



# the need for full recognition of same-sex marriage

by charlene gomes

†his summer has been monumental for gay rights. First, on June 17, 2003, the Canadian government indicated acceptance of same-sex marriages when it chose not to appeal an Ontario provincial court decision that allowed gay marriage. British Columbia followed Ontario by legalizing same-sex marriages in the province on July 8. The Canadian government plans to draft legislation to fully legalize same-sex unions soon. On June 26 the U.S. Supreme Court ruled in *Lawrence v. Texas* that states may not outlaw “sexual practices common to a homosexual lifestyle,” striking down a Texas law which had prohibited homosexual acts of oral and anal sex. And now a case to legalize same-sex marriages is pending in the Massachusetts Supreme Court, with a decision expected any day.

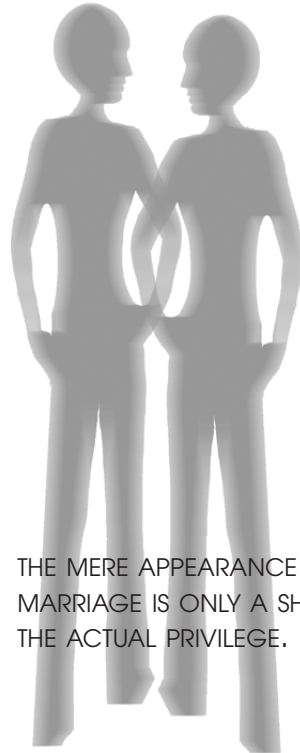
Many legal scholars—conservative and liberal alike—believe reconsideration of official government recognition of same-sex marriages is not far behind. Yet in response to these developments, President George W. Bush has come out strongly opposed to the prospect of same-sex marriage. In a July 30 press conference—his first since early March—he stated, “I believe marriage is between a man and a woman, and I believe we ought to codify that one way or the other, and we have lawyers looking at the best way to do that.”

Yet within U.S. history, the concept of marriage has evolved significantly in two other ways: women, traditionally considered the property of their husbands, eventually became full persons in the eyes of the law and gained the right to own property themselves; and antimiscegenation laws, which had prohibited or refused to recognize interracial marriages, were struck down. What seemingly has remained constant—until now—is the definition of marriage as a union between one man and one woman. Yet contrary to even this assumption, at least a handful of states has never limited marriage to unions between a man and a woman, instead defining marriage using gender-neutral language.

The time has come to expand marriage to include same-sex couples. Recent census data reveal that the number of committed same-sex couples in the United States continues to rise, as does the number of same-sex couples raising children. Legal recognition of these relationships is vital to protecting the emotional and economic well-being of these families. Furthermore, legal recognition must be on an equal plane with heterosexual marriage—“separate but equal” is never equal.

Most human beings at some point in their lives desire to share their fortunes and misfortunes with a partner with whom they have formed lasting bonds, desire to provide emotional stability and economic security for their loved ones, desire to feel secure in the knowledge that their loved ones’ emotional and economic security are protected by law. Some also desire to raise a family. In this respect, as in many others, gays and lesbians are no different from heterosexuals.

No state currently recognizes same-sex marriages, despite the fact that approximately 34 percent of lesbian and 22 percent of gay male couples are raising children under the age of eighteen. And some argue that if gay couples are going to solemnize their partnerships; present themselves to the community, friends, and family as married; and raise children even without state recognition; then what is to be gained by changing the laws to allow them true marital status? The answer is that the mere appearance of marriage is only a shadow of the actual privilege. The harm of this pantomime manifests itself in two significant areas: denying the life partner the benefits and protections afforded to a legal spouse; and interfering with the best interests of children by treating gay families differently than nongay families.



THE MERE APPEARANCE OF MARRIAGE IS ONLY A SHADOW OF THE ACTUAL PRIVILEGE.

Vermont has come closer than any other state to recognizing gay marriage. On April 25, 2000, the Vermont legislature enacted a bill allowing gay couples to form civil unions that carry many, but not all, of the benefits and responsibilities of traditional marriages. The legislation essentially creates a separate system of benefits for gay couples opting to form civil unions apart from the usual benefits accorded married couples. But these benefits are available only to registered couples in Vermont, and the state has no power to confer any of the numerous federal marriage benefits to these families.

In considering how the denial of full marital status harms same-sex couples, Vermont legislators enumerated a long list of benefits and protections arising out of the marriage contract. These include: the right to inherit from a partner in the absence of a will, the right to bring a lawsuit for wrongful death of a spouse, the right to workers' compensation and other spousal economic benefits, the right to refrain from revealing marital communications in a lawsuit, the presumption of joint ownership of property, the ability to adopt a partner's child, and medical treatment and hospital visitation rights. The list goes on and on.

Some of these rights, such as creating a power of attorney, can be recreated through private contracts; however the law reserves many of these rights for a spouse only. Furthermore, the practice of contracting rights is time consuming, expensive, and far from "equal" to rights bearing the imprimatur of state or federal law. For example, the Family and Medical Leave Act, which provides leave to care for children, spouses, and parents, makes no provision for unmarried partners.

### benefits and protections

Laws governing the marital relationship generally fall into two categories: those recognizing an emotional relationship and those recognizing an economic relationship. All states recognize statutes or common law doctrines that grant decision-making powers to relatives when someone becomes incompetent to make personal decisions. Generally the law will look to a parent or child if the incompetent person is unmarried. If the person is married, the law looks first to the spouse. Some states have broader laws that provide for the appointment of a guardian or conservator who in addition to making medical decisions has the ability to make decisions about care, residence, and financial matters. State laws also grant the spouse part or all of a married person's assets if he or she dies without a will (intestate). Conversely the number of states conferring preferred decision-maker status or a portion of the intestate estate to a same-sex life partner can be counted on one hand.

The resulting harm is obvious: though these laws were created to protect the incompetent person's interests and maintain privacy and respect for relationships, in the case of same-sex couples these protections are left to the whim of third parties. These are often the same parents, siblings, and children who have lived estranged from the gay person and who stand to benefit from what the life partner loses. Furthermore, biological relations can possibly exploit the homosexual relationship by alleging that the life partner had undue influence where a will and/or power of attorney was executed, or by alleging that the mere existence of the homosexual relationship was a symptom of incompetence.

The greater part of laws regulating the economic relationship of married couples treats the couple as a

single economic unit. Particularly in the last fifty or so years, marriage has served to protect the more economically dependent spouse. These laws are based on the assumption that married couples pool their assets and determine expenditures based on mutual benefit without regard for which spouse earned the money. That this method is more efficient than an apportionment scheme is elementary. It isn't surprising therefore that similar asset pooling has been documented in long-term same-sex relationships; yet these couples lack the legal protections of married couples.

Other laws recognize that one spouse is often economically dependent on the other. Social Security benefits and gift and estate taxes operate on this principle. Additionally, public and private employers often make health care benefits available to employee spouses, and federal and state income tax laws exempt the value of benefits for the non-working spouse. Although some employers provide health care benefits to same-sex partners, the coverage isn't subject to tax exemption.

One more area of the law is worth noting—laws regulating the distribution of property among married couples. Most states operate under a “common law” rule whereby the couple jointly owns whatever property is purchased in both of their names and separately whatever is in their individual names. A handful of states have “community property” laws in which the spouses separately own whatever they bring into the marriage or receive by gift or bequest during the marriage and jointly own assets acquired during marriage. Regardless of which regimen a state follows, a scripted form of allocation that creates expectation and certainty within the marital unit is fundamental. In the event of a breakup, same-sex couples must either leave property distribution to chance or enter into a private agreement that may or may not be legally enforceable.

Situations in which one life partner is economically dependent upon the other are similarly uncertain. As laws regulating alimony or maintenance payments are relevant only to divorced spouses, the economic status of the lower-wage earning same-sex partner isn't pro-

tected.

### children

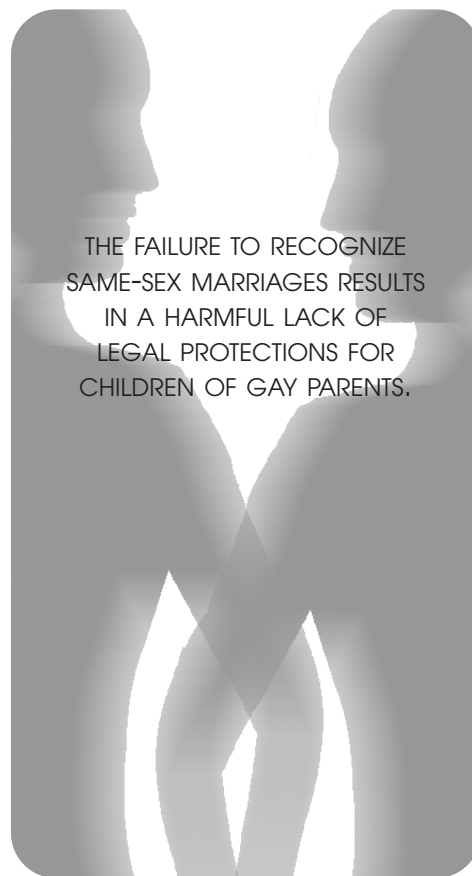
The failure to recognize same-sex marriage and to allow adoption by nonbiological life partners results in a harmful lack of legal protections for children of gay parents. Nonbiological same-sex partners can most easily be compared with stepparents in heterosexual marriages. Like the same-sex partner, the stepparent has no biological link to the child. Stepparents and their stepchildren enjoy many, though not all, of the benefits and protections of biological parents. Increasingly, courts and legislatures have recognized the importance of maintaining a relationship between the stepparent and stepchild when the marriage dissolves by allowing the stepparent to petition for visitation and in some cases even custody.

Yet stepparents still have more rights than same-sex parents. If the noncustodial biological parent consents, stepparents may adopt children. Same-sex parents in the same situation are required extensive home visits and family studies, if the practice is allowed at all.

If the nonbiological partner is unable to establish a legal relationship with the child, the child can potentially suffer unduly should the relationship dissolve or the biological parent die. For example, the child wouldn't be entitled to financial support from the nonbiological partner, nor will the child have inheritance rights if the nonbiological partner dies without a will.

The child will often suffer emotionally as well. Without a legal relationship, the nonbiological partner has no right to seek custody or visitation, no right to consent to medical treatment of

the child in an emergency, and no right to attend parent-teacher conferences or otherwise be involved in the child's day-to-day life and development. Needless to say, removing one parent unilaterally from a child's life can have serious emotional repercussions when the child has come to rely on that parent's presence and involvement. This starkly contrasts with laws recognizing a married man as the legal parent of any child born to his wife during the marriage regardless



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of any biological relationship between the father and the child—actual paternity doesn't have to be proved. In addition, parents of a same sex partner can be denied legal grandparent status if their child's relationship to a same-sex partner and nonbiological child isn't legally recognized.

Although some state workers' compensation programs and the federal Social Security survivor benefit program now permit minor stepchildren living with and dependent upon a stepparent to receive benefits after the stepparent's death, this isn't the case for children of a nonbiological gay parent.

Extending these benefits and protections to same-sex couples by legally legitimizing their relationships would ensure that their children are treated equally to children of heterosexual married couples. The present practice of denying these children protection is similar to earlier draconian laws penalizing illegitimate children for the "sins" of their parents. This nation has since recognized that children are a national treasure and hold the future in their hands; they shouldn't be discriminated against simply because they are the children of an unpopular minority. The benefits of according these protections to all children easily outweigh third parties' unfounded disapproval of homosexuality.

### marriage versus civil unions

It thus follows that civil unions simply aren't good enough. Although civil unions and domestic partnership protections offer important benefits to families which cannot marry, only a true civil marriage provides complete equality at the state and federal level. This includes: the ability to enter into a legally recognized relationship in any jurisdiction; the ability to move freely throughout the country with the assurance that the rela-

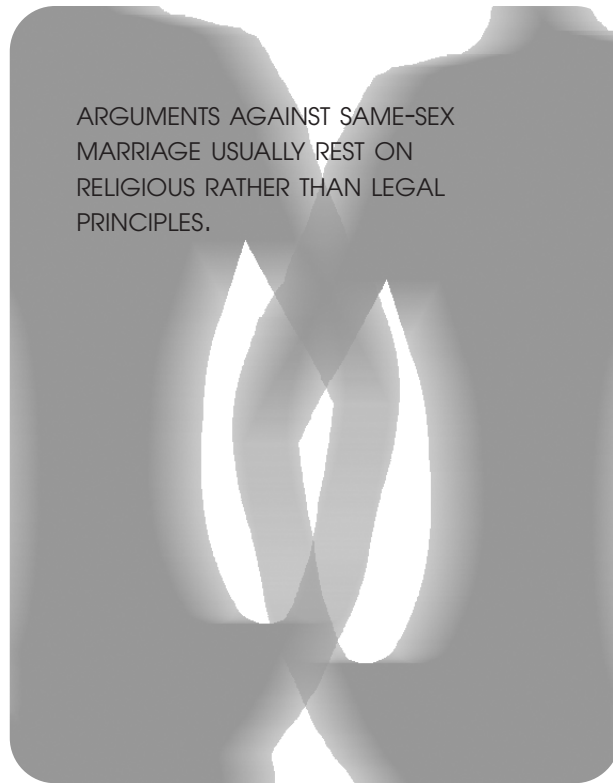
tionship's legality will be recognized; the availability and protection, according to the General Accounting Office, of more than one thousand federal laws; and other policies that benefit married couples including social security, inheritance in the absence of a will, the right to file joint taxes and take family leave, and the right to sponsor a partner for immigration.

In August 2002 the New York City Council passed a law recognizing same-sex domestic partnerships, civil unions, and marriages legally formed in other jurisdictions. The law recognizes the previously registered partnerships and unions of same-sex couples moving into New York City, affording the relationship the same full faith and credit that married heterosexual couples receive everywhere in the United States.

With the exception of New York City, however, Vermont civil unions will most likely lose some or all of their benefits should the couple move to another state. Recognition of domestic partnership benefits is also limited to the locality where it was registered. Civil unions and domestic partnerships confer only the enumerated benefits and protections of the state or locality recognizing the relationship. No federal rights, responsibilities, or protections are conferred.

### arguments against same-sex marriage

Arguments against same-sex marriage usually focus on the sanctity of marriage as a procreative union between a man and a woman. Indeed, Bush is so opposed to same-sex marriages because, as he explains, "I believe in the sanctity of marriage." This position assumes that the marriage relationship has been static since time began. But this isn't the case. Initially, married women were treated as chattel owned and controlled by their husbands. Likewise, antimiscegenation laws prohibited interracial marriages. At one point no-fault divorces didn't exist, and the dissolution of marriage was much more difficult to obtain and carried a great stigma, especially for women.



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Furthermore, arguments against same-sex marriage usually rest on religious rather than legal principles. Civil marriages have always existed outside of and apart from marital unions receiving the blessing of any religious institution. Today at least a handful of religions—Reform Judaism, Unitarian Universalism, and some sects of Buddhism—openly support gay marriage and regularly perform commitment ceremonies, which indicates that any foundation for a unified religious objection to same-sex marriage is slipping away.

A popular argument propounded by conservatives is that a host of social ills will result from legal recognition of gay marriage. The most frequently cited is the proposition that, if states allow gays to marry, the definition of *marriage* itself will be altered beyond recognition, and all types of “marriages” would have to be recognized, including bigamous marriages, incestuous marriages, and marriages between humans and animals. Many groups hold this position, most notably the Family Research Council and Gary Bauer’s Campaign for Working Families.

U.S. Supreme Court Justice Antonin Scalia, in his dissenting opinion for *Lawrence*, echoes these sentiments: “State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are...called into question by today’s decision.” Senator Rick Santorum (Republican, Pennsylvania) also recently advocated this mentality during an Associated Press interview when he compared homosexuality to pedophilia and bestiality. Santorum incorrectly stated, “Every society in the history of man has upheld the institution of marriage as a bond between a man and a woman. Why? Because society is based on one thing: that society is based on the future of the society. And that’s what? Children.”

Santorum needs to do his homework. Many societies have traditions of recognizing and supporting families outside of the heterosexual/child-rearing model. The important role of the *berdache* in many Native American nations provides a useful example. Berdache typically were men who dressed as and performed the roles of women but also acted as healers and spiritual leaders, integral to everything from childrearing to mediating disputes between tribal members. Berdache often entered into marriages with other men in the tribe and sometimes with female warriors who had “proven” to be men through their fighting skills. Several tribes also recognized women who filled similar gender-bending roles. In all cases, a berdache was a valued and important member of the tribe, contributing greatly to its success and ability to survive.

The apocalyptic predictions put forward by

Santorum and conservative groups are absurd. As surely as states have for all these years restricted legal marriage to one man and one woman, they just as easily can extend marriage to encompass same-sex couples and nothing else. Life partnerships and childrearing between consenting adults are experiences that contribute to quality of life and enjoyment of full personhood.

### laws against same-sex marriage

Two additional methods are commonly used to attack the legalization of same-sex marriage: “sodomy” laws and the Defense of Marriage Act (DOMA). Sodomy statutes are problematic for a number of reasons—they are of biblical origin, constitute a uniquely tolerated intrusion on privacy, are intended to regulate “morality,” and are discriminatorily enforced against same-sex couples. Sodomy statutes are based on the premise that the state has a vested interest in promoting marriage as a forum for procreation and child-rearing. These statutes against anal and oral sex have been raised in the past as a



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fall-back should the argument against retaining the current definition of marriage fail. Yet all of these arguments are weak because they are based on outdated ideas about sexual relations and marriage.