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## What's Sex Got to Do With It - A Cinematic Critique on the Arguments against Same-Sex Marriage

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# What's Sex Got to Do With It? A Cinematic Critique on the Arguments Against Same-Sex Marriage

by

SCOTT NORTON\*

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## I. Dearly Beloved, We Are Gathered Here Today . . .

“I believe in marriage! I believe what it stands for!” exclaimed Alex McDonough, the attorney character advocating for the legality of same sex marriage in the film *I Now Pronounce You Chuck & Larry*. Courts have expressed a similar sentiment in decisions regarding the legality of same sex marriage, yet have repeatedly held against the validity of such

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marriages.<sup>1</sup> If both sides of the marriage argument believe in marriage, what is the litigation about? The answer lies in the various interpretations of the definition of a marriage. In several opinions, state courts define marriage primarily as a means of procreation and a stable environment in which to raise a child.<sup>2</sup> Conversely, as exemplified by the film *I Now Pronounce You Chuck & Larry*, proponents of gay marriage present it as the committed union of two individuals sharing benefits and responsibilities.<sup>3</sup>

From a legal standpoint, states created marriage to provide rules regarding familial, financial, and survivor responsibilities, but can also be seen as a road to many benefits. Because the judicial system views marriages as contracts, states may regulate who cannot enter into such a contract. When a state regulates marriage contracts by prohibiting same sex marriage they codify the ban in one of two ways; by limiting marriage to the union of one man and one woman,<sup>4</sup> or by explicitly banning the union of two members of the same sex.<sup>5</sup>

Domestic partnerships<sup>6</sup> are the only option available to same sex couples who wish to receive benefits similar to that of married couples. Domestic partnerships are defined as a committed union of two members of the same sex.<sup>7</sup> Some states have legalized domestic partnerships for same sex couples (and sometimes their heterosexual counterparts), where partners are afforded the same benefits but subject to the same responsibilities as heterosexual partners.<sup>8</sup> The difficulty comes in understanding the reason why states regulate marriage in such a way. Society refuses in many cases to offer legal protections to same sex couples despite the fact that many same sex couples exhibit the same level of commitment to each other as opposite-sex couples. Therefore, the reasons behind this refusal must be reviewed.

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1. See *Standhardt v. Superior Court*, 77 P.3d 451, 461 (2003) (citing cases establishing the fundamental nature of marriage to society and why it holds such a standing).

2. See *id.* at 462.

3. See, e.g., CAL. FAM. CODE § 760 (Deering 2006) (defining property acquired during marriage as community property); CAL. EVID. CODE § 980 (Deering 2004) (regarding the privilege of confidential marital communications).

4. See, e.g., CAL. FAM. CODE § 308.5; IOWA CODE ANN. § 595.2 (West 2001); MO. ANN. STAT. § 451.022 (West 2003).

5. See, e.g., ARIZ. REV. STAT. ANN. § 25-101 (2007); KY. REV. STAT. ANN. § 402.020 (LexisNexis 1999); N.C. GEN. STAT. § 51-1.2 (2005).

6. Domestic partnership is one example of a system giving rights to same sex couples while not defining this institution as marriage, hoping to create a "middle road" of sorts. An example of a domestic partnership scheme can be found in CAL. FAM. CODE § 297.

7. CAL. FAM. CODE § 297 (2006 & 2008 Supp.) (defining domestic partners as two *adults*).

8. CAL. FAM. CODE § 297.5 (2006 & 2008 Supp.).

In the movie *I Now Pronounce You Chuck & Larry*, Chuck and Larry share a relationship that does not fit into a statutory scheme of either opposite-sex marriage or same sex domestic partnership. The film uses society and the legal system to illustrate what is essentially a gender driven litmus test to enter a state-protected union.<sup>9</sup> Their relationship cannot fit the present legal definition of marriage because they are not members of the opposite sex.<sup>10</sup> Conversely, they do not fit into the definition of a domestic partnership because they do not have sex.<sup>11</sup> According to courts, the reason they cannot be married by the state is their inability to produce biological children; however, this same requirements is not levied on their heterosexual counterparts. The reason they do not fit in either scheme is the same, they cannot and do not have “sexual relations,” or in other words, physical intimacy between members of a committed couple. Sex therefore becomes the sole road to legitimizing the relationship in a way society can understand. Society’s predisposition with sex turns a relationship based on trust, love, and respect into one centered on society’s perceived sexual morals. In short, the accepted legal basis of marriage centers on sex; without sex, there can be no marital relationship.

This note will discuss how courts rely on sex as a justification for regulating marriage and do not explain why this justification is relevant. In Part II, this note discusses the Arizona case of *Standhardt v. Superior Court*<sup>12</sup> to show the government’s two accepted justifications for the same sex marriage ban. Later in Part II, the focus shifts to the decision in *Goodridge v. Department of Public Health*<sup>13</sup> as a counterpoint to the majority’s view in *Standhardt*. Part III focuses on the film *I Now Pronounce You Chuck & Larry* as an illustration of why law does not produce a desirable result that legally sanctioned relationships do not turn on sexual practice. Finally, Part IV discusses why the film’s lessons create an alternate interpretation the court may use in deciding how to define marriage.

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9. *I NOW PRONOUNCE YOU CHUCK & LARRY* (Universal Studios 2007).

10. *Id.*

11. *Id.*

12. 77 P.3d 451.

13. 440 Mass. 309 (2003).

## II. If Anyone Knows a Reason These Two Should Not Be Joined . . .<sup>14</sup>

The standard of review for statutes banning same sex marriage is the same regardless of how states word the statute: under rational basis review.<sup>15</sup> The burden of proof falls on the challenging party to show that the ban does not bear any rational relation to a legitimate government objective.<sup>16</sup> In cases where the regulation effects a “suspect classification” or infringes upon a “fundamental right,” the court will give a higher level of scrutiny to the regulation called “strict scrutiny.”<sup>17</sup> Since most courts have determined that sexual orientation is not a suspect class nor same sex marriage constitute a fundamental right, this piece will focus on how to overturn a ban on same sex marriage even if the court uses the lower scrutiny of rational basis review.<sup>18</sup> The importance of the basis of review is the deference given to the government. A higher standard of review (strict scrutiny) is more difficult for the government to meet; whereas a lower standard of review (rational basis) makes it more likely that a court will uphold the legislation.

### A. *Standhardt v. Superior Court* and the Rejection of Same sex Marriage

In *Standhardt v. Superior Court*, the court had before it two men who wished to challenge the Arizona ban on same sex marriage.<sup>19</sup> After the Supreme Court’s decision in *Lawrence v. Texas*, the men argued that the marriage bans should be considered unconstitutional.<sup>20</sup> The Arizona Court concluded that the government interests for the ban on same sex marriage—procreation and having children reared in a two-parent, opposite-sex environment—were both legitimate and rationally related to the government action.<sup>21</sup>

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14. At the time that this note was written, the California case of *In re Marriage Cases*, 43 Cal. 4th 757 (2008), was still being decided. This case determined that sexual orientation deserved heightened scrutiny as a suspect classification. *Id.* at 783-84. Because this note focuses on how to survive the lower scrutiny of rational basis review, it will not discuss the California case that chose the higher standard, and instead argue how the gay marriage bans should not survive any level of scrutiny.

15. For a discussion on tiered scrutiny see *D’Amico v. Bd. Of Med. Exam’rs*, 11 Cal. 3d. 1, 16-17 (1974) (discussing one example of the standard of review courts employ when analyzing a challenged statute under rational basis review).

16. *See id.* at 16.

17. *Id.* at 17.

18. *See, e.g., Andersen v. King County*, 138 P.3d. 963 (Wash. 2006).

19. *Standhardt*, 77 P.3d at 454.

20. *Id.*

21. *Id.* at 460-61.

In refuting procreation as a basis of rejecting same sex marriages, the plaintiffs (same sex couples), argued that procreation was not a legitimate interest because heterosexual couples were not required to procreate in order to marry.<sup>22</sup> The court responded that inquiring into the subject of procreation before issuing a license to opposite-sex couples would violate privacy laws.<sup>23</sup> It adduced an implication of privacy concerns through a line of U.S. Supreme Court cases, and found that asking such questions as a prerequisite to marriage was forbidden.<sup>24</sup> The court reasoned that reproductive technologies had advanced to such a point that it would be impossible to determine who would never bear and raise children.<sup>25</sup>

Courts have consistently held that marriage between opposite-sex couples is a fundamental right while the same is not true of same sex couples.<sup>26</sup> Moreover, allowing opposite-sex couples to enter into marriage regardless of their willingness or ability to procreate does not defeat the reasonableness link between marriage and procreation.<sup>27</sup> Instead, the court need only find a reasonable link between the asserted interests and their rationales.<sup>28</sup> Since the Arizona Court considered this burden met, it found this justification rational.<sup>29</sup>

Additionally, the Arizona Court addressed the government's asserted interest in promoting child rearing within the stable environment traditionally associated with marriage.<sup>30</sup> Plaintiffs argued that same sex couples also raised children who would benefit from the stable environment provided by marriage.<sup>31</sup> The court first conceded that same sex couples and their families would benefit from marriage, particularly where the child of same sex parents does not have biological ties with either parent.<sup>32</sup> This fact did not persuade the court however. It concluded that the mere fact same sex couples would benefit by lifting the ban was not sufficient to defeat it,<sup>33</sup> and that the line between same sex couples and

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22. *Id.* at 462.

23. *Id.*

24. *Id.* (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965)).

25. *Id.* at 462.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 461.

31. *Id.* at 462.

32. *Id.* at 463.

33. *Id.*

opposite-sex couples could have been drawn differently was a matter for the legislature to rectify.<sup>34</sup>

As a final reason the court opined that the State could reasonably decide that procreation is relevant because part of marriage is to promote responsible procreation and child rearing.<sup>35</sup> Here, the court intertwined their argument regarding procreation to that of child rearing.<sup>36</sup> The court first stated,

The State could reasonably decide that by encouraging opposite-sex couples to marry, thereby assuming legal and financial obligations, the children born from such relationships will have better opportunities to be nurtured and raised by two parents within long-term, committed relationships, which society has traditionally viewed as advantageous for the children.<sup>37</sup>

The court also went on to state that, “[b]ecause same sex couples by themselves cannot procreate, the State could also reasonably decide that sanctioning same sex marriages would do little to advance the State’s interest in ensuring responsible procreation within committed, long-term relationships.”<sup>38</sup> The court first discusses child rearing by assuming that children are better off in homes headed by opposite-sex couples, but does not address how families headed by same sex couples differ in any meaningful way. Instead, it reverts to how legitimizing same sex marriages does not advance an interest in responsible procreation, thereby completely passing over explaining specifically how the distinction between families headed by opposite-sex couples and those headed by same sex couples favors the state’s argument.<sup>39</sup> Nowhere in the opinion does the court advance a reason that same sex couples are differently situated from opposite-sex couples with respect to child rearing in such a way that would permit the State to regulate marriage on the basis of that justification.

#### **B. *Goodridge v. Dept of Public Health: Coming to the Defense of Marriage***

In *Goodridge v. Department of Public Health*, the Massachusetts Supreme Court concluded that these same two interests, procreation and child rearing, were irrational as applied.<sup>40</sup> The court first determined that the procreative ability of opposite-sex couples as compared to same sex

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34. *Id.*

35. *Id.* at 462-63.

36. *Id.*

37. *Id.*

38. *Id.* at 463.

39. *Id.*

40. 440 Mass. at 336.

couples was not rationally related to a regulation of marriage on the basis.<sup>41</sup> The court advanced evidence illustrating that the commonwealth affirmatively facilitates bringing children into a family regardless of the method this occurs.<sup>42</sup> If the commonwealth was concerned with procreation as a necessary component to marriage, the Court stated its legislature could draft and approve new laws tightening the boundaries on non-marital child bearing.<sup>43</sup> In addition, the argument that “marriage is procreation” singles out the sole unbridgeable difference between same- and opposite-sex couples, and makes that difference the essence of marriage.<sup>44</sup> The court determined that basing the entirety of the ban on this difference in sexual practice impermissibly, “identifies persons by a single trait and then denies them protection across the board.”<sup>45</sup> As the U.S. Supreme Court held this action impermissible, the Massachusetts Court could not use this as the basis for the Massachusetts regulation of marriage.<sup>46</sup> The theoretical procreative capacity of opposite-sex couples was not a valid justification for the ban.<sup>47</sup>

Next, the court in *Goodridge* turned to the government’s asserted interest in child rearing.<sup>48</sup> The court determined that this interest could not be fully separate from the previous interest in procreation.<sup>49</sup> Considering the changing make of up the American family, the court recognized Massachusetts’ support for this change demonstrated the commonwealth’s acceptance of same sex families.<sup>50</sup>

The commonwealth argued that a two-parent family with one parent of each sex is the optimal setting for child rearing.<sup>51</sup> It did not, however, produce any evidence showing that limiting marriage in this way would increase the number of opposite-sex couples choosing to enter into marriage in order to have and raise children.<sup>52</sup> In addition, the Court

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41. *Id.* at 333.

42. *Id.* at 332-33 (discussing how adoption and insurance coverage for assisted reproduction technology are available to married couples, same sex couples, and single individuals alike).

43. *Id.* at 333.

44. *Id.*

45. *Id.* (explaining that holding animus towards an unpopular group is not a valid reason to enact legislation against that group (citing *Romer v. Evans*, 517 U.S. 620, 633 (1996))).

46. *Romer*, 517 U.S. at 633.

47. *Goodridge*, 440 Mass. at 333 n. 25.

48. *Id.* at 333.

49. *Id.*

50. *Id.* at 334.

51. *Id.* at 331.

52. *Id.* at 334.

suggested that the government should be more interested in the best interests of the child.<sup>53</sup>

If the government is in fact concerned child welfare, it should adopt a policy that does not punish children of same-sex couples. Children of same sex couples would benefit immeasurably from the state granting their parents the legal right to marry. This would not infringe on or affect in any appreciable way the benefits granted to children whose parents were married heterosexual couples.<sup>54</sup> It can be concluded that penalizing children because the government disapproves of the sexual orientation of the parents is impermissible.<sup>55</sup>

The Court in Massachusetts looked behind the government's proffered interests and determined they had no basis in practice. The court prohibited the government to base their regulations solely on sexual practice, because it stands as the sole difference between heterosexual and homosexual couples.<sup>56</sup> Even though the court used rational basis review in this case, the Court was unconvinced that they should simply condone the actions of the Commonwealth because they were engaging in a lower level of scrutiny. As such, the Court in *Goodridge* showed us that rational basis review, while generally deferential to State action, can still have some "bite."<sup>57</sup>

### III. As a Symbol of Love and Commitment . . .

*I Now Pronounce You Chuck & Larry*, directed by Dennis Dugan, is a romantic comedy.<sup>58</sup> Because of the genre of film, it can explore relationships and marriage in society in such a way that it can experiment with the law as enacted and determine how it works in practice. Andrew Horton, a scholar who analyzes many different kinds of films,<sup>59</sup> defines romantic comedy in his book *Laughing Out Loud* as a genre focused traditionally on boy-girl relationships as juxtaposed "between personal desire and social/family institutions."<sup>60</sup> Traditionally, the goal of young

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53. *Id.* at 335.

54. *Id.* One example of these benefits is that with the civil recognition of marriage by the legislature, parents are encouraged to remain committed to each other and their children.

55. *Id.* at 336.

56. *Id.* at 333.

57. Jon-Peter Kelly, *Act of Infidelity: Why the Defense of Marriage Act is Unfaithful to the Constitution*, 7 CORNELL J. L. & PUB. POL'Y 203, 247 (1997).

58. (Universal Studios 2007).

59. See ANDREW HORTON, *COMEDY/CINEMA/THEORY* (University of California Press 1991); ANDREW HORTON, *MODERN EUROPEAN FILMMAKERS AND THE ART OF ADAPTATION* (F. Ungar Publishing Co. 1981).

60. ANDREW HORTON, *LAUGHING OUT LOUD* 50 (University of California Press 2000).

couples is to reach the most official of all unions: marriage.<sup>61</sup> Whether or not they actually marry on camera is irrelevant;<sup>62</sup> it is more important that the couple is seen overcoming obstacles that block the couple and triumph over those blocking figures.<sup>63</sup> In other words, the point of a romantic comedy is not simply a story about the means to an end (marriage), but rather to explore the path two people explore during a relationship. A romantic comedy, therefore, becomes the playing field on which we can explore contradictions between “love and sexuality, honesty and deceit, personal desire and social decorum, private obsession and public customs.”<sup>64</sup> The genre plays on many different emotions; laughter being the obvious one, but also sorrow and compassion.<sup>65</sup> Alexander Payne and Barry Fanaro therefore did not choose this genre of film by accident in writing the screenplay.<sup>66</sup> Because the nature of *I Now Pronounce You Chuck & Larry* explores the meaning of marriage and its societal implications, they used the romantic comedy genre as a means to explore the possible boundaries and definitions of marriage in the twenty-first century, as shown through the journey of the relationship between Chuck and Larry.

Chuck Levine (Adam Sandler) and Larry Valentine (Kevin James) are firefighters in Brooklyn. Chuck is the embodiment of the archetypal single, heterosexual male. He has a new sexual partner every day.<sup>67</sup> Larry, on the other hand, is the archetype of the American father figure. He is a widower with two children whom he loves deeply and for whom he provides.<sup>68</sup> Larry's decision-making centers on what is best for his children.

After a near-fatal experience in a burned out building, Larry awakes after having saved Chuck from falling debris. He must immediately consider the possibility that his children could be without a father at any

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61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. It should be noted that Payne wrote and directed *SIDEWAYS* (Fox Searchlight Pictures 2004) and *ELECTION* (Paramount Pictures 1999), which also used the comedy genre to expound upon other important societal messages.

67. *I NOW PRONOUNCE YOU CHUCK & LARRY* (Universal Studios 2007) (we get this impression after his girlfriend confronts him at the firehouse and says, “you slept with my twin sister”).

68. *Id.* (though he cannot cook, or have the courage to ask his housekeeper for more help, Larry prepares dinner for his children each night trying to keep some semblance of family time and normalcy despite his work schedule).

time.<sup>69</sup> As such, he wants to ensure that in the event of sudden death, his children would be cared for. Unfortunately, due to a flaw in his pension program, his benefits will not vest in his children in the event of his death.<sup>70</sup> His beneficiary can only change in the event of three major occurrences—birth, death, or marriage.<sup>71</sup> Because the first two options are not possible, Chuck can only change his beneficiary through remarriage.<sup>72</sup> When contemplating his options, he comes across a newspaper article about domestic partnership. Larry, believing Chuck owes him a favor as a result of Larry saving his life, proposes to Chuck that they enter into a domestic partnership. Though initially hostile to the idea, Chuck finally acquiesces and agrees.<sup>73</sup>

Though this seems like the perfect solution, problems immediately arise. As Larry was once married to a woman, it triggers an initial investigation by the City of New York into their relationship, which they fail because they cannot act like a real gay couple.<sup>74</sup> Faced with the prospect of serious legal troubles, they seek legal counsel to aid them in the city's investigation.<sup>75</sup> The lawyer tells Chuck and Larry they may be under investigation by the city's fraud inspector (played by Steve Buscemi).<sup>76</sup> When the fraud inspector appears in the film, he picks through their garbage, and looks for evidence tending to prove that Chuck and Larry are actually gay.<sup>77</sup> When they ask the lawyer about this, she says the best way to prove their legitimacy as a same sex couple is to marry,<sup>78</sup> and suggests they go to Canada to validly marry.<sup>79</sup>

Chuck and Larry go to Canada and get married, but are unable to go through with the kiss at the end of the ceremony.<sup>80</sup> This hesitation is a recurring theme in the movie, as Chuck and Larry cannot ever show

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69. *Id.* (the children come into the hospital room in tears. Larry worries he could die if he returns to fighting fires and fears leaving his children without anyone to care for them).

70. *Id.*

71. *Id.*

72. *Id.* (the pension office worker suggests Larry could marry her when she says, "I don't know, perhaps even someone you just met," referring to who he could marry).

73. *Id.* at 21:40 (Chuck puts out his hand and says, "Partners?" and Chuck agrees, "Partners.").

74. *Id.* at 27:10.

75. *Id.* at 27:45.

76. *Id.* at 24:03.

77. *Id.* at 44:03.

78. *Id.* at 31:17.

79. See *Reference Re Same sex Marriage*, [2004] 3 S.C.R. 698, 728-29 (Can.) (upholding extension of marriage rights to same sex couples).

80. *Id.* at 36:10 (Chuck hits Larry at the conclusion of the ceremony instead of going through with the kiss).

physical expressions of intimacy because they are not actually gay. At the beginning of their relationship, Chuck and Larry act as friends, rather than lovers, by teasing each other, and merely try to pass as a couple when it is necessary.<sup>81</sup> They do not convince anyone except their lawyer that they are a true couple because they do not know how to act like one.

After their return from Canada, Chuck is invited to attend a fundraiser by their lawyer, which is a gay costume party.<sup>82</sup> They attend this party, and are immersed into gay culture. At the party, a reporter photographs Chuck knocking out a protestor, and as such, everyone in the city finds out about Chuck and Larry's relationship.<sup>83</sup> Their public "outing" leads their colleagues to sign a petition in favor of transferring them to a different station.<sup>84</sup> The captain does not comply, but instead assigns them to separate shifts.<sup>85</sup> As a result, Chuck goes home and Larry goes downstairs to the living room of the firehouse to confront each one of the signatories, reminding them of times that Chuck had saved their lives in various ways and how it did not matter that he was gay then.<sup>86</sup>

After this scene, Larry and Chuck begin to act like a real couple instead of just attempting to pass as one. They each take turns with the children, and each take responsibility for certain household chores.<sup>87</sup> The children begin performing better in school, seem happier, and Larry's son even participates in a school play.<sup>88</sup> These events strongly suggest the children are better off as a result of their "parents'" commitment.<sup>89</sup>

The only remaining problem with Chuck and Larry's relationship is the lack of physical intimacy.<sup>90</sup> This issue rears its head when Chuck, in a moment of weakness, kisses their lawyer with whom he has become good friends.<sup>91</sup> The lawyer then exclaimed perhaps the most important line of the movie, "I believe in marriage! I believe in what it represents!"<sup>92</sup> Only she defines the marriage between Chuck and Larry as one of love and

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81. *Id.* at 24:03 (an example of this conduct is when the initial investigator comes by and they have no idea how they should act).

82. *Id.* at 47:12.

83. *Id.* at 57:42.

84. *Id.* at 1:21:02.

85. *Id.* at 1:21:12.

86. *Id.* at 1:22:55.

87. *Id.* at 1:23:30.

88. *Id.* at 1:25:20.

89. *Id.*

90. *Id.*

91. *Id.* at 1:15:42.

92. *Id.* at 1:16:09.

commitment, not of sex and procreation.<sup>93</sup> Through this incident, however, the audience sees Chuck and Larry's relationship become that of a "real" couple.<sup>94</sup> They fight like a "real" married couple and then actually make up like one as well.<sup>95</sup> During the reconciliation, they even willingly decide to sleep in the same bed, and the audience is lead to believe it is because they want to.<sup>96</sup>

Unfortunately, Chuck's past heterosexual relationships come back to haunt him. Several of the women he had sexual relationships with tell the city's investigator that they had been intimate with Larry in the last one and a half years.<sup>97</sup> This incites the climax of the movie, which is the hearing at City Hall.<sup>98</sup> At the bottom of the stairs, Chuck and Larry show their first public display of affection when they hold each other's hand while walking up the stairs of City Hall.<sup>99</sup> Even though they are not in a physical relationship, these actions show their level of emotional support for each other.<sup>100</sup>

During the hearing, they are each required to testify separately, and it is here we learn the true depth of their relationship.<sup>101</sup> Even though they have no physical intimacy, they did have a long-term relationship as friends.<sup>102</sup> Additionally, the children testify about how happy they are with both Chuck and Larry taking care of them.<sup>103</sup> Despite this, the inspector still asks for the one aspect of marriage they cannot produce—a physical act of intimacy.<sup>104</sup> The captain stops them before they do it, so we never see this final proof.<sup>105</sup> The captain, as well as Chuck and Larry's firefighter coworkers, rally behind Chuck and Larry by saying they all knew about the fraud and helped them conceal it.<sup>106</sup> Even though they did not think the city would throw them all in prison, because of the fraud, they are all

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93. *Id.* at 1:16:15.

94. *Id.* at 1:19:15.

95. *Id.* at 1:24:35 (Chuck and Larry fight when attempting to rescue a man stuck in a building, but make up later when Larry actually invites Chuck to re-enter the "marital" bed).

96. *Id.* at 1:24:40.

97. *Id.* at 1:26:27.

98. *Id.* at 1:29:20.

99. *Id.*

100. *Id.* at 1:29:20.

101. *Id.* at 1:32:20.

102. *Id.* at 1:34:00.

103. *Id.* at 1:34:15.

104. *Id.* at 1:36:25.

105. *Id.* at 1:38:00.

106. *Id.* at 1:41:50.

imprisoned.<sup>107</sup> This ending presents a problem, because after they are released from prison there must be a conclusion to the film. The law in the United States however does not allow the preferred ending to a romantic comedy, where the couple eventually ends up together. Therefore, the only way to provide this resolution is for the whole group to run away to Canada and finish the movie with a same sex marriage in the only place they could.<sup>108</sup>

There are two important points to note in this movie. First, the most important act that will prove the legitimacy of a relationship is the physical act of intimacy. In the film, it is the kiss. Even though Chuck and Larry live together, forward Chuck's mail, and each take care of the children, this is insufficient to prove the existence of a true same sex relationship. Since this is an Adam Sandler movie, it is not directed at scholarly debate. Instead, it is more likely to be targeting 16-year-old boys throughout the nation.<sup>109</sup> As such, the sexual intimacy must be toned down to be appropriate for the intended audience. Second, since the movie ends in Canada, what the film is attempting to say is that the law as enacted in the United States is a moral distortion and perverse such that a proper resolution to this movie cannot occur in the country and the only way to attain a suitable resolution is to go abroad to achieve their resolution.

#### **IV. Can You Take This Man as Your Lawfully Wedded Husband?**

*I Now Pronounce You Chuck & Larry* illustrates a response to the gay marriage bans by analyzing both procreation and child-rearing, and finds what is really behind those interests. The Massachusetts Supreme Court agrees with the film's analysis by separating sex, procreation, and child rearing into separate categories, with each category requiring proof of legitimacy.<sup>110</sup>

##### **A. To Have and to Hold**

The film analyzes the link between marriage and procreation by illustrating that a couple's physical relationship is not required to create a stable home environment. The state in *Standhardt* argued that while this link between marriage and procreation was not perfect, this was not

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107. *Id.* at 1:42:10.

108. *Id.* at 1:45:20.

109. See, e.g., *BIG DADDY* (Columbia Pictures 1999); *THE WATERBOY* (Touchstone Pictures 1998); *HAPPY GILMORE* (Universal Studios 1996).

110. *Goodridge*, 440 Mass. at 333-36.

dispositive of the issue.<sup>111</sup> The state need only show that there is a “reasonable, even though debatable, basis for [its] enactment.”<sup>112</sup> The film, on the other hand, shows how the basis for this ban is not reasonable in any sense by showing that their relationship has identical features to that of a married couple. They fight and reconcile, sleep in the same bed, and provide each other with invaluable physical and emotional support.<sup>113</sup> According to the lawyer and the captain of the firehouse, these aspects of the marital relationship are the most important.<sup>114</sup>

The investigator, on the other hand, analyzes this relationship much the same way the courts do. Throughout the movie, he looks for the one piece of evidence that in his mind is dispositive of the issue, evidence of physical intimacy.<sup>115</sup> Even after hearing the touching testimonies of Chuck, Larry, and the children, the inspector is not satisfied. The kiss in front of the courtroom seems to be the only dispositive evidence to the inspector (and ultimately everyone else) as to whether a relationship exists. In the mind of the inspector, without physical intimacy, there can be no marriage (or domestic partnership).

Chuck and Larry, in addition to the other characters, show that people do not think of sex or procreation when they think of marriage. Even the firefighters, who are portrayed as epitomes of homophobic American men, support Chuck and Larry, seeing beyond their sexuality and remembering the heroic individuals they are. To everyone except the inspector, the physical act of the kiss is entirely incidental to the other aspects of the relationship.

The inspector’s request to have Chuck and Larry kiss disproves the Arizona Court’s argument that inquiring into the subject of procreation would violate privacy laws.<sup>116</sup> After all, proof of their physical intimacy is being forced into the public forum. The court also argues that privacy laws do not confer greater rights onto the marital relationship than the due process clause provides.<sup>117</sup> If this is the case, the privacy laws act as a

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111. *Standhardt*, 77 P.3d at 462.

112. *Id.* at 460-61.

113. I NOW PRONOUNCE YOU CHUCK & LARRY (Universal Studios 2007) at 1:29:20 (relating to the scenes near the end of the movie where they act in this manner).

114. *Id.* at 1:16:09 (the lawyer says “I believe in marriage! I believe in what it represents!” which, in context, refers to their committed loving relationship); *Id.* at 58:05 (the captain talked to Larry about how Paula and Larry were the most beautiful couple he had ever seen, again not referring to sex in any way).

115. *Id.* at 1:36:17 (he looks for evidence of intimacy in the courtroom, and even the lawyer suggests they get married with a photo of the kiss to prove they have performed the act).

116. *Standhardt*, 77 P.3d at 462.

117. *Id.* at 460.

shield to keep opposite sex couples from having to prove the willingness/intent to procreate, while not affording same sex couples the same protection. Because procreation cannot happen in a same sex relationship without outside assistance, same sex couples automatically have their dissimilarity on display. The same is not true of a barren couple who never have to disclose the fact that they cannot have children.

The Arizona Court advanced the argument that, “[b]ecause same sex couples cannot by themselves procreate, the State could also reasonably decide that sanctioning same sex marriages would do little to advance the State’s interest in ensuring responsible procreation within committed, long-term relationships.”<sup>118</sup> However, Arizona provides no facts to support this argument. By their own admission, same sex couples “cannot by themselves procreate.” Therefore, any procreation that occurs within a same sex relationship requires a degree of consideration before it is undertaken. The issue, therefore, has nothing to do with the physical act of sex, since the court is solely concerned with responsible procreation.

The Massachusetts Court, on the other hand, is far more critical of the government when confronting the subject of procreation.<sup>119</sup> It agrees with the film insofar as procreation and the physical act of intimacy should be addressed as separate entities when analyzing them as interests for marriage.<sup>120</sup> It correctly compared the inability for same sex couples to independently procreate with couples who cannot biologically procreate because of their age or because they are barren.<sup>121</sup> Since both of these classes of people are allowed to marry, despite the fact that they cannot procreate, similarly situated same sex couples cannot be singled out. Even Justice Cordy’s dissent in *Goodridge* conceded that in today’s world, heterosexual intercourse, procreation, and child rearing are not necessarily intertwined.<sup>122</sup>

Given the changes in our social mores, both Massachusetts and the film argue that the physical act of sex cannot stand as the sole basis for a valid marriage. A restriction on procreation is, in essence, a restriction on sex, since according to most courts they are inseparable in the marital context. As the film shows, and the Massachusetts Court seems to agree, the legal system and religious activists seem like the only groups concerned about the actual physical act. The principal reason the other people in the film

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118. *Id.* at 463.

119. *Goodridge*, 440 Mass. at 331-33.

120. *Id.* at 332-33.

121. *Id.* at 334.

122. *Id.* at 332 (citing Cordy, J., dissenting).

care about intimacy as proof is to appease those groups who want proof of a “real” relationship.

Even though the Arizona Court formulated a seemingly legitimate interest in procreation, the court should have analyzed this interest to determine if it is in fact legitimate as applied. Chuck and Larry show that procreation cannot be a legitimate interest in regulating marriage because society does no longer defines marriage in that way. As such, this interest cannot pass constitutional muster under any level of scrutiny.

## B. For Better or for Worse

In addition to procreation, Chuck and Larry show that physical intimacy, or lack thereof, bears no relationship to one’s ability to raise a child. The children in the film are happier and more successful after Chuck and Larry begin sharing the responsibilities. The Arizona Court properly argues that the state’s interest in child rearing is legitimate.<sup>123</sup> However, it does not advance a shred of evidence proving that interest is furthered by the prohibition on same sex marriage.<sup>124</sup> Instead, the court concedes that extending the marital right to same sex couples would benefit their children by affording them with a stable environment in which to grow.<sup>125</sup> Nowhere does the court advance the argument that same sex couples, as parents, are somehow less fit than opposite-sex couples. The only argument the court actually addresses is that two-parent families are a more suitable environment in which to raise children than single parent households.<sup>126</sup> The sole reason it finds same sex couples differently situated is that they cannot naturally produce a child within the relationship.<sup>127</sup> It follows from the court’s analysis that parents who adopt or foster children are somehow less suitable as parents for no other reason than because they did not conceive the child through procreative intercourse. Because this conclusion contains no factual basis, the child rearing argument cannot stand on its own, and must rely on the procreation argument to survive.

Chuck and Larry’s relationship illustrates the lack of connection between a couple’s ability to raise children and the physical intimacy of those in the relationship. They cannot procreate, yet they share the task of raising Larry’s two children when they are put on separate shifts. They also share in the domestic duties. Larry still spends time with the children,

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123. *Standhardt*, 77 P.3d at 462-63.

124. *Id.* at 463.

125. *Id.*

126. *Id.*

127. *Id.* at 462.

and Chuck helps with cooking and schoolwork. The children begin excelling in school and even testify that it was good having Chuck as a second parental figure and that Chuck is even a little like a mother figure.<sup>128</sup>

The Massachusetts Court and the film similarly acknowledge the changing demographics of the American family.<sup>129</sup> Furthermore, the Massachusetts Court has responded supportively to these changes by strengthening the modern family in its many variations, thus recognizing these new family constructs.<sup>130</sup> The Court reasoned that the government offered no evidence proving that forbidding same sex couples to marry would benefit opposite-sex couples wishing to raise children in any appreciable way nor increase the number of couples wishing to have children.<sup>131</sup> As such, no link could be made to banning same sex couples from marriage on the basis of child rearing.

The American Psychological Association (“APA”) further agrees that same sex parents, like Chuck and Larry, are equal as parents to opposite-sex couples.<sup>132</sup> The APA further contends that empirical data taken over the past twenty years has failed to show any meaningful difference between opposite- and same sex couples raising children.<sup>133</sup> Therefore, the manner in which people have sex has no effect on their ability to raise children, and thus should have no bearing on the arguments concerning same sex marriage. Since the APA, with its clinical experts, is an expert on this topic, the Arizona Court should have given this data more weight in its decision, especially given that social commentary (in this case the film) agrees with this proposition.

In order for a court to find a government’s interests to be rational, they must bear some relation to the regulation at issue. Since the government has not been able to find any credible, empirical evidence to prove their theory that children raised by opposite-sex couple are better off than children raised by same sex couples, this justification is not rationally related to the ban on same sex marriage. Because the defendants do not

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128. *I NOW PRONOUNCE YOU CHUCK & LARRY* (Universal Studios 2007) at 1:34:15 (during trial, the children testify that they have thoroughly enjoyed having Chuck around).

129. *Goodridge*, 440 Mass. at 333-34.

130. *Id.* at 334.

131. *Id.* (forbidding same sex couples to marry does not increase opposite-sex couples from entering into marriage to have children).

132. Brief for American Psychological Association as Amici Curiae Supporting Petitioners, *In re Marriage Cases*, 43 Cal. 4th 757 (2008) (No. S147999).

133. *Id.*

meet the requisite burden of proof, the bans on same sex marriage cannot pass constitutional muster under any standard.

### V. I Now Pronounce You . . . ?

The film, *I Now Pronounce You Chuck & Larry*, as well as the courts, attempt to resolve the issue, "What is marriage?" The courts rely on antiquated notions that marriage originated for the twin purposes of procreation and child rearing, whereas the film draws upon society's current view of why couples enter into marriage. Marriage is a state-created social contract conferring benefits but also imposing responsibilities. Through the film, we see that today's society focuses more on love and commitment, as well financial benefits and responsibilities, rather than solely on procreation.

Sexual orientation bears no relation to one's ability to fulfill the responsibilities of marriage, nor does marriage impose such a burden on the populous that people should be excluded solely based on their sexual orientation. Unfortunately, state courts have applied their respective Constitutions in ways that prevent same sex couples from validating their relationship, preventing them from experiencing these various benefits and responsibilities. Although Justice Kennedy addressed only sodomy laws in *Lawrence v. Texas*, he predicts that the future may hold better times for those who have been oppressed:

Had those who drew and ratified the Due Process Clauses of the *Fifth Amendment* and the *Fourteenth Amendment* known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact only serve to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.<sup>134</sup>

One can only hope that these words do not fall on deaf ears. As times have changed, so too have our conceptions of marriage. Hopefully these changes will be legally recognized someday. Until then, perhaps we should take our cue from Chuck and Larry and run off to Canada. After all, as the film shows us, Canada seems to be the only place where the movie, and same sex couples, can have their happy ending.

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134. *Lawrence*, 539 U.S. at 578-79.