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October 20, 2005

TESTIMONY IN SUPPORT OF THE FEDERAL MARRIAGE AMENDMENT

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October 14, 2005

If I were drafting a slogan to assist opponents of the Federal Marriage Amendment in summarizing a key element in their position, I might suggest, "no big deal." (Or perhaps, "no great matter for national attention.") This slogan puts into a nutshell the cluster of assertions which have it that same-sex marriage initiatives are of importance only to those couples who may seek a same-sex-marriage license, do not have much effect on others, are of local or statewide interest exclusively, and do not merit national concern.

I am a resident of the only American jurisdiction which has adopted same-sex marriage. As a professor who writes and teaches on the subject of marriage, I have had occasion to examine the situation in Massachusetts and also in other jurisdictions which have legal provisions establishing same-sex marriage or similar institutions. The most obvious effects concern legal status: in Massachusetts, more than six thousand same-sex couples obtained marriage licenses during the first year of availability (about 20% of all licenses during that period). But my testimony is not primarily about the direct legal consequences; instead it relates to the social and moral effects that have begun to emerge. I am here to testify that these consequences are a significant matter and that they ought to raise grave concerns, both at the local and at the national level.

The practice of licensing same-sex couples as married has been in place in Massachusetts for only seventeen months. Plainly at this early moment we can only begin to surmise the full consequences of a development whose effects are sure to unfold across generations. We can, however, detect the fact that developments to date have been rapid and continue to accelerate in several important sectors of the social order. This testimony identifies several of these developments, in Massachusetts and also to some extent in other jurisdictions which have traveled a similar path. It concludes that these developments are neither small nor exclusively local and that they merit the concern and attention of the nation as a whole.

I. THE SOCIAL AND MORAL CONSEQUENCES OF THE RECOGNITION OF SAME-SEX MARRIAGE

The decision of the Supreme Judicial Court in *Goodridge v. Department of Public Health*

brought about the recognition of same-sex marriage (hereinafter referred to as "SSM") in Massachusetts effective in May of 2004. As the effective date approached, Thomas W. Payzant, Superintendent of the Boston Public Schools, issued a memorandum to the Boston School System. This memorandum is attached as an exhibit to this testimony. It states that "[t]his is a historic moment in our Commonwealth and in our country" and that the Goodridge decision "has had, and continues to have, a profound impact on our civil life and discourse."

1. Effects in the Public Schools. - One sector in which this effect is already pronounced is that of education. As Superintendent Payzant's memorandum states, the "profound impact" of same-sex marriage "filters through our society and our schools."

As it filters through the schools it suppresses and chills debate and discussion. Superintendent Payzant in his memorandum warns grimly that he has "received some reports of inappropriate . . . speech." He continues:

"It is important at this time, therefore, to reiterate our zero-tolerance policy, and to reinforce a message of respect for the law and for the differences and choices represented among our school population.

"Administrators, teachers, parents and students are reminded that no action or speech will be tolerated that results in harassment, discrimination, bias or intimidation toward any member of our community for any reason, including his/her sexual orientation or perceived sexual orientation. We urge school staff to report and act promptly on any incidents that may create a climate of intolerance in our schools. Such incidents will be considered a serious violation of the BPS Code of Discipline and of accepted standards of professional behavior, and will result in discipline up to and including expulsion of the responsible student or termination of the offending employee."

After this, what would you advise a teacher who was conducting a class discussion? What would you advise a teacher who was advising a student with concerns about his social life? Observe: "no . . . speech will be tolerated that results in ... discrimination [or] bias." A teacher would take her career into her hands by encouraging an examination of the cons as well as the pros of SSM, or even of same-sex activities outside of marriage. The way the memorandum is drafted, she violates the rules even if she has no bias; all she need do is say something that causes someone else to develop bias. If the teacher says nothing at all, she still may have to worry about an obligation to blow the whistle if one of her students says something unpleasant ("report and act promptly on any incidents that may create a climate of intolerance"). And as to advising a student about concerns in his social life, the mind boggles. He better not exhibit bias in the way he conducts it.

Beyond chilling discussion and debate as to the negative aspects and the contra-SSM position, the effect of this social movement is to encourage the introduction of vivid and sometimes graphic presentation of various sexual practices. The following is an excerpt from the National Public Radio program All Things Considered in which an eighth-grade teacher in a public school in the Boston area testifies:

"[Teacher] In my mind, I know that, `OK, this is legal now.' If somebody wants to challenge me, I'll say, `Give me a break. It's legal now.'

"SMITH: And, [she] says, teaching about homosexuality is also more important now. She says the debate around gay marriage is prompting kids to ask a lot more questions, like what is gay sex, which [she] answers thoroughly and explicitly with a chart.

"[Teacher]: And on the side, I'm going to draw some different activities, like kissing and hugging, and different kinds of intercourse. All right?

"SMITH: [She] asks her students to fill in the chart with yeses and nos.

"[Teacher]: All right. So can a woman and a woman kiss and hug? Yes. Can a woman and a woman have vaginal intercourse, and they will all say no. And I'll say, `Hold it. Of course, they can. They can use a sex toy.

. . . [A]nd we talk--and we discuss that."

The effect of the Goodridge decision has been to encourage the indoctrination of public school students in the merits of legalization of SSM. Thus Superintendent Payzant's memorandum exhorts the Boston Public School teachers to use "this historic moment" as:

"[An] opportunity to help our students understand it as a vital manifestation of some of the principles that have shaped our system of government - such as rule of law, balance of powers, and separation of church and state - as well as another step in our continuing efforts to create a more just society for all of our citizens."

In other SSM jurisdictions, similar pressures have been felt:

"In the wake of Canada's legalization of same-sex marriage, a human-rights complaint has been filed in British Columbia alleging the absence of pro-homosexual instruction in public schools is a denial of equal treatment.

The development underscores the concerns of same-sex marriage opponents in the United States who argue legalization would force schools to teach about homosexual behavior as a positive, alternative lifestyle for children.

Murray and Peter Corren, who were given a marriage license last July, concede the province-wide curriculum is not anti-homosexual, but complain its omissions have the effect of 'enforcing the assumption that all people are or should be heterosexual.'

"'Basically, there is systemic discrimination through omission and suppression of queer issues in the whole of the curriculum,' said Murray Corren in an interview with the Vancouver Sun.

"Corren, an elementary school teacher in Coquitlam, B.C., said that with the legalization of same-sex marriage, the education ministry needs to update its approach to issues surrounding homosexuality.

"[The issues of same-sex marriage and gay rights] are going to come into the classrooms, whether people like it or not,' Corren told the Sun. 'It's a fact, it's a reality now in Canada.'

"Corren says the province's social studies curriculum refers to aboriginals, women and multiculturalism, but has no mention of what Corren defines as the 'queer population,' the Vancouver paper said.

"He wants that changed to include: 'Queer history and historical figures, the presences of positive queer role models . . . the contributions made by queers to various epochs, societies and civilizations, and legal issues relating to [lesbian, gay, bisexual, transgendered] people, same-sex marriage and adoption.'"

2. Effects as regards Parental Authority over Education. - Inevitably initiatives such as those described above bring school administrators into conflict with concerned parents. This sort of conflict is vividly illustrated by the case of David Parker, a father who became concerned when he found that his five-year-old son had been given a book which dealt with same-sex parenting as part of the educational program of the Lexington, Massachusetts Public School system. School officials refused to assure Mr. Parker that he would receive notice before his son was exposed to further presentations along these lines. Discussions apparently broke down; Mr. Parker refused to leave; officials called the police; and Mr. Parker was arrested and spent the night in jail. And, in a less dramatic confrontation which did not result in an arrest, Newton parents were ejected from school grounds where they were recording a "gay pride" presentation.

It would be incorrect to say that those of us who have children in Massachusetts public schools go about in fear of arrest, but it is the case that same-sex-relationship educational programs lead almost inevitably to a situation of tension and adversity between teachers and school officials, on the one hand, and those numerous parents who adhere to ethical beliefs and belong to religious communities which disfavor those practices, on the other. The situation bears close comparison with that of abortion, which, like same-sex marriage, was imposed by the courts against the wishes of many Americans, and in conflict with the religion and morality by which most citizens have been guided, and which has therefore been made available through school clinics without parental involvement.

Under those circumstances, the incentive is great for school systems to be reticent or less than candid about their programs. Last year the reporter for the local newspaper, the Newton Tab, was ejected from among those observing a "gay pride" presentation on the grounds of a Newton, Massachusetts school. And ensuing upon the Parker arrest, school official William J. Hurley wrote to Parker: "If you are found on Lexington public schools' properties you will be subject to arrest by the Lexington police Access to school properties can only be accomplished with prior written authorization from the superintendent of schools or his designee." More recently, the Lexington Superintendent of Schools has issued a memorandum which acknowledges that

"some parents have requested they be notified whenever their child has access to any material, conversation, or activity that acknowledges differences in sexual orientation, including any reference to families with same-gender parents"

but then goes on to rule that:

"[S]taff has no obligation to notify parents of discussions, activities, or materials that simply reference same-gender parents or that otherwise recognize the existence of differences in sexual orientation. Accordingly, I expect teachers to continue to allow children access to such activities and materials to the extent appropriate to children's ages, to district goals of respecting diversity, and to the curriculum."

It is not unlikely that just as courts have extended the right to abortion to the point of striking down parental consent laws, so also they might extend a right to same-sex relationships to the point of striking down provisions protecting a parent's access to information and a parent's right to influence school activities in this area. The Federal Marriage Amendment would help protect against this further erosion of parental rights.

3. The Deconstruction of the Intellectual and Social Definition of Marriage. -- More fundamentally, the Goodridge decision and others like it project what might almost be called a theory of marriage, or at least a certain "take" on how to think about that institution and what it means. That "profound impact on our civil life and discourse" to which Superintendent Payzant portentously referred would include an impact not only on practice but on thought and belief as well.

The marital morality of Goodridge and other same-sex marriage authorities displays several important features. The first might be called "positivism": the view that things all come down to the mandates of the State. The Goodridge court announced:

"[T]he terms of marriage - who may marry and what obligations, benefits, and liabilities attach to civil marriage - are set by the Commonwealth."

"[T]he government creates civil marriage."

Statements like these close the door firmly on the nonpositive roots of the institution of marriage and on nonpositive, extra-state authorities for defining and understanding it; sources widely relied on in judicial authorities until recent decades, namely custom, nature, tradition, and religion. Indeed, statements in some SSM cases bluntly excoriate the marital beliefs of the citizenry. "[R]ooted in persistent prejudices," concludes the Goodridge court. "[R]epugnant," states an Ontario court. "[L]ike it or not," a Hawaii court announced, "constitutional law may mandate ... that customs change."

The second feature of the SSM authorities might be called "deconstruction." This feature arises from the circumstance that Massachusetts has adopted no comprehensive definition of marriage, either as a matter of the common law or as a matter of statute; people here generally understood what marriage meant through custom, tradition, religion, and morality. Goodridge called everything into question, put everything up for

litigation and challenge, and closed the door on the most obvious bases for reaching a solution. Marriage is something defined by the state, we are told; but then the state does not define it.

A third feature of some judicial authorities in this area is a derogatory attitude towards moral normativity. The Goodridge court referred to the desirability of "defin[ing] the liberty of all, not . . . mandat[ing] our own moral code." Justice O'Connor's concurring opinion in *Laurence v. Texas* seeks "other reasons . . . to promote the institution of marriage beyond mere moral disapproval of an excluded group" (turning, instead, to "state interest"). Note that this third feature is not merely an extension of the first: it seems to be not only social morals, or religious morals, or objective ethical morals which are to be avoided, but even positive, legal moralizing ("our own" moral order). Fixed standards of conduct are to be generally suspect, it seems, and subject to derogation when they conflict - as they almost always do - with liberty very broadly defined as "'the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.'" Law survives only in those (undefined and shifting) circumstances in which it serves the "interests" of the state.

The fourth feature, inevitably, is confusion and the possibility of infinite malleability in the meaning and conduct of marriage, both socially and as a matter of law. "[C]ivil marriage," the Goodridge court announces in its opinion, "is an evolving paradigm."

Last summer in Toronto, two heterosexual men, still heterosexual, each still interested in finding a woman to love, decided to take advantage of that jurisdiction's SSM law and marry one another. (For the tax advantage, they said). They have been advised by counsel that they are eligible to do so. SSM authorities say little or nothing about the purposes and activities which couples need to perform or intend.

Not only SSM but also heterosexual marriage and the terms which define the traditional family tumble into this post-modern void. The barriers between marriage and cohabitation collapse. The furthest extension to date may appear in a recent provision in Ontario where the legislature, under the prodding of a judicial mandate to revise marriage-related terminology in its statutes, has redefined "spouse" to include people who are not married. See Bill 56 (2004), amending the Employment Standards Act to make the term "spouse" include:

"either of two persons which . . . live together in a conjugal relationship outside of marriage."

Your spouse might be someone you are not married to? The ultimate social consequence of the SSM authorities may be the destruction of the sense of the ridiculous.

The trajectory leads on to the recognition of all sorts of "pair-bonded" structures -- including those intended to be temporary rather than permanent. It implies the "nonjudgmental" attitude recommended by a sociologist:

"[Policymakers] could attempt to create policies to support and help people in what ever type of social structures they create, giving equal credence and respect to divorced and married people, cohabiting and married couples, to children born out of wedlock and children born to married couples, and to married and unmarried parents.

". . . [S]ocial policies need to support people as they enter into, reside within, and move to whatever pair-bond structures fit their needs and goals. . . . Social policies must be based on respect for people's right to choose . . . to live . . . within any particular pair-bond structure."

And there seems to be no reason why only pairs should be supported and recognized. Polygamy - the absurdity to which SSM advocates resisted being reduced in argument even a year or two ago - has recently come to be treated by leading authorities as eligible for legal recognition. A respected Boston columnist sees it on the horizon. The head of the ACLU now favors its protection.

4. The Degradation and Destabilization of Marriage. - As legal authorities and social policy makers lose their grasp on any coherent and common understanding of marriage, that institution forfeits its definitive status as a matter of general opinion and social practice as well. Marriage becomes harder and harder to distinguish from nonmarital cohabitation. Custom, tradition, and religion may be ruled out as determinative and the slight definitive language in the SSM authorities is unhelpful. Both kinds of relationship are based on "choice." The most vivid example is afforded by the Ontario amendment, quoted above, which makes one of the Ontario statutes define "spouse" to include people who are not married.

In Denmark, where SSM-type provisions have been in place for many years, cohabitation is now a "normatively accepted option." The practice has increased in frequency.

5. The Degradation and Destabilization of the Family. - In America and other countries, cohabitation often leads to family turbulence and parental split-ups. Authorities note:

"Fully three-quarters of children born to cohabiting couples are likely to see their parents split up before they reach age sixteen, whereas only about a third of children born to married parents face a similar fate."

"Cohabiting is not the functional equivalent of marriage. . . . Children with cohabiting parents have outcomes more similar to the children living with single (or remarried) parents than children from intact marriages. . . . Couples who live together . . . report relationships of lower quality than do married couples - with cohabiters reporting more conflict, more violence and lower levels of satisfaction and commitment."

Following parental split-ups, children are often raised by reconstituted couples, preponderantly by their biological mother and her new partner. "A large body of social scientific evidence now shows that the risk of physical or sexual abuse rises dramatically when children are cared for in the home by adults unrelated to them, with children being especially at risk when left at home with their mothers' boyfriends."

II. RECOGNITION OF SAME-SEX MARRIAGE IS AN APPROPRIATE SUBJECT OF COMMON CONCERN AND ACTION BY THE AMERICAN PEOPLE, AND NECESSITATES ADOPTION OF THE FEDERAL MARRIAGE AMENDMENT.

When one state licenses same-sex unions the consequences inevitably flow over to the others. This is most obviously the case with regard to direct legal consequences. Same-sex partners change residence and litigation ensues as to family-law issues. The following passages from a news story in the Washington Post illustrate such a situation:

"It is a painfully familiar story with a modern twist: A young couple fall in love, exchange vows and become parents. They later decide to part, with the custody of the child left for a court to determine.

"Lisa Miller and Janet Jenkins were joined in a civil union in Vermont in 2000, merged their last names, and two years later moved from Virginia to this small town in the western part of the state to begin a new life.

"Today they are embroiled in an acrimonious tug of war over a 2-year-old girl named Isabella, a case that legal experts say is the most significant custody battle to emerge since same-sex civil unions were established here four years ago and a test of the viability of marriage laws that vary from state to state.

"With more than 7,000 gay couples having formed civil unions in Vermont since 2000 and thousands more married in Massachusetts since such unions became legal there in May, what happens to children when such relationships end is an unsettled legal question. Opponents have long argued that relationships sanctioned by some states and not others make for legal chaos and confusion.

"This is the first of what I imagine will be a long train of cases for gays and lesbians all over the United States testing the idea of whether legal rights they've won in certain states are going to be recognized in other jurisdictions,' said Joseph R. Price, an attorney for Janet Miller-Jenkins and the chairman of Equality Virginia, a gay rights advocacy group."

When a single state or a small minority of states gets off the same page as the rest of the country as regards who is married and who is not, the dislocation and disorder extends beyond specifically legal areas and becomes a matter of social discontinuity as well. In the custody dispute described above, Vermont social-action groups on both sides of the issue have weighed in, with at least one of them engaging in a major fundraiser over the matter. It is a social conflict which, just as attorney Price is quoted as predicting, is likely to be fought out in "a long train of cases for gays and lesbians all over the United States."

When a state gets off the same page as the rest of the country as regards fundamental marital and sexual morality, and comes to indoctrinate children in ways that are anathema elsewhere; when a state begins to exclude or even prohibit the presentation of opinions which are not only acceptable but common and commonsensical in the minds of the rest of the country; and when a state goes even further along the road and develops a morality and jurisprudence of marital relationships which is unstable and divergent from tradition, it is appropriate to bring the matter forward for national discussion and common resolution. A nation cannot maintain a coherent social order while operating two marital systems.

This testimony has laid out in detail some of the social and moral changes which are ensuing upon the recognition of same-sex marriage in Massachusetts and other SSM jurisdictions. This should show some of the reasons why the United States of America needs the Federal Marriage Amendment.