

FAMILY FINDINGS

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Same-Sex 'Marriage' Is NOT About Civil Rights

EXECUTIVE SUMMARY

Marriage has been under attack in New Jersey since June 2002, when Lambda Legal Defense Fund (a national homosexual rights group) filed a lawsuit against the state on behalf of seven homosexual couples who were denied marriage licenses. Lambda argues that denying same-sex couples the benefits of marriage violates their constitutional right to equal protection.

The state of New Jersey maintains that the couples suing the state are not seeking "equal access to marriage, but a fundamental change in the meaning of marriage itself," and "the power to define marriage rests with the Legislature."

The case, *Lewis v. Harris*, was heard in the New Jersey Supreme Court on Feb. 15, 2006, and a decision is expected in late spring. The two lower court decisions (Superior Court, Nov. 5, 2003 and the Court of Appeals, June 14, 2005) made it clear that: (1) no right to same-sex marriage appears in the state Constitution; (2) comparing the state's marriage statutes to laws perpetuating racial prejudice is not appropriate; and (3) redefining marriage is the role of the Legislature, not the courts.

Until the New Jersey high court issues a decision, marriage still hangs by the thread of a single judge's decision. In the state Supreme Court hearing, Assistant Attorney General Patrick DeAlmeida explained that our constitution protects the right to marry, "but only as the founders understood it," and to them, same-sex marriage was "a foreign concept."

Chief Justice Poritz responded that the founders "could never have imagined medical advances that would make it necessary for the court to protect a 'right to die.' ... We can't ignore modern realities."¹ Because of such activist reading of law, it is predicted that the high court may usurp the role of the Legislature by rewriting marriage law rather than interpreting existing law, as did the lower courts.

ABSTRACT: This report defines civil rights and explains how the legalization of same-sex "marriage" in New Jersey has nothing to do with civil rights. The decisions of both lower state courts are examined, demonstrating how the legalization of same-sex "marriage" would be a redefinition of marriage, not an extension of rights. It also explains why marriage is a public institution with a vital public purpose — and that is the basis for marital law. Lastly, it outlines how extending false civil rights will restrict the rights of the majority.

Seven same-sex couples are suing the state of New Jersey (*Lewis v. Harris*, see Executive Summary), claiming that their civil rights are being violated because they cannot marry. Do they have a valid claim?

To determine that, we must look first at the Constitution, the definition of civil rights, the Civil Rights Act of 1964, and the role of government and the public purpose of marriage. It will then be evident that "civil rights" has nothing to do with the issue of same-sex "marriage."

The Constitution

A Right to Marry?

Activists contend that our state constitution guarantees a right to same-sex "marriage," yet it doesn't even explicitly recognize a "right" to marry. Article 1, paragraph 1 of the New Jersey Constitution has been used to grant equal protection under the law and the "right to privacy," but there is no reference to homosexuality or "sexual orientation" (or to sex or marriage at all) in either the U.S. or the New Jersey Constitutions (see "The Law and Marriage," p. 3).

The New Jersey Supreme Court has held that the due process and privacy protections of article 1, paragraph 1 include a fundamental right to marry, and that right extends only to marriages between members of the opposite sex and is subject to reasonable state regulation.

This means that all who meet the criteria of our marriage law (legal age, not married to anyone else, not closely related, humans only, one man and one woman) must be treated equally. Therefore, the New Jersey Constitu-

tion simply protects those who *should* be treated alike from unequal treatment. What homosexual activists are in fact seeking is a redefinition of marriage itself, not a mere application of rights.

New Jersey Court Decisions

Before the *Lewis v. Harris* case reached the New Jersey Supreme Court, two lower courts both agreed that the state constitution does not include a right that allows same-sex couples to marry, and that such a move would require the New Jersey Legislature to rewrite the law, changing the very *definition* of marriage. In rejecting the plaintiffs' claim, both lower courts ruled as follows:

Superior Court of New Jersey, Mercer County

"The right to marry has always been understood in law and tradition to apply only to couples of different genders. A change in that basic understanding would not lift a restriction on the right, but would work a fundamental transformation of marriage into an arrangement that could never have been within the intent of the Framers of the 1947 Constitution. Significantly, such a change would contradict the established and universally accepted legal precept that marriage is the union of people of different genders"² (Nov. 5, 2003).

New Jersey Superior Court Appellate Division

"Plaintiffs' [same-sex activists] claim of a constitutional right to State recognition of marriage between members of the same sex has no foundation in the text of the Constitution, this Nation's history and traditions or contemporary standards of liberty and justice"³ (June 14, 2005).

There is no evidence that the founding fathers ever intended their work to protect homosexual acts of any kind, let alone create a right to homosexual "marriage." In their ruling on *Lewis v. Harris*, the New Jersey Appellate Court agreed, stating, "It certainly is an idea that would have been alien to the delegates to the 1947 Constitutional Convention who proposed this provision and to the voters who approved it."⁴

Civil Rights

What are civil rights?

Gay activists have tried to equate their being denied legal marriage and its benefits to now-defunct laws banning interracial marriage. But what is a civil right? The dictionary defines civil rights as "rights belonging to a person by virtue of his status as a citizen or as a member of civil society."⁵

Civil rights that belong to every person are found in the Bill of Rights in the U.S.

Constitution, which guarantees that every American has the freedom of religion, speech, press, due process of law, and protects them from unreasonable search and seizure, self-incrimination, or being tried more than once for the same crime. Homosexuals have never been legally denied any of these constitutional rights.

Civil Rights Act of 1964

When homosexuals talk about "civil rights" they are talking about civil rights in the sense that the term was used in the Civil Rights Act of 1964, which made it illegal to practice discrimination on the basis of race, color, national origin or religion. Federal law grants this protection from "discrimination" based on personal characteristics which are inborn or immutable (such as race and color), do no harm to society, and are in the Constitution.

In truth, sexual orientation does not meet any of these criteria. Sexual orientation has never been scientifically proven to be inborn and it is not recognized in the Constitution. New Jersey is one of a small number of states that has an anti-discrimination law. Although the law includes protection from discrimination based on sexual orientation, it does not reference marriage, and the New Jersey Constitution does not specify a right to same-sex "marriage."

Prohibiting homosexual marriage actually protects society from harm. Homosexual homes experience higher rates of promiscuity, sexually transmitted diseases, mental illness, substance abuse and domestic violence. Additionally, there is a higher rate of child sexual abuse among homosexual men.

In the Netherlands, registered partnerships and legal same-sex "marriage" has increased the separation between marriage and parenthood. From 1998-2002 the number of broken families increased by 60 percent. Society and children suffer, because cohabiting couples with children break up at a rate 2 to 3 times higher than married couples with children.

There is a huge difference between rectifying an injustice that prevented interracial marriage, versus granting "marriage" to same-sex couples.

- Race is immutable and inborn. Homosexuality is not, as evidenced by many former homosexuals and the entities that now provide counseling and support to "ex-gays."
- Race is cited in the Constitution. The decision to engage in homosexual behavior is not.
- Laws that formerly limited marriage partners by race were designed to keep blacks and whites apart. Restricting one's choice of marriage partner by gender preserves marriage as an institution that

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brings men and women together to create future generations and foster a healthy society with clearly defined paternal and maternal relationships that make unique contributions to a child's development.

In addition, most African Americans and civil rights leaders strongly reject the assertion that same-sex "marriage" is a civil rights issue. Jesse Jackson explains "Gays were never called three-fifths of a person in the Constitution ... and they did not require the Voting Rights Act to have the right to vote."⁶

With regard to the law, both lower New Jersey courts agreed that there is nothing in the Fourteenth amendment or in *Loving v. Virginia* (the case that eliminated the restriction on interracial marriage) that accords heightened protection to individuals who claim discrimination based on sexual orientation.

Superior Court of New Jersey, Mercer County: Judge Linda Feinberg said that the "decisions striking down statutes... prohibiting interracial marriage... [were derived] from Constitutional amendments prohibiting racial discrimination and subjecting laws that classify individuals based on race to the highest level of scrutiny. No similar Constitutional provisions outlaw statutory classifications based on sexual orientation ... Comparing the state's marriage statutes to laws perpetuating racial prejudice, therefore is inappropriate (i.e., not pertinent or appropriate)."⁷

New Jersey Superior Court Appellate Division: "However, nothing in *Loving* suggests that the Fourteenth Amendment prohibits a State from limiting the institution of marriage to a State-recognized union between a man and a woman." "Subsequent Supreme Court decisions also indicate that the constitutionally protected right recognized by the Court is the right of members of the opposite sex to marry (noting that *Loving* 'was anchored to the concept of marriage as a union involving persons of the opposite sex,' and that "[i]n contrast, recognizing a right to marry someone of the same sex would not expand the established right to marry, but would redefine the legal meaning of 'marriage.'")⁸

Marriage: Public Purpose & the Law

Public Purpose of Marriage

When the government sanctions marriage, it is recognizing that marriage is the foundational structure of our society. **It is**

not just a "private" institution; it's a public one. The well-being of children, the emotional and physical health of adults, and even the state of the workforce are all tied to the existence of stable marriages and families.

Obviously, government has a legitimate interest in preserving one man/one woman marriage. Marriage brings together men and women for the purpose of reproducing the human race and encourages a mother and father to cooperate in raising children.

A vast body of contemporary social science research affirms that marriage is in the public's best interest.

Husbands and wives and the children they conceive and raise are happier, healthier and more prosperous than people in any other living situation.⁹ No "civil right" exists to *deny* children of both a mother and a father, which is exactly what a same-sex home does — or to conduct a vast social experiment with their lives.

The Law and Marriage

The New Jersey Constitution, article 1, paragraph 1 states: "*All persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty and obtaining safety and happiness.*"

While all citizens are guaranteed the basic rights of enjoying "liberty" and "happiness," no individual right is paramount to the "general welfare" of all society. That is why laws prohibit many harmful behaviors, such as pedophilia, bigamy, polygamy, drug use, assault, etc., all based on moral standards. Citizens are not free to do whatever they want and then insist that the government support it.

Maggie Gallagher explains that marriage law is not a special interest issue, but rather a common good that must be preserved. "Some people who argue for creating same-sex 'marriage' do so in the name of high ideals: justice, compassion, fairness. Their sincerity is not the question.

"The issue is taking an already troubled institution, most responsible for the protection of children and throwing out its most

basic presumption in order to further adult interests in sexual freedom. It would be morally callous and socially irresponsible."¹⁰

Allowing same-sex marriages would open legal doors to further redefine and weaken marriage and family. **For example, if the courts were to legalize same-sex "marriage," proponents of other types of sexual relationships would seek approval and benefits on the same basis as same-sex couples.**

When asked, "Why draw the line at two people?" same-sex marriage advocate Cheryl Jacques of the Human Rights Campaign said, "Because I don't approve of that."¹¹

This response illustrates how marriage law, once changed, would become even more susceptible to further changes. Why would her "I don't approve of that" objection to polygamy be more reasonable than someone else's "I don't approve of that" objec-

tion to same-sex "marriage"?

Polygamy has already been legalized in the Netherlands, and the move to legalize it in Canada is now on the fast track, just one year after the country legalized same-sex "marriage." In September 2005, the Netherlands took the next step in redefining marriage when they legalized polygamy by registering the first civil union of *three* partners.

In addition, the Canadian Justice Department recently released the results of a new federal study recommending that Canada's law banning polygamy be eliminated "to help women and children living in such multiple-spouse relationships." The legalization of other relationships (for example, adult-child) may be farther off, but the rationale would be the same.

Extending False Civil Rights Will Restrict Rights of Majority

The move to redefine marriage is not about denying civil rights to homosexuals ... and extending such rights will take away the majority's rights.

Legalizing same-sex "marriage" would,

"No 'civil right' exists to deny children of both a mother and a father, which is exactly what a same-sex home does — or to conduct a vast social experiment with their lives."

in fact, force the rest of society to accept and abide by new morals through the imposition of law. Hate crimes legislation would be passed to inflict penalties on those who do not embrace this new morality.

Only months after legalizing same-sex marriage in Canada, activists there successfully passed a bill (C-250) which criminalized public statements against homosexuality, punishable by up to two years in prison.¹² The bill's author, homosexual Canadian politician Svend Robinson, said he hoped his measure would make "the current use of homophobic pejoratives in public schools and in public places socially and criminally reprehensible."¹³

Consider these examples of citizens whose civil rights have been violated as a result of the legalization of same-sex unions:¹⁴

Parental Authority

In Massachusetts, the father of a 6-year-old boy was arrested because he would not leave his child's school until the principal or a board member assured him that his child would be removed from class during instruction on same-sex marriage and the family.

The school refused the father's request and sought legal counsel. To sidestep the state parental notification law that allows parents to exempt their children from sex-ed class, the school stated that the father has no right to remove his child in this case because the superintendent claims that homosexuality is not about "human sexuality issues" but "real life" that must be taught to kids.¹⁵

Conducting Private Business

Commercial printer Scott Brockie, a Christian, refused to print business cards and other material for the Canadian Lesbian and Gay Archives, contending that he would be abetting sin if he did so.

In February 2000, the Ontario Human Rights Tribunal ruled that Brockie had violated the ban on "sexual orientation" discrimination in the Ontario Human Rights Code. He was ordered to pay \$5,000 in damages to the president of the Archives and to "henceforth print materials for any homosexual individual or group on the same basis as all other clients."

Brockie appealed to the Ontario Divisional Court but lost in June 2002. After spending almost \$100,000 in legal fees, Brockie decided against any further appeal.

Censure of Public Airwaves

The Canadian broadcasting board ruled that Dr. Laura's characterization of homosexuality as abnormal and deviant violated their hate crimes law. Her radio show must either cut out portions dealing with homosexuality or air public announcements to notify the public of the council's decision.

Dr. James Dobson's *Focus on the Family* and Dr. Jerry Falwell's *Old Time Gospel Hour* have also been warned not to broadcast anything critical of homosexuality in Canada.

Sharing Medical Information

William Whatcott, a Saskatchewan resident and former homosexual, distributed fliers detailing the medical dangers of homosexual behavior. He was charged with a "hate speech" violation of Canada's hate

crimes law. In 2005, the Saskatchewan Human Rights Tribunal ordered Whatcott to pay \$17,500 in damages to four homosexuals who sued him for distributing the fliers.

Conclusion

The real issue according to the law is not civil rights, but what benefit, if any, would society reap if marriage was redefined to include same-sex unions? The societal fallout would far outweigh any presumed benefit.

Impressionable young children would be taught that homosexual sex is equal to heterosexual sex, sending a message to society that one-man, one-woman marriage is not uniquely important. Cohabitation and family break-up rates would increase.

Once same-sex marriages are legitimized, the legal floodgates would be opened to sanction other types of sexual relationships. The right of the majority to freely think and speak their opinions would be sharply curtailed.

Marriage is not an equal rights issue, nor simply a legal contract of privileges. The foundational purpose for marriage has always been a bond of duty cementing the affiliation of mother and father to the child. By separating sex and procreation from marriage—and granting marriage "rights" to anyone and everyone—we would be curtailing the rights of children to their natural parents, as well as submitting to the strong arm of the state.

Banning the "marriage" of same-sex couples preserves marriage's nature and purpose in a civil society. Homosexual "marriage" is not a civil right. It is a political demand that must be denied.

ENDNOTES

1 "To Define a Marriage," *Star Ledger*, Feb. 16, 2006, p. 24.

2 Superior Court of New Jersey, Mercer County, *Mark Lewis and Dennis Winslow, et al v. Guendolyn L. Harris*, Docket No.: MER-L-15-03, Nov. 5, 2003.

3 Superior Court of New Jersey Appellate Division, *Lewis v. Harris*, Docket No. A-2244-03T5, published June 14, 2005.

4 *Ibid.*

5 *American Heritage Dictionary*.

6 Marcell Bombardieri, "Jackson Wary of Same-Sex Rift," *Boston Globe*, Feb. 17, 2004, as cited in "Talking Points on Same-Sex Marriage," *Citizen Magazine*, March 2005, p. 12.

7 Superior Court of New Jersey, Mercer County, *Mark Lewis and Dennis Winslow, et al v. Guendolyn L. Harris*, Docket No.: MER-L-15-03, Nov. 5, 2003, pp. 50-53.

8 Superior Court of New Jersey Appellate Division, *Lewis v. Harris*, Docket No. A-2244-03T5, published June 14, 2005.

9 Peter Sprigg, "Homosexuality: The Threat to the Family and the Attack on Marriage." Address to World Congress of Families III, Mexico City, March 29, 2004 (www.frc.org/get.cfm? = PD04F01&v = PRINT).

10 Maggie Gallagher, "What is Marriage For?" *The Weekly Standard*, Aug. 4, 2003, Vol. 008, Issue 45.

11 Tucker Carlson and Paul Begala (Anchors), "President Bush Backs Ban on Gay Marriage," *CNN: Crossfire*, Transcript #0224001CN.V20, Feb. 24, 2004, as cited by Glenn T. Stanton, "Debate-Tested Sound Bites on Defending Marriage," *Focus on the Family*, updated Oct. 1, 2004.

12 Glenn T. Stanton, "Debate-Tested Sound Bites on Defending Marriage."

13 "A Call to Prayer: Swedish Pastor Faces PRISON for So-Called 'Hate Speech' in Sermon..." *Alliance Defense Fund Weekly Alert*, Nov. 8, 2005.

14 Robert Knight and Lindsey Douthit, "Hate Crime' Laws Threaten Religious Freedom," *Concerned Women for America*, Washington, D.C., Dec. 12, 2005.

15 Article 8 Alliance, Massachusetts Resistance website: www.Article8.org (Waltham, Mass.).

ABOUT US:

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