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1-1-2005

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### Recommended Citation

14 St. Louis U. Pub. L. Rev. 11

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**ONE WEDDING AND A REVOLUTION:  
A FILM BY DEBRA CHASNOFF<sup>1</sup>**

PATRICIA A. CAIN\* AND JEAN C. LOVE\*\*

INTRODUCTION

On November 18, 2003 the Supreme Judicial Court of Massachusetts ruled in favor of same-sex marriage.<sup>2</sup> The court found that the exclusion of same-sex couples from civil marriage violated the equality provisions of the Massachusetts Constitution.<sup>3</sup> Nonetheless, the court stayed the effect of its holding for 180 days, giving the legislature time to make legislative changes if needed.<sup>4</sup> The legislature responded by asking whether it could avoid same-sex marriage by enacting a “civil union” statute, similar to the one enacted by the Vermont Legislature in response to that state’s highest court ruling on the unconstitutionality of Vermont’s marriage law.<sup>5</sup> On February 3, 2004, responding to a request for an advisory opinion from the Massachusetts Senate, the Supreme Judicial Court of Massachusetts stood firm and held that offering a civil union option to same-sex couples while continuing to bar them from civil marriage would not cure the constitutional defect.<sup>6</sup> In sum, when the

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1. The film is a joint project of Women’s Educational Media and the National Center for Lesbian Rights. It is available in either VHS or DVD format and can be ordered online at [www.womedia.org](http://www.womedia.org). The price for individuals is \$40.00.

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2. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

3. *Id.* at 968.

4. *Id.* at 970.

5. *See Baker v. Vermont.*, 744 A.2d 864 (Vt. 1999). The *Baker* court concluded that: [U]nder the Common Benefits Clause of the Vermont Constitution . . . , plaintiffs may not be deprived of the statutory benefits and protections afforded persons of the opposite sex who choose to marry. We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel “domestic partnership” system or some equivalent statutory alternative, rests with the Legislature. Whatever system is chosen, however, must conform with the constitutional imperative to afford all Vermonters the common benefit, protection, and security of the law.

*Id.* at 867.

6. *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 569 (Mass. 2004).

court said the institution of *marriage* must be made available to all, it meant *marriage* and not some substitute or alternative. The 180-day stay expired at midnight on May 16, 2004 and immediately thereafter the marriages began. City Halls were full of crowds, and news cameras recorded the historic moment for the world to see.<sup>7</sup>

Three months earlier, on the other coast, in a more private ceremony, a lesbian couple exchanged vows in another City Hall, just two days shy of the fifty-first anniversary of their relationship. The date was February 12, 2004. The place was San Francisco. The wedding couple was Del Martin and Phyllis Lyon. It was “one wedding and a revolution.”

Fortunately for us, and for the historical archives that future generations will use to help understand the events of this time, an award-winning filmmaker, Debra Chasoff,<sup>8</sup> recorded the San Francisco marriage.<sup>9</sup> The film is nineteen minutes long and tells the story of the events that led up to the marriage, with a useful commentary by Kate Kendell, Executive Director of the National Center for Lesbian Rights. The other key spokespersons are the mayor of San Francisco, Gavin Newsom, his Director of Public Policy, Joyce Newstat, and Assessor-Recorder for the City and County of San Francisco, Mabel Teng. Then, of course, there are Del and Phyllis, the revolutionary couple.

7. Thousands of supporters gathered for the celebrations in Cambridge, Boston, and other towns throughout the state as marriage licenses were issued to those who had been standing in line for hours. The first couple to apply for a marriage license in Cambridge had arrived at City Hall three days earlier. For news and photos of the event, see Yvonne Abraham & Rick Klein, *Free to Marry: Historic Day Arrives for Same-Sex Couples in Massachusetts*, BOSTON GLOBE, May 17, 2004, at A1, available at [http://www.boston.com/news/specials/gay\\_marriage/articles/2004/05/17/free\\_to\\_marry/](http://www.boston.com/news/specials/gay_marriage/articles/2004/05/17/free_to_marry/).

8. Chasoff's documentary film *Deadly Deception: General Electric, Nuclear Weapons and our Environment* won an Academy Award in 1992. Her forty-five second acceptance speech made its own place in history as she publicly thanked her life partner. *Deadly Deception: General Electric, Nuclear Weapons, and our Environment* also won first prize at the Earth Peace International Film Festival in Vermont, the C.I.N.E. “Golden Eagle,” and the Gold Hugo of the Chicago International Film Festival. Her first film was *Choosing Children*, filmed in the 1980s and told the stories of several lesbian women who “chose” to have children. Susie Day, *Debra Chasoff*, in *OUTSTANDING LIVES: PROFILES OF LESBIANS AND GAY MEN 93-95* (Michael Bronski et al. eds., 1997). For a short biography, see also *Debra Chasoff*, at [http://theoscarsite.com/whoswho7/chasoff\\_d.htm](http://theoscarsite.com/whoswho7/chasoff_d.htm) (last visited Nov. 1, 2004).

9. As explained in the press release for the film:

Joyce Newstat [the mayor's policy director] called me and said, “You've got to get down here with a film crew. The mayor is marrying Del and Phyllis in an hour,” Chasoff said, recalling the frenzy of activity the morning of February 12. “So I called our cinematographer and said ‘Do you have your camera with you? Come pick me up!’”

Press Release, Women's Educational Media, Academy Award-Winning Filmmaker Debra Chasoff Documents First San Francisco Same-Sex Wedding of Lesbian Pioneers Del Martin and Phyllis Lyon (July 28, 2004), at [http://wemfilm.securesites.net/owr\\_premiere.htm](http://wemfilm.securesites.net/owr_premiere.htm).

THE FILM<sup>10</sup>

The film begins with voice-overs from news channels announcing the fact that marriages are beginning to be held in San Francisco. Then the camera pans to Kate Kendell, who introduces us to the context in which the film's events occur.

Fact: On November 18, the Supreme Judicial Court of Massachusetts rules it unconstitutional to ban same-sex marriage,<sup>11</sup> and the film begins.

Next frame: Joyce Newstat explains the substantive issues from the mayor's campaign. Same-sex marriage was nowhere on the radar screen. What happened to change all this?

Next frame: Mabel Teng explains with reserve and dignity that, yes, she did believe same-sex marriages would occur one day, but probably not in her lifetime. What changed to make it happen in San Francisco this early?

Fact: On January 20, 2004, newly elected San Francisco mayor Gavin Newsom attends President George W. Bush's State of the Union Address.

Next comes a clip from that address. Bush is at the podium saying: "A strong America must also value the institution of marriage . . . . If judges insist on forcing their arbitrary will upon the people [a clear reference to the Massachusetts decision], the only alternative left to the people would be the constitutional process. Our nation must defend the sanctity of marriage."

The news camera then pans to the audience. Some clap. Three persons rise. Most remain seated.

Next we see Gavin Newsom talking about his reaction. As other people walked out of the event praising the President for advancing the notion of a constitutional amendment on marriage, Newsom felt a different force, a force in favor of equality.<sup>12</sup> His first call after this event was to his office in San Francisco to ask his staff to start researching what other mayors had done to effectuate a nondiscriminatory application of the marriage license laws. His staff did the research. They looked at who had authority to make decisions of

10. All facts in the following section, not otherwise footnoted, are taken from the film *One Wedding and a Revolution*.

11. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

12. Newsom sent a letter to the San Francisco County Clerk explaining the following: Upon taking the Oath of Office, . . . I swore to uphold the Constitution of the State of California . . . . The California courts have interpreted the equal protection clause of the California Constitution to apply to lesbians and gay men and have suggested that laws that treat homosexuals differently from heterosexuals are suspect. The California courts have also stated that discrimination against gay men and lesbians is invidious . . . . The Supreme Courts in other states have held that equal protection provisions in their state constitutions prohibit discrimination against gay men and lesbians with respect to the rights and obligations flowing from marriage. It is my belief that these decisions are persuasive and that the California Constitution similarly prohibits such discrimination.

*Lockyer v. San Francisco*, 95 P.3d 459, 465 n.4 (Cal. 2004).

this sort, but in the end, they reported that no other mayor had ever taken the public position that marriage licenses should be issued to same-sex couples because the current Constitution required that sort of equality.

Clearly by this time he had made his decision. The marriage laws were unconstitutional. Now he needed to know whether he had the authority to do anything about it. He engaged the City Attorney in the project and became more and more convinced that the Constitution of the State of California required nondiscrimination in the issuance of marriage licenses.

We next learn that on Friday, February 6, 2004, Kate Kendell received a phone call from the mayor's chief-of-staff saying that the mayor intended to begin issuing marriage licenses to same-sex couples the following Monday, February 9. Kate provides us with this snippet of information in a way that conveys her secret delight and surprise that this was happening. She admits she was "staggered and stunned" and further that she was "concerned about how it might play out in the rest of the country."

The "rest of the country" was primarily referring to lawyers and litigants throughout the country who had been carefully planning their strategy for claiming the legal right to civil marriage. Lawyers are notoriously conservative about how they fight these battles. They don't want to go to court too soon. They want to have the right plaintiffs. Early cases are test cases. They have to be perfect. Yet here was a rogue mayor, mayor of San Francisco, the gay, lesbian, bisexual, and transgender ("GLBT") capital of the country, and he had decided on his own that it was time for San Francisco to recognize same-sex marriage. This was monumental!

That weekend the telephone lines were buzzing. Gay rights activists in Massachusetts and Washington, D.C. had to be contacted. National organizations had to be consulted. Additional conversations with the mayor's staff followed, and all of this had to happen without letting the secret out: the mayor was prepared to issue marriage licenses the very next week to gay men and lesbians.

As key players around the country debated, Mayor Gavin Newsom was making up his own mind. This newly-elected heterosexual white male mayor was convinced that all people, including gay men and lesbians, should be able to experience "marriage" on the same level that he and his wife had. The legal significance was important, but the emotional significance of that legal tie and the fact that some people were denied that very personal experience seemed to drive his resolve more than anything else.

Fact: Over the weekend, key national leaders try to persuade the mayor that this is not the right time.

By Sunday night it was clear to all that the mayor had made up his mind. Same-sex marriages were going to happen in San Francisco the following week. The clip of Newsom at this point in the film is terrific as he explains:

“There will never be a right time. There will always be reasons why politicians and lawyers think we should put this off.”

By Monday, February 9, once Kate Kendell was convinced these marriages were going to be performed, she began to think strategically. Who should be first? It was immediately clear to Kate (and to many others who gave this question some thought) that the first couple should be Del Martin and Phyllis Lyon. Together for over half a century, they had been “firsts” in so many important events in the GLBT movement. They formed the Daughters of Bilitis in the 1950s,<sup>13</sup> they wrote the book *Lesbian/Woman* in the early 1970s,<sup>14</sup> they challenged the National Organization for Women in its early days to include lesbian issues, and they are still fighting for numerous feminist causes, including the rights of lesbian moms and battered women.<sup>15</sup> Their dedication to each other and to the movement has been inspirational for many of us. But would they do it? Would Del and Phyllis, the feminist couple that years ago had argued against the patriarchal institution of marriage, be willing to become San Francisco’s first married lesbian couple?

Kate called. Phyllis answered. The question was posed. Phyllis said: “I’ll have to ask Del.” Ten minutes later she called back and said, “We’ll do it.”

The still clips from the earlier days in the lives of these two women are a treasure, but are shown only briefly. The film presses us to focus on the main event: the wedding.

February 12: Wedding Day. City Hall was abuzz, not with crowds, but with officials checking over the paperwork to be sure that all was in order. The film gives us clips from beginning to end, from the time the two women filled out their application to the final pronouncement. It includes a wonderfully funny moment that occurred just before the ceremony began. As Del and Phyllis were given a copy of their marriage license and certificate, they were also given the required pamphlets on family planning and pregnancy. As Joyce Newstat explained, this wedding was not just for show. Rather, all concerned wanted it to be as real, as legal, and as official as possible. Paying attention to details was crucial. Another concern was the fear that opponents of same-sex marriage might get word of what was going on and

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13. For a documentary on their joint lives and a history of the movement, we recommend another film in which they “star”: NO SECRET ANYMORE: THE TIMES OF DEL MARTIN AND PHYLLIS LYON (Frameline, 2003). The 57-minute film was directed by Joan E. Biren and can be ordered from Frameline at <http://lesbianlife.about.com/gi/dynamic/offsite.htm?zi=1/XJ&sdn=lesbianlife&zu=http%3A%2F%2Fwww.jebmedia.com%2F>.

14. DEL MARTIN & PHYLLIS LYON, *LESBIAN/WOMAN* (1972) (providing a history of the lesbian movement and arguing for equal rights for lesbians). The book was originally published by Glide Publications and reprinted in paperback by Bantam Books throughout the 1970s. A twentieth anniversary edition was published by Volcano Press in 1991.

15. See DEL MARTIN, *BATTERED WIVES* (1976); DANIEL JAY SONKIN, DEL MARTIN & LENORE E. AUERBACH WALKER, *THE MALE BATTERER: A TREATMENT APPROACH* (1985).

walk in at the last minute with a restraining order. Fears aside, the wedding commenced, with Mabel Teng presiding and Kate Kendell and Roberta Achtenberg<sup>16</sup> standing by as witnesses.

The scenes of Del and Phyllis sharing their vows is intimate and moving. As viewers, we experience it as the personal and solemn moment that it is in their lives. When Mabel Teng says, "By virtue of the authority vested in me by the State of California, I now pronounce you spouses for life," the enormity of the moment breaks through. Kate Kendell and Roberta Achtenberg each shed a tear, in part for Del and Phyllis, but also for all of us who never thought we'd see a public official perform that ceremony for two lesbians in our lifetimes.

The Revolution: As officials worked with Phyllis and Del on their application and other paperwork, Mabel Teng shared an overriding concern about the future. The office was starting to get a lot of calls. What if more than one hundred people showed up requesting same-sex marriage licenses? The problem was that their ticketing system would only accommodate requests by up to fifty couples.

Teng's concerns were well founded, as the last three frames of the film show:

*First frame:* Over the next twenty-nine days San Francisco city officials performed 4,037 same-sex wedding ceremonies for couples who came from forty-six states and eight countries around the world.

*Next frame:* On March 11, the California Supreme Court ordered San Francisco to stop issuing marriage licenses to lesbian and gay couples.

*Final frame:* The constitutionality of these marriages ultimately will be decided by the courts.

### THE BATTLE IN THE COURTS

On February 13, two lawsuits were filed in San Francisco County, both asking the court to issue an immediate stay in order to stop the city's issuance

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16. Achtenberg is a civil rights lawyer and activist who currently serves as Senior Vice President of the San Francisco Chamber of Commerce. She was the highest ranking "out" lesbian in the Clinton administration where she served as an assistant secretary. Before her stint in Washington, she served on the Board of Supervisors for the City and County of San Francisco. She also served as Legal Director of the Lesbian Rights Project (the forerunner of the National Center for Lesbian Rights) from 1984-88. See Andrea L.T. Peterson, *Roberta Achtenberg, in OUTSTANDING LIVES: PROFILES OF LESBIANS AND GAY MEN 3-7* (Michael Bronski et al. eds., 1997); see also SAN FRANCISCO CHAMBER OF COMMERCE, *Roberta Achtenberg Biography*, at [http://www.sfchamber.com/roberta\\_achtenberg\\_bio.htm](http://www.sfchamber.com/roberta_achtenberg_bio.htm) (last visited Nov. 1, 2004).

of marriage licenses to same-sex couples.<sup>17</sup> The court refused.<sup>18</sup> The marriages continued.

On February 27, Attorney General Bill Lockyer filed an “original writ of mandate, prohibition, certiorari and/or other relief” in the California Supreme Court.<sup>19</sup> The petition asked for an immediate stay.<sup>20</sup>

On March 11, the Supreme Court ordered San Francisco to stop issuing same-sex marriage licenses and certificates<sup>21</sup> and stayed the two proceedings in the court below until such time as the court could rule on the substantive issues raised in Attorney General Lockyer’s petition.<sup>22</sup> The Attorney General asked the court to direct the local officials to comply with existing statutes governing

17. *Lockyer v. San Francisco*, 95 P.3d 459, 465 (Cal. 2004) (citing *Thomasson v. Newsom*, No. CGC-04-428794 (Super. Ct. S.F. City and County 2004) and *Proposition 22 Legal Defense and Educ. Fund v. San Francisco*, No. CPF-04-50943 (Super. Ct. S.F. City and County 2004)).

18. *Id.* at 466 n.6. The court declined to grant the immediate stay, but it did set a hearing for March 29 in order for the city to have an opportunity to “show cause” for its continued actions. *Id.*

19. See Original Petition for Writ of Mandate, Prohibition, Certiorari and/or other Appropriate Relief, *Lockyer v. San Francisco*, 95 P.3d 459 (Cal. 2004) (No. S122923), available at <http://courinfo.ca.gov/>.

20. *Id.*

21. We feel compelled to add a personal footnote at this point. Because we are part-time residents of California, we feel a special connection to California. When the mayor of San Francisco began issuing same-sex marriage licenses, we decided we should join the other couples in line. We had been together for over twenty years and believed that the legality of our relationship would best be recognized by marriage, rather than one of its alternatives (e.g., domestic partnership, civil union). Because of other family commitments, we could not leave Iowa and go to San Francisco immediately. By the time we had cleared our calendars, it was very difficult to get through to the clerk’s office and schedule an appointment. The only option was to make an appointment using the web. That we did. The first available date was not until April. On March 12 we received the following e-mail message from the Office of the County Clerk:

Effective March 11, 2004 - 2:33 p.m., by order of the California Supreme Court. The San Francisco County Clerk has been ordered to discontinue issuance of same-sex marriage licenses. Therefore all previously scheduled same-sex appointments are now cancelled. If payment was made in advance, the marriage license fee will be refunded to you within 4-6 weeks if the marriage license was not issued to you due to the court decision. Please do not email requesting a refund as one will be issued automatically back to your credit card account.

The Supreme Court has stated that the court will hear the case at the earliest in late May or early June and then a decision would be made within ninety days. Should the court then make a decision allowing us to issue same-sex licenses at that time, then a new appointment would need to be scheduled.

E-mail from Office of the County Clerk, to Patricia Cain & Jean Love (Mar. 12, 2004) (on file with authors). While the decision was not a complete surprise to us, it was a huge disappointment.

22. Press Release, Judicial Council of California, California Supreme Court Takes Action in Same-Sex Marriage Cases (Mar. 11, 2004), at <http://www.courtinfo.ca.gov/presscenter/newsreleases/NR15-04.HTM>.



marriage,<sup>23</sup> to declare the 4,037 same-sex marriages performed since February 10 invalid, and to direct the city to refund fees it had collected for the issuance of these licenses.<sup>24</sup>

On August 14, 2004, the court ruled in favor of the Attorney General on all three points. The court's decision is rooted in the legal doctrine of the separation of powers.<sup>25</sup> The question squarely before the court was: Which branch of government has the power to determine the constitutionality of duly enacted statutes? The answer was: the courts, not the executive branch.<sup>26</sup> Thus, Mayor Newsom's belief that the marriage statutes are unconstitutional, even if valid, was not sufficient to give him the authority to refuse to enforce the statute as written. It is difficult to quibble with this part of the opinion. A statute is presumed to be constitutional until an appellate court rules otherwise.<sup>27</sup> Any other outcome, especially one in which various governmental actors could decide for themselves independent of judicial review which statutes should be enforced, would violate the basic principles of separation of powers.<sup>28</sup> At the same time, the court made it abundantly clear that it was not expressing an opinion as to the constitutionality of the marriage statute.<sup>29</sup>

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23. Section 300 of the California Family Code provides that “[m]arriage is a personal relation arising out of a civil contract between a man and a woman . . .” CAL. FAM. CODE § 300 (West 1994). Section 308.5, added by the voters in March 2000 when they passed Proposition 22, provides: “Only marriage between a man and a woman is valid or recognized in California.” CAL. FAM. CODE § 308.5 (West 2000).

24. *Lockyer v. San Francisco*, 95 P.3d 459, 466 (Cal. 2004).

25. *Id.* at 463 (“[T]he classic understanding of the separation of powers doctrine [is] that the legislative power is the power to enact statutes, the executive power is the power to execute or enforce statutes, and the judicial power is the power to interpret statutes and to determine their constitutionality.”).

26. *Id.* at 464.

27. See CAL. CONST. art. III, § 3.5 (providing that “[a]n administrative agency . . . has no power: (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of its being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional; (b) To declare a statute unconstitutional . . .”). The City argued that this provision did not apply to it or its officials because they were not administrative agencies. See *Lockyer*, 95 P.3d at 474. The court disagreed. *Id.*

28. As Judge Moreno points out in a concurring opinion, however, local officials can sometimes act on their own determination that a statute is unconstitutional. *Id.* at 501-02 (Moreno, J., concurring). Sometimes a statute is clearly unconstitutional and sometimes the local official is in a position to act and then immediately test in court the validity of the official's constitutional determination; however, this was not the situation in this case. *Id.* (Moreno, J., concurring).

29. *Id.* at 501 (Moreno, J., concurring). The constitutional issue has been raised in several separate cases that are making their way through the California courts. On March 12, 2004, one day after the California Supreme Court ordered San Francisco to stop issuing same-sex marriage licenses, the National Center for Lesbian Rights, together with several other law firms, filed suit on behalf of twelve same-sex couples, claiming that denying them the right to marry violated the

Two judges concurred in the portion of the decision holding that the local officials had exceeded their authority, but dissented as to the declaration that the 4,037 marriage licenses issued by the officials were a nullity.<sup>30</sup> They believed that such a decision should be postponed until the court had ruled on the question of the constitutionality of excluding same-sex couples from civil marriage.<sup>31</sup> By contrast, the majority ruled that if, in the future, the statute were to be held unconstitutional and marriage were to then be extended to same-sex couples, the couples simply would have to reapply, get a new license, and marry again.<sup>32</sup> Phyllis Lyon's response to the court's decision was: "Del is eighty-three years old, and I am seventy-nine. After being together for more than fifty years, it is a terrible blow to have the rights and protections of marriage taken away from us. At our age, we do not have the luxury of time."<sup>33</sup>

### CONCLUSION

Eventually the California Supreme Court will determine whether Del and Phyllis can be legally married in California.<sup>34</sup> Regardless of the outcome of

California constitution. The city and county of San Francisco also filed suit, claiming that the ban on same-sex marriages violated the California constitution. Those two cases, *Woo v. Lockyer* and *City and County of San Francisco v. Lockyer*, have been consolidated before the San Francisco Superior Court. See NATIONAL CENTER FOR LESBIAN RIGHTS, THE DOCKET—MARRIAGE, at [http://www.nclrights.org/cases/woo\\_lockyer\\_overview.htm](http://www.nclrights.org/cases/woo_lockyer_overview.htm) (last visited Jan. 14, 2005).

30. *Lockyer*, 95 P.3d at 503 (Kennard, J., concurring in part and dissenting in part); *id.* at 508 (Werdegar, J., concurring in part and dissenting in part).

31. *Id.* at 503 (Kennard, J., concurring in part and dissenting in part).

32. *Id.* at 497.

33. Press Release, Lambda Legal, California Supreme Court Invalidates Marriages from San Francisco Without Resolving Whether Same-Sex Couples Have the Right to Marry (Aug. 12, 2004), at <http://www.commondreams.org/news2004/0812-02.htm>.

34. The case challenging the marriage statutes, *Woo v. Lockyer*, is currently before the San Francisco Superior Court, but that court's decision is predicted by all concerned to be appealed to the California Supreme Court. Constitutional challenges to state statutes that bar same-sex couples from marriage are also progressing in other states. The trial court in the state of Washington has held that state's statute unconstitutional. See *Anderson v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, at \*11 (Wash. Super. Ct. Aug. 4, 2004).

In early March, Multnomah County officials in Portland, Oregon began handing out same-sex marriage licenses. In the litigation that resulted from these events, the Multnomah County Circuit Court enjoined the issuance of additional same-sex marriage licenses on April 20, 2004, but, unlike the California Supreme Court, ordered state officials to record marriage licenses that had already been issued. See *Li v. Oregon*, No. 0403-03057, 2004 WL 1258167, at \*9 (Or. Cir. Apr. 20, 2004). Oregon's marriage statute is a bit more vague than California's. It provides: "Marriage is a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable." OR. REV. STAT. § 106.010 (1997). Nonetheless, the statute has been consistently interpreted to authorize only opposite-sex marriages. See *Li*, 2004 WL 1258167, at \*3. An earlier case in Oregon had determined that same-sex couples were a suspect class for purposes of analyzing denial of constitutional rights

this litigation, however, we will always have this film and the lasting picture of these two courageous lesbians pledging their love and standing firmly at the center of a revolution.

We plan to use this film when we teach same-sex marriage, both in our law school course on Sexuality and the Law and when we guest lecture for undergraduate courses in the Sexuality Studies program. The film puts a personal face on a hotly debated issue. At a mere nineteen minutes, it will not even require editing. The events it portrays are crucial in the history of the battle for equality for same-sex couples and we are very thankful that Debra Chasnoff has preserved the story for us.<sup>35</sup>

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under the state constitution. *Tanner v. Or. Health Sciences Univ.*, 971 P.2d 435 (Or. Ct. App. 1998). The *Li* court, relying on *Tanner*, held that the denial of marital benefits to same-sex couples violated their right to privileges and immunities, but the court stopped short of requiring that marital status be extended. *Li*, 2004 WL 1258167, at \*6, \*9. Citing to the Vermont case that led to the enactment of civil unions, *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999), the *Li* court held instead that the legislature would have a limited time in which to extend the benefits of marriage on an equal basis to same-sex couples and, if it failed to do so, counties should begin issuing marriage licenses to same-sex couples. *Li*, 2004 WL 1258167, at \*10. The case is on expedited appeal to the Oregon Supreme Court. Oral arguments were made on December 15, 2004. *See A Case for History: Li v. State of Oregon Heard by Oregon Supreme Court*, at <http://www.basicrights.org/news/newsitem.asp?ID=98> (Dec. 16, 2004).

Additional cases challenging the constitutionality of the exclusion of same-sex couples from state marital laws are progressing in Arizona, Florida, Indiana, Maryland, and New York. In addition, the mayor of New Paltz and two ordained Unitarian ministers faced criminal charges for solemnizing marriages of same-sex couples who had been unable to obtain a marriage license. In defending themselves, the mayor and the ministers all argued that failure to issue marriage licenses to same-sex couples was unconstitutional and thus they could not be criminally liable for failing to honor an unconstitutional law. In each case the trial court agreed and dismissed the charges. *See People v. West*, 780 N.Y.S.2d 723, 725 (Just. Ct. 2004); *People v. Greenleaf*, 780 N.Y.S.2d 899, 905 (Just. Ct. 2004).

35. While this article was in press, several important shifts occurred on the marriage front. On August 18, 2004, a lower level court in Massachusetts upheld the denial of same-sex marriage to certain nonresidents. *See Cote-Whitacre v. Department of Public Health*, 18 Mass. L. Rptr. 190 (Mass. Super. 2004). On Election Day in November 2004, eleven states adopted constitutional amendments banning same-sex marriage. Oregon was one of those states, which means that the marriage challenge in Oregon, *Li v. Oregon*, cannot result in a court ruling that favors marriage. However, the language of the Oregon amendment was clearly limited to ban only same-sex marriages, and thus it leaves open the possibility of other forms of state recognition for same-sex couples. The Oregon Supreme Court could find that the denial of equal benefits to same-sex couples violates the Oregon constitution, and could require the legislature to equalize benefits either by repealing the benefits for married couples or by extending similar benefits to same-sex couples. On December 22, 2004, oral arguments were made in the San Francisco marriage case *Woo v. Lockyer*. Del and Phyllis, together with eleven other named same-sex couples, await that decision.

# **SEXUAL ORIENTATION: THE JUDICIAL RESPONSE**

