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R. Andrew Smith¹

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**IN THE CIRCUIT COURT
OF COOK COUNTY, CHANCERY DIVISION**

BEVERLY HILSTRAND, ANGELA PENA,)	
STEPHEN JONES, BRADLEY SCHULTZ-JONES,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 06 CH-MIG 055345
)	
STEPHEN A. MARTIN, JR.,)	Before the Honorable Leroy Wayne
In his capacity as Chief Operating Officer of)	
The Cook County Department of Public Health,)	
)	
Defendant.)	
)	

JUDGMENT AND ORDER OF THE COURT

This matter comes before this Court on Plaintiff’s petition for a permanent injunction, requesting the court to require the Department of public health to issue marriage licenses to two homosexual couples. This Court finds that the law in Illinois does not permit individuals of the same sex to obtain a marriage license particularly because of the language of the governing Act of the Legislature. Before addressing the substantive legal issues presented by this case, I must first address the relevant facts before this Court.

FACTS

The Plaintiffs, as previously stated, have both attempted through different means, to have their relationships legally recognized in the state of Illinois. First, Beverly Hillstrand and her partner, Angela Pena, applied for a marriage license with the Cook County Department of Public Health (the Department) so they could pursue solemnization of their vows before a judge of Cook County. However, per the definition of marriage, the Cook County Department of Public

Health denied their application for a marriage license. The Department denied the application solely because both parties to the proposed marriage were women.

Second, Stephen Jones and Bradley Schultz-Jones attempted to have their preexisting marriage recognized by the State of Illinois. The Joneses were attempting to secure their interests in their shared property. Having been married in Massachusetts, the two first attempted to have the State of Illinois recognize their foreign legal union. However, due to the Federal Defense of Marriage Act, the Department also refused to register the foreign marriage license. After failing to obtain legal recognition for their existing marriage, the Joneses attempted to rewed here in Illinois. However, like Ms. Hillstrand and Ms. Pena, the Department denied their application for an Illinois Marriage License for the same reasons.

The Plaintiffs now bring this action in equity requesting a permanent injunction. During the preliminary hearing after denial of a temporary restraining order, the Plaintiffs demonstrated that each of them are of legal age, and not related to one another in a manner that would otherwise prevent them from obtaining a marriage license. As demonstrated at the hearing, the only fact restricting the Plaintiffs from obtaining marriage licenses is the fact that they wish to enter into same sex unions. As a result of these facts, the Plaintiffs maintain that they do not garner equal protection from the law because of their status as homosexuals, and have asked this Court to invalidate the proscriptions on homosexual marriages as a result.

After discovery prior to the preliminary hearing, the Plaintiffs moved for summary judgment alleging a violation of due process and the Defendants made a cross-motion for summary judgment in reliance on the present state of the law that renders homosexual marriage illegal. This Court now considers the motions presented in order to render its ruling on the merits in the case at bar.

DISCUSSION

With all of the facts presently before this Court, it is important to note the standard by which these motions are governed. First, motions for summary judgment pursuant to 735 ILCS 5/2-1005 request a court enter judgment on behalf of a moving party because, with all the facts before the court, no dispute of fact arises between the parties such that the movant is entitled to a judgment as a matter of law. This Court denies the Plaintiffs' motion for summary judgment and grants the Defendants' motion for summary judgment. While no dispute of fact exists between the parties, the law as it stands in Illinois does not support the Plaintiffs' position. Rather, it supports the Defendants.

As a result of the status of the law, therefore, this Court grants the Defendant's request to dismiss this case because the Plaintiffs effectively lack standing to bring their claim before this Court. Effectively, the Plaintiffs are asserting a right to wed that is not permitted under Illinois Law. It should first be noted that the Marriage Act on its own defines marriage between a man and a woman. 750 ILCS 5/201. On that basis, this Court could extrapolate that the Marriage Act was never meant to apply to same-sex couples, obviating any legal process that would legally recognize such unions. However, this Court need not go so far as to infer such a restriction since same-sex marriages since the code classifies them as prohibited marriages. 750 ILCS 5/212(a)(5). The net result of these provisions renders the Plaintiffs' action void *ab initio*.

However, the Plaintiffs' have asserted that these restrictions violate their right to marry whoever they choose per the United States Supreme Court's decision in *Loving v. Virginia*. In addition, the Plaintiffs assert that the United States Supreme Court's decision in *Lawrence v. Texas* establishes homosexuality as a protected class requiring additional Constitutional protection from laws that discriminate them on that basis. Contrary to the Plaintiffs' position,

the policy undertaken by the State of Illinois is clearly sufficient to warrant satisfying the necessary standards of due process to permit the State of Illinois to administer the necessary regulations. As a result, this Court cannot find the relevant portions of the Marriage and Dissolution of Marriage Act in violation of the due process clause.

First, this Court must note that a question has arisen regarding the level of scrutiny that should apply in this particular case. In situations where a plaintiff brings a due process challenge, but is not part of a group considered a suspect class, or does not claim a right labeled as fundamental under the Constitution, courts apply the rational basis or reasonable relation test. *Boyton v. Cusper*, 112 Ill. 2d 356, 494 N.E.2d 135 (1985); *People v. Downin*, 357 Ill.App.3d 193, 828 N.E.2d 341 (3d Dist. 2005). The relevant authority regarding the applicable rights in this case suggest that the legislature need only a rational basis by to pass the laws presently subject to the Constitutional challenge raised by the Plaintiffs. It is perfectly reasonable for the legislature to institute laws governing the ability of individual to wed. The State has a clear interest in protecting familial units, and the creation of those familial units falls squarely within the ambit of that interest.

Moreover, the Plaintiffs' reliance on *Lawrence v. Texas* and *Loving v. Virginia* to create a newly recognizable fundamental right would only amount to the kind of slippery slope that would prevent the State from making policy determinations in the best interests of protecting families, and ultimately protecting children. Furthermore, this position is illogical considering the status of these cases under the law. *Loving* dealt with the right of a man and a woman to marry, dealing with a racial restriction on marriage. In that case, the United States Supreme Court considered a race restriction within a right to marry context, leading to the application of

the highest level of Constitutional Scrutiny. The same cannot be said to apply here since the parties are not asserting discrimination on the basis of race, or even sex.

During argument, Plaintiffs cite the *Goodridge* decision from Massachusetts. There, the Massachusetts Supreme Court considered a similar challenge to an analogous state law to the Marriage and Dissolution of Marriage Act. However, the reasoning of the Massachusetts Court is only persuasive authority in Illinois, and under the Illinois Constitution, this Court does not find that reasoning sufficient to change this Court's position.

CONCLUSION

Based on the foregoing, it is clear that the law does not require this Court to render the contested sections of the Marriage and Dissolution of Marriage Act Constitutionally invalid. Therefore, the Plaintiffs' complaint is hereby dismissed, and this Court finds in favor of the Defendant's Motion for Summary Judgment.

IT IS SO ORDERED.

By way of reference, this Court will incorporate the statement of facts as stated by the Circuit Court of Cook County as the issues before this Court are issues of law, and both parties have stipulated to the facts at hand. As a result of the proceedings below, we note that the primary issue before this Court is whether the current provisions of the Marriage and Dissolution of Marriage Act (the Act) violate the Due Process Clause of the Illinois Constitution. The Plaintiffs have raised this issue on appeal in two ways: first, that strict scrutiny should apply in reviewing the Constitutionality of these laws due to the nature of homosexuals as a suspect class or because the laws infringe on a fundamental right; and, second, that the provisions at issue violate the Due Process Clause regardless of the measure of scrutiny that applies. We necessarily take these arguments in turn as raised by the Plaintiffs and in so doing, we reverse the finding of the Circuit Court of Cook County.

I. The Applicable Level of Scrutiny

The Appellants assert that the applicable level of scrutiny that should apply in this case is strict scrutiny. In the process, they raise the argument in two ways: (1) that homosexuals are discriminated simply for being homosexuals, and (2) that the applicable sections of the Act infringe upon a fundamental right. The Appellee deftly points out that the first argument lacks sufficient merit to demonstrate the need to raise the level of scrutiny from rational basis review, and we are inclined to agree with the points raised by their brief and argument before this Court.

Simply put, the recent decision of the United States Supreme Court does not state explicitly that homosexuals are a suspect class under the law such that a heightened level of scrutiny should apply to laws that may or may not discriminate based on this individual lifestyle choice. *See People v. Downin*, 357 Ill. App. 3d 193, 199-200 (3d Dist. 2005) (*citing Lawrence v. Texas*, 539 U.S. 558 (2003)). It is clear from the High Court's method of resolution that the

homosexual lifestyle is not singled out for special treatment the way an immutable characteristic is in analogous cases where race discrimination is at issue. Clearly, if the High Court felt it necessary to designate a new suspect class, they would have done so given the chance. As a result, we need only address the constitutionality of the provision, insofar as it discriminates based on sexual preference under a rational basis review. Under such analysis, though, it is clear that the Plaintiffs' challenge fails as the state has a marked interest in regulating the familial unit. However, this Court is far more concerned with the implication of these kinds of restrictions on the fundamental right to marry as announced by *Loving v. Virginia*.

There is no doubt under the law that the right to marry is a fundamental right guaranteed by the due process clause. *Boynton v. Kusper*, 112 Ill. 2d 356, 368 (1986) (citing *Loving v. Virginia*, 388 U.S. 1 (1967)). Although not all restrictions on marriage are subject to strict scrutiny, the restriction at issue deals specifically with the ability of two individuals to enter into the marriage union. *Id.* As a result, the implication of a fundamental right requires this Court to apply a strict scrutiny analysis to any law that impinges on a fundamental liberty interest. *Id.* It is under this analysis that we consider whether 750 ILCS 5/201 and 5/212 violate the Due Process Clause of the Illinois Constitution and the United States Constitution.

II. The Constitutionality of 750 ILCS 5/201 and 5/212

At the outset, we note that recent decisions from this appellate court has not questioned the validity of Section 201 and 212. Specifically, *In Re Simmons* concerned itself with a transsexual attempting to validate a marriage license in order to establish parentage rights. *In Re Simmons*, 355 Ill. App. 3d 942, 825 N.E.2d 303 (1st Dist. 2005). That decision, though, did not raise the questions presently before this Court. Instead, the issue was the validity of the marriage license after the removal of the impediment that made the license invalid. *Id.* As a result, we

consider this matter for the first time. In fact, this Court's prior decision is the only decision directly on point, and it is salient to note that the challenge made at that time was not the issue presently before this Court. As a result, we are forced to consider all relevant law in analyzing the issue.

A primary consideration in the context of the fundamental right to marry is the social benefits that derive from a solemnized relationship. Clearly, the State conveys significant additional rights to married couples, in particular rights of parentage, transferability of estates, and tax benefits. In deed, these are all benefits that support the fundamental nature of the right to marry. In the context of Due Process, Equal protection requires that similarly situated individuals be treated under the law in a similar manner. *Downin*, 357 Ill. App. 3d at 200 (citing *People v. Reed*, 148 Ill. 2d 1, 7, (1992)). In considering whether a statute violates strict scrutiny in the context of the abrogation of a fundamental right, we must consider whether the statute is narrowly tailored to effectuate a compelling or sufficiently important governmental interest. *Boynton*, 112 Ill. 2d at 369. Given this standard, it is clear that Section 201 and 212 are not sufficiently narrow to effect a sufficient government interest.

Appellants attack the legislation as a categorical bar to their ability to marry in that it prevents all homosexuals from marrying even outside of the concerns raised by the other subsections of Section 212 and by the definition of marriage in Section 201. The present case, as a result, is very similar to the case presented to the Massachusetts Court in 2003. In *Goodridge v. Department of Public Health*, the Massachusetts Court determined that the restrictions could not satisfy rational basis review required there by the application of the state police power through an administrative agency. *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass.

2003). We are inclined to adopt similar reasoning, but apply a weightier standard of review in light of the fundamental nature of the right at issue with marriage.

In the present case, there has been no demonstration that the statutes are narrowly tailored to fit the state's goals of promoting families or protecting children. In addition, the idea that the Act stands for a socially acceptable moral standard fails to justify the strict scrutiny standard because the existence of the minority without great public outcry and the revelation of *Lawrence v. Texas*, suggest that social moral standards are not a consideration when analyzing individual moral expectations in the context of a private right to consensual behavior between adults. This is not to say that other forms of marriage presently restricted by the Act would become permissible, rather, that in the confines of same-sex unions, there is no demonstration that this law would further protect families or children. In our modern society, families take all different forms. In some cases, multiple male family members raise children while in others, single mothers raise children. There is no indication that a family unit comprised of same-sex parents would render any greater or lesser care of the child. If anything, recognized solemnization would provide great stability to such a familial unit, and result in a better environment for a child.

As a result, this Court cannot support the notion that same-sex unions are a sufficient danger to permit the state to create a regulation prohibiting such conduct in light of the fact that the state has not demonstrated a sufficient governmental interest to survive strict scrutiny. As a result, this Court has determined that the restrictions in the Act are unconstitutional and void as a result. This Order does not void the entire Act, rather just invalidates those provisions restricting the rights of same-sex couples to legally marry in Illinois.

IT IS SO ORDERED.

Justice Edward Branson, Dissenting

I write separately to express my distaste with this Court's attempt to meddle in affairs not rightly within the ambit of this Court's authority. The legislature is purely within the bounds of the power granted to it by the Constitution of the State of Illinois and the United States that this Court need not get involved. Restrictions on same-sex relationships should fall within the lowest level of Constitutional scrutiny, and all the state need do in that circumstance is demonstrate that the law is rationally related to a sufficient governmental interest. Clearly, this kind of restriction is no more or less unconstitutional than the prohibition on the marriage between first cousins, something already upheld by the courts of this state.

The 7th Addition of Black's Law Dictionary defines marriage as "a legal union of a man and woman as husband and wife." Black's Law Dict., 7th Del. Ed., "marriage", pg. 986. Similarly, Merriam-Webster defines Marriage as "the state of being united to a person of the opposite sex as husband or wife in a consensual and contractual relationship recognized by law." Merriam-Webster Online, <http://www.merriam-webster.com/dictionary/marriage> (November 11, 2007). While the Merriam-Webster definition has been updated to include same-sex marriage, the historical underpinnings of the first definition cannot be ignored. Similarly, as the lower court noted, the law presently under attack has been challenged and survived constitutional scrutiny in the past. Therefore, this Court should not mire itself in matters rightly within the cognizable realm of the Legislature.

At its core, the issue before this Court requires the Court to determine the level of scrutiny that applies when reviewing whether the statute in question is Constitutional. As the trial court aptly noted, the statute at issue in this case should only be reviewed by this court under the rational basis standard. This is due to the fact that the facts before this Court fail to

demonstrate that the Plaintiffs were discriminated against based on an immutable characteristic like race, gender, or country of national origin, that would typically result in a court of review applying a standard requiring the utilization of a more strict standard of review. *See generally In Re Simmons*, 355 Ill. App. 3d 942 (1st Dist. 2005).

Under the rational basis test, the state need only show that the state has created a reasonable restriction that is rationally related to its purpose. While I am inclined to agree with the United States Supreme Court that restrictions on actions that are part of a homosexual lifestyle fail under this analysis, see *Lawrence v. Texas*, I cannot extend the High Court's reasoning beyond that decision as the majority does by its opinion. Protecting families and the nature of the familial unit are a vital part of this society, and the State has a sufficient interest in protecting the family unit to permit this kind of restriction. Furthermore, I also see it as an unnecessary imposition by this Court to render a decision that would question the ability of the legislature when determining to who it provides social benefits to under the law. This is also a matter where the Legislature deserves the utmost of discretion, and it is well beyond the ambit of this Court's enumerated power to impinge upon the State's ability in that manner barring sufficient exigent circumstances that would run afoul of core constitutional principles requiring this Court's involvement.

For these reasons I respectfully dissent from the majority's opinion.

RELEVANT AUTHORITY

Constitutional Provisions:

United States Constitution

Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

Illinois Constitution:

Article I, Section 2:

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

Statutory Provisions:

750 ILCS 5/201: Formalities. A marriage between a man and a woman licensed, solemnized and registered as provided in this Act is valid in this State.

750 ILCS 5/212: Prohibited Marriages.

(a) The following marriages are prohibited:

- (1) a marriage entered into prior to the dissolution of an earlier marriage of one of the parties;
- (2) a marriage between an ancestor and a descendant or between a brother and a sister, whether the relationship is by the half or the whole blood or by adoption;
- (3) a marriage between an uncle and a niece or between an aunt and a nephew, whether the relationship is by the half or the whole blood;
- (4) a marriage between cousins of the first degree; however, a marriage between first cousins is not prohibited if: (i) both parties are 50 years of age or older; or (ii) either party, at the time of application for a marriage license, presents for filing with the county clerk of the county in which the marriage is to be solemnized, a certificate signed by a licensed physician stating that the party to the proposed marriage is permanently and irreversibly sterile;
- (5) a marriage between 2 individuals of the same sex.

(b) Parties to a marriage prohibited under subsection (a) of this Section who cohabit after removal of the impediment are lawfully married as of the date of the removal of the impediment.

(c) Children born or adopted of a prohibited or common law marriage are the lawful children of the parties.

Decision(s) of the Illinois Courts:

Johnson v. Johnson, 45 N.E.2d 625 (Ill. 1943).

In Re Estate of Kathrein, 16 Ill. 2d 621 (1959).

Boynton v. Kusper, 112 Ill. 2d 356 (1986).

People v. Williams, 349 Ill. App. 3d 273 (3d Dist. 2004)

In re Marriage of Simmons, 355 Ill. App. 3d 942 (1st Dist. 2005).

People v. Downin, 357 Ill. App. 3d 193 (3d Dist. 2005).

Decision(s) of Other Jurisdictions:

Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003).

Supreme Court of Illinois.
John C. BOYNTON et al., Appellees,
v.
Stanley T. KUSPER, Jr., County Clerk, et al.,
Appellants.

Feb. 21, 1986.
Rehearing Denied April 1, 1986.

Judgment affirmed.

Miller, J., dissented and filed opinion, in which Goldenhersh, J., joined.

Justice RYAN delivered the opinion of the court:

Plaintiffs, John C. Boynton, Kent Koplin, Marianne Lubke, and Joanne Simon, brought this class action against several Cook County and Illinois State officers to challenge the validity of section 3 of "An Act to provide for the fees of the * * * county clerk in counties of the third class" (Ill.Rev.Stat.1983, ch. 53, par. 73). The challenged statute required clerks in counties with a population exceeding one million to pay \$10 of the \$25 fee collected for issuing a marriage license into the Domestic Violence Shelter and Service Fund. (See Ill.Rev.Stat.***360** 1983, ch. 40, pars. 2403, 2403.1.) Plaintiffs maintained that this portion of the license fee was an unconstitutional tax. The Illinois Coalition Against Domestic Violence was given permission to intervene as a defendant. On cross-motions for summary judgment, the trial court ruled for the plaintiffs, holding the challenged provision of the statute unconstitutional. The defendants appealed directly to this court pursuant to Supreme Court Rule 302(a) (94 Ill.2d R. 302(a)). We consolidated defendants' appeals for this opinion.

The legislature, as part of its statutory scheme to combat domestic violence, passed "An Act in relation to domestic relations and domestic violence shelters and service programs" (hereinafter cited as the Domestic Violence Shelters Act). (Ill.Rev.Stat.1983, ch. 40, par. 2401 *et seq.*) This act authorized the Department of Public Aid to "administer domestic violence shelters and service programs, or * * * provide for their administration by not-for-profit corporations with whom the Department has contracts." (Ill.Rev.Stat.1983, ch. 40, par. 2402.) Among other services, these shelters were to provide "temporary residential facilities to family or household members who are victims of domestic

violence and their children." (Ill.Rev.Stat.1983, ch. 40, par. 2401(c).) Funding for the shelters was to be provided by the Department from funds allocated to the Domestic Violence Shelter and Service Fund. Ill.Rev.Stat.1983, ch. 40, par. 2403.

In conjunction with the passage of these provisions, the legislature increased the fee charged by a county clerk for the issuance of a marriage license in a third class county from \$15 to \$25. County clerks were specifically directed to pay the \$10 increase into the Domestic Violence Shelter and Service Fund. (Ill.Rev.Stat.1983, ch. 53, par. 73.) A similar provision was enacted for fees charged for marriage licenses in counties of the first and ***361** second class. (Ill.Rev.Stat.1983, ch. 53, par. 35.) The statute has since been amended to raise the fee to \$40, with \$25 targeted for the funding of shelters and services for victims of domestic violence. Ill.Rev.Stat., 1984 Supp., ch. 53, pars. 35, 73.

Under the Domestic Violence Shelters Act, the county clerk deposits the designated portion of the marriage license fee with the county treasurer. The county treasurer remits the money to the State Treasurer on a monthly basis. The State Treasurer ****137** *****210** deposits "such amounts into the Domestic Violence Shelter and Service Fund in the State treasury." Ill.Rev.Stat.1983, ch. 40, par. 2403.1.

In our case the four plaintiffs applied for marriage licenses in Cook County in February 1984. They were made aware that the cost of the license included the portion allotted to the Domestic Violence Shelter and Service Fund. Plaintiffs objected to the payment of this portion of the fee, but were informed that a license would not be issued unless the entire fee amount was paid. Plaintiffs paid the fee but filed a written protest with the county clerk regarding the portion designated for the shelters.

Plaintiffs filed this class action in February 1984 pursuant to sections 2-801 and 2-802 of the Civil Practice Law (Ill.Rev.Stat.1983, ch. 110, pars. 2- 801, 2-802). The trial court certified the cause as a class action. Plaintiffs attacked the statute as a violation of the due process guarantee of article I, section 2, of the Illinois Constitution of 1970. Plaintiffs also alleged that the statute violated article IX, section 2, of the Illinois Constitution, which provides that "[i]n any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable

and the subjects and objects within each class shall be taxed uniformly. Exemptions, deductions, credits, refunds and other allowances shall *362 be reasonable."

On cross-motions for summary judgment, the trial court ruled in favor of the plaintiff class. The court found that it was bound by our decision in [Crocker v. Finley](#) (1984), 99 Ill.2d 444, 77 Ill.Dec. 97, 459 N.E.2d 1346, to find the statute unconstitutional as a violation of the due process guarantee of article I, section 2, of the Illinois Constitution of 1970.

The virtues of the domestic-violence shelter program are not at issue in this case. However, our duty to decide whether a statute is violative of a constitutional provision cannot be evaded or neglected no matter how desirable or beneficial the legislation may be. ([Grasse v. Dealer's Transport Co.](#) (1952), 412 Ill. 179, 190, 106 N.E.2d 124.) In considering the question before us we must be mindful of Justice Holmes' admonition in [Pennsylvania Coal Co. v. Mahon](#) (1922), 260 U.S. 393, 416, 43 S.Ct. 158, 160, 67 L.Ed. 322, 326, that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

We are dealing in this case with a very sensitive and highly emotional issue. Plaintiffs, defendants, intervenor and *amici* have devoted a large portion of the briefs to the subject of wife beating and whether contemporary societal norms sanction such conduct. Similarly, a substantial part of the record below consists of statistical data, testimony of experts and publications. The thrust of much of this material is that there is a cause-and-effect relationship between marriage and domestic violence. Much of this material is irrelevant. Simply stated, the issue before us is whether our legislature may impose a "fee" upon a class of people based only on the fact that they have applied for marriage licenses, where the money collected is used to fund a general welfare program.

Since we are dealing here with the same sections of *363 the Domestic Violence Shelters Act, the same type of "fee," and the same type of limited classification of who must pay the fee, we agree with the trial court that our decision in [Crocker v. Finley](#) (1984), 99 Ill.2d 444, 77 Ill.Dec. 97, 459 N.E.2d 1346, is controlling in the present case.

In *Crocker*, the plaintiff class challenged the validity

of a statute that required circuit court clerks to collect a special \$5 filing fee from petitioners for dissolution of marriage "to fund shelters and other services for victims of domestic violence in Illinois." (99 Ill.2d 444, 447-48, 77 Ill.Dec. 97, 459 N.E.2d 1346.) The fee was collected to enable the Department of Public Aid to carry out the provisions of the Domestic Violence Shelters Act, the same statutory **138 ***211 provisions involved here. See 99 Ill.2d 444, 447-48, 77 Ill.Dec. 97, 459 N.E.2d 1346.

Plaintiffs in *Crocker* alleged both that the provision conflicted "with the Illinois constitutional right to obtain justice by law freely" ([Crocker v. Finley](#) (1984), 99 Ill.2d 444, 451, 77 Ill.Dec. 97, 459 N.E.2d 1346), and that it violated the due process clause of the Illinois constitution (99 Ill.2d 444, 456, 77 Ill.Dec. 97, 459 N.E.2d 1346.) We recognized that the central issue in both contentions was whether the legislature could impose such a fee upon a limited group of plaintiffs where the funds collected went into the State Treasury to fund a general welfare program. 99 Ill.2d 444, 451, 77 Ill.Dec. 97, 459 N.E.2d 1346.

As to the first contention, this court found that the filing fee constituted a tax that unreasonably interfered with the plaintiffs' access to Illinois courts. ([Crocker v. Finley](#) (1984), 99 Ill.2d 444, 455, 77 Ill.Dec. 97, 459 N.E.2d 1346.) This finding alone would have been sufficient to render the statute invalid. (See 99 Ill.2d 444, 451-52, 77 Ill.Dec. 97, 459 N.E.2d 1346.) However, this court also discussed the plaintiffs' second allegation as a separate basis for invalidating the statute. The court recognized that whether the filing fee was imposed under the State's police power or the power to tax, it could not be imposed arbitrarily. (99 Ill.2d 444, 457, 77 Ill.Dec. 97, 459 N.E.2d 1346.) The court noted the issues of due process and equal protection were *364 "overlapping and intertwining" and that an arbitrary exercise of either the taxing power or the police power "is violative of due process, as well as equal protection, guaranteed by our Constitution. [Citation.]" 99 Ill.2d 444, 457, 77 Ill.Dec. 97, 459 N.E.2d 1346.

Based upon the facts that the services provided by the fees were "available to all adults and their dependents who are the subjects of domestic violence"; that there was "no requirement that recipients of the services be either married or divorced"; and that only those petitioning for dissolution of marriage were required to pay the fee, the statute was found "to be an *arbitrary* use"

(emphasis added) of the State's power, "inconsistent with due process guarantees." [Crocker v. Finley \(1984\), 99 Ill.2d 444, 456, 77 Ill.Dec. 97, 459 N.E.2d 1346.](#)

The basic terms of the Domestic Violence Shelters Act have not changed since this court decided [Crocker](#). (See [99 Ill.2d 444, 447-51, 77 Ill.Dec. 97, 459 N.E.2d 1346](#); Ill.Rev.Stat.1981, ch. 40, par. 2401; Ill.Rev.Stat.1983, ch. 40, par. 2401.) As defined in the Act, domestic violence may occur between any family or household member. Ill.Rev.Stat.1983, ch. 40, par. 2401(a.) A family or household member is defined as "a spouse, person living as a spouse * * * or other adult person related by consanguinity or affinity, who is residing or has resided with the person committing domestic violence." (Ill.Rev.Stat.1983, ch. 40, par. 2401(b).) Thus, the Act, as stated in [Crocker](#), provides services to all adult citizens and their dependents who are victims of domestic violence, with no requirement that the adult recipients have any particular marital status. [Crocker v. Finley \(1984\), 99 Ill.2d 444, 456, 77 Ill.Dec. 97, 459 N.E.2d 1346.](#)

We recognized in [Crocker](#) that "a charge having no relation to the services rendered, assessed to provide general revenue rather than compensation, is a tax. [Citations.]" ([99 Ill.2d 444, 452, 77 Ill.Dec. 97, 459 N.E.2d 1346.](#)) Thus, the fee involved in that case was found to be a tax on litigation. The portion *365 of the marriage license fee in question here has no relation to the county clerk's service of issuing, sealing, filing, or recording the marriage license. Its sole purpose is to raise revenue which is deposited in the Domestic Violence Shelter and Service Fund (see Ill.Rev.Stat.1983, ch. 53, par. 73) so that the Department of Public Aid can provide domestic-violence shelters and service programs. (See Ill.Rev.Stat.1983, ch. 40, par. 2403). Thus, here, as in [Crocker](#), this portion of the fee is a tax.

[1] The tax imposed here, as in [Crocker](#), is levied on only a narrow class of people who may or may not become eligible **139 ***212 to be recipients of the benefits of the object of the tax. In [Crocker](#), the legislature chose to tax only those persons seeking a dissolution of their marriages. ([Crocker v. Finley \(1984\), 99 Ill.2d 444, 456, 77 Ill.Dec. 97, 459 N.E.2d 1346.](#)) Other classes of litigants, equally eligible to receive the benefits of the shelters and the service programs, were not taxed. (See Ill.Rev.Stat. 1981, ch. 25, pars. 27.1, 27.2) In this case, the tax has been placed only upon those single people who apply for marriage licenses. Other classes of people equally

eligible to receive the benefits of the Domestic Violence Shelters Act are not assessed such a "fee." (See Ill.Rev.Stat.1983, ch. 53, pars. 35, 73; Ill.Rev.Stat.1983, ch. 127, par. 142b4). As noted, in [Crocker](#) this court, in addition to considering the question of a tax on litigation, considered the issues of due process and equal protection under the Illinois Constitution and under article IX, section 2, of our constitution, relating to classification for tax purposes. As stated above, we noted that there was a "certain overlapping and intertwining of the issues." ([99 Ill.2d 444, 457, 77 Ill.Dec. 97, 459 N.E.2d 1346.](#)) Although the same overlapping and intertwining may be found in this case, plaintiffs here have not raised an equal protection issue, and the primary thrust of the arguments of all the parties has centered on due process of *366 law under the Illinois Constitution. The trial court based its holding on the due process issue. We likewise will base our holding solely on the due process clause of this State's constitution (Ill. Const.1970, art. I, sec. 2).

We noted above that much effort has been expended in this case in an attempt to establish a cause-and-effect relationship between marriage and domestic violence. The purpose was to establish a rational basis for imposing the tax upon the limited class of persons who are taxed under the statute in question and to establish a rational relation between the class taxed and the object of the legislation. In [Crocker](#) those seeking to uphold the tax likewise contended that there was a reasonable relation between the taxed class and the legislative purpose. ([Crocker v. Finley \(1984\), 99 Ill.2d 444, 455, 77 Ill.Dec. 97, 459 N.E.2d 1346.](#)) However, this court held that there was no rational basis for imposing the tax on only the narrow class of taxpayers selected under the Act. ([99 Ill.2d 444, 457, 77 Ill.Dec. 97, 459 N.E.2d 1346.](#)) The court stated that the relationship asserted is simply too remote. ([99 Ill.2d 444, 455, 77 Ill.Dec. 97, 459 N.E.2d 1346.](#)) The same reasoning is applicable to the class selected for taxation in this case, and the trial court properly held that the decision in [Crocker](#) was controlling.

[2][3][4] As in [Crocker](#), we consider the relationship between the purchase of the marriage license and domestic violence to be too remote to satisfy the rational-relation test of due process. This court has discussed the rational-relation test in different ways, all of which focus on essentially the same elements. In considering the reasonableness of a classification from a due process point of view, under either the police power or the taxing power of the State, "it

must appear that the particular classification is based upon some real and substantial difference in kind, situation or circumstance in the persons or objects on which the classification rests, and which bears a *rational relation* to the evil to be remedied and *367 the purpose to be attained by the statute, otherwise the classification will be deemed arbitrary and in violation of the constitutional guaranties of due process and equal protection of the laws." (Emphasis added.) (*Grasse v. Dealer's Transport Co.* (1952), 412 Ill. 179, 193-94, 106 N.E.2d 124.) Assuming the existence of the serious problem of domestic violence (which is not disputed), the mere finding that it exists does not permit the adoption of arbitrary or unrelated means of meeting it. (*Heimgaertner v. Benjamin Electric Manufacturing Co.* (1955), 6 Ill.2d 152, 159, 128 N.E.2d 691.) The due process clause of our constitution, insofar as it limits the exercise of the State's police or taxing powers, prohibits the arbitrary and unreasonable use of these powers. To be a valid exercise of the police power, the legislation must bear a *reasonable relationship* **140 ***213 to the public interest to be served and the means adopted must be a reasonable method to accomplish such objective. (*Illinois Gamefowl Breeders Association v. Block* (1979), 75 Ill.2d 443, 453, 27 Ill.Dec. 465, 389 N.E.2d 529; *Finish Line Express, Inc. v. City of Chicago* (1978), 72 Ill.2d 131, 138, 19 Ill.Dec. 626, 379 N.E.2d 290; *Sherman-Reynolds, Inc. v. Mahin* (1970), 47 Ill.2d 323, 327, 265 N.E.2d 640.) If a law bears a *reasonable relationship* to a proper legislative purpose and is not arbitrary or discriminatory, the requirements of due process are met. *S. Bloom, Inc. v. Mahin* (1975), 61 Ill.2d 70, 77, 329 N.E.2d 213.

If the relation between the procurement of a marriage license and domestic violence were found to be sufficient to satisfy the requirements of due process, then, as noted in *Crocker* (99 Ill.2d 444, 456, 77 Ill.Dec. 97, 459 N.E.2d 1346), countless other social welfare programs would qualify for monies obtained by imposing a similar tax on those who apply for marriage license. Using the same cause-and-effect test that defendants would have us apply to the relation between marriage and domestic violence, other worthy social problems can be found that are just as closely and reasonably related to marriage as is domestic violence, if *368 not more so. Since *all* divorces involve people who have been married, why should not a marriage counseling program be financed by another tax on marriage licenses? Since most marriages produce children, why should we not defray certain educational costs by the imposition of yet another add-on tax to marriage licenses? Why should not such a tax be imposed for the maintenance

of institutions for delinquent or neglected children, and why should not yet another tax be imposed to defray juvenile-probation costs? We conclude in this case that the imposition of a tax on the issuance of a marriage license does not bear a reasonable relation to the public interest sought to be protected by the Act in question and the means adopted, that is, the imposition of the tax on marriage licenses, is not a reasonable means of accomplishing the desired objective.

[5] We have addressed the due process question only on the rational-relation basis. That was the basis of the trial court's holding and the primary thrust of the arguments in this court. However, plaintiffs have also urged that the "strict scrutiny" test be applied. Freedom to marry has been recognized as a fundamental right. In *Loving v. Virginia* (1967), 388 U.S. 1, 12, 87 S.Ct. 1817, 1824, 18 L.Ed.2d 1010, 1018, the court held that marriage is one of the basic civil rights of man, fundamental to our very existence. (See also *Boddie v. Connecticut* (1971), 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113.) Although marriage is a fundamental right, every regulation relating to the prerequisites for marriage is not necessarily subjected to the "strict scrutiny" test applicable to fundamental rights. Reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may be imposed. *Zablocki v. Redhail* (1978), 434 U.S. 374, 386, 98 S.Ct. 673, 681, 54 L.Ed.2d 618; *Califano v. Jobst* (1977), 434 U.S. 47, 54, 98 S.Ct. 95, 99, 54 L.Ed.2d 228, 235; *369 *Moran v. Bever* (7th Cir.1984), 734 F.2d 1245, 1246-47.

Here, however, we are not dealing with an attempt to impose reasonable regulations upon those who desire to enter into the marriage contract. Nor are we concerned with a general State regulation or tax. Instead, by the statute in question the legislature has singled out marriage as a special object of taxation. In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue* (1983), 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295, the Supreme Court found that a special tax which singled out the press as an object of taxation could not be countenanced unless the State showed a counterbalancing interest of compelling importance it could not achieve without the differential taxation. (460 U.S. 575, 585, 103 S.Ct. 1365, 1372, 75 L.Ed.2d 295, 305.) We conclude that the same rationale must be applied to our case.

[6] Here the imposition of the special tax upon the issuance of a marriage license imposes a *direct*

impediment to the exercise ****141***214** of the fundamental right to marry and must be subjected to the heightened test of strict scrutiny and not to the lesser rational-relation test. When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important State interests and is closely tailored to effectuate only those interests. (*Zablocki v. Redhail* (1978), 434 U.S. 374, 388, 98 S.Ct. 673, 682, 54 L.Ed.2d 618, 631.) The classification in this case does not meet the strict-scrutiny test.

It may be argued that the amount of the tax imposed by the Act in question is nominal and does not therefore impose a significant interference with the fundamental right to marry. True, the tax in question is only \$10. However, as noted earlier, the legislature has now increased the tax on marriage licenses to \$25. Once it is conceded that the State has the *power* to impose a special ***370** tax on a marriage license, that is, to single out marriage for special tax consideration, there is no limit on the amount of the tax that may be imposed. In *M'Culloch v. Maryland* (1819), 17 U.S. (4 Wheat.) 316, 428, 4 L.Ed. 579, 607, Chief Justice Marshall long ago stated that the power to tax may legitimately be exercised on the objects of taxation to the utmost extent to which the government may choose to carry it. This observation was followed by the famous statement that the power to tax involves the power to destroy. Thus, once we acknowledge the State's power to specially tax the issuance of marriage licenses, a significant interference with the fundamental right to marry has been established. As noted, the original tax here was only \$10. It was then raised to \$25, and if the legislature sees fit, this special tax may be increased to \$100 or more to support this welfare program alone. Also, as previously noted, there are many other social problems that could also be addressed by imposing a special tax upon marriage licenses. We are not here concerned with the traditional political limitation on taxation referred to in *M'Culloch v. Maryland*. It is true that at some point political considerations will cause the legislature to limit the amount of the special tax it will impose upon the issuance of a marriage license. However, we are dealing here with a fundamental right, and long before political considerations limit the amount of this tax some people will be forced by the tax imposed to alter their marriage plans and will have "suffer[ed] a serious intrusion into their freedom of choice in an area in which we have held such freedom to be fundamental." (*Zablocki v. Redhail* (1978), 434 U.S. 374, 387, 98 S.Ct. 673, 681, 54 L.Ed.2d 618, 631.)

This court has noted that it has long been the standing policy of this State to foster and protect marriage. (*People v. Walker* (1951), 409 Ill. 413, 418, 100 N.E.2d 621.) The State has not demonstrated a compelling State interest ***371** which will satisfy the strict-scrutiny test. We therefore conclude that the State may not impose the special tax in question. The judgment of the circuit court of Cook County is therefore affirmed.

Judgment affirmed.

Justice SIMON took no part in this case, having withdrawn therefrom.

Justice MILLER, dissenting:

Because I believe that the imposition of a \$40 marriage license fee does not significantly interfere with a decision as important as whether to marry and that the legislature, in enacting the statute in question, could have found a reasonable relationship between the purposes of the Act and the means and the classification used to achieve those purposes, I dissent from the majority opinion.

A. Strict-Scrutiny Analysis

Although marriage undoubtedly is a fundamental right (see *Loving v. Virginia* (1967), 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010), not every restriction on marriage is subject to strict-scrutiny analysis. "[R]easonable regulations that do not significantly interfere with decisions to enter into the marital relationship" may be imposed without rigorous scrutiny by the courts. (****142***215** *Zablocki v. Redhail* (1978), 434 U.S. 374, 386, 98 S.Ct. 673, 681, 54 L.Ed.2d 618, 631; *Moran v. Beyer* (7th Cir.1984), 734 F.2d 1245, 1246-47.) I do not believe that a State's decision to impose a \$40 fee on marriage licenses for the purpose, in part, of funding the Domestic Violence Shelter and Service Fund (Ill.Rev.Stat.1983, ch. 40, par. 2403) significantly interferes with a decision to marry, and none of the parties contesting the fee raise that claim.

***372** In *Califano v. Jobst* (1977), 434 U.S. 47, 98 S.Ct. 95, 54 L.Ed.2d 228, the Supreme Court refused to review under the strict-scrutiny test a Federal statute providing that social security beneficiaries permanently lost their benefits if they married nonbeneficiaries. Beneficiaries retained their benefits, however, if they married persons who also received social security benefits. The court unanimously held that strict-scrutiny analysis was inapplicable to review of the Federal provision, even

though some persons who might otherwise have married were deterred from marriage by the rule. The court found that the law terminating benefits upon marriage did not interfere with the individual's freedom to make a decision as important as the decision to marry. ([434 U.S. 47, 54, 98 S.Ct. 95, 99, 54 L.Ed.2d 228, 235.](#)) For similar reasons, I do not believe that the fee imposed here should subject the statute in question to a strict-scrutiny analysis as a significant interference on the decision to enter into marriage.

Plaintiffs here do not allege that their decision to marry, or that of anyone else, was affected by the license fee. Rather, plaintiffs challenge only the use for which the fee was designated by statute. In contemplating marriage, few people consider how the State will appropriate their marriage license fee as a factor in their marriage decision. Certainly, a person's disagreement with how marriage license funds are to be disbursed by the State is not such a significant factor in the marriage decision as to constitute a direct impediment on the right to marry.

Although, as the majority points out, the power to tax is the power to destroy ([M'Culloch v. Maryland \(1819\), 17 U.S. \(4 Wheat.\) 316, 428, 4 L.Ed. 579, 607.](#)) mere possession by the State of the power to tax marriage licenses does not, of itself, constitute an impediment to the right to marry. Rather, it is the exercise of ***373** the taxing power in an oppressive manner which could impact upon the marriage decision. The Supreme Court, in [Zablocki v. Redhail \(1978\), 434 U.S. 374, 386, 98 S.Ct. 673, 681, 54 L.Ed.2d 618, 631.](#) stated that strict scrutiny is not required of every regulation which affects marriage; rather, strict scrutiny is required only of those regulations which significantly interfere with the decision to enter into marriage. Strict scrutiny of a statute such as the one before us would be required only if the tax became burdensome to the point that it became a factor worthy of consideration to those deciding upon marriage. That claim has not been raised here.

B. Rational-Relationship Standard

The majority concludes that no rational relationship exists between the marriage license fee and any legitimate legislative purpose, and that the tax violates principles of due process. I believe that plaintiffs' challenge to the statute invokes principles of equal protection separate from their due process claims. Nevertheless, for the reasons which follow, I would uphold the funding provisions of the Domestic Violence Shelters Act against both the due process

and equal protection challenges to the statute.

1. Due Process

The requirements of due process are met if a law bears a reasonable relationship to a proper legislative purpose and is neither arbitrary nor discriminatory. ([Kidd v. Industrial Com. \(1981\), 85 Ill.2d 534, 55 Ill.Dec. 497, 426 N.E.2d 822; Illinois Gamefowl Breeders Association v. Block \(1979\), 75 Ill.2d 443, 454, 27 Ill.Dec. 465, 389 N.E.2d 529.](#)) The majority finds that imposing a tax on marriage licenses does not bear a reasonable relationship to a legitimate public interest, because the relationship between domestic violence and the procurement ****143***216** of marriage licenses was not conclusively established.

***374** To comport with principles of due process, however, it is not necessary to establish a relationship between those who purchase marriage licenses and those who use the shelter program. For purposes of a due process, as opposed to an equal protection, analysis there need be no relation between the class of taxpayers and the purpose of the appropriation. ([New York Rapid Transit Corp. v. City of New York \(1938\), 303 U.S. 573, 586, 58 S.Ct. 721, 728, 82 L.Ed.2d 1024, 1034.](#)) As the Supreme Court has explained,

"[T]here is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided * * *:

'Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.

A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government.' "

([Commonwealth Edison Co. v. Montana \(1981\), 453 U.S. 609, 620, 69 L.Ed.2d 884, 897, 101 S.Ct. 2946, 2955,](#) quoting [Carmichael v. Southern Coal & Coke Co. \(1937\), 301 U.S. 495, 521-22, 81 L.Ed. 1245, 1260-61, 57 S.Ct. 868, 878.](#))

This court has previously upheld tax statutes against constitutional attack where those who pay the tax are not the only beneficiaries of the tax revenues. See [Titus v. Texas Co. \(1973\), 55 Ill.2d 437, 303 N.E.2d 361](#) (statute upheld which taxed only gasoline-powered boats, although the tax proceeds benefited owners of sailboats and diesel-powered boats as well).

Under due process principles, the challenged law, rather than the burdened classification, must bear a reasonable relationship to a legitimate public interest, and the means adopted must be a reasonable manner of accomplishing *375 the desired objective. In the present case, all parties have agreed that the shelter program is a laudable program and a legitimate object of legislative creation. A taxing statute is directly related to raising revenue (see S. Bloom, Inc. v. Mahin (1975), 61 Ill.2d 70, 77, 329 N.E.2d 213); the statute at issue here, therefore, is rationally related to its purpose. Furthermore, in light of the following equal protection analysis, the means used, *i.e.*, taxing an identified class, is not arbitrary.

I find that the funding provisions of the Domestic Violence Shelters Act do not violate constitutional due process proscriptions.

2. Equal Protection

Under both the Federal and State constitutions, laws may treat differently persons who appear to be similarly situated if the legislative classification bears a rational relationship to a legitimate legislative purpose. (Clements v. Fashing (1982), 457 U.S. 957, 962-63, 102 S.Ct. 2836, 2843, 73 L.Ed.2d 508, 515; S. Bloom, Inc. v. Mahin (1975), 61 Ill.2d 70, 329 N.E.2d 213.) In taxation, even more than in other fields, legislatures possess the greatest freedom in classification. (Lehnhausen v. Lake Shore Auto Parts Co. (1973), 410 U.S. 356, 364, 93 S.Ct. 1001, 1006, 35 L.Ed.2d 351, 357; Doolin v. Korshak (1968), 39 Ill.2d 521, 528, 236 N.E.2d 897.) Classifications for purposes of taxation bear a strong presumption of constitutionality which can only be overcome "by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." (Lehnhausen v. Lake Shore Auto Parts Co. (1973), 410 U.S. 356, 364, 93 S.Ct. 1001, 1006, 35 L.Ed.2d 351, 358.) States are not required to convince the courts of the correctness of their legislative judgments. Rather, those challenging the legislative judgment must convince the court that the legislative facts upon which the classification is apparently *376 based could not reasonably be conceived to be true by the governmental decision maker. **144***217Minnesota v. Clover Leaf Creamery Co. (1981), 449 U.S. 456, 464, 101 S.Ct. 715, 724, 66 L.Ed.2d 659, 668-69.

Equal protection and due process analyses are the same except that equal protection pertains to the basis of differentiation in a legislative classification. (See J. Nowak, R. Rotunda, and J. Young, Constitutional

Law 585-86 (1983).) In the present case, the gravamen of plaintiff's complaint is that there are no grounds to distinguish or separate those who are taxed under the statute from others who are not taxed, with respect to the domestic-violence shelters program. If persons marrying in Illinois as a class have characteristics different than the general population with respect to domestic violence, then this difference provides a rational basis for the legislative classification challenged here.

The evidence is closely balanced as to whether the percentage of married persons who use the shelter program is higher than the proportion of married persons in the general population. Because of the strong presumption in favor of upholding taxpayer classifications, however, plaintiffs have the burden of showing that married persons as a class bear no greater relationship to the shelter program than does the general population.

There is evidence indicating that the percentage of married persons eligible to use the program is higher than the percentage of married persons in the general population. Defendants' sociological experts testified, for example, that serious violence occurs more often between family members, especially spouses, than between other individuals in society.

I believe that the legislature could have found that purchasing a marriage license provides a rational ground of classification upon which to base a tax supporting the shelter fund. This view is strengthened by the weighty *377 presumption of constitutionality which operates here with regard to taxpayer classifications.

I do not find constitutionally prohibitive the fact that only persons presently entering into marriage in Illinois are taxed by the marriage license fee. The legislature may implement its programs one step at a time. (Minnesota v. Clover Leaf Creamery Co. (1981), 449 U.S. 459, 466, 101 S.Ct. 715, 725, 66 L.Ed.2d 659, 670.) Although only a small percentage of those persons who are now married in Illinois have paid the tax, the class would expand as the number of marriages celebrated after the effective date of the statute increased and, eventually, all of those persons who had been married in Illinois would have paid the tax to fund the shelter.

Finally, I do not believe that the result in Crocker v. Finley (1984), 99 Ill.2d 444, 77 Ill.Dec. 97, 459 N.E.2d 1346, controls the present case. In Crocker, the fee imposed on those seeking a divorce was found

to be arbitrary. Unlike the present case, no evidence was presented in *Crocker* to establish a connection between those seeking a divorce and the incidence of domestic violence. It is difficult to equate those who are terminating the marital relationship with those who are entering into the relationship for purposes of analyzing the reasonable relationship between the marital state and domestic violence. In contrast to *Crocker*, evidence was adduced here to establish that the classification of those taxed was not arbitrary, which, taken with the presumption in favor of the classification, is enough to validate the classification.

For the reasons stated, I believe that the funding provisions of the Domestic Violence Shelters Act violate neither the due process nor the equal protection guarantees of the United States and Illinois constitutions. I would, therefore, uphold the statute against constitutional attack.

Justice GOLDENHERSH joins in this dissent.

112 Ill.2d 356, 494 N.E.2d 135, 98 Ill.Dec. 208, 54 USLW 2449

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Supreme Court of Illinois.
In re ESTATE OF Mary KATHREIN.
Ann MERZ et al., Appellants,
v.
Alois KATHREIN, Appellee.
No. 35146.

May 22, 1959.

BRISTOW, Justice.

This appeal involves the validity of a will and reaches us after trial in the probate and superior courts of Cook County. There is a freehold involved, giving us, jurisdiction.

The relevant facts are these: Mary Grace executed a will on December 30, 1953, leaving her property to her brother and sister or their descendants; Mary Grace and Alois Kathrein were lawfully married on September 21, *622 1957. The probate court and superior court denied the probate of the will on the ground that the marriage had invalidated the instrument. (Ill.Rev.Stat.1957, chap. 3, par. 197.) The named beneficiaries under the will challenge this determination on the ground that the marriage was invalid because it was within the degree of consanguinity prohibited by the law of Illinois and therefore the will was not revoked in consequence thereof.

The pertinent statute, section 1 of the act in relation to marriages, reads: 'That hereafter marriages between parents and children including grandparents and grandchildren of every degree, between brothers and sisters of the half, as well as of the whole blood, between uncles and nieces, aunts and nephews, and between cousins of the first degree are declared to be incestuous and void. This section shall extend to illegitimate, as well as legitimate children and relations.' Ill.Rev.Stat.1957, chap. 89, par. 1.

Alois Kathrein and the mother of Mary Grace Kathrein were first cousins. Mary Grace therefore falls into the category of a second cousin or a first cousin once removed. Thus, appellee and the testatrix were not related as cousins of the first degree.

[1] First cousins are those who have the same grandfather or grandmother, while second cousins are those who have the same great-grandfather or great-grandmother. The common ancestor here is a **601 grandparent of one of the parties and the great-grandparent of the other.

[2] It is undisputed that a void marriage does not revoke a will. 68 Corpus Juris 835; [95 C.J.S. Wills s 291](#). Appellant places considerable reliance upon two opinions rendered by the Attorney General of Wisconsin and Minnesota. Involved therein were comparable provisions, namely, 'In this state marriage between those who are nearer of kin than second cousins is forbidden' and 'no marriage shall be contracted between persons who are nearer of kin than second cousins, computed *623 by the rule of civil law.' Both opinion indicated that marriages involving relationship as comparable to those appearing here are void.

In 1929 the Attorney General of Illinois was called upon by the State's Attorney of Clinton County, Illinois, to answer the identical question that we have before us. It was his opinion 'that the parties in question are not cousins of the first degree and are not prohibited from marrying by reason of said statute on marriages.'

No doubt the county clerks in the State of Illinois relying upon this pronouncement of the law have issued many licenses when marriages have been solemnized between parties whose relationship was the same as those involved in this controversy.

[3][4] A correlative state that deserves mention is section 157 of division I of the Criminal Code, which reads as follows: 'Persons within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who shall intermarry with each other * * * shall be imprisoned in the penitentiary.' (Ill.Rev.Stat.1957, chap. 38, par. 375.) This statute being penal in nature must be strictly construed in favor of an accused. One is not permitted to go beyond the literal and obvious meaning of the statute. [People v. Lund, 382 Ill. 213, 46 N.E.2d 929](#). In the case of [Arado v. Arado, 281 Ill. 123, 117 N.E. 816, 818, 4 A.L.R. 28](#), this court said: 'The question whether the marriage of the appellant and appellee was void * * * must be determined from the amended act of 1887 and the provision of the Criminal Code making parties to a marriage declared to be incestuous and void punishable by imprisonment in the penitentiary.'

[5][6][7] We are of the opinion that section 1 of the act in relation to marriages should be strictly construed. If the legislature had intended to embrace cousins of any other category than cousins of the first degree,' it would have so indicated. it would seem clear that it was its intention to *624 exclude cousins

of any other class. The intention of the legislature must be gathered from the words that are used. [United States v. Wiltberger, 5 Wheat. 76, 95, 5 L.Ed. 37.](#)

The marriage here was a valid one, thus revoking the will.

Order affirmed.

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Appellate Court of Illinois,
First District, Third Division.
In re MARRIAGE OF Sterling SIMMONS,
Petitioner-Appellant,
and
Jennifer Simmons, Respondent-Appellee.
Nos. 1-03-2284, 1-03-2348.

Feb. 16, 2005.
Rehearing Denied March 15, 2005.

Justice [SOUTH](#) delivered the opinion of the court:

Petitioner, Sterling Robert Simmons, and the minor child respondent, through his child-representative, Patrick T. Murphy, the Cook County Public Guardian, have filed these consolidated appeals arising from an order of the circuit court of Cook County which denied the petition for dissolution marriage; declared that the marriage between petitioner and respondent, Jennifer Simmons, was invalid; awarded respondent sole care and custody of the minor child; held that petitioner lacked standing to seek custody of the child; terminated petitioner's parental rights; held that the minor child's constitutional rights were protected; and denied the minor child's motion for declaratory judgment.

FACTUAL BACKGROUND

Petitioner was born a female on March 31, 1959, and given the name of Bessie Cornelia Lewis. At a very young age, he [\[FN1\]](#) began experiencing a great discomfort with his female anatomy and became convinced that he was actually a boy who had been born into the body of a girl. This condition is commonly referred to in the psychiatric field as gender dysphoria or gender identity disorder. A person suffering from gender dysphoria is uncomfortable with his assigned or genetic sex and has a preoccupation with ridding himself of the physical characteristics of that assigned or genetic sex. To that end, petitioner began taking [testosterone](#), the male hormone, to alter his appearance and started going by the name of Robert Sterling**307 ***51 Simmons. He has been taking [testosterone](#) since he was 21 years old, and as a result thereof he now has the outward appearance of a man, which includes facial and body hair, male pattern baldness, a deep voice, a hypertrophied clitoris, and increased muscle and body mass.

[FN1](#). Throughout this opinion, we shall refer to petitioner as "He." This is done out of respect for petitioner and has no legal significance.

Petitioner and respondent participated in a wedding ceremony on August 10, 1985, and a certificate of marriage was issued by the county clerk of Cook County on August 29, 1985. In 1991, they decided to have a child, and it was agreed that respondent would undergo [artificial insemination](#). As a result of that procedure, respondent gave birth to the minor child on July 20, 1992, and petitioner is listed as the father on the child's birth certificate.

*946 On July 31, 1991, petitioner underwent a [total abdominal hysterectomy](#) and a [bilateral salpingo oophorectomy](#), which removed his uterus, fallopian tubes and ovaries. However, he still to this day retains all of his external female genitalia, which includes a vagina, labia, a hypertrophied clitoris, and breasts.

In 1994, petitioner sought to obtain a new birth certificate which would designate his sex as "male." In accordance with the Vital Records Act ([410 ILCS 535/1 et seq.](#) (West 2002)), Dr. Raymond McDermott, petitioner's treating physician who specializes in obstetrics and gynecology, submitted an "Affidavit by Physician as to Change of Sex Designation" to the Department of Public Health, attesting that he had performed "certain surgical operations" on petitioner "by reason of which the sex designation" should be changed from "female" to "male." The surgeries to which Dr. McDermott was alluding were the July 31, 1991, [hysterectomy](#) and [oophorectomy](#). In October of 1994, the State Registrar issued petitioner a new birth certificate which bears the name of Sterling Robert Simmons and the gender designation of "male." The original birth certificate has been placed under seal and can only be opened by court order. Additionally, petitioner's name has been legally changed by court order to Sterling Robert Simmons.

The relationship between the parties was quite tumultuous and began to deteriorate throughout the years. On August 24, 1998, petitioner filed a petition for dissolution of marriage in which he sought, *inter alia*, temporary and permanent sole care and custody of the minor child. In her answer, respondent alleged that petitioner lacked standing to assert custody rights over the minor child because their same-sex marriage was invalid under Illinois law, and he was neither the biological nor adoptive parent. A trial was conducted on the petition, and the minor child was represented throughout the proceedings by a guardian *ad litem* and the office of the Public Guardian. At the conclusion of the trial, the court denied the petition

for dissolution of marriage on the grounds that there was no marriage to dissolve since it was void *ab initio* as a same-sex marriage. The court also awarded sole custody of the minor child to respondent and declared that petitioner lacked parental rights or standing to seek custody. However, the court did grant petitioner visitation rights. While petitioner and the minor child appeal from the order, neither they nor respondent appeal that portion of the order which grants him visitation rights.

Petitioner and the minor child have raised several issues for our consideration: (1) whether the trial court erred in holding that petitioner is a woman and not legally male and, therefore, not legally *947 married to respondent who is also a woman; (2) whether the trial court erred in holding that petitioner is not a legal parent under the Illinois Parentage Act (750 ILCS 40/1 *et seq.* (West 2002)), the Illinois Parentage Act of 1984 (750 ILCS 45/1 *et seq.* (West 2002)), the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/101 *et seq.* (West 2002)), or common law; (3) whether respondent is barred from challenging petitioner's parentage of the minor child under the doctrines of equitable estoppel and *laches* and the statute of limitations as set forth in the Illinois Parentage Act; (4) whether the minor child can bar respondent from attacking the validity of petitioner's parentage as an intended third-party beneficiary to his parents' [artificial insemination](#) agreement; (5) whether the trial court's finding that petitioner is not the legal father of the minor child violates the minor child's constitutional rights to equal protection and due process; and (6) whether petitioner should be given standing as a parent to seek custody of the minor child under equitable or *de facto* parentage theories.

DISCUSSION

Under the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/101 *et seq.* (West 2002)), while a marriage between a man and a woman is valid (750 ILCS 5/201 (West 2002)), a marriage between two individuals of the same-sex is prohibited (750 ILCS 5/212(a)(5) (West 2002)). However, parties to a marriage prohibited under section 212 who cohabit after removal of the impediment are lawfully married as of the date of the removal of the impediment. 750 ILCS 5/212(b) (West 2002).

Petitioner challenges the trial court's conclusion that he is a female and not legally male. Petitioner was diagnosed as a transsexual male in his late teens and began undergoing sex reassignment treatments.

Petitioner maintains that he is male, that his marriage to respondent was valid, and that the trial court's conclusion that the marriage is invalid on the basis that he is a female was against the manifest weight of the evidence.

[1][2] The decision of the trial court following a bench trial should be overturned only if it is against the manifest weight of the evidence. [In re Marriage of Kendra](#), 351 Ill.App.3d 826, 829, 286 Ill.Dec. 812, 815 N.E.2d 22 (2004). A decision is against the manifest weight of the evidence when the opposite conclusion is apparent or when the ruling is unreasonably arbitrary or not based on the evidence. [Judgment Services Corp. v. Sullivan](#), 321 Ill.App.3d 151, 154, 254 Ill.Dec. 70, 746 N.E.2d 827 (2001). Under the Marriage Act, the formalities for a lawful marriage require a marriage between a man and a woman to be licensed, solemnized and registered as provided in the Marriage Act. 750 ILCS 5/201 (West 2002).

[3] *948 Dr. Laurence Levin, respondent's expert in the field of gender reassignment, testified that while petitioner presents the physical appearance of a male, he has clear, normal female external genitalia and breast tissue. Dr. Frederic Ettner, petitioner's expert and a member of the Harry Benjamin International Gender Dysphoria Association, has treated hundreds of transsexuals during his medical career and described petitioner as a healthy male with male pattern baldness, the musculature of a male, facial and male body hair, and a male torso, but who still has female genitals, including atrophic or dysfunctional female breasts, atrophic labia, an [enlarged clitoris](#), and a vagina. Dr. McDermott, while not an expert in the field of sexual or gender reassignment, testified that petitioner is still a female even after the [hysterectomy](#) and [oophorectomy](#), and that those surgeries were never intended to be part of the sex-reassignment process. He admitted that the only reason he signed **309 ***53 the physician's affidavit in connection with the issuance of the new birth certificate was to "help out" petitioner and make it easier for him to legally change his sex from female to male. All of the physicians testified that there were other surgeries which had to be done on petitioner before he could be considered completely sexually reassigned, which would include a [vaginectomy](#), [reduction mammoplasty](#), [metoidioplasty](#), [scrotoplasty](#), [urethroplasty](#), and [phalloplasty](#).

Based upon the testimony of all of the expert

in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing executed and acknowledged by both the husband and wife. The physician who is to perform the technique shall certify their signatures and the date of the insemination, and file the husband's consent in the medical record where it shall be kept confidential and held by the patient's physician. However, the physician's failure to do so shall not affect the legal relationship between father and child." [750 ILCS 40/3\(a\)](#) (West 2002).

On April 18, 1991, the parties went to a fertility clinic and entered into a written [artificial insemination](#) agreement with a physician to perform "one or more, if necessary," [artificial insemination](#) procedures with sperm from a stranger-donor. That agreement stated, in relevant part:

"It is further agreed that [at] the moment of conception the *husband* hereby accepts the act as his own, and agrees:

1. That such child or children so produced are his own legitimate child or children and are heirs of his body; and
2. That he hereby completely waives forever any right which he might have to disclaim such child or children as his own; and
3. That such child or children so procedure [*sic*] are, and shall be considered to be, in all respects including descent of property, child or children of his own body." (Emphasis added.)

That agreement was signed by petitioner as "husband," respondent as "wife," and the physician who performed the [artificial insemination](#) procedure.

****311 ***55** This issue requires us to determine whether section 3 of the Parentage Act includes transsexual males who have signed [artificial insemination](#) agreements as husbands in an invalid same-sex marriage. We find that it does not.

[\[5\]\[6\]\[7\]](#) ***951** Issues of statutory construction are reviewed *de novo*. [In re D.D.](#), 196 Ill.2d 405, 418, 256 Ill.Dec. 870, 752 N.E.2d 1112 (2001). The primary objective in construing a statute is to determine and give effect to the legislature's intent. [Yang v. City of Chicago](#), 195 Ill.2d 96, 103, 253 Ill.Dec. 418, 745 N.E.2d 541 (2001). This effort properly begins with an examination of the statutory language. [Texaco-Cities Service Pipeline Co. v. McGaw](#), 182 Ill.2d 262, 270, 230 Ill.Dec. 991, 695 N.E.2d 481 (1998). Each undefined word in the statute must be ascribed its ordinary and popularly understood meaning. [Texaco-Cities](#), 182 Ill.2d at 270, 230 Ill.Dec. 991, 695 N.E.2d 481.

[\[8\]](#) It is clear from reading the statute in question that the legislature intended that this statute apply to "husbands" and "wives" as those terms are ordinarily and popularly understood. Petitioner and respondent signed the agreement as "husband" and "wife." However, inasmuch as we have upheld the trial court's determination that petitioner was not a "husband" and respondent was not a "wife" due to the invalidity of their marriage, we are compelled to find that the agreement is also invalid. Furthermore, the physician who performed the [artificial insemination](#) procedure failed to comply with the statute in that he did not certify the signatures and the date of the insemination. Under the statute, the physician is required to certify the date of insemination in order to make the consent valid. [750 ILCS 40/3\(a\)](#) (West 2002). In this case, the only date that appears on the consent form is April 18, 1991, but the record does not disclose the actual date of insemination because it was never certified by the physician. Respondent testified that the first procedure did not occur until approximately one month after the April 18, 1991, agreement was signed, and that she did not become pregnant until after the sixth procedure, some several months later. We find that the [artificial insemination](#) agreement did not comport with the statute and was, therefore, invalid on those grounds as well. See [In re Marriage of Witbeck-Wildhagen](#), 281 Ill.App.3d 502, 506, 217 Ill.Dec. 329, 667 N.E.2d 122 (1996) (wherein the Fourth District stated in *dicta* that the husband's written consent is required each time the wife is to undergo an insemination procedure).

Petitioner further argues that even if the agreement is held to be invalid, section 5 of the Illinois Parentage Act of 1984 (Parentage Act of 1984) ([750 ILCS 45/5](#) (West 2002)) grants a presumption of parenthood, and that a child born from [artificial insemination](#) to two married parents retains his right to parentage with both parents even if the marriage is subsequently held invalid.

Section 5 of the Parentage Act of 1984 states in relevant part:

"(a) A man is presumed to be the natural father of a child if:

(1) he and the child's natural mother are or have been married to each other, even though the marriage is or could be declared invalid, and the child is born or conceived during such marriage;

***952** (2) after the child's birth, he and the child's natural mother have married each other, even though the marriage is or could be declared invalid, and he is named, with his written consent, as the

child's father on the child birth certificate[.]” [750 ILCS 45/5\(a\)\(1\), \(a\)\(2\)](#) (West 2002).

****312 ***56 [9]** While we agree with petitioner's interpretation of the statute, we must conclude that it does not apply to him. That section, which confers a presumption on a "man" to be the natural father of a child even after a marriage has been declared invalid, is based on the premise that the parties who are involved are a man and a woman. As we have previously determined, petitioner is not a man within the meaning of the statute, and that, therefore, the statute does not apply.

Petitioner further maintains that even if we find that the Parentage Act, the Parentage Act of 1984, and the Marriage Act do not apply, he can still be considered a legal parent under common law. In support of his argument, he relies on [In re Parentage of M.J., 203 Ill.2d 526, 272 Ill.Dec. 329, 787 N.E.2d 144 \(2003\)](#). In that case, petitioner and respondent, a woman and a man respectively, were not married to each other but agreed to have a child through [artificial insemination](#) because respondent was sterile. They did not sign an [artificial insemination](#) consent agreement, but the respondent made oral promises to petitioner that he would always provide financial support for the child, and he paid for the procedure. Petitioner subsequently gave birth to twins, and the respondent, as promised, provided financial support for the children until their relationship ended after she discovered that he was married to someone else. At that time, respondent withdrew his financial support, and petitioner filed a three-count complaint to establish paternity and impose a support obligation for the benefit of their children. The first count alleged the breach of an oral agreement, and the second count alleged promissory estoppel. Both counts alleged that respondent made an offer to petitioner that he would treat the child/children as his own and provide financial support for them and that but for these representations she never would have undergone [artificial insemination](#). The third count sought a request for a declaration of paternity and establishment of child support pursuant to the Parentage Act of 1984. Our supreme court held that because written consent is a prerequisite for invoking the protections of the Parentage Act, plaintiff could not maintain an action under it. However, the court also found that there was nothing in the Parentage Act of 1984 that prohibited common law actions to establish parental responsibility. [M.J., 203 Ill.2d at 531, 539, 272 Ill.Dec. 329, 787 N.E.2d 144](#).

[\[10\]](#) While *M.J.* does stand for the proposition that

an action can be brought under common law theories for financial support, it does not ***953** stand for the proposition that questions of paternity or custody may be brought under common law theories of breach of contract and promissory estoppel. In fact, the plaintiff in *M.J.* did not prevail on her request for a declaration of paternity in count III of her complaint, as the court held that such an issue can only be addressed under the Parentage Act of 1984. We read *M.J.* to stand for the proposition that while matters of financial support and parental responsibility may be brought under common law theories of breach of an oral contract and promissory estoppel, questions of paternity and custody must still be brought under the Parentage Act of 1984. Since we have previously determined that petitioner lacks standing under the Parentage Act of 1984, this argument must fail.

Petitioner also contends that he should be declared the *de facto* parent based upon his long, loving and close relationship with the minor child who has always known him as his "Daddy."

[\[11\]](#) In [In re Visitation With C.B.L., 309 Ill.App.3d 888, 243 Ill.Dec. 284, 723 N.E.2d 316 \(1999\)](#), the petitioner, who had ****313 ***57** engaged in a long-term lesbian relationship with respondent, who had given birth to the minor as a result of [artificial insemination](#), sought an order granting her visitation with the minor child pursuant to the Marriage Act. She argued that she had alleged facts in her petition sufficient to establish her standing as a common law *de facto* parent or as an individual *in loco parentis* to the minor child. [C.B.L., 309 Ill.App.3d at 889-90, 243 Ill.Dec. 284, 723 N.E.2d 316](#). On appeal, she abandoned her contention that the allegations within her petition were sufficient to establish her standing under the Marriage Act and contended only that they were sufficient to provide her standing as a common law *de facto* parent or as an individual *in loco parentis* to C.B.L. [C.B.L., 309 Ill.App.3d at 890, 243 Ill.Dec. 284, 723 N.E.2d 316](#). This court held that the Marriage Act superseded and supplanted the common law of visitation in Illinois and that, therefore, any standing for visitation must be found solely within that Act. [C.B.L., 309 Ill.App.3d at 891, 243 Ill.Dec. 284, 723 N.E.2d 316](#). Since petitioner conceded her lack of standing under the Act, her petition lacked merit. [C.B.L., 309 Ill.App.3d at 894, 243 Ill.Dec. 284, 723 N.E.2d 316](#).

The court in *C.B.L.* further stated:

"Finally, this court is not unmindful of the fact that our evolving social structures have created

nontraditional relationships. This court, however, has no authority to ignore the manifest intent of our General Assembly. Who shall have standing to petition for visitation with a minor is an issue of complex social significance. Such an issue demands a comprehensive legislative solution. That solution is provided, by our General Assembly, within [the Marriage Act]." [C.B.L., 309 Ill.App.3d at 894-95, 243 Ill.Dec. 284, 723 N.E.2d 316.](#)

Similarly, in the instant case, petitioner's standing to seek full *954 care and custody of the minor child must be found solely within the Marriage Act, the Parentage Act, or the Parentage Act of 1984. Our determination that he lacks such standing under those acts is dispositive of the issue.

Finally, petitioner argues that respondent should be barred from contesting his parentage by the doctrines of equitable estoppel and *laches* and the applicable statute of limitations under the Parentage Act of 1984.

[12][13] Estoppel arises when a party, by his words or conduct, intentionally or through culpable negligence, induces reasonable reliance by another on his representations and thus leads the other, as a result of that reliance, to change his position to his detriment. [Zink v. Maple Investment & Development Corp., 247 Ill.App.3d 1032, 1039, 187 Ill.Dec. 548, 617 N.E.2d 1269 \(1993\).](#) The purpose of equitable estoppel is to prevent fraud and injustice. [Payne v. Mill Race Inn, 152 Ill.App.3d 269, 276, 105 Ill.Dec. 324, 504 N.E.2d 193 \(1987\).](#) Equitable estoppel bars a wife from attacking the validity of a joint custody agreement that calls for shared custody of the child and for the husband to pay child support when the wife entered into the agreement, accepted child support and allowed the husband to visit the child, which caused the husband to act as the child's father and to anticipate that his parent-child relationship would continue. See [In re Marriage of Schlam, 271 Ill.App.3d 788, 794, 207 Ill.Dec. 889, 648 N.E.2d 345 \(1995\).](#)

[14] In the instant case, equitable estoppel cannot apply because no action on the part of respondent can confer standing on petitioner to seek custody. The issue here is not a joint custody agreement but whether the parties' marriage complies with Illinois law or is in contravention of it. Inasmuch as the parties' marriage was void *ab initio*, there is nothing in the law which prohibits respondent from raising **314 ***58 that invalidity. It would be illogical to

hold that because petitioner and respondent agreed to enter into a marriage prohibited under Illinois law, the state is now obliged to recognize that illegal union and all that flows therefrom simply because respondent participated and acquiesced in it.

[15][16] *Laches* is the neglect or omission on the part of a complainant to assert a right, taken in conjunction with a lapse of time and other circumstances causing prejudice to any adverse party. [Lincoln-Way Community High School District 210 v. Village of Frankfort, 51 Ill.App.3d 602, 611, 9 Ill.Dec. 884, 367 N.E.2d 318 \(1977\).](#) The necessary elements of *laches* are delay and prejudice. [Lincoln-Way, 51 Ill.App.3d at 611, 9 Ill.Dec. 884, 367 N.E.2d 318.](#) The statute of limitations found in the Parentage Act of 1984 to which petitioner refers is found in section 8. [750 ILCS 45/8](#) (West 2002). That section provides that a party who brings an action to declare the nonexistence of the parent and child relationship shall be barred if brought later *955 than two years after the petitioner obtains knowledge of relevant facts. [750 ILCS 45/8\(a\)\(3\)](#) (West 2002).

[17] Petitioner cannot avail himself of any of these theories because he, not respondent, has brought this action. Once the action was filed, respondent could raise whatever defenses she deemed appropriate or legally sound. We know of no case law which stands for the proposition that a respondent is estopped from raising defenses due to *laches* or the statute of limitations. Therefore, petitioner's arguments under estoppel, *laches* and the statute of limitations must fail.

The minor child argues that he was the intended third-party beneficiary of the contract entered into between petitioner and respondent and, therefore, has a right to sue under that contract even though he is never a party to it.

[18][19][20] A third-party beneficiary may sue under a contract even when not a party to it, provided the benefit of the contract is directed to him, as opposed to being merely incidental. [Gallagher Corp. v. Russ, 309 Ill.App.3d 192, 199-200, 242 Ill.Dec. 326, 721 N.E.2d 605 \(1999\).](#) It must appear from the language of the contract when properly construed that the contract was made for the direct benefit of the third person and that the benefit was not merely incidental. [Midwest Concrete Products Co. v. La Salle National Bank, 94 Ill.App.3d 394, 396, 49 Ill.Dec. 968, 418 N.E.2d 988 \(1981\).](#) The argument is that the minor child is the third-party beneficiary under the [artificial insemination](#) agreement, particularly in light of the

fact that respondent entered into it and acknowledged that the child would be considered petitioner's heir. However, since we have already determined that the agreement is invalid, there can be no contract to enforce, and the minor child cannot be construed as a third-party beneficiary to an invalid, non-existent contract.

[21] Additionally, the Public Guardian argues that the trial court's decision violates the minor child's right to equal protection of the laws under both the Illinois and United States Constitutions. He maintains that the child, as an artificially inseminated child born into an invalid same-sex marriage, is being denied parentage while almost all other children are not.

The Public Guardian cites [Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 \(1972\)](#), where the United States Supreme Court held that all parents, whether married or unmarried, male or female, are constitutionally entitled to a hearing on their fitness before their children could be removed from their custody. Illinois law had previously presumed that unwed fathers were unsuitable and neglectful parents, which the Supreme Court found violated due process. **315** [Stanley, 405 U.S. at 650, 92 S.Ct. at 1212, 31 L.Ed.2d at 551](#). The Supreme Court, however, has never determined whether a child has a **956** liberty interest symmetrical with that of a natural parent in maintaining his current relationship. [Michael H. v. Gerald D., 491 U.S. 110, 130, 109 S.Ct. 2333, 2346, 105 L.Ed.2d 91, 110-11 \(1989\)](#). Attempts to assert such a right on behalf of children who have become psychologically attached to a nonparent have not met with success in other jurisdictions. See, e.g., [In re Clausen, 442 Mich. 648, 502 N.W.2d 649 \(1993\)](#). Moreover, the Illinois Supreme Court has specifically held that no such liberty interest exists with respect to a child's psychological attachment to a nonbiological parent. See [In re Petition of Kirchner, 164 Ill.2d 468, 208 Ill.Dec. 268, 649 N.E.2d 324 \(1995\)](#). Accordingly, the Public Guardian's argument here must fail.

Both petitioner and the Public Guardian were granted permission to cite additional authority subsequent to oral argument. They cited the recent supreme court case of [People ex rel. Department of Public Aid v. Smith, 212 Ill.2d 389, 289 Ill.Dec. 1, 818 N.E.2d 1204 \(2004\)](#), in support of their position that a father's acknowledgment of paternity is conclusive under the Parentage Act of 1984. In that case, two days after the child was born, Smith executed a voluntary acknowledgment of paternity.

Subsequently, Smith learned through DNA testing that the child was not his biological child. Smith then brought an action to declare the nonexistence of the parent-child relationship under the Parentage Act of 1984. The State's motion to dismiss the action was granted by the trial court, which this court reversed. The supreme court affirmed the trial court's holding, finding that under section 6(d) of the Parentage Act of 1984 ([750 ILCS 45/6\(d\)](#) (West 2002)), a signed acknowledgment of paternity may be challenged in court only on the basis of fraud, duress, or material mistake of fact. [Smith, 212 Ill.2d at 405, 289 Ill.Dec. 1, 818 N.E.2d 1204](#). The court found that Smith's acknowledgment of paternity was not rebuttable. [Smith, 212 Ill.2d at 406, 289 Ill.Dec. 1, 818 N.E.2d 1204](#).

Petitioner and the Public Guardian maintain that *Smith* supports their contention that respondent's acknowledgment of petitioner's paternity in the [artificial insemination](#) agreement is conclusive. We disagree and, therefore, reject their argument based upon our previous determination that the [artificial insemination](#) agreement was invalid since petitioner has never been a husband within the meaning of the statute.

Accordingly, based upon the foregoing analysis, the judgment of the circuit court is affirmed.

Affirmed.

[KARNEZIS](#), P.J., and [HARTMAN](#), J., concur.

355 Ill.App.3d 942, 825 N.E.2d 303, 292 Ill.Dec. 47

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Appellate Court of Illinois,
Third District.
The PEOPLE of the State of Illinois, Plaintiff-
Appellee,
v.
Donna L. WILLIAMS, Defendant-Appellant.
No. 3-02-0456.

May 26, 2004.

Justice O'BRIEN delivered the Opinion of the court:

Following a bench trial, the appellant Donna L. Williams was convicted of prostitution pursuant to section 11-14 of the Illinois Criminal Code of 1961 (Criminal Code) ([720 ILCS 5/11-14](#) (West 2002)). She was sentenced to four years' imprisonment. Williams appeals her conviction.

We affirm the trial court.

FACTS

On November 16, 2001, Williams was charged with the offense of *274 prostitution. Because of a previous conviction for prostitution, the offense was elevated to a Class 4 felony. Williams waived her right to a jury trial and a bench trial was held. At trial, the following evidence was presented. While working a "prostitution detail" a Peoria police officer encountered Williams walking the street. The officer offered Williams a ride which she accepted. Once inside the officer's vehicle, Williams agreed to perform an act of oral copulation upon the officer in exchange for \$30. Williams was arrested and charged with prostitution under section 11-14 of the Criminal Code. [720 ILCS 5/11-14](#) (West 2002). She was convicted and sentenced to a term of four years' imprisonment. Williams appeals her conviction.

ANALYSIS

On appeal Williams does not dispute that she performed an act of prostitution **1198 ***319 as defined in the Criminal Code. Williams argues that the conduct the statute prohibits is conduct constitutionally protected under the fourteenth amendment of the United States Constitution. [U.S. Const., amend XIV](#). Williams contends that the activity proscribed in the statute is private consensual sexual activity between adults and is therefore protected from unwarranted governmental interference.

[1] As a threshold issue, the State argues that Williams has waived her argument on appeal because she failed to raise the issue at trial or in a posttrial motion. Waiver is a limitation on the parties, not the court. [Wausau Insurance Co. v. All Chicagoland Moving & Storage Co.](#), 333 Ill.App.3d 1116, 1126, 268 Ill.Dec. 139, 777 N.E.2d 1062, 1071 (2002). We therefore consider Williams' argument on appeal.

Section 11-14(a) of the Criminal Code defines prostitution as follows:

"Any person who performs, offers or agrees to perform any act of sexual penetration as defined in Section 12-12 of this Code for any money, property, token, object, or article or anything of value, or any touching or fondling of the sex organs of one person by another person, for any money, property, token, object, or article or anything of value, for the purpose of sexual arousal or gratification commits an act of prostitution." [720 ILCS 5/11-14\(a\)](#) (West 2002).

[2][3] Where, as in the present case, legislation does not affect a fundamental right or suspect classification, the court will review the statute under the rational basis test. [Tully v. Edgar](#), 171 Ill.2d 297, 304, 215 Ill.Dec. 646, 664 N.E.2d 43, 47 (1996). To withstand a due process challenge under rational review, the statute in question needs to bear only a rational relation to a legitimate legislative purpose and be neither arbitrary nor discriminatory. [Tully](#), 171 Ill.2d at 304, 215 Ill.Dec. 646, 664 N.E.2d at 47.

The Illinois courts have previously applied the rational basis *275 test to the criminal prostitution statute and upheld it as a valid attempt by the State to promote the legitimate purpose of protecting the safety, health, and welfare of the people. In [People v. Johnson](#), 60 Ill.App.3d 183, 17 Ill.Dec. 382, 376 N.E.2d 381 (1978), the defendant was convicted of prostitution because of conduct similar to that of Williams. Johnson raised several constitutional challenges to the statute, including the assertion that the statute violated her due process right to privacy in sexual matters. [Johnson](#), 60 Ill.App.3d at 186, 17 Ill.Dec. 382, 376 N.E.2d at 384. The *Johnson* court found that the state legislature acted properly within the scope of its authority. [Johnson](#), 60 Ill.App.3d at 190, 17 Ill.Dec. 382, 376 N.E.2d at 386. The court in *Johnson* reasoned that the State's legitimate interests in enacting the statute included "preventing [venereal disease](#), cutting down prostitution-related crimes of violence and theft, and protecting the integrity and stability of family life." [Johnson](#), 60 Ill.App.3d at 190, 17 Ill.Dec. 382, 376 N.E.2d at 386. The *Johnson*

court concluded that the statute rationally related to a valid state interest. [Johnson](#), 60 Ill.App.3d at 190, 17 Ill.Dec. 382, 376 N.E.2d at 386. See also [People v. Thompson](#), 85 Ill.App.3d 964, 968, 41 Ill.Dec. 263, 407 N.E.2d 761, 764 (1980) (it is legitimate for the legislature to prohibit offers and agreements to perform sexual acts).

347 Ill.App.3d 1123, 349 Ill.App.3d 273, 811 N.E.2d 1197, 285 Ill.Dec. 318

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[4] The rationale and conclusion of the *Johnson* court apply to the present case. Williams agreed to perform a sexual act in exchange for money. She does not dispute that her actions violated the prostitution statute. As discussed above, the State of Illinois has a legitimate governmental interest in proscribing the activity defined in the statute. Because the statute is a valid attempt by the State to protect the public ****1199 ***320** welfare, it does not violate Williams' constitutional rights.

Williams relies heavily on the recent United States Supreme Court decision in [Lawrence v. Texas](#), 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). In *Lawrence*, the United States Supreme Court struck as unconstitutional a Texas statute that made it a crime for two persons of the same sex to engage in a consensual act of sodomy in the privacy of their home. [Lawrence](#), 539 U.S. at 578-79, 123 S.Ct. at 2484, 156 L.Ed.2d at 526. Included in the conduct the *Lawrence* Court specifically excluded from its opinion were acts of prostitution. 539 U.S. at 578, 123 S.Ct. at 2484, 156 L.Ed.2d at 525.

Williams' reliance on the *Lawrence* decision is misplaced. Williams characterizes her conduct as private sexual activity between two consenting adults. As the State argues, however, Williams' activity is more aptly described as the commercial sale of sex. The *Lawrence* Court specifically excluded prostitution from its analysis. [Lawrence](#), 539 U.S. at ----, 123 S.Ct. at 2484, 156 L.Ed.2d at 525 "([the present case] does not involve public conduct or prostitution.)" Moreover, the ***276** drafters of the Illinois statute were careful to craft the language of the statute to distinguish between "the prime concern" of the legislation, the business of selling sex, and private, noncommercial acts. 720 ILCS Ann. 5/11-14, Committee Comments--1961, at 448 (Smith-Hurd 2002).

For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed.

Affirmed.

[McDADE](#), J. with [SCHMIDT](#), J. concurring.

Supreme Court of Illinois.
JOHNSON
v.
JOHNSON.
No. 26724.

Nov. 17, 1942.
Rehearing Denied Jan. 13, 1943.

WILSON, Justice.

Plaintiff, E. R. Johnson, October 21, 1940, filed his complaint in the circuit court of Winnebago county, praying for a divorce from defendant, Virginia Johnson, on the ground of desertion. Summons was served upon defendant, together with a certified copy of the complaint, in Hampton, Virginia, where defendant resided. She filed her special appearance and motion to dismiss on the ground of lack of jurisdiction. Upon denial of her motion and pursuant to order of court she filed her answer. She denied plaintiff was a resident of Illinois and that the court had jurisdiction of the cause, admitted the marriage and *364 that there were two children of the marriage, and denied desertion. Plaintiff's motion to strike the answer was overruled. A decree was entered April 4, 1941. The court found it had jurisdiction of the parties and subject matter; that plaintiff was an actual resident of the county of Winnebago and State of Illinois; that the parties were married June 21, 1918; that defendant wilfully deserted plaintiff in the month of September, 1931, and that such wilful desertion continued until the time of the hearing. Conformably to leave granted, defendant appeals from the judgment of the Appellate Court affirming the decree. [313 Ill.App. 193, 39 N.E.2d 389.](#)

Plaintiff, a commander in the United States Navy, testified he was born in Rockford, graduated from high school there in 1913 and, in 1914, received his appointment to the Naval Academy, and that he has been in the naval service ever since. He testified his duties required him to be stationed wherever ordered by the naval authorities. He explained that during peacetime routine officers can generally expect alternately a three-year tour of sea duty, followed by a tour of shore duty lasting two years. His testimony discloses that the only times he and his wife lived together during their married life were the following: From September, 1919, until February 1, 1920, in an apartment in Philadelphia while he was stationed at the navy yard; from September, 1923, until June, 1924, in Annapolis, while he attended post-graduate school; in 1925, when they spent his month's leave at

his parents' home in Rockford, and from May, 1929, until May, 1930, in Norfolk during his assignment to the navy yard. He also testified that from 1925 until 1928, while he was at sea on the U. S. S. Richmond, it was agreed she was to remain in Hampton. From February, 1920, until June, 1920, and from September, 1921, until February, 1922, while he was stationed at Constantinople and Vladivostok, respectively, naval officers had been advised to leave their families home, *365 because of conditions there and possible danger to life and health. Two instances were related by him wherein he claimed his wife failed to join him, one in June, 1921, when he wrote her from Constantinople to meet him in Manila. However, he was transferred to Vladivostok, from which point he wrote rescinding his previous request because his ship was scheduled to sail to the United States via Manila. Upon arrival at Manila his itinerary was altered, and he was ordered to the Orient. Thereupon, he again revised his instructions, and requested her to meet him at Manila. He also advised her that the U. S. S. Henderson, a navy transport, would leave Hampton Roads, some time in May, 1922. She wrote stating she could not leave. She also failed to meet him in San Francisco August 1, 1923, pursuant to his previous request mailed from China, in May, 1923.

Plaintiff further testified that upon detachment from the U. S. S. Richmond, in October, 1928, he was ordered to shore duty in the Norfolk navy yard, located about thirty-five or forty miles from Hampton. Defendant remained in Hampton, where he visited her weekly for six months, each time remonstrating with her for not moving to Norfolk. Finally, in May, 1929, upon her refusal to accompany him, he declared, 'I won't be coming over here any more,' and returned to Norfolk. The following Saturday he left their automobile and keys at her home and returned to Norfolk without seeing her. She telephoned the next day stating she had changed her mind. She went to Norfolk and they selected an apartment, purchased furniture, and lived together, as previously stated, from May, 1929, until May, 1930.

In May, 1930, pursuant to previous discussions with his wife, he sought and received an assignment to the U. S. S. Lexington, with the Pacific Fleet, based at Long Beach, California. Inasmuch as they were then expecting *366 the arrival of their second child, his wife deemed it inadvisable to accompany **627 him, but promised to join him later in California. Finally, he testified, he acceded to her request to remain in Hampton until the child was one year old. They left their apartment in Norfolk about the middle of May,

1930. His wife returned to Hampton. The household goods were, at his direction, conveyed there by a navy moving van. From May to June he often visited his wife, and wrote her upon his arrival in California and at frequent intervals thereafter. He remained there three years. The first child, Joseph, was born in July, 1924; the second child, Patricia, in July, 1930, shortly after his departure for California. He further testified that when the second child was a year old he communicated with his wife about coming to California; that she answered stating her willingness to join him, whereupon he wrote asking the exact date, so that he could request transportation for her and their household effects; that in September, 1931, three months later, he received a reply stating that she did not want to go to California; that he again wrote her, reminding her of her previous promise, stating he could compel her to join him but would not do so, and asking her to advise him when she changed her mind, declaring that if she came it must be only under the condition she was ready and willing to leave her parents permanently and to establish their home wherever he was stationed; that in about a month he received her reply, stating that a doctor had told her the second year of a child's life was delicate, dangerous and important, and that she deemed it inadvisable to leave her home and her parents, because of their age, also because of her fear of traveling alone, of the child becoming ill, and of living alone in California when he was at sea.

Plaintiff further testified that the first year of their marriage he made an allotment to her to \$150 per month. The *367 testimony also shows this allotment was increased in 1930 to \$200 a month. He stated he did not further correspond with his wife except that he notified her in June, 1933, of his shore-duty appointment in San Francisco and gave her his official address. In January, 1934, she wrote evincing a desire to visit him for several weeks with her two sisters and the children. His reply thereto stated he would be delighted to have her come to San Francisco to live with him permanently in their own home but under no other conditions. He said he received no answer.

On cross-examination, plaintiff testified that on his transfer to duty in Washington, D. C., in 1938, he gave his wife his official address; that at this time his boy was fourteen years old; that he had not seen him for eight years and had never seen his daughter, and that from the time he returned to Washington he never went to Hampton, about 200 miles away, to see his son, daughter or wife. He also testified as to an occurrence in Washington in July of 1939. Upon

answering a telephone call he heard a child's voice say: 'Daddy.' Plaintiff testified, 'I hung up the receiver. I suspected the call was from my daughter. I did not learn that it was from anybody. I had never seen that daughter * * * at the time of that call.' Shortly thereafter, the telephone operator called again, informing him of a long distance call from Hampton, and he told the operator, 'I don't want to receive any calls from Hampton.' He testified that later the same month his wife and two children came to the University Club in Washington. He denied that on this occasion defendant had stated to him, 'I am here to ask you again to make a home for us.' Plaintiff further testified that after mailing the letter, identified as defendant's exhibit 6, dated October 10, 1939, he had retained two lawyers, Morrison and Howder, in Washington to represent him. He admitted he was present in Washington at a meeting attended by his wife, *368 Morrison, Howder and one Kearney, and that 'at that conference Mrs. Johnson was asked by my counsel to start action for divorce against me, that was after this letter * * * was written, that was after all the claimed acts of desertion which have been testified to here today and after the claimed refusals to come and live with me.' He also testified that in his letter of October 10 to defendant, in which he asked her to procure a divorce, he did not claim that she had deserted him or had refused to live with him; that he did not so claim, nor did anyone so claim for him at the meeting in Washington when he was represented by the two lawyers; that the first time he had ever officially claimed, since June, 1918, that his wife had deserted or refused to live with him was when this action was commenced. Plaintiff further testified that during the period from 1930 until the time of the hearing he had sent his wife a present every Christmas, usually a check representing his pay for the month of December; that during this ten-year period he had written her about a dozen letters, **628 more or less, and that he had exchanged Christmas and birthday gifts with his wife and children. He further testified that he never offered to send a navy truck for the purpose of transporting their household goods to any other place; that while assigned to the Lexington he was on actual shipboard away from Long Beach, California, probably twenty-five per cent of the time, the balance of the time being spent in and out of Long Beach daily; that his only room or home was on the ship, and that when transferred to San Francisco he lived in an apartment house for a year and ten and a half months, after which he went on sea duty aboard the U. S. S. Dent.

At the close of plaintiff's evidence, defendant made a motion to find for her and to dismiss the complaint

for the reason that the proof did not establish wilful desertion. This motion was argued before the court, and was denied. *369 After denial, defendant was called as a witness in her own behalf, whereupon plaintiff's attorney, stated, 'Now, your Honor, the rule is in this State that after they make a motion in a chancery suit to find for the defendant they cannot put on evidence. I do not know whether that applies to a divorce suit or not, but it does to other chancery suits.' The court indicated agreement, and refused to allow defendant to testify. Defendant's attorney then stated, 'So there will not be any embarrassment to counsel and court, I will withdraw the motion we have heretofore made.' He also called to the attention of the court that the motion was made orally. The court denied his motion, stating, 'After you make the motion and he makes the cross-motion, you rest your case. You have rested your case; you are all through.' Defendant was there upon tendered as a witness in her own behalf, her counsel stating she had filed an answer. The court again refused to allow her to testify. The court further refused to allow introduction in evidence of defendant's exhibit No. 6 previously identified by her when she was called as a witness under section 60 of the Civil Practice Act Ill.Rev.Stat.1941, c. 110, § 184.

Plaintiff contends that the motion made by defendant at the close of his evidence to dismiss his complaint because of the claimed insufficiency of the evidence to prove desertion constituted a submission of the cause to the chancellor, and that the defendant was thereby properly precluded from introducing evidence in her own behalf. It is conceded that this is the rule which obtains in general equity cases. [Fewkes v. Borah, 376 Ill. 596, 35 N.E.2d 69; Magnolia Petroleum Co. v. West, 374 Ill. 516, 30 N.E.2d 24, 136 A.L.R. 372; Abel v. Flesher, 296 Ill. 604, 130 N.E. 353; Thorworth v. Scheets, 269 Ill. 573, 110 N.E. 42; Koebel v. Doyle, 256 Ill. 610, 100 N.E. 154, 156.](#) The reason for the rule, as stated in *Koebel v. Doyle*, supra, is: 'To permit such a motion would result in hearing a case by piecemeal, the sustaining of a motion resulting in an appeal, and on a reversal another *370 hearing on more evidence, followed, perhaps, by another appeal.' Defendant maintains, however, that, having filed her answer denying desertion, and not being in default, the court erred in not allowing her to present her defense, and, further, because the State, representing society, is a party to all divorce cases, the rule which governs in other chancery matters is inapplicable. The controlling question for decision on this appeal, therefore, is whether the court was in error in refusing to allow defendant to withdraw her motion to dismiss and in not allowing her to introduce

evidence in her own behalf.

[\[1\]\[2\]\[3\]\[4\]\[5\]](#) At this juncture it is pertinent to observe that courts of equity have no inherent powers in cases of divorce. The jurisdiction of courts of equity to hear and determine divorce cases, and all matters relating thereto, is conferred only by statute. While such courts may exercise their powers within the limits of the jurisdiction conferred by the statute, the jurisdiction depends upon the grant of the statute and not upon general equity powers. [Smith v. Smith, 334 Ill. 370, 166 N.E. 85; Smith v. Johnson, 321 Ill. 134, 151 N.E. 550.](#) Marriage is a civil contract, to which there are three parties: The husband, the wife, and the State; and while a suit for divorce upon its face is a mere controversy between the parties to the record, yet the public occupies the position of a third party; and it is the duty of the State, in the conservation of the public morals, to guard the relation. [Leland v. Leland, 319 Ill. 426, 150 N.E. 270; Way v. Way, 64 Ill. 406.](#) Moreover, there are two minor children in the case at bar who have a decided interest in the result of this litigation. In the *Leland* case, supra, the applicable rules pertaining to divorce proceedings are aptly stated: 'Some of the states of this country have passed statutes giving to representatives of the state the power to intervene, or *629 appoint officers to represent the state on the hearing of divorce actions, among which are Georgia, Indiana, Michigan, Oregon, and *371 Tennessee. In the absence of such statutory enactment, it is a doctrine of general acceptance that the court represents the interest of the state in divorce suits. [Citations.] In 2 Bishop on Marriage, Divorce and Separation (663, 664), it is said: 'The public, which, we have seen to be a party in all divorce suits, occupies a unique position, sometimes embarrassing to the court. It does not ordinarily appear by counsel, and when without counsel does not plead. As against this party, when only thus represented by what is called the conscience of the court, the plaintiff is entitled to the decree on his case being duly and fully proved. But this party, unlike the others, never loses a right by laches; and so, whenever a defense comes out in the evidence, whether alleged or not, it is fatal to the proceeding. A maxim in these suits, therefore, is, that a cause is never concluded as against the judge; and the court may, and to satisfy its conscience sometimes does, of its own motion, go into the investigation of facts not contested by pleadings. * * * The limit to the right of the public to be protected while thus disregarding the just and common practice of the court cannot be precisely defined by rule. The judge, keeping in view the precedents, with his 'conscience' always awake, should see that while the record parties are not

deprived of the justice of the law, the public good, which suffers from every dishonest divorce and from every one not as well within the spirit of the statute as its terms, is not sacrificed. A rule more exact than this does not appear to be in the nature of the case possible." [319 Ill. 426, 150 N.E. 272.] To like effect is Winning v. Winning, 366 Ill. 57, 7 N.E.2d 750, a divorce proceeding where a default was set aside, decree vacated, and additional notice ordered to be given defendant of the time and place of hearing before granting a default decree. In the instant case, plaintiff claims to have been deserted by defendant in September, 1931, more than nine years prior to the filing of his complaint. Defendant filed *372 her answer, denying the jurisdiction of the court and also that she had deserted plaintiff. Defendant was called as an adverse witness under section 60 of the Civil Practice Act and identified eight exhibits representing letters and a telegram received from plaintiff. In one of the letters (defendant's exhibit 6) plaintiff admits he asked her to procure a divorce. Plaintiff also admitted that in a conference in Washington, in 1939, in his presence, his counsel requested defendant to file an action for divorce against him. In 1930, plaintiff increased his allotment to her and she received \$200 monthly thereafter. During all the time from 1930 until the date of the hearing the parties hereto exchanged gifts at Christmas and on birthdays, and by his own admission, plaintiff never at any time prior to filing his complaint officially claimed defendant had deserted him. Under these circumstances, we believe simple justice required a full and complete hearing on both sides of the controversy, and, under the discretionary power existing in the court, acting in a divorce proceeding and as a representative of the State, the court should have allowed defendant to withdraw her oral motion to dismiss plaintiff's complaint and should have permitted her to introduce such evidence as was pertinent to the issues formed by the pleadings. As stated in 30 Corpus Juris Secundum, Equity, § 492, p. 888, 'A court of equity has full power to set aside a submission of the cause for the purpose of permitting the taking of additional testimony. The matter rests in the discretion of the court. After the cause has been fully argued and submitted to the court for its decision, it is improper for the court to receive additional evidence from either party without the knowledge of the other, unless the submission is set aside, but if, after submission of the case, matters are brought to the court's attention which raise doubts as to fundamental claims in the case, the court may order the taking of further testimony, with equal opportunity to both sides to enlighten the court.'

[6] *373 Indicative of the legislative trend is the

amendment (approved July 21, 1941, and in force January 1, 1942,) to section 64 of the Civil Practice Act (Ill.Rev.Stat. 1941, chap. 110, par. 188). This amendment abolishes the former rule in equity that a defendant by moving for a finding in his favor at the close of plaintiff's evidence thereupon submits the entire case to the chancellor for decision on the evidence adduced and waives his right to offer evidence in support of the defense in the event the motion is denied. While it is true that at the time this cause was heard the foregoing amendment to the Civil Practice Act was not in effect, nevertheless, it bears out defendant's contention that a trial judge, in **630 hearing a cause such as this, should not be restricted by technical conventions. Under the rule, as now amended, if the decision is adverse to a defendant he may elect to proceed to adduce evidence in support of his defense, and the motion to dismiss or for a finding is deemed to have been waived and withdrawn, making the practice in equity cases substantially the same as has heretofore obtained in actions at law.

For the reasons assigned, the chancellor, acting with a broad discretion, should have permitted defendant to present her evidence in this cause, and the failure so to do requires a new trial. It will not be necessary to consider other grounds for reversal argued by defendant.

The judgment of the Appellate Court and the decree of the circuit court of Winnebago county are each reversed and the cause is remanded to the circuit court for a new trial in conformity with the views expressed in this opinion.

Reversed and remanded.

381 Ill. 362, 45 N.E.2d 625

Appellate Court of Illinois,
Third District.
The PEOPLE of the State of Illinois, Plaintiff-
Appellee,
v.
Nicholas J. DOWNIN, Defendant-Appellant.

Justice O'BRIEN delivered the opinion of the court:

Following a bench trial, defendant Nicholas Downin was found guilty of three counts of aggravated criminal sexual abuse. [720 ILCS 5/12-16\(d\)](#) (West 2002). The court sentenced Downin to a 60 day term of incarceration, a \$1,000 fine, and a 30 month term of probation. Downin appeals his conviction and sentence. We affirm the trial court.

FACTS

Defendant Nicholas Downin was charged under the Illinois Criminal Code of 1961 (the Code) with nine counts of aggravated criminal sexual abuse. [720 ILCS 5/12-16\(d\)](#) (West 2002). The counts alleged that when Downin was at least 5 years older than the alleged victim, Jennifer, who was at the time at least 13 years of age, but under 17 years of age, Downin had sexual intercourse with Jennifer on several different occasions. A bench trial ****344 ***374** was held and the following testimony presented.

Jennifer testified she first met Downin in an Internet chat room when she was 15 years old. She communicated with him through the address *nickd@galesburg.net*. In February of 2000, Jennifer met Downin in person when he came to her house. Jennifer stated that initially she and Downin treated each other as brother and sister, however, their feelings toward each other began to change the week of January 17, 2001. Jennifer testified she and Downin first had sexual intercourse in her bedroom on January 24, 2001, sometime after midnight. Jennifer stated with specificity several other dates on which she and Downin had sexual intercourse, including January 25, 2001, in her home. Jennifer further testified to intercourse with Downin on January 26, 27, 28, 29, and February 4, 8, and 10, 2001. The intercourse of January 26 took place in Downin's home in the afternoon after Downin picked Jennifer up from school using his mother's car. Jennifer testified that the other incidents that occurred in her home took place generally around midnight, sometimes in front ***195** of the fireplace. Jennifer stated that during the time she had a sexual relationship with Downin her dad usually slept in the living room. Jennifer stated the room was fairly large and her father's bed was located on the far wall about

15 feet from the fireplace. Jennifer testified that her father would generally go to sleep around 9 or 10 o'clock. Jennifer stated her father had a sleeping disorder and "[h]e was out as soon as he fell asleep." Jennifer testified her mother would sometimes stay awake until 2 or 3 o'clock in the morning. Her mother slept in a bedroom separated from Jennifer's bedroom by a connecting bathroom. Jennifer habitually kept the door to her bedroom closed.

Jennifer stated she was aware of the dates she and Downin had sexual intercourse because she noted the incidents as they occurred in a calendar she later provided to Knox County sheriff's deputy David Caslin. The calendar was introduced as evidence. Jennifer testified that an entry in her calendar on the date of February 7, 2001, indicated her cat had died. Jennifer stated this event was significant in her life and she recalled Downin was present in her home on that date and comforted her in front of her mother. Jennifer stated that in mid-February, her mother discovered the sexual nature of her relationship with Downin and forbade Jennifer from seeing him again. Jennifer continued to have contact with Downin via e-mail and telephone. The e-mail address she used to reach Downin was the same one through which she had always contacted him.

Jennifer testified that after her mother contacted them, Jennifer provided the police two pairs of underwear she had worn on days she had intercourse with Downin. Jennifer testified she was still in possession of her soiled underwear because her room was messy and she gathered laundry on an as-needed basis. Forensic experts testified that the DNA profile of a sperm sample on one of the pairs of underwear matched the DNA profile of Downin. DNA on the same pair of underwear also matched Jennifer's profile. Jennifer later met with Deputy Caslin and at his instigation sent an e-mail to Downin. Jennifer testified she received no notification that the e-mail had been improperly transmitted. A copy of her communication was introduced as evidence. Also introduced was a copy of a transmission Jennifer testified was the response to her e-mail that she received from Downin's e-mail address. Jennifer testified this communication was responsive to her e-mail and contained information that would be known ****345 ***375** exclusively to Downin. At trial, Jennifer read from the copies of the e-mail transmissions. In the e-mail that Caslin prompted, Jennifer indicated she was under a lot of stress and was considering telling her mother about the sexual relationship. She requested that the ***196** recipient let her know his thoughts. The response e-mail

contained admissions of a sexual relationship.

Jennifer testified that from January of 2000 to the date of trial she suffered from depression for which she had seen a psychologist and had been prescribed medication. She could not recall if she had been consistently taking her medication during January and February of 2001. Jennifer testified that Downin's family kept their front door unlocked. She denied removing a used condom from Downin's house or telling Summer Knuth that she had done so. Jennifer also denied speaking to Ashley Giles about a movie titled, "Crush." Jennifer admitted using Downin's user name and password to access the Internet during a time when her parents had denied her access.

Dave Caslin of the Knox County sheriff's department testified that he met with Jennifer on April 12, 2001, to investigate allegations of criminal sexual abuse against Nicholas Downin. During his investigation, Caslin determined that in January and February of 2001, Downin was 22 years and 3 months of age and Jennifer was 16 years and 3 months of age. The difference in their ages was six years and one month. After meeting with Jennifer, Caslin requested she attempt to communicate with Downin via e-mail, a method of communication Caslin testified he understood the two had used in the past. Caslin provided Jennifer with access to the Internet through a computer located in the public safety building where they met. Caslin identified a printout of an e-mail communication he testified he observed Jennifer send to the address, *nickd@galesburg.net*, an address Jennifer provided. Caslin identified a printout of an e-mail response forwarded to him via e-mail from Jennifer. Caslin also identified a calendar he received from Jennifer. Caslin testified he did not confiscate either Jennifer's or Nicholas' computer.

Jennifer's mother, Joanne, testified. Joanne stated that Jennifer's birth date was November 24, 1984. Joanne testified that she met Downin in the fall of 2000 when Jennifer was 15 years old and Downin was about to turn 22 years old. Joanne testified that she told Downin at the time that because of their age differences, Downin and Jennifer could only be friends. Thereafter, Downin spent a considerable amount of time at Joanne's home. Joanne characterized his relationship with Jennifer as initially like brother and sister. Around the end of February of 2001, Joanne became concerned about the nature of Downin and Jennifer's relationship. Her concern was based on her observation of Downin's change in behavior toward Jennifer. Joanne testified

that she observed Downin comfort Jennifer when her cat died by caressing her face. She also saw Downin touch Jennifer's "private parts." She *197 did not observe any actual sexual contact between the two. In early March of 2001, Joanne forbade Downin from seeing Jennifer again until she turned 18 years of age. Joanne testified that she had similar concerns for Jennifer on two other occasions: once when her son's friend sent "inappropriate" e-mails to Jennifer; and another time when she reported to the police that a young man had tried to "force himself" on Jennifer. Joanne also testified that when Jennifer had a boyfriend who was one year older than she was, Joanne felt there was nothing inappropriate about the two kissing and hugging one another.

346 *376 Summer Knuth, 18 years old at the time of trial, testified that she met Downin through Jennifer whom she described as her best friend. Knuth testified that in Jennifer's home there was a bed in the living room on which Jennifer's dad would usually sleep. The bed was located about 5 to 10 feet from the fireplace with no obstructing walls in between. Knuth stated Jennifer told her that she had sex with Downin in her parents' home by the fireplace and in her bedroom. Knuth testified that she had observed Jennifer on the home's computer accessing both her own e-mail and e-mail accounts belonging to others, including Downin. Knuth testified that Jennifer was able to access Downin's e-mail account because she possessed his password. Knuth testified that on June 11, 2001, she had a conversation with Jennifer in Jennifer's home. Knuth stated that Jennifer told her she was upset because Downin was pleading not guilty. Jennifer mentioned a movie titled, "Crush." According to Knuth, Jennifer explained that the movie was about a girl who plotted revenge against a man because she was jealous of another girl. The character in the movie retrieved a condom the man had used and inserted it in her vagina. Jennifer also told Knuth she had turned over to the police a calendar on which she had falsely stipulated days she and Downin had engaged in sex.

Eighteen-year old Ashley Giles testified she and Jennifer had worked together. In November of 2001, Giles had a conversation with Jennifer during which Jennifer advised Giles that if she was having problems with a man she could create trouble for him by falsifying e-mails. According to Giles, Jennifer also summarized the movie "Crush" for Giles and told her that like the girl in "Crush," Jennifer had taken a used condom from Downin's home. Giles later met and befriended Downin via the Internet.

Mary Downin, the mother of the defendant, testified. Mary stated that on January 26, 2001, Downin did not have access to an automobile. Mary testified that in March or April of 2001, Downin was seeing a girl named Raivan. Mary stated that when she cleaned house during the year 2001, she found condom wrappers and condoms in the trash *198 in Downin's room. She acknowledged Downin was likely sexually active during the time. Mary stated she was aware Downin knew Jennifer. He never stated to Mary that he and Jennifer were sexually active.

Arthur Spires testified. Spires first met Downin when Spires employed Downin in April of 1998 at Trilutions Computer and Internet Center. Spires recalled that on January 23, 2001, Downin failed to show for a dinner at Spires' home. Spires stated he found out the next day that Downin was suffering from a sinus infection. On January 25, 2001, Spires visited Downin at his home. Spires described Downin as in "rough shape." According to Spires, Downin spent the evening with him on February 4, 8, and 10, 2001. Spires testified that he met Jennifer when Downin brought her to a company Christmas party. Downin told Spires he and Jennifer were friends. Spires testified Downin vehemently denied having had any sexual relationship with Jennifer.

John Bo Ring of Trilutions Computer and Internet Center testified he had a bachelor's degree in computer science and had been receiving continuing specialized training in computer networking. Ring testified that he was in charge of the Internet department at Trilutions, which handled 2,500 Internet clients on a daily basis, with an emphasis on e-mail accounts. Ring was tendered as an expert in the field of electronic mail and computers. Ring explained the mechanics of e-mail. **347 ***377 According to Ring, a printed copy of e-mail does not necessarily reflect the origination of the e-mail because printed copies of e-mail can be created from sources other than the e-mail program. Ring testified that by using other computer programs it is possible to duplicate the look of e-mail communications. Ring stated that the exhibit introduced as an e-mail response to Jennifer's e-mail appeared to have been sent from *nickd@galesburg.net* through the website "hotmail," run by Microsoft. Ring stated the only way to authenticate the origination of the mail was through an investigation of the Internet provider (IP) address, an address not included on the exhibit provided.

At the close of the evidence and closing arguments, the trial court found Downin guilty of the allegations

related to the dates January 27, 28, and 29, 2001. Downin filed a motion for a new trial on July 11, 2003. On July 24, 2003, the court sentenced Downin to a 60 day term of incarceration, a \$1,000 fine, and a 30 month term of probation. Downin appeals his conviction and sentence.

ANALYSIS

[1][2] Downin's first argument on appeal is that the statute under which *199 he was charged with criminal sexual abuse, section 12-16(d) of the Code ([720 ILCS 5/12-16\(d\)](#) (West 2002)), unconstitutionally violates the fourteenth amendment equal protection clause ([U.S. Const. amend. XIV](#)), because it criminalizes sexual intimacy between individuals who could obtain a marriage license under the Illinois Marriage and Dissolution of Marriage Act (the Act) ([750 ILCS 5/203](#) (West 2002)), and presumably engage in the same sexual conduct prohibited under section 12-16(d) of the Code. Under section 12-16(d) of the Code, an individual commits an act of aggravated criminal sexual abuse if the person "commits an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but under 17 years of age and the accused was at least 5 years older than the victim." [720 ILCS 5/12-16\(d\)](#) (West 2002). Under section 203(1) of the Act, a person 16 years of age but not yet 18 years of age may obtain a marriage license if the person "has either the consent to the marriage of both parents or his guardian or judicial approval." [750 ILCS 5/203\(1\)](#) (West 2002). In the present case, at the time of the offense, Downin was 22 years of age and Jennifer was 16 years of age. According to Downin, the aggravated criminal sexual abuse statute violates equal protection in that it restricts unmarried 16-year-olds and their paramours from engaging in sexual intercourse even with parental consent while 16-year-olds married with parental consent may presumably engage in sexual intercourse with their spouses. A constitutional question is reviewed under a *de novo* standard. [Miller v. Rosenberg](#), 196 Ill.2d 50, 57, 255 Ill.Dec. 464, 749 N.E.2d 946, 951 (2001).

[3] Downin urges this court to apply a strict scrutiny analysis to this issue, arguing that the conduct in question falls under the penumbra of a "fundamental right to privacy." In asserting his argument, Downin relies heavily on the case of [Lawrence v. Texas](#), 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). In *Lawrence*, the United States Supreme Court applied the rational basis test and concluded that the statute at issue, which made it a crime for two persons of the same sex to engage in a consensual act

of sodomy in the privacy of their home, was an unconstitutional violation of due process. [Lawrence, 539 U.S. at 579, 123 S.Ct. at 2484, 156 L.Ed.2d at 526](#). Downin urges this court to extrapolate from the *Lawrence* decision the "inescapable" conclusion that *Lawrence* stands for ****348 ***378** the proposition that homosexual conduct falls within the penumbra of the fundamental right to privacy or liberty and the further implication that the right of nonmarried individuals to engage in sexual conduct is likewise a fundamental right. Although a valiant attempt to stretch the boundaries of *Lawrence*, Downin's argument is unpersuasive. The ***200** Supreme Court in *Lawrence* stated that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. [Lawrence, 539 U.S. at 572, 123 S.Ct. at 2480, 156 L.Ed.2d at 521](#). However, as Downin admits, the Court in *Lawrence* did not conclude that sodomy or any other sexual activity is a fundamental right. The *Lawrence* decision involved a due process claim and was resolved through an application of the rational basis test. [Lawrence, 539 U.S. at 578, 123 S.Ct. at 2484, 156 L.Ed.2d at 525](#) (finding the Texas statute furthered no legitimate state interest which could justify its intrusion into the personal and private life of the individual). Finally, and importantly with respect to the case at hand, the Supreme Court in *Lawrence* carefully crafted the opinion to apply only to the private consensual activity of *adults*, stating, "[t]he present case does not involve minors." (Emphasis provided) [Lawrence, 539 U.S. at 578, 123 S.Ct. at 2484, 156 L.Ed.2d at 525](#). We thus determine the appropriate standard of review in the present case is the rational basis test. [People v. Reed, 148 Ill.2d 1, 7-8, 169 Ill.Dec. 282, 591 N.E.2d 455, 457 \(1992\)](#) (laws that do not impinge on fundamental constitutional rights are subject to rational basis review).

[\[4\]\[5\]\[6\]](#) We turn now to the issue of whether the Code and the Act place similarly situated persons into different classes for reasons wholly unrelated to the purposes of the legislation. [People v. Reed, 148 Ill.2d 1, 7, 169 Ill.Dec. 282, 591 N.E.2d 455, 457 \(1992\)](#). Equal protection requires that similarly situated individuals be treated under the law in a similar manner. [Reed, 148 Ill.2d at 7, 169 Ill.Dec. 282, 591 N.E.2d at 457](#). Downin asserts that under the Code, those persons who engage in sexual intercourse while unmarried who are of the same age as those persons who presumably engage in sexual intercourse after having married with parental consent under the Act are similarly situated, yet differently treated. Under the rational basis standard, a statute needs to bear only a rational relation to a

legitimate legislative purpose and be neither arbitrary nor discriminatory. [People v. Williams, 349 Ill.App.3d 273, 274, 285 Ill.Dec. 318, 811 N.E.2d 1197, 1198 \(2004\)](#). If any state of facts may be reasonably conceived to justify the legislation, it must be upheld. [Reed, 148 Ill.2d at 8, 169 Ill.Dec. 282, 591 N.E.2d at 458](#). Whether a statutory classification is justified requires an examination of its purpose. [Reed, 148 Ill.2d at 9, 169 Ill.Dec. 282, 591 N.E.2d at 458](#). As stated in *Reed*, the purpose of section 12-16(d) of the Code is to protect children from sexual exploitation by adults five or more years older than themselves. [Reed, 148 Ill.2d at 10, 169 Ill.Dec. 282, 591 N.E.2d at 459](#). The aggravated criminal sexual abuse statute bears a rational relationship to this objective. [Reed, 148 Ill.2d at 10, 169 Ill.Dec. 282, 591 N.E.2d at 459](#).

201** Section 12-16(d) of the Code recognizes that age disparity increases the likelihood that a minor will succumb to the sexual overtures of an adult. [Reed, 148 Ill.2d at 10, 169 Ill.Dec. 282, 591 N.E.2d at 459](#). Section 203(1) of the Act recognizes that when a 16-year-old has parental approval to marry, the likelihood that the minor is being exploited by an adult is greatly diminished. The involvement of the parents or someone acting *in loco parentis* assumes that the ability of the 16-year-old *349 ***379** to confront the consequences of premature sexual experience has been addressed by an older party with the young person's interest in mind. This protection, combined with a State-sanctioned marriage, which mandates that the parties bear some responsibility for one another, mitigates the opportunity for overreaching on the part of an adult 21-years or older seeking a relationship with a 16- year-old. It follows that the legislature could conclude that section 203(1) of the Act is a reasonable means to address the objective of section 12-16(d) of the Code, the prevention of sexually exploitive encounters between minors and adults with significant age differences, by requiring the involvement of an adult interested in the minor's welfare and a State-sanctioned marriage. For these reasons, persons who marry under the Act are not similarly situated to persons of the same age who in violation of the Code engage in sexual intercourse while unmarried. The classifications of the statutes are not wholly unrelated in purpose or arbitrary and therefore do not violate equal protection.

[\[7\]\[8\]\[9\]\[10\]](#) Downin's next argument on appeal is that he was not proven guilty beyond a reasonable doubt. Downin argues that because the trial court concluded he was not guilty of the counts of aggravated criminal sexual abuse for which he

presented alibi evidence, the court should have had a reasonable doubt as to all of the dates Jennifer alleged they engaged in sexual intercourse. Downin also asserts that Jennifer's testimony was so incredible as to be contrary to human nature or experience. Specifically, Downin asserts as incredible Jennifer's testimony that some of her sexual encounters with Downin took place in front of the fireplace within feet of where her father lay sleeping. Also according to Downin, in light of testimony that Jennifer related the plot of the movie "Crush" to two of the witnesses and indicated to one that she had taken a used condom from Downin's trash, Jennifer's assertion that semen from Downin was on her underwear because they had sexual intercourse was an obvious fabrication. Downin further questions the validity of the e-mail introduced as evidence, an argument that will be addressed below. Whether a defendant was found guilty beyond a reasonable doubt is a question reviewed in a light most favorable to the prosecution using the *202 standard of whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. [People v. Collins, 106 Ill.2d 237, 261, 87 Ill.Dec. 910, 478 N.E.2d 267, 277 \(1985\)](#). Findings based on the credibility of the witnesses and the weight given their testimony are determinations exclusively within the province of the finder of fact. See [Collins, 106 Ill.2d at 261-62, 87 Ill.Dec. 910, 478 N.E.2d at 277](#). When evidence is merely conflicting, a reviewing court will not substitute its judgment for the judgment of the trier of fact. [People v. Miller, 222 Ill.App.3d 1081, 1086, 165 Ill.Dec. 372, 584 N.E.2d 551, 555 \(1991\)](#). In the present case, with the exception of the issue of the propriety of the introduction of the e-mail copies into evidence, the disputes that Downin notes are determinations of credibility and weight that are exclusively within the province of the finder of fact, in this case, the trial court. Jennifer testified she had sexual intercourse with Downin after their feelings changed for each other. Jennifer's mother indicated she was sensitive to the possibility that Downin might view his relationship with Jennifer as sexual. She testified that she noted a change in the nature of the relationship around the time that Jennifer's cat died. Jennifer also used this event as a point of reference. Although the testimony of Jennifer's friend, Knuth, conflicted with Jennifer's in **350 ***380 many respects, Knuth testified that Jennifer told her she had sexual intercourse with Downin in her home by the fireplace and in her bedroom. Jennifer testified that her father's bed was located on the far wall away from the fireplace of a fairly large room. She stated that when he fell asleep he was "out." Jennifer testified a bathroom separated her mother's bedroom from hers.

When Jennifer was in her bedroom she kept the door closed. The DNA evidence supported Jennifer's testimony as did the printed e-mail communications. For these reasons, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

[\[11\]\[12\]\[13\]\[14\]\[15\]](#) Downin's final argument on appeal is that the trial court erred in admitting into evidence two printed versions of e-mail purportedly sent by Downin to Jennifer. The e-mail contained admissions of guilt. Downin asserts that because the documents were not properly authenticated, the copies were inadmissible for lack of a proper foundation. Downin argues that in the absence of any evidence of an Internet provider address linking the e-mail to Downin, there is no way to tell that the e-mail copy was not falsified by Jennifer. A trial court's decision to admit a document is reviewed under an abuse of discretion standard. [People v. Ross, 329 Ill.App.3d 872, 884, 264 Ill.Dec. 116, 769 N.E.2d 953, 965 \(2002\)](#). A finding of authentication is merely a finding that there *203 is sufficient evidence to justify presentation of the offered evidence to the trier of fact and does not preclude the opponent from contesting the genuineness of the writing after the basic authentication requirements are satisfied. [People v. Munoz, 70 Ill.App.3d 76, 86, 26 Ill.Dec. 509, 388 N.E.2d 133, 140 \(1979\)](#), citing P. Broun, *Authentication and Contents of Writings*, 1969 Ariz. St. L.J. 611, 624-34. The prosecution need only prove a rational basis upon which the fact finder may conclude that the exhibit did in fact belong to the defendant. [Munoz, 70 Ill.App.3d at 88, 26 Ill.Dec. 509, 388 N.E.2d at 141](#). The ultimate issue of authorship is for the trier of fact to determine. [Munoz, 70 Ill.App.3d at 88, 26 Ill.Dec. 509, 388 N.E.2d at 142](#).

[\[16\]\[17\]](#) A document may be authenticated by direct or circumstantial evidence. [People v. Towns, 157 Ill.2d 90, 104, 191 Ill.Dec. 24, 623 N.E.2d 269, 275 \(1993\)](#). Circumstantial evidence of authenticity includes such factors as appearance, contents, and substance. [Towns, 157 Ill.2d at 104, 191 Ill.Dec. 24, 623 N.E.2d at 275](#). *Prima facie* authorship of a document may include a showing that the writing contains knowledge of a matter sufficiently obscure so as to be known to only a small group of individuals. See [Munoz, 70 Ill.App.3d at 87-88, 26 Ill.Dec. 509, 388 N.E.2d at 141](#). These factors that courts use in authenticating writings and other items similarly apply to e-mail messages. M. Robins, *Evidence at the Electronic Frontier: Introducing E-*

Mail At Trial in Commercial litigation, 29:2 Rutgers Computer & Tech. L. 219, 228 (2003). "[C]ourts are unlikely to deviate from the basic approach of the Federal Rules of Evidence towards authenticating e-mails * * * merely because of the different medium used to generate such evidence * * *. [I]t appears that courts have found the framework of these rules sufficient to address questions presented by e-mail." 29:2 Rutgers Computer & Tech. L.J. at 238.

In the present case, although Downin argues the characteristics of e-mails preclude the application of standards used to authenticate reply letters, the similarities between the two offer guidance in determining the authenticity of the e-mail copies. Jennifer testified she met Downin ****351 ***381** over the Internet. Before and after they met in person they communicated via e-mail. When Deputy Caslin suggested Jennifer send an e-mail to Downin from the public safety building, she used the e-mail address for him that she had used on all prior occasions. Jennifer testified she received a reply from Downin's e-mail address at her e-mail address, the same address Downin had previously used to communicate with her. The reply e-mail was responsive to the e-mail Jennifer sent and she testified it contained information known exclusively to her and Downin. For these reasons the trial court did not abuse its discretion in admitting the e-mail copies into evidence. Thereafter, Downin was free to, and did, challenge the genuineness of ***204** the documents. It was for the trier of fact to make the ultimate determination of authorship.

For the foregoing reasons, the judgment of the circuit court of Knox County is affirmed.

Affirmed.

[BARRY](#) and [McDADE](#), JJ., concurring.

357 Ill.App.3d 193, 828 N.E.2d 341, 293 Ill.Dec. 371

Hillary GOODRIDGE & others² vs.
DEPARTMENT OF PUBLIC HEALTH &
another.³

March 4, 2003 - November 18, 2003

Present: Marshall, C.J., Greaney, Ireland,
Spina, Cowin, Sosman, & Cordy, JJ.

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

We are mindful that our decision marks a change in the history of our marriage law. Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual

²Julie Goodridge, David Wilson, Robert Compton, Michael Horgan, Edward Balmelli, Maureen Brodoff, Ellen Wade, Gary Chalmers, Richard Linnell, Heidi Norton, Gina Smith, Gloria Bailey, and Linda Davies.

³ Commissioner of Public Health.

conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. Neither view answers the question before us. Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach. "Our obligation is to define the liberty of all, not to mandate our own moral code." *Lawrence v. Texas*, 123 S.Ct. 2472, 2480 (2003) (*Lawrence*), quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992).

Whether the Commonwealth may use its formidable regulatory authority to bar same-sex couples from civil marriage is a question not previously addressed by a Massachusetts appellate court.⁴ It is a question the United States Supreme Court left open as a matter of Federal law in *Lawrence*, *supra* at 2484, where it was not an issue. There, the Court affirmed that the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner. The Court also reaffirmed the central role that

⁴ For American appellate courts that have recently addressed this issue, see *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz.Ct.App.2003); *Dean v. District of Columbia*, 653 A.2d 307 (D.C.1995); *Baehr v. Lewin*, 74 Haw. 530 (1993); *Baker v. State*, 170 Vt. 194, 242 (1999). Earlier cases include *Adams v. Howerton*, 486 F.Supp. 1119 (C.D.Cal.1980), *aff'd*, 673 F.2d 1036 (9th Cir.), cert. denied, 458 U.S. 1111 (1982); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky.Ct.App.1973); *Baker v. Nelson*, 291 Minn. 310 (1971), appeal dismissed, 409 U.S. 810 (1972); *Singer v. Hara*, 11 Wash.App. 247 (1974). See also *Halpern v. Toronto (City)*, 172 O.A.C. 276 (2003); *Egale Canada, Inc. v. Canada (Attorney Gen.)*, 13 B.C.L.R. (4th) 1 (2003).

decisions whether to marry or have children bear in shaping one's identity. *Id.* at 2481. The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life.

Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law.

I

The plaintiffs are fourteen individuals from five Massachusetts counties. As of April 11, 2001, the date they filed their complaint,

- the plaintiffs Gloria Bailey, sixty years old, and Linda Davies, fifty-five years old, had been in a committed relationship for thirty years;
- the plaintiffs Maureen Brodoff, forty-nine years old, and Ellen Wade, fifty-two years old, had been in a committed relationship for twenty years and lived with their twelve year old daughter;
- the plaintiffs Hillary Goodridge, forty-four years old, and Julie Goodridge, forty-three years old, had been in a committed relationship for thirteen years and lived with their five year old daughter;
- the plaintiffs Gary Chalmers, thirty-five years old, and Richard Linnell, thirty-seven years old, had been in a committed relationship for thirteen

- years and lived with their eight year old daughter and Richard's mother;
- the plaintiffs Heidi Norton, thirty-six years old, and Gina Smith, thirty-six years old, had been in a committed relationship for eleven years and lived with their two sons, ages five years and one year;
- the plaintiffs Michael Horgan, forty-one years old, and David Balmelli, forty-one years old, had been in a committed relationship for seven years;
- and the plaintiffs David Wilson, fifty-seven years old, and Robert Compton, fifty-one years old, had been in a committed relationship for four years and had cared for David's mother in their home after a serious illness until she died.

The plaintiffs include business executives, lawyers, an investment banker, educators, therapists, and a computer engineer. Many are active in church, community, and school groups. They have employed such legal means as are available to them – for example, joint adoption, powers of attorney, and joint ownership of real property – to secure aspects of their relationships. Each plaintiff attests a desire to marry his or her partner in order to affirm publicly their commitment to each other and to secure the legal protections and benefits afforded to married couples and their children.

The Department of Public Health (department) is charged by statute with safeguarding public health. *See G.L. c. 17*. Among its responsibilities, the department oversees the registry of vital records and statistics (registry), which "enforce[s] all laws" relative to the issuance of marriage licenses and the keeping of marriage records, *see G.L. c. 17, § 4*, and which promulgates policies and procedures for the

issuance of marriage licenses by city and town clerks and registers. *See, e.g., G.L. c. 207, §§ 20, 28A, and 37.* The registry is headed by a registrar of vital records and statistics (registrar), appointed by the Commissioner of Public Health (commissioner) with the approval of the public health council and supervised by the commissioner. *See G.L. c. 17, § 4.*

In March and April, 2001, each of the plaintiff couples attempted to obtain a marriage license from a city or town clerk's office. As required under G.L. c. 207, they completed notices of intention to marry on forms provided by the registry, *see G.L. c. 207, § 20*, and presented these forms to a Massachusetts town or city clerk, together with the required health forms and marriage license fees. *See G.L. c. 207, § 19.* In each case, the clerk either refused to accept the notice of intention to marry or denied a marriage license to the couple on the ground that Massachusetts does not recognize same-sex marriage.^{5 6} Because obtaining a marriage license is a necessary prerequisite to civil marriage in Massachusetts, denying marriage licenses to the plaintiffs was tantamount to denying them access to civil marriage itself, with its appurtenant social

⁵ General Laws c. 207, § 37, provides: "The commissioner of public health shall furnish to the clerk or registrar of every town a printed list of all legal impediments to marriage, and the clerk or registrar shall forthwith post and thereafter maintain it in a conspicuous place in his office." The record does not reveal whether any of the clerks' offices that considered the plaintiffs' applications for a marriage license had posted such a list of impediments, or whether such list included as an impediment that the applicants are of the same sex.

⁶ The plaintiffs alleged that they met all of the facial qualifications to obtain marriage licenses pursuant to G.L. c. 207, and the department does not contest this assertion.

and legal protections, benefits, and obligations.⁷

On April 11, 2001, the plaintiffs filed suit in the Superior Court against the department and the commissioner seeking a judgment that "the exclusion of the [p]laintiff couples and other qualified same-sex couples from access to marriage licenses, and the legal and social status of civil marriage, as well as the protections, benefits and obligations of marriage, violates Massachusetts law." *See G.L. c. 231A.* The plaintiffs alleged violation of the laws of the Commonwealth, including but not limited to their rights under arts. 1, 6, 7, 10, 12, and 16, and Part II, c. 1, § 1, art. 4, of the Massachusetts Constitution.^{8 9}

⁷ The complaint alleged various circumstances in which the absence of the full legal protections of civil marriage has harmed them and their children. For example, Hillary and Julie Goodridge alleged that, when Julie gave birth to their daughter (whom Hillary subsequently coadopted) during a delivery that required the infant's transfer to neonatal intensive care, Hillary "had difficulty gaining access to Julie and their newborn daughter at the hospital"; Gary Chalmers and Richard Linnell alleged that "Gary pays for a family health insurance policy at work which covers only him and their daughter because Massachusetts law does not consider Rich to be a 'dependent.' This means that their household must purchase a separate individual policy of health insurance for Rich at considerable expense.... Gary has a pension plan at work, but under state law, because he is a municipal employee, that plan does not allow him the same range of options in providing for his beneficiary that a married spouse has and thus he cannot provide the same security to his family that a married person could if he should predecease Rich."

⁸ Article 1, as amended by art. 106 of the Amendments to the Massachusetts Constitution, 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 the law shall not be denied or abridged because of sex, race, color, creed or national origin." Article 6 provides: "No man, nor corporation, or association of men, have any other

The department, represented by the Attorney General, admitted to a policy and practice of denying marriage licenses to same-sex couples. It denied that its actions violated any law or that the plaintiffs were entitled to relief. The parties filed cross motions for summary judgment.

A Superior Court judge ruled for the department. In a memorandum of decision and order dated May 7, 2002, he dismissed the plaintiffs' claim that the marriage statutes should be construed to permit

title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public...." Article 7 provides: "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: Therefore the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it." Article 10 provides, in relevant part: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws...." Article 12 provides, in relevant part: "[N]o subject shall be ... deprived of his property, immunities, or privileges, put out of the protection of the law ... or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." Article 16, as amended by art. 77 of the Amendments, provides, in relevant part: "The right of free speech shall not be abridged." Part II, c. 1, § 1, art. 4, as amended by art. 112, provides, in pertinent part, that "full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this Commonwealth."

⁹ The department claims that the plaintiffs have waived their art. 12 and art. 16 claims on appeal. Because our holding today does not turn on art. 12 or art. 16, we do not consider the department's waiver argument.

marriage between persons of the same sex, holding that the plain wording of G.L. c. 207, as well as the wording of other marriage statutes, precluded that interpretation. Turning to the constitutional claims, he held that the marriage exclusion does not offend the liberty, freedom, equality, or due process provisions of the Massachusetts Constitution, and that the Massachusetts Declaration of Rights does not guarantee "the fundamental right to marry a person of the same sex." He concluded that prohibiting same-sex marriage rationally furthers the Legislature's legitimate interest in safeguarding the "primary purpose" of marriage, "procreation." The Legislature may rationally limit marriage to opposite-sex couples, he concluded, because those couples are "theoretically ... capable of procreation," they do not rely on "inherently more cumbersome" noncoital means of reproduction, and they are more likely than same-sex couples to have children, or more children.

After the complaint was dismissed and summary judgment entered for the defendants, the plaintiffs appealed. Both parties requested direct appellate review, which we granted.

II

Although the plaintiffs refer in passing to "the marriage statutes," they focus, quite properly, on G.L. c. 207, the marriage licensing statute, which controls entry into civil marriage. As a preliminary matter, we summarize the provisions of that law.

General Laws c. 207 is both a gatekeeping and a public records statute. It sets minimum qualifications for obtaining a marriage license and directs city and town clerks, the registrar, and the department to keep and maintain certain "vital records" of civil

marriages. The gatekeeping provisions of G.L. c. 207 are minimal. They forbid marriage of individuals within certain degrees of consanguinity, §§ 1 and 2, and polygamous marriages. *See G.L. c. 207, § 4. See also G.L. c. 207, § 8 (marriages solemnized in violation of §§ 1, 2, and 4, are void ab initio).* They prohibit marriage if one of the parties has communicable syphilis, *see G.L. c. 207, § 28A*, and restrict the circumstances in which a person under eighteen years of age may marry. *See G.L. c. 207, §§ 7, 25, and 27.* The statute requires that civil marriage be solemnized only by those so authorized. *See G.L. c. 207, §§ 38-40.*

The record-keeping provisions of G.L. c. 207 are more extensive. Marriage applicants file standard information forms and a medical certificate in any Massachusetts city or town clerk's office and tender a filing fee. *G.L. c. 207, §§ 19-20, 28A.* The clerk issues the marriage license, and when the marriage is solemnized, the individual authorized to solemnize the marriage adds additional information to the form and returns it (or a copy) to the clerk's office. *G.L. c. 207, §§ 28, 30, 38-40* (this completed form is commonly known as the "marriage certificate"). The clerk sends a copy of the information to the registrar, and that information becomes a public record. *See G.L. c. 17, § 4; G.L. c. 66, § 10.*^{10 11}

¹⁰ The marital forms forwarded by the clerk or register must contain the "date of record, date and place of marriage, name, residence and official station of the person by whom solemnized; for each of the parties to be married the name, date and place of birth, residence, age, number of the marriage, as first or second, and if previously married, whether widowed or divorced, and the birth-given names of their parents." G.L. c. 46, § 1.

¹¹ "The record of a marriage made and kept as provided by law by the person by whom the marriage was solemnized, or by the clerk or registrar, or a copy thereof duly certified, shall be prima facie evidence of such marriage." G.L. c. 207, § 45. A "certificate of

In short, for all the joy and solemnity that normally attend a marriage, G.L. c. 207, governing entrance to marriage, is a licensing law. The plaintiffs argue that because nothing in that licensing law specifically prohibits marriages between persons of the same sex, we may interpret the statute to permit "qualified same sex couples" to obtain marriage licenses, thereby avoiding the question whether the law is constitutional. *See School Comm. of Greenfield v. Greenfield Educ. Ass'n*, 385 Mass. 70, 79 (1982), and cases cited. This claim lacks merit.

We interpret statutes to carry out the Legislature's intent, determined by the words of a statute interpreted according to "the ordinary and approved usage of the language." *Hanlon v. Rollins*, 286 Mass. 444, 447 (1934). The everyday meaning of "marriage" is "[t]he legal union of a man and woman as husband and wife," *Black's Law Dictionary* 986 (7th ed. 1999), and the plaintiffs do not argue that the term "marriage" has ever had a different meaning under Massachusetts law. *See, e.g., Milford v. Worcester*, 7 Mass. 48, 52 (1810) (marriage "is an engagement, by which a single man and a single woman, of sufficient discretion, take each other for husband and wife"). This definition of marriage, as both the department and the Superior Court judge point out, derives from the common law. *See Commonwealth v. Knowlton*, 2 Mass. 530, 535 (1807) (*Massachusetts common law derives from English common law except as otherwise altered by Massachusetts statutes and Constitution*). *See also Commonwealth v. Lane*, 113 Mass. 458, 462-463 (1873)

the [c]ommissioner's copy, signed by the [c]ommissioner or the [r]egistrar, is admissible as evidence of the record." *Secretary of the Commonwealth v. City Clerk of Lowell*, 373 Mass. 178, 181-182 (1977).

("when the statutes are silent, questions of the validity of marriages are to be determined by the jus gentium, the common law of nations"); *C.P. Kindregan, Jr., & M.L. Inker, Family Law and Practice* § 1.2 (3d ed.2002). Far from being ambiguous, the undefined word "marriage," as used in G.L. c. 207, confirms the General Court's intent to hew to the term's common-law and quotidian meaning concerning the genders of the marriage partners.

The intended scope of G.L. c. 207 is also evident in its consanguinity provisions. See *Chandler v. County Comm'rs of Nantucket County*, 437 Mass. 430, 435 (2002) (statute's various provisions may offer insight into legislative intent). Sections 1 and 2 of G.L. c. 207 prohibit marriages between a man and certain female relatives and a woman and certain male relatives, but are silent as to the consanguinity of male-male or female-female marriage applicants. See G.L. c. 207, §§ 1-2. The only reasonable explanation is that the Legislature did not intend that same-sex couples be licensed to marry. We conclude, as did the judge, that G.L. c. 207 may not be construed to permit same-sex couples to marry.¹²

III A

The larger question is whether, as the department claims, government action that bars same-sex couples from civil marriage constitutes a legitimate exercise of the

¹² We use the terms "same sex" and "opposite sex" when characterizing the couples in question, because these terms are more accurate in this context than the terms "homosexual" or "heterosexual," although at times we use those terms when we consider them appropriate. Nothing in our marriage law precludes people who identify themselves (or who are identified by others) as gay, lesbian, or bisexual from marrying persons of the opposite sex. See *Baehr v. Lewin*, 74 Haw. 530, 543 n. 11, 547 n. 14 (1993).

State's authority to regulate conduct, or whether, as the plaintiffs claim, this categorical marriage exclusion violates the Massachusetts Constitution. We have recognized the long-standing statutory understanding, derived from the common law, that "marriage" means the lawful union of a woman and a man. But that history cannot and does not foreclose the constitutional question.

The plaintiffs' claim that the marriage restriction violates the Massachusetts Constitution can be analyzed in two ways. Does it offend the Constitution's guarantees of equality before the law? Or do the liberty and due process provisions of the Massachusetts Constitution secure the plaintiffs' right to marry their chosen partner? In matters implicating marriage, family life, and the upbringing of children, the two constitutional concepts frequently overlap, as they do here. See, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996) (noting convergence of due process and equal protection principles in cases concerning parent-child relationships); *Perez v. Sharp*, 32 Cal.2d 711, 728 (1948) (analyzing statutory ban on interracial marriage as equal protection violation concerning regulation of fundamental right). See also *Lawrence*, supra at 2482 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests"); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (racial segregation in District of Columbia public schools violates the due process clause of the Fifth Amendment to the United States Constitution), decided the same day as *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954) (holding that segregation of public schools in the States violates the equal protection clause of the Fourteenth

Amendment). Much of what we say concerning one standard applies to the other.

We begin by considering the nature of civil marriage itself. Simply put, the government creates civil marriage. In Massachusetts, civil marriage is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution. See *Commonwealth v. Munson*, 127 Mass. 459, 460-466 (1879) (noting that "[i]n Massachusetts, from very early times, the requisites of a valid marriage have been regulated by statutes of the Colony, Province, and Commonwealth," and surveying marriage statutes from 1639 through 1834). No religious ceremony has ever been required to validate a Massachusetts marriage. *Id.*

In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State. See *DeMatteo v. DeMatteo*, 436 Mass. 18, 31 (2002) ("Marriage is not a mere contract between two parties but a legal status from which certain rights and obligations arise"); *Smith v. Smith*, 171 Mass. 404, 409 (1898) (on marriage, the parties "assume[] new relations to each other and to the State"). See also *French v. McAnarney*, 290 Mass. 544, 546 (1935). While only the parties can mutually assent to marriage, the terms of the marriage – who may marry and what obligations, benefits, and liabilities attach to civil marriage – are set by the Commonwealth. Conversely, while only the parties can agree to end the marriage (absent the death of one of them or a marriage *void ab initio*), the Commonwealth defines the exit terms. See *G.L. c. 208*.

Civil marriage is created and regulated through exercise of the police power. See *Commonwealth v. Stowell*, 389 Mass. 171, 175 (1983) (regulation of marriage is

properly within the scope of the police power). "Police power" (now more commonly termed the State's regulatory authority) is an old-fashioned term for the Commonwealth's lawmaking authority, as bounded by the liberty and equality guarantees of the Massachusetts Constitution and its express delegation of power from the people to their government. In broad terms, it is the Legislature's power to enact rules to regulate conduct, to the extent that such laws are "necessary to secure the health, safety, good order, comfort, or general welfare of the community" (citations omitted). *Opinion of the Justices*, 341 Mass. 760, 785 (1960).¹³ See *Commonwealth v. Alger*, 7 Cush. 53, 85 (1851).

Without question, civil marriage enhances the "welfare of the community." It is a "social institution of the highest importance." *French v. McAnarney*, *supra*. Civil marriage anchors an ordered society by encouraging stable relationships over transient ones. It is central to the way the Commonwealth identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds, and tracks important epidemiological and demographic data.

Marriage also bestows enormous private and social advantages on those who choose to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship,

¹³ "The term public welfare has never been and cannot be precisely defined. Sometimes it has been said to include public convenience, comfort, peace and order, prosperity, and similar concepts, but not to include 'mere expediency.'" *Opinion of the Justices*, 333 Mass. 773, 778 (1955).

intimacy, fidelity, and family. "It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). Because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.

Tangible as well as intangible benefits flow from marriage. The marriage license grants valuable property rights to those who meet the entry requirements, and who agree to what might otherwise be a burdensome degree of government regulation of their activities.¹⁴ See *Leduc v. Commonwealth*, 421 Mass. 433, 435 (1995), cert. denied, 519 U.S. 827 (1996) ("The historical aim of licensure generally is preservation of public health, safety, and welfare by extending the public trust only to those with proven qualifications"). The Legislature has conferred on "each party [in a civil marriage] substantial rights concerning the assets of the other which unmarried cohabitants do not have." *Wilcox v. Trautz*, 427 Mass. 326, 334 (1998). See *Collins v. Guggenheim*, 417 Mass. 615, 618 (1994) (rejecting claim for equitable distribution of property where plaintiff cohabited with but did not marry defendant); *Feliciano v. Rosemar Silver Co.*, 401 Mass. 141, 142 (1987) (government interest in promoting marriage would be "subverted" by recognition of "a right to recover for loss of consortium by a person who has not

¹⁴ For example, married persons face substantial restrictions, simply because they are married, on their ability freely to dispose of their assets. See, e.g., G.L. c. 208, § 34 (providing for the payment of alimony and the equitable division of property on divorce); G.L. c. 191, § 15, and G.L. c. 189 (rights of elective share and dower).

accepted the correlative responsibilities of marriage"); *Davis v. Misiano*, 373 Mass. 261, 263 (1977) (*unmarried partners not entitled to rights of separate support or alimony*). See generally *Attorney Gen. v. Desilets*, 418 Mass. 316, 327-328 & nn. 10, 11 (1994).

The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death. The department states that "hundreds of statutes" are related to marriage and to marital benefits. With no attempt to be comprehensive, we note that some of the statutory benefits conferred by the Legislature on those who enter into civil marriage include, as to property:

- joint Massachusetts income tax filing (*G.L. c. 62C, § 6*);
- tenancy by the entirety (a form of ownership that provides certain protections against creditors and allows for the automatic descent of property to the surviving spouse without probate) (*G.L. c. 184, § 7*);
- extension of the benefit of the homestead protection (securing up to \$300,000 in equity from creditors) to one's spouse and children (*G.L. c. 188, § 1*);
- automatic rights to inherit the property of a deceased spouse who does not leave a will (*G.L. c. 190, § 1*);
- the rights of elective share and of dower (which allow surviving spouses certain property rights where the decedent spouse has not made adequate provision for the survivor in a will) (*G.L. c. 191, § 15, and G.L. c. 189*);
- entitlement to wages owed to a deceased employee (*G.L. c. 149, § 178A [general] and G.L. c. 149, § 178C [public employees]*);

- eligibility to continue certain businesses of a deceased spouse (e.g., *G.L. c. 112, § 53 [dentist]*);
 - the right to share the medical policy of one's spouse (e.g., *G.L. c. 175, § 108, Second [a] [3] [defining an insured's "dependent" to include one's spouse], see Connors v. Boston, 430 Mass. 31, 43 (1999) [domestic partners of city employees not included within the term "dependent" as used in G.L. c. 32B, § 2]*);
 - thirty-nine week continuation of health coverage for the spouse of a person who is laid off or dies (e.g., *G.L. c. 175, § 110G*);
 - preferential options under the Commonwealth's pension system (see *G.L. c. 32, § 12[2] ["Joint and Last Survivor Allowance"]*);
 - preferential benefits in the Commonwealth's medical program, MassHealth (e.g., *130 Code Mass. Regs. § 515.012[A] prohibiting placing a lien on long-term care patient's former home if spouse still lives there*);
 - access to veterans' spousal benefits and preferences (e.g., *G.L. c. 115, § 1 [defining "dependents"] and G.L. c. 31, § 26 [State employment] and § 28 [municipal employees]*);
 - financial protections for spouses of certain Commonwealth employees (fire fighters, police officers, prosecutors, among others) killed in the performance of duty (e.g., *G.L. c. 32, §§ 100-103*);
 - the equitable division of marital property on divorce (*G.L. c. 208, § 34*);
 - temporary and permanent alimony rights (*G.L. c. 208, §§ 17 and 34*);
 - the right to separate support on separation of the parties that does not result in divorce (*G.L. c. 209, § 32*);
 - and the right to bring claims for wrongful death and loss of consortium, and for funeral and burial expenses and punitive damages resulting from tort actions (*G.L. c. 229, §§ 1 and 2; G.L. c. 228, § 1. See Feliciano v. Rosemar Silver Co., supra*).
- Exclusive marital benefits that are not directly tied to property rights include:
- the presumptions of legitimacy and parentage of children born to a married couple (*G.L. c. 209C, § 6, and G.L. c. 46, § 4B*);
 - and evidentiary rights, such as the prohibition against spouses testifying against one another about their private conversations, applicable in both civil and criminal cases (*G.L. c. 233, § 20*).
- Other statutory benefits of a personal nature available only to married individuals include:
- qualification for bereavement or medical leave to care for individuals related by blood or marriage (*G.L. c. 149, § 52D*);
 - an automatic "family member" preference to make medical decisions for an incompetent or disabled spouse who does not have a contrary health care proxy, see *Shine v. Vega, 429 Mass. 456, 466 (1999)*;
 - the application of predictable rules of child custody, visitation, support, and removal out-of-State when married parents divorce (e.g., *G.L. c. 208, § 19 [temporary custody], § 20 [temporary support], § 28 [custody and support on judgment of divorce]*,

§ 30 [removal from Commonwealth], and § 31 [shared custody plan];

- priority rights to administer the estate of a deceased spouse who dies without a will, and requirement that surviving spouse must consent to the appointment of any other person as administrator (*G.L. c. 38, § 13 [disposition of body], and G.L. c. 113, § 8 [anatomical gifts]*);
- and the right to interment in the lot or tomb owned by one's deceased spouse (*G.L. c. 114, §§ 29-33*).

Where a married couple has children, their children are also directly or indirectly, but no less auspiciously, the recipients of the special legal and economic protections obtained by civil marriage. Notwithstanding the Commonwealth's strong public policy to abolish legal distinctions between marital and nonmarital children in providing for the support and care of minors, *see Department of Revenue v. Mason M.*, 439 Mass. 665 (2003); *Woodward v. Commissioner of Social Sec.*, 435 Mass. 536, 546 (2002), the fact remains that marital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of one's parentage.

It is undoubtedly for these concrete reasons, as well as for its intimately personal significance, that civil marriage has long been termed a "civil right." *See, e.g., Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("*Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and*

survival"), quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Milford v. Worcester*, 7 Mass. 48, 56 (1810) (referring to "civil rights incident to marriages"). *See also Baehr v. Lewin*, 74 Haw. 530, 561 (1993) (identifying marriage as a "civil right[]"); *Baker v. State*, 170 Vt. 194, 242 (1999) (Johnson, J., concurring in part and dissenting in part) (same). The United States Supreme Court has described the right to marry as "of fundamental importance for all individuals" and as "part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). *See Loving v. Virginia, supra* ("*The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men*").¹⁵

Without the right to marry – or more properly, the right to choose to marry – one is excluded from the full range of human experience and denied full protection of the laws for one's "avowed commitment to an intimate and lasting human relationship." *Baker v. State, supra* at 229. Because civil marriage is central to the lives of individuals and the welfare of the community, our laws assiduously protect the individual's right to marry against undue government incursion. Laws may not "interfere directly and substantially with the right to marry." *Zablocki v. Redhail, supra* at 387. *See Perez*

¹⁵ Civil marriage enjoys a dual and in some sense paradoxical status as both a State-conferred benefit (with its attendant obligations) and a multi-faceted personal interest of "fundamental importance." *Zablocki v. Redhail*, 434 U.S. 376, 383 (1978). As a practical matter, the State could not abolish civil marriage without chaotic consequences. The "right to marry," *id.* at 387, is different from rights deemed "fundamental" for equal protection and due process purposes because the State could, in theory, abolish all civil marriage while it cannot, for example, abolish all private property rights.

v. Sharp, 32 Cal.2d 711, 714 (1948) ("There can be no prohibition of marriage except for an important social objective and reasonable means").¹⁶

Unquestionably, the regulatory power of the Commonwealth over civil marriage is broad, as is the Commonwealth's discretion to award public benefits. See *Commonwealth v. Stowell*, 389 Mass. 171, 175 (1983) (marriage); *Moe v. Secretary of Admin. & Fin.*, 382 Mass. 629, 652 (1981) (Medicaid benefits). Individuals who have the choice to marry each other and nevertheless choose not to may properly be denied the legal benefits of marriage. See *Wilcox v. Trautz*, 427 Mass. 326, 334 (1998); *Collins v. Guggenheim*, 417 Mass. 615, 618 (1994); *Feliciano v. Rosemar Silver Co.*, 401 Mass. 141, 142 (1987). But that same logic cannot hold for a qualified individual who would marry if she or he only could.

B

For decades, indeed centuries, in much of this country (including Massachusetts) no lawful marriage was possible between white and black Americans. That long history availed not when the Supreme Court of

¹⁶ The department argues that this case concerns the rights of couples (same sex and opposite sex), not the rights of individuals. This is incorrect. The rights implicated in this case are at the core of individual privacy and autonomy. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State"); *Perez v. Sharp*, 32 Cal.2d 711, 716 (1948) ("The right to marry is the right of individuals, not of racial groups"). See also *A.Z. v. B.Z.*, 431 Mass. 150, 162 (2000), quoting *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977) (noting "freedom of personal choice in matters of marriage and family life"). While two individuals who wish to marry may be equally aggrieved by State action denying them that opportunity, they do not "share" the liberty and equality interests at stake.

California held in 1948 that a legislative prohibition against interracial marriage violated the due process and equality guarantees of the Fourteenth Amendment, *Perez v. Sharp*, 32 Cal.2d 711, 728 (1948), or when, nineteen years later, the United States Supreme Court also held that a statutory bar to interracial marriage violated the Fourteenth Amendment, *Loving v. Virginia*, 388 U.S. 1 (1967).¹⁷ As both *Perez* and *Loving* make clear, the right to marry means little if it does not include the right to marry the person of one's choice, subject to appropriate government restrictions in the interests of public health, safety, and welfare. See *Perez v. Sharp*, *supra* at 717 ("the essence of the right to marry is freedom to join in marriage with the person of one's choice"). See also *Loving v. Virginia*, *supra* at 12. In this case, as in *Perez* and *Loving*, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance – the institution of marriage – because of a single trait: skin color in *Perez*

¹⁷ The department argues that the *Loving* decision did not profoundly alter the by-then common conception of marriage because it was decided at a time when antimiscegenation statutes were in "full-scale retreat." But the relationship the department draws between popular consensus and the constitutionality of a statute oppressive to a minority group ignores the successful constitutional challenges to an antimiscegenation statute, initiated some twenty years earlier. When the Supreme Court of California decided *Perez v. Sharp*, 32 Cal.2d 711, 728 (1948), a precursor to *Loving*, racial inequality was rampant and normative, segregation in public and private institutions was commonplace, the civil rights movement had not yet been launched, and the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), was still good law. The lack of popular consensus favoring integration (including interracial marriage) did not deter the Supreme Court of California from holding that State's antimiscegenation statute to violate the plaintiffs' constitutional rights. Neither the *Perez* court nor the *Loving* Court was content to permit an unconstitutional situation to fester because the remedy might not reflect a broad social consensus.

and Loving, sexual orientation here. As it did in *Perez* and *Loving*, history must yield to a more fully developed understanding of the invidious quality of the discrimination.¹⁸

The Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language. See *Planned Parenthood League of Mass., Inc. v. Attorney Gen.*, 424 Mass. 586, 590 (1997); *Corning Glass Works v. Ann & Hope, Inc. of Danvers*, 363 Mass. 409, 416 (1973). That the Massachusetts Constitution is in some instances more protective of individual liberty interests than is the Federal Constitution is not surprising. Fundamental to the vigor of our Federal system of government is that "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Arizona v. Evans*, 514 U.S. 1, 8 (1995).¹⁹

¹⁸ Recently, the United States Supreme Court has reaffirmed that the Constitution prohibits a State from wielding its formidable power to regulate conduct in a manner that demeans basic human dignity, even though that statutory discrimination may enjoy broad public support. The Court struck down a statute criminalizing sodomy. See *Lawrence*, *supra* at 2478 ("The liberty protected by the Constitution allows homosexual persons the right to make this choice").

¹⁹ We have recognized that our Constitution may more extensively protect individual rights than the Federal Constitution in widely different contexts. See, e.g., *Horsemen's Benevolent & Protective Ass'n v. State Racing Comm'n*, 403 Mass. 692 (1989) (freedom from intrusive drug testing in highly regulated industry); *Cepulonis v. Secretary of the Commonwealth*, 389 Mass. 930 (1983) (inmates' right to register to vote); *Batchelder v. Allied Stores Int'l, Inc.*, 388 Mass. 83 (1983) (freedom to solicit signatures for ballot access in public election); *Moe v. Secretary of Admin. & Fin.*, 382 Mass. 629 (1981) (right to State Medicaid payment for medically

The individual liberty and equality safeguards of the Massachusetts Constitution protect both "freedom from" unwarranted government intrusion into protected spheres of life and "freedom to" partake in benefits created by the State for the common good. See *Bachrach v. Secretary of the Commonwealth*, 382 Mass. 268, 273 (1981); *Dalli v. Board of Educ.*, 358 Mass. 753, 759 (1971). Both freedoms are involved here. Whether and whom to marry, how to express sexual intimacy, and whether and how to establish a family – these are among the most basic of every individual's liberty and due process rights. See, e.g., *Lawrence*, *supra* at 2481; *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Roe v. Wade*, 410 U.S. 113, 152-153 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Loving v. Virginia*, *supra*. And central to personal freedom and security is the assurance that the laws will apply equally to persons in similar situations. "Absolute equality before the law is a fundamental principle of our own Constitution." *Opinion of the Justices*, 211 Mass. 618, 619 (1912). The liberty interest in choosing whether and whom to marry would be hollow if the Commonwealth could, without sufficient justification, foreclose an individual from freely choosing the person with whom to share an exclusive commitment in the unique institution of civil marriage.

The Massachusetts Constitution requires, at a minimum, that the exercise of the State's regulatory authority not be "arbitrary or capricious." *Commonwealth v. Henry's*

necessary abortions); *Coffee-Rich, Inc. v. Commissioner of Pub. Health*, 348 Mass. 414 (1965) (freedom to pursue one's lawful business).

Drywall Co., 366 Mass. 539, 542 (1974).²⁰ Under both the equality and liberty guarantees, regulatory authority must, at very least, serve "a legitimate purpose in a rational way"; a statute must "bear a reasonable relation to a permissible legislative objective." *Rushworth v. Registrar of Motor Vehicles*, 413 Mass. 265, 270 (1992). See, e.g., *Massachusetts Fed'n of Teachers v. Board of Educ.*, 436 Mass. 763, 778 (2002) (equal protection); *Coffee-Rich, Inc. v. Commissioner of Pub. Health*, 348 Mass. 414, 422 (1965) (due process). Any law failing to satisfy the basic standards of rationality is void.

The plaintiffs challenge the marriage statute on both equal protection and due process grounds. With respect to each such claim, we must first determine the appropriate standard of review. Where a statute implicates a fundamental right or uses a suspect classification, we employ "strict judicial scrutiny." *Lowell v. Kowalski*, 380 Mass. 663, 666 (1980). For all other statutes, we employ the "'rational basis' test." *English v. New England Med. Ctr.*, 405 Mass. 423, 428 (1989). For due process claims, rational basis analysis requires that statutes "bear[] a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare." *Coffee-Rich, Inc. v. Commissioner of Pub. Health*, *supra*, quoting *Sperry & Hutchinson*

²⁰ The Massachusetts Constitution empowers the General Court to enact only those orders, laws, statutes, and ordinances "wholesome and reasonable," that are not "repugnant or contrary" to the Constitution, and that, in the Legislature's judgment, advance the "good and welfare" of the Commonwealth, its government, and all of its subjects. Part II, c. 1, § 1, art. 4. See Opinion of the Justices, 360 Mass. 877, 883 (1971), quoting *Jones v. Robbins*, 8 Gray 329, 343 (1857) (powers vested in government are set down in the Massachusetts Constitution "in a few plain, clear and intelligible propositions, for the better guidance and control, both of legislators and magistrates").

Co. v. Director of the Div. on the Necessaries of Life, 307 Mass. 408, 418 (1940). For equal protection challenges, the rational basis test requires that "an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." *English v. New England Med. Ctr.*, *supra* at 429, quoting *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 452 (1985) (*Stevens, J., concurring*).²¹

The department argues that no fundamental right or "suspect" class is at issue here,²² and rational basis is the appropriate standard of review. For the reasons we explain below,

²¹ Not every asserted rational relationship is a "conceivable" one, and rationality review is not "toothless." *Murphy v. Commissioner of the Dep't of Indus. Accs.*, 415 Mass. 218, 233 (1993), citing *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). Statutes have failed rational basis review even in circumstances where no fundamental right or "suspect" classification is implicated. See, e.g., *Murphy v. Commissioner of the Dep't of Indus. Accs.*, 415 Mass. 218, 226-227 (1993) (fee imposed on retention of counsel in administrative proceedings); *Secretary of the Commonwealth v. City Clerk of Lowell*, 373 Mass. 178, 186 (1977) (selection of surname for nonmarital child); *Aetna Cas. & Sur. Co. v. Commissioner of Ins.*, 358 Mass. 272, 280-281 (1970) (automobile insurance ratesetting); *Coffee-Rich, Inc. v. Commissioner of Pub. Health*, 348 Mass. 414, 422 (1965) (sale of wholesome product); *Mansfield Beauty Academy, Inc. v. Board of Registration of Hairdressers*, 326 Mass. 624, 627 (1951) (right to charge for materials furnished to models by trade school); *Opinion of the Justices*, 322 Mass. 755, 760-761 (1948) (proposed statute concerning regulating cemeteries); *Boston Elevated Ry. v. Commonwealth*, 310 Mass. 528, 556-557 (1942) (legislation impairing contract right); *Durgin v. Minot*, 203 Mass. 26, 28 (1909) (statute authorizing certain board of health regulations).

²² Article 1 of the Massachusetts Constitution specifically prohibits sex-based discrimination. See post at (Greaney, J., concurring). We have not previously considered whether "sexual orientation" is a "suspect" classification. Our resolution of this case does not require that inquiry here.

we conclude that the marriage ban does not meet the rational basis test for either due process or equal protection. Because the statute does not survive rational basis review, we do not consider the plaintiffs' arguments that this case merits strict judicial scrutiny.

The department posits three legislative rationales for prohibiting same-sex couples from marrying:

- (1) providing a "favorable setting for procreation";
- (2) ensuring the optimal setting for child rearing, which the department defines as "a two-parent family with one parent of each sex"; and
- (3) preserving scarce State and private financial resources.

We consider each in turn.

The judge in the Superior Court endorsed the first rationale, holding that "the state's interest in regulating marriage is based on the traditional concept that marriage's primary purpose is procreation." This is incorrect. Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family. General Laws c. 207 contains no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus. Fertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married. *See Franklin v. Franklin*, 154 Mass. 515, 516 (1891) ("*The consummation of a marriage by coition is not necessary to its validity*").²³ People who cannot stir from

²³ Our marriage law does recognize that the inability to participate in intimate relations may have a bearing on one of the central expectations of marriage. Since

their deathbed may marry. *See G.L. c. 207, § 28A*. While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the *sine qua non* of civil marriage.²⁴

the earliest days of the Commonwealth, the divorce statutes have permitted (but not required) a spouse to choose to divorce his or her impotent mate. *See St. 1785, c. 69, § 3*. While infertility is not a ground to void or terminate a marriage, impotency (the inability to engage in sexual intercourse) is, at the election of the disaffected spouse. *See G.L. c. 207, § 14* (annulment); *G.L. c. 208, § 1* (divorce). *Cf. Martin v. Otis*, 233 Mass. 491, 495 (1919) ("impotency does not render a marriage void, but only voidable at the suit of the party conceiving himself or herself to be wronged"); *Smith v. Smith*, 171 Mass. 404, 408 (1898) (marriage nullified because husband's incurable syphilis "leaves him no foundation on which the marriage relation could properly rest"). *See also G.L. c. 207, § 28A*. However, in *Hanson v. Hanson*, 287 Mass. 154 (1934), a decree of annulment for nonconsummation was reversed where the wife knew before the marriage that her husband had syphilis and voluntarily chose to marry him. We held that, given the circumstances of the wife's prior knowledge of the full extent of the disease and her consent to be married, the husband's condition did not go "to the essence" of the marriage. *Id.* at 159.²⁴ It is hardly surprising that civil marriage developed historically as a means to regulate heterosexual conduct and to promote child rearing, because until very recently unassisted heterosexual relations were the only means short of adoption by which children could come into the world, and the absence of widely available and effective contraceptives made the link between heterosexual sex and procreation very strong indeed. Punitive notions of illegitimacy, *see Powers v. Wilkinson*, 399 Mass. 650, 661 (1987), and of homosexual identity, *see Lawrence*, *supra* at 2478-2479, further cemented the common and legal understanding of marriage as an unquestionably heterosexual institution. But it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been. As one dissent acknowledges, in "the modern age," "heterosexual intercourse, procreation, and childcare are not necessarily conjoined." *Post* at (Cordy, J., dissenting).

Moreover, the Commonwealth affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual.²⁵ If procreation were a necessary component of civil marriage, our statutes would draw a tighter circle around the permissible bounds of nonmarital child bearing and the creation of families by noncoital means. The attempt to isolate procreation as "the source of a fundamental right to marry," *post at (Cordy, J., dissenting)*, overlooks the integrated way in which courts have examined the complex and overlapping realms of personal autonomy, marriage, family life, and child rearing. Our jurisprudence recognizes that, in these nuanced and fundamentally private areas of life, such a narrow focus is inappropriate.

The "marriage is procreation" argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage. Like "Amendment 2" to the Constitution of Colorado, which effectively denied homosexual persons equality under the law and full access to the political process, the marriage restriction impermissibly "identifies persons by a single trait and then

²⁵ Adoption and certain insurance coverage for assisted reproductive technology are available to married couples, same-sex couples, and single individuals alike. See G.L. c. 210, § 1; Adoption of Tammy, 416 Mass. 205 (1993) (adoption); G.L. c. 175, § 47H; G.L. c. 176A, § 8K; G.L. c. 176B, § 4J; and G.L. c. 176G, § 4 (insurance coverage). See also *Woodward v. Commissioner of Social Sec.*, 435 Mass. 536, 546 (2002) (posthumous reproduction); *Culliton v. Beth Israel Deaconness Med. Ctr.*, 435 Mass. 285, 293 (2001) (gestational surrogacy).

denies them protection across the board." *Romer v. Evans*, 517 U.S. 620, 633 (1996). In so doing, the State's action confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect.²⁶

The department's first stated rationale, equating marriage with unassisted heterosexual procreation, shades imperceptibly into its second: that confining marriage to opposite-sex couples ensures that children are raised in the "optimal" setting. Protecting the welfare of children is a paramount State policy. Restricting marriage to opposite-sex couples, however, cannot plausibly further this policy. "The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household." *Troxel v. Granville*, 530 U.S. 57, 63 (2000). Massachusetts has responded supportively to "the changing realities of the American family," *id. at 64*, and has moved vigorously to strengthen the modern family in its many variations. See, e.g., G.L. c. 209C (*paternity statute*); G.L. c. 119, § 39D (*grandparent visitation statute*); *Blixt v. Blixt*, 437 Mass. 649 (2002), *cert. denied*, 537 U.S. 1189 (2003) (*same*); *E.N.O. v. L.M.M.*, 429 Mass. 824, *cert. denied*, 528 U.S. 1005 (1999) (*de facto parent*); *Youmans v. Ramos*, 429 Mass. 774, 782 (1999) (*same*); and *Adoption of Tammy*, 416 Mass. 205 (1993) (*coparent adoption*). Moreover, we have repudiated the common-

²⁶ Because our laws expressly or implicitly sanction so many kinds of opposite-sex marriages that do not or will never result in unassisted reproduction, it is erroneous to claim, as the dissent does, that the "theoretical[]" procreative capacity of opposite-sex couples, *post at (Cordy, J., dissenting)*, sufficiently justifies excluding from civil marriage same-sex couples who actually have children.

law power of the State to provide varying levels of protection to children based on the circumstances of birth. *See G.L. c. 209C (paternity statute); Powers v. Wilkinson, 399 Mass. 650, 661 (1987) ("Ours is an era in which logic and compassion have impelled the law toward unburdening children from the stigma and the disadvantages heretofore attendant upon the status of illegitimacy").* The "best interests of the child" standard does not turn on a parent's sexual orientation or marital status. *See e.g., Doe v. Doe, 16 Mass.App.Ct. 499, 503 (1983) (parent's sexual orientation insufficient ground to deny custody of child in divorce action). See also E.N.O. v. L.M.M., supra at 829-830 (best interests of child determined by considering child's relationship with biological and de facto same-sex parents); Silvia v. Silvia, 9 Mass.App.Ct. 339, 341 & n. 3 (1980) (collecting support and custody statutes containing no gender distinction).*

The department has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children. There is thus no rational relationship between the marriage statute and the Commonwealth's proffered goal of protecting the "optimal" child rearing unit. Moreover, the department readily concedes that people in same-sex couples may be "excellent" parents. These couples (including four of the plaintiff couples) have children for the reasons others do – to love them, to care for them, to nurture them. But the task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws. While establishing the parentage of children as soon as possible is crucial to the safety and welfare of children, *see Culliton v. Beth Israel Deaconness Med. Ctr., 435 Mass. 285, 292 (2001)*, same-sex couples must

undergo the sometimes lengthy and intrusive process of second-parent adoption to establish their joint parentage. While the enhanced income provided by marital benefits is an important source of security and stability for married couples and their children, those benefits are denied to families headed by same-sex couples. *See, e.g., note 6, supra.* While the laws of divorce provide clear and reasonably predictable guidelines for child support, child custody, and property division on dissolution of a marriage, same-sex couples who dissolve their relationships find themselves and their children in the highly unpredictable terrain of equity jurisdiction. *See E.N.O. v. L.M.M., supra.* Given the wide range of public benefits reserved only for married couples, we do not credit the department's contention that the absence of access to civil marriage amounts to little more than an inconvenience to same-sex couples and their children. Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of "a stable family structure in which children will be reared, educated, and socialized." *Post at (Cordy, J., dissenting).*²⁷

No one disputes that the plaintiff couples are families, that many are parents, and that the children they are raising, like all children, need and should have the fullest opportunity to grow up in a secure, protected family unit. Similarly, no one disputes that, under the rubric of marriage, the State provides a

²⁷ The claim that the constitutional rights to bear and raise a child are "not implicated or infringed" by the marriage ban, *post at (Cordy, J., dissenting)*, does not stand up to scrutiny. The absolute foreclosure of the marriage option for the class of parents and would-be parents at issue here imposes a heavy burden on their decision to have and raise children that is not suffered by any other class of parent.

cornucopia of substantial benefits to married parents and their children. The preferential treatment of civil marriage reflects the Legislature's conclusion that marriage "is the foremost setting for the education and socialization of children" precisely because it "encourages parents to remain committed to each other and to their children as they grow." *Post at (Cordy, J., dissenting)*.

In this case, we are confronted with an entire, sizeable class of parents raising children who have absolutely no access to civil marriage and its protections because they are forbidden from procuring a marriage license. It cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents' sexual orientation.

The third rationale advanced by the department is that limiting marriage to opposite-sex couples furthers the Legislature's interest in conserving scarce State and private financial resources. The marriage restriction is rational, it argues, because the General Court logically could assume that same-sex couples are more financially independent than married couples and thus less needy of public marital benefits, such as tax advantages, or private marital benefits, such as employer-financed health plans that include spouses in their coverage. An absolute statutory ban on same-sex marriage bears no rational relationship to the goal of economy. First, the department's conclusory generalization – that same-sex couples are less financially dependent on each other than opposite-sex couples – ignores that many same-sex couples, such as many of the plaintiffs in this case, have children and other dependents (here, aged parents) in their

care.²⁸ The department does not contend, nor could it, that these dependents are less needy or deserving than the dependents of married couples. Second, Massachusetts marriage laws do not condition receipt of public and private financial benefits to married individuals on a demonstration of financial dependence on each other; the benefits are available to married couples regardless of whether they mingle their finances or actually depend on each other for support.

The department suggests additional rationales for prohibiting same-sex couples from marrying, which are developed by some amici. It argues that broadening civil marriage to include same-sex couples will trivialize or destroy the institution of marriage as it has historically been fashioned. Certainly our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries. But it does not disturb the fundamental value of marriage in our society.

Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law. Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own

²⁸ It is also true that civil marriage creates legal dependency between spouses, which is simply not available to unmarried couples. See Part III A, *supra*.

race.²⁹ If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.³⁰

It has been argued that, due to the State's strong interest in the institution of marriage as a stabilizing social structure, only the Legislature can control and define its boundaries. Accordingly, our elected representatives legitimately may choose to exclude same-sex couples from civil marriage in order to assure all citizens of the Commonwealth that (1) the benefits of our marriage laws are available explicitly to create and support a family setting that is, in the Legislature's view, optimal for child rearing, and (2) the State does not endorse gay and lesbian parenthood as the equivalent

²⁹ Justice Cordy suggests that we have "transmuted the 'right' to marry into the right to change the institution of marriage itself," post at (Cordy, J., dissenting), because marriage is intimately tied to the reproductive systems of the marriage partners and to the "optimal" mother and father setting for child rearing. Post at (Cordy, J., dissenting). That analysis hews perilously close to the argument, long repudiated by the Legislature and the courts, that men and women are so innately and fundamentally different that their respective "proper spheres" can be rigidly and universally delineated. An abundance of legislative enactments and decisions of this court negate any such stereotypical premises.

³⁰ We are concerned only with the withholding of the benefits, protections, and obligations of civil marriage from a certain class of persons for invalid reasons. Our decision in no way limits the rights of individuals to refuse to marry persons of the same sex for religious or any other reasons. It in no way limits the personal freedom to disapprove of, or to encourage others to disapprove of, same-sex marriage. Our concern, rather, is whether historical, cultural, religious, or other reasons permit the State to impose limits on personal beliefs concerning whom a person should marry.

of being raised by one's married biological parents.³¹ These arguments miss the point. The Massachusetts Constitution requires that legislation meet certain criteria and not extend beyond certain limits. It is the function of courts to determine whether these criteria are met and whether these limits are exceeded. In most instances, these limits are defined by whether a rational basis exists to conclude that legislation will bring about a rational result. The Legislature in the first instance, and the courts in the last instance, must ascertain whether such a rational basis exists. To label the court's role as usurping that of the Legislature, *see, e.g., post at (Cordy, J., dissenting)*, is to misunderstand the nature and purpose of judicial review. We owe great deference to the Legislature to decide social and policy issues, but it is the traditional and settled

³¹ Justice Cordy's dissenting opinion, post at--and nn. 24-28 (Cordy, J., dissenting), makes much of the current "battle of the experts" concerning the possible long-term effects on children of being raised in households headed by same-sex parents. We presume that the Legislature is aware of these studies, *see Mutual Loan Co. v. Martell*, 200 Mass. 482, 487 (1909), *aff'd*, 222 U.S. 225 (1911), and has drawn the conclusion that a child's best interest is not harmed by being raised and nurtured by same-sex parents. *See G.L. c. 210, § 7. See also Adoption of Tammy*, 416 Mass. 205 (1993); 110 Code Mass. Regs. § 1.09(3) (2000) ("The Department [of Social Services] shall not deny to any person the opportunity to become an adoptive or foster parent, on the basis of the ... sexual orientation ... of the person, or of the child, involved"). Either the Legislature's openness to same-sex parenting is rational in light of its paramount interests in promoting children's well-being, or irrational in light of its so-called conclusion that a household headed by opposite-sex married parents is the "optimal" setting for raising children. *See post at (Cordy, J., dissenting)*. We give full credit to the Legislature for enacting a statutory scheme of child-related laws that is coherent, consistent, and harmonious. *See New England Div. of the Am. Cancer Soc'y v. Commissioner of Admin.*, 437 Mass. 172, 180 (2002).

role of courts to decide constitutional issues.³²

The history of constitutional law "is the story of the extension of constitutional rights and protections to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996) (*construing equal protection clause of the Fourteenth Amendment to prohibit categorical exclusion of women from public military institute*). This statement is as true in the area of civil marriage as in any other area of civil rights. See, e.g., *Turner v. Safley*, 482

³² If total deference to the Legislature were the case, the judiciary would be stripped of its constitutional authority to decide challenges to statutes pertaining to marriage, child rearing, and family relationships, and, conceivably, unconstitutional laws that provided for the forced sterilization of habitual criminals; prohibited miscegenation; required court approval for the marriage of persons with child support obligations; compelled a pregnant unmarried minor to obtain the consent of both parents before undergoing an abortion; and made sodomy a criminal offense, to name just a few, would stand. Indeed, every State court that has recently considered the issue we decide today has exercised its duty in the same way, by carefully scrutinizing the statutory ban on same-sex marriages in light of relevant State constitutional provisions. See *Brause vs. Bureau of Vital Statistics*, No. 3AN-95-6562CJ (Alaska Super.Ct., Feb. 27, 1998) (concluding marriage statute violated right to privacy provision in Alaska Constitution) (superseded by constitutional amendment, art. I, § 25 of the Constitution of Alaska); *Baehr v. Lewin*, 74 Haw. 530, 571-580 (1993) (concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanding case to lower court for further proceedings); *Baker v. State*, 170 Vt. 194, 197-198 (1999) (concluding marriage statute violated Vermont Constitution's common benefits clause). But see *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz.Ct.App.2003) (marriage statute does not violate liberty interests under either Federal or Arizona Constitution). See also *Halpern v. Toronto (City)*, 172 O.A.C. 276 (2003) (concluding marriage statute violated equal protection provisions of Canada's Charter of Rights and Freedoms); *Eagle Canada, Inc. v. Canada (Attorney Gen.)*, 13 B.C.L.R. (4th) 1 (2003) (same).

U.S. 78 (1987); Loving v. Virginia, 388 U.S. 1 (1967); *Perez v. Sharp*, 32 Cal.2d 711 (1948). As a public institution and a right of fundamental importance, civil marriage is an evolving paradigm. The common law was exceptionally harsh toward women who became wives: a woman's legal identity all but evaporated into that of her husband. See generally *C.P. Kindregan, Jr., & M.L. Inker, Family Law and Practice §§ 1.9 and 1.10 (3d ed.2002)*. Thus, one early Nineteenth Century jurist could observe matter of factly that, prior to the abolition of slavery in Massachusetts, "the condition of a slave resembled the connection of a wife with her husband, and of infant children with their father. He is obliged to maintain them, and they cannot be separated from him." *Winchendon v. Hatfield*, 4 Mass. 123, 129 (1808). But since at least the middle of the Nineteenth Century, both the courts and the Legislature have acted to ameliorate the harshness of the common-law regime. In *Bradford v. Worcester*, 184 Mass. 557, 562 (1904), we refused to apply the common-law rule that the wife's legal residence was that of her husband to defeat her claim to a municipal "settlement of paupers." In *Lewis v. Lewis*, 370 Mass. 619, 629 (1976), we abrogated the common-law doctrine immunizing a husband against certain suits because the common-law rule was predicated on "antediluvian assumptions concerning the role and status of women in marriage and in society." *Id. at 621*. Alarms about the imminent erosion of the "natural" order of marriage were sounded over the demise of antimiscegenation laws, the expansion of the rights of married women, and the introduction of "no-fault" divorce.³³

³³ One prominent historian of marriage notes, for example, that in the Nineteenth Century, the Reverend Theodore Woolsey led the charge against expanding the grounds for divorce, arguing that the "the only divinely approved (and therefore truly legitimate) reason for divorce was adultery" and that only the innocent party to a marriage terminated by

Marriage has survived all of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution.

We also reject the argument suggested by the department, and elaborated by some amici, that expanding the institution of civil marriage in Massachusetts to include same-sex couples will lead to interstate conflict. We would not presume to dictate how another State should respond to today's decision. But neither should considerations of comity prevent us from according Massachusetts residents the full measure of protection available under the Massachusetts Constitution. The genius of our Federal system is that each State's Constitution has vitality specific to its own traditions, and that, subject to the minimum requirements of the Fourteenth Amendment, each State is free to address difficult issues of individual liberty in the manner its own Constitution demands.

Several amici suggest that prohibiting marriage by same-sex couples reflects community consensus that homosexual conduct is immoral. Yet Massachusetts has a strong affirmative policy of preventing discrimination on the basis of sexual orientation. *See G.L. c. 151B (employment, housing, credit, services); G.L. c. 265, § 39 (hate crimes); G.L. c. 272, § 98 (public accommodation); G.L. c. 76, § 5 (public education)*. *See also, e.g., Commonwealth v. Balthazar, 366 Mass. 298 (1974) (decriminalization of private consensual adult conduct); Doe v. Doe, 16 Mass.App.Ct. 499, 503 (1983) (custody to homosexual parent not per se prohibited)*.

reason of adultery be permitted to remarry. Cott, *Public Vows: A History of Marriage and the Nation* 106 (2000). *See id.* at 44-45, for a general discussion of resistance to the demise of antimiscegenation laws.

The department has had more than ample opportunity to articulate a constitutionally adequate justification for limiting civil marriage to opposite-sex unions. It has failed to do so. The department has offered purported justifications for the civil marriage restriction that are starkly at odds with the comprehensive network of vigorous, gender-neutral laws promoting stable families and the best interests of children. It has failed to identify any relevant characteristic that would justify shutting the door to civil marriage to a person who wishes to marry someone of the same sex.

The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual.³⁴ "The

³⁴ It is not dispositive, for purposes of our constitutional analysis, whether the Legislature, at the time it incorporated the common-law definition of marriage into the first marriage laws nearly three centuries ago, did so with the intent of discriminating against or harming persons who wish to marry another of the same sex. We are not required to impute an invidious intent to the Legislature in determining that a statute of long standing has no applicability to present circumstances or violates the rights of individuals under the Massachusetts Constitution. That the Legislature may have intended what at the time of enactment was a perfectly reasonable form of discrimination--or a result not recognized as a form of discrimination--was not enough to salvage from later constitutional challenge laws burdening nonmarital children or denying women's equal partnership in marriage. *See, e.g., Trimble v. Gordon, 430 U.S. 762 (1977)* (nonmarital children); *Angelini v. OMD Corp., 410 Mass. 653, 662, 663 (1987)* ("The traditional common law rules

Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (construing Fourteenth Amendment). Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.

IV

We consider next the plaintiffs' request for relief. We preserve as much of the statute as may be preserved in the face of the successful constitutional challenge. See *Mayor of Boston v. Treasurer & Receiver Gen.*, 384 Mass. 718, 725 (1981); *Dalli v. Board of Educ.*, 358 Mass. 753, 759 (1971). See also G.L. c. 4, § 6, Eleventh.

Here, no one argues that striking down the marriage laws is an appropriate form of

which discriminated against children born out of wedlock have been discarded" and "[w]e have recognized that placing additional burdens on [nonmarital] children is unfair because they are not responsible for their [status]"); *Silvia v. Silvia*, 9 Mass.App.Ct. 339, 340-341 (1980) (there now exists "a comprehensive statutory and common law pattern which places marital and parental obligations on both the husband and wife"). We are concerned with the operation of challenged laws on the parties before us, and we do not inhibit our inquiry on the ground that a statute's original enactors had a benign or at the time constitutionally unassailable purpose. See *Colo v. Treasurer & Receiver Gen.*, 378 Mass. 550, 557 (1979), quoting *Walz v. Tax Comm'n of the City of N.Y.*, 397 U.S. 664, 678 (1970) ("the mere fact that a certain practice has gone unchallenged for a long period of time cannot alone immunize it from constitutional invalidity, 'even when that span of time covers our entire national existence and indeed predates it' "); *Merit Oil Co. v. Director of Div. on the Necessaries of Life*, 319 Mass. 301, 305 (1946) (constitutional contours of State's regulatory authority coextensive "with the changing needs of society").

relief. Eliminating civil marriage would be wholly inconsistent with the Legislature's deep commitment to fostering stable families and would dismantle a vital organizing principle of our society.³⁵ We face a problem similar to one that recently confronted the Court of Appeal for Ontario, the highest court of that Canadian province, when it considered the constitutionality of the same-sex marriage ban under Canada's Federal Constitution, the Charter of Rights and Freedoms (Charter). See *Halpern v. Toronto (City)*, 172 O.A.C. 276 (2003). Canada, like the United States, adopted the common law of England that civil marriage is "the voluntary union for life of one man and one woman, to the exclusion of all others." *Id. at, quoting Hyde v. Hyde*, [1861-1873] All E.R. 175 (1866). In holding that the limitation of civil marriage to opposite-sex couples violated the Charter, the Court of Appeal refined the common-law meaning of marriage. We concur with this remedy, which is entirely consonant with established principles of jurisprudence empowering a court to refine a common-law principle in light of evolving constitutional standards. See *Powers v. Wilkinson*, 399 Mass. 650,

³⁵ Similarly, no one argues that the restrictions on incestuous or polygamous marriages are so dependent on the marriage restriction that they too should fall if the marriage restriction falls. Nothing in our opinion today should be construed as relaxing or abrogating the consanguinity or polygamous prohibitions of our marriage laws. See G.L. c. 207, §§ 1, 2, and 4. Rather, the statutory provisions concerning consanguinity or polygamous marriages shall be construed in a gender neutral manner. See *Califano v. Westcott*, 443 U.S. 76, 92-93 (1979) (construing word "father" in unconstitutional, underinclusive provision to mean "parent"); *Browne's Case*, 322 Mass. 429, 430 (1948) (construing masculine pronoun "his" to include feminine pronoun "her"). See also G.L. c. 4, § 6, Fourth ("words of one gender may be construed to include the other gender and the neuter unless such construction would be "inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute").

661-662 (1987) (reforming the common-law rule of construction of "issue"); *Lewis v. Lewis*, 370 Mass. 619, 629 (1976) (abolishing common-law rule of certain interspousal immunity).

We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others. This reformulation redresses the plaintiffs' constitutional injury and furthers the aim of marriage to promote stable, exclusive relationships. It advances the two legitimate State interests the department has identified: providing a stable setting for child rearing and conserving State resources. It leaves intact the Legislature's broad discretion to regulate marriage. See *Commonwealth v. Stowell*, 389 Mass. 171, 175 (1983).

In their complaint the plaintiffs request only a declaration that their exclusion and the exclusion of other qualified same-sex couples from access to civil marriage violates Massachusetts law. We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution. We vacate the summary judgment for the department. We remand this case to the Superior Court for entry of judgment consistent with this opinion. Entry of judgment shall be stayed for 180 days to permit the Legislature to take such action as it may deem appropriate in light of this opinion. See, e.g., *Michaud v. Sheriff of Essex County*, 390 Mass. 523, 535-536 (1983).

So ordered

SPINA, J. (dissenting, with whom Sosman and Cordy, JJ., join): What is at stake in this case is not the unequal treatment of individuals or whether individual rights have

been impermissibly burdened, but the power of the Legislature to effectuate social change without interference from the courts, pursuant to art. 30 of the Massachusetts Declaration of Rights.³⁶ The power to regulate marriage lies with the Legislature, not with the judiciary. See *Commonwealth v. Stowell*, 389 Mass. 171, 175 (1983). Today, the court has transformed its role as protector of individual rights into the role of creator of rights, and I respectfully dissent.

1. Equal protection. Although the court did not address the plaintiffs' gender discrimination claim, G.L. c. 207 does not unconstitutionally discriminate on the basis of gender.³⁷ A claim of gender discrimination will lie where it is shown that differential treatment disadvantages one sex over the other. See *Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n*, 378 Mass. 342, 349-352 (1979). See also *United States v. Virginia*, 518 U.S. 515 (1996). General Laws c. 207 enumerates certain qualifications for obtaining a marriage license. It creates no distinction between the sexes, but applies to men and women in precisely the same way. It does not create any disadvantage identified with gender as both men and women are similarly limited to marrying a person of the opposite sex. See *Commonwealth v. King*, 374 Mass. 5, 15-22 (1977) (law prohibiting prostitution not discriminatory based on gender because of equal application to men and women).

³⁶ Article 30 of the Massachusetts Declaration of Rights provides that "the judicial [department] shall never exercise the legislative and executive powers ... to the end it may be a government of laws and not of men."

³⁷ Article 1 of the Massachusetts Declaration of Rights, as amended by art. 106 of the Amendments, the Equal Rights Amendment, states: "Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."

Similarly, the marriage statutes do not discriminate on the basis of sexual orientation. As the court correctly recognizes, constitutional protections are extended to individuals, not couples. *Ante n. 15*. The marriage statutes do not disqualify individuals on the basis of sexual orientation from entering into marriage. All individuals, with certain exceptions not relevant here, are free to marry. Whether an individual chooses not to marry because of sexual orientation or any other reason should be of no concern to the court.

The court concludes, however, that G.L. c. 207 unconstitutionally discriminates against the individual plaintiffs because it denies them the "right to marry the person of one's choice" where that person is of the same sex. *Ante at*. To reach this result the court relies on *Loving v. Virginia*, 388 U.S. 1, 12 (1967), and transforms "choice" into the essential element of the institution of marriage. The *Loving* case did not use the word "choice" in this manner, and it did not point to the result that the court reaches today. In *Loving*, the Supreme Court struck down as unconstitutional a statute that prohibited Caucasians from marrying non-Caucasians. It concluded that the statute was intended to preserve white supremacy and invidiously discriminated against non-Caucasians because of their race. *See id. at 11-12*. The "choice" to which the Supreme Court referred was the "choice to marry," and it concluded that with respect to the institution of marriage, the State had no compelling interest in limiting the choice to marry along racial lines. *Id.* The Supreme Court did not imply the existence of a right to marry a person of the same sex. To the same effect is *Perez v. Sharp*, 32 Cal.2d 711 (1948), on which the court also relies.

Unlike the *Loving* and *Sharp* cases, the Massachusetts Legislature has erected no

barrier to marriage that intentionally discriminates against anyone. Within the institution of marriage,³⁸ anyone is free to marry, with certain exceptions that are not challenged. In the absence of any discriminatory purpose, the State's marriage statutes do not violate principles of equal protection. *See Washington v. Davis*, 426 U.S. 229, 240 (1976) ("invidious quality of a law claimed to be ... discriminatory must ultimately be traced to a ... discriminatory purpose"); *Dickerson v. Attorney Gen.*, 396 Mass. 740, 743 (1986) (for purpose of equal protection analysis, standard of review under State and Federal Constitutions is identical). *See also Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n*, *supra*. This court should not have invoked even the most deferential standard of review within equal protection analysis because no individual was denied access to the institution of marriage.

2. Due process. The marriage statutes do not impermissibly burden a right protected by our constitutional guarantee of due process implicit in art. 10 of our Declaration of Rights. There is no restriction on the right of any plaintiff to enter into marriage. Each is free to marry a willing person of the opposite sex. *Cf. Zablocki v. Redhail*, 434 U.S. 374 (1978) (fundamental right to marry impermissibly burdened by statute requiring court approval when subject to child support order).

Substantive due process protects individual rights against unwarranted government intrusion. *See Aime v. Commonwealth*, 414 Mass. 667, 673 (1993). The court states, as we have said on many occasions, that the Massachusetts Declaration of Rights may protect a right in ways that exceed the

³⁸ Marriage is the civil union between a single man and a single woman. *See Milford v. Worcester*, 7 Mass. 48, 52 (1810).

protection afforded by the Federal Constitution. *Ante at. See Arizona v. Evans*, 514 U.S. 1, 8 (1995) (*State courts afforded broader protection of rights than granted by United States Constitution*). However, today the court does not fashion a remedy that affords greater protection of a right. Instead, using the rubric of due process it has redefined marriage.

Although art. 10 may afford greater protection of rights than the due process clause of the Fourteenth Amendment, our treatment of due process challenges adheres to the same standards followed in Federal due process analysis. *See Commonwealth v. Ellis*, 429 Mass. 362, 371 (1999). When analyzing a claim that the State has impermissibly burdened an individual's fundamental or other right or liberty interest, "[w]e begin by sketching the contours of the right asserted. We then inquire whether the challenged restriction burdens that right." *Moe v. Secretary of Admin. & Fin.*, 382 Mass. 629, 646 (1981). Where a right deemed "fundamental" is implicated, the challenged restriction will be upheld only if it is "narrowly tailored to further a legitimate and compelling governmental interest." *Aime v. Commonwealth*, *supra* at 673. To qualify as "fundamental" the asserted right must be "objectively, 'deeply rooted in this Nation's history and tradition,' [*Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (*plurality opinion*)] ... and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997), quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937) (*right to assisted suicide does not fall within fundamental right to refuse medical treatment because novel and unsupported by tradition*) (*citations omitted*). *See Three Juveniles v. Commonwealth*, 390 Mass. 357, 367 (1983)

(*O'Connor, J., dissenting*), *cert. denied sub nom. Keefe v. Massachusetts*, 465 U.S. 1068 (1984). Rights that are not considered fundamental merit due process protection if they have been irrationally burdened. *See Massachusetts Fed'n of Teachers v. Board of Educ.*, 436 Mass. 763, 777-779 & n. 14 (2002).

Although this court did not state that same-sex marriage is a fundamental right worthy of strict scrutiny protection, it nonetheless deemed it a constitutionally protected right by applying rational basis review. Before applying any level of constitutional analysis there must be a recognized right at stake. Same-sex marriage, or the "right to marry the person of one's choice" as the court today defines that right, does not fall within the fundamental right to marry. Same-sex marriage is not "deeply rooted in this Nation's history," and the court does not suggest that it is. Except for the occasional isolated decision in recent years, *see, e.g., Baker v. State*, 170 Vt. 194 (1999), same-sex marriage is not a right, fundamental or otherwise, recognized in this country. Just one example of the Legislature's refusal to recognize same-sex marriage can be found in a section of the legislation amending G.L. c. 151B to prohibit discrimination in the workplace on the basis of sexual orientation, which states: "Nothing in this act shall be construed so as to legitimize or validate a 'homosexual marriage'" *St.1989, c. 516, § 19*. In this Commonwealth and in this country, the roots of the institution of marriage are deeply set in history as a civil union between a single man and a single woman. There is no basis for the court to recognize same-sex marriage as a constitutionally protected right.

3. Remedy. The remedy that the court has fashioned both in the name of equal protection and due process exceeds the

bounds of judicial restraint mandated by art. 30. The remedy that construes gender specific language as gender neutral amounts to a statutory revision that replaces the intent of the Legislature with that of the court. Article 30 permits the court to apply principles of equal protection and to modify statutory language only if legislative intent is preserved. *See, e.g., Commonwealth v. Chou*, 433 Mass. 229, 238-239 (2001) (*judicial rewriting of gender language permissible only when Legislature intended to include both men and women*). *See also Lowell v. Kowalski*, 380 Mass. 663, 670 (1980). Here, the alteration of the gender-specific language alters precisely what the Legislature unambiguously intended to preserve, the marital rights of single men and women. Such a dramatic change in social institutions must remain at the behest of the people through the democratic process.

Where the application of equal protection principles do not permit rewriting a statute in a manner that preserves the intent of the Legislature, we do not rewrite the statute. In *Dalli v. Board of Educ.*, 358 Mass. 753 (1971), the court refused to rewrite a statute in a manner that would include unintended individuals. "To attempt to interpret this [statute] as including those in the category of the plaintiff would be to engage in a judicial enlargement of the clear statutory language beyond the limit of our judicial function. We have traditionally and consistently declined to trespass on legislative territory in deference to the time tested wisdom of the separation of powers as expressed in art. [30] of the Declaration of Rights of the Constitution of Massachusetts even when it appeared that a highly desirable and just result might thus be achieved." *Id. at 759*. Recently, in *Connors v. Boston*, 430 Mass. 31 (1999), we refused to expand health insurance coverage to

include domestic partners because such an expansion was within the province of the Legislature, where policy affecting family relationships is most appropriate and frequently considered. *Id. at 42-43*. Principles of equal protection do not permit the marriage statutes to be changed in the manner that we have seen today.

This court has previously exercised the judicial restraint mandated by art. 30 and declined to extend due process protection to rights not traditionally coveted, despite recognition of their social importance. *See Tobin's Case*, 424 Mass. 250, 252-253 (1997) (*receiving workers' compensation benefits not fundamental right*); *Doe v. Superintendent of Schs. of Worcester*, 421 Mass. 117, 129 (1995) (*declaring education not fundamental right*); *Williams v. Secretary of the Executive Office of Human Servs.*, 414 Mass. 551, 565 (1993) (*no fundamental right to receive mental health services*); *Matter of Tocci*, 413 Mass. 542, 548 n. 4 (1992) (*no fundamental right to practice law*); *Commonwealth v. Henry's Drywall Co.*, 366 Mass. 539, 542 (1974) (*no fundamental right to pursue one's business*). Courts have authority to recognize rights that are supported by the Constitution and history, but the power to create novel rights is reserved for the people through the democratic and legislative processes.

Likewise, the Supreme Court exercises restraint in the application of substantive due process "because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." [*Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).] By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore "exercise the utmost care whenever we are asked to break new ground

in this field,' *[id.]*, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court, *Moore [v. East Cleveland]*, 431 U.S. 494, 502 (1977)] (*plurality opinion*). " *Washington v. Glucksberg*, *supra* at 720.

relationship that homosexual persons seek to enter"). Ironically, by extending the marriage laws to same-sex couples the court has turned substantive due process on its head and used it to interject government into the plaintiffs' live.

The court has extruded a new right from principles of substantive due process, and in doing so it has distorted the meaning and purpose of due process. The purpose of substantive due process is to protect existing rights, not to create new rights. Its aim is to thwart government intrusion, not invite it. The court asserts that the Massachusetts Declaration of Rights serves to guard against government intrusion into each individual's sphere of privacy. *Ante at*. Similarly, the Supreme Court has called for increased due process protection when individual privacy and intimacy are threatened by unnecessary government imposition. *See, e.g., Lawrence v. Texas*, 123 S.Ct. 2472 (2003) (*private nature of sexual behavior implicates increased due process protection*); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (*privacy protection extended to procreation decisions within nonmarital context*); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (*due process invoked because of intimate nature of procreation decisions*). These cases, along with the Moe case, focus on the threat to privacy when government seeks to regulate the most intimate activity behind bedroom doors. The statute in question does not seek to regulate intimate activity within an intimate relationship, but merely gives formal recognition to a particular marriage. The State has respected the private lives of the plaintiffs, and has done nothing to intrude in the relationships that each of the plaintiff couples enjoy. *Cf. Lawrence v. Texas*, *supra* at 2484 (*case "does not involve whether the government must give formal recognition to any*