

## Marriage and Civil Partnership for Same-Sex Couples: The International Imperative

KENNETH MCK. NORRIE \*

### INTRODUCTION

Within the single month of November 2004, Saskatchewan became the latest Canadian province to accept same-sex marriage,<sup>1</sup> South Africa's Supreme Court of Appeal held the limitation of marriage to opposite-sex couples to be unconstitutional,<sup>2</sup> the United Kingdom became the latest European country to introduce civil partnerships as an institution for same-sex couples analogous to marriage,<sup>3</sup> and the government of New Zealand presented a Bill to the New Zealand Parliament to do the same thing in that country.<sup>4</sup> In the 15 years since Denmark became the first country in the world to introduce such an institution<sup>5</sup> most jurisdictions in Western Europe and in Canada, and a handful of states in the United States of America, have followed Denmark's innovation and some<sup>6</sup> have opened up the institution of marriage itself to same-sex couples. The peculiarly North American debate whether civil partnership is a second-rate alternative to marriage as a means of achieving gay and lesbian equality has not been engaged with elsewhere in the world, and it will not be engaged with here. This article intends, rather, to explore the remarkable phenomenon that such a debate is today one of practical reality rather than hypothetical aspiration.

It was not many years ago that the idea that same-sex couples should have their relationships recognized for any purpose, far less the

---

\* Professor of Law and Head of the Law School, University of Strathclyde, Glasgow, Scotland. Fellow of the Royal Society of Edinburgh, Patron of OUTRight Scotland.

<sup>1</sup> *W.(N.) v. Canada (Attorney General)*, 2004 SKQB 434, [2004] S.J. No. 669 (Sask. Q.B.).

<sup>2</sup> *Fourie and Another v. Minister of Home Affairs and Others*, 2005 (3) S.A. 429 (S.C.A.) [*Fourie*].

<sup>3</sup> *Civil Partnership Act 2004* (U.K.), 2004, c. 33.

<sup>4</sup> *Civil Union Bill* (N.Z.), No. 149-2, 29 November 2004.

<sup>5</sup> For a discussion of the Danish *Registered Partnership Act 1989*, see Linda Neilsen 'Family Rights and the "Registered Partnership" in Denmark' (1990) 4 Int'l J.L. & Fam. 297; Morten Broberg 'The Registered Partnership for Same-Sex Couples in Denmark' (1996) 8 Child & Family Law Quarterly 149.

<sup>6</sup> The Netherlands, Belgium and Spain in Europe, Canada and the US state of Massachusetts. The matter is presently before the Constitutional Court of South Africa and under political discussion in Switzerland, Sweden, and Luxembourg.

full range of purposes encompassed within the institution of marriage, was met with uncomprehending resistance by policy-makers, legislators and judges. Until around the mid 1990s courts across the world were reluctant to award custody of children to lesbian mothers because of the perceived harm 'living in the shadow of deviance' would cause.<sup>7</sup> In the United Kingdom, a statute declared in 1988, famously and ungrammatically, that 'homosexuality' was no more than a 'pretended family relationship'.<sup>8</sup> Two years previously, the Supreme Court of the United States of America had upheld the constitutionality of laws criminalizing same-sex sexual activity<sup>9</sup> and a series of earlier United States cases had consistently upheld the heterospecificity of both marriage and other recognized domestic relationships.<sup>10</sup> Yet by the end of the 1990s court challenges in countries across the western world<sup>11</sup> to rules of law excluding same-sex couples from benefits, liabilities, and opportunities afforded opposite-sex couples were becoming increasingly successful, and by the early years of the new century apparently irresistible. Advancement by litigation usually creates no more than an uneven patchwork of rights and liabilities affecting the subject-matter of individual disputes, but the virtual evaporation of judicial ability or willingness to oppose recognition of same-sex relationships has given legislators the confidence to make comprehensive provision for such recognition across the whole gamut of family law. This was, ten years ago, unthinkable to opponents, and a dreamy Utopia for proponents, of gay and lesbian equality. How could this have changed, so rapidly and so universally?

## I A DECADE OF ADVANCEMENT

There is no obvious turning point in judicial or legislative attitudes to same-sex relationships, but an important moment in time at which to start our examination was the adoption in May 1996 of the new post-

<sup>7</sup> See for example *J.L.P. v. D.J.P.*, 643 S.W.2d 865 (Missouri App. Ct. 1982); *Re P (A Minor)* (1983), 4 F.L.R. 401 (England); *L and L* (1983), F.L.C. 91-353 (Australia); *Early v. Early*, 1989 S.L.T. 114 (Scotland); *Bottoms v. Bottoms*, 444 S.E.2d 276 (Virginia App. Ct. 1994); *Van Rooyen v. Van Rooyen*, 1994 (2) S.A. 325 (South Africa).

<sup>8</sup> *Local Government Act 1988* (U.K.), s. 28.

<sup>9</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986) [*Bowers*].

<sup>10</sup> See *Baker v. Nelson*, 191 N.W.2d 185 (Supreme Court of Minnesota 1971); *Jones v. Hallahan*, 501 S.W.2d 588 (Kentucky App. Ct. 1973); *Singer v. Hara*, 522 P.2d 1187 (Court of Appeals of Washington 1974); *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982); *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Super. 1984).

<sup>11</sup> It is very different elsewhere. By 'western world' I mean, for the purposes of this article, North America, Europe, Australasia, and South Africa.

apartheid South African Constitution.<sup>12</sup> It would be no exaggeration to describe this as a milestone in world legal history, for it was the first constitutional or human rights<sup>13</sup> instrument in the world explicitly guaranteeing everyone the right to be free from discrimination on the basis of (*inter alia*) sexual orientation.<sup>14</sup> Elsewhere, at around the same time, judicial interpretation of existing human rights instruments brought sexual orientation within general anti-discrimination rules that had previously ignored the issue. So for example the Supreme Court of Canada<sup>15</sup> held that sexual orientation, though not mentioned in the *Canadian Charter of Rights and Freedoms*, was analogous to those unlawful grounds for discrimination expressly listed in section 15 thereof, and so was equally a prohibited ground. Similarly, in 1999, the European Court of Human Rights held for the first time that sexual orientation was 'intolerable' to the non-discrimination requirements in Article 14 of the *European Convention on Human Rights* even though it was not explicitly mentioned in that article.<sup>16</sup>

One of the earliest (and entirely predictable) consequences of the adoption of the South African Constitution was that the existing (pre-democracy) laws criminalizing male-male sexual activity in South Africa were held to be unconstitutional and were struck down.<sup>17</sup> This decision was explicitly founded on arguments of equality and its underlying concept of human dignity. The same result had earlier been achieved throughout Europe by a different route: the requirement contained in Article 8 of the European Convention to respect individuals' private lives. In *Dudgeon v. United Kingdom*<sup>18</sup> the ban on male-male sexual activity that had been maintained in Northern Ireland<sup>19</sup> was held to breach Article 8 and it is not now possible for a member state of either the European Union (twenty-five states) or the Council of Europe (forty-six states) to maintain such a blanket ban:

---

<sup>12</sup> *Constitution of the Republic of South Africa* 1996, No. 108 of 1996.

<sup>13</sup> Chapter 2 of the Constitution contains a *Bill of Rights*.

<sup>14</sup> *Constitution of the Republic of South Africa* 1996, No. 108 of 1996, s. 9(3). For a discussion of the political imperatives that led to the inclusion of this provision in the South African Constitution, see Carl Stychin 'Constituting Sexuality: The Struggle for Sexual Orientation in the South African Bill of Rights' (1996) 23 J. L. & Soc'y 455.

<sup>15</sup> *Egan v. Canada*, [1995] 2 S.C.R. 513, (1995), 124 D.L.R. (4th) 609; *Vriend v. Alberta*, [1998] 1 S.C.R. 493, (1998), 156 D.L.R. (4th) 385.

<sup>16</sup> *Salgueiro Da Silva Mouta v. Portugal* (2001), 31 E.H.R.R. 1055.

<sup>17</sup> *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, [1999] (1) S.A. 6 (S. Afr. Const. Ct.).

<sup>18</sup> (1981), 4 E.H.R.R. 149.

<sup>19</sup> Having been repealed in England and Wales by the *Sexual Offences Act* 1967 and in Scotland by the *Criminal Justice (Scotland) Act* 1980.

applicant member states to either institution are required to repeal any such laws.<sup>20</sup> But founding only on private life was insufficient to ensure equality, and many European countries maintained differential ages of lawful sexual activity. Relying on Article 14 of the *European Convention*, the European Court of Human Rights has more recently held such differential ages to amount to unlawful discrimination.<sup>21</sup> Even the United States of America has now mandated decriminalization and in *Lawrence v. Texas*<sup>22</sup> that country's Supreme Court overruled its own earlier decision in *Bowers v. Hardwick*.<sup>23</sup> The majority in *Lawrence* explicitly located its decision within the context of an emerging worldwide consensus that adults of the same sex have a right to engage with each other in intimate, consensual, sexual activity.<sup>24</sup>

Decriminalization opened the door for relationship recognition, but that has tended to come in stages. Though it did not seem so at the time, claims such as those in *M. v. H.*,<sup>25</sup> where the Supreme Court of Canada was faced with a claim by a woman who had been in a same-sex relationship to access a statute that provided for financial readjustment between ex-partners, were actually quite modest: the applicant was seeking to be treated in the same way as a member of an opposite-sex but *unmarried* couple. Even when the Supreme Court allowed her claim, and federal and provincial legislatures responded with comprehensive law reform, the effect was to put same-sex couples in the position of unmarried couples. This same result followed in the United Kingdom where in *Ghaidan v. Mendoza*<sup>26</sup> the House of Lords held that the phrase normally used in British statutes to identify unmarried conjugal couples (those 'living together as husband and wife') had to be interpreted to include same-sex couples, since that was the only way to make the statute compatible with the non-discrimination provisions of the *European Convention on Human Rights*. Comprehensive legislation has not been enacted, but as in Canada unmarried same-sex couples can now expect to access all United Kingdom statutory rights and responsibilities extended to unmarried

---

<sup>20</sup> See *Norris v. Ireland* (1988), 13 E.H.R.R. 186; *Modinos v. Cyprus* (1993), 16 E.H.R.R. 485.

<sup>21</sup> *S.L. v. Austria* (2003), 37 E.H.R.R. 39; *L. & V. v. Austria*, (39392/98) [2003] E.C.H.R. 20 (9 January 2003); *B.B. v. The United Kingdom*, (53760/00) [2004] E.C.H.R. 64 (10 February 2004); *Woditschka and Wilfling v. Austria*, (69756/01 and 6306/02) (21 October 2004).

<sup>22</sup> 123 S.Ct. 2472, 539 U.S. 558 (2003).

<sup>23</sup> *Supra* note 9.

<sup>24</sup> *Supra* note 22 at 2483.

<sup>25</sup> [1999] 2 S.C.R. 3, (1999), 171 D.L.R. (4th) 577.

<sup>26</sup> [2004] U.K.H.L. 30, [2004] 3 W.L.R. 113 (H.L.).

opposite-sex couples.<sup>27</sup>

More demanding claims are made when same-sex couples seek to be treated in the same way as opposite-sex *married* couples. Originally such claims were made in the context of attempts to access individual marital rights, as typified by claims before the South African courts subsequent to the adoption of the 1996 Constitution. In *National Coalition for Gay and Lesbian Equality v. Minister for Home Affairs*,<sup>28</sup> in order to save the validity of an immigration statute that gave benefits to 'spouses', the words 'or partner, in a permanent same-sex life partnership' were added. This meant that same-sex couples were to be afforded the same protections not of unmarried opposite-sex couples but of married opposite-sex couples. The reasoning in this case has been consistently followed when same-sex couples have sought to access other South African statutes conferring benefits on married couples.<sup>29</sup>

Once it is accepted that for individual purposes same-sex couples should be treated the same way as opposite-sex couples, it becomes difficult to resist the argument that they should be so treated for the whole range of rights and responsibilities bundled together in the hitherto heterosexual relationship of marriage. *Baehr v. Lewin*<sup>30</sup> was the first of the modern series of cases in which a United States court held that the state had to provide convincing reasons why marriage should be limited to opposite-sex couples, and when the state failed to do so<sup>31</sup> the way was open for same-sex marriage in Hawaii, barred only by subsequent constitutional amendment. Nevertheless a 'reciprocal benefits law'<sup>32</sup> was passed giving couples, same-sex and opposite-sex, who register their relationship with the state a wide variety of benefits previously limited to married couples. In *Baker v. Vermont*<sup>33</sup> the Supreme

---

<sup>27</sup> *M and Langley v. Bradford Metropolitan District Council*, [2004] E.W.C.A. (Civ.) 1343. The argument has been held by the Scottish Court not to work for cases arising before the coming into force of the *Human Rights Act 1998*: *Telfer v. Kellock*, 2004 S.L.T. 1290.

<sup>28</sup> [2000] (2) S.A. 1 (S. Afr. Const. Ct.).

<sup>29</sup> See for example *Satchwell v. President of the Republic of South Africa*, [2002] (6) S.A. 1 (S. Afr. Const. Ct.) (judicial pensions); *Du Toit v. Minister for Welfare and Population Development*, [2003] (2) S.A. 198 (S. Afr. Const. Ct.) (adoption); *J. v. Director General, Dept. of Home Affairs*, [2003] (5) S.A. 621 (S. Afr. Const. Ct.) (co-parenting status).

<sup>30</sup> 74 Haw. 530, 852 P.2d 44 (1993). For analysis, see Martin Dupuis 'The Impact of Culture, Society and History on the Legal Process: An Analysis of the Legal Status of Same-Sex Relationships in the United States and Demark' (1995) 9 Int'l J.L. & Fam. 86 at 95-8.

<sup>31</sup> *Baehr v. Miike*, 910 P.2d 112 (Haw. 1996).

<sup>32</sup> *An Act Relating to Unmarried Couples 1997*, Hawaii Sess. Laws 383.

<sup>33</sup> 744 A.2d 864 (Vt. 1999).

Court of Vermont held that the legal benefits and protections flowing from marriage are so significant that any exclusion from these benefits must be justified by public concerns of sufficient weight, cogency and authority that the justice of the exclusion cannot seriously be questioned. No such concerns were established and the Court held the marriage statute to be contrary to the Vermont Constitution: this led to the statutory introduction in 2000 of civil unions for same-sex couples.

The years 2003 and 2004 saw a series of cases in North America in which marriage rights were sought not through civil unions, as in Vermont and European countries, but through marriage itself. One of the first of these cases was *Halpern v. Attorney General of Canada*<sup>34</sup> where the Ontario Court of Appeal held that '[d]enying same-sex couples the right to marry perpetuates the ... view ... that same-sex couples are not capable of forming loving and lasting relationships, and thus same-sex relationships are not worthy of the same respect and recognition as opposite-sex relationships.'<sup>35</sup> This approach was followed in Massachusetts in *Goodridge v. Department of Public Health*<sup>36</sup> where the Supreme Judicial Court held that since the *sine qua non* of marriage is the exclusive and permanent commitment of the partners to each other rather than the begetting of children, there was no rational justification to limit it to opposite-sex couples. Similar reasoning was adopted by the Supreme Court of Appeal in South Africa, which was explicitly founded upon both *Halpern* and *Goodridge*.<sup>37</sup>

## II SEEKING EXPLANATIONS

Just as the year 1999 saw court cases around the western world permitting same-sex couples to access non-marital conjugal rights, so 2004 has seen a variety of both courts and legislatures permitting same-sex couples to access marital rights, either through civil partnership or marriage. This similarity in timing cannot be accidental. The legislative and political processes in different countries are clearly being informed by, and feeding off, each other. Increased and instantaneous access to developments across the world is without doubt facilitating this but it does not explain why the movement is virtually all one way. I should like to offer four factors, which, taken together, render the developments described above as inevitable and ultimately irresistible.

---

<sup>34</sup> (2003), 225 D.L.R. (4th) 529 (Ont. C.A.) [*Halpern*]. See also *Hendricks c. Québec (Procureur général)*, [2002] R.J.Q. 2506 (C.S.Q.); *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 225 D.L.R. (4th) 472 (B.C.C.A.); *Dunbar & Edge v. Yukon (Government of) & Canada (Attorney General)*, 2004 Y.K.S.C. 54, 14 July 2004 (Yukon Sup. Ct.); *W.(N.)*, *supra* note 1.

<sup>35</sup> (2003) 225 D.L.R. (4th) 472 at para. 94.

<sup>36</sup> 440 Mass. 309 (2003) [*Goodridge*].

<sup>37</sup> *Fourie*, *supra* note 2.

First, decriminalization has been the spark that lit the fuse, sometimes slow burning and sometimes (as in South Africa) extremely fast burning, that leads to the explosion of relationship recognition. For decriminalization removes the primary justification for treating same-sex couples less favourably than opposite-sex couples. The criminal law creates a status of 'criminal' and it is rational and indeed expected that the law will regard those with that status as less valued members of society than those who are entirely 'innocent'. Criminalizing behaviour that is characteristic of same-sex relationships therefore provides a firewall against claims for equal treatment, for the simple (if simplistic) reason that all legal systems, rightly, treat criminals less favourably than non-criminals. But to remove that firewall exposes that less favourable treatment to challenge and obliges those who support it to find other justifications.<sup>38</sup> Indeed, it has been argued<sup>39</sup> that decriminalization is not only an essential first step to the legitimization and ultimate full recognition of same-sex relationships, but that this first step makes the end result inevitable. This argument receives support from the unlikely source of Scalia J's dissenting judgment in *Lawrence*. He says,

At the end of its opinion ... [the majority in the present case] says that the present case 'does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.' ... Do not believe it. ... Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.<sup>40</sup>

Second, the late 1990s saw a constitutionalization of family law throughout much of the western world at exactly the same time as same-sex relationships were being accepted as falling within the parameters of family law. The importance of this is that constitutionalization provided gay and lesbian people with a mechanism to challenge existing assumptions flowing from the heteronormativity of 'family'. Until sexual orientation was recognized by the Canadian courts, the South African Constitution, and the European Court of Human Rights as an illegitimate ground for discrimination, a human rights analysis in these countries could not be guaranteed.<sup>41</sup> And a human rights analysis, by

---

<sup>38</sup> This was recognized in the South African Supreme Court of Appeal by Farlam JA in *Fourie*, *supra* note 2 at para. 120.

<sup>39</sup> Kees Waaldijk, 'Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe' (2000) 17 Can. J. Fam. L. 62.

<sup>40</sup> *Supra* note 22 at 2497-8.

<sup>41</sup> This is apparent in, for example, the House of Lords decision in *Fitzpatrick v. Sterling Housing Association*, [1999] 4 All E.R. 707 (H.L.), which was

definition, requires a rational approach divorced from preconceptions, assumptions, and stereotyping. It is no accident that the least constitutionalized country in the western world, Australia, has been able to resist full relationship recognition more effectively than other countries.<sup>42</sup>

Third and following on from this, the search for rational justification for treating same-sex couples less favourably than opposite-sex couples has proved vain. The poverty of arguments brought forward by those seeking to maintain the existing position is eloquent testimony to their intellectual bankruptcy. The desire to protect marriage, the traditional family, and the proper upbringing of children have all been placed at the forefront of states' defences and while these are all legitimate concerns, the assertion that they justify discrimination has proved easy to dismiss. Neither marriage nor the traditional family is demeaned by extending benefits to same-sex couples that had previously been extended only to married couples. Madame Justice L'Heureux-Dubé put it thus some time ago in *Canada (Attorney General) v. Mossop*, '[i]t is possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form, and non-traditional family forms may equally advance true family values.'<sup>43</sup> Any other view is illogical: seeking to enter marriage is not to undermine it, but is rather to celebrate its importance.

The claim that extending equal benefits to same-sex couples is an attack on opposite-sex couples is in reality a plea to continue to treat opposite-sex couples *better than* same-sex couples, for only their relative and not their absolute position is affected. But such a plea is an assertion of superiority, not a justification for acceding to that plea. Underlying

---

decided before the coming into effect of the *U.K. Human Rights Act 1998*, c. 42, and which was, therefore, a traditional and entirely limited exercise in statutory interpretation. The decision, though of great symbolic importance in conferring legitimacy to the concept of same-sex relationships, provided little technical precedent (*stare decisis*) that could be used in later cases. See also *Telfer*, *supra* note 27.

<sup>42</sup> In October 2004 the Federal Parliament (shortly after the re-election of a conservative government) passed the *Marriage Amendment Act 2004* (Cth.), which both defined 'marriage' as a relationship between one man and one woman and purported to prohibit the recognition in Australia of any same-sex marriage validly contracted in another country.

<sup>43</sup> [1993] 1 S.C.R. 554 at 634. Similarly the European Court of Human Rights in *Marckx v. Belgium* (1979), 2 E.H.R.R. 330 at para. 40 said this: 'The Court recognises that support and encouragement of the traditional family is in itself legitimate or even praiseworthy. However, in the achievement of this end recourse must not be had to measures whose object or result is, as in the present case, to prejudice the "illegitimate" family'.



the claim may well be the unspoken belief that advantaging opposite-sex relationships will encourage gay people to enter opposite-sex relationships. That may well have been true in a previous age, but it is neither realistic nor acceptable today. The other argument commonly raised is that the state has an interest in the upbringing of children in opposite-sex relationships, which it is assumed is best for children. This argument is illogical (though it is still presented) in jurisdictions that tolerate and even facilitate gay parenting (for example through adoption or formalizing co-parenting arrangements),<sup>44</sup> and even in countries where that is not possible the argument is based on stereotyping and assumptions made in the absence of evidence that children are indeed harmed by being brought up in family surroundings different from the norm.<sup>45</sup> Protection of children from harm is, of course, a legitimate state interest, but courts no longer assume that children are exposed to a higher level of risk of harm simply because the adult who is bringing them up is gay or lesbian. A further argument, put forward most recently in the Supreme Court of Canada<sup>46</sup> was that the legal acceptance of same-sex marriage is the imposition of a dominant social ethos, in itself an interference with the freedom of religious beliefs of those who oppose it. The Supreme Court was witheringly dismissive in response: 'The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another.'<sup>47</sup> If human rights are based on tolerance of differences, a demand to be intolerant has credence only when the difference is harmful to society. And that argument was lost long ago.

---

<sup>44</sup> In *Baker v. Vermont*, 744 A.2d 864 at 31 (Vt. 1999), Amestoy CJ, the Court pointed out that the state of Vermont allowed adoption by same-sex couples and so 'the exclusion of same-sex couples from the legal protections incident to marriage exposes their children to the precise risks that the state argues the marriage laws are designed to secure against.' In *M. v. H.*, *supra* note 25 at para. 92, the Supreme Court of Canada could not understand how the alleged state interest in encouraging children to be brought up by opposite-sex couples could be rationally related to the statute there at issue, which concerned spousal support. In *Fourie*, *supra* note 2 at para. 17, Cameron JA said that the argument does not work in a country like South Africa, where procreative potential is not a defining characteristic of conjugal relationships. The European Court of Human Rights rejected, in a different context, the notion that marriage is so defined (*Goodwin v. United Kingdom* (2002), 35 E.H.R.R. 18 at para. 98).

<sup>45</sup> In *T, Petitioner*, [1997] S.L.T. 724, the Scottish Appeal Court permitted a child to be adopted by a gay man, the judge at first instance being castigated for having refused to do so on the basis of 'his own preconceptions of homosexuality' rather than on any evidence actually presented to the Court.

<sup>46</sup> *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698.

<sup>47</sup> *Ibid.* at para. 46.

Fourth, and not to be underplayed in importance, is the increased social acceptability and, crucially, visibility of gay and lesbian people in all walks of life, even at the highest levels of government. Without this, judges and legislators would have remained comfortable in their ignorance of gay and lesbian people and would have felt more able to justify a refusal to ameliorate their position on moral grounds. Yet moral consensus no longer dictates that gay and lesbian people should remain hidden or that they should be cast out from decent society. This is not to suggest that society has become amoral in its views on family, personal relationships or even the criminal law. Rather, human rights have become the new morality. From a starting point at the intersection of dignity, privacy, and equality, the thinking population accepts the illegitimacy not of same-sex relationships but of homophobia.<sup>48</sup> Virtually everyone in the western world knows either real people or characters from popular culture whose sexual orientation is different from their own. That could not have been said twenty years ago and its contribution to social comfort has played a not insignificant role in shaping the views of policy-makers.

## CONCLUSION

Decriminalization of same-sex sexual activity removed the firewall protecting discriminatory laws from rational analysis; constitutionalization of family law provided the mechanism to challenge discriminatory laws by applying that rational analysis; the poverty of argument utilized by those seeking to defend the status quo made the results of many of the cases described above obvious; and the increased social acceptance and visibility of gay and lesbian people made the developments towards full recognition irresistible. While it is true that in the United States constitutional amendments in many states will limit marital benefits to opposite-sex couples<sup>49</sup> these amendments will themselves be open to challenge before the Supreme Court,<sup>50</sup> which has

---

<sup>48</sup> This was graphically illustrated in the Autumn of 2004 when the European Parliament (almost without precedent) rejected a nominee to the new European Commission because he expressed the view that homosexuality was a 'sin'.

<sup>49</sup> During the November 2004 presidential election in that country, eleven states sought at the same time popular approval, through so-called 'ballot initiatives', for such constitutional amendments. In Australia (see *supra* note 42) the Federal Parliament amended its definition of marriage to exclude same-sex relationships at around the same time.

<sup>50</sup> The constitutional amendment prohibiting the passing of anti-discrimination laws in favour of gay and lesbian people in Colorado traced its history to a ballot initiative, but that did not prevent the Supreme Court from striking it down (*Romer v. Evans*, 517 U.S. 620 (1996)). For a discussion, see Angus Campbell & Kenneth Norrie, 'Homosexual Rights in

already refused to deal with a challenge to the Massachusetts legislation opening up marriage to same-sex couples.<sup>51</sup> Judicial exposure to same-sex marriage and civil partnership will increase even in resisting jurisdictions through the conflict of laws rules;<sup>52</sup> this will also expose courts to reasoning and juridical policy in other countries and ought, it is suggested, to increase judges' acceptance that there is no danger to social well-being from treating gay and lesbian people as well as anyone else. The danger to social well-being comes from an insistence on maintaining laws discriminating against gay and lesbian people, and the relationships they enter into, when the justifications for doing so have already been rejected in relation to laws discriminating on the grounds of sex and race.

---

*Romer v. Evans*: Animus Averted' (1998) 27 Anglo-Am. L. Rev. 285.

<sup>51</sup> *Largess v. Supreme Judicial Court of Massachusetts*, No. 04.420 (29 November 2004).

<sup>52</sup> See, already, *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. Ct. 2002); *Cote-Whitacre v. Department of Public Health*, 2004 W.L. 2075557 (Mass. 2004).