Toward A More Perfect Union: The Road To Marriage Equality For Same-Sex Couples

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TOWARD A MORE PERFECT UNION: THE ROAD TO MARRIAGE EQUALITY FOR SAME-SEX COUPLES

Jennifer Levi*

I. INTRODUCTION

In 2001, I, along with my colleagues1 at Gay & Lesbian Advocates & Defenders ("GLAD"), filed a lawsuit on behalf of seven same-sex couples in Massachusetts challenging the Commonwealth's discriminatory marriage laws.2 As the case of Goodridge v. Department of Public Health3 made its way through the state courts, those of us committed to achieving a favorable outcome realized that at the same time the case was being tried in the courts, it would also be tried in the court of public opinion. Then, as now, I realized that public discourse has a major effect on the shape of any civil rights movement; and, in order to foster an informed public opinion on the topic of marriage for gay and lesbian couples, people had to have an understanding of the broader context in which the case was moving forward. What follows is one version of a talk that I gave to many different audiences throughout the Commonwealth while the Goodridge case was pending. My audiences included student groups, community groups, legal groups, parent groups, and other groups made up of people from the political right, the political left, and every political shade in between. Especially in the aftermath of the Goodridge decision, the value of the educational efforts made alongside the case became even more apparent.

* Jennifer Levi is an Assistant Professor at Western New England College School of Law. Many thanks to my colleagues at Gay & Lesbian Advocates & Defenders for the ideas behind this piece and for their collaboration on the marriage case discussed herein. Special thanks to Lisa Osiecki for the invaluable research support she provided.
1 The four other attorneys on the case include Mary Bonauto, Gary Buseck, Karen Loewy and Ben Klein.
3 Id.
Now that the case has been decided and the Supreme Judicial Court of Massachusetts has twice ordered marriage licenses to be issued to same-sex couples, the context of this broader struggle is even more relevant. This Symposium issue discusses civil unions—a proposed parallel, but separate status, that would provide certain benefits, protections, and obligations under the law to married couples. Its origin was a compromise struck by the Vermont legislature. The adoption of the Civil Unions Law sought to placate gay and lesbian citizens of that state that challenged its discriminatory marriage laws while, at the same time, mollifying the opponents to gay and lesbian equality who wanted, at all cost, to deny same-sex couples equal access to marriage.

Since Vermont’s adoption of that law, civil unions, though not a term of art, have become a placeholder for that compromise.

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4 On May 17, with much jubilation and celebration, marriage licenses were issued to same-sex couples throughout the Commonwealth of Massachusetts. See generally Alan Cooperman, Church "Protect Marriage" Day Is Urged: Groups Backing Amendment Seek Focus on Sunday Before Senate Vote, WASH. POST, June 26, 2004, at A24; John McElhenny & Jenn Abelson, Church Groups Rally on Gay Marriage, BOSTON GLOBE, Mar. 8 2004, at B3.


As the members of the House Judiciary Committee made clear, the only reason they opted for the cumbersome partnership option, rather than choosing the more straightforward option of same-sex marriage, was "political reality." That "political reality" is the homophobia that swept the state in the wake of the Baker decision.

Id.

7 Civil unions, speaking formally, have a legal existence in only one state—Vermont. Despite that, some legislators in other jurisdictions have used the term civil unions to refer alternately to marriage equivalents or some placeholder for a subset of rights that might be afforded to same-sex couples under a proposed state law. See generally Rose Acre, Massachusetts Court Upholds Same-Sex Marriage, Feb. 6 2004, at http://www.cnn.com/2004/LAW/02/04/gay.marriage/ (last visited June 27, 2004) (discussing California legislature’s passing of a domestic partnership law and noting that "[s]everal other states have granted limited marriage benefits to gays but called them domestic partnerships"). Because the term is often used imprecisely, it is often difficult, without a specific definition, to know precisely what one is talking
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position. As a placeholder, civil unions have become synonymous with inequality. In this posture, I mean the term inequality to be descriptive rather than subjective. While, admittedly, I wholeheartedly believe that civil unions relegate gay and lesbian couples to second-class status, that is not the sense in which I mean to use inequality here. The only thing I mean by inequality in this paragraph is that civil unions, however characterized or defined, are not marriages. Those two statuses are not equivalent; they are not equal.

Within that framework, in order for any one person to decide where he or she stands on the issue of whether gay and lesbian couples should be entitled to marriage, civil unions, something else, or nothing, he or she must first understand why marriage matters to families and how the Goodridge case and others fit into the civil rights struggle to create equality for gays and lesbians as well as into other civil rights struggles. Section II of this essay describes several examples of how the exclusion from marriage has harmed families, and, therefore, why it matters to people, gay and non-gay alike. Section III describes the history of marriage as it has evolved for same-sex couples and its relationship to other civil rights struggles. Section IV describes the Goodridge case, its

about when they refer to a "civil union." A similar problem exists with the term domestic partnership because of its varying definition across the country including in state laws and private employment contracts. See, e.g., CAL. FAM. CODE § 297; BOSTON, MASS. MUNICIPAL CODE ch. 12, § 9A (2004), available at www.cityofboston.gov/cityclerk/domestic_partnership.asp (last visited June 27, 2004); University of Wisconsin—La Crosse, Human Resources: Domestic Partnership Policy & Procedure, at http://www.uwlax.edu/hr/Domestic%20Partnership.htm#definition (last visited June 27, 2004) (defining domestic partners—with regards to employment and attendance at the university—as "two individuals who, together, each meet all of the following criteria set forth in the Domestic Partner Affidavit, UWS-50").


House and Senate leaders yesterday struggled to craft a revised constitutional amendment that would ban same sex marriages, but give gay couples some rights under civil unions. The strategy was designed to win enough votes for passage of the amendment later this week by reaching out to lawmakers who want to undo the historic Supreme Judicial Court decision that declared gay marriage constitutional, as well as those who would like to extend some rights and benefits to gay couples.

Id.
outcome, and aftermath. Finally, Section V takes up the question of whether civil unions are a legitimate station on the way to marriage rights or a misguided departure in a struggle for equality and concludes that civil unions are an unacceptable alternative.

II. WHY MARRIAGE MATTERS

A. A Few Examples

There are countless examples of how gay and lesbian families are harmed by the exclusion from marriage. Working at GLAD for over six years, I received many calls from individuals, couples and families experiencing serious legal problems as a result of not being able to marry.

One example of the impact of discriminatory marriage laws derives from a call I received several years ago from a woman living on the North Shore of Massachusetts who came home one day, only to find her partner of twenty-six years missing from the home. Her partner had early onset Alzheimer’s disease, so the caller imagined the worst. It was nearly two days later before the caller learned of her partner’s whereabouts. She finally found out from her partner’s estranged family that they had removed her partner from the home she was living so she could be in a long-term care facility, four hours away from the partner but closer to a mother and sister with whom the partner had had little contact over a ten-year period. Had this couple been able to marry, as they wished, they would never have been separated, nor could an estranged family member have kept them apart. Because they were not married and because there was a technical glitch in the documents they had executed, the woman who called me had no recourse to challenge the transfer decision made by her partner’s legal "family." The caller was as significant as an interested stranger to her partner of twenty-six years in the eyes of the law.

9 Because of the pace of post-Goodridge developments in conjunction with the production of this Symposium issue, this Article may necessarily be incomplete at the time of publication.

Most recently, the tragedy of September 11, 2001, has highlighted the plight of committed gay and lesbian couples made strangers by the marriage law’s exclusion. One illustrative case involved life partners of nearly thirteen years, Nancy Walsh and Carol Flyzik.11 On that fateful day, Carol left Boston’s Logan Airport for a business trip on behalf of Meditech, her employer.12 When Nancy awoke to the same shocking news that confronted the rest of the country, she had no way to get information from the airlines about whether or not Carol was on the plane.13 She was regarded as a legal nobody in her efforts to get the most basic information about the well-being of her partner of almost thirteen years.14 Nancy’s difficulties continued from that point on to include her inability to handle the day-to-day administration of her affairs and those involving Carol’s estate.15 As a result of the law’s exclusion, Nancy was unable to renew the title of the car she drives, which was in Carol’s name, handle routine affairs of the household, or administer the estate of her deceased partner.16

Other examples making the same points abound, including a surviving partner who could not fulfill his dying partner’s wish to be cremated because his legal family decided otherwise,17 and the surviving partner of a career firefighter who had no health

14 Id.
15 Id.
16 Id.
17 MASS. GEN. LAWS ANN. ch. 114, § 5B (West 2001) ("Each such cemetery corporation shall notify . . . the family of the deceased or the person making funeral arrangements for the deceased of the choice of three options for burial services.").
insurance because his partner could not secure it for him through his public job.\textsuperscript{18}

Marriage matters. It matters in the most important of times—times when families are vulnerable and the law needs to make presumptions about who can act in another’s best interests, who can take care of family, and who can carry out the wishes of a lost partner in ensuring the protection of remaining family.\textsuperscript{19}

\textbf{B. Neither Laws of Contract Nor Piecemeal State Law Protections Provide Comparable Protections}

Some respond to this claim of marriage’s importance to gay and lesbian families that most of the law’s protections can be reproduced either by written contracts or by legal designations such as guardianships or powers of attorney. While it is true that gay and lesbian couples can secure a handful of the protections that come with marriage, the vast majority of protections, rights, and responsibilities of marriage are off limits to couples that cannot marry.

There is simply no way to contract into the vast safety net that exists for marital families. For example, no one can contract into Massachusetts Health\textsuperscript{20} or other state social welfare systems that protect the family home for the community spouse from the spend-down provisions that are triggered when the other spouse has to go into long-term care.\textsuperscript{21} No one can contract into the state worker’s compensation system that presumes financial dependency of a


\textsuperscript{20} Massachusetts Health is a state insurance program that provides health insurance to those who qualify typically for financial or age-related reasons. See MassHealth—Executive Office of Health and Human Services, at www.mass.gov/oha/dmaidx.htm (last visited June 27, 2004).

spouse when the other spouse is injured on the job. Nor can one contract into the testimonial privileges that protect a spouse from having to testify as to private conversations with a marital partner; or into the survivor benefits that are provided for public employees, such as firefighters and police officers; or into the protections under federal Employee Retirement Income Security Act ("ERISA") laws that require spousal consent to the assignment of 401K earnings to anyone other than a spouse; or into access to the judicial system to apply default divorce rules upon dissolution of the relationship; or into legal presumptions of parentage when a child is born into the relationship. Although there are a handful of protections available to gay and lesbian couples, it is the thousands of unreachable protections that make marriage central to the issue of protecting families.

III. THE HISTORY OF THE STRUGGLE FOR INCLUSION

Having established the importance of marriage and the failure of existing legal alternatives to provide comparable protections, this section addresses the history of the struggle for same-sex marriage and its relationship to other civil rights movements.

A. Historic Parallels to Be Drawn From Civil Rights Movements for Race and Gender Equality

Race discrimination in marriage is longstanding in this country and part of a shameful history. At the country’s inception,

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22 See MASS. GEN. LAWS. ANN. ch. 152, §§ 31, 32, 35A (West 1988).
24 See MASS. GEN. LAWS. ANN. ch. 32, §§ 100, 100A (West 2001).
27 MASS. GEN. LAWS. ANN. ch. 209C, § 6 (West 1998); MASS. GEN. LAWS. ANN. ch. 46, § 4B (West 1994).
nearly every state criminalized interracial marriages.\textsuperscript{28} It was
criminalized in Massachusetts as early as 1705 by statute.\textsuperscript{29} 
However, it was not until 1948, that the first state supreme court
struck down a miscegenation law as unconstitutional.\textsuperscript{30} And it was
nearly twenty years before the United States Supreme Court in
\textit{Loving v. Virginia}\textsuperscript{31} would do the same for all the laws remaining.

While no two civil rights struggles are the same—and this
author in no way contends that race discrimination and sexual
orientation discrimination are the same—there are some striking
parallels which bear closer examination. In both the race and
sexual orientation context, opponents to full and equal marriage
rights, contended that marriage, by definition, excludes the
inclusion of the couples challenging the laws. For example, in the
race context, the \textit{Loving} trial court explained:

Almighty God created the races white, black, yellow, malay
and red, and he placed them on separate continents. And but for
the interference with his arrangement there would be no cause
for such marriages. The fact that he separated the races shows
that he did not intend for the races to mix.\textsuperscript{32}

The updated form of this "natural law" objection to marriage
equality was advanced by the Commonwealth of Massachusetts.
As the Commonwealth’s brief explained, exclusionary marriage
laws do not discriminate on the basis of sexual orientation because
"[h]eterosexuality is not a prerequisite for marriage, and many
homosexuals choose marriage to marry members of the opposite
sex for many reasons."\textsuperscript{33} This natural law justification is no more

\textsuperscript{28} Josephine Ross, \textit{The Sexualization of Difference: A Comparison of
Mixed-Race and Same-Gender Marriage}, 37 HARV. C.R.-C.L. L. REV. 255, 262
(2002).
\textsuperscript{30} Perez v. Sharp, 198 P.2d 17, 34 (Cal. 1948).
\textsuperscript{31} 388 U.S. 1, 2 (1967).
\textsuperscript{32} Id. at 3.
\textsuperscript{33} Memorandum in Opposition to Plaintiff’s Motion for Summary
Judgment and in Support of Defendants’ motion for Summary Judgment at 51,
defensible today than it was thirty (or fifty, or one hundred, for that matter) years ago.

The way the history of public opinion has been shaped by the struggle for race equality in marriage also provides some helpful guidance for the right way to respond to the constitutional deprivation provided by the discriminatory marriage laws. Some have argued that the people, whether directly or through their elected representatives—and not the courts—should decide how best to respond to a constitutional deprivation. Again, the history of race discrimination in marriage provides a helpful lesson. There is very little question that if the people had been left to decide whether or not to extend marriage protections to interracial couples, those couples would have been left out in the cold, as revealed by polling data released by the New York Times around the time of the Loving decision. Just over thirty years ago, a nationwide poll asked: "Do you approve or disapprove of marriage between whites and non-whites?" In 1968, only twenty percent of Americans approved while a full seventy-two percent disapproved, and eight percent had no opinion. Then, as now, leaving civil rights up to a popularity contest would have done little to redress a problem of constitutional magnitude.

Just as marriage includes a shameful history of exclusion based on race, neither was it particularly a bastion of equality for women. Historically, women lost all rights upon marriage. The

34 This has consistently been the position of the Governor of Massachusetts, Mitt Romney, throughout the course of the Goodridge litigation and beyond. See, e.g., Raphael Lewis, Romney Chides Legislature on Gay Marriage, BOSTON GLOBE, Apr. 24, 2004, at B1. Romney was quoted: "If it is a real effort with real intent, then the Legislature will give me the occasion to reach the Supreme Court and ask for a stay. Other wise, we will have same-sex marriage in Massachusetts without a decision of the people." Id. (emphasis added). Another article quotes Romney as stating that marriage "is the foundation of human society, and that is something that the people should decide, not one justice." Frank Phillips, SJC Ruling Aftermath: Travaglini Will Call Convention Promises Vote on Gay Marriage Amendment, BOSTON GLOBE, Feb. 7, 2004, at A1 (emphasis added).

35 U.S. Found Most Opposed to Interracial Marriage, N.Y. TIMES, Nov. 10, 1968, at 123.

36 Id.

37 Margaret Valentine Turano, Law and Literature: Jane Austen, Charlotte Brontë, and the Marital Property Law, 21 HARV. WOMEN'S L.J. 179 passim
classical line from Blackstone is that in marriage, the man and woman become one, and that one is the husband. Women, upon marrying, lost the right to own property as well as to sue or be sued in their own name. Indeed, they lost the right to criminal protections from their husbands upon marriage. This history is similarly important to respond to the objection that marriage is defined by that which it has always been. Just as, over time, marriage evolved so as to fully include women within its rights and responsibilities, so too may it evolve to include gay and lesbian couples.

Over time courts across the country struck down unequal marriage laws for women and racial minorities. In fact, over time, nearly every discriminatory marriage law has been struck. In cases involving challenges to exclusionary marriage laws waged by incarcerated felons and individuals who willfully fail to pay child support, the court has repeatedly explained that marriage is a basic, fundamental, constitutionally protected right that may not be denied to individuals based on personal characteristics unrelated to purposes of the laws. So at the point in time of the Goodridge litigation, the only individuals who otherwise met the statutory requirements for marriage but could not marry, were gay and lesbian couples.

B. History of Same-Sex Couples’ Struggle for Marriage Rights

And so it makes sense that marriage has become a focus of the gay and lesbian civil rights movement. The first cases brought


Lisa Kelly, Divining the Deep and Inscrutable: Toward a Gender-Neutral, Child-Centered Approach to Child Name Change Proceedings, 99 W. VA. L. REV. 1, 23 (1996). The author notes that "the common American practice of surnaming reflects common law conceptualizations of the family as described by Blackstone. The man and woman become one and the name at marriage reflects that unity of identity as being situated in the husband." Id.

Id. at 79.


seeking marriage for same-sex couples originated in the 1970s. Included among them were *Baker v. Nelson*,42 *Jones v. Hallahan*,43 and *Singer v. Hara*.44

The cases were far from ringing successes. To the contrary, the plaintiffs were hardly taken seriously by the courts. Procedurally, the cases were very similar to those later brought in Hawaii, Vermont, Massachusetts, and most recently, New York, California, Washington, Oregon and elsewhere. In 1972, plaintiffs John Singer and Paul Barwick brought a lawsuit seeking to compel the county auditor to issue a marriage license to them.45 The trial court denied their motion on the basis that "there was no prima facie showing that Washington law permits the marriage of two people of the same sex, and that the denial of a marriage license to two people of the same sex does not constitute an abridgement of any constitutional rights."46 The plaintiffs appealed the trial court's decision, arguing that the trial court erred in concluding same-sex marriages are prohibited under the Washington marriage statutes, and that the court's order violated the Equal Rights Amendment (ERA) of the state constitution as well as the Eighth, Ninth and Fourteenth Amendments to the United States Constitution.47 Unfortunately, the appellate court in *Singer* upheld the trial court’s decision and issued a dismissive comment that was typical of the legal analysis in similar cases during that time, saying that "what [the plaintiffs] propose is not a marriage."48 It would be nearly

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42 191 N.W.2d 185 (Minn. 1971).
45 Id. at 1188.
46 Id.
47 Id. at 1188-89 (footnote omitted).
48 Id. at 1192 (quoting Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. 1973)). The court went on to reject parallels between the racial classification in *Loving* and *Perez* and the present case by stating the following:
The operative distinction lies in the relationship which is described by the term "marriage" itself, and that relationship is the legal union of one man and one woman. Washington statutes, specifically those relating to marriage (RCW 26.04) and marital (community) property (RCW 26.16), are clearly founded upon the presumption that marriage, as a legal relationship, may exist only between one man and one woman who are otherwise qualified to enter that relationship.

*Id.* at 1191.
twenty years before the gay and lesbian community would again pursue its efforts for marriage equality.

The early 1990s saw two new cases arise. This re-emergence of the marriage issue was in part fueled and supported by the increased visibility of gay families especially in states allowing second-parent adoptions and in part by the dire needs of families as discussed in Section II, above.

One of the first suits filed in the second wave of marriage litigation was Dean v. District of Columbia. Two gay men, Craig Robert Dean and Patrick Gerard Gill, appealed a superior court order that rejected their complaint requesting a marriage license from the clerk of the superior court. They argued that the superior court erred in holding that

"the District of Columbia marriage statute... prohibit[ed]... clerk[s] from issuing marriage licenses to same-sex couples... the clerk did not unlawfully discriminate against Dean and Gill under the District of Columbia Human Rights Act... by refusing to issue them a marriage license..."

There is no analogous sexual classification involved in the instant case because appellants are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex.

Id. at 1192.


53 Dean, 653 A.2d at 309 (Ferren, J., dissenting in part).
and that marriage was not a fundamental right for gay men and lesbians protected by the due process clause. The appeals court affirmed the order denying their requested relief.

Cases filed in Hawaii and later in Vermont, though not leading to equal marriage rights, showed more promise. In Hawaii, three same-sex couples brought suit seeking equal marriage rights in 1991. Although they experienced an early initial loss at the trial level affirming the state's motion for judgment on the pleadings, they were buoyed by the Hawaii Supreme Court's reversal. Upon reversal, the court explained that in order to defend the discriminatory marriage exclusion the state would have to demonstrate that the exclusionary law could pass muster under a strict scrutiny standard.

For perhaps the first time in United States history, a court understood that a sexual orientation classification is sex discrimination. After all, if one of the members of the lesbian couple plaintiffs would be allowed to marry her chosen partner if only she were a man and if one of the members of the gay male couple plaintiff could marry his partner if only he were a woman, the exclusion must be one based on the plaintiffs' sex as male or female. In light of the Hawaii Constitution's inclusion of an Equal Rights Amendment, the Hawaii Supreme Court explained that the appropriate degree of review was the highest level of scrutiny. In Hawaii, as in most jurisdictions, this articulation of the applicability of strict scrutiny signaled to the litigants the likely demise of the marriage law's exclusion.

As the plaintiffs had hoped, the state could not meet its burden on remand. However, while the second trial court decision was pending on appeal to the Hawaii Supreme Court, Hawaiian voters amended their constitution creating an exception to the state sex equality provision that had been the foundation of the couples'
case. Proving a point made earlier about the relationship between civil rights protections and majoritarian views, on November 3, 1998, Hawaii voted to adopt a state constitutional amendment that allowed the legislature to decide who may enter into a civil marriage, thereby ending any chance for equal marriage rights in that state.

The Vermont case went even a step further than the Hawaii one. In the Vermont case, the Vermont Supreme Court agreed with the plaintiff couples that the exclusionary marriage law violated constitutional guarantees secured by the Common Benefits Clause while simultaneously rejecting all of the justifications offered by the state for the law. However, in arguably ambiguous language, that court allowed the legislature to determine what the remedy would be. After a contentious battle in the state house, the Civil Unions Law was passed. For the first time ever, a state created a parallel, separate status for the unions of gay men and lesbians, providing them all of the state-based benefits, obligations, and responsibilities of marriage, while simultaneously affirming their exclusion from marriage.

The result was a great step forward but one that left the community far from the position of different-sex couples forming families within the strictures of marriage.

IV. THE GOODRIDGE CASE AND ITS AFTERMATH

Building on a tremendous amount of education that had already taken place in Massachusetts leading to a state nondiscrimination law, a safe schools law, a hate crimes law, and the legislature's ratification of a high court decision allowing second-parent adoption, GLAD turned its focus to Massachusetts

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59 See supra Section III.
60 Id.; HAW. REV. STAT. ANN. § 572-1 (Michie 1998).
63 MASS. GEN. LAWS ANN. ch. 76, § 5 (West 2002).
64 MASS. GEN. LAWS ANN. ch. 265, § 39 (West 2002).
65 See Adoption of Tammy, 619 N.E.2d 315, 318-19 (Mass. 1993) ("person" in step-parent adoption includes jointly petitioning same-sex couples). In 1999, the Massachusetts legislature ratified the high court's adoption ruling by amending chapter 210, section 1 of the Massachusetts General Laws to
where the recent census confirmed that same-sex couples with and without children live and work in every community, every town, and every county in the commonwealth.\textsuperscript{66}

In April 2001, GLAD filed suit seeking the right to marry on behalf of seven same-sex couples in the Massachusetts Supreme Judicial Court.\textsuperscript{67} The \textit{Goodridge} case resulted in a favorable decision in which the Massachusetts Supreme Judicial Court declared the legal exclusion of same-sex couples to be violative of the state constitutional guarantees of liberty and equality.\textsuperscript{68} The plaintiffs argued, and the court ultimately agreed, that there is a fundamental right to marry that extends to all citizens of the commonwealth, not just non-gay ones.\textsuperscript{69} Although the plaintiffs argued for heightened scrutiny based on both the fundamental right to marry.

expand the class of people who could adopt, leaving intact the decisions interpreting the definition of person in chapter 210, section 1. See 1999 Mass. Legis. Serv. ch. 3, § 15 (West).


\textsuperscript{68} \textit{Goodridge}, 798 N.E.2d at 968.

\textsuperscript{69} \textit{Id.} at 965, 969. Some might argue that the court skirted this issue in ultimately applying rational basis review of the exclusion. \textit{Id.} at 961 ("Because the statute does not survive rational basis review, we do not consider the plaintiffs' arguments that this case merits strict scrutiny.") However, a closer inspection of the dicta suggests otherwise. As the court explained, "civil marriage has long been termed a 'civil right.'" \textit{Id.} (citing \textit{Loving} v. Virginia, 388 U.S. 1, 12 (1967)). "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence . . . ." \textit{Loving}, 388 U.S. at 12 (quoting \textit{Skinner} v. Oklahoma, 316 U.S. 535 (1942)). The court further cited \textit{Baehr} v. \textit{Lewin}, the Hawaii Supreme Court decision that identified marriage as a civil right. Even more than its reference to other cases, the court itself noted that "[w]ithout the right to marry—or more properly, the right to choose to marry—one is excluded from the full range of human experience and denied full protection of the laws for one's 'avowed commitment to an intimate and lasting human relationship.'" \textit{Id.} at 957 (quoting \textit{Baker} v. State, 744 A.2d 864, 889 (Vt. 1999)). It is hard to argue that the court's references and language leave any room for doubt about the nature of the right at stake in the case.
at stake and the sex and sexual orientation classification of the exclusion, the court found no need to go beyond simple rational basis review to strike the discriminatory law.\textsuperscript{70}

The state offered three justifications for the discriminatory law, each of which the court rejected.\textsuperscript{71} As the high court ultimately understood them, the state was heard to defend the exclusion based on the following rationales: "(1) providing a 'favorable setting for procreation'; (2) ensuring the optimal setting for child rearing, which the [state] defines as 'a two-parent family with one parent of each sex'; and (3) preserving scarce State and private financial resources."\textsuperscript{72}

The court addressed and rejected each justification in turn. The court rejected the first justification out of hand saying starkly, "[o]ur laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family."\textsuperscript{73} Stated alternately, the court acknowledged that "[w]hile it is certainly true that many, perhaps most, married couples have children together . . . it is the exclusive and permanent commitment

\textsuperscript{70}Id at 961. The Massachusetts Supreme Judicial Court's approach in resolving the case on rational review reflects a recent trend of courts, including the United States Supreme Court, in not explicitly addressing the level of review where the exclusion is so devoid of justification as to fail under any scrutiny. See also Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996). The approach reflects only that the classification cannot survive under any level of review, not that the lowest level of scrutiny is the only applicable one.

\textsuperscript{71}Goodridge, 798 N.E.2d at 961. It bears mention that the justification of the state morphed somewhat during the course of the litigation. At the trial level, the state's first justification was a defense of traditional marriage, or as the trial judge characterized it, "the state's interest in regulating marriage is based on the traditional concept that marriage's primary purpose is procreation." Id. (citation omitted). On appeal, that justification transformed into what the Supreme Judicial Court identified as "providing a favorable setting for procreation." Id. Frankly, from this litigator's perspective, the initial justification was always somewhat of a moving target, in part, because behind the language, the true motivation for it seemed to be an animus-based position that was both untenable politically and impractical legally.

\textsuperscript{72}Id. (citation omitted).

\textsuperscript{73}Id.
of the marriage partners to one another, not the begetting of children, that is the *sine qua non* of civil marriage."

As to the second justification, the court agreed "[p]rotecting the welfare of children is a paramount State policy." However, fatal to the state's justification was the lack of any relationship or nexus between the exclusion in the marriage law and the asserted policy. The court went on to explain that:

no evidence [supports the State's suggestion] 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. There is thus no rational relationship between the marriage statute and the Commonwealth's proffered goal of protecting the "optimal" child rearing unit.

To the contrary, in light of the fact that same-sex couples throughout the state—including four of the seven plaintiff couples—have children, the exclusion undermines the state's interest in the welfare of children, rather than furthers it.

Finally, the court gave short shrift to the state's economic justification of the exclusion. It deemed the state's generalization—that same-sex couples are more financially independent and therefore less needy of public marital benefits—to be conclusory. Even more, as the court explained, the laws do not require a showing of financial dependence by married couples and no such requirement should be imposed on same-sex couples. The court recognized that even beyond the couples involved, same-sex couples like different-sex ones, have dependents in their care. The court concluded that these other dependents are no less needy nor less deserving than the dependents of married couples.

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74 *Id.*
75 *Id.* at 963.
76 *Id.*
77 *Id.*
78 *Id.* at 964.
79 *Id.* at 963-64.
80 *Id.* at 964.
81 *Id.* at 963-64.
The court went beyond the plaintiffs' specific justifications offered to reject the partially developed (but pressed by amici) justifications offered by the state. In addition to dismissing the primary three justifications, the court declared uncreditable other rationales including that "broadening civil marriage to include same-sex couples will trivialize or destroy the institution,"\textsuperscript{82} that only the legislature can define and control marriage boundaries, that allowing same-sex couples to marry would lead to interstate conflict,\textsuperscript{83} and that the exclusion is justified by "community consensus that homosexual conduct is immoral."\textsuperscript{84}

In conclusion, the court acknowledged that "[t]he marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason."\textsuperscript{85} The gulf between the justifications offered and the harm the exclusion inflicts, reasoned the court, "suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual."\textsuperscript{86} The court concluded that the marriage ban "violate[d] the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution."\textsuperscript{87}

Much has changed since the \textit{Goodridge} decision. The decision itself was subject to competing interpretations because of the court's simultaneous issuance of a 180-day stay of the effectiveness of the ruling. As a result of a nod to the legislature in the decision, permitting the legislature "to take such action it may deem appropriate \textit{in light of this opinion},"\textsuperscript{88} several opponents of the outcome, including the governor and legislative leaders, read into it the possibility of "wiggle room."\textsuperscript{89} As explained, this "wiggle room" would allow the legislature to respond by passing a civil union law, comparable to that passed in Vermont, to deny

\begin{itemize}
\item \textsuperscript{82} \textit{Id.} at 965.
\item \textsuperscript{83} \textit{Id.} at 967.
\item \textsuperscript{84} \textit{Id.}
\item \textsuperscript{85} \textit{Id.} at 968.
\item \textsuperscript{86} \textit{Id.}
\item \textsuperscript{87} \textit{Id.}
\item \textsuperscript{88} \textit{Id.} at 970 (emphasis added).
\item \textsuperscript{89} \textit{See id.} at 969-70 (noting the legislature's "broad discretion"). \textit{See also} Frank Phillips & Raphael Lewis, \textit{AG Suggests Bill: Same-Sex Benefits Without Marriage}, \textit{BOSTON GLOBE}, Nov. 21, 2003, at A1.
\end{itemize}
marriage to same-sex couples while passing a law providing to them all of the benefits, protections, and obligations under state law.

Requesting an advisory opinion from the court, the Senate sought clarification of the ruling. In arguably an even stronger decision, the court, in no uncertain terms, explained that no civil union law could provide the equality called for by the Goodridge decision. As the court clarified, equal means equal and "separate is seldom, if ever, equal." Certainly, explained the court, a separate legal status available exclusively to gay and lesbian couples is not equal due to the cross-cultural currency, history, and intangible associations that marriage provides. In addition, the court said the that marriage, unlike civil unions, provides security for couples when they travel and move as well as the opportunity to seek federal legal protections even though currently denied by an arguably discriminatory federal law. As a result of the court's clarification—or more accurately re-articulation, of the earlier decision—supporters and opponents of marriage rights for same-sex couples agreed on at least one thing: marriage licenses would issue in the Commonwealth of Massachusetts as of May 17, 2004.

Following the court's issuance of its advisory opinion relating to the lawfulness of civil unions, the Massachusetts stage shifted to the state legislature which took up a proposed state constitutional amendment that would create an exception to the guarantees of

90 In re Opinions of the Justices to the Senate, 802 N.E.2d 565, 566 (Mass. 2004).
91 Id. at 569-70.
92 Id. at 569.
93 See generally id.
95 Indeed, the first marriage license to issue to a same-sex couple in Massachusetts was in Cambridge Probate Court. To celebrate the inclusion of gay and lesbian couples in the state law, Cambridge opened its City Hall on midnight of May 17, 2004. Thomas Caywood & Elizabeth Beardsley, Marry-Thon Monday: Bay State Gays Ring in New Era, Cambridge Opens the Door, BOSTON HERALD, May 17, 2004, at 5.
liberty and equality and in turn deny gay and lesbian couples the right to full equality, including the right to marry.\textsuperscript{96} Having avoided an earlier effort to amend the state constitution,\textsuperscript{97} the legislature in joint session took up a proposed, legislatively initiated, amendment that sought to do the same thing.\textsuperscript{98} The legislative debate raged fiercely over two months as legislators staked out competing positions about the correctness of the \textit{Goodridge} decision and the need (or lack of it) to instantiate inequality in the Massachusetts Declaration of Rights (the state Constitution). The outcome of that debate was (by a 105 to 92 margin) the advancement of a proposed legislative amendment, defining marriage as excluding gay and lesbian couples, to a second legislative session.\textsuperscript{99} The proposal, in addition to defining marriage in an exclusionary way, would inscribe civil unions into the state constitution as the only possible alternative for gay and lesbian couples. Having passed the first hurdle required for advancing a legislatively initiated amendment, that proposal must yet receive a second majority vote of both houses of the next legislative session in order to, at the earliest, advance to a vote by the electorate in November 2006.\textsuperscript{100}

Not finding immediate success in the legislature, the Governor of Massachusetts has sought to limit, to the extent of his ability, the effect of the \textit{Goodridge} decision. In order to do so, he has latched onto a Jim Crow era law often referred to as "reverse evasion" in order to exclude any non-Massachusetts gay and lesbian couples from marrying.\textsuperscript{101} Two lawsuits—one brought by married couples


\textsuperscript{100} Id.

\textsuperscript{101} \textit{See} MASS. GEN. LAWS ANN. ch. 207, §§ 11-13 (West 1998).
and those who seek to marry,\textsuperscript{102} the other brought by twelve cities and towns\textsuperscript{103}—challenge the discriminatory enforcement of the antiquated law.\textsuperscript{104}

Through other events taking place across the country, the issue of marriage for same-sex couples has taken center stage in a national debate.\textsuperscript{105} In cities and towns across the country, for the first time ever in United States history, marriage licenses have issued to same-sex couples. Cities and towns that have already issued licenses include San Francisco, California;\textsuperscript{106} Bernalillo, New Mexico;\textsuperscript{107} New Paltz, New York;\textsuperscript{108} Asbury, New Jersey;\textsuperscript{109}

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\textsuperscript{104} An in-depth discussion of the case is beyond the scope of this Article. However, the basic grounds for challenging the statute and the Governor's discriminatory enforcement of it are: (1) the statute is being misinterpreted in its application to all non-residents; (2) discriminatory exclusion of non-residents from the protection of Massachusetts law violates Article IV of the federal Constitution (Privileges and Immunities); and (3) the statute violates the guarantees of liberty and equality as articulated in the Goodridge case.
\textsuperscript{105} In addition to the legislative and litigation initiatives around the country, a proposed federal anti-marriage amendment has been proposed but has, so far, not advanced beyond its introduction. H.R.J. Res. 56, 108th Cong. (2003); S.J. Res. 26, 108th Cong. (2003). The amendment as currently drafted reads:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution nor 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.

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and Multnomah County, Oregon.110 In those and other states, court cases have been filed and pursued to secure marriage rights for same-sex couples, including New Jersey,111 Oregon,112 Washington,113 West Virginia,114 New York,115 Indiana,116 and California.117 Individuals and groups in other locations promise to bring similar suits or seek the issuance of licenses from town clerks.


111 Same-Sex Marriage Suit Filed in NJ, CHICAGO TRIB., June 27, 2002, at N18.


V. WHITHER CIVIL UNIONS

In this unbelievably transformed legal landscape, a discussion of civil unions seems almost anachronistic. As one Massachusetts state representative has said, "a year ago civil unions were the most divisive issue in history. Now they are very boring to anyone who isn't in one."118 Despite that sentiment, there is a strong argument that civil unions have become a placeholder for the position of those against the right of gay and lesbian people to marry and, despite providing more protections for some gay and lesbian couples than are currently available, should not be adopted.

The four principles reasons for opposing civil unions are (1) gay and lesbian couples need and deserve equality and no separate system, regardless of how comparable, can provide that equality; (2) civil unions fall far short of marriage, as a practical matter because their portability to states outside the jurisdiction of issuance is questionable; (3) nothing short of marriage can provide the far-reaching federal protections and responsibilities in light of the so-called federal Defense of Marriage Act;119 and (4) as a doctrinal matter, there is no legitimate justification for denying gay and lesbian couples equality in marriage and, therefore, no civil union law could survive scrutiny regardless of the applicable standard of review. Beyond these more formalistic reasons, however, lies perhaps the most compelling one. Civil unions are explicitly intended to ensure that gay and lesbian couples do not receive the equal marriage rights of non-gay couples. It is a strong, clear and very public statement of discrimination that sullies our society and the communities within which we live. For that reason alone, no separate system, intended exclusively for gay and lesbian families and provided for in order to intentionally exclude same-sex couples from marriage rights, should be adopted or should survive.120

120 Notably, in Vermont, the only state to provide for civil unions, there remains a serious question about the constitutionality of the existing law. Press Release, Gay & Lesbian Advocates & Defenders, Couples Announce
As to the first reason, one must be mindful, as the *Goodridge* court was, that marriage is far more than the sum of its parts. It is not just about social security, marriage taxes, worker's compensation protections, or divorce or intestacy laws. People do not generally marry for the reason of obtaining these benefits. They marry because they love each other, because they want to form and create families, because they bow to family and societal pressures, because they want to make a public statement about a private experience. In short, people marry because they fall in love.

And gay people want to marry for all of these same reasons. Yet, no separate system—without the history and cross-cultural currency that marriage has spawned—can offer gay and lesbian couples the opportunity to make the same universally understood statement about the nature and importance of our relationships. Only marriage has the pedigree necessary to convey all of the significance that it entails.

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122 *Brief of Interested Party/Amicus Curiae Gay & Lesbian Advocates & Defenders at 26, *In re Request for an Advisory Opinion From the President of the Senate, 802 N.E.2d 565* (Mass. 2004) (No. 09163) ("[T]here is nothing that has all the same obligations, rights and benefits as marriage but marriage .... [M]arriage is not just a bundle of rights. Legal marriage is, and has been for hundreds of years, a privileged status."). "Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition." *Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955* (Mass. 2003).

123 *See Goodridge, 798 N.E.2d at 957* (quoting *Baker v. State, 744 A.2d 864, 889* (Vt. 1999)) ("Without the right to marry—or more properly to choose to marry—one is excluded from the full range of human experience and denied full protection of the laws for one's 'avowed commitment to an intimate and lasting human relationship.'"). *See also* Evan Thomas, *The War Over Gay Marriage, NEWSWEEK*, July 7, 2003, at 38. ("[H]illary [Goodridge] asked Annie [her daughter] if she knew any people who loved each other. The little girl rattled off the names of her mothers' married friends, heterosexuals all. 'What about Mommy and Ma?' asked Hillary. 'Well,' the child replied, 'if you loved each other you'd get married.'").

123 *The Supreme Judicial Court of Massachusetts held that "[t]he benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death. The department states that 'hundreds of statutes' are related to marriage and to marital benefits." Goodridge, 798 N.E.2d at 955.*
As to the second reason, perhaps as important, a parallel legal system has serious practical limitations as well. We have yet to fully learn the implications for couples who obtain civil unions and what significance will be attached to the relationship outside of the borders of Vermont; yet the initial judicial results suggest vast discrimination against civil unions outside of the state of issuance.\textsuperscript{124} Couples travel and move, and no one in a marriage would wonder whether that marriage will be respected everywhere.\textsuperscript{125} No one from Vermont worries that when they get in a car accident in New Hampshire their marriage will face discrimination; and yet that is the situation for couples in civil unions.

The third reason, which looms large, is that without the ability to marry (and not simply enter into a parallel, separate system), the full panoply of federal marital protections are off limits because of the so-called Defense of Marriage Act passed in 1996\textsuperscript{126} that enshrines discrimination into federal law. The Defense of Marriage Act purports to do two primary things. First, it tries to circumvent the federal Full Faith and Credit Act by specifically stating that each state may decide for itself whether or not to recognize the marriages of same-sex couples from other states. Second, it defines for federal purposes marriage to be the union of one man and one woman. Since its adoption, thirty-eight states have passed laws

\textsuperscript{124} See Rosengarten v. Downes, 802 A.2d 170 (Conn. App. Ct. 2002) cert. granted, 806 A.2d 1066 (Conn. 2002) (unpublished table decision) (Connecticut courts lack jurisdiction to dissolve a civil union because doing so—as contrasted with dissolving a marriage—does not fall within any of the statutorily prescribed areas that the court is empowered to decide); Hall v. Beauchamp, 833 So. 2d 123 (Fla. Dist. Ct. App. 2002) (unpublished table decision) (no child visitation allowed while father had overnight guests to whom he was not married, including his civil union spouse); Burns v. Burns, 560 S.E.2d 47 (Ga. Ct. App. 2002) (no child visitation allowed while mother’s civil union spouse is in home where divorce order only allowed child visitation in presence of adult overnight guests to whom mother was married or related within second degree); Langan v. Saint Vincent’s Hosp., 765 N.Y.S.2d 411 (N.Y. App. Div. 2003) (recognizing the plaintiff’s standing to sue for the wrongful death of his civil union spouse).


stating, in one form or another, that they will not recognize otherwise lawful and valid marriages of same-sex couples entered into in a sister state.

As to the part of DOMA that defines marriage for federal purposes, we have yet to see its full implications because of the recency of same-sex couples being able to marry and therefore learn of the full impact of the law. Regardless of whether or not it may preclude couples from receiving all federal benefits and protections or just some, its effect is draconian and many argue unconstitutional. Without the ability to marry, even with a provision for entry into a civil union, the federal statute may remain unchallengeable. The fact that the adoption of a civil unions law—instead of modification of the laws to include same-sex couples in marriage—would continue to deny couples the

127 A comprehensive discussion of DOMA is well beyond the scope of this article. Suffice it to say, however, that this author is unconvinced that it should exclude lawfully married couples from all federal laws that in any way implicate marriage. For example, there are numerous joint state and federal programs—Medicaid for instance—which incorporate a state's definition of marriage (or spouse, where applicable). The benefits of such programs should not be denied to married same-sex couples. Note, however, that federal agencies have already taken DOMA to arguably ridiculous extremes. For example, the passport agency has interpreted the law to mean that the agency may ignore the legal fact of a married same-sex couple taking a common name. See Franci Richardson, Feds Deny Passport Name Change for Gay Man, BOSTON HERALD, July 28, 2004, at 15. Although a Massachusetts state statute provides that upon marriage, the couple may take a common name, MASS. GEN. LAWS ANN. ch. 46, § 1D (1994), the federal passport agency maintains that DOMA requires it to ignore the legal effect of the marriage and, therefore, the new name resulting from operation of state law. Franci Richardson, Feds Deny Passport Name Change for Gay Man, BOSTON HERALD, July 28, 2004, at 15. That position, if taken to its logical conclusion, would mean that a federal agency could refuse to accept dollars paid to it by a couple (or individual, for that matter) that were received through a tax refund as a result of Massachusetts joint state tax filing—an absurd position.

128 See Andrew Koppelman, Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional, 83 IOWA L. REV. 1 (1997) (arguing that DOMA is unconstitutional under Romer v. Evans); Mark Tanney, Note, The Defense of Marriage Act: "A Bare Desire to Harm" an Unpopular Minority Cannot Constitute a Legitimate Governmental Interest, 19 T. JEFFERSON L. REV. 99, 99 (1997) (arguing that "by defining marriage to exclude gay men and lesbians, [the DOMA] invidiously discriminates against gays, and unreasonably interferes with their fundamental right to marry").
ability to challenge this odious federal law is yet another reason why civil unions are insufficient to provide equality to gay men and lesbians.

The final reason is a straightforward doctrinal one. Once one acknowledges that the exclusion from the marriage laws—whether or not there is a separate status in the form of civil unions—is not simply definitional (that is, once one accepts that the exclusion is real, explicit, and has the effect of denying gay and lesbian individuals the ability to marry), then regardless of the standard of scrutiny, the state must have some justification for providing only for a separate status, regardless of how comprehensive its protections are. In some ways, the case for justification becomes even harder once there are some laws in place that provide protections to gay and lesbian families. In other words, once a legislature acknowledges that gay and lesbian families exist (as it must) and determines that such families are needing and deserving of the law’s protections, the question becomes how one can justify any limitations on the comprehensiveness of the protections of marriage. It is hard, if not impossible, to imagine any justification other than raw animus as supporting a separate, parallel track. As the United States Supreme Court has now twice recently explained, such raw animus will not survive under any level of scrutiny.\(^{130}\)

\(^{129}\) Some, including the Commonwealth of Massachusetts have argued that laws requiring that a marriage be between one man and one woman do not deny gay men and lesbians the ability to marry because, after all, a gay man could marry a woman and a lesbian could marry a man; they simply cannot marry the person they fell in love with. See generally Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment and in Support of Defendants’ motion for Summary Judgment at 46-56, Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (No. 01-1647-A), available at www.glad.org/marriage/AG.memo.pdf (last visited July 26, 2004). Rejecting this argument when first made in a race context, the California Supreme Court explained in striking down that state’s anti-miscegenation law as unconstitutional, "Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains." Perez v. Sharp, 198 P.2d 17, 25 (1948).

VI. CONCLUSION

As recently as 2003, commentators could only speculate as to what our society might look like if gay and lesbian couples could marry in this country. Too much has changed between now and then to make a discussion focused on speculation interesting. Gay and lesbian couples, many with children and many who have already been in committed, loving relationships for decades, are now lawfully married and living throughout the country (indeed, throughout the world). In light of recent, fast-paced developments in the law with more to come, a discussion of civil unions is anachronistic and, at the risk of putting too strong a spin on it, shameful. Civil unions have become code for inequality and the imposition of second class status on a community of law-abiding, tax-paying, contributing members of our society. Moreover, civil union—or more specifically, a marital status exclusively reserved for same-sex couples that falls far short of marriage—is legally indefensible. The question now should shift from whether we treat these families with the equal dignity and respect they deserve to how.

131 See Scott S. Greenberger & Bill Dedman, Survey Finds Women in Majority, BOSTON GLOBE, May 18, 2004, at A1 ("Two-thirds of the gays who applied for marriage licenses yesterday were women, half of the couples had been together for at least a decade, and an enormous majority were Massachusetts residents, a Globe survey of 752 couples in 11 cities and towns found.").