



April 2003

## ***Marriage, Same-Sex Relationships, and the Debate in Massachusetts***

### **Why is marriage an issue today?**

A campaign is underway to have Massachusetts treat relationships of two men or two women as a marriage, or as equal to a marriage. If the campaign wins, same-sex couples would have all the rights of spouses. Massachusetts has recognized since its founding that marriage is the union of one man and one woman.

Advocates are going to court and going to the legislature to redefine marriage. They seek a court order forcing the state to allow same-sex couples to receive marriage licenses. The name of the lawsuit is *Goodridge v. Department of Public Health*. The case is now before the state's highest court, the Supreme Judicial Court. Advocates have also filed bills in the state legislature. One bill, H. 3677, would create same sex marriage. The other bill, H. 1149 in the House and S. 935 and S. 1045 in the Senate, would create a new legal category for same sex couples called a "civil union." Civil union partners would have all the rights of spouses.

In response, others have filed a constitutional amendment, H. 3190, the Marriage Affirmation and Protection Amendment. This amendment states:

It being the public policy of this Commonwealth to protect the unique relationship of marriage in order to promote among other goals, the stability and welfare of society and the best interests of children, only the union of one man and one woman shall be valid or recognized as a marriage in Massachusetts. Any other relationship shall not be recognized as a marriage or its legal equivalent.

The amendment reaffirms marriage as the union between one man and one woman and recognizes the unique contribution of this sexual bond. Marriage would continue as the only legal status that converts individuals into spouses.

### **Would the proposed constitutional amendment deny benefits?**

No. The amendment only deals with the definition and uniqueness of marriage. It does not at all refer to benefits one way or the other, leaving that issue entirely to the legislature and courts. Nothing stops anyone, including the state, from giving out benefits to whoever wants them.

The Catholic Church supports in principle the provision of health care and other social benefits to anyone who needs them. This is a matter of justice. The definition of marriage is altogether a different matter.

## **What would happen if the state supreme court rules in favor of same sex marriage?**

That will create a firestorm. The Supreme Judicial Court is expected to issue a ruling by June. Many legal commentators say they will not be surprised if the court abolishes the traditional definition of marriage, or at least mandates civil unions. From our perspective, that will be a supreme example of judicial extremism. If such a ruling comes down, then Massachusetts will very quickly become the marriage magnet for same sex couples from all over the country. It will also open up the door to discrimination suits against religious and other entities with employment and other policies that do not recognize same sex partners as spouses.

## **What about creating the status of “civil union”?**

“Civil union” has become a brand name, so to speak, that refers to the way that Vermont law now treats same sex relationships. The civil union bills filed in Massachusetts pattern the Vermont law. They create a new status of “civil union” that, when entered by a same sex couple, qualifies each partner as spouses, automatically eligible for whatever the law provides to married spouses.

Legally speaking, this makes the civil union equal to marriage in everything but the name. This approach is not a “compromise” because it reduces the category of marriage to just a name, as if it were merely a semantic distinction without a difference. Marriage is unique and should remain so.

As already mentioned, nothing in the proposed constitutional amendment would prevent the state from giving any number of benefits to unmarried couples, including to same sex partners. Beyond the limit on making the relationship the equivalent of marriage, the field is wide open.

## **Isn't limiting marriage to heterosexual couples discriminatory?**

The question is not whether there is discrimination, but whether the different treatment is justified.

When it comes to defining marriage, all reasonable people “discriminate” and any limits on who can “marry” are potentially justifiable. If there is some distinction at stake, and a reason to rely on that distinction, then different treatment may be in order.

If you asked supporters of gay marriage whether they support bigamous marriage, they likely will respond, as did the Gay & Lesbian Advocates & Defenders in the *Goodridge* case, that bigamous relationships can be treated differently, that is, be banned. That's discrimination too. Clearly, the concept of same sex marriage discriminates against bigamists. Advocates for same sex marriage think it is justifiable to limit marriage to couples, thus excluding groups of more than two.

But then they turn around and accuse supporters of traditional marriage of being discriminatory. They claim we harbor a bias against persons attracted to others of the same sex. Yet, even people of color, historically subject to racial discrimination, and members of the homosexual

community itself, count themselves among those who agree that marriage should not be redefined. The definition of marriage deals with discrimination of another sort, based on what thousands of years of experience has taught: the relationship between a man and a woman provides the ideal means for raising children and represents the totality of the human community, made male and female.

Marriage, as a relationship built on the conjugal union, is distinguishable on that basis from any other relationship and deserves special recognition.

### **What’s wrong with letting two people of the same sex marry?**

There really are two questions here: 1) isn’t it possible for two people of the same sex to marry, and 2) why not approve same sex relationships the same way we approve marriage?

If a marriage is not possible, then it’s wrong to act like the relationship is a marriage. If another relationship is not the same as a marriage union, then it is wrong to treat it as if it were identical. “Wrong” here means not being honest about or faithful to reality.

Thus at one level the marriage debate is a dispute over what the word “marriage” means. To what reality does the word refer? Is it commitment? Or is it something else?

There is another level to consider. Let’s say for now that the reality of what constitutes marriage, its definition, just cannot include the same sex relationship because it is different in kind. Then the marriage debate focuses on whether same sex relations have just as much worth or value as marriage—not the same in content, but equal in any good that results. If the marriage between a man and woman creates some benefit that same sex relations do not, or if the latter causes some harm that marriage does not, then “wrong” here means to equally endorse something of unequal value.

So, from the Catholic Church’s perspective, letting two persons of the same sex be treated as if they are married is wrong on two levels. First, the relationships involve separate realities. They are different in key ways. It would be dishonest to ignore the difference. Second, the relationship between a man and a woman provides society with unique benefits that justify its endorsement. Giving equal approval to same sex relations creates its own set of problems. It would be unreasonable to overlook the consequences.

In the statement on *Family, Marriage and ‘De Facto’ Unions* 28-29 (2000), the Pontifical Council for the Family, quoting from Pope John Paul II, various national bishops’ conferences, and other Vatican documents, outlined Catholic teaching on “same sex marriage”:

- Creating such a legal status is “incongruous”—it would be characterized by the “objective impossibility of making the partnership fruitful through the transmission of life according to the plan inscribed by God in the very structure of the human being.”
- The institution of same sex marriage would lack “the condition for that interpersonal complementarity between male and female willed by the Creator at both the physical-biological and the eminently psychological levels.”

- Only the relationship between a man and a woman “implies sexual difference, the conjugal dimension, the ability to exercise fatherhood and motherhood.” Same sex marriage “cannot represent this symbolic whole.”

**Aren’t we missing the boat, though? Even if there are differences, how can we not show compassion and respect for people who want to commit themselves to each other?**

Let’s be clear. While society should not be forced to endorse all forms of cohabitation or sexual relations, we must treat all persons with dignity and compassion. Hatred has no place in affirming marriage. As the Vatican’s Congregation for the Doctrine of the Faith has observed:

It is deplorable that homosexual persons have been and are the object of violent malice in speech or in action. Such treatment deserves condemnation from the Church's pastors wherever it occurs. It reveals a kind of disregard for others which endangers the most fundamental principles of a healthy society. The intrinsic dignity of each person must always be respected in word, in action and in law.<sup>1</sup>

The Catholic Bishops of Massachusetts have been equally adamant: “Homosexuals, like everyone else, should not suffer from prejudice against their basic human rights. They have a right to respect, friendship and justice.” Statement of the Massachusetts Catholic Bishops, May 31, 1984.

The Catechism notes that “[w]hether it develops between persons of the same or opposite sex, friendship represents a great good for all.” Catechism of the Catholic Church (hereinafter “Catechism”), no. 2347 (2d ed. 2000). This teaching, however, is included in the Catechism’s discussion of sexual chastity and continence. While the Church commends friendships between persons of the same sex as potentially “a great good for all”, it withholds approval from any accompanying sexual relations. *Id.* at nos. 2357-59.

All persons deserve respect. But not every private relationship or mutual conduct merits official approval by formalizing it as a public institution. We can still show compassion towards individuals and honor friendships without being required to endorse every joint activity or objective.

Calling a relationship “marriage” is an endorsement, not so much of the persons involved but of the relationship. The marriage institution honors something more than commitment between friends, however. At its core is a particular sexual intimacy.

So, for example, we don’t normally interpret the failure to permit parents and their children to marry each other as an attempt to demean parents and children. We show compassion and respect to parents and to children through other means.

The same is true for persons attracted to members of the same sex. We can recognize, as does the Vatican, that “homosexual persons are . . . often generous and giving of themselves” without

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<sup>1</sup> Congregation for the Doctrine of the Faith, *Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons* (1986) (no. 10) (hereinafter “CDF, Pastoral Care of Homosexual Persons”).

having to endorse with a marriage license a commitment “to engage in homosexual activity”. CDF, Pastoral Care of Homosexual Persons, no. 7.

### **You say that the core of marriage is a particular sexual intimacy. Why not allow any couple in a sexually intimate relationship to marry?**

This brings us back to the definition of marriage. The word “marriage” has always been associated with the particular sexual behavior between a man and a woman that unites them so completely as to identify them as “one flesh”. The Church calls this the “conjugal union”. Only this form of sexual intimacy has the natural potential to create new generations. Only this form of physical bonding, even in cases of infertility, unites the two halves of the human race in a “complete” representation of all of humanity.

Marriage was raised to the level of a public institution by society and the law precisely because of the conjugal union, and not because of friendship, commitment or sexual intimacy in general. Friendships, commitments and sexual relations between persons of the same sex lack any association with the conjugal union. In this sense, the marriage of same sex couples is impossible because conjugal unions by these couples are impossible.

Of course, redefining marriage by eliminating its association with the conjugal union seemingly removes the impossibility. Such a move however obscures the underlying reality of the conjugal union. It forces the state to ignore the special characteristics and advantages of the conjugal union as a norm for sexual intimacy. The state would have to abide by a strict neutrality that avoids any preference for relationships based on the conjugal union.

### **What’s so important to society about the sexual bond between a man and a woman that same sex relations could not also provide?**

Interestingly, an advocate for same sex marriage raised this question recently and gave a pretty good response:

There is something unique and miraculous about the connection between male-female sex and the creation of new life. Its connection to a marital structure in which that new life can be nurtured, protected, and elevated is also one that is obviously vital to defend. Catholic thinkers have developed the most elaborate modern doctrine on this subject. That doctrine affirms something life-giving and important: the nexus between sex, marriage, and family. As a symbol of what sexuality can be about, indeed what it is ultimately about, this linkage makes moral and theological sense. It also makes social sense. The data that children are better adjusted when they grow up in stable, nurturing, traditional homes is overwhelming. It makes all the sense in the world for a society to find a way to celebrate and protect this arrangement for, if nothing else, the benefit of the next generation.<sup>2</sup>

The conjugal union provides the natural gateway through which humanity itself is replenished. It affords the best natural means for achieving intergenerational stability. It becomes the “first

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<sup>2</sup> Andrew Sullivan, *We’re All Sodomists Now*, The NewRepublic Online (April 13, 2003).

society” as referred to by John Locke.<sup>3</sup> From it springs, and it mirrors in all its completeness and fullness, the larger society. These factors justify the conjugal union’s unique status in history, and recommend it for approval as the norm for sexual relations.

Sexual relations between persons of the same sex encompass a different reality. Intimacy in this context lacks any natural association with procreation. Such intercourse can never be for the purpose of begetting. It has no direct bearing on the regeneration of the human community. Nor does the physical coupling reflect the entire composite of humanity—one half or the other remains unrepresented. Same sex relationships may exhibit a commendable quality of friendship. Yet the structure of any underlying sexual conduct has nothing to commend it as a publicly endorsed norm.

At its root, then, the crucial advantage of the conjugal union lies in its two-fold public function: it serves as the replenishment and reflection of human society itself.

### **If the bond of a married man and woman is so beneficial, then how will the relationship between the same sex couple living down the street hurt that bond?**

The issue here is not toleration. It’s endorsement. That’s what the institution of marriage does—it endorses private conduct and establishes a public norm. Advocates for same sex marriage seek official approval that goes further than toleration. So we have to ask: what qualifies homosexual conduct for equal endorsement?

### **Isn’t it unfair to limit the issue to sexual relations? Same sex couples are just as capable as opposite sex couples of commitment, friendship, and parenting. All they want is the same public acknowledgement of their devotion.**

If marriage were about endorsing commitment, friendship and parenting, then a comparison of these qualities would be in order. Advocates for same sex marriage would have the opportunity to prove that their devotion to each other and to any children involved is worth endorsing as marriage. Of course, the burden would have to be on their shoulders. And they would have to rebut the longstanding conviction, expressed by people ranging from Republican conservative Bill Bennett to Democrat liberal Hillary Clinton, that having both a mother and a father involved and committed to each other best serves a child’s interests.<sup>4</sup>

Marriage is not the means for endorsing these things, whatever general benefits could be proven. If it were, then all commitments, all friendships, and all parenting arrangements would have long ago been included as marriage.

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<sup>3</sup> John Locke, *Second Treatise on Government*, chap. 7, § 78.

<sup>4</sup> Compare Bennett (“The timeless function of marriage is childbearing and child-rearing, and the best arrangement ever developed to that end is the marital union between one man and one woman . . .”) with Clinton (“an adult mother and father and the children to whom they are biologically connected, has proven the most durable and effective means of meeting children’s needs over time”). See William J. Bennett, *The Broken Hearth* 133 (2001) & Hillary Rodham Clinton, *It Takes a Village* 50 (1995).

As important as are the other aspects of a good marriage, it is the potential for and promise of sexual commitment that distinguishes the marriage institution. It alone invites a man and a woman to engage in sexual intimacy.

In the *Goodridge* case, advocates for same sex marriage agreed that,

[i]n the popular imagination and the law, sexual intimacy is a core element of marriage. . . . roommates may well live together for extended periods of time and share household expenses, but no one confuses that relationship with marriage where the roommates are not romantically involved. . . . Marriage is . . . characterized by a romantic passion that is most typically expressed through sexual activity.”<sup>5</sup>

So it is entirely fair to ask: what is it that commends the sexual activity of same-sex couples for elevation to the status of a public institution?

**Persons attracted to others of the same sex can’t help it, and didn’t choose their orientation. Why isn’t this good enough reason to recognize their relationship as marriage?**

Marriage is about what is best for society and best for children. The institution is not the official licensing agent for adult satisfaction. If it were, it would be boundless and therefore meaningless as a normative institution. It arose for the purpose of regulating procreative sexual activity in order to guarantee the smooth transition of generations. It also recognized that relationships based on the conjugal union serve as the “first society” by representing both halves of the human community. Thus, the conjugal union carries a clear public significance. The question remains: what public interest, as opposed to private intent, is advanced by sexual relations between persons of the same sex?

**Many same sex couples have children, they can adopt in Massachusetts, and thus they are already playing a “publicly significant” role in the “transition of generations”. Isn’t that enough to qualify them for marriage?**

Let’s look at this issue from three angles. First, is marriage determined by the capacity to bring children into one’s care? No, marriage identifies who is presumably capable of engaging in a form of socially important sexual conduct, not who can become a parent.

Second, expanding the scope to encompass the capacity to acquire children would make any relationship capable of child care marriage-eligible. Two sisters caring for a niece should qualify for spousal benefits then. Is this what society wants? Certainly, denying these caring sisters spousal status while giving such status to same sex couples would be utterly inconsistent.

Third, the issue of adoption requires its own inquiry. The question here is not about the qualification to get married, but the qualification to adopt. The care of children by their married biological mother and father enjoys a presumption of best interest, and no court need approve the

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<sup>5</sup> Amici Curiae Brief of the Professors of the History of Marriage, Families, and the Law in support of plaintiffs-appellants at 38 & n. 2, *Goodridge v. Dep’t of Public Health*, No. SJC-08860 (decision pending).

procreation of children in this setting. Adoption requires legal oversight and a state finding of best interest.

Essentially, advocates for same sex marriage are asking for the same automatic presumption of best interest now extended to the biological mother and father of a child. They want the state to treat their relationship as no different from the biological one, even though children brought into the relationship will by design lack the presence of either the biological father or mother. Calling the same sex relationship marriage and applying the automatic presumption endorses the view that a father is extraneous when two women are parents, and a mother is extraneous when two men are parents. Is that what society wants?

On the side of parenting by both a child's mother and father, thousands of years of experience weigh in, justifying the presumption of best interest. On the side of same sex parenting, recent studies purport to rebut the presumption, saying there is "no difference" in quality.

### **What do the data show on same sex parenting and child development?**

While the American Academy of Pediatrics (see Technical Report: Co-Parent or Second-Parent Adoption by Same-Sex Parents, Feb. 2002, [www.aap.org/policy/020008t.html](http://www.aap.org/policy/020008t.html)) and other groups have come out in favor of same sex adoption, the body of research they have relied on has generated considerable controversy from both sides of the same-sex marriage debate. As noted by the AAP technical report, the "small and nonrepresentative samples studied and the relatively young age of most of the children suggest some reserve." The AAP nonetheless chose to leap into the fray. Was this a wise move?

In their book *No Basis: What the Studies Don't Tell Us About Same-Sex Parenting* (2000), Robert Lerner, Ph.D., and Althea Nagai, Ph.D., evaluated forty-nine empirical studies on same-sex parenting. The authors earned their doctorates in sociology and political science respectively from the University of Chicago and are consultants in statistical analysis. The Marriage Law Project, an organization supporting the traditional definition of marriage, published the book and provides a downloadable copy on its website at <http://marriagelaw.cua.edu/>.

Lerner and Nagai critiqued every study involving original research that they could find published in peer-reviewed scientific journals and books. Their book "concentrates on an analysis of the methodologies used . . . . We conclude that the methods used in these studies are so flawed that these studies prove nothing. Therefore, they should not be used in legal cases to make any argument about 'homosexual vs. heterosexual' parenting.'" *Id.* at 6.

The biggest failing identified was the way that the studies framed the research question and neglected to apply sufficiently rigorous statistical controls. Most of the studies sought only to compare characteristics of same-sex parenting with other types of parenting without asking whether and why any differences were present. Many of the studies were designed to prove a negative, that is, to confirm the researchers' belief that no differences exist between the two child-raising settings. According to Lerner and Nagai, these researchers wrongly concluded that failing to find differences in their particular study was the same as proving that no differences exist. The researchers should have, but did not, apply the standard array of statistical controls to rule out the possibility that procedural errors led to a "false negative".

Thus, only a few of the studies compared the data derived from same-sex households with data derived from intact families consisting of both a mother and a father and their children. Instead,

single-parent and divorced parent households were used as heterosexual control groups. *Id.* at 49 (“The traditional two parent family whose child is biologically related gets the short-shrift in these studies.”). Additionally, most of the studies involved same-sex couples consisting exclusively of white, economically advantaged women, and only a handful involved gay men, thus potentially skewing the results. *Id.* at 51. Ultimately, a “fatal flaw” in methodology marked every one of the forty-nine studies, rendering them unreliable, according to Lerner and Nagai, as bases for justifying a dramatic shift in public policy on marriage and child-raising. *Id.* at 3.

## **What about from the other side?**

From the other side of the fence, sociologists Judith Stacey and Timothy J. Biblarz published (*How Does The Sexual Orientation of Parents Matter?*, in the April 2001 issue of the American Sociological Review (vol. 66, p. 159), criticizing the same-sex parenting research for much the same reasons with one important addition. A copy is available online at <http://www.asanet.org/pubs/stacey.pdf/>.

Identifying themselves as supporters of gay parenting (*id.* at 160), Stacey and Biblarz nevertheless “disagree with those who claim that there are no differences between the children of heterosexual parents and children of lesbian parents.” *Id.* at 179.

Stacy and Biblarz first describe the “conceptual, methodological, and theoretical limitations in the psychological research on the effects of parental sexual orientation”, agreeing with Lerner and Nagai about the problems with small and unrepresentative polling samples, for example, but disagreeing that this alone disqualified the studies for use in policy debates. They then argue that “despite the limitations, there is suggestive evidence and good reason to believe that contemporary children and young adults with lesbian or gay parents do differ in modest and interesting ways from children of heterosexual parents.” *Id.* at 176.

Important differences include:

- “A significantly greater proportion of young adult children raised by lesbian mothers than those raised by heterosexual mothers . . . reported having had a homoerotic relationship” *Id.* at 170.
- “Relative to their counterparts with heterosexual parents, the adolescent and young adult girls raised by lesbian mothers appear to have been more sexually adventurous and less chaste[.]” *Id.* at 171. Stacy and Biblarz also noted that boys raised by lesbian mothers appeared “somewhat less sexually adventurous and more chaste”. However, this raises the question: would boys with two gay men as parents also be more “sexually adventurous and less chaste” than their counterparts raised by heterosexual parents?
- “Children with lesbian parents appear less traditionally gender-typed and more likely to be open to homoerotic relationships.” *Id.*
- “The sexual orientation of parents appears to have a unique (although not large) effect on children in the politically sensitive domain of sexuality. The evidence, while scanty and underanalyzed, hints that parental sexual orientation is positively associated with the possibility that children will be more likely to attain a similar orientation[.]” *Id.* at 178.

Stacy and Biblarz observe that a “diverse array of gender theories . . . would predict that children with two same-gender parents, and particularly with co-mother parents, should develop in less

gender-stereotypical ways than would children with two heterosexual parents”. Given that lesbian mothers seek generally to “redefin[e] the meaning and content of motherhood, extending its boundaries to incorporate the activities that are usually dichotomized as mother and father”, children “living independent of male domestic authority or influence should develop less stereotypical symbolic, emotional, practical, and behavioral gender repertoires. . . . The burden of proof in the domain of gender and sexuality should rest with those who embrace the null hypothesis.” *Id.* at 176-77.

Ultimately, Stacy and Biblarz would see the differences between heterosexual and same-sex parenting as positive, and they believe researchers who support same-sex parenting have been so predisposed to find “no difference” of any kind that they have overlooked their own data indicating differences in sexual attitudes and behavior. *Id.* at 162-64.

They recommend that society reassess “the implicit hetero-normative presumption governing the terms of the discourse—that healthy child development depends upon parenting by a married heterosexual couple.” *Id.* at 160.

Many others would disagree that the types of differences described by Stacy and Biblarz are positive or are “just differences” of no public consequence—for example, is it really beneficial for children to become more “sexually adventurous and less chaste”? Is it of no public significance that the sexual orientation of children may be influenced by the sexual orientation of the parents?

The jury is still out on the sufficiency of the studies brought forth to support the claim that no difference between opposite sex and same sex parenting exists and that therefore marriage should be redefined. One who chooses to overlook the methodological problems with these studies then has to take into account the possibility that differences of dubious public benefit in sexual attitudes and behavior among children could result if same-sex marriage were recognized.

## **What’s the bottom line here on the Marriage Affirmation and Protection Amendment?**

Whether one agrees or disagrees with current public policy recognizing marriage as the union between one man and one woman, no one disputes the real possibility of judicial change. If the Supreme Judicial Court overturns thousands of years of tradition, as many legal commentators expect, then the amendment represents the only way that the people can have their say.

If a majority of people agrees that the conjugal union should no longer be associated with marriage, and that children do not need both a mother and a father, then they can vote against the amendment. But if a majority thinks otherwise, then getting to the ballot a constitutional amendment overturning the Supreme Judicial Court is paramount. Legislators should move the amendment forward.

The process requires the legislature to vote twice on the amendment, once each in 2003-04 and 2005-06. If a majority votes each time to move it forward, then it would be placed on the November 2006 ballot.

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