>38</sup> The Commission did so by holding that “homosexuality” was “sufficient grounds for denying appointment to a Government position or for the removal of a person from the Federal service.”<sup>39</sup> Between 1947 and 1950, the Commission consequently denied governmental employment to 1,700 applicants because

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emotional problem.” NAT’L ASS’N OF SOC. WORKERS, POLICY STATEMENT ON LESBIAN, GAY AND BISEXUAL ISSUES (1993) (approved by NASW Delegate Assembly), *reprinted in* SOCIAL WORK SPEAKS: NASW POLICY STATEMENTS 224 (6th ed., 2003), *available at*

<http://www.socialworkers.org/resources/abstracts/abstracts/lesbian.asp> (indicating belief that people of all sexual orientations should be given same rights). In 1973, the American Psychiatric Association reclassified homosexuality as a sexual orientation or expression and not a mental disorder. American Academy of Pediatrics, *Statement on Sexual Orientation and Adolescents*, 113 PEDIATRICS, 1827, 1827-32 (2004), *available at* <http://aappolicy.aappublications.org/cgi/content/full/pediatrics;113/6/1827%20>. The mechanisms for the development of a particular sexual orientation remain unclear, but the current literature and most scholars in the field state that one’s sexual orientation is not a choice; that is, individuals do not choose to be “homosexual” or “heterosexual.” *Id.*

36. See generally Ellen C. Perrin, *Technical Report: Coparent or Second Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341 (2002) (discussing commonalities of gay and non-gay parents and “normality” of children raised by same-sex couples). Indeed, all of the major children’s welfare organizations and mental health professionals affirmatively support placing children for adoption with lesbians and gay men as consistent with the goals of adoption. CHILD WELFARE LEAGUE OF AMERICA, POSITION STATEMENT ON PARENTING OF CHILDREN BY LESBIAN, GAY, AND BISEXUAL ADULTS, *available at* <http://www.cwla.org/programs/culture/glbtposition.htm> (last visited Apr. 21, 2007); NORTH AMERICAN COUNCIL ON ADOPTABLE CHILDREN, POSITION STATEMENTS: GAY AND LESBIAN FOSTER CARE AND ADOPTIONS (April 9, 2005), *available at* [http://www.nacac.org/pub\\_statements.html#](http://www.nacac.org/pub_statements.html#) (advocating equal evaluation for all prospective parents regardless of sexual orientation); John J. Conger, *Proceedings of the American Psychological Ass’n, Inc., for the Year 1976*, 32 AM. PSYCHOL. 408, 432 (1977) (indicating sexual orientation not to be taken into account for prospective adoptive parents); National Ass’n of Social Workers, *Lesbian, Gay, and Bisexual Issues*, in SOCIAL WORK SPEAKS 193-99 (2000) (supporting same-sex couples right to adopt); American Academy of Pediatrics, *Comm. on Psychological Aspects of Child and Family Health, Coparent or Second Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 339-40 (2002) (supporting legalization of both parents’ of same-sex couple’s ability to adopt).

37. See Committee Report, Employment Non-Discrimination Act, H.R. REP. NO. 104-873, at 209 (1996) (recounting witness testimony regarding denial of employment opportunities because of sexual orientation). The Committee Report states in part, “[w]itnesses came forward to testify as to discrimination they had faced due to being homosexual or supporting individuals that were (or allegedly were) gay or lesbian. The witnesses had lost job opportunities or were fired from positions due to their alleged sexual orientation or for standing up for gay/lesbian rights.” *Id.* at 209.

38. ESKRIDGE, GAYLAW, *supra* note 8, at 69.

39. ESKRIDGE, GAYLAW, *supra* note 8, at 69 (recounting history of discrimination against homosexuals in the 1950s).

they had “a record of homosexuality or other sex perversion.”<sup>40</sup> A later U.S. Senate study on the “Employment of Homosexuals and Other Sex Perverts in Government” concluded gay people were emotionally unstable and were therefore security risks.<sup>41</sup> In 1953, President Eisenhower issued an Executive Order which required the dismissal of *all* government employees who were sex perverts, including homosexuals, from both the civilian and military branches of the federal government as well as from private corporations with federal contracts.<sup>42</sup> Thousands of people lost their jobs due to terminations or forced resignations.<sup>43</sup> This ban remained in effect until the mid-1970s when federal personnel rules were changed.<sup>44</sup>

Advocates for gay people have been more successful in securing legal protection from job discrimination at the state level. In 1971, there were no municipal ordinances, let alone state laws, forbidding discrimination based on sexual orientation.<sup>45</sup> Wisconsin became the first state to enact a law prohibiting discrimination based on sexual orientation in 1981, and since then things have changed dramatically as other states have followed suit, including Massachusetts in 1989.<sup>46</sup> Now, eighteen states, the District of Columbia, and over 200 cities and towns have such laws or ordinances, covering close to half of the population in the United States.<sup>47</sup> Still, most state laws provide no

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40. ESKRIDGE, GAYLAW, *supra* note 8, at 69 (providing statistical evidence of history of discrimination based on sexual orientation).

41. ESKRIDGE, GAYLAW, *supra* note 8, at 68-69 (discussing Senate report labeling homosexuals as “sex perverts”).

42. Exec. Order No. 10,450, 18 C.F.R. 2489 (1953) (mandating dismissal of anyone in federal government with “sexual perversion”); *see also* CHAUNCEY, WHY MARRIAGE, *supra* note 7, at 6 (discussing Executive Order); Cain, *supra* note 8, at 1565-66 (recounting history of discrimination based on sexual orientation including issuance of Executive Order condemning “homosexuality”).

43. *Developments in the Law: Sexual Orientation and the Law, Part I of II*, 102 HARV. L. REV. 1508, 1556 (1990) (explaining result of Executive Order was loss of employment for thousands of individuals).

44. *See Norton v. Macy*, 417 F.2d 1161, 1168 (D.C. Cir. 1964). *Norton* established that due process requires the government to establish a rational relationship between a person’s same-sex sexual orientation and the efficiency of government operations before disqualifying the person from government service. *Id.* at 1164. While a similar case was pending in the Ninth Circuit, *Singer v. U.S. Civil Service Comm’n*, 530 F.2d 247 (9th Cir. 1976), *vacated* 429 U.S. 1034 (1977), the Federal Personnel Manual was modified to provide that a person should not be prohibited from seeking federal employment just because he or she engages in same-sex sexual acts. EDITORS OF HARVARD LAW REVIEW, *SEXUAL ORIENTATION AND THE LAW*, 48-49 n.29 (1990).

45. William N. Eskridge, Jr., *Lawrence’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1059 (2004) (setting out history of sex discrimination and sexual orientation discrimination before *Lawrence*).

46. 1989 Mass. Acts ch. 516 (providing discrimination based on sexual orientation unlawful); Act of March 2, 1982, ch. 112, 1981 Wisc. Sess. Laws 70 (1981 Assembly Bill 70) (relating to sexual orientation discrimination).

47. *See, e.g.*, CAL. GOV’T CODE § 12920 (West 1992) (declaring public policy of state that employers cannot discriminate based on sexual orientation); CONN. GEN. STAT. § 46A-81C (1991) (prohibiting discrimination based on sexual orientation in employment); D.C. CODE § 2-1402.11 (1973) (stating unlawful to discriminate on sexual orientation); HAW. REV. STAT. § 378-2 (1991) (making it unlawful for employers to discriminate on basis of sexual orientation); 775 ILL. COMP. STAT. 5/1-102 (2005) (indicating policy of state for people to be free from discrimination based on sexual orientation); ME. REV. STAT. ANN. tit. 5, § 4572 (2005)

redress, and there is no generally applicable federal law to forbid such discrimination based on sexual orientation.<sup>48</sup> Sexual orientation discrimination complaints at the local level proportionately correspond to complaints filed on the basis of sex and race based on per capita numbers.<sup>49</sup>

### E. The U.S. Military

Gay people are also currently denied the chance to serve openly in the largest employer in the United States—the U.S. military.<sup>50</sup> That prohibitory law dates back to policies first initiated in World War II.<sup>51</sup> The 1993 law

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(forbidding discrimination on sexual orientation); MD. CODE ANN., art. 49B § 16 (2001) (banning sexual orientation discrimination in employment); MASS. GEN. LAWS ch. 151B, § 4 (1989) (describing unlawful employment practices include discriminating based on sexual orientation); MINN. STAT. § 363A.08 (1993) (stating discrimination based on sexual orientation only permissible in employment when bona fide occupational qualification); NEV. REV. STAT. § 613.330 (1999) (prohibiting employers from discriminating based on sexual orientation); N.H. REV. STAT. ANN. § 354-A:7 (1997) (making unlawful discrimination on basis of sexual orientation in employment); N.J. STAT. ANN. § 10:5-12 (1992) (mandating employers act in non-discriminatory manner in relation to sexual orientation); N.M. STAT. § 28-1-7 (2003) (setting forth discrimination based on sexual orientation constitutes unlawful practice); N.Y. EXEC. LAW § 296 (McKinney 2002) (banning discrimination based on sexual orientation in employment arena); R.I. GEN. LAWS § 28-5-7 (1995) (prohibiting discrimination by employer on basis of sexual orientation); VT. STAT. ANN. tit. 21, § 495 (1992) (declaring unlawful employment practice to discriminate on basis of sexual orientation); WASH. REV. CODE § 49.60.180 (2006) (stating unfair employment practice to discriminate against someone because of sexual orientation); WIS. STAT. § 230.18 (1982) (prohibiting discrimination on basis of sexual orientation in employment). See generally NATIONAL GAY & LESBIAN TASK FORCE, GLASS NEARLY HALF FULL: ANALYSIS SHOWS 47% OF U.S. POPULATION NOW PROTECTED FROM DISCRIMINATION BASED ON SEXUAL ORIENTATION (Jan. 25, 2005), available at [http://thetaskforce.org/press/releases/pr782\\_012505](http://thetaskforce.org/press/releases/pr782_012505) (noting forty-seven percent of U.S. population lives in district banning discrimination based on sexual orientation). Two other states are likely to have such laws in effect by 2008. See S.B. 427, 82nd Gen. Assem., Reg. Sess. (Iowa 2007) (outlawing discrimination on basis of sexual orientation and gender identity in employment, public accommodations, housing, education and credit practices); Oregon Equality Act, S.B. 2, 74th Leg., Reg. Sess. (Or. 2007) (banning workplace discrimination on the basis of sexual orientation and gender identity). At the time of this writing, it appears Vermont will likely amend its non-discrimination laws to forbid discrimination based on gender identity and expression. Nine other states and the District of Columbia have already done so. SEE HUMAN RIGHTS CAMPAIGN, STATEWIDE EMPLOYMENT LAWS AND POLICIES (2007), available at [http://www.hrc.org/template.cfm?section=your\\_community&template=/contentmanagement/contentdisplay.cfm&contentid=14821](http://www.hrc.org/template.cfm?section=your_community&template=/contentmanagement/contentdisplay.cfm&contentid=14821).

48. See, e.g., *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063 (9th Cir. 2002) (explaining irrelevancy of employee's sexual orientation for purposes of Title VII); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3rd Cir. 2001) (holding Title VII only protects employees on basis of sex not sexual orientation); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (noting Title VII does not prohibit harassment based on sexual orientation); *Wrightson v. Pizza Hut of Amer., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) (explaining Title VII does not protect plaintiffs against discrimination based on sexual orientation). A measure to amend federal nondiscrimination laws is pending in the 110th Congress. Employment Nondiscrimination Act of 2007, H.R. 2015, 110th Cong. (2007).

49. William B. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 S. CAL. L. REV. 65, 67-68 (2001) (setting forth findings relating to complaints of discrimination based on sexual orientation, gender, and race).

50. 10 U.S.C. § 654 (2000).

51. See *Policy Concerning Homosexuality in the Armed Forces, Hearings Before the Senate Comm. on Armed Services*, 103rd Cong. 845, at 13-14 (1993) (statement of Dr. David F. Burrelli).

provides that evidence that a serviceman or woman has engaged in “homosexual” conduct and intends to continue to do so still renders the individual ineligible for service in the armed forces.<sup>52</sup>

Congress justified this categorical ban against gay persons on the ground that their service poses an unacceptable risk to military morale, good order, discipline, and unit cohesion.<sup>53</sup> Even with full deference to congressional and military judgment, taken at face value, this justification violates fundamental principles of equal protection jurisprudence. The logic behind this interest, as described by military commanders themselves and as evidenced in the structure of the policy, is that service members perform their jobs better if their discomfort with gays and lesbians is accommodated by shielding them from working alongside people they know to be gay.<sup>54</sup> It is now firmly established in the equal protection context that accommodating private discomfort, bias, fear, or disapproval is never an acceptable basis for discrimination, irrespective of the level of review.<sup>55</sup>

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52. See 10 U.S.C. § 654(b) (2000). This law was created after President Clinton announced his intention to end the ban. The statute states in part that

“[a] member of the armed forces shall be separated from the armed forces . . . if one or more of the following findings is made . . . (1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts . . . (2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect . . . (3) That the member has married or attempted to marry a person known to be of the same biological sex.

10 U.S.C. § 654(b) (2000); see also *Able v. United States*, 155 F.3d 628, 636 (2d Cir. 1998) (upholding military ban prior to *Lawrence*); *Philips v. Perry*, 106 F.3d 1420, 1430 (9th Cir. 1997) (concluding First Amendment not violated by military ban).

53. 10 U.S.C. § 654(a)(15) (2000) (providing rationale for ban).

54. S. REP. NO. 103-112, at 278 (1993). This report cites testimony of General Colin Powell who stated, “the presence of . . . [open homosexuality] would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are essential to effective combat.” *Id.* at 278. Lieutenant General Calvin Waller also provided testimony regarding the military’s concern with the discomfort of its soldiers: “[h]aving a casual encounter with an individual who is openly homosexual is one thing . . . having to be exposed to the same individual on a 24 hour a day basis, day in and day out, is ‘a horse of another color.’” *Id.* at 280. Dr. William Daryl Henderson, an expert from the National War College was called to the Senate Armed Services Committee to testify on unit cohesion, and he testified that unit cohesion would be impaired because “the soldiers are strongly against it” and that such difficulties would be more problematic than those encountered during racial integration of the services because “back then . . . the American public changed its attitude toward race very quickly” but “[y]ou do not find that in today’s public about the homosexual issue.” *Policy Concerning Homosexuality in the Armed Forces, Hearings Before the S. Comm. on Armed Services*, 103rd Cong. 845, at 278 (1993) (testimony of Dr. Henderson).

55. See Brief of Petitioner-Appellant at 12, *Cook v. Gates*, Nos. 06-2313 & 06-2381 (1st Cir. oral arg. scheduled Mar. 7, 2007), *appealing* *Cook v. Rumsfeld*, 929 F. Supp. 2d 385 (D. Mass. 2006). With assistance from lawyers at Jenner & Block, GLAD recently argued as amicus curiae in *Cook* that:

[A] statute fails equal protection review when its purpose evinces nothing more than a “bare . . . desire to harm.” But the Equal Protection Clause protects unpopular or misunderstood groups from more than “fit[s] of spite.” Any governmental interest that rests on aversion toward the group legislated against is illegitimate, whether it relies upon outright animosity, or on more subtle and invidious forms of aversion such as “moral disapproval”; “fear”; “unease”; “suspicion”; or generic

Even when a state pursues a so-called benign purpose, the state may not allow private prejudices to dictate its actions. In *Palmore v. Sidoti*,<sup>56</sup> the Supreme Court unanimously reversed a trial court's child custody order that found a child's best interests would be served by placing her with her father, rather than with her mother.<sup>57</sup> The trial court reasoned that the mother's unmarried interracial relationship would expose the child to "social stigmatization."<sup>58</sup> The Supreme Court recognized the "reality of private biases and the possible injury they might inflict," but the Court nonetheless held that the State was forbidden from "bowing to the hypothetical effects of private . . . prejudice."<sup>59</sup> The Supreme Court therefore reversed the trial court's order, famously insisting that such "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."<sup>60</sup>

While *Palmore* involved a classification based on the confluence of race and marital status, the Court refused to recognize that such an interest was legitimate *at all*.<sup>61</sup> As the Court stated, "[t]he question, however, is whether the reality of private biases and the possible injury they might inflict are *permissible* considerations . . . . We have little difficulty concluding that they are not."<sup>62</sup>

Similarly, in *Romer v. Evans*,<sup>63</sup> the Court refused to credit the state's asserted interest in accommodating "landlords or employers who have personal or religious objections to homosexuality" as a legitimate basis for Colorado's "Amendment 2."<sup>64</sup> The Amendment would have accommodated such

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"negative attitudes." In other contexts, the Supreme Court has cautioned against reliance upon irrational and invidious stereotypes as a basis for legislation.

*Id.* (internal citations omitted). Among the Supreme Court cases establishing these principles are *Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (O'Connor, J., concurring in judgment) (holding "moral disapproval" not legitimate governmental interest); *Romer v. Evans*, 517 U.S. 620, 632, 636 (1996) (concluding Equal Protection Clause protects individuals from "fit[s] of spite" and "bare . . . desire to harm"); *United States v. Virginia*, 518 U.S. 515, 542 (1996) (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994) (holding state may not legislate on basis of "generalizations" and "judgments"); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448-49 (1985) (indicating "fear" or "negative attitudes" not legitimate governmental interest); *O'Conner v. Donaldson*, 422 U.S. 563, 575 (1975) (stating governmental reliance on "unease" not legitimate interest); *U.S. Dep't. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (holding "bare . . . desire to harm" not justifiable purpose for statute); *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1042-43 (9th Cir. 1988) (explaining "negative attitudes" not legitimate governmental interest).

56. 466 U.S. 429 (1984).

57. *Id.* at 433.

58. *Id.* at 431.

59. *Id.*

60. *Palmore*, 466 U.S. at 433.

61. *Id.* at 433.

62. *Id.* Accordingly, the logic of *Palmore* equally prohibits the consideration of such interests in "rational basis" cases. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (recognizing logic of *Palmore* and using rational basis).

63. 517 U.S. 620 (1996).

64. *Id.* at 635.

objections to homosexuality by repealing local antidiscrimination ordinances related to housing and employment and forbidding their future enactment.<sup>65</sup> The Supreme Court in *Romer* demanded “the law’s neutrality where the rights of persons are at stake.”<sup>66</sup> In refusing to credit the state’s claimed purposes of respecting the associational rights of other citizens and conserving resources to fight discrimination against other groups, the Court noted those reasons were “impossible to credit” when the Amendment was so broad and removed from those justifications.<sup>67</sup> Further dooming the Amendment, the Court also repeated that any disadvantage “born of animosity” or by a “bare . . . desire to harm a politically unpopular group” can never be a legitimate state interest.<sup>68</sup>

The military ban accommodating private prejudice is no different from the award of custody in *Palmore* and the Colorado Amendment in *Romer*. Even in the military context, state action that discriminates because of fear or dislike is never a valid interest. Efforts continue in the Congress to repeal the ban and to void it in court.<sup>69</sup>

#### F. Hate Crimes and Objects of Contempt

As the legal and cultural climate for gay people and same-sex couples has improved, more gay men and lesbians have refused to hide their sexual orientation.<sup>70</sup> Stigma remains, and nationally 22.9% of people say they would prefer *not* to have a gay or lesbian person as a neighbor.<sup>71</sup> For some, living openly and honestly as nothing more than who they are has come with severe consequences. The United States Surgeon General approximates that forty-five percent of gay men and lesbians have been threatened with violence as a result of their sexual orientation, and seventeen percent have been physically

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65. *Id.* at 624 (describing Amendment 2’s broad implications).

66. *Id.* at 623.

67. *Romer*, 517 U.S. at 635.

68. *Id.* at 634.

69. See generally *Log Cabin Republicans v. Rumsfeld*, No. CV 04-8425 GPS (Ex), slip op. (C.D. Cal. 2006); *Cook v. Rumsfeld*, 429 F. Supp. 2d 385 (D. Mass. 2006), *appeal docketed*, No. 06-2313 (1st Cir. 2006); see also H.R. 1246, 110th Cong. (2007). The Military Readiness Enhancement Act would repeal the current ban and replace it with a new provision prohibiting discrimination based on sexual orientation in the Armed Forces.

70. THE HENRY J. KAISER FAMILY FOUNDATION, *INSIDE-OUT: A REPORT ON THE EXPERIENCES OF LESBIANS, GAYS AND BISEXUALS IN AMERICA AND THE PUBLIC’S VIEWS ON ISSUES AND POLICIES RELATED TO SEXUAL ORIENTATION 2-3* (2001) [hereinafter KAISER, *INSIDE-OUT*], available at <http://www.kff.org/kaiserpolls/upload/New-Surveys-on-Experiences-of-Lesbians-Gays-and-Bisexuals-and-the-Public-s-Views-Related-to-Sexual-Orientation-Report.pdf>.

71. Vani K. Borooah & John Mangan, *Love Thy Neighbour: How Much Bigotry Is There In Western Countries?*, UNIVERSITY OF ULSTER 26 (2007) (reporting homophobia most pervasive form of bigotry in the United States of those interviewed), available at <http://www.publicaffairs.ulster.ac.uk/podcasts/Bigotry.pdf>; U.S. *Rides Bigotry Median, Study Finds*, PLANET OUT, Feb. 9, 2007, <http://www.planetout.com/news/article.html?date=2007/02/09/5> (summarizing report on homophobia internationally).

attacked.<sup>72</sup> A 2001 study by the Kaiser Family Foundation found that about one third of lesbians, gay men, and bisexuals had been the target of physical violence.<sup>73</sup> It should come as no surprise that young people also encounter problems at schools, ranging from derogatory remarks to physical and sexual harassment.<sup>74</sup> This harassment contributes to a higher frequency of school absences and a greater likelihood of engaging in risky behaviors such as drug and alcohol use and running away from home.<sup>75</sup>

Many people may fear violence or assault. Gay, lesbian, bisexual, and transgender people, however, like other minority groups, fear it for the additional reason that their mere presence may trigger a hostile response from an unknown person.<sup>76</sup> State and federal hate crimes laws cannot prevent all violence, but their enactment can aid enforcement and set standards of minimal human decency and respect.<sup>77</sup>

### G. Family and Marriage

Most people define “living the good life” as having one’s own family and children and meeting the universal human need to love and be loved. Gay people have been denied “the good life” because they have been denied the ability to marry the person of their choice everywhere in this country and at all times until May 2004 in Massachusetts.<sup>78</sup> Since that time, 8,764 same-sex couples have wed, and the majority view is supportive of marriage for same-

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72. U.S. Surgeon General, *The Surgeon General’s Call to Action to Promote Sexual Health and Responsible Sexual Behavior*, at Part III, The Public Health Problem (July 9, 2001) [hereinafter *Surgeon General’s Call to Action*] (citations omitted), available at <http://www.surgeongeneral.gov/library/sexualhealth/call.htm>.

73. Kaiser, *supra* note 70, at 4.

74. JOSEPH G. KOSCIW & ELIZABETH M. DIAZ, THE 2005 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN OUR NATION’S SCHOOLS 6 (2005), available at [http://www.glsen.org/binary-data/GLSEN\\_ATTACHMENTS/file/585-1.pdf](http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/585-1.pdf); see also Patricia Williams, *Hatred in the Hallways: Violence and Discrimination Against Lesbian, Gay, Bisexual, and Transgender Students in U.S. Schools, Part VI*, HUMAN RIGHTS WATCH (2001), available at <http://www.hrw.org/reports/2001/uslgbt/toc.htm> (explaining gay youth face violence as well as disparaging remarks on regular basis).

75. See KOSCIW & DIAZ, *supra* note 74, at 6-7 (setting out consequences of harassment on gay youth); see also Williams, *supra* note 74 (noting lesbian and gay youth more likely to miss school and have lower goals).

76. See generally Abraham Abramovsky, *Bias Crime: Is Parental Liability the Answer?*, 1992/1993 ANN. SURV. AM. L. 533 (1993); *Hate Crimes Laws: State by State*, HUMAN RIGHTS CAMPAIGN FOUNDATION, [http://www.hrc.org/Template.cfm?Section=Laws\\_Legal\\_Resources&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=66&ContentID=19987](http://www.hrc.org/Template.cfm?Section=Laws_Legal_Resources&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=66&ContentID=19987) (last visited April 14, 2007); Migdalia Maldonado, *Practical Problems with Enforcing Hate Crimes Legislation in New York*, 1992/1993 ANN. SURV. AM. L. 555 (1993).

77. H.R. 1592, 110th Cong. (2007). The pending Local Law Enforcement Hate Crimes Prevention Act would give the Justice Department the power to investigate and prosecute bias motivated violence where the victim was selected because of race, color, religion, national origin, gender, sexual orientation, gender identity or disability, and also allow the Justice Department to assist state and local jurisdictions in investigating and prosecuting serious bias-motivated crimes. *Id.*

78. *Goodridge v. Dep’t. of Pub. Health*, 798 N.E.2d 941, 969-70 (Mass. 2003) (ruling in favor of plaintiffs declaring Massachusetts Constitution requires marriage protections for same-sex couples).

sex couples.<sup>79</sup> As of October 2006, Rhode Islanders have also legally married in Massachusetts.<sup>80</sup>

In 1996, long before any state ended the exclusion of marriage for same-sex couples, Congress passed the so-called “Defense of Marriage Act.”<sup>81</sup> That law, which could more accurately be called the “Discrimination in Marriage Act,” has two parts. The more commonly known part purports to authorize states to refuse to accord full faith and credit to marriages of same-sex couples by enacting legislation stating their public policies.<sup>82</sup> The second part requires the

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79. See E-mail from Massachusetts Registry of Vital Records and Statistics, Table 1 (March 22, 2007, 10:31:46 EST) (on file with author) (accounting number of marriage records received and recorded in Massachusetts from 2004 to 2006). Specifically, the table accounts for the number of marriage records, with a breakdown for marriages of same-sex couples from May 17, 2004, to November 9, 2006. *Id.* The 2006 numbers are subject to change upon update of records. *Id.*; see also Frank Phillips, *Poll Backs Research on Stem Cells: But Cloning Opposed in Mass. Survey*, BOSTON GLOBE, Mar. 13, 2005, at A1, available at [http://www.boston.com/yourlife/health/diseases/articles/2005/03/13/poll\\_backs\\_research\\_on\\_stem\\_cells/](http://www.boston.com/yourlife/health/diseases/articles/2005/03/13/poll_backs_research_on_stem_cells/) (reporting fifty-six percent support for marriage for same-sex couples). At the same time, a citizen-initiated amendment to the Massachusetts Constitution that, if ratified, would ban same-sex couples from marriage has moved forward, although its ultimate fate remains uncertain. Frank Phillips & Lisa Wangness, *Same-Sex Marriage Ban Advances: Lawmakers OK item for ballot, but hurdle remains*, BOSTON GLOBE, Jan. 3, 2007, at 1A, available at [http://www.boston.com/news/local/massachusetts/articles/2007/01/03/same\\_sex\\_marriage\\_ban\\_advances/](http://www.boston.com/news/local/massachusetts/articles/2007/01/03/same_sex_marriage_ban_advances/). If the measure gains the votes of at least 50 of 200 members of the legislature in 2007-2008, as it did on the last day of the 2005-2006 session, it would then be put out to the voters for a ratification decision in November 2008. Steve LeBlanc, *Suit Against Legislators who Recessed is Pulled*, BOSTON GLOBE, Jan. 5, 2007, at 8C, available at [http://www.boston.com/news/local/articles/2007/01/05/suit\\_against\\_legislators\\_who\\_recessed\\_is\\_pulled/](http://www.boston.com/news/local/articles/2007/01/05/suit_against_legislators_who_recessed_is_pulled/).

80. *Cote-Whitacre v. Dep't of Pub. Health*, No. 04-2656, 2006 WL 3208758, at \*4-5 (Mass. Super. Ct. Sept. 29, 2006).

81. Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2000); 1 U.S.C. § 7 (2000)).

82. 28 U.S.C. § 1738C (2000) (providing states are not required to give full faith and credit to marriages of same-sex couples); see also U.S. CONST. art. IV, § 1 (providing states must give “Full Faith and Credit” to “Acts, Records, and Judicial Proceedings” of other states). While the Full Faith and Credit Clause, both self-executing and as implemented by Congress, has had clear relevance in some parts of domestic relations law, it has had no role to date in respect or disrespect of marriages. On the one hand, it has long been established that states must give full faith and credit to divorce decrees entered by another state if that state properly exercised jurisdiction to entertain an action for divorce. See *Williams v. North Carolina*, 325 U.S. 226, 239 (1945). In addition, Congress has acted to make it clear that the states must, in certain circumstances, grant full faith and credit to custody and visitation determinations and to child support orders. 28 U.S.C. § 1738A (2000) (declaring states must not modify child custody determinations made by other states); 28 U.S.C. § 1738B (2000) (mandating states follow child support orders made by other states).

But with respect to the question of giving full faith and credit to a marriage validly entered into in another jurisdiction, there appears to be no reported judicial decisions on point, let alone any controlling authority from the United States Supreme Court. See David P. Currie, *Full Faith & Credit to Marriages*, 1 Green Bag 2d 7, 10 and n.21 (1997) (noting no courts require state to give out-of-state marriage full faith and credit). Currie does mention *Ram v. Ramharack*, where the court referenced full faith and credit but then engaged in a different analysis to recognize an out-of-state common-law marriage. Currie, *supra*, at 10 n.21 (citing *Ram v. Ramharack*, 150 Misc. 2d 1009 (N.Y. 1991)).

There is speculation on both sides of the argument. One can find support for the view that full faith and credit requires courts to give conclusive effect to an out-of-state marriage as well as support for the very opposite view. ROBERT H. BORK, *SLOUCHING TOWARD GOMORRAH* 112 (2000) (discussing impact of Hawaii marriage rules on Full Faith and Credit Clause); Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and*

federal government to disrespect any marriage of a same-sex couple validly licensed by a state.<sup>83</sup> This law contravenes the federal government's longstanding practice of deferring to state determinations of marital status.<sup>84</sup> In effect, the federal discrimination portion of the law places off limits all of the 1,138 federal statutes in which marital status is a factor.<sup>85</sup> All same-sex married couples in Massachusetts are currently denied the protections provided by the federal government to opposite-sex married couples.<sup>86</sup> The result of the law is that same-sex couples may not file joint income tax returns, which for many families allows them to pool deductions and pay less of their income in taxes.<sup>87</sup> This law strips these families of protection under the Family and Medical Leave Act which helps workers balance their competing workplace and familial demands by permitting time off to care for a seriously ill spouse.<sup>88</sup> Married couples who are gay or lesbian and who have paid into social security

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*the Evasion of Obligation*, 1 STAN. J. CIV. R. & CIV. LIBERTIES 1, 31-43 (2005) (arguing Full Faith and Credit Clause requires recognition of marriage for same-sex couples in Massachusetts). Bork notes that "the first part of that sentence [of the Full Faith and Credit Clause] almost certainly means that, if the Hawaii court rules as expected, other states must accept marriages between homosexuals performed in Hawaii . . ." BORK, *supra*, at 12. *But see* Currie, *supra*, at 8 (disputing notion that Full Faith and Credit would require states to recognize marriage for same-sex couples). Currie notes that "the full faith and credit clause does not require other states to permit Hawaii to regulate the marital status of their citizens." Currie, *supra*, at 8.

The absence of controlling Full Faith and Credit precedents is likely a reflection of the fact that American courts have consistently and with no difficulty relied on principles of comity alone to address the question of recognition of out-of-state marriages. *See* WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICTS OF LAWS: § 119 THE VALIDITY OF MARRIAGE 402 (3d ed., 2002) (noting "overwhelming tendency" in the United States to recognize validity of marriage based upon law where performed); *see also* RESTATEMENT (Second) OF CONFLICT OF LAWS § 283 (1971).

83. 1 U.S.C. § 7 (2000) (defining marriage as union between man and woman for federal government).

84. *See* *Ensminger v. Comm'r of Internal Revenue*, 610 F.2d 189, 191 (4th Cir. 1979) (concluding federal government has deferred regulation of marriage to states). "Federal deference in matters within the state police power reflects more than a matter of comity. In fact, it represents a constitutionally derived recognition of the essential character of state government within our federal system." *Id.* at 191 n.4; *see also* *Ex Parte Burrus*, 136 U.S. 586, 593-94 (1890). "The whole subject of the domestic relations of husband and wife . . . belongs to the laws of the states, and not to the laws of the United States." *Ex parte Burrus*, 136 U.S. at 593-94; *see also* *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) (indicating well established rule that "there is no federal law of domestic relations").

85. GENERAL ACCOUNTING OFFICE, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT, GAO-04-353R (Jan. 23, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf> (providing number of federal statutes implicating marriage in some way); U.S. GENERAL ACCOUNTING OFFICE, DEFENSE OF MARRIAGE ACT, GAO/OGC-97-16, at Enc. II (Jan. 31, 1997), available at <http://www.gao.gov/archive/1997/og97016.pdf> (listing federal statutes involving marriage).

86. *See* 1 U.S.C. § 7 (2000) (limiting marriage for federal purposes to male-female marriages).

87. *See generally* GLAD, PROTECTIONS, BENEFITS AND OBLIGATIONS OF MARRIAGE UNDER MASSACHUSETTS AND FEDERAL LAW: SOME KEY PROVISIONS OF A WORK-IN-PROGRESS 23-24 (2001) [hereinafter GLAD, PROTECTIONS], available at <http://www.glad.org/rights/PBOsOfMarriage.pdf> (explaining tax advantages provided for opposite-sex married couples but not same-sex married couples); *see also*, Holly Wilkerson, What Price Love? Paying the Marriage Penalty, <http://www.fpanc.org/2016408920.html> (last visited May 10, 2007) (explaining advantages and disadvantages of married versus single filing statuses).

88. The Family and Medical Leave Act, H.R. 1369, 110th Cong. 1st Sess. (2007) (amending 29 U.S.C. § 2611 (2000)) (defining terms used in Family and Medical Leave Act); 29 U.S.C. § 2612(1) (2000) (discussing eligibility for benefits).

their entire lives cannot rely on their work credits to support a lower-earning spouse after the worker's retirement or death.<sup>89</sup> Those with spouses who end up in a nursing home have to fear foreclosure on the "Medicaid lien," which would force them from their homes.<sup>90</sup> Gay people who have served in wars, from WWII to Iraqi Freedom, cannot even be buried next to their spouses in federal cemeteries as other military veterans can.<sup>91</sup>

The current President has urged the passage of an amendment to the United States Constitution that would end marriage and end civil unions.<sup>92</sup> This amendment would enshrine discrimination against gay men and lesbians into the Constitution. Thankfully, its chances in the current 110<sup>th</sup> Congress appear dim.<sup>93</sup>

### H. Parenting

The human need to raise, nurture, and care for the next generation also extends to gay people. As the U.S. Supreme Court noted in 2000 in *Troxel v. Granville*,<sup>94</sup> the demographics of American families have so profoundly changed that it is impossible to describe a typical American family.<sup>95</sup> Although data is not available to indicate the exact number of lesbian and gay parents in the United States, the 2000 Census found that among those who reported cohabiting with a same-sex partner, thirty-three percent of women and twenty-two percent of men had a son or daughter under eighteen years old living in their home.<sup>96</sup> The comparable figure for heterosexual married couples is thirty-

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89. 42 U.S.C. §§ 402(b), (c), (e), (f) (2000) (listing insurance benefits for surviving spouse); 42 U.S.C. § 402(i) (2000) (describing lump sum death benefit).

90. See MASS. GEN. LAWS ch. 118E, § 25(2) (2004) (stating applicant's residence is factored into determination of eligibility unless spouse remains in the house); 130 MASS. CODE REGS. 520.008(A), 515.012 (2004) (explaining home subject to lien unless spouse lives in home). For same-sex couples, foreclosure of the couple's home following the death of an institutionalized spouse could force the surviving spouse out of the home. MASS. GEN. LAWS ch. 118E, § 25 (2004); 130 MASS. CODE REGS. 520.008(A), 515.012 (2004).

91. 38 U.S.C. § 2402(5) (2000) (allowing burial of spouse of veteran in cemetery).

92. President George W. Bush, State of the Union Address (January 20, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>. President Bush stated in his speech that "[a]ctivist judges . . . have begun redefining marriage by court order, without regard for the will of the people and their elected representatives . . . . If judges insist on forcing their arbitrary will on the people, the only alternative left to the people would be the constitutional process . . ." *Id.* The Senate introduced a resolution on November 25, 2003, which provided "[m]arriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups." S.J. RES. 26, 108th Cong. (2004).

93. *FMA Backers: No New Attempt To Revive Anti-Gay Marriage Amendment In New Congress*, 365GAY.COM, Jan. 22, 2007, <http://www.365gay.com/Newscon07/01/012207fedamend.htm>.

94. 530 U.S. 57 (2000).

95. See *id.* at 63. The *Troxel* Court stated that "[t]he demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household." *Id.*

96. TAVIA SIMMONS & MARTIN O'CONNELL, U.S. CENSUS BUREAU, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000 9 (Table 4), available at <http://www.census.gov/prod/2003pubs/censr-5.pdf>

five percent.<sup>97</sup> The number of children being raised by same-sex couples is difficult to establish, but is commonly estimated at more than one million.<sup>98</sup>

Yet states and courts have barred gay people from adopting and raising children. As recently as 2004, the Eleventh Circuit Court of Appeals upheld a Florida law prohibiting lesbians and gay men from adopting children.<sup>99</sup> At least three other states—Michigan, Mississippi, and Utah—explicitly forbid same-sex couples from adopting.<sup>100</sup> Most states have no such ban, and allow a qualified single gay person to adopt, and the trend among courts that have considered the issue is to allow same-sex couples to adopt.<sup>101</sup> There is, however, a definite concern that the “logic” of the marriage movement—that children must have one mother and one father—will lead to voter initiated

(last visited Oct. 6, 2004) (disseminating findings regarding household characteristics married and unmarried couples).

97. *Id.*

98. See C.J. PATTERSON & L.V. FRIEL, *Sexual Orientation and Fertility*, in INFERTILITY IN THE MODERN WORLD: BIOSOCIAL PERSPECTIVES 238 (G. Bentley ed., 2000) (noting difficulty in determining number of gay and lesbian parents); Ellen C. Perrin & Committee on Psychosocial Aspects of Child and Family Health, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341 (2002) (explaining number of children raised by homosexual parents estimated between one and nine million).

99. See *Lofton v. Dep't of Children & Family Servs.*, 358 F.3d 804, 826-27 (11th Cir. 2004); see also Rosemary Barkett, *The Tyranny of Labels*, 38 SUFFOLK U. L. REV. 749, 753-54 (2005).

100. See, e.g., MISS. CODE ANN. § 93-17-3 (2007) (prohibiting same-sex couples from adopting); UTAH CODE ANN. § 78-30-1 (2007) (providing children may not be adopted by cohabitated non-married couples); *In re Adams*, 473 N.W.2d 712, 714 (Mich. Ct. App. 1991) (holding two unmarried persons may not jointly adopt).

101. See, e.g., *In re M.M.D. & B.H.M.*, 662 A.2d 837, 859 (D.C. 1995) (holding adoption statutes do not prohibit unmarried couples from adopting); *In re Petition of K.M. & D.M.*, 653 N.E.2d 888, 899 (Ill. App. Ct. 1995) (permitting unmarried couples to jointly adopt regardless of sexual orientation); *In re Infant Girl W.*, 845 N.E.2d 229, 243 (Ind. Ct. App. 2006) (allowing same-sex couples to jointly adopt); *Adoption of Tammy*, 619 N.E.2d 315, 319-21 (Mass. 1993) (concluding same-sex couple may jointly adopt). Some courts construe statutes to permit second-parent adoption (i.e. a process whereby one party in an unmarried couple petitions without the other party relinquishing his or her parental rights, with the result that a child had two legal, unmarried parents). See *Sharon S. v. Super. Ct. of San Diego County*, 73 P.3d 554, 570 (Cal. 2003); *In re Jacob & In re Dana*, 660 N.E.2d 397, 400 (N.Y. 1995); *In re Adoption of R.B.F. & R.C.F.*, 803 A.2d 1195, 1201-03 (Pa. 2002); *Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271, 1276 (Vt. 1993).

Several states have concluded that their statutes permit joint adoptions by unmarried couples without the necessity of appellate litigation. *Holden v. N.J. Dep't of Hum. Servs.*, No. C-203-97, slip op. at 5 (N.J. Super. Ct. Ch. Div. 1997) (permitting joint adoptions of children in custody of Division of Youth and Family Services); OR. ADMIN. R. 413-120-0200(3). The Department of Human Services regulations provide that the state and private agencies “shall accept applications from couples (married or unmarried) or individuals (married or unmarried).” *Id.*

Other states have permitted either joint or second-parent adoptions at the trial level. See, e.g., David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 135 (2006) (noting approximately fifty percent of the states allow same-sex partners to adopt child their partner's children). But see *In re Jason C.*, 533 A.2d 32, 33-34 (N.H. 1987) (denying joint petition for adoption by unmarried couple); *Adoption of M.C.D.*, 42 P.3d 873, 881 (Okla. Civ. App. Ct. 2002) (explaining joint adoption by antagonistic, divorcing persons not authorized by statute). A small number of state courts have denied second-parent adoptions when the legal parent in the couple did not relinquish his or her parental rights first. See *In re Adoption of T.K.J. & K.A.K.*, 931 P.2d 488, 493 (Colo. App. Ct. 1997); *The Adoption of Baby Z.*, 724 A.2d 1035, 1055-56 (Conn. 1999); *Adoption of Luke*, 640 N.W.2d 374, 381-83 (Neb. 2002); *Adoption of Doe*, 719 N.E.2d 1071, 1072-73 (Ohio App. 1998); *In the Interest of Angel Lace M.*, 516 N.W.2d 678, 683 (Wis. 1994).

statutes limiting options for gay people to become parents.<sup>102</sup>

In ordinary disputes between a gay and non-gay parent, the majority rule is that a parent's sexual orientation in and of itself is not relevant to a child custody determination. There is, however, a significant minority of states holding that sexual orientation is per se harmful and these states use sexual orientation to deny or limit child custody and visitation rights.<sup>103</sup> As recently as 2002, the Alabama Chief Justice explained, "[t]he common law designates homosexuality as an inherent evil, and if a person openly engages in such a practice, that fact alone would render him or her an unfit parent."<sup>104</sup> In another case, *Ex Parte D.W.W.*,<sup>105</sup> the father was charged with domestic abuse on three occasions, after he closed his infant son in a clothes dryer and threatened to kill the children.<sup>106</sup> Nonetheless, the court denied the wife full visitation and awarded custody to the abusive father because the mother was a lesbian and "the conduct inherent in lesbianism is illegal in Alabama."<sup>107</sup>

Despite the difficulties for same-sex parents—both in terms of fewer social supports and a lack of economic protections—scientific research has consistently shown there are no sexual-orientation-based differences in parenting skills.<sup>108</sup> Children of same-sex parents fare no differently than children of heterosexual parents on all measures of healthy development.<sup>109</sup> Every respected medical, psychological, and child-welfare organization that has addressed the topic has concluded that children of same-sex parents are as healthy, happy, and productive as their peers.<sup>110</sup> The American Psychological Association recently contested the policy assertions that "heterosexual couples are inherently better parents than same-sex couples" and that "children of lesbian or gay parents fare worse than children raised by heterosexual

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102. See Maggie Gallagher, *What Is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 782 (2002) (proposing children fare better with two married opposite-sex parents); Michael S. Wald, *Adults' Sexual Orientation and State Determinations Regarding Placement of Children*, 40 FAM. L.Q. 382, 402-05 (2006) (noting opponents of gay parents argue need for both father and mother); Amanda Paulson, *Several States Weigh Ban on Gay Adoptions*, CHRISTIAN SCIENCE MONITOR, Mar. 15, 2006, at 2 (noting several states contemplating bans on gay adoption).

103. See Wald, *supra* note 102, at 382 (commenting that states occasionally use fact that one parent is gay to determine custody disputes); see also *id.* at 421-23 (discussing current approaches to sexual orientation in custody disputes).

104. D.H v. H.H., 830 So. 2d 21, 35 (Ala. 2002) (Moore, C.J., concurring) (condemning homosexuality).

105. 717 So. 2d 793 (Ala. 1998).

106. *Id.* at 797-98 (Kennedy, J., dissenting) (discussing pattern of serious abuse inflicted on children by father).

107. *Id.* at 796 (rationalizing custody award to father on basis of mother's lesbianism); see also *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (wresting custody away from lesbian mother in favor of child's grandmother). The court noted the mother was a lesbian and stated "[c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth." *Bottoms*, 457 S.E.2d at 108; see also *S v. S*, 608 S.W.2d 64, 65-66 (Ky. 1980) (requiring child custody shifted to father because of mother's "deviate practice" as a lesbian); *supra* note 21 (discussing the "collateral consequences" imposed by sodomy bans).

108. See *supra* note 36 and accompanying text.

109. See *supra* note 36 and accompanying text.

110. See *supra* notes 35-36 and accompanying text.

parents.”<sup>111</sup> The American Psychological Association found “no reliable scientific research supports . . . [the] conclusion” that gay and lesbian parents are unfit.<sup>112</sup> Because this issue is one on which so many people believe themselves to have inherent expertise, it is worth setting out at some length what the professional organizations say about the scientific research.

Empirical research over the past two decades has failed to find any meaningful differences in the parenting ability of lesbian and gay parents compared to heterosexual parents. Most research on this topic has focused on lesbian mothers and refutes the unsupported stereotype that lesbian parents are not as child-oriented or maternal as non-lesbian mothers. Researchers have concluded that heterosexual and lesbian mothers do not differ in their parenting ability. Although there are far fewer studies examining gay fathers, those that exist find that gay men are similarly fit and able parents, as compared to heterosexual men. No reliable scientific research supports the opposite conclusion.

Turning to the children of gay and lesbian parents, no credible evidence exists that psychological adjustment among lesbians, gay men, or their children is impaired in any significant way. Indeed, every relevant study shows that parental sexual orientation per se has no measurable effect on the quality of parent-child relationships or on children’s mental health or social adjustment. Once again, most research on this topic has focused on lesbian mothers. Peer-reviewed scientific studies in this area reported no differences between children raised by lesbians and those raised by heterosexuals with respect to the factors that matter: self-esteem, anxiety, depression, behavioral problems, performance in social arenas (sports, school and friendships), use of psychological counseling, mothers’ and teachers’ reports of children’s hyperactivity, unsociability, emotion difficulty, or conduct difficulty.<sup>113</sup>

Not only is the consensus among the mainstream medical and child welfare organizations that children are equally well off with heterosexual and with gay or lesbian parents, but there is also a consensus that allowing those gay and lesbian parents to marry would benefit the children in those households. Those organizations see three principal benefits to the children: “First, . . . having a clearly defined legal relationship with both of their *de facto* parents, particularly for those families that lack the wherewithal to complete a second-parent adoption . . . . Second, . . . greater stability and security . . . [when] their parent’s relationship . . . is legally recognized through marriage . . . . Finally, . . . by reducing the stigma currently associated with those children’s

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111. Brief of American Psychological Ass’n, et al. as Amici Curiae, in support of the Plaintiffs-Appellants at 10-11, *Kerrigan v. Comm’r of Public Health*, S.C. 17716 (Conn. Supreme Ct. filed Jan. 31, 2007) [hereinafter *Kerrigan Child Welfare Br.*], available at [http://www.glad.org/marriage/Kerrigan-Mock/Amici%20Briefs/Child\\_Welfare\\_2.pdf](http://www.glad.org/marriage/Kerrigan-Mock/Amici%20Briefs/Child_Welfare_2.pdf).

112. *Kerrigan Child Welfare Br.*, *supra* note 111, at 11.

113. *Kerrigan Child Welfare Br.*, *supra* note 111, at 11 (setting forth relevant scientific information on parenting abilities as well as child well-being).

status.”<sup>114</sup>

This cursory legal history shows that matters once seen as commonsensical or natural are now viewed as discriminatory. The notion that one set of legal rules can be applied to gay people and a different set to everyone else is increasingly viewed as unconstitutional. This evolution sets the stage for the marriage cases.

### III. THE MARRIAGE CASES

As a central legal and cultural institution, it is impossible to end discrimination based on sexual orientation without addressing gay people's exclusion from marriage.

#### A. *The 1970s*

Same-sex couples brought the first marriage cases in the 1970s. Appellate courts in Minnesota, Kentucky, and Washington ruled against the same-sex couple plaintiffs.<sup>115</sup> Their rulings differed from present day adverse rulings more in tone than in substance. The principal rationale for rejecting those challenges remains today: that which you seek is not a marriage because marriage is a union of a man and a woman.<sup>116</sup> This a priori definitional defense is also circular because it never justifies the exclusion except by repeating it. The second rationale is that marriage exists for purposes related to biological procreation.<sup>117</sup> That argument now has several permutations which will be discussed below.

#### B. *Hawaii and Alaska*

Originally, same-sex couples did not bring challenges to marriage statutes because people were convinced they were unwinnable. That changed in 1993. Two years earlier, three couples went forward in Hawaii.<sup>118</sup> Their complaint

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114. Kerrigan Child Welfare Br., *supra* note 111, at 14-15.

115. See *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973) (rejecting constitutional claims for marriage of a same-sex couple); *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971) (holding same-sex marital restriction constitutionally permissible and appeal dismissed for lack of federal question); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974) (holding denial of marriage license required by state statute).

116. See *Jones*, 501 S.W.2d at 589 (citing Black's Law Dictionary as support that marriage is union of man and woman); *Baker*, 191 N.W.2d at 185-86 (concluding marriage is union of persons of opposite sex); *Singer*, 522 P.2d at 1191 (stating marriage exists for procreative purposes). Other cases have accepted the idea that marriage has a fixed meaning. See *Adams v. Howerton*, 486 F. Supp. 1119, 1122 (C.D. Cal. 1980) (explaining man not another man's spouse for purposes of federal immigration law), *aff'd*, 673 F.2d 1036 (9th Cir.); *Baker v. Vermont*, 744 A.2d 864, 869 (Vt. 1999) (discussing evidence of "legislative assumption" of marriage as union between man and woman).

117. See *Adams*, 486 F. Supp. at 1124 (stating society recognizes marriage for purposes of procreation); *Singer*, 522 P.2d at 1195. The *Singer* court noted that "[m]arriage exists as a protected legal institution primary because of societal values associated with propagation of the human race." *Singer*, 522 P.2d at 1195.

118. *Baehr v. Lewin*, 852 P.2d 44, 48-49 (Haw. 1993) (describing procedural history of case and detailing

was dismissed for failure to state a claim upon which relief could be granted.<sup>119</sup> Then, in May 1993, the Hawaii Supreme Court shocked nearly everyone by ruling that the district court should not have dismissed the plaintiffs' claim.<sup>120</sup> The court reasoned that the marriage statute discriminated based on sex, and the state's sex-based classification would have to be justified under a strict scrutiny standard.<sup>121</sup>

The Hawaii court's reasoning is analogous to the part of *Loving v. Virginia*<sup>122</sup> in which the U.S. Supreme Court condemned the equal protection violations effected by anti-miscegenation laws that limited an individual's choice of marital partner based on his or her own race.<sup>123</sup>

The first retort to this argument is that there is no discrimination because men and women are equally disadvantaged. This equal application defense was expressly rejected in *Loving*—racial discrimination still existed where both whites and persons of color were equally disabled from marrying each other. Critically, rather than comparing the experience of whites and persons of color *as groups*, the courts found that limiting an individual's choice of whom he or she could marry based on the *individuals'* races was racial discrimination forbidden by the Fourteenth Amendment.<sup>124</sup> As others have noted, by focusing

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principal constitutional claims). The plaintiffs in *Baehr* argued that Hawaii marriage statutes were unconstitutional as applied by the Department of Health in "refusing to issue a marriage license on the sole basis that the applicant couple is of the same sex." *Id.* at 49.

119. *Id.* at 48.

120. *Id.* at 68.

121. *Id.* at 60-61 (finding application of marriage laws regulate on basis of sex); *id.* at 67 (remanding for trial and application of strict scrutiny). The following illustrates the sex-discrimination claim. The claim is this: Linda wants to marry Gloria. Any man could marry Gloria. As a woman, Linda may not marry Gloria because she is not a man. But for Linda's sex, she could marry Gloria.

122. 388 U.S. 1 (1967).

123. *Id.* at 11-12.

124. *Id.* at 8 (rejecting notion that "equal application" of statute does not violate Fourteenth Amendment). The *Loving* Court noted that such "equal application of a statute . . . is [not] enough to remove the classification from the Fourteenth Amendment's proscription of invidious racial discrimination." *Id.* In this way, *Loving* followed *McLaughlin v. Florida*, in which the Supreme Court explicitly rejected its ruling in *Pace v. Alabama*, which had upheld a statute prohibiting adultery or fornication between a black person and a white person, with higher penalties than for same-race violations, because the "law applied equally to those to whom it was applicable." *McLaughlin v. Florida*, 379 U.S. 184, 189 (1964) (overruling *Pace v. Alabama*, 106 U.S. 583 (1883)). Addressing the state's reliance on an earlier U.S. Supreme Court case upholding a statute making it a crime for unmarried black and white couples to cohabit, the *McLaughlin* Court ruled that:

*Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in subsequent decisions of this Court . . . . This narrow view of the Equal Protection Clause was soon swept away . . . . Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation.

*McLaughlin*, 379 U.S. at 188-91. Accordingly, the *McLaughlin* Court struck down a statute that "treats the interracial couple made up of a white person and a Negro differently than it does any other couple." *Id.* at 188; see also *Perez v. Lippold*, 198 P.2d 17, 29 (Cal. 1948) (voiding anti-miscegenation law under the Fourteenth Amendment).

only on broad-based discrimination rather than individual impacts, the equal application defense would permit a state law to require that, upon divorce, “all female children must reside with their mother and all male children must reside with their father.”<sup>125</sup> Such rationale would also support a state law prohibiting a woman from holding a job traditionally held by a man, and vice versa, because such a law would facially apply equally to both sexes.<sup>126</sup>

The second rejoinder is to focus on the fact that *Loving* condemned the Virginia statute on equal protection grounds while noting the race restriction was “designed to maintain White Supremacy.”<sup>127</sup> Of course, the statute would have been struck as racially discriminatory even if it required individuals to marry outside their race to encourage racial harmony rather than for invidious purposes. The Supreme Court’s findings were that a racial classification existed, and, second, that it had to be (but could not be) justified. Application of the same methodology leads to a finding that a sex classification exists in the marriage restrictions. Moreover, under some state constitutions, sex discrimination is explicitly equivalent to race as a characteristic upon which discrimination is forbidden.<sup>128</sup> When sex is the characteristic limiting an individual’s opportunities, its use as a classification must be justified by the state regardless of whether benignly or invidiously motivated.<sup>129</sup>

Given the Hawaii ruling and a later Alaska trial court ruling finding that the denial of marriage in that state was both sex discrimination and a violation of the fundamental right to choose one’s life partner, the country then renewed a teach-in about gay people started during the AIDS epidemic.<sup>130</sup> This “teach in” included a trial in a Hawaii courtroom in which experts testified on the state’s childrearing justification for excluding same-sex couples from marriages in that state.<sup>131</sup> Ultimately, the court found there were no material differences between the parenting of gay people and non-gay people that would justify the ban on marriage for gay people.<sup>132</sup>

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125. *Andersen v. King County*, 138 P.3d 963, 1039 (Wash. 2006) (Bridge, J., dissenting).

126. *Id.*

127. *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *see also Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) (discussing rationale from *Loving*); *Andersen*, 138 P.3d at 989 (Wash. 2006) (rejecting plaintiff’s contention that sex-discrimination analogous to facts of *Loving*).

128. *Andersen*, 138 P.3d at 989.

129. *See Johnson v. California*, 543 U.S. 499, 506 (2005) (racial classifications receive close scrutiny even when they burden or benefit the races equally); *Hernandez*, 855 N.E.2d at 29-30 (Kaye, C.J., dissenting) (explaining still impermissible sex discrimination even though men and women both discriminated against); *Andersen*, 138 P.3d at 1039 (Bridge, J., dissenting) (arguing broadly interpreting of prohibition of sex-discrimination wrong analysis, focus is on individual).

130. *Brause v. Bur. of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at \*6 (Alaska Super. Feb. 27, 1998) (holding state’s marriage statute unconstitutional). *See generally* WILLIAM B. RUBENSTEIN, *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* xxiv (West Publishing Co., 2d ed. 1997) (discussing family rights movement spurred by AIDS epidemic).

131. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at \*4, \*10 (Haw. Cir. Ct. Dec. 3, 1996) (describing expert witnesses’ testimony).

132. *Id.* at 17-18 (discussing normality of children raised by gay and lesbian parents). Findings included:

A “Campaign to Protect Marriage,” orchestrated by anti-gay groups and announced publicly in February 1996, countered these developments.<sup>133</sup> With this began “a well funded effort to go state to state and to pressure the federal government into enacting anti-gay, anti-family, anti-marriage measures . . . ,” including laws to deny marriage for same-sex couples and deny legal respect for such marriages when licensed elsewhere.<sup>134</sup> The campaign scored tremendous successes both at the federal and state levels.<sup>135</sup>

In 1998, both Hawaii and Alaska amended their constitutions to moot out the

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The evidence presented by Plaintiffs and Defendant establishes that the single most important factor in the development of a happy, healthy and well-adjusted child is the nurturing relationship between parent and child . . . . The sexual orientation of parents is not in and of itself an indicator of the overall adjustment and development of children . . . . Gay and lesbian parents and same-sex couples have the potential to raise children that are happy, healthy and well-adjusted . . . . Gay and lesbian parents and same-sex couples can provide children with a nurturing relationship and a nurturing environment which is conducive to the development of happy, healthy and well-adjusted children . . . . Gay and lesbian parents and same-sex couples can be as fit and loving parents, as non-gay men and women and different-sex couples . . . . While children of gay and lesbian parents and same-sex couples may experience symptoms of stress and other issues related to their non-traditional family structure, the available scientific data, studies and clinical experience presented at trial suggests that children of gay and lesbian parents and same-sex couples tend to adjust and do develop in a normal fashion . . . .

*Id.*

133. EVAN WOLFSON, MARRIAGE MATTERS 34 (2004).

134. *Id.*

135. As to federal law, *see supra* notes 81-85 and accompanying text. As to state laws, by the end of 2003 thirty-eight states had passed marriage limitation statutes and four ratified constitutional amendments. ALASKA CONST. art. I, § 25; HAW. CONST. art. I, § 23; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; ALA. CODE § 30-1-19 (2006); ALASKA STAT. § 25.05.013 (2006); ARIZ. REV. STAT. ANN. § 25-101(C) (2007); ARK. CODE ANN. § 9-11-208 (2002); CAL. FAM. CODE § 308.5 (West 2006); COLO. REV. STAT. § 14-2-104 (2006); CONN. GEN. STAT. ANN. § 45A-727A (West 2004); DEL. CODE ANN. tit. 13, § 101 (2004); FLA. STAT. § 741.212 (2005); GA. CODE ANN. § 19-3-3.1 (2004); IDAHO CODE § 32-209 (2006); 750 ILL. COMP. STAT. 5/212 (1999); IND. CODE § 31-11-1-1 (1998); IOWA CODE § 595.2 (2001); KAN. STAT. ANN. § 23-101(A) (1995); KY. REV. STAT. ANN. § 402.005 (West 1999); LA. CIV. CODE ANN. art. 89 (West Supp. 2007); ME. REV. STAT. ANN. tit. 19-A, § 701 (1997); MICH. COMP. LAWS ANN. § 551.1 (West 2005); MINN. STAT. § 517.03 (2006); MISS. CODE ANN. § 93-1-1 (1999); MO. REV. STAT. § 451.022 (2003); MONT. CODE ANN. § 40-1-401 (2005); N.H. REV. STAT. ANN. §§ 457:1, 457:2 (2004); N.C. GEN. STAT. § 51-1.2 (2005); N.D. CENT. CODE § 14-03-01 (2004); OKLA. STAT. tit. 43, § 3.1 (2001); 23 PA. CONS. STAT. ANN. § 1704 (West 2001); S.C. CODE ANN. § 20-1-15 (2007); S.D. CODIFIED LAWS § 25-1-38 (1999); TENN. CODE ANN. § 36-3-113 (2005); TEX. FAM. CODE ANN. § 2.001 (Vernon 2006); UTAH CODE ANN. § 30-1-2 (1991); VT. STAT. ANN. tit. 15, § 8 (2002); VA. CODE ANN. § 20-45.2 (2004); WASH. REV. CODE § 26.04.020 (2005); W.VA. CODE § 48-2-603 (2004); WYO. STAT. ANN. § 20-1-101 (2005). Since that time, two additional states have enacted marriage limitation or non-recognition statutes, N.H. REV. STAT. ANN. § 457:3 (2004), OHIO REV. CODE ANN. § 3101.01 (2002), and another twenty-three states have ratified constitutional amendments. ALA. CONST. art. I, § 36.03; ARK. CONST. amend. 83, § 1; COLO. CONST. art. II, § 31; GA. CONST. art. I, § IV; IDAHO CONST. art. III, § 28; KAN. CONST. art. XV, § 16; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. 14, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5A; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13.

lawsuits in those states.<sup>136</sup> The trial court's ruling for the plaintiffs in Hawaii was stayed pending appeal, and then the higher court effectively stayed its decision through inaction until after the November 1998 amendment vote.<sup>137</sup> After the vote the court dismissed the case.<sup>138</sup>

### C. Vermont

After the Hawaii and Alaska legislatures ratified constitutional amendments in November 1998, the Vermont Supreme Court heard oral argument in *Baker v. State*.<sup>139</sup> This case was also premised on the state constitutional guarantees of liberty and equality. In December 1999, framing the issue solely as one in which “denying them access to a civil marriage license, the law effectively excludes them from a broad array of legal benefits and protections incident to the marital relation . . . ,” the Court unanimously agreed that it was unconstitutional to deny the three plaintiff couples the state-based rights and protections of marriage.<sup>140</sup> The court allowed the legislature to decide how to remedy the problem—either by creating a parallel system for gay people, or by including gay people within the marriage statutes.<sup>141</sup>

The court's ruling did not make either party entirely happy. As one of the counsel for the plaintiffs, it was hard to understand how legal equality can mean different things for different people. How could the dignity and respect marriage conveys for families be severed from the state-based rights and protections associated with it without simply repackaging the stigma of exclusion effectuated by denying access to marriage?<sup>142</sup> The opponents of marriage for same-sex couples were unhappy for any number of reasons, primarily because they did not want the law to accord any respect to same-sex

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136. ALASKA CONST. art. I, § 25 (declaring marriage only valid if between man and woman); HAW. CONST. art. I, § 23 (stating legislature may define marriage narrowly and exclude same-sex couples).

137. Baehr v. Miike, Civ. No. 20371 slip op. at 5-8 (Dec. 9, 1999) (taking notice of constitutional amendment).

138. *Id.* (dismissing underlying case in light of amendment vote); see also Mary Becker, *Family Law in the Secular State and Restrictions on Same-Sex Marriage: Two Are Better Than One* 2001 U. ILL. L. REV. 1, 5 (2001) (describing history of Hawaii marriage case).

139. 744 A.2d 864 (1999). In *Baker v. Vermont*, GLAD litigated a marriage case with two Vermont attorneys, Beth Robinson and Susan M. Murray of Langrock, Sperry & Wool.

140. *Baker*, 744 A.2d at 867-70.

141. *Id.* at 867 (determining legislature's duty to modify marriage statute or create parallel system).

142. See Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate But (Un)Equal*, 25 VT. L. REV. 113, 147 (2000) (contending Vermont provides same-sex couples “pale shadow” of rights/protections granted opposite-sex couples); Michael Mello, *For Today, I'm Gay: The Unfinished Battle for Same-Sex Marriage in Vermont*, 25 VT. L. REV. 149, 156 (2000) (arguing Vermont refused to grant same-sex couples full marital rights due to “political reality”); Beth Robinson, *The Road to Inclusion for Same-Sex Couples: Lessons from Vermont*, 11 SETON HALL CONST. L.J. 237, 248-50 (2001) (arguing creation of civil unions instead of allowing same-sex couples to marry “profoundly disappointing”). But see Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15, 20 (2000) (arguing civil unions should be accepted by gay community as alternative to marriage).

couples.<sup>143</sup> The outcome in Vermont is well known. In 2000, the legislature passed and then Governor Dean signed the “Civil Unions Law” providing that same-sex couples who join in civil union would have the same rights and responsibilities as married couples in Vermont under state law.<sup>144</sup>

Proponents of marriage equality believed making the civil union compromise was a good idea at that time and in that place because it would show how same-sex couples could have a marital status—including denomination as spouses—and all would still be well in the world. Advocates also hoped that, over time, civil unions would be respected like marriages by other states.<sup>145</sup>

There has been enormous value in civil unions, primarily for those who have joined in civil union and now have legal protections that are entirely off limits to most same-sex couples in the country.<sup>146</sup> Civil unions are not, however, the same thing as marriage, and that is precisely why they are viewed as an acceptable political compromise: they alleviate discrimination against same-sex couples while also perpetuating it via the exclusion from marriage. A civil union nods to the equality principle, but fails to reach it. Rather than expressly including lesbian and gay couples within the existing legal and social institution of marriage, civil unions are separate laws and a separate legal institution for same-sex couples alone. By denying access to the institution of marriage, civil union laws deny access to a profound relationship that forms a

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143. See David Orgon Coolidge & William C. Duncan, *Beyond Baker: The Case for a Vermont Marriage Amendment*, 25 VT. L. REV. 61, 80-90 (2000) (viewing civil union law as redefinition of marriage with deleterious consequences). The first proposed amendment to the United States Constitution which would deny marriage and other relationship protections was introduced after Vermont’s passage of the civil union law. See H.R.J. RES. 93, 107th Cong. (2002); Alan Cooperman, *Little Consensus on Marriage Amendment: Even Authors Disagree on the Meaning of Its Text*, WASH. POST, Feb. 14, 2004, at A1 (discussing federal amendment introduced in the House of Representatives in 2002).

144. 15 VT. STAT. ANN. tit. 15, §§ 1201-1207 (2006); 18 VT. STAT. ANN. tit. 18, §§ 5160-5169 (2006) (codifying Vermont’s civil union law).

145. See generally Mary L. Bonauto, *The Freedom to Marry for Same-Sex Couples in the United States of America*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 177 (Robert Wintemute and Mads Andenaes eds., 2001) (explaining why civil unions should be respected by other states).

146. See Vermont Department of Health, Place of Residence of Groom & Bride (Table G-1), <http://healthvermont.gov/research/stats/2003/G01.HTM> (last visited on Apr. 20, 2007). As of 2003, 282 (approximately ten percent) of 2,794 individuals who joined their partners in a civil union were Vermont residents while the balance are from other states or countries. *Id.* Some gay people appreciate civil unions because they do emphasize a difference between gay and non-gay people. See David L. Chambers, *The Baker Case, Civil Unions, and the Recognition of our Common Humanity: An Introduction and a Speculation*, 25 VT. L. REV. 5, 12-13 (2000). Civil unions are now also available in Connecticut and New Jersey. CONN. GEN. STAT. §§ 46b-38pp (2006); N.J. STAT. ANN. § 37:1-28 (2006). A civil union law becomes effective on Jan. 1, 2008 in New Hampshire. Tom Fahey, *Civil Unions OK’d*, UNION LEADER, Apr. 27, 2007, <http://www.unionleader.com/article.aspx?headline=Civil+unions+OK'd&articleId=bb28b6f1-4af2-498a-906f-46e97dad08de>. Oregon is also expected to enact a “domestic partner” law that is legally equivalent to civil unions. See *Domestic Partnership Bill Headed for Final Vote*, OREGONLIVE.COM, Apr. 25, 2007, [http://blog.oregonlive.com/politics/2007/04/domestic\\_partnership\\_bill\\_head\\_1.html](http://blog.oregonlive.com/politics/2007/04/domestic_partnership_bill_head_1.html) (predicting passage of bill).

critical part of self-definition, expresses deep commitment and fidelity to another person, and participation in an institution that our culture understands as a fundamental and civil right. As the philosopher Ronald Dworkin noted in regard to civil unions:

Such a step reduces the discrimination, but falls far short of eliminating it. The institution of marriage is unique: it is a distinct mode of association and commitment with long traditions of historical, social, and personal meaning . . . . We can no more now create an alternate mode of commitment carrying a parallel intensity of meaning than we can now create a substitute for poetry or for love. The status of marriage is therefore a social resource of irreplaceable value to those to whom it is offered . . . .<sup>147</sup>

While advocates must take steps to eliminate the harsh legal void imposed on same-sex couples and their children under most states' laws, it is also essential to be clear that such a step is a midpoint in the journey to equality under law and not an endpoint.

#### D. Massachusetts

GLAD filed *Goodridge v. Department of Public Health* in Massachusetts in April 2001.<sup>148</sup> Seven plaintiff couples joined the suit from across the state who were in relationships between four and thirty years, and who ranged from their mid-30s to their 60s.<sup>149</sup> Their claims were premised primarily on Article 1 of the Massachusetts Declaration of Rights: "All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."<sup>150</sup> Stated simply, the equality claim was that qualified gay and lesbian couples (i.e., those who meet the age, consanguinity, and marital status requirements) should no longer be denied access to the governmental institution of marriage.<sup>151</sup> The liberty claim in *Goodridge* was that same-sex couples should be free to make this important and defining personal choice on the same terms as applied to others.<sup>152</sup> In other words, the plaintiffs pursued claims based on the fundamental right to marry, which can only be limited with compelling and narrowly tailored state

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147. Ronald Dworkin, *Three Questions for America*, NEW YORK REVIEW OF BOOKS, Sept. 21, 2006, at 24, available at <http://www.nybooks.com/articles/19271> (explaining tradition of marriage). See generally RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? (2006).

148. *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

149. *Id.* at 949. This author has already written at length about the *Goodridge* case. See Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1 (2005) (hereafter Bonauto, *Context*).

150. MASS. CONST. Pt. 1, art. I.

151. *Goodridge*, 798 N.E.2d at 953.

152. *Id.*

justifications.<sup>153</sup> On the equal protection side, GLAD also claimed the existing marriage regime impermissibly restricted marriage on the suspect bases of sex and sexual orientation, and that in any event there was no rational basis for denying marriage to the plaintiffs.<sup>154</sup>

Many are familiar with the result. On November 18, 2003, the Massachusetts Supreme Judicial Court ruled that the marriage statutes were unconstitutional on a rational basis theory.<sup>155</sup> The court reformed the common-law definition of marriage to make the marriage statutes constitutional.<sup>156</sup> The first paragraph of the decision sums up the majority opinion:

Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. In return it imposes weighty legal, financial, and social obligations. The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may not. The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens. In reaching our conclusion we have given full deference to the arguments made by the Commonwealth. But it has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples.<sup>157</sup>

The decision was attacked immediately.<sup>158</sup> As to those attacks, the remarks of former Suffolk University Law School Donahue lecturer, the Honorable Rosemary Barkett of the Eleventh Circuit Court of Appeals are relevant. In her 2005 remarks, she bemoaned the “tyranny of labels” like “judicial activism” by noting that the label is often used to express disagreement “in the stead of any explanation, reasoned or otherwise, for disagreeing with a particular decision.”<sup>159</sup>

Judge Barkett argues that “judicial accountability takes the form of considering and explaining every assumption or premise in a judicial opinion and demonstrating how these premises lead to legal conclusions.”<sup>160</sup> The *Goodridge* majority opinion is an accountable opinion in all these ways. One of the central tenets of the majority opinion is that there is no exception to our

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153. Brief of the Plaintiffs-Appellants, at 38-48, *Goodridge v. Dep't of Pub. Health*, 798 N.E. 941 (Mass. Mar. 4, 2003) (No. SJC-08860).

154. *Id.* at 48-94.

155. *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003).

156. *Id.* at 969 (reforming common-law definition of marriage). The Supreme Judicial Court defined marriage as “the voluntary union of two persons as spouses, to the exclusion of all others.” *Id.*

157. *Id.* at 948.

158. See Bonauto, *Context, supra* note 149, at 45-46.

159. Barkett, *supra* note 99, at 751.

160. Barkett, *supra* note 99, at 751

laws and constitutional principles based on sexual orientation.<sup>161</sup> Citing the U.S. Supreme Court, the Supreme Judicial Court stated,

We are mindful that our decision marks a change in the history of our marriage law. Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. Neither view answers the question before us. Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach. “Our obligation is to define the liberty of all, not to mandate our own moral code.”<sup>162</sup>

### *E. Rational Basis Review in Goodridge*

The *Goodridge* decision was based upon the premise that denying same-sex couples the right to marry failed rational basis review for both equal protection and due process under the state constitution. Rather than rule on many of the claims requiring strict judicial scrutiny, the court concluded it did not need to reach those issues because, as in *Romer*, the discrimination at issue failed to satisfy even rational basis review.<sup>163</sup>

As the *Goodridge* court articulated, rational basis review under the Massachusetts Constitution demands application of logic—another aspect of judicial reasoning that Judge Barkett notes is lacking in cases involving gay people.<sup>164</sup> In Massachusetts,

[f]or due process claims, rational basis analysis requires that statutes “bear a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare.” For equal protection challenges, the rational basis test requires that “an impartial lawmaker could logically believe that the classification would serve a legitimate public interest that transcends the harm to the members of the disadvantaged class.”<sup>165</sup>

In other words, does the challenged law or classification genuinely advance a legitimate state interest? Rather than quibble with the legitimacy of any of the Commonwealth’s asserted interests, the Court assumed procreation, child rearing, and conserving resources were all legitimate interests.<sup>166</sup> It focused

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161. *Goodridge v. Dep’t. of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

162. *Id.* (citing *Lawrence v. Texas*, 539 U.S. 558, 559 (2003)).

163. *Id.* at 961 n.21; *see also Romer v. Evans*, 517 U.S. 620, 631-32 (1996) (holding Amendment fails rational review).

164. Barkett, *supra* note 99, at 751-57 (introducing “syllogistic logic” as component to decisions and discussing *Bowers*, *Lofton*, and *Williams*); *see also Williams v. Att’y Gen. of Ala.*, 378 F.3d 1232 (11th Cir. 2004); *Lofton v. Sec’y. of Dep’t. of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004).

165. *Goodridge*, 798 N.E.2d at 960 (internal citations and quotations omitted).

166. *Id.* at 961-64 (describing state’s proposed justifications for statute).

instead on the second prong of the analysis, that is, whether excluding gay people from marriage reasonably advanced or furthered any of the state's legitimate interests.<sup>167</sup> This examination required nothing more than application of basic logic and led to the conclusion that the state interests advanced on the one hand, and the exclusion only of same-sex couples on the other hand, were too discontinuous and disjointed to satisfy the rational relationship test.<sup>168</sup>

### 1. Procreation

The Commonwealth of Massachusetts asserted that civil marriage exists in order to facilitate and regulate procreation.<sup>169</sup> The court demonstrated the legal history of what makes a valid marriage has not involved linking the two.<sup>170</sup> As written and interpreted, the statutes required no connection between the classification and the proffered interest.<sup>171</sup> Considering the text of the marriage law and centuries of case law under it, the court concluded there exists "no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus. Fertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married."<sup>172</sup>

Beyond the marriage licensing laws, the court also examined other state laws and the logic of an asserted link between marriage eligibility and bearing children by biological reproduction.<sup>173</sup> State laws contradicted the connection as well as the very premise of the asserted goal.<sup>174</sup> Referring to the state's adoption laws and alternative reproduction statutes, the court noted, "the Commonwealth affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual."<sup>175</sup> Given that the Commonwealth's litigation

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167. *Id.* (setting forth state's argument and explaining why rationale not furthered by statute).

168. *Id.* at 961.

169. *See* Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003).

170. *Id.* at 961-62 (pointing out flaws in state's reason of procreation).

171. *Id.*

172. *Id.* at 961 (internal citations omitted). The same principle applies in federal equal protection analysis. *See* Hooper v. Bernalillo County Assessor, 472 U.S. 612, 622 (1985) (striking down state statute under rational basis review). The *Hooper* Court reasoned the statute "[was] not written to require any connection between [the classification] and [the proffered interest]." *Id.*

173. *Goodridge*, 798 N.E.2d at 961 n.22 (analyzing interpretations of divorce and annulment statutes relating to fertility).

174. *Id.* (listing case law countering state's assertion of procreation as valid rationale behind statute). As the U.S. Supreme Court explained "[e]ven the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993).

175. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003) (setting out and citing statutes

position was so at odds with the state statutory and regulatory framework, the court concluded that procreation was not a rational basis on which to exclude same-sex couples under the marriage licensing laws.<sup>176</sup>

## 2. *Optimal Child Rearing*

Endorsing the government's interest in promoting child welfare, the court also examined the claimed interest of denying marriage to same-sex couples in order to encourage heterosexual parents to raise children. Reviewing the landscape of Massachusetts' laws regarding children, the court found the exclusion of same-sex couples from marriage did not rationally further that interest and, in fact, harmed children of same-sex couples.<sup>177</sup> The Court presented the issue as follows:

The department's first stated rationale, equating marriage with unassisted heterosexual procreation, shades imperceptibly into its second: that confining marriage to opposite-sex couples ensures that children are raised in the "optimal" setting. Protecting the welfare of children is a paramount State policy. Restricting marriage to opposite-sex couples, however, cannot plausibly further this policy.<sup>178</sup>

The court methodically examined this assertion and concluded that the Commonwealth's argument that a marriage ban was related to creating an optimal setting for children was contradicted by the legal framework of family-supportive statutes, policies, and cases.<sup>179</sup> The family supportive framework extended to areas relating to adoption, paternity of children, grandparent visitation, and de facto parenting, and condemned distinctions made among parents based on sexual orientation, marital status, and gender.<sup>180</sup> This consistent body of law belied the argument that the state has an interest in favoring heterosexual parents over gay and lesbian parents.

Second, the assertion that denying same-sex couples the right to marry would further the purpose of creating "optimal" family units of biologically procreating male-female couples was simply speculative. According to the

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and cases at odds with state's position on procreation).

176. *Id.* at 961-62. The Supreme Judicial Court also had the assistance of an amici curiae brief by two preeminent family law scholars and practitioners in Massachusetts, one of whom is Suffolk University Law School Professor Charles Kindregan. *See generally* Brief for Monroe Inker and Charles Kindregan as Amici Curiae, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (No. SJC 08860).

177. *Goodridge*, 798 N.E.2d at 962-64 (noting children of opposite-sex couples not helped by preventing marriage of same-sex couples). The Court rejected the Commonwealth's arguments on child rearing *without* addressing the social science briefs and other information offered about the welfare of children growing up in lesbian, gay, and bisexual families. Two of the dissents explored the debate about social science results. *Id.* at 979-80 (Sosman, J., dissenting) (commenting on absence of scientific data from majority opinion); *id.* at 998-1000 (Cordy, J., dissenting) (discussing research relating to negative impacts on children born out of wedlock).

178. *Id.* at 962.

179. *Id.* at 962-63.

180. *See id.* at 962.

court, there was “no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children.”<sup>181</sup> Moreover, the Court added,

Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a “stable family structure in which children will be reared, educated and socialized” . . . . It cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents’ sexual orientation.<sup>182</sup>

Accordingly, the court in *Goodridge* concluded that the exclusion of same-sex couples from marriage did not rationally further any interest in encouraging children to be raised by heterosexual parents.<sup>183</sup>

Part of the integrity of the *Goodridge* decision is that it applies the reasoning we expect of courts—the rigors of basic logic. The other reason, as evident in the first paragraph of its opinion, is that it courageously applied that logic to acknowledge the citizenship and humanity of gay people.<sup>184</sup>

#### IV. POST-GOODRIDGE CASES

Currently, there are a handful of marriage cases pending in different states.<sup>185</sup> The New Jersey Supreme Court decided *Lewis v. Harris*<sup>186</sup> in October 2006.<sup>187</sup> The Maryland and Connecticut high courts, as well as the Iowa trial court, have cases pending before them as well.<sup>188</sup>

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181. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 963 (Mass. 2003).

182. *Id.* at 964.

183. *Id.* at 962-64 (holding rational basis not satisfied by state’s second reason of child rearing); *see also* *Baker v. State*, 744 A.2d 864, 884 (1999) (noting “logical disjunction” between law harming children and rationale of helping children).

184. *See Goodridge*, 798 N.E.2d at 948.

185. The California Supreme Court will likely reach the issue in 2007. *In re Marriage Cases*, 49 Cal.Rptr. 3d 675 (Cal. Ct. App. 2006), *modified*, 2006 Cal. App. Lexis 1746 (Nov. 6, 2006), *superseded by grant of review*, 149 P.3d 737 (2006).

186. 908 A.2d 196 (N.J. 2006).

187. *Id.* In a 4-3 ruling, that court held that same-sex couples do not have a fundamental right to marry. *Id.* at 211. The court did conclude, however, that equal protection principles require “the State must provide to committed same-sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual married couples.” *Id.* at 224. The state enacted a civil union law, and the issue will return to the legislature for a consideration of equal marriage rights. *See* Julie Shaw, *Across N.J., gays register for civil unions*, PHILADELPHIA DAILY NEWS, Feb. 20, 2007, available at <http://www.philly.com/mld/dailynews/16737903.htm> (couples intend to press for marriage); Elise Young, *Could real same-sex marriage be next?*, THE RECORD, Dec. 15, 2006, available at <http://www.northjersey.com/page.php?qstr=eXJpcnk3ZjczN2Y3dnFIZUVFeXkzJmZnYmVsN2Y3dnFIZUVFeXk3M3NzIyJnlyXJ5N2Y3MTdmN3ZxZWVFRXl5Mg> (recognizing the need to address marriage).

188. *Kerrigan v. Comm’r of Pub. Health*, S.C. 17716 (Conn. filed Nov. 22, 2006); *Conaway v. Deane & Polyak*, No. 44 (Md. oral arg. Dec. 4, 2006); *Varnum v. Brien*, No. CV5965 (Iowa Dist. Ct. Polk Cty. filed Dec. 13, 2005).

Two high court cases resulting in losses for the same-sex couples seeking marriage deserve analysis: *Hernandez v. Robles*,<sup>189</sup> decided by the New York Court of Appeals in a 4-2 decision, and *Andersen v. King County*,<sup>190</sup> decided by the Washington Supreme Court in a 5-4 decision.<sup>191</sup>

By way of background, both the New York and Washington cases reached and rejected arguments that were raised but not decided in *Goodridge*—such as the denial of a fundamental right to marry and sex and sexual orientation discrimination. Both courts applied rational basis review and determined the states had rational bases to exclude same-sex couples from marriage.<sup>192</sup>

### A. Fundamental Rights

The *Andersen* opinion sets out the familiar standard used for fundamental rights issues: for a right to be fundamental, it must be “objectively ‘deeply rooted in this Nation’s history and tradition’ . . . and ‘implicit in our concept of ordered liberty’ such that ‘neither liberty nor justice would exist if they were sacrificed.’”<sup>193</sup> Our Nation has considered marriage a fundamental right for a long time. For example, in *Loving*, the U.S. Supreme Court struck down a state ban on interracial marriages, unequivocally declaring that the right to marry is fundamental under the Due Process Clause of the Fourteenth Amendment.<sup>194</sup> Referring to the Due Process Clause, the Court said, “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”<sup>195</sup>

Eleven years later in *Zablocki v. Redhail*,<sup>196</sup> the Court considered a Wisconsin statute that barred from marrying certain parents who were delinquent in their child support payments. The Supreme Court removed any doubt that an independent fundamental right to marriage exists under the federal Constitution, stating that *Loving* “could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause.”<sup>197</sup> But the Court went on to hold that the laws

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189. 855 N.E.2d 1 (N.Y. 2006).

190. 138 P.3d 963 (Wash. 2006).

191. *Id.* The court was fractured. The plurality opinion authored by Justice Madsen was joined by two others. Justice Johnson wrote for himself and one other Justice concurring in the judgment only. A total of four justices dissented, with Justice Fairhurst writing the lead dissent joined by all the other dissenters, and Justices Bridge and Chambers also wrote opinions concurring in dissent.

192. *See infra* note 234.

193. *Andersen*, 138 P.3d at 976 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)); *see also Hernandez*, 855 N.E.2d at 9-10 (explaining what constitutes fundamental right for Due Process claim).

194. *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (striking ban); *id.* at 11-12 (discussing both equal protection and fundamental rights holdings).

195. *Id.* at 12 (holding marriage fundamental right).

196. 434 U.S. 374 (1978).

197. *Id.* at 383.

“arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry . . . .”<sup>198</sup> The Court further stated that “[a]lthough *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals.”<sup>199</sup> Within another decade, the U.S. Supreme Court decided *Turner v. Safley*,<sup>200</sup> ruling that the right to marry applies to prisoners even though inmates’ constitutional rights may be compromised by legitimate penological objectives.<sup>201</sup> On the rational basis review applicable in the prison context, the Court invalidated on its face a Missouri regulation banning nearly all inmate marriages.<sup>202</sup> In ruling that the right to marry applies to prison inmates, the Court emphasized that marriages are “expressions of emotional support and public commitment” and these attributes are “an important and significant aspect of the marital relationship” for inmates just as for others.<sup>203</sup> In addition, the Court pointed to the “spiritual significance” of marriage for many individuals, the expectation of intimacy upon parole and release that informs many inmate marriages, and the fact that marital status is often a “precondition to the receipt of government benefits.”<sup>204</sup>

It is evident against this backdrop that marriage is a fundamental right. The *Lawrence* Court also recently admonished that the liberties enjoyed under the Due Process Clause belong to all people *including* gay people:

The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:

“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state.”

Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.<sup>205</sup>

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198. *Id.*

199. *Id.* at 384.

200. 482 U.S. 78 (1987).

201. *Id.* at 95-96.

202. *Id.* (holding right to marry applies to prisoners).

203. *Id.* (explaining rationale behind applying marriage rights to prison inmates).

204. *Turner*, 482 U.S. at 95-96.

205. *Lawrence v. Texas*, 539 U.S. 558, 573-74 (2003) (internal citations omitted).

While *Lawrence* was not a marriage case, it reinforced that liberties, once identified, are liberties for all.<sup>206</sup>

Both the *Hernandez* and *Andersen* opinions reframe the generally applicable right to marry as the *right to same-sex marriage*.<sup>207</sup> Justice Madsen of the Supreme Court of Washington states that “there is no history and tradition of same-sex marriage in this country” or in the state.<sup>208</sup> Of course, she is correct. Justice Smith in *Hernandez* also correctly states “[t]he right to marry someone of the same sex . . . is not ‘deeply rooted’; it has not even been asserted until relatively recent times.”<sup>209</sup> This has not been the methodology in the past. *Loving* did not conclude marriage was only essential to the happiness of interracial couples.<sup>210</sup> Nor did the Court in *Zablocki* calibrate its holding to support only the right of child support debtors to marry.<sup>211</sup> Further, the *Turner* Court did not restrict its holding to the right of incarcerated prisoners to marry.<sup>212</sup> In each of these cases, the right was applicable and the legal question was whether the states had advanced adequate reasons for interfering with a basic right of the individual. In each case, the court answered “no.”<sup>213</sup> As the NAACP-LDEF argued in *Hernandez*, despite the different historical experiences of African-Americans and gays and lesbians, “[t]he legal questions [in *Hernandez*] and in *Loving* are analogous” because both improperly restrict an individual’s right to marry the person of his or her choice.<sup>214</sup>

Chief Justice Kaye, dissenting in *Hernandez*, pithily explains why those correct statements improperly frame and then ignore the constitutional question.

[F]undamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights.

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206. *Id.* at 578 (noting rights extending equally). The opinion also stated the obvious, i.e., that it was not considering “whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” *Id.*

207. *Hernandez v. Robles*, 855 N.E.2d 1, 9 (N.Y. 2006) (determining no right to same-sex marriage); *Andersen v. King County*, 138 P.3d 963, 978 (Wash. 2006) (indicating no “tradition of same-sex marriage” in the state). This stratagem is hardly novel. See *Standhart v. Superior Court*, 77 P.3d 451, 465 (Ariz. Ct. App. 2003) (casting right as right to same-sex marriage); *Dean v. Dist. of Columbia*, 653 A.2d 307, 331 (D.C. 1995) (explaining fundamental right to marry does not include same-sex marriage); *Baehr v. Lewin*, 852 P.2d 44, 47 (Haw. 1993) (concluding right to same-sex marriage not fundamental because no tradition).

208. *Andersen*, 138 P.3d at 977.

209. *Hernandez*, 855 N.E.2d at 9.

210. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (concluding “freedom to marry” recognized as “vital personal rights” necessary for pursuit of happiness).

211. *Zablocki v. Redhail*, 434 U.S. 374, 388-90 (1978).

212. *Turner v. Safley*, 482 U.S. 78, 95 (1987) (concluding *Zablocki* applicable to prison inmates because the right to marry is fundamental).

213. See *Turner*, 482 U.S. at 91 (striking down statute because failed rational review analysis); *Zablocki*, 434 U.S. at 390-91 (holding statute constitutionally unjustified); *Loving*, 388 U.S. at 12 (holding Equal Protection Clause violated by restricting right to marry based on race).

214. *Hernandez v. Robles*, 855 N.E.2d 1, 25-26 (N.Y. 2006) (Kaye, C.J., dissenting) (citing Brief of NAACP Legal Defense and Education Fund).

Indeed, in recasting plaintiffs' invocation of their fundamental right to marry as a request for recognition of a "new" right to same-sex marriage, the Court misapprehends the nature of the liberty interest at stake. In *Lawrence v. Texas*, the Supreme Court warned against such error.

*Lawrence* overruled *Bowers v. Hardwick*, which had upheld a Georgia statute criminalizing sodomy. In so doing, the *Lawrence* court criticized *Bowers* for framing the issue presented too narrowly . . . . *Lawrence* explained that *Bowers* purported to analyze-erroneously-whether the Constitution conferred a "fundamental right upon homosexuals to engage in sodomy." This was, however, the wrong question. The fundamental right at issue, properly framed, was the right to engage in private consensual sexual conduct—a right that applied to both homosexuals and heterosexuals alike . . . . The same failure is evident here. An asserted liberty interest is not to be characterized so narrowly as to make inevitable the conclusion that the claimed right could not be fundamental because historically it has been denied to those who now seek to exercise it . . . .

Simply put, fundamental rights are fundamental rights. They are not defined in terms of who is entitled to exercise them.<sup>215</sup>

Beyond reframing the analysis, the *Andersen* majority also contests the general applicability of the fundamental right to marry to same-sex couples by stating that the right to marry is inextricably linked to procreation.<sup>216</sup> The court asserts that *Loving*, *Zablocki*, and *Skinner v. Oklahoma*<sup>217</sup> tie the right to procreation and the survival of the human race.<sup>218</sup> *Skinner*, a case invalidating forced sterilization of prison inmates, stated in dictum, "[m]arriage and procreation are fundamental to the very existence and survival of the race."<sup>219</sup> *Loving* concludes marriage is "fundamental to our very existence . . . ."<sup>220</sup> While *Zablocki* claims "[I]f [plaintiff]'s right to procreate means anything at all, it must imply some right to enter the only relationship in which the State . . . allows sexual relations legally to take place."<sup>221</sup>

These isolated quotations do not support the claim that the fundamental right to marry is predicated on the possibility of heterosexual procreation. Further, these same quotations do not justify shrinking the "freedom to marry" of all

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215. *Id.* at 23-24 (internal citations omitted). Chief Justice Kaye stated in part in her dissent, "[t]o define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it has never been accessible, is conclusory and bypasses the core question [courts] are asked to decide." *Id.* at 26 (quoting *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 972-73 (Mass. 2003) (Greaney, J., concurring)).

216. *Andersen v. King County*, 138 P.3d 963, 990 (Wash. 2006).

217. 316 U.S. 535 (1942).

218. *Andersen*, 138 P.3d at 978.

219. *Skinner*, 316 U.S. at 541.

220. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (quoting *Skinner*, 316 U.S. at 541) (acknowledging importance of marriage).

221. *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

individuals into a right available only for opposite-sex couples.<sup>222</sup> As to *Skinner*, an explicit reference to an individual's separate right to "procreation" should not be surprising in a forced sterilization case. An individual's rights to choose whether to procreate and to choose whether to marry are each fundamental rights and neither is a predicate for the other. As to procreation, it is settled law that it is within the fundamental privacy rights of the individual, whether married or not, to choose whether or not to have a child.<sup>223</sup> Any link that may have existed between marriage and procreation was severed by the U.S. Supreme Court's ruling in *Griswold v. Connecticut*,<sup>224</sup> which held that married couples enjoy a constitutionally guaranteed right to avoid procreation.<sup>225</sup> The Supreme Court in *Griswold* defended marriage as a meaningful private relationship *against* the State of Connecticut's attempt to promote procreation by banning the use of contraception.<sup>226</sup> While *Griswold* clarified that marriage is fundamental without regard to procreation, *Eisenstadt v. Baird*<sup>227</sup> clarified that procreation is legally unconnected to marriage. Striking a Massachusetts statute barring contraceptive use by unmarried persons, the Supreme Court declared "it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>228</sup> In line with these principles, the two rights are recognized as separate and distinct.<sup>229</sup> While these predicates for the right to sexual privacy all involve heterosexual couples, the *Lawrence* Court, repudiating *Bowers*, held that the right to sexual privacy belongs to all individuals, and the Court's earlier precedents could not be narrowed to rights of heterosexuals only.<sup>230</sup>

*Turner*—a marriage case—also demonstrates the independent contours of the two rights. In striking a Missouri prison regulation that forbade inmate marriages except for compelling reasons, which in practice meant pregnancy or birth of a non-marital child, the Court found that all inmates possessed a right to marry even apart from considerations involving procreation.<sup>231</sup> What is the state's justification for denying only same-sex couples the basic liberty to

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222. See *id.* at 383-84 (explaining *Loving*'s holding not restricted to discrimination based on race).

223. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

224. 381 U.S. 479 (1965).

225. *Id.* at 485-86.

226. *Id.* (holding government may not intrude into privacy of marriage and prohibit contraceptive use).

227. 405 U.S. 438 (1972).

228. *Id.* at 453 (extending *Griswold*'s right of privacy protecting married couples to single people as well).

229. See *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (noting Constitution protects "personal decisions . . . [including] marriage, procreation, contraception, family relationships, child rearing, and education"); *id.* at 573-74 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

230. *Id.* at 565-67 (discussing sexual privacy cases including *Griswold* and *Eisenstadt* as foundation for liberty interest).

231. *Turner v. Safley*, 482 U.S. 78, 82 (1987) (providing background information on state statute); *id.* at 95-97 (concluding inmates have fundamental right to marry).

marry?<sup>232</sup>

### B. *Changing the Equal Protection Test*

Turning from fundamental rights to equal protection, both *Andersen* and *Hernandez* rejected claims of sex and sexual orientation discrimination.<sup>233</sup> Applying rational basis review, both majority opinions transformed the standard paradigm for equal protection and eviscerated the requirement of logic implicit in the “connection” element of rational basis review.<sup>234</sup>

The standard paradigm asks for a state interest that justifies exclusion of the omitted class. As stated by the U.S. Supreme Court in *City of Cleburne v. Cleburne Living Center*,<sup>235</sup> the inquiry is whether “the classification drawn by the statute is rationally related to a legitimate state interest.”<sup>236</sup> As the *Romer* court put it a decade later, “[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained.”<sup>237</sup>

Contrary to this settled paradigm, the New York and Washington courts addressed the rational basis for including different-sex couples in marriage rather than focusing on the exclusion only of same-sex couples. The *Hernandez* majority states, “The critical question is whether a rational legislature could decide that these benefits should be given to members of opposite-sex couples, but not same-sex couples.”<sup>238</sup> Likewise, *Andersen* applied rational basis review “to the legislature’s decision that only opposite-

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232. A number of concurring and dissenting jurists have accepted the fundamental rights claim. *See, e.g., Hernandez v. Robles*, 855 N.E.2d 1, 23-26 (N.Y. 2006) (Kaye, C.J., dissenting) (holding majority had cast right too narrowly and fundamental right to marry exists for all); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 970 (Mass. 2003) (Greaney, J., concurring) (determining same-sex couples do enjoy a fundamental right to marry); *Andersen v. King County*, 138 P.3d 963, 1019-26 (Wash. 2006) (Fairhurst, J., dissenting) (concluding right to marry fundamental right for all people).

233. *Hernandez*, 855 N.E.2d at 10-12 (setting out rationale for why statute does not violate Equal Protection Clause); *Andersen*, 138 P.3d at 974-76, 980-85, 998 (discussing sex and sexual orientation claims and applying rational basis).

234. *Compare Hernandez*, 855 N.E.2d at 11 (discussing majority’s rational review for restrictions based on marriage and family), *with id.* at 30 (Kaye, C.J. dissenting) (expressing rational basis requires legitimate interest and classification needs to rationally advance interest). *Compare also Andersen*, 138 P.3d at 975-76, 980-85, 988 (rejecting plaintiff’s assertion that heightened scrutiny should apply to gays and lesbians), *with id.* at 1015-17 (Fairhurst, J., dissenting) (discussing lack of logical connection), *and id.* at 1032-36 (Bridge, J., dissenting) (contesting legitimacy prong of state’s justifications concerning religious teachings, moral judgment and inferring animosity). In *Andersen*, one dissent concluded that the marriage restriction was an impermissible “classification of persons undertaken for its own sake.” *Andersen*, 138 P.3d at 1037 (Bridge, J., dissenting) (quoting *Romer v. Evans*, 517 U.S. 620, 635 (1996)).

235. 473 U.S. 432 (1985).

236. *Id.* at 440.

237. *Romer v. Evans*, 517 U.S. 620, 632 (1996).

238. *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006). The court also asked “whether the challenged limitation can be defended as a rational legislative decision,” but its rationale focused on the benefits of marriage for different-sex couples. *Id.* at 6.

sex couples are entitled to civil marriage in this state.”<sup>239</sup>

Focusing on the state’s interests in encouraging opposite-sex couples to marry utterly changes the case. Arguing that the “legislated distinction” must further a “legitimate state interest” rather than “the discriminatory law itself,” Chief Justice Kaye argued in dissent in *Hernandez*,

Were it otherwise, an irrational or invidious exclusion of a particular group would be permitted so long as there was an identifiable group that benefited from the challenged legislation. In other words, it is not enough that the State have a legitimate interest in recognizing or supporting opposite-sex marriages. The relevant question here is whether there exists a rational basis for *excluding* same-sex couples from marriage, and, in fact, whether the State’s interests in recognizing or supporting opposite-sex marriages are rationally *furthered* by the exclusion.<sup>240</sup>

As Justice Fairhurst argued in dissent in the *Andersen* case, “[u]nder rational basis review, . . . a ‘reasonable ground must exist for making a distinction between those who fall within the class and those who do not.’”<sup>241</sup> She elaborated:

[T]his case does not present the issue of whether allowing *opposite-sex* couples the right to marry is rationally related to the State’s supposed interests in encouraging procreation, marriage for relationships that result in children, and traditional child rearing . . . . [T]he question we are called upon to ask and answer here, which the plurality fails to do, is how *excluding* committed same-sex couples from the rights of civil marriage furthers any of the interests that the State has put forth. Or, put another way, would giving same-sex couples the same right that opposite-sex couples enjoy injure the State’s interest in procreation and health child rearing?<sup>242</sup>

Defining the question in terms of how heterosexual marriage aids heterosexual people clearly changes the subject, and as the *Andersen* plurality conceded, focusing the inquiry on whether the exclusion of same-sex couples furthers state interests would change “the entire focus, *and perhaps outcome*, of the case.”<sup>243</sup>

### 1. Procreation as a Rational Basis

Both courts relied on procreation-related justifications for including only different-sex couples in the states’ marriage licensing schemes. In addition to changing the equal protection test, both courts applied a form of lifeless

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239. *Andersen v. King County*, 138 P.3d 963, 969 (Wash. 2006).

240. *Hernandez*, 855 N.E.2d at 30 (Kaye, C.J., dissenting).

241. *Andersen*, 138 P.3d at 1016 (Fairhurst, J., dissenting) (quoting State *ex rel. Bacich v. Huse*, 59 P.2d 1101 (1936)) (noting reasonableness touchstone for rational basis test).

242. *Andersen*, 138 P.3d at 1017 (Fairhurst, J., dissenting) (internal citations omitted).

243. *Id.* at 985 (emphasis added) (commenting on different framing of issues by majority and dissents).

rational basis to the states' justifications.<sup>244</sup>

Focusing on the reproductive potential of some heterosexual sexual activity, and distinguishing between the ways in which children are brought into the world, the *Andersen* plurality reasoned,

marriage is traditionally linked to procreation and survival of the human race. Heterosexual couples are the only couples who can produce biological offspring of the couple. And the link between opposite-sex marriage and procreation is not defeated by the fact that the law allows opposite-sex marriage regardless of a couple's willingness or ability to procreate. The facts that all opposite-sex couples do not have children and that single-sex couples raise children and have children with third party assistance or through adoption do not mean that limiting marriage to opposite-sex couples lacks a rational basis. Such over- or under-inclusiveness does not defeat finding a rational basis.<sup>245</sup>

But as the *Goodridge* court and the *Andersen* dissenters observed, the question of who is permitted to marry, notwithstanding the alleged procreative purposes of marriage, is not a matter of over or under inclusiveness, but of the genuineness of the connection between the exclusion of same-sex couples (the classification) and the state's purported interest.<sup>246</sup> As Justice Jackson admonished in *Railway. Express Agency, Inc. v. New York*<sup>247</sup>:

[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation [or here, a procreation requirement for marriage] and thus to escape the political retribution that might be visited upon them if larger numbers were affected.<sup>248</sup>

Dissenting in *Lawrence*, Justice Scalia agreed that "encouragement of procreation" could not possibly be a justification for denying marriage to gay and lesbian couples, since couples incapable of having children including sterile and elderly couples are allowed to marry.<sup>249</sup> In *Anderson*, the court ruled that marriage exists to acknowledge procreative sexual acts of heterosexual couples and allowing same-sex couples to marry does not further that interest.<sup>250</sup>

Both *Andersen* and *Hernandez* use the fact that some opposite-sex unions unexpectedly produce children to argue that marriage exists to provide

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244. Compare *Hernandez v. Robles*, 855 N.E.2d 1, 10-12 (N.Y. 2006) (explaining rational basis review is "highly indulgent" of legislative classifications), and *Andersen v. King County*, 138 P.3d 963, 984 (Wash. 2006) (describing legislative power as "nearly limitless" and rational basis standard as "extremely deferential"), with *Andersen*, 138 P.3d at 1016-17 (Fairhurst, J., dissenting) (discussing two-prong test of rational basis and decisions striking down laws on rational basis).

245. *Andersen*, 138 P.3d at 982-83 (upholding classification despite over and under inclusiveness).

246. See *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003); *Andersen*, 138 P.3d at 1018 (Fairhurst, J., dissenting); see also *Hernandez*, 855 N.E.2d at 27 (Kaye, C.J., dissenting).

247. 336 U.S. 106 (1949).

248. *Id.* at 112 (Jackson, J., concurring).

249. *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting).

250. *Andersen v. King County*, 138 P.3d 963, 982-83 (Wash. 2006).

commitment incentives and thus stability to those sexual relationships.<sup>251</sup> The *Hernandez* majority states, “First, the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships.”<sup>252</sup> Why is it more important for the state to care about stability in opposite-sex than same-sex relationships, or why is it unimportant to have equal regard for the familial settings of all children? The New York court answers:

Heterosexual intercourse has a natural tendency to lead to the birth of children . . . . The Legislature could also find that such relationships are all too often casual or temporary. It could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other.<sup>253</sup>

Beyond the obvious irony of reserving the responsibilities of marriage to persons thought to be irresponsible, and withholding responsibilities from same-sex couples thought to be responsible, the court misses key doctrinal points. At root, these opinions are saying that the state uses marriage to favor procreation by heterosexual intercourse whether intentional or accidental, as opposed to procreation with “third party involvement” or by “adoption, or by artificial insemination or other technological marvels.”<sup>254</sup> As discussed above, the rights to procreate and to marry are distinct individual rights and same-sex couples also enjoy the right to procreate.<sup>255</sup> By focusing on the manner in which same-sex couples and/or different-sex couples exercise their fundamental right to procreate, these opinions did not supply a rational basis for denying marriage to same-sex couples. Instead they articulate *another* reason to subject the exclusion of same-sex couples from marriage to strict scrutiny.

Stated differently, this rationale undermines its ultimate conclusion because

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251. *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006); *Andersen*, 138 P.3d at 982. The *Anderson* court noted:

The State reasons that no other relationship has the potential to create, without third party involvement, a child biologically related to both parents, and the legislature rationally could decide to limit legal rights and obligations of marriage to opposite-sex couples who may have relationships that result in children is preferable to having children raised by unmarried parents.

*Anderson*, 138 P.3d at 982 (citing *Morrison v. Sadler*, 821 N.E.2d 15, 25 (Ind. Ct. App. 2005)).

252. *Hernandez*, 855 N.E.2d at 7 (explaining why statute survives rational basis test).

253. *Id.* (conducting rational basis review of statute). This argument resonates with the dim view of heterosexuals popularized by “marriage movement” advocates. See generally Maggie Gallagher, *What Is Marriage is for? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773 (2002).

254. *Hernandez*, 855 N.E.2d at 7; *Andersen*, 138 P.3d at 982.

255. See *supra* notes 193-206, 219-228 and accompanying text (discussing fundamental rights of marriage and procreation).

the state cannot penalize people who seek to exercise a right on the basis of decisions they make regarding their independent right to procreate. This kind of situation rarely arises, but for example, in *Shapiro v. Thompson*,<sup>256</sup> the U.S. Supreme Court struck down Connecticut's one year residency requirement for eligibility for certain government benefits, holding that this policy unconstitutionally disadvantaged people based on their exercise of the right to interstate travel.<sup>257</sup> "[A]ny classification which serves to penalize the exercise [of a fundamental] right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional."<sup>258</sup> Similarly, in *Cleveland Board Of Education v. LaFleur*,<sup>259</sup> the Court struck down a policy requiring pregnant teachers to take unpaid maternity leave five months before the anticipated birth of a child.<sup>260</sup> The Court found that "[b]y acting to penalize the pregnant teacher for deciding to bear a child," the challenged policy constituted "a heavy burden" on the teacher's protected personal choices in matters of family life.<sup>261</sup> In other words, when a law (such as the law denying marriage) serves to penalize the otherwise lawful exercise of a fundamental right (procreative decisions), the government needs a compelling and narrowly tailored justification for the classification in the law.<sup>262</sup>

Nonetheless, the New York and Washington courts justified denying marriage to same-sex couples because of differences in how same-sex couples and (some) opposite-sex couples reproduce and otherwise bring children into their families.<sup>263</sup> That justification contravenes the same principle. Opposite-sex couples can exercise the right to procreate by engaging in sexual intercourse as well as by the myriad methods employed by same-sex couples, including use of reproductive technologies and adoption. Yet, under this analysis, the exclusion of same-sex couples from marriage could not survive the strict scrutiny such an argument would trigger.

While it is true and that some opposite-sex couples can "accidentally" procreate and that children may benefit from the stabilizing force of marriage, it has nothing to do with justifying the exclusion of same-sex couples from

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256. 394 U.S. 618 (1969).

257. *Id.* at 637.

258. *Id.* at 634 (analyzing case under strict scrutiny because dealing with fundamental right).

259. 414 U.S. 632 (1974).

260. *Id.* at 651 (holding required leave provision unconstitutional).

261. *Id.* at 640 (setting out standard of review).

262. See *Hernandez v. Robles*, 855 N.E.2d 1, 11 (N.Y. 2006). The court also uses its assumptions about heterosexual versus gay and lesbian sexual activity to justify not using heightened scrutiny for laws involving sexual orientation classifications in the area of marriage and the family, although it states it might use heightened scrutiny in other areas. *Id.* at 11. "A person's preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the State's interest in fostering relationships that will serve children best." *Id.* After *Lawrence*, if not earlier, the type of constitutionally protected, adult, consensual sexual activity is not relevant to the analysis at all.

263. *Hernandez*, 855 N.E.2d at 11; *Andersen v. King County*, 138 P.3d 963, 982 (Wash. 2006).

marriage.<sup>264</sup> Neither of these truisms rationally supports the notion that children of accidental procreation need the stabilizing force of marriage more than children of same-sex couples. Making the essential logical point on rational basis review, Chief Justice Kaye argued in dissent: “[W]hile encouraging opposite-sex couples to marry before they have children is certainly a legitimate interest of the State, the *exclusion* of gay men and lesbians from marriage in no way furthers this interest.”<sup>265</sup> Arguing that “no one rationally decides to have children because gays and lesbians are excluded from marriage,” Chief Justice Kaye points to laws that would constitute state policies promoting procreation, none of which is codified in New York.<sup>266</sup> Similarly, Justice Fairhurst’s dissent exposes the lack of logical connection, noting that the plurality points to “encouraging . . . marriage for relationships that result in children,” but that “denying same-sex couples the right to marry also will not encourage couples who have children to marry or to stay married for the benefit of their children.”<sup>267</sup>

Finally, by focusing on *how* children have been brought into the world rather than *that* they have been brought into the world, both opinions contradict a major emphasis of U.S. Supreme Court decisional law, namely to equalize treatment of all children.<sup>268</sup> Regardless of whether they are born through traditional means or through the aid of reproductive technology, or whether born to their legal parents or adopted by them, and whether marital or non-marital, the Supreme Court has emphasized that children should be treated equally.<sup>269</sup> Similarly, state paternity and parentage laws impose responsibilities on parents for their welfare whether the parents are married or not.<sup>270</sup> Denying marriage to same-sex couples does not improve any other child’s welfare, but it does deny their children the material benefits that flow uniquely from the parents’ marriage. As Justice Fairhurst argued in dissent in *Andersen*,

Rather than furthering legitimate interests, denial of the right to marry *will*

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264. *Hernandez*, 855 N.E.2d at 7. The *Hernandez* majority contrasts the responsible procreation of gay and lesbian people with the assumed irresponsible procreative behavior of heterosexuals. *Id.* It also turns on its head the longstanding stereotypes that gay people cannot maintain stable relationships or provide a stable home for children. See Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer’s Guide to Social Science Research*, 1 L. & SEXUALITY 133, 161 (1991) (stating myths including “Myth #6: Lesbians and gay men are not capable of sustained relationships”).

265. *Hernandez*, 855 N.E.2d at 30 (Kaye, C.J., dissenting).

266. *Id.* at 31. The court cites tax breaks to couples who have children, subsidizing child care for those couples, or mandating generous family leave for parents as among the benefits that “might convince people who would not otherwise have children to do so.” *Id.*

267. *Andersen*, 138 P.3d at 1018.

268. See *Levy v. Louisiana*, 391 U.S. 68, 71-72 (1968) (holding discrimination based on illegitimacy unconstitutional).

269. See *id.* (holding children born out of wedlock may not be denied rights enjoyed by other citizens).

270. See JOHN DEWITT GREGORY, PETER N. SWISHER & SHERYL L. SCHEIBLE, *UNDERSTANDING FAMILY LAW*, 120 (Legal Text Series, 2d ed. 1995). In “all fifty states today, fathers as well as mothers are compelled to support their nonmarital children under state statutory law.” *Id.*

certainly *harm* children of same-sex couples, couples to whom the State has given its blessing to adopt or beget children through artificial means, but upon whom the State has turned its back once those children are integrated into their families. It is those children who actually do and will continue to suffer by denying their parents the right to marry.<sup>271</sup>

## 2. *Child Rearing as a Rational Basis*

The other rational basis accepted in both *Hernandez* and *Andersen*, but rejected in *Goodridge*, relates to child rearing. *Anderson* and *Hernandez* both stated that a rational legislature could believe it is permissible to limit marriage because it is better for children to be raised by their biological mother and father. As the *Hernandez* majority stated,

The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. *Intuition and experience* suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like. It is obvious that there are exceptions to this general rule—some children who never know their fathers, or their mothers, do far better than some who grow up with parents of both sexes—but the Legislature could find that the general rule will usually hold . . . .

To support their argument, plaintiffs and *amici* supporting them refer to social science literature reporting studies of same-sex parents and their children. Some opponents of [marriage for same-sex couples] criticize these studies, but we need not consider the criticism, for the studies on their face do not establish beyond doubt that children fare equally well in same-sex and opposite-sex households. What they show, at most, is that rather limited observation has detected no marked differences . . . .

Plaintiffs seem to assume that they have demonstrated the irrationality of the view that opposite-sex marriages offer advantages to children by showing there is no scientific evidence to support it. Even assuming no such evidence exists, this reasoning is flawed. In the absence of conclusive scientific evidence, the Legislature could rationally proceed on the *commonsense* premise that children will do best with a mother and father in the home. And a legislature proceeding on that premise could rationally decide to offer a special inducement, the legal protection of marriage, to encourage the formation of opposite-sex households.<sup>272</sup>

This claim suffers from some of the same structural flaws as the procreation argument, including the improper burdening of the right to marry because of

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271. See *Andersen v. King County*, 138 P.3d 963, 1018-19 (Wash. 2006) (Fairhurst, J., dissenting); see also *Hernandez v. Robles*, 855 N.E.2d 1, 32 (N.Y. 2006) (Kaye, C.J., dissenting).

272. *Hernandez*, 855 N.E.2d at 7-8 (emphasis added) (internal citations omitted).

how gay people exercise the rights to family autonomy and child rearing.<sup>273</sup> Chief Justice Kaye also noted this rationale is purposeful discrimination and thus conflicts with elementary equal protection principles.<sup>274</sup> As she argued,

Nor may the State legitimately seek either to promote heterosexual parents over homosexual parents, as the plurality posits, or to discourage same-sex parenting. First, granting such a preference to heterosexuals would be an acknowledgment of purposeful discrimination against homosexuals, thus constituting a flagrant equal protection violation. Second, such a preference would be contrary to the stated public policy of New York, and [is] therefore irrational.<sup>275</sup>

Chief Justice Kaye's public policy point illustrates the failure to connect the state's purposes and the exclusion of same-sex couples from marriage. In this vein, consider, also, the references in *Hernandez* to "intuition and experience" and "common sense" regarding what is best for children.<sup>276</sup> What is logical or rational about relying on a judicial gut check when New York statutes and decisional law show that the state does *not* have an interest in favoring heterosexual over gay and lesbian parents, but instead seeks to equalize the legal circumstances of all children? As Justice Fairhurst explained, even if the state has a valid interest in encouraging heterosexual parents to raise children, that interest is "completely unrelated" to denying marriage to same-sex couples.<sup>277</sup> Beyond the absence of a connection, is it logical or rational for a court to ignore the consensus of the nation's preeminent medical and child welfare groups that the sex and sexual orientation of the parents is not relevant to normal child outcomes?<sup>278</sup> The *Hernandez* opinion acknowledges that studies of children reared by gay and lesbian parents show "no marked differences" from children raised in non-gay households,<sup>279</sup> but inexplicably concludes that the studies have not shown that children in gay families "fare equally well in same-sex and opposite-sex households."<sup>280</sup> If, as the court acknowledges, there is "no scientific evidence to support" the notion that opposite-sex marriages offer advantages to children, then how can the legislature nonetheless "rationally proceed" with that "commonsense premise?"<sup>281</sup>

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273. See *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (noting "constitutional protection to personal decisions relating to marriage . . . family relationships, child rearing, and education).

274. *Hernandez*, 855 N.E.2d at 32 (Kaye, C.J., dissenting).

275. *Id.* (internal quotations and citations omitted) (referring to adoption laws providing applicants cannot be rejected just because they are gay, and judicial decisions allowing second-parent adoption).

276. *Id.* at 7.

277. *Andersen v. King County*, 138 P.3d 963, 1018 (Wash. 2006) (Fairhurst, J., dissenting).

278. *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006); *id.* at 32 (Kaye, C.J., dissenting) (referencing scientific information in both majority and dissent).

279. *Id.* at 8.

280. *Id.*

281. *Id.* at 7.

## V. THE FUTURE

This is a hard time for courts. They want to do the right thing in honoring both principle and precedent, but struggle with the correct legal boxes. They struggle with their institutional legitimacy and wonder if this issue is better left to the political branches. The lead opinions in both *Anderson* and *Hernandez* stressed the court's limited role and the need to defer these arguments to the legislature.<sup>282</sup> But, of course, there is no marriage exception to the court's power and duty to address constitutional questions. *Loving*, *Zablocki*, and *Turner* are all excellent examples of courts playing their role in vindicating constitutional rights, thereby checking the legislatures' denials of basic rights.

Former U.S. Justice O'Connor has added her voice to this discussion recently as well, observing that "far more often than not in modern times, the judiciary has admirably performed these two vital tasks: checking the other two branches and protecting minority rights."<sup>283</sup> Despite "the breadth and intensity of rage currently being leveled at the judiciary" courts will continue to play a vital role in vindicating constitutional rights, including with respect to marriage.<sup>284</sup>

Can marriage discrimination be ended by the courts and no other way? Of course not. As in any social and legal justice movement, all three branches of government must play a vital role. There have been and will be important successes in state legislatures. Ten states have created important protections for same-sex couples. Massachusetts allows same-sex couples to marry. Vermont, Connecticut, New Jersey, and New Hampshire have enacted civil union laws.<sup>285</sup> California has, and Oregon will soon have, a comprehensive domestic partner law that is equivalent to civil unions.<sup>286</sup> Hawaii, Maine, and Washington have enacted more limited laws allowing gay and non-gay couples access to some of the legal rights formerly limited to married couples.<sup>287</sup>

Governor Schwarzenegger's veto of a marriage bill passed by the state

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282. See *Hernandez*, 855 N.E.2d. at 12 (expressing hope that opponents of statute will address problem with legislature); *Andersen*, 138 P.3d at 983 (noting "the legislature acted within its power to limit the status of marriage"). But see *Andersen*, 138 P.3d at 1015 (Wash. 2006) (Fairhurst, J., dissenting) (rebuking majority for failure to uphold constitutional duty and describing judicial role in checks and balances).

283. Sandra Day O'Connor, Op Ed., *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18.

284. *Id.*

285. CONN. GEN. STAT. §§ 46b-38pp (2006) (providing protections for civil unions); N.J. STAT. ANN. § 37:1-28 (2006); VT. STAT. ANN. tit. 15, § 1201 (2002); H. 437, 2007 Sess. (N.H. 2007), available at <http://www.gencourt.state.nh.us/legislation/2007/HB0437.html> (last visited May 12, 2007).

286. CAL. FAM. CODE § 297 (West 2005) (establishing domestic partnerships); Oregon Family Fairness Act, H. 2007, 74th Leg. Assem., Reg. Sess. (Or. 2007).

287. HAW. REV. STAT. § 572C (2005); ME. REV. STAT. ANN. tit. 22, § 2710 (2006) (establishing domestic partnership registry); ME. REV. STAT. tit. 18-A, § 1-20-1(10A) (defining domestic partner); S. 5336, 60th Leg., Reg. Sess. (Wash. 2007) (establishing domestic partner registry). New Jersey still maintains a domestic partner registry as well. See N.J. Dept of Health and Senior Services, Domestic Partnership, <http://www.state.nj.us/health/vital/dp2.shtml> (last visited May 9, 2007).

legislature in 2005 is ironic given his rationale that ending the exclusion is the job of the courts and not the legislature.<sup>288</sup> California's legislature is again considering a marriage bill, along with the legislatures of Rhode Island, Vermont, Connecticut, and Illinois.<sup>289</sup> Still other states have passed laws respecting relationships of same-sex couples for particular purposes.<sup>290</sup>

Some state governors are beginning to lead on this issue. Governor Elliot Spitzer of New York has pledged that he will help make marriage equality the law of New York State.<sup>291</sup> Governor Deval Patrick of Massachusetts supports the state's nondiscriminatory marriage laws and has publicly opposed a constitutional amendment.<sup>292</sup> With time, citizens of states that have passed discriminatory amendments may well have "voter remorse" when they realize the amendments protect nothing but simply deny marriage, and sometimes other legal protections, to their fellow citizens. Currently, state high courts are facing the questions of about whether marriage amendments preclude a state from providing domestic partnership health benefits and whether domestic violence laws apply to unmarried couples.<sup>293</sup> The amendments virtually guarantee a major role for the courts in cases interpreting or challenging the amendments.<sup>294</sup> Hopefully, some of those amendments will be repealed in whole or in part to allow for significant relationship recognition protections. Still other states may reject new attempts to pass discriminatory laws or amendments, as Arizona voters did in November 2006, and as the Indiana legislature did in 2007.<sup>295</sup>

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288. Statement by Gubernatorial Press Secretary Margita Thompson on AB 849 (Sept. 7, 2005), available at <http://gov.ca.gov/index.php?press-release/1443/>.

289. Assemb. 43, 2007 Reg. Sess. (Cal. introduced Dec. 4, 2006); H. 7395, 2007 Gen. Assem., Jan. Sess. (Conn. introduced Jan. 2007), reported favorably from Judiciary Committee, available at <http://www.cga.ct.gov/2007/TOB/h/pdf/2007HB-07395-R01-HB.pdf>; H. 1615, 95th Gen. Assemb., Sess. (Ill. introduced Feb. 22, 2007); S. 0202, 2007 Gen. Assem., Jan. Sess. (R.I. introduced Jan. 31, 2007); S. 80, Gen. Assem., 2007-2008 Sess. (Vt. introduced Feb. 8, 2007).

290. See H. 1057, 2007 Leg., 423rd Sess. (Md. 2007), available at <http://mlis.state.md.us/2007RS/bills/hb/hb1057e.pdf> (authorizing insurers to provide domestic partnership coverage).

291. New York Times News Service, *Spitzer Plans Bill to Make Gay Marriage Legal in N.Y.*, BOSTON.COM, Apr. 23, 2007, [http://www.boston.com/news/nation/articles/2007/04/23/spitzer\\_plans\\_bill\\_to\\_make\\_gay\\_marriage\\_legal\\_in\\_ny/](http://www.boston.com/news/nation/articles/2007/04/23/spitzer_plans_bill_to_make_gay_marriage_legal_in_ny/).

292. *Governor-Elect Deval Patrick's statement on today's Constitutional Convention*, BOSTON.COM, Jan. 2, 2007, [http://www.boston.com/news/globe/city\\_region/breaking\\_news/2007/01/governorelect\\_d.html](http://www.boston.com/news/globe/city_region/breaking_news/2007/01/governorelect_d.html).

293. *Nat'l Pride at Work, Inc. v. Governor of Michigan*, No. 265870, 2007 WL 313582 (Mich. Ct. App. Feb. 1, 2007) (concluding domestic partnership benefits not authorized in light of state marriage amendment). The Michigan ACLU plans to appeal the ruling to the Supreme Court. See Stephanie Simon, *Michigan denies same-sex benefits*, L.A. TIMES, Feb. 3, 2007, at A14; see also *State v. Carswell*, No. CA2005-04-047, 2005 WL 3358882 (Ohio Ct. App. Dec. 12, 2005), on appeal No. 2006-0151 (Ohio).

294. Honorable J. Harvie Wilkinson, III, *Gay Rights and American Constitutionalism: What's a Constitution For?*, 56 DUKE L.J. 545, 566-67 (2006) (arguing that state amendments place "interpretive authority" on judges).

295. CNN.com, *America Votes 2006: Key Ballot Measures*,

Convincing Americans that discrimination based on sexual orientation is wrong is the foundation of our progress and essential for lasting change. In the words of Evan Wolfson, “It is not enough for gay people and our allies to say we are for marriage equality, and then wait for courts or legislators to do all the heavy lifting. Rather, it is our job to take every opportunity to address people’s concerns and discomfort, answer questions, and give them the time and information they need.”<sup>296</sup>

Is there cause for optimism? Of course. At the same time the American hero Rev. Dr. Martin Luther King Jr.’s *Letter From Birmingham Jail* offers a cautionary note. Addressed to his clergy brethren, his ostensible allies, he challenged them—and he challenges all of us in justice work—to remember that “human progress never rolls in on wheels of inevitability . . . .”<sup>297</sup> For all of our optimism, we can only afford to be optimistic if we also agree to do the work of convincing America that marriage discrimination is wrong.

In the fourteen years since the first Hawaii Supreme Court decision, much has changed. Increasing numbers of Americans favor ending marriage discrimination and a majority of Americans favor civil unions.<sup>298</sup> Persistence, urgency, and time, along with the fairness instinct of the American people will ultimately bring this discrimination to an end.

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<http://www.cnn.com/ELECTION/2006/pages/results/ballot.measures/> (last visited on April 20, 2007) (reporting Arizona voted not to ban marriage for same-sex couples); Christine Vestal, *Gay Marriage Ripe for Decision in 3 Courts*, STATELINE.ORG/PEW RESEARCH CENTER, Mar. 1, 2007,

<http://www.stateline.org/live/details/story?contentId=20695> (noting Arizona only state thus far to decline to ban gay marriage). Indiana’s rejection of an amendment occurred after an initial vote in favor, and after the Indiana business community lobbied against the amendment. Erika D. Smith, *Same Sex Marriage Ban: Antigay Bill Could Have Hurt State Image*, INDY STAR, Apr. 13, 2007, available at <http://www.indystar.com/apps/pbcs.dll/article?AID=/20070413/BUSINESS/704130446>.

296. Evan Wolfson, *Our Nation Needs Marriage Equality For All*, THE PROGRESSIVE MEDIA PROJECT, Feb. 6, 2006, available at [http://www.progressive.org/media\\_mpwolfson020606](http://www.progressive.org/media_mpwolfson020606).

297. Letter from Rev. Martin Luther King, Jr. from Birmingham Jail, Apr. 16, 1963, available at <http://www.stanford.edu/group/king/frequentdocs/birmingham.pdf>.

298. See generally PEW RESEARCH CENTER, MOST WANT MIDDLE GROUND ON ABORTION: PRAGMATIC AMERICANS LIBERAL AND CONSERVATIVE ON SOCIAL ISSUES (2006), <http://people-press.org/reports/display.php3?ReportID=283>; PEW RESEARCH CENTER, STRONG SUPPORT FOR STEM CELL RESEARCH: ABORTION AND RIGHTS OF TERROR SUSPECTS TOP COURT ISSUES (2005), <http://people-press.org/reports/display.php3?ReportID=253>; PEW RESEARCH CENTER, GOP THE RELIGION-FRIENDLY PARTY: BUT STEM CELL ISSUE MAY HELP DEMOCRATS (2004), <http://people-press.org/reports/display.php3?ReportID=223>.