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ARTICLE: CLUSTER VII: RACE, GENDER, AND SEXUALTIY: ERiddle for our Times: The Continued Refusal to Apply the Miscegenation Analogy to Same-Sex Marriage

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SUMMARY: ... There was a riddle that went around my elementary school thirty years ago. ... Next, this article will explicitly consider the miscegenation analogy and the Attorney General's strategy to limit the reach of Loving v. Virginia and to counter the related claim that denying same-sex couples the right to marry constitutes a form of sex discrimination. ... Does the state consider male sexuality irrelevant to teenage pregnancy? Or is the state looking for a way to sexualize same-sex relationships and contrast that to the supposed "purity" of children? ... Loving v. Virginia ruled that the prevention of mixed-race marriage constituted race discrimination and violated the fundamental right to marry. ... On the other hand, the state does not want there to be a finding of sex discrimination that would then require the state to justify such a classification. ... Once Loving v. Virginia is accepted as precedent, it would be difficult for a court to deny full formal equality. ... The companion riddle is how to recognize the awful history of oppression against African-Americans without exploiting it, without using inequality in history as an excuse to deny equality now. ...

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I. The Riddle

There was a riddle that went around my elementary school thirty years ago. The riddle went as follows: "a father is driving his son to school when the car crashes, killing the father. The son is rushed to the hospital and the surgeon is about to operate but stops, announcing: "I cannot operate on this boy; he's my son.' How can this be?" Answer: "the surgeon is the boy's mother." When I recently posed this riddle while driving my child and the rest of the car pool, the kids, who usually like riddles, didn't see it as a riddle at all. "The doctor was his mother," quickly responded an eleven-year-old girl, as if I were stupid. "Or the child had two fathers," added my child. I was pleased the joke fell flat; it was a mark of progress.

An analogous riddle for today's times comes to mind: "A couple falls in love, has a big church wedding, buys a house. Soon a child is born. One member of the couple dies. The other is told she inherits nothing, must move out of the house, and must sue if she wants custody of the child. How can this be?" The answer: the couple is a same-sex couple, so despite the church wedding the couple was not married in the eyes of the law.

Note that the second riddle also relies on a gender switch. Instead of a doctor being a male, the partner who dies turns out to be the other gender than the one presumed. The second riddle is equally unfunny, but for a different reason than the first riddle. The first riddle relied on the counter-intuitive aspect of a female surgeon. It gently chided listeners to examine their own assumptions. As we move past that stage where female doctors are unexpected, the humor disappears. In contrast, the second riddle does not highlight a problem of perception, but rather a problem with reality. One may quickly guess the answer, but the question "how can this be?" also reads "how can we let this happen in our society?" That is more difficult to answer.

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II. Pending Marriage Litigation

As I write this piece, there is a marriage case pending in Massachusetts. n1 Seven same-sex couples have sought the right to marry in Goodridge v. Department of Public Health, grounding their argument in the Massachusetts constitution. n2 The importance of this case should not be underestimated even though Vermont pioneered the way with a high court ruling three years ago requiring some form of parity for same-sex couples. n3 Without a favorable Massachusetts **[*1001]** decision, Vermont threatens to be an anomaly, in the same way that California remained the only state to overrule the ban on mixed-

race marriages for nineteen years until the federal courts finally required states to grant licenses to mixed-race heterosexual couples. n4 Similarly, Wisconsin remained an anomaly for seven years, the only state with a statute preventing anti-gay discrimination until Massachusetts became the second state to pass gay rights legislation. n5 Now there are twelve states with anti-discrimination statutes, many passed shortly after Massachusetts. n6 Thus, using history as a guide, the Massachusetts marriage litigation may well have a lasting impact on American jurisprudence in the area of marriage rights.

To help us solve the riddle posed at the beginning of this article, it is useful to explore some of the arguments made by the Attorney General against same-sex marriage in the state's memorandum [hereinafter Attorney General's Memorandum]. n7 This article will begin by examining the most controversial of the Attorney General's arguments, the allegation of promiscuity among daughters of lesbians. By exposing the flaws in this argument, I hope the reader will begin to see parallels between current attitudes towards same-sex relationships and attitudes towards mixed-race relationships in the mid-twentieth century. One goal of the Attorney General's Memorandum was to defeat the plaintiffs' argument that the cases that held the miscegenation statutes unconstitutional should serve **[*1002]** as precedent for same-sex marriage. Ironically, the promiscuity argument ultimately serves to buttress the plaintiffs' miscegenation analogy.

Next, this article will explicitly consider the miscegenation analogy and the Attorney General's strategy to limit the reach of Loving v. Virginia n8 and to counter the related claim that denying same-sex couples the right to marry constitutes a form of sex discrimination. The manner in which the Attorney General of Massachusetts responded to the claim of sex discrimination and the miscegenation analogy disclose a contradictory use of history. History is used in two incongruent ways in the Attorney General's Memorandum. First, the history of slavery serves as a wedge with which to block the miscegenation analogy. The state argues that sex discrimination should not be compared to race discrimination, thereby shielding the state from liability for sex discrimination. This wedge between race and other forms of discrimination should be understood as a form of binary reasoning, that only black/white struggles matter, a logic used to discount other types of discrimination. n9 Second, the state invokes the history of heterosexual marriage in order to gloss over discrimination past and present, also shielding the state from liability for sex discrimination within the marriage statutes.

Finally, this article will consider the importance of the sex discrimination claim in the Massachusetts marriage case, seeking to determine if there is a connection between the theory chosen by the Supreme Judicial Court and the type of relief they may grant.

III. A New "Purity of Children" Argument

At one point in the Attorney General's Memorandum, the state argues that it is rational to discriminate against gay parents since **[*1003]** they arguably raise promiscuous daughters. Here's how the Attorney General's Memorandum phrased it:

> In particular, adolescent girls raised by lesbian parents tend to be more sexually active and adventurous than girls raised by opposite-sex parents. [cite omitted] Given the strong state interest in limiting teenage pregnancies, this finding alone could rationally lead the Legislature to limit marriage to opposite-sex couples. n10

This argument has such flimsy factual underpinnings that it is easy to overlook the problems with its jurisprudential reasoning. Even if it were true that adolescents and young adults raised by same-sex couples had more sex partners than adults of heterosexuals, would that be a reason to deny marriage rights? What if young adults raised by Latino couples had more sex, would it be permissible to deny Latinos/as the right to marry? Why is sexuality the issue rather than the question of overall social adjustment?

The weakness of the allegation is also important to our inquiry because the more an allegation is built on sand, or thin air, the more it proves that prejudice underlies the allegation. When an argument is built on prejudice, who needs facts? n11 It is telling that in Massachusetts, a state with an anti-discrimination law, the Attorney General thought this argument would convince a court, despite its ethereal foundation. n12 Ironically, the Attorney General's Memorandum did not cite the original study, but rather an article by Stacey and Biblarz that asserts that social scientists were wary about uncovering negative findings about gay families because such findings could be used against gay men, lesbians and their children. n13 **[*1004]** Psychological studies are hampered by the misuse of data for anti-gay ends, the social scientists argued. Stacey and Biblarz' thesis is proven by the very use to which their article was put.

The genesis of the government's assertion is one study by Tasker and Golombok that began in the mid-1970's in England. n14 The study's principal conclusion was

that children raised by lesbians demonstrated good adjustment in personal and social development as young children and also as adolescents, a conclusion not cited in the Attorney General's Memorandum. n15 There are several problems with the state's "little known fact," n16 starting with the miniscule data underpinning this generalized declaration. Tasker and Golombok's follow-up study tracked only twenty-five children from lesbian mothers and twenty-one children from heterosexual mothers. Of those, only sixteen were daughters of lesbians and only nine were daughters from heterosexual mothers. Thus, civil rights hangs on the behavior of nine young English women whose mothers were heterosexual. n17 These nine daughters of heterosexuals all had sex out of wedlock but four of these happened to have only one sexual partner since they had become sexually active. Had these four young women behaved differently in England in the 1990's, it seems, children of same-sex couples in America in 2002 might be able to enjoy the security of governmental recognition of their parents' relationship. Alternatively, the sixteen adolescents with lesbian mothers needed to be perfect "role models" for as they stumble, all similarly-situated minorities will be painted with that brush. n18 The **[*1005]** study specifically warned about drawing certain conclusions from such a small sample, and particularly warned about conclusions regarding sexuality. n19

The state's argument jumped from sexuality to teenage pregnancies, a jump not supported by the study at all. None of the daughters of lesbian mothers had unwanted pregnancies. In addition, the figures involving sexuality included types of sexual intimacy where pregnancy is not even a risk, sexuality other than heterosexual intercourse. n20 Significantly, the lesbian mothers in the study were found to be superior to heterosexual mothers in the study in their ability to offer advice on contraception. n21

Finally, when sons were included in the statistics, there was no difference between sexual adventurousness of children from straight and gay mothers at all. The report found that overall, "young people from lesbian mother families and their counterparts from heterosexual homes reported similar numbers of sexual relationships." Does the state consider male sexuality irrelevant to teenage pregnancy? Or is the state looking for a way to sexualize same-sex relationships and contrast that to the supposed "purity" of children?

Unfortunately the Attorney General's Memorandum cannot be dismissed as the ranting of a homophobe, for the Attorney General in question, Thomas F. Reilly, is not anti-gay. n22 This argument generated controversy within the gay community in part because he is considered a friend to gay men and lesbians. He came to discuss the case with the organized gay bar and apologized for some of the **[*1006]** overreaching of the brief.

Was it meant to be offensive? No, it wasn't meant to be offensive. I've heard from enough people now to believe that obviously it was offensive. It was taken offensively... . How do things like that happen? You know it's no other explanation other than that shouldn't have gotten by. It did. And if that's something I can correct then I will. n23

Hence, we must recognize these as arguments that any opponent might make. n24

LatCrit scholar Beverly Greene argues that sexual promiscuity has often been a label used to stereotype, from stereotyping black women as promiscuous to stereotyping Hillbillies as licentious. n25 Allegations of sexual licentiousness were widely used against black men in the effort to block mixed-race marriage. n26 In the miscegenation cases, the courts worried about the well-being of future generations and the purity of the white race, thereby contrasting the licentiousness of the mixed-race couple with the **[*1007]** supposed purity of children. n27

At LatCrit, I opined that these theoretical claims of the "best interest of the future generations of children" used against mixed-race and same-sex couples were disingenuous given that our society has done little to promote the well-being of children, tolerating both child poverty and environmental destruction in both the 20[su'th'] and 21[su'st'] centuries. n28 More importantly, "best interest of the children" arguments are particularly incongruous given that children of mixed-race marriages suffered precisely because their parents' bonds were not given state recognition. This is equally true for children of same-sex unions. The Attorney General's controversial argument feeds directly into the points I made at LatCrit. n29 It is not about the best **[*1008]** interests of children at all, or about their future well-being as adults, but an argument to highlight the impurity of gay relationships in contrast to the supposed purity of children. The substitution for the words "women" and "young adults" in the original study with the word "girls" in the Attorney General's Memorandum, underlines this concept of childhood purity. n30 Although the Attorney General's Memorandum does not sexualize gay couples directly, it does so indirectly, by focusing on the sexuality of young women raised by lesbian mothers. It does so by creating a false issue about teenage pregnancy when the study underlying its conclusions suggests the reverse, that lesbian mothers are better at helping their children prevent pregnancies.

It does so by focusing on consensual non-marital sex when sexuality was not, and should not be, an issue in the case.

American ambivalence with sexuality has impacted stereotypes and been used to deprive marriage rights for black men, Asian men, Latinos and white women. n31 Currently, the charge is aimed at gays, particularly gay men. n32 Other briefs opposing same-sex marriage have argued about the interests of children, and they should also be understood to juxtapose the supposed purity of children against the supposed licentiousness of same-sex relationships. n33 Massachusetts may be the first state to allege promiscuity among grown children, but it must be recognized as just a new twist on the usual stereotypes.

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IV. How The State Uses the History of Race and Gender Discrimination to Defeat the Miscegenation Analogy

The Goodridge plaintiffs tendered a sex discrimination argument. n34 "Heidi Norton was denied a license to marry Gina Smith because both are women. If David Wilson were a woman, Robert Compton could undoubtedly marry him. In each case, an individual's choice of marital partner was constrained because of the sex of that other individual." n35 The sex discrimination claim is integrally tied to the miscegenation analogy. Plaintiffs' brief analogized to Loving v. Virginia, n36 the seminal federal case that outlawed anti-miscegenation and to Perez v. Lippold, n37 the only state case to overturn a ban on miscegenation. "Just as Perez and Loving contained a race-based classification, so, too, does the present marriage system contain a sex-based classification" argued plaintiffs. n38

A. The History of Slavery Adapted as a Wedge Against the Sex Discrimination Claim

Banning same-sex couples from marrying is not sex discrimination, asserts the Attorney General, because men and women are treated the same, for neither can marry someone of the same sex. n39 Although this was precisely the reasoning rejected by the Loving Court, the Attorney General asserts that Loving does not apply. Loving was about race and racial supremacy, the state argued, and is tied to the legacy of slavery. Attempts to limit Loving to its specific facts would be amusing to Constitutional law buffs if the consequences didn't involve families losing economic equality and civil rights. Loving v. Virginia ruled that the prevention of mixed-race marriage constituted race discrimination and violated the fundamental right to marry. n40 Same-sex marriage cases are a logical extension of the principles of Loving v. Virginia, for both its holdings: **[*1010]** (1) Even though the statute effects African-Americans and whites, it still constitutes a racial classification which must be justified under a higher burden of proof; and (2) There is a fundamental right to marry.

One decisive factor in Loving's holding, according to the Attorney General's Memorandum, is the fact that Virginia's law was specifically designed to exclude Pocahontas' descendants by allowing marriages of 1/16[su'th'] American Indian Blood. n41 The error in limiting Loving to statutes involving prohibitions on some American Indians is transparent since Pocahontas' descendents were only an issue to one state, Virginia, yet Loving invalidated all the remaining anti-miscegenation laws in one swoop. n42 Pocahontas aside, however, the state's argument that Loving should be limited to anti-miscegenation cases has force even though this too is an incorrect textual reading of the case. n43

The legacy of slavery can be compared to little else in United States history except the extermination of Native Americans. Distinguishing Loving from current civil rights efforts because it is about white supremacy makes Loving impossible as a precedent. The state's argument forces gay couples into quibbling over who suffered more discrimination: straight African-Americans in 1924 when the Virginia statute was drafted or married women in Colonial times when the marriage statute was drafted. A losing proposition in itself. **[*1011]** Moreover, the sub-text is "how dare gay Americans compare their discrimination to African Americans in the Jim Crow South?" n44 This binary logic separates black/white struggles from all others in order to discount other types of discrimination.

The Attorney General's Memorandum also uses slavery as a wedge by asserting that since the Massachusetts constitution did not outlaw slavery, it cannot be considered a constitution that affords equality to anyone. n45 Again, this binary reasoning is seductive - what injustice can possibly compare to the wrongs of slavery that would allow the constitution to outlaw one and not the other? It takes a moment to recognize the subtle irony that respecting the terrible history of slavery could lead to the conclusion that the constitution should not be used to enhance equality.

To segregate Loving by making it only apply to situations where the legacy of slavery is alleged, improperly limits Loving's legacy. If the holding in Loving only applied where racial animus was proven, then Zablocki v. Redhail n46 and Turner v. Safley n47 would have been decided differently. Zablocki reviewed a law requiring parents with court-ordered

support obligations to seek court approval before marrying. Unlike Loving, the challenger in Zablocki was not from a protected class and unlike Loving, the reason for the discrimination was a far cry from white supremacy - there was a credible argument that the limitation on marriage would benefit the children that were supposed to be receiving financial support. n48 When the Supreme **[*1012]** Court held this purpose insufficient to permit the classification because it infringed on the fundamental right to marry, Loving was expanded well beyond its racist and sexist origins. How different it would be if the courts ruled that same-sex couples must show they are as discriminated against as are heterosexual men who owe child support.

The Attorney General's brief is based on binary thinking, namely, Loving v. Virginia involved subjugated African-Americans while the marriage case involves middle class whites.

B. The Gloss Placed over Historic Sex Discrimination

While the Attorney General uses the history of race discrimination as wedge against same-sex couples, he harnesses the history of sex discrimination in a dramatically different way.

On the one hand, the Attorney General needs to prove that the sex classification in the statute is explicit, leaving no ambiguity for same-sex couples to fit in under the existing statute. n49 On the other hand, the state does not want there to be a finding of sex discrimination that would then require the state to justify such a classification. n50 To resolve this apparent contradiction, the Attorney General's Memorandum paints a nostalgic view of history's sexism, a sort of "Kate and Leopold" n51 gloss over the inequality of the past. The state writes that in Colonial times, when the Massachusetts laws were drafted,

> There was a clear, gender-specific division of responsibility between ... male and female ... with the husband responsible first for farming and later for financial support and the wife responsible for domestic work, child-bearing and child-rearing ... . In particular, women were expected to bear many children at short intervals during their child-bearing years. n52

[*1013] Doesn't that sound like rigid sex roles? Intentional sex discrimination? But everything listed in the past - other than slavery - is viewed as beyond reproach, legitimate simply because it happened a long time ago.

What is most surprising and/or disturbing is the Attorney General's current view of sex-roles within marriage. "Even as the concept of marriage shifted to a more companionate model, that model "did not imply sexual equality or blurring of gender boundaries.'" n53 No blurring of the husband's role and the wife's role in modern marriage? The Attorney General argued and got away with the argument that the marriage laws do not discriminate on the basis of sex even though marriage licenses are awarded dependent on the sex of the parties and even though there is no sexual equality within marriage.

The Superior Court judge never even got to the question of whether the discrimination was pernicious or justified, because the court simply found the classification was not one dependent on sex. n54 Since neither the historic division of labor within marriage nor the continued gender boundaries between men and women within marriage are deemed sex discrimination, then the state's equal rights amendment never comes into play for same-sex couples. n55

The historic rosy hue placed on sex discrimination, coupled with the isolation of Loving as only a race discrimination case, are placing the tools intended to end discrimination out of reach of gay plaintiffs. It is a sign of the discomfort with the parallels between mixed-race heterosexual couples and same-sex couples that most states have successfully proffered a limited reading of Loving. n56 To overcome this **[*1014]** discomfort, I began the process at LatCrit of looking at mixed-race couples and how their lives bore similarities with same-sex couples. Despite a growing acceptance of mixed-race relationships, both can be described as outsider relationships. Consideration of mixed-race relationships requires one to forgo the usual black-white binary thinking. For one, many mixed-race relationships do not include African-Americans, but may involve a relationship of a white person with a Mexican American, Asian American or Native American. n57 It could be two Latinos marrying, with one spouse light and the other dark. n58 Moreover, when one considers how being an outsider affects the lives of the couple, one is by definition considering the lives of individual white men and white women as well as the lives of certain individual men and women of color.

Comparison between two outsider groups can be fraught with pitfalls, n59 but the advantages are clear. As Francisco Valdes writes, one of the aims of Latcrit theory is "the expansion and interconnection of antisubordination struggles." n60 In this case, the comparison helps elucidate the arguments made in current marriage litigation. As Valdes notes, "Queer theory - or, more accurately, **[*1015]** sexual

orientation legal scholarship - has been limited by collective failures of intersectional inquiry and convocation." n61 The history of treatment of mixed-race couples as well as an understanding of the current lives of mixed-race couples in the United States, provides a rich context for understanding the sexualization of gay lives and for revisiting the continued rejection of the antimiscegenation analogy by courts.

V. Conclusion

While the plaintiffs in Massachusetts seek marriage itself rather than marriage equivalency, the Supreme Judicial Court of Massachusetts has three options. The high court could decline to grant relief; they could grant full marriage rights as has been done in the Netherlands, n62 or they could take a middle line akin to that of the Vermont Supreme Court, requiring some kind of domestic partnership scheme. n63 Arguably there is a correlation between the type of relief a court will bestow and the constitutional principle underlying the relief. Thus, in Vermont, the Court refused to grant full marriage rights although it found the scheme violated the Common Benefits Clause of the Vermont constitution. n64 The Vermont-specific Common Benefits Clause enunciates general principles of equality not associated with race or gender discrimination, making it easier for the court to eschew formal equality and craft its own relief. In contrast, the sole justice in Vermont who found the marriage ban constituted discrimination on the basis of sex would have mandated marriage. n65

[*1016] As in Vermont, the sex discrimination argument is but one of a selection of constitutional arguments Massachusetts plaintiffs offer for striking down the current marriage exclusion. n66 While there is no precise equivalent of the Vermont Common Benefits Clause, there is plenty of language in the Massachusetts Constitution, known as the Declaration of Rights, that accords general principles of equality and liberty. n67 Counsel explicitly makes such a substantive due process **[*1017]** argument, arguing that denying the right to marry constitutes a deprivation of liberty and a deprivation of general principles of equality. Although the Supreme Judicial Court could grant full marriage rights based upon finding a violation of these general principles, it could also order something akin to civil unions or follow Vermont's lead, leaving open the precise form of relief and ordering the legislature to fashion a remedy.

Since there is an ERA provision in Massachusetts' state constitution, once a statute makes a classification on the basis of sex, the state has a burden of proving that the classification meets a lawful objective and is narrowly tailored to that end. n68 If the sex discrimination argument prevails and the government was unable to meet its burden, full marriage rights would appear the reasonable remedy. Once Loving v. Virginia is accepted as precedent, it would be difficult for a court to deny full formal equality. n69 Thus the sex discrimination analogy has hidden potency in the Massachusetts litigation.

There are practical pressures on the Supreme Judicial Court justices to reject full marriage rights for same-sex couples. The **[*1018]** Massachusetts general public does not support full marriage rights and the court risks a constitutional amendment overturning a pro-marriage decision were the court to take that route. n70 In addition, current political tensions between the state legislature and the court may impact the case enhancing the risk that the legislature might refuse to honor a decision requiring full marriage rights. n71 Moreover, to rule that discrimination against same-sex couples is sex discrimination would unsettle a body of case law in Massachusetts and elsewhere to the contrary. n72

It may well be that the Attorney General's binary thinking resounds within society. This would also make it difficult for the Court to decide the case based on sex discrimination and the miscegenation analogy. Society appears to be comfortable with a certain amount of sex differentiation, which is tolerated if not encouraged, and Goodridge, like other marriage cases before it, threatens to undermine this comfort zone. Related to the desire to avoid scrutiny of sex roles within marriage and sex discrimination within society is a tendency to think of mixed-race couples as something totally separate from and non-analogous to same-sex couples. By thinking of gay relationships as separate and distinct from straight relationships, heterosexual couples need not reflect on how little or much gender differentiation there is in their own relationships. n73

The riddle for our times is how to get a court to recognize sexism when the topic is not whether a woman can go to medical school or find work in a law firm. We see how the Massachusetts Attorney General's Memorandum relied on the court ignoring discrimination when husbands are given financial duties and wives domestic duties. **[*1019]** We see that the state proffered sexist arguments when it implied that young men should be free to express themselves sexually but not young women. Ultimately, sexism leads to the failure of courts to even recognize sex/gender classifications in marriage as sex/gender classifications when all agree that sex determines whom a woman can and cannot marry. The companion riddle is how to recognize the awful history of

oppression against African-Americans without exploiting it, without using inequality in history as an excuse to deny equality now.

By exposing the state's arguments for what they are, I hope to hasten the time that the second riddle is but a bit of historical trivia. People in the future shall be able to supply two correct answers to the second riddle, answering a mixed-race couple in the early twentieth century before Loving v. Virginia, or a same-sex couple in the last century.

FOOTNOTE-1:

n1. Goodridge v. Dep't of Pub. Health, 14 Mass. L. Rptr. 591 (Super. Ct. 2002). Both plaintiffs and defendants moved for summary judgment and the Superior Court judge granted summary judgement for the state. Mem. of Decision and Order on Parties' Cross-Mot. for Summ. J. at 1, Goodridge, 14 Mass. L. Rptr. 591 [hereinafter Superior Court Order] available at http://www.glad.org/GLAD<uscore>cases/Goodridge<uscore>SupCt<uscore>Decision.pdf (last visited Jan. 22, 2003). The case is presently on appeal to the Supreme Judicial Court, Massachusetts' highest court. Goodridge, 14 Mass. L. Rptr 591, appeal docketed, No. SJC-08860 (Mass. 2003).

n2. See Pl. Verified Compl. at 29-30, Goodridge, 14 Mass. L. Rptr. 591, available at http://www.glad.org/GLAD<uscore>cases/MAmarriagecomplaint.pdf (last visited Jan. 22, 2003); Mem. in Supp. of Pl.'s Mot. for Summ. J. at 7-30, Goodridge, 14 Mass. L. Rptr. 591, available at http://www.glad.org/GLAD<uscore>cases/Plaintiffs%27<uscore>SJ<uscore>Memo.pdf (last visited Jan. 22, 2003).

n3. As a direct result of the Vermont ruling, the Vermont legislature passed the Vermont Civil Union Law, which bestowed a host of state benefits and responsibilities onto same-sex couples who sought a license from the state. For the full text of the Vermont Civil Union Law, see http://www.leg.state.vt.us/docs/2000/acts/act091.htm (last visited Oct.14, 2002). The passage of civil unions for same-sex couples impacted Vermont's elections although many pro-union candidates did prevail. A dozen pro-Civil Union Representatives lost their seats giving anti-Union forces a majority. Bryan K. Marquard, After Civil Unions, Can Vermont Be Civil? State Hopes Healing Follows Bitter Election, BOSTON GLOBE, Nov. 20, 2000, at C9. See generally http://www.vermontfundforfamilies.org (last visited Jan. 19, 2003). However, these losses in the House were recouped in the 2002 elections. In 2002, the Democrats defeated 14 anti-civil union Republican incumbents while losing only 3 pro-civil union incumbents, for a total pro-civil union count of 73 of the 150 incoming House members. www.vermontfundforfamilies.org. In the Senate, although two pro-Civil Union senators lost their seats in 2000, the Senate retained a pro-Civil Union majority that continued after the 2002 elections. Several statewide office holders were elected in 2000 despite their support for civil unions. Most prominently, Governor Howard Dean was re-elected in 2000 despite championing the civil union compromise, and soon after declared his candidacy for president in the Democratic primary of 2003. See GLAD, Civil Marriage for Same-Sex Couples: The Facts August 2002, available at http://www.glad.org (last visited Oct. 14, 2002). Currently, anti-civil union supporters are attempting to make a constitutional amendment to the Vermont state constitution limiting marriage to one and one woman. See Take It To The People: Vermont's Grassroots Coalition for Traditional Marriage, Vermont House Passes H.404 "Clarification of Marriage", available at http://www.takeittothepeople.org (last visited Oct. 15, 2002).

n4. California was the only state to declare anti-miscegenation laws a violation of its state constitution. Perez v. Sharp, 32 Cal.2d 711, 198 P.2d 17 (1948). State courts that considered the issue, did not follow Perez. See, e.g., State v. Brown, 108 So.2d 233 (1959) (Louisiana rejects state as well as federal constitutional equal protection argument to decriminalize cohabitation for mixed-race couples).

n5. The signing of the country's first statewide "gay rights" law was an historic event. On Feb. 25, 1982, Republican

Wisconsin Gov. Lee Sherman Dreyfus signed a law which prohibited discrimination in employment, housing and public accommodations on the basis of sexual orientation. It was not until 1989 that Massachusetts followed suit with its own such law.

n6. Since Massachusetts passed a gay rights law (in 1989), ten other states have joined the roster of state governments broadening their civil rights protections to incorporate sexual orientation: Vermont, 1992; New Jersey, 1992; Minnesota, 1993; Connecticut, 1994; Rhode Island, 1995; Hawaii, 1995; New Hampshire, 1997; California, 1999; Maryland, 2001; and, Illinois, 2002. In addition, the District of Columbia passed a gay rights law in 1993. For the full texts of these laws, see http://www.qrd.org/qrd/usa/legal to access the link for a particular state.

n7. See Att'y Gen.'s Mem., Mem. in Opp. to Pl.'s Mot. for Summ. J. and In Supp. of Def.'s Mot. for Summ. J., Goodridge, 14 Mass. L. Rptr. 591 [hereinafter Attorney General's Memorandum].

n8. Loving v. Virginia, 388 U.S. 1 (1967).

n9. Prof. Espinoza has criticized binary logic: "Racism is not only historical slavery, Jim Crow laws and gerrymandered voting districts in the South. It is also immigration laws and internment camps; it is stolen land grants and silenced languages ... it is invisibility and lost identity." Leslie Espinoza & Angela P. Harris, Afterword, Embracing the Tar-Baby - LatCrit Theory and the Sticky Mess of Race, 85 Calif. L. Rev. 1585, 1592-93 (1997). Cf. Prof. Harris discussing the roots of black exceptionalism. Id. at 1594-1601; see also Juan F. Perea, Ethnicity and the Constitution: Beyond the Black and White Binary Constitution, 36 Wm. & Mary L. Rev. 571 (1995); Juan Perea, The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought, 85 Calif. L. Rev. 1213 (1997). See also Francisco Valdes, Afterward: Theorizing "Outcrit' Theories: Coalitional Method and Comparative Jurisprudential Experience - Racecrits, Queercrits and Latcrits, 53 U. Miami L. Rev. 1265, 1284 (1999) criticizing the Black/white paradigm and Anthony P. Farley, All Flesh Shall See It Together, 19 Chicano-Latino L. Rev. 163, 171-72 (1998) ("Blacks have not been the authors of the so-called "black-white paradigm.").

n10. Attorney General's Memorandum at 64 (citing Judith Stacey & Timothy J. Biblarz, (How) Does The Sexual Orientation of Parents Matter?, 66 Am Soc. Rev. 159, 171(2001)).

n11. See Michelle A. Travis, Perceived Disabilities, Social Cognition, and "Innocent Mistakes,' 55 Vand. L. Rev. 481 (2002), for a psychological analysis of how prejudice operates in the hiring arena. Prof. Travis gives examples of cases where job evaluators made assumptions without fully investigating the facts. One example is an evaluator who saw an obese applicant walk slowly to the interview and attributed the cause to the woman's size, rather than to an innocuous temporary condition, such as that her foot had fallen asleep. Id. at 527-29.

n12. Perhaps this argument did help convince the court, although the Superior Court judge did not cite this argument in ruling in favor of the state's motion for summary judgment. See Superior Court Order, supra note 1.

n13. [Attorney General's Memorandum, supra note 7 (citing Judith Stacey & Timothy J. Biblarz, (How) Does The Sexual Orientation of Parents Matter?, 66 Am Soc. Rev. 159, 159-83 (2001)) (concluding that the "field suffers ... from the unfortunate intellectual consequences that follow from the implicit hetero-normative presumption ... that healthy child development depends upon parenting by a married heterosexual couple." Id. at 160. This concept, which runs contrary to the argument asserted in the Attorney General's brief, was not included in the Attorney General's Memorandum.

n14. Fiona L. Tasker & Susan Golombok, Growing up in a Lesbian Family: Effects on Child Development (1997) 37, 127-33 [hereinafter Tasker & Golombok]. However, this study is not cited directly in the Memorandum.

n15. Id. at 145. This conclusion comports with the bulk of the social science data. The American Academy of Pediatrics

concluded that "there is no systematic difference between gay and non-gay parents in emotional health, parenting skills, and attitudes toward parenting." See Ellen C. Perrin, Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents, 109 Pediatrics 2, 341-344 (2002). For other studies see Josephine Ross, Sexualizing of Difference: A Comparison of Mixed-Race and Same-Gender Marriage, 37 Harv. C.R.-C.L. L. Rev. 255, n. 59 (2002) [hereinafter Ross, Sexualizing of Difference].

n16. In Peanuts comic strips, Lucy liked to inform Linus of "little known facts" such as the "fact" that snow comes up like flowers. See Anthony Rapp, Little Known Facts on You're A Good Man, Charlie Brown: The Broadway Musical (RCA 1999).

n17. Tasker & Golombok, supra note 14, at 40. There was no difference between lesbian and straight-headed households in the age that the daughters or sons first had intercourse. In America, children generally have sex earlier than in England. Id. at 127. Extend the logic of the Attorney General's Memorandum, and there is an argument that American marriages should not be recognized in England because of early adventurousness of American children.

n18. See Regina Austin, Sapphire Bound!, 1989 Wis. L. Rev. 539, 552-57 commenting on Chambers v. Omaha Girls Club, 629 F. Supp. 925 (D. Neb. 1986), aff'd, 834 F.2d 697 (8th Cir. 1987), reh'g denied, 840 F.2d 583 (1988), where a young African American woman is fired for violating the Club's "role model rule" by becoming pregnant.

n19. Tasker & Golombok, supra note 14, at 147. "Children brought up by a lesbian mother not only showed good adjustment in personal and social development as young children but also continued to function well as adolescents and as young adults, experiencing no detrimental long-term effects in terms of their mental health, their family relationships, and relationships with peers and partners in comparison with those from heterosexual mother families."

n20. Id. at 112.

n21. Id. at 121.

n22. Attorney General Thomas F. Reilly voiced his support for the Vermont civil unions. He also testified against the state's defense of marriage act, which would amend the constitution to prohibit same-sex marriage (quoted in http://www.massequality.org/testimony/ag.php (last visited Oct. 16, 2002)). The defense of marriage act was a constitutional amendment entitled H. 4840. In addition to prohibiting marriage, it would also have prohibited domestic partnership benefits in many situations. Unlike Hawaii, where the amendment served to moot the constitutional court challenge, the Massachusetts legislature prevented the amendment from getting on the ballot. See Adrian Walker, "Democracy Inaction", Boston Globe, July 18, 2002 at B1. The vote occurred on July 17, 2002. Id.

n23. Laura Kiritsy, "AG Tom Reilly meets with gay lawyers to discuss positions on issues," Bay Windows, June 27-July l3, 2002. I was at this meeting on June 25, 2002, and asked the attorney general specifically about the promiscuity issue, and his apology clearly encompassed that issue. In fact, he promised that the argument would not reappear in the Attorney General's appellate brief.

n24. For similar arguments made in Hawaii and Vermont, see Ross, Sexualizing of Difference, supra note 15, at n.58. For the proposition that discrimination is most often unconscious, see Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317 (1987) (identifying "racism's primary source" as "a product of the unconscious," and describing cognitive psychologists' model for understanding the unconscious nature of race discrimination); David Benjamin Oppenheimer, Negligent Discrimination, 141 U. Pa. L. Rev. 899, 899-915 (1993); see also Michelle A. Travis, Perceived Disabilities, Social Cognition, and "Innocent Mistakes,' 55 Vand. L. Rev. 481 (2002). Professor Travis also cites to other articles dealing with unconscious race discrimination and sex discrimination. Id. at n.35.

n25. Beverly Greene, Beyond Heterosexism And Across the Cultural Divide: Developing an Inclusive Lesbian, Gay and Bisexual Psychology: A Look to the Future, in Education, Research and Practice in Lesbian, Gay, Bisexual, and Transgendered Psychology: A Resource Manual 21-22 (Greene & Croom eds. 2000).

n26. For a more detailed discussion of sexualization as a means of devaluation, see Ross, Sexualization of Difference, supra note 15, at 257-261 and accompanying footnotes, and 286-87, n.129, n.130. Sociologists debated whether the fear of sexual contact between white women and men of color lay at the heart of the anti-integration effort, or whether the economic interests fueled the anti-miscegenation effort. See Charles Herbert Stember, Sexual Racism: The Emotional Barrier to an Integrated Society at ix, 11-15 (1976); see also Leti Volpp, American Mestizo: Filipinos and Antimiscegenation Laws in California, 33 U.C. Davis L. Rev. 794, 809-10 (2000), pointing out that Chinese and Japanese men were considered sexually depraved and that Filipinos were considered to have an enormous sexual appetite.

n27. Ross, Sexualizing of Difference, supra note 15, at 266-67 and accompanying footnotes.

n28. For a similar argument regarding the nation's recent condemnation on child abuse, see Henry Jenkins, Childhood Innocence and Other Modern Myths in Nancy Sheper-Hughes, et al., The Children's Culture Reader 1-37 (1998). Jenkins argues that "the Right increasingly draws on a vocabulary of child protection as the bulwark of its campaign against multiculturalism, feminism, Internet expression, and queer politics. Any meaningful political response to this conservative agenda must reassess childhood innocence." Id. at 3. Both Right and Left "opportunistically evoke the figure of the innocent child as a "human shield' against criticism." Id. at 2. See also Nancy Sheper-Hughes and Howard F. Stein, Child Abuse and the Unconscious in American Popular Culture in The Children's Culture Reader, supra at 178-195 (arguing that the attention on child abuse serves to mask the collective responsibility on what our society is doing to children when we impliment policies that place children at risk in this country and throughout the world.)

n29. When I gave a talk at LatCrit VI, I compared mixed-race relationships to same-sex relationships as a means of exploring some of the current misconceptions about gay relationships and gay identity. Mixed-race couples faced similar treatments in the 1950s, 60s and 70s as same-sex couples do today. There was harassment and violence directed at some couples because they were mixed race; they faced disapproval from their parents about their choice of mate; as a result of other's reactions, couples were sometimes closeted about their relationships. Maria P.P. Root, Love's revolution: Racial Intermarriage 17-19, 21, 37, 172 (2001). Most importantly, their relationships were seen as primarily sexual. Although sexual attraction played a role in the formation of these relationships, their relationships were not simply about sex although society saw them in that light. I argued that one impediment to same-sex marriage was the way gay relationships are sexualized, seen as illicit, pornographic. In contrast, marriage is viewed as sacred. To afford marriage rights for same-sex couples is therefore viewed as a jump from profane to sacred, too big a jump to make. See generally, Josephine Ross, Sex, Marriage & History: Analyzing the Continued Resistance to Same-Sex Marriage, 55 SMU L. Rev. 1657 (2002) [hereinafter, Ross, Sex, Marriage and History]. By painting gay relationships in a sexual manner - as was historically done to mixed-race heterosexual couples - opponents of same-sex marriage marginalize these relationships, diminish them. I do not mean to suggest that mixed-race couples are currently free of discriminatory attitudes, but rather that there is more acceptance now than in 1967, when Loving v. Virginia, 388 U.S. 1 (1967), was decided. Polls tend to indicate that this increase has been gradual and also may be read to support the conclusion that the legal decriminalization of mixed-race

intimacy coupled with marriage rights helped increase public acceptance.

n30. Tasker & Golombok, supra note 14, at 40. The study referred to the adolescent and post-adolescent daughters and sons from lesbian households as "men" and "women" while the state's Memorandum used the term "girls." Id. at 145. The average age of the children in the follow-up study is 23.5, an age that is generally considered an adult, not a child. Id. at 40.

n31. See Leti Volpp, supra note 26, at 809-10; Ross, Sexualizing of Difference, supra note 15, at 286-87, n. 129-30.

n32. See Ross, Sex, Marriage and History, supra note 29.

n33. The State of Hawaii, in its brief opposing same-sex marriage, wrote that in order for a child to reach "optimal development," the child needs to be raised "in a single home by its parents, or at least by a married male and female." Pre-Trial Brief for the State of Hawaii, Baehr v. Miike, No. CIV.91-1394, 1996 WL 694235, at 3 Haw. Cir. Ct. Dec. 3, 1996), available at http://www.hawaiilawyer.com/same<uscore>sex/briefs/statbref.txt (last visited Jan. 24, 2003). The State of Vermont similarly argued in its brief opposing same-sex marriage that society has seen an increase in parents who "fail[] to take [their] parental responsibilities seriously ... . By encouraging the formation of same-sex unions, such a policy could be seen to advance the notion that fathers or mothers, as the case may be, are mere surplusage to the functions of procreation and child rearing." Brief for the State of Vermont (Part 2), Baker v. State, 744 A.2d 864 (Vt. 1999) (No. 98-32), available at http://www.vtfreetomarry.org/statepart2.htm.

n34. Mem. In Supp. of Pl.'s Mot. for Summ. J., at 40, Goodridge, 14 Mass. L. Rptr. 591, available at http://www.glad.org/GLAD<uscore>Cases/Plaintiffs%27<uscore>SJ<uscore>Memo.PDF (last visited Jan. 22, 2003). The brief is heavily weighted in favor of the substantive due process arguments and general equality arguments. Note that the sex discrimination argument appears after the other two and is comparatively short. Even the Vermont Supreme Court, which brought about civil unions, did not find the marriage scheme violative of equal protection. See Baker, 744 A.2d 864. This fact was highlighted in the Attorney General's Memorandum at 52.

n35. Mem. In Supp. of Pl.'s Mot. for Summ. J., supra note 34, at 40-41.

n36. Loving v. Virginia, 388 U.S. 1 (1967).

n37. Perez v. Lippold, 198 P.2d 17 (Ca. 1948). This case outlawed anti-miscegenation in California under the state constitution.

n38. Mem. In Supp. of Pl.'s Mot. for Summ. J., supra note 34, at 43.

n39. Attorney General's Memorandum, supra note 7, at 51.

n40. Loving, 388 U.S. at 1.

n41. Attorney General's Memorandum, supra note 7, at 49.

n42. There were 16 laws remaining on the books at the time Loving was decided. Loving, 388 U.S. at 6.

n43. The Attorney General's Memorandum misinterprets Loving. He compounds two separate inquiries in Loving into one. The first question is whether there is a racial classification despite the fact that the statute applies equally to whites and non-whites. Id. at 7-8. The Court answers that in the affirmative, thereby invoking strict scrutiny. Id. at 11. Next, the court questions the legitimate purpose for which the law was drawn. Id. at 8. The court concludes there is "no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification." Id. at 11. The Court's conclusion that the statute was designed to maintain White Supremacy is important to the second question, a factor in whether the state met its burden of justifying the racial classification. Id. To determine whether there is a sex classification despite the fact that the statute applies equally to women and men, one need not reach the question of animus. Here is the Supreme Court's language:

Because we reject the notion that the mere "equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose.

Id. at 8. Thus, the miscegenation analogy boils down to whether the Massachusetts statute makes distinctions drawn according to sex, and if it does, the court should require more than the minimal rational basis test to determine whether the distinction was justified.

n44. See generally Leslie Espinoza & Angela P. Harris, Afterward: Embracing the Tar-Baby - LatCrit Theory and the Sticky Mess of Race, 85 Calif. L. Rev. 1585 (1997). In that piece, Prof. Harris warns about the dangers of identity politics when "the story of our slavery -'three hundred years ago our ancestors were brought here in chains' - becomes ... a story told to silence others and to paralyze ourselves." Id. at 1588. See also Justice Scalia's dissent in Romer v. Evans, 517 U.S. 620, 636-53 (1996) (Scalia, J., dissenting), where the justice chastises the majority for placing "the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias." Id. at 636. Scalia characterizes gays as affluent and powerful and unworthy of the courts' protection. "That is where Amendment 2 came in. It sought to counter both the geographic concentration and the disproportionate political power of homosexuals." Id. at 647.

n45. Attorney General's Memorandum, supra note 7, at 43 (arguing that because slavery was not excluded in the Massachusetts Constitution, the courts should not give any teeth to the equal protection provisions of the Massachusetts Constitution).

n46. Zablocki v. Redhail, 434 U.S. 374 (1978).

n47. Turner v. Safley, 482 U.S. 78, 95 (1987) (holding that rule forbidding prisoners to marry based on security and rehabilitation concerns is unconstitutional violates fundamental right to marry). The court writes, "Inmate marriages, like others, are expressions of emotional support and public commitment." Id.

n48. Zablocki, 434 U.S. at 388. Moreover, Zablocki also helps put to rest the idea that because same-sex marriage hurts men and women, it is not sex discrimination. One could similarly argue that the statute in Zablocki did not simply discriminate against men with support obligations, because it equally impinged on those women who wanted to marry these men. The fact that the Supreme Court never even considered this argument shows how solidly the Loving case dismissed this type of reasoning.

n49. See Attorney General's Memorandum, supra note 7, at 7-10 for argument that "The History and Purpose of the Marriage Statutes Further Demonstrate That They Were Intended to Apply Only to Opposite-Sex Couples."

n50. See Attorney General's Memorandum, supra note 7, at 48-51 for argument that "The marriage statutes do not discriminate on the basis of sex." See Andrew Koppelman, Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination, 69 N.Y.U. L. Rev. 197, 221, 249 (1994).

n51. In "Kate and Leopold", "a lonely marketing maven" played by Meg Ryan, falls for "a handsome, courtly Victorian duke (played by Hugh Jackman) transplanted from 1876 to the present." "Kate and Leopold", N.Y. Times, Abstracts, Jan. 25, 2002 available at WL 11165348 (describing the film as "elaborately plotted sci-fi romantic comedy barely touches on reality, and therein lies its wispy charm.").

n52. Attorney General's Memorandum, supra note 7, at 7-8.

n53. Id. at 8 (citing Mintz & Kellogg, Domestic Revolutions: A Social History of American Family Life 47 (The Free Press 1988). Procreation, the state also argued, was the "main object" of marriage both historically and currently: "the primary purpose of the marriage statutes-- to

protect and further the propagation of the human race."

n54. Superior Court Order, supra note 1, at 24. For discussion of whether marriage restriction should be understood as unconstitutionally pressuring people into gendered behavior, see David B. Cruz, Disestablishing Sex And Gender, 90 Cal. L. Rev. 997, 1078-85 (2002).

n55. Superior Court Order, supra note 1, at 8.

n56. The only appellate court to have reasoned that the prohibition on two men marrying or two women marrying is discrimination based on sex is the Hawaii Supreme Court. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding that the prohibition on same-sex marriage triggered strict scrutiny as discrimination based on sex, and remanding for a determination whether the state could present a compelling state interest). A trial court judge in Alaska also recognized that gender classifications are analogous to race classifications in the marriage context. Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Feb. 27, 1988). Alaska's constitution was subsequently amended to nullify the court ruling. Alaska Const. art. I, 25 (amended 1999).

n57. Sociologist Maria Root interviewed a range of heterosexual mixed-race married couples in her book, purposely avoiding the black/white paradigm. See Maria P.P. Root, Love's revolution: Racial Intermarriage 11, 77 (2001); see also Leti Volpp, supra note 26, at 799-801.

n58. Prof. Volpp notes that Latinas/os were not subjected to miscegenation laws unless Filipinas/os are considered to be Latino/a. Leti Volpp, supra note 26, at 833.

n59. One example of a pitfall when comparing mixed-race couples with same-sex couples, one must make sure that mixed-race gay couples are not rendered invisible. In this article, I certainly mean to include mixed-race gay couples within the concept "same-sex couples. See generally Trina Grillo & Stephanie M. Wildman, Obscuring The Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (Or Other - Isms), 1991 Duke L.J. 397 (espousing the dangers of analogizing race and sex discrimination); Beverly Greene, supra note 25, at 21 (stating that "African Americans and members of groups of other people of color often perceive a comparison between heterosexism and racism as oppressions, as one that trivializes their history of racial oppression."). Prof. Espinoza once pondered in a foreword to LatCrit: "when we speak of our own oppression, why do we seem to reinforce the oppression of other outsider groups?" Leslie Espinoza & Angela P. Harris, supra note 9, at 1615.

n60. Francisco Valdes, Afterword: Theorizing "Outcrit' Theories: Coalitional Method and Comparative Jurisprudential Experience - Racecrits, Queercrits and Latcrits, 53 U. Miami L. Rev. 1265 (1999) [hereinafter, Valdes, Afterword]. Prof. Valdes writes "these preliminary LatCrit efforts have pointed to four basic aims or functions of critical legal theory: the production of critical and interdisciplinary knowledge; the promotion of substantive social transformation; the expansion and interconnection of antisubordination struggles; and the cultivation of community and coalition among outsider scholars." Id. at 1301. Prof. Espinoza wrote that "LatCrit theorists want to complicate our understanding of the mechanics of oppression." Leslie Espinoza & Angela P. Harris, supra note 9, at 1591.

n61. Valdes, Afterword, supra note 60, at 1299.

n62. See Associated Press, 2,000 Same-Sex Marriages in Netherlands Since April 1, The Record, Dec. 14, 2001, at A40. Two Canadian Superior Courts recently issued decisions that the exclusion of same-sex couples from marriage violates the Canadian Charter of Rights and Freedoms. Halpern v. Toronto, [2002] CarswellOnt 2309; Hendricks v. Quebec (Procureur General), [2002] CarswellQue 1890. In Quebec, same-sex couples have been afforded civil unions, but this case, like the one in Toronto, requires full marriage rights and gives the federal government two years to comply before being preempted by the judiciary. Nelson Wyatt,

Court Supports Same-Sex Unions, The Globe and Mail, Sept. 7, 2002, at A9.

n63. The middle scheme allowing some kind of domestic partnership scheme could be accomplished directly by the court, or more likely, by the court requiring the legislature to pass a new statute as was done in Vermont.

n64. Vt. Const., ch. I, art. VII. The Common Benefits Clause of the Vermont Constitution states that the government "ought to be instituted for the common benefit, protection and security of the people ... and not for the particular emolument or advantage of any single person, family, or set of persons." Id.

n65. Baker, 744 A.2d at 898-99 (Johnson, J., dissenting). Similarly, the Hawaii court ruled that the marriage ban constituted discrimination on the basis of sex unless the state could prove at trial that the state had a compelling reason to discriminate narrowly tailored to legitimate governmental ends. See Baehr v. Lewin, 852 P.2d 44, 63 (Haw. 1993). This decision became moot after a constitutional amendment overturned the ruling. Interestingly, Massachusetts also faced a constitutional amendment that would have mooted the current litigation. However, Massachusetts became the first state in the country to block a DOMA ballot initiative when the legislature maneuvered its demise. Yvonne Abraham, Gay Marriage Ban Thwarted Legislators Kill Ballot Question, Boston Globe, July 18, 2002, at B1.

n66. Statutory construction is the first issue presented in both Goodridge (Massachusetts) and Baker (Vermont). (1) The state's marriage statutes should be interpreted to allow qualified same-sex couples. See Mem. in Supp. of Pl.'s Mot. for Summ. J. at 4-7, Goodridge, 14 Mass. L. Rptr. 591; see also Brief: The Freedom to Marry for Same-Sex Couples: The Opening Appellate Brief of Plaintiffs Stan Baker et al. v. State of Vermont, 5 Mich. J. Gender & Law 409, 418-425 (1999) [hereinafter Baker: Pl.'s Brief]. (2) Goodridge plaintiffs next argue that marriage is a liberty interest protected under substantive due process principles of the Declaration of Rights. See Pl.s' Mot. for Summ. J. at 7-30, Goodridge, 14 Mass. L. Rptr. 591; see also Baker: Pl.'s Brief, supra, at 426-36.(3) An equal protection argument follows, also grounded in general principles set forth in the Declaration of Rights. See Pl.s' Mot. for Summ. J. at 30-40, Goodridge, 14 Mass. L. Rptr. 591; see also Baker: Pl.'s Brief, supra, at 426(referencing "Vermont's deep commitment to protecting every Vermonter's equality in the eyes of the law, and every citizen's liberty from excessive state interference with individual choices.") Plaintiffs also make two additional equality arguments. (4) The marriage exclusion constitutes discrimination on the basis of sex. See Pl.s' Mot. for Summ. J. at 40-44, Goodridge, 14 Mass. L. Rptr. 591.See also Baker: Pl.'s Brief, supra, at 459-468. (5) The Massachusetts constitution prohibits discrimination on the basis of sexual orientation discrimination. See Pl.s' Mot. for Summ. J. at 45-57, Goodridge, 14 Mass. L. Rptr. 591. (6) Finally, plaintiffs raise free expression and intimate association claims under the Massachusetts constitution. See See Pl.s' Mot. for Summ. J. at 57-62, Goodridge, 14 Mass. L. Rptr. 591. These claims were not raised in Vermont. The full text of the briefs in Baker, 744 A.2d 864 (Vt. 1999) can be found at Brief: The Freedom to Marry for Same-Sex Couples: The Opening Appellate Brief of Plaintiffs Stan Baker et al. v. State of Vermont, 5 Mich. J. Gender & Law 409 (1999); Brief: The Freedom to Marry for Same-Sex Couples: The Reply Brief of Plaintiffs Stan Baker et al. in Baker et al. v. State of Vermont, 6 Mich. J. Gender & Law 1 (1999).

n67. The commencement of Article VII of the Massachusetts Constitution is a Common Good Provision, analogous to the Vermont Common Benefits Clause:

> Government is instituted for the common good, for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men.

Mass. Const., pt. 1, art. VII (emphasis added). Compare with Vermont's Common Benefits Clause:

Government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community.

Vt. Const., ch. I, art. 7 (emphasis added). Unlike Vermont, Goodridge plaintiffs do not rely heavily on the Common Goods Provision, but rather proffer a penumbra approach. Several provisions of the Massachusetts constitution embrace values of liberty, freedom and equality, they argue. See Mem. in Supp. of Pl.'s Mot. for Summ. J. at 10, 36, Goodridge, 14 Mass. L. Rptr. 591. Plaintiffs rely most heavily on Article I of the Massachusetts Declaration of Rights that provides:

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. Equality under law shall not be denied or abridged because of sex, race, color, creed or national origin.

Mass. Const., Decl. of Rights, art I (amended by Am. Art. CVI). While the first sentence in Article 1 (quoted above) forms part of plaintiffs' substantive due process penumbra argument, the second sentence of Article I underpins the various equal protection arguments. The equal protection clause was amended to include an ERA (an Equal Rights Amendment forbidding discrimination on the basis of sex), relied upon in plaintiffs' sex discrimination claim. See Mem. in Supp. of Pl.'s Mot. for Summ. J. at 10, 34, Goodridge, 14 Mass. L. Rptr. 591.

n68. The statute must meet heightened scrutiny in order to stand constitutional muster under Mass. Declaration of Rights. Mass. Const., Decl. of Rights, art. 106; see also Mem. in Supp. of Pl.'s Mot. for Summ. J. at 10. 34, Goodridge, 14 Mass. L. Rptr. 591 (stating that classifications based on sex may only be upheld if "they further a demonstrably compelling purpose and limit their impact as narrowly as possible consistent with their legitimate purpose.")(citing Commonwealth v. King, 374 Mass. 5, 21 (1977)).

n69. This would explain why the sole dissenter in Vermont would have granted full marriage rights, and comports with the reasoning in Baehr. Baehr, 852 P.2d at 52-67 (Haw. 1993).

n70. Although the Massachusetts legislature blocked a ballot initiative that would have amended the state constitution to forbid same-sex marriage, there is nothing to prevent a second ballot initiative.

n71. The landscape surrounding the Goodridge case may have bearing on the outcome. The Massachusetts legislature and high court are presently locked in a struggle over the implementation of a voter initiative called "The Clean Elections Law." The legislature has refused to fund this law that the voters approved, and the SJC has ordered the seizure of assets to pay for the candidates meeting the "Clean Elections Law" criteria. This ruling has caused the speaker of the house [Thomas Finneran] to threaten several reprisals against the court, including requiring judges to stand for election.. Rick Klein, Finneran Suggests Election of Judges, Boston Globe, Feb. 8, 2002, at A1. In addition, Massachusetts has just voted in a new governor who has gone on the record opposing marriage and civil unions for same-sex couples. Yvonne Abraham and Bill Dedman, Romney Votes Came From Unexpected Places Voters In Cities Up For Grabs Snub O'Brien, Boston Globe, Nov. 7, 2002 at B8; Emily Sweeney, Forum Will Examine Marriage, Gay Unions Author To Discuss Institution's History, Boston Globe, Oct. 24, 2002, at A1.

n72. Andrew Koppelman, supra, note 50, at 208.

n73. See generally Ross, Sex, Marriage and History, supra note 29.

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