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# The Marriage Equality Act: A Legal and Moral Analysis

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**THE MARRIAGE EQUALITY ACT:  
A LEGAL AND MORAL ANALYSIS**

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Law and Morality Fall 2014

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## **Part I. History and Current Jurisprudence**

New York has seen a multitude of movements throughout the years. New York City, in particular, has historically been a progressive place. The evolving social, cultural and political climate has helped set the stage for individuals to push the status quo and move for change. New York City became the ideal site for the landmark movement in the rights for the gay, lesbian, bisexual and transgender community. The modern gay rights movement resembled other notable civil rights movements during the time, with its radical and progressive nature. This movement allowed the Marriage Equality Act to be passed, extending the right to marry to same-sex couples in New York. However, in addition to discussing the history of the Act, we must also look at the situation of the gay community in New York City for the past several decades.

During the 1920s and 1930s, society saw homosexuality as evil and immoral. Lawmakers acted on such beliefs and created legislation discriminating against homosexuals.<sup>1</sup> In 1923, New York enacted a sodomy law, making it a crime for men to frequent or loiter in “any public place soliciting men for the purpose of committing a crime against nature or other lewdness.”<sup>2</sup> The penalty was set at up to six months in a jail or workhouse, or a fine of up to \$50, or both or probation for up to two years.<sup>3</sup> Following the sodomy law, in 1933, New York issued a law which threatened to shut down any theater that depicted gay and lesbian characters.<sup>4</sup>

A study published in 1938 showed that the sample gay men convicted of various sexual offenses in one year in New York showed that 97% were convicted of sexual acts with other individuals.<sup>5</sup> The study also revealed:

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<sup>1</sup> David Carter, *Stonewall* (New York: St. Martin's Press, 2004) 14.

<sup>2</sup> *Laws of New York 1923*, page 960, ch. 642, enacted May 22, 1923.

<sup>3</sup> *Id.* at 962, §723

<sup>4</sup> George Chancey, *Why Marriage?* (New York: Basic Books, 2004), 6.

<sup>5</sup> George W. Henry and Alfred A. Gross, "Social Factors in Case Histories of 100 Underprivileged Homosexuals," *Mental Hygiene*, 22:591-611 (Oct. 1938).

[s]ome judges for one reason or another impose jail sentences on all homosexuals, even in the case of first offenders. As these men come before the courts again and again, the term of imprisonment is lengthened until they receive the maximum penalty, although neither imprisonment nor the threat of imprisonment produces any change in the offender's mode of living; at most it serves to make him more cautious.<sup>6</sup>

This study showed the belief of New Yorkers that homosexuality was a societal evil and should therefore be punished. The judiciary's treatment of individuals convicted of sexual acts reflected this belief.

Moving forward to the 1950s, many American soldiers began returning home to their families from World War II. This era was characterized by strong gender roles and conformity within the context of the traditional family. Men were the breadwinners and served as the head of the family household. While women took care of the children and did a majority of the household chores. Courtship practices were also very traditional. It was typical for men and women to marry at a young age, while most of the time the women entering marriage were virgins.<sup>7</sup> Anything which did not resemble this model was seen as abnormal and looked down upon.

At the time, there were no "traditional values" or model for courtship or forming intimate relationship for homosexuals. Most of the encounters or relationship forming revolved around sex. Contrary to traditional heterosexual courtships, homosexuals focused more on sex, rather than the pre-requisite formalities. A New York novelist and playwright, stated: "Gay life circumvented the courtship phase. You could not pick up a boy at his house. Instead you went from sex to courtship and built the relationship backwards."<sup>8</sup>

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<sup>6</sup> *Id.* at 599.

<sup>7</sup> PBS, "People & Events: Mrs. America: Women's roles in the 1950s"; available from [http://www.pbs.org/wgbh/amex/pill/peopleevents/p\\_mrs.html](http://www.pbs.org/wgbh/amex/pill/peopleevents/p_mrs.html); Internet; accessed 5 December 2014.

<sup>8</sup> Michael Norma, "Homosexuals Confronting a Time of Change," New York Times, 16 June 1983, p. A1.

Homosexuals clearly did not fit the model established during the 1950s and as a result stood out in a homogenous society. This new visibility provoked many targeted attacks. Many homosexuals around the country were terminated from government jobs. In 1953, President Dwight D. Eisenhower issued an executive order barring homosexuals from all federal jobs. The lead taken by the federal government encouraged others to follow suit. Many state and local governments and even private companies implemented similar orders, either formally or informally.<sup>9</sup>

America's social conservatism was soon challenged in the 1960s with a crusade towards sexual freedom and expression. Mass media played a huge role in this crusade. During this period, sex became more main stream and adult magazines like *Playboy* came to the forefront.<sup>10</sup> Slowly society moved away traditional values with respect to marriage and accepted the exploration of one's sexual life.<sup>11</sup> A subculture of the gay community began to develop. Bathhouses, bars and discos often became safe havens for various sexual encounters—perpetuating the sexual lifestyle of the homosexual community. The now more public subculture encouraged more individuals to enter into the once taboo world of homosexuality.

As a by-product of this new visibility, NYPD began to conduct raids on restaurants and bars, sometimes arresting dozens of men and women in a single night. During a typical raid, the lights were turned on and customers were lined up and their identification checked. Customers or even staff members without identification or dressed provocatively would typically be arrested. Another police tactic, were illegal entrapments. Many officers would try to entrap individuals, especially since homosexuality was illegal at the time. Officers, in plain clothing, would make

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<sup>9</sup> David Carter. *Stonewall* (New York: St. Martin's Press, 2004) 14.

<sup>10</sup> PBS, "People & Events: The Pill and the Sexual Revolution"; available from [http://www.pbs.org/wgbh/amex/pill/peopleevents/e\\_revolution.html](http://www.pbs.org/wgbh/amex/pill/peopleevents/e_revolution.html); Internet; accessed on 5 December 2014.

<sup>11</sup> *Id.*

advances to patrons and ultimately arrest them. This illegal practice was done, many times, to close establishments that homosexuals frequented. The Mattachine Society, formed in the 1950s, fought against and helped put an end to the illegal practices conducted by the local police.<sup>12</sup> The society would also become a beacon of hope for the homosexual community.

However, the most significant event for the gay community was the Stonewall Riots. On a Friday evening, June 27, 1969, the NYPD raided a Greenwich Village gay bar, the Stonewall Inn. Deputy Inspector Seymour Pine led a small group of police officers and raided the bar during the bar's peak hour.<sup>13</sup> Up until this point, the police raided a number of establishments with very little resistance. Contrary to expectations, the patrons fought back against the police. The patrons formed a large crowd and responded to the raid by throwing a variety of objects and even lighting them on fire and tossing them at the police.<sup>14</sup>

The patrons and other homosexuals were outraged that the police would raid a safe haven for many in the gay community. Ironically, due to the rioting, police officers barricaded themselves inside the Stonewall Inn for their own safety. The large crowd outnumbered the small group of police officers. The small police force was eventually cornered by the large crowd. Afterwards, police reinforcements arrived to free the police trapped inside the Stonewall and with the larger police force, they detained as many rioters as they could.<sup>15</sup>

By the morning, tons of people were arrested and some were even hospitalized. Almost everything in the Stonewall Inn was broken. Toilets, mirrors, jukeboxes and cigarette machines were destroyed. News of the riot spread quickly throughout the gay community and the riot

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<sup>12</sup> David Carter, *Stonewall* (New York: St. Martin's Press, 2004) 14.

<sup>13</sup> *Id.* at 137.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

which had ensued continued for two more nights, Saturday and Wednesday.<sup>16</sup> On Saturday, thousands of people gathered in front of Stonewall and once again battled the police. Both demonstrators and police like received injuries. Some individuals even proceeded to engage in looting nearby establishments.

After two nights of rioting, the Christopher Street area was calm until Wednesday night, July 2<sup>nd</sup>. During the few calm days, mass media took upon themselves to demean the gay population which further enraged the community. The *New York Daily News* coverage of the riots reflected how society viewed the gay community. Headlined “Homo Nest Raided, Queen Bees Are Stinging Mad,” the article went on to explain,

She sat there with her legs crossed, the lashes of her mascara-coated eyes beating like the wings of a hummingbird. She was angry. She was so upset she hadn’t bothered to shave. A day old stubble was beginning to push through the pancake makeup. She was a he. A queen of Christopher Street.

Last weekend the queens had turned commandos and stood bra strap to bra strap against an invasion of the helmeted Tactical Patrol Force. The elite police squad had shut down one of their private gay clubs, the Stonewall Inn at 57 Christopher St., in the heart of a three-block homosexual community in Greenwich Village. Queen Power reared its bleached blonde head in revolt. New York City experienced its first homosexual riot. “We may have lost the battle, sweets, but the war is far from over,” lisped an unofficial lady-in-waiting from the court of the Queens.<sup>17</sup>

The *Village Voice* coverage of the events had the same demeaning tone and language as the New York Daily news article. The articles written used words such as “limp wrists,” “faggots” and “dyke.” The gay community saw the news coverage as a continued attack on their existence.<sup>18</sup> The coverage from both the *New York Daily News* and the *Village Voice* reflected

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<sup>16</sup> *Id.*

<sup>17</sup> “Homo Nest Raided, Queen Bees Are Stinging Mad,” *New York Daily News*, July 6, 1969.

<sup>18</sup> Donn Teal, *Gay Militants: How Gay Liberation Began in America, 1969–1971* (New York: St. Martin’s Press, 1971), 37.



the continued mindset of society towards LGBT people—homosexuals don't have a place in modern society.

Wednesday night, resembled the same pattern as the other nights.<sup>19</sup> Large crowds came together to once again battle the police but in a more organized fashion. Other radical groups sought to join the movement. These groups attempted to cash in on the news coverage and attention. The Mattachine Society stepped in and sought the riots as an opportunity to spread its message. The society's New York chapter made sure to capitalize on the notoriety of the situation.

The Stonewall Riots represented a stepping stone of hope and the first leg of the gay rights movement. Like a bubble bursting, Stonewall was an explosion after twenty years of oppression and prejudice by society. Up until then, homosexuals lived their lifestyles under the radar and moved along with little attention. The riots helped demonstrate to the general public that the gay community deserved not only the right to be gay but also should be able to enjoy the same rights as others.<sup>20</sup> Essentially, Stonewall brought the idea of gay rights to the forefront. It was the catalyst to push other gays who historically were denied their rights but now realized their existence should be recognized.

The efforts in Stonewall didn't take long to inspire other individuals to push and challenge the status quo. Stonewall created the awakening of a new social consciousness like never before. Activists began distributing leaflets that read: "Do You Think Homosexuals Are Revolting? You Bet Your Sweet Ass we Are."<sup>21</sup> What began as a small group of individuals seeking justice, evolved into several full-blown organizations pushing for change, like the Gay Liberation Front (GLF). The GLF wanted to not only confront the homophobia plaguing the

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<sup>19</sup> Carter, *Stonewall*, 137.

<sup>20</sup> Ronnie Di Brienza, "Stonewall Incident," *New York Post*, 3 July 1969.

<sup>21</sup> Teal, *Gay Militants*, 57.

United States but also oppression and exploitation in general. One prominent radical activist, Jim Fouratt explained: “We wanted to end the homophile movement. We wanted them to join us in making the gay revolution. We were a nightmare to them. They were committed to being nice, acceptable status quo Americans, and we were not; we had no interest at all in being acceptable.”<sup>22</sup>

GLF wanted to make their presence known. An example of this mission could be seen in its statement to one underground newspaper, the *Rat*:

We are a revolutionary homosexual group of men and women formed with the realization that complete sexual liberation for all people cannot come about unless existing social institutions are abolished. We reject society’s attempt to impose sexual roles and definitions of our nature. We are stepping outside these roles and simplistic myths. We are going to be who we are. At the same time, we are creating new social forms and relations, that is, relations based upon brotherhood, cooperation, human love, and uninhibited sexuality. Babylon has forced us to commit ourselves to one thing...revolution.<sup>23</sup>

The mass media that depicted gays for years as sub-human and outcasts of society was being used as a weapon in the movement for gay rights. GLF members, attempted to use all different types of mediums to broadcast their message.<sup>24</sup> However, not everyone was accepting of publishing their message. GLF tried to advertise in the *Village Voice*, the very newspaper which had demeaned and bashed the gay community in the past. In order to raise money and publicize activities, GLF sought out the *Voice*. Thousands of petitions were sent to the *Voice*, demanding them to reconsider and amend their policies. These efforts inevitably forced the newspaper to concede.<sup>25</sup>

Other groups decided to aid and publicly approve the gay rights cause. On August 21, 1970, Huey Newton, co-founder of the Black Panther organization wrote an openly pro-gay

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<sup>22</sup> Martin Duberman, *Stonewall* (New York: Plume, 1994), 229.

<sup>23</sup> Carter, *Stonewall*, 219

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 226.

statement, printed in party's newspaper called *The Black Panther*. The article was titled "A Letter From Huey to the Revolutionary Brothers and Sisters About the Women's Liberation and Gay Liberation Movements." In the article, Newton stated that "Homosexuals are not given freedom and liberty by anyone in the society. Maybe they might be the most oppressed people in the society." Newton further argued that "The terms 'faggot' and 'punk' should be deleted from our vocabulary, and especially we should not attach names normally designed for homosexuals to men who are enemies of the people."<sup>26</sup>

Gay Activists Alliance (GAA), a newly created organization from GLF dissident members, also helped take some action on the local level in New York City. GAA and the New York State proposed the first piece of homosexual legislation to the city council. As an unsuspecting champion, New York State Assemblyman William Passannante proposed the Fair Employment Bill. The bill aimed to modify the State's Executive Code to prevent discrimination against homosexuals in employment, housing and public accommodations context.<sup>27</sup> Nonetheless, the bill was inevitable struck down, due to the overwhelming pressure placed on the councilmen by conservative groups, including local police and fire departments and religious groups. In 1971, Assemblyman Passannante once again lobbied for pro-homosexual legislation but was ultimately defeated.<sup>28</sup>

The gay community continued to make developments in the mid-1970s, which included the protests against the American Psychiatric Association's (APA) designation of homosexuality as a mental illness. At the time, homosexuals were viewed as sick. As a result, social and legal progression for the homosexuals was heavily constrained. Activists such as Frank Kameny and

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<sup>26</sup> *Id.* at 151.

<sup>27</sup> International Gay Information Center, Inc., "Gay Activists Alliance"; available from <http://microformguides.gale.com/Data/Introductions/20240FM.htm>; Internet; accessed 12 December 2014.

<sup>28</sup> "William F. Passannante, 76, Greenwich Village Legislator," New York Times, 18 December 1996.

Barbara Gittings came to the forefront to discuss the negative effects of the “therapies” being used to treat homosexuals. Due to their efforts, in 1973, the APA’s Board of Trustees removed homosexuality from its list of mental illnesses.<sup>29</sup> It was a unanimous vote of 13-0. Being homosexual was no longer an illness that should be feared nor warrant negative attention.

In 1980, the New York Court of Appeals addressed the issue of prohibitions on private consensual, sodomatic conduct, both heterosexual and homosexual. Ronald Onofre was convicted for violating New York Penal Law that made it a misdemeanor to engage in sodomy. The law defined sodomy as any sexual act that included and/or oral sex between same-sex and opposite sex participants.<sup>30</sup> Several other defendants were also convicted and on appeal, argued that the sodomy statute was unconstitutional. The Court of Appeals agreed with Onofre and the other defendants that the Sodomy law was unconstitutional. Judge Jones wrote the majority opinion and stated:

It is not the function of the penal law to provide for the enforcement of moral or theological values. Specifically, those concurring with the decision, believed that “the People have failed to demonstrate how government interference with the practice of personal choice in matters of intimate sexual behavior out of view of the public and with no commercial component will serve to advance the cause of public morality or do anything other than restrict individual conduct and impose a concept of private morality chosen by the State.”<sup>31</sup>

The Court of Appeals made history because it was the first judicial victory for advocates of sexual freedom for homosexuals in a case where homosexual acts were directly at issue.

However, the gay community would have a setback in their movement. In the early 1980s, various reports began to emerge in New York and California about a small group of cases

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<sup>29</sup> Eric Marcus, *Making History: The Struggle for Gay and Lesbian Equal Rights, 1945–1990* (New York: Harper Collins, 1992), 253.

<sup>30</sup> *People v. Onofre*, 51 N.Y.2d 476 (1980)

<sup>31</sup> *Id.*

of men who had been diagnosed with rare forms of cancer and/or pneumonia.<sup>32</sup> At the moment, the condition was diagnosed as Pneumocystis Pneumonia Carinii (PCP). However, PCP usually was only found in people with weak immune systems. The men afflicted by the disease were young and with relatively strong immune systems. The only characteristic that each of them shared was their homosexual lifestyle.

Not too long after, the Center of Disease Control labeled the disease: acquired immunodeficiency syndrome (AIDS).<sup>33</sup> Shortly after, the AIDS virus began to be associated with homosexuals. Many began to see the disease as the awakening of destruction. As a result, it brought negative attention to the gay community around the nation and further strengthened the stigma that homosexuals are evil and inherently ill. The attention resulted in harsher treatment by the public. An example of such attention could be seen in the *Bowers v. Hardwick* case.

In *Bowers*, Hardwick was criminally charged for committing consensual sodomy with another male adult in the bedroom of his home. Hardwick brought suit in federal court challenging the constitutionality of the Georgia statute, criminalizing consensual sodomy. Hardwick argued that the statute violated his constitutional rights.<sup>34</sup> The *Bowers* Court held that homosexual sodomy was not encompassed by the liberty component of the Due Process Clause. In relevant part, the Court expressed that the “respondent would have us announce...a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.... Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause.”<sup>35</sup>

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<sup>32</sup> Morbidity and Mortality Weekly Report, “Pneumocystis Pneumonia-Los Angeles”; available from [http://www.cdc.gov/mmwr/preview/mmwrhtml/june\\_5.htm](http://www.cdc.gov/mmwr/preview/mmwrhtml/june_5.htm); Internet; accessed 8 December 2014.

<sup>33</sup> Unmesh Kher, “July 27, 1982: A Name for the Plague”; available from <http://www.time.com/time/80days/820727/html>; Internet; accessed 8 December 2014.

<sup>34</sup> *Bowers*, 478 U.S. 186, 191-95 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

<sup>35</sup> *Id.* at 191, 194.

The *Bowers* decision showed the America's unwillingness to accept homosexuals and their lifestyles. It also showed the ability of the government to regulate homosexual's lives. This was a blow to the gay community who was already trying to cope with the AIDS epidemic and the resulting back lash. The court ruling changed the goals and mission of the gay rights movement. The movement began to be less radical and more conservative in their tactics.

The AIDS virus changed the way homosexuals lived. Particularly for couples, the virus shifted the importance of sexual exploration to more long term goals. The gay community began adopting more traditional goals with regards to relationships and family. Homosexuals now found it necessary to secure certain rights, similar to those enjoyed by heterosexuals. Homosexuals wanted to be recognized as legal and legitimate couples in the eyes of society. Homosexuals sought to draw up contracts, wills and powers of attorney to protect themselves in case of the death of their partner. Without such documents, gay couples lacked any legal form or unity and were forced to take risks on their future.<sup>36</sup>

AIDS brought about the discussion for same-sex marriage. It was the catalyst for the gay community to start thinking about achieving equality with respect to marriage. Minnesota was one of the first states to tackle the issue of same-sex marriage. In *Baker v. Nelson*, Richard Baker and James McConnell made an application for a marriage license and were denied a license on the grounds that they were of the same-sex.<sup>37</sup> Baker argued that Minnesota law allowed for the marriage and denying them a license violated their constitutional rights, under the Ninth and Fourteenth Amendments. The Supreme Court upheld the lower court's decision that Minnesota

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<sup>36</sup> Frank Rich, "The Joy of Gay Marriage," *New York Times*, 29 February 2004, sec. 2, p. 1.

<sup>37</sup> *Baker v. Nelson*, 291 Minn. 310 (1971)

did not deprive a gay couple of any constitutional rights when it prohibited them from obtaining a marriage license on the basis of their sex.<sup>38</sup>

The *Baker* decision set a precedent for other states to interpret and address the issue of same-sex marriage. Never before was this issue litigated and brought before the judicial system. It sent a message to the general public that the legality of marriage falls under the purview of the states. The states have the authority to regulate themselves with respect to domestic relations. Thus, states can choose to deny or allow a couple to marry.

After *Baker*, legalization of same-sex marriage managed to gain support from outside homosexual community. Ironically, the movement achieved support from a protestant faith group, the Unitarian Universalist Association. In 1984, the religious organization affirmed the practice of conducting services of union for gay and lesbian couples. The Unitarian Universalists became the first major church to approve religious blessings on homosexuals. They would become a leader in the work to make same-sex marriages legal on state and national level.<sup>39</sup>

The outside support from religious organizations, like the Unitarian Universalists, showed the shift in public sentiment towards allowing homosexuals to enjoy the right to marriage. The beliefs and stigmas on the institution of marriage were beginning to loosen. The idea of marriage was experiencing an evolution. Supporters of same-sex marriage emphasized that marriage is not a religious ceremony but rather “marriage is [also] a relationship between a couple and the government.”<sup>40</sup> Nonetheless, many still believed that marriage is a religious ceremony before God between a man and a woman. Heterosexuals believed that the gay community wanted infringe on the sanctity of marriage. However, the gay community only

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<sup>38</sup> *Id.*

<sup>39</sup> “Unitarians Endorse Homosexual Marriages,” *New York Times*, 29 June 1984, p. A16.

<sup>40</sup> Evan Wolfson, *Why Marriage Matters: America, Equality and Gay People’s Right to Marry* (New York: Simone & Schuster, 2004), 4.

wanted to be privy to the same rights and privileges as heterosexual married couples.<sup>41</sup> Among these rights were ones touching upon inheritance, health, housing, immigration, taxes, insurance and parenting.<sup>42</sup>

An important moment in the struggle for equitable rights for homosexuals occurred in the late 1980s in the housing context. During that time, New York City had a high demand for housing, most notably rent controlled units. Those who were able to acquire these valuable units usually passed them down to family. However, the rules governing rent-controlled units were challenged in a 1989 court case. In *Braschi*, a same-sex couple lived in a rent-controlled apartment, however, only one tenant was the tenant of record. After one tenant died, the apartment owner ordered the remaining tenant to vacate the apartment.<sup>43</sup> *Braschi* filed for a permanent injunction based on New York City Rent and Eviction Regulations. The trial court found that the long-term nature of the couple fulfilled any criteria of the term “family.” However, the Appellate Court reversed and *Braschi* appealed. The New York Supreme Court reversed the Appellate Court and held that a gay couple constitutes a family under New York’s rent control laws.<sup>44</sup>

The *Braschi* decision helped the gay community in New York State by modifying laws and regulations with respect to housing. Homosexuals could enjoy the same rights as others in the housing context. Other agencies and organizations also followed the example left by *Braschi*. *Braschi* expanded the idea of family for homosexuals in the housing world but also gave hope to the gay community that it was possible to achieve the same rights and privileges as others. This hope was tested in the same-sex marriage context for the first time in New York in 1990.

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<sup>41</sup> *Id.*

<sup>42</sup> Wolfson, *Why Marriage Matters*, 13-15

<sup>43</sup> *Braschi v. Stahl*, 74 N.Y.2d 201 (1989)

<sup>44</sup> *Id.*



*In re Estate of Cooper*, William Cooper lived in a homosexual union with Ernest Chin. Cooper left everything to Mr. Chin in his will with the exception of certain real estate that constituted over 80% of the entire estate. Mr. Chin sought to take an elective share of the estate as Cooper's surviving spouse. The court ruled that "the State has a compelling interest in fostering the traditional institution of marriage as old and as fundamental as our entire civilization, which institution is deeply rooted and long established in firm and rich societal values." The effect of the ruling was that surviving gay partners would be deemed a "surviving spouse" by the court.<sup>45</sup>

For several years after *In re Estate of Cooper*, the advancement of same-sex rights remained quiet until 1993. In 1993, the New York State Assembly passed an anti-discrimination bill called the Sexual Orientation Non-Discrimination Act (SONDA). The bill prohibited discrimination on the basis of sexual orientation in several contexts including: housing, education, employment and public accommodations.<sup>46</sup> The bill was an example of progress within the gay community; however the bill did not come into effect until 2002.<sup>47</sup>

The next year, the gay community faced significant adversity at the hands of the State's newly appointed Attorney General Dennis C. Vacco. Vacco wanted to send a message that he did not believe in the protection of homosexuals was an important goal for his office. Upon assuming office, Vacco removed sexual orientation from the department's non-discrimination policy. Several of the department's openly homosexual attorneys were then discharged as a part

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<sup>45</sup> *In re Estate of Cooper*, 564 N.Y.S.2d 684, 688 (New York Family Court 1990).

<sup>46</sup> New York State, "The Sexual Orientation Non-Discrimination (SONDA)"; available from [http://www.oag.state.ny.us/civilrights/sonda\\_brchure.html](http://www.oag.state.ny.us/civilrights/sonda_brchure.html); Internet; accessed 4 December 2014.

<sup>47</sup> *Id.*

of a very large internal lay off of career attorneys in the department.<sup>48</sup> The removal was reflective that the efforts of the gay community could be erased depending on who is in power.

Before the end of the Cuomo administration, the gay community would receive a pleasant parting gift. On June 28, 1994, Governor Cuomo announced that he would extend benefits to domestic partners of gay and lesbian state employees as of January 1995.<sup>49</sup> The governor's agreement to same-sex couples assured their inclusion in upcoming union contracts. The announcement came before the new governor George Pataki took office. Under Pataki, the new governor renewed the order banning discrimination on the grounds of sexual orientation relating to state employment. The renewal was an important victory for a suffering gay community.<sup>50</sup>

In 1995, another gay couple challenged the New York State's policy on same-sex marriage. In *Holcomb*, two men applied for a marriage license but were denied. The two men argued in the lower courts that the denial of the marriage license constituted a violation of their constitutional rights.<sup>51</sup> New York's highest court ruled that denial was correct because the state did not provide same-sex couples the right to marry. The court noted that the constitutional protections afforded to opposite sex couples did not apply to same-sex couples.<sup>52</sup> The court was unwilling to take a step towards setting a precedent that would allow same-sex couples to enjoy the right to marriage.

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<sup>48</sup> PrideAgenda.org, Press Release: Empire State Pride Agenda Endorses Eliot Spitzer for Governor of New York State (June 25, 2006), available from <http://www.prideagenda.org/tabid/304/default.aspx?c=186>; Internet; accessed 4 December 2014.

<sup>49</sup> Empire State Pride Agenda Press Release, "Gay Rights Lobby Welcomes Pataki Reissue of Order Banning Discrimination: Governor's OK an important victory for Lesbian and Gay community" 2 May 1996.

<sup>50</sup> *Id.*

<sup>51</sup> *Storrs v. Holcomb*, Supreme Court of New York, Appellate Division, Third Department. 245 A.D.2d 943

<sup>52</sup> *Id.*

Around the same time as *Holcomb*, President Bill Clinton supervised the passage of the Defense of Marriage Act (DOMA) on September 21, 1996.<sup>53</sup> DOMA provided that no state would have to recognize a same-sex marriage performed in another state, and defines marriage as a “legal union between one man and one woman.”<sup>54</sup> With the enactment of DOMA, Congress for the first time limited states’ obligation to give full faith and credit to public acts, records and judicial proceedings of other states.<sup>55</sup> Congress, rather than to rely on the judiciary, took an affirmative step reaffirm the institution of marriage.

Before being passed, DOMA received much scrutiny and opposition. Many argued that DOMA exceeded Congress’s powers and violated equal protection and therefore was unconstitutional. They believed that the bill usurped the State’s power to act within its own frame to engage with other states. It was an example of Congress overreaching its boundaries. Other critics saw an issue with re-defining the concept of marriage. They believed the more traditional meaning of marriage should be preserved.

DOMA did much damage to the gay community. DOMA had detrimental effects on the same-sex marriage initiative because it now restricted states in their ability to recognize other states. The federal government sent a message to the gay community that it could regulate gay marriage. Despite the impact, public opinion of homosexuals changed dramatically. More people began to believe that gay marriage should not be legal.<sup>56</sup> Homosexuals were once again reminded of the political resistance and opposition to their cause.

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<sup>53</sup> DOMAwatch; “Federal Defense of Marriage Act (DOMA)”; available from

<http://www.domawatch.org/about/federaldoma.html>; Internet; accessed 8 December 2014.

<sup>54</sup> The Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 28 U.S.C. § 1738C and 1 U.S.C. § 7).

<sup>55</sup> *Id.*

<sup>56</sup> Gallup News Services, “Some Change Over Time in American Attitudes towards Homosexuality, but negativity Remains”; available from <http://www.gallup.com/poll/4045/Some-Change-Over-Time-American-Attitudes-towards-Homosexuality.aspx>; internet; accessed 8 December 2014.

Homosexuals in New York saw positive progress with the election of Mayor Rudy Giuliani. In 1998, Giuliani signed a law which increased the benefits of domestic partners.<sup>57</sup> The bill established a formal mechanism with respect to benefits of domestic partners. It created certain requirements for the applicants including age and residency. The bill also included the rights awarded to and deprived from the partners. The position of Gays in New York was much improved by gaining some legal recognition with respect to their partner.<sup>58</sup>

In 2002, New York City was struck by the tragedy of the terrorist attacks on the World Trade Center. Both heterosexuals and homosexuals were afflicted by the tragedy. In response to, Governor Pataki expanded his Executive Order 2002 and made it permanent for domestic partners to seek governmental relief through the state's Crime Victims Board for 9/11 victims and all other crime victims.<sup>59</sup> Other agencies and groups also began to treat domestic partners in the same manner as married spouses.

New York had made significant strides towards insuring equal protection. One major case which helped influence New York to take further action was *Lawrence v. Texas*. In *Lawrence*, a police officer found two men engaged in sexual conduct, in their home and were arrested under a Texas anti-sodomy statute that prohibited such conduct between two men.<sup>60</sup> The Texas Fourteenth Court of Appeals ruled in favor of Lawrence, stating that the statute was unconstitutional; however, the decision resulted in an appeal. The United States Supreme Court affirmed the Court of Appeals' decision and stated that intimate sexual conduct between

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<sup>57</sup> Empire State Pride Agenda, "New York City Takes Historic Step on Domestic Partnership"; available from [http://www.columbia.akadns.net/cu/gables/dpinfo\\_nyc/espapressrelease\\_1998-07-08.html](http://www.columbia.akadns.net/cu/gables/dpinfo_nyc/espapressrelease_1998-07-08.html); Internet; accessed 8 December 2014.

<sup>58</sup> New York City Clerk's Office, "Domestic Partnership Registration"; available from [http://www.cityclerk.nyc.org/html/marriage/domestic\\_partnership\\_reg.shtml](http://www.cityclerk.nyc.org/html/marriage/domestic_partnership_reg.shtml); Internet; accessed 8 December 2014.

<sup>59</sup> Empire State Pride Agenda, "incremental Steps by the New York State Government".

<sup>60</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003)

consenting adults is a liberty protected under the Due Process Clause of the Fourteenth Amendment.<sup>61</sup> The decision effectively overturned the decision in *Bowers v. Hardwick*.

The *Lawrence* decision had a huge impact on the gay community. It proved to the world that homosexuals were entitled to same constitutional protections as anyone else. It showed that the Supreme Court recognized the turning tides in society. And most importantly, the decision repealed the remaining thirteen states' sodomy laws. Sodomy no longer was associated with the gay community. In the larger scheme, *Lawrence* was a step forward towards homosexuals achieving the right to marry. Homosexuals now saw same-sex marriage as a possibility.

Later on that year, under President George W. Bush, Congress introduced the Marriage Protection Act. The act would deny Federal courts jurisdiction to hear or decide any question relating to the interpretation of the Defense of Marriage Act and the bill itself. However, after several attempts it failed to pass the senate in 2004.<sup>62</sup> The attempt by the Republic party to pass the bill showed the continued resistance towards legalizing same-sex marriage. Ultimately, it was a failed attempt to prevent same-sex marriage and stunt the progress made in *Lawrence*.

Two years later, in *Hernandez v. Robles*, the New York Court of Appeals addressed the issue of same-sex marriage. New York's highest court ruled that the New York state constitution did not require same-sex marriage rights and left the question of recognition to the legislature.<sup>63</sup> The decision was an example of the social, political and legal resistance against changing the traditional institution of marriage. It also legitimated the perceived benefits of traditional gender norms by upholding legislation that grants heterosexual couples and their children numerous

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<sup>61</sup> *Id.*

<sup>62</sup> Joanna Grossman, "The Proposed Marriage Protection Act: Why it May Be Unconstitutional", Findlaw.com, available from <http://writ.news.findlaw.com/grossman/20040727.html>; Internet; accessed 8 December 2014.

<sup>63</sup> *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006)

legal protections related to marriage, while denying those same benefits to same-sex couples and their children.<sup>64</sup>

Following *Hernandez*, the New York State Assembly passed same-sex marriage bills in 2007, 2009, and 2011. Still, the New York Senate rejected same-sex marriage legislation in a 38–24 vote on December 2, 2009.<sup>65</sup> Governor Andrew Cuomo engaged in negotiations with Republic members of the Senate, who resisted the bill, and was able to convince the Senate to ultimately approve the bill in a 33–29 vote. As a concession for the necessary Republic votes, the final bill featured several religious exemptions and an in severability clause. First, the legislation exempts religious and non-profit entities from civil liability by local and state agencies for declining to validate same-sex wedding ceremonies.<sup>66</sup> Second, religious organization retained the ability to discriminate with respect to employment and housing, in order to promote their religious principles. Third, an in severability clause was placed in the bill which directs that the entire bill shall be invalid if a court strikes any part of it.<sup>67</sup>

On July 24, 2011, under the Marriage Equality Act, same-sex marriage in New York became legal.<sup>68</sup> The Marriage Equality Act grants same-sex couples the freedom to marry in New York. In addition to the religious exemptions and in severability clause, the Act provides that government or private entities cannot deny same-sex couples the right to marry. Moreover, any New York law that uses gender-specific terms to describe the rights and responsibilities of couples will now be interpreted in a gender-neutral manner. Other states and countries that have issued marriage licenses to same-sex couples will be recognized in New York.<sup>69</sup>

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<sup>64</sup> *Id.*

<sup>65</sup> Jeremy W. Peters, *The New York Times*, "New York State Senate Votes Down Gay Marriage Bill".

<sup>66</sup> Marriage Equality Act, ch. 95, 2011 N.Y. Sess. Laws 749 (McKinney); Nicholas Confessore & Michael Barbaro, *New York Allows Same-sex Marriage, Becoming Largest State to Pass Law*, N.Y. Times, June 25, 2011, at A1.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

In 2011, New York became the sixth state to allow same-sex couples to marry. The Act affected more than 42,000 same-sex couples raising 14,000 children in the state.<sup>70</sup> The Marriage Equality Act is the culmination of all the effort from the gay and outside community to ensure equal rights for same-sex couples. Homosexuals have seen much setback and progress throughout the last few decades. From radical to conservative tactics, the gay community ultimately was able to achieve the right to marry.

## **Part II. Natural Law**

Given the debate on same-sex marriage and the enactment of the Marriage Equality Act (hereinafter “the Act”) in New York, it is useful to look to legal philosopher John Finnis’ work, *Natural Law and Natural Rights* for direction. First published in 1980, the book has become widely known as one of the most definitive works on natural law doctrine. It closely integrates the philosophy of law with ethics, social theory and political philosophy. Finnis presents an analytical framework outlining moral values and an objective standard of right and wrong, independent of the individual conscience.<sup>71</sup> The framework could be used to understand a multitude of issues which humans face today. As such, Finnis’s theory provides a sound framework to assess the Act.

Finnis’s natural law theory begins by discussing knowledge and his theory of the importance of basic goods.<sup>72</sup> Basic goods are irreducible, self-evident, “and even unquestionable.”<sup>73</sup> To Finnis, there are objective basic values that every reasonable person must promote to achieve a fulfilling life.<sup>74</sup> Finnis argues that each of the basic goods incontrovertibly

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<sup>70</sup> New York Civil Liberties Union, “Know Your Rights: Frequently Asked Questions about New York’s Marriage Equality Act”; available from <http://www.nyclu.org/marriageFAQ>; Internet; accessed 10 December 2014.

<sup>71</sup> John Finnis, *Natural Law and Natural Rights*, (2d Ed. 2011)

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 23

<sup>74</sup> *Id.*

intrinsic and worth having for their own sake and not as a means of obtaining other goods. And the pursuit of these goods exhausts the ultimate reasons one could have for action.<sup>75</sup>

### **A. Basic Goods**

There are seven of these basic goods: (1) life, (2) knowledge, (3) play, (4) aesthetic experience, (5) sociability or friendship, (6) practical reasonableness, and (7) religion.<sup>76</sup> Finnis maintains that the list of basic goods is exhaustive and incommensurable. Most recently, Finnis now argues that the marital sexual intercourse between a man and woman partakes in a special basic good, called “marital good.”<sup>77</sup> This special good is effectively an addition to the basic good of life and applies to heterosexual unions, but not same-sex couples or unmarried heterosexual relationships.<sup>78</sup> Within the list, there is no hierarchy and as such each basic good is equally fundamental and important. Each basic good is uniquely special and have distinct claims for their respective importance in promoting human progression. Finnis argues that individuals should pursue all basic goods in one way or another, with the inevitability of some taking precedence in the specific individuals’ lives.<sup>79</sup>

However, only a few select basic goods are stake when conducting a moral analysis of the Marriage Equality Act or more generally the idea of same-sex marriage. The basic goods at stake in this discussion are: (1) marital good, (2) friendship, (3) religion and (4) practical reasonableness.

### **Marital Good**

Marital good is a special basic form of human good, interwoven in the basic good of life. The marital good is open only to married, heterosexual couples, but not to same-sex couples or

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<sup>75</sup> *Id.* at 105.

<sup>76</sup> *Id.* at 86-89.

<sup>77</sup> John Finnis, “Law, Morality and Sexual Orientation” (1994) *Notre Dame Law Review*, p. 1066

<sup>78</sup> *Id.*

<sup>79</sup> John Finnis, *Natural Law and Natural Right*, p. 90.



even unmarried heterosexual couples.<sup>80</sup> According to Finnis, “marriage, in which a man and woman find their friendship and devotion to each other fulfilled in their procreation, nurture, protection, education and moral formation of their children, is an intrinsic, basic human good.”<sup>81</sup> Finnis argues that it is morally insufficient for heterosexual individuals to feel mutual affection and love with one another.<sup>82</sup>

Finnis, motivated by the importance of procreation to marital sexual intercourse, maintains that homosexual acts are essentially incomplete attempts at forming a heterosexual bond of marriage.<sup>83</sup> Homosexual conduct can be viewed as masturbatory in nature because it treats one’s own body and the body of others as instruments and therefore does not promote any basic human good.<sup>84</sup> As such, the unity of marriage is important and Finnis argues:

In short, sexual acts are not unitive in their significant unless they are marital (actualizing the all-level unity of marriage) and (since the common good of marriage has two aspects) they are not marital unless they have not only the generosity of acts of friendship but also the procreative significant, not necessarily of being intended to generate or capable in the circumstances of generating but at least of being, as human conduct, acts of reproductive kind-actualizations, so far as the spouses then and there can, of the reproductive function in which they are biologically and thus personally one.<sup>85</sup>

The Marriage Equality Act does not promote the marital good but rather undermines it and the institution of marriage. The Act grants same-sex couples the freedom to marry in New York. As a result, the Act promotes homosexuality by granting certain rights and privileges for those in homosexual unions. A homosexual union, despite its attempt to imitate a traditional bond of marriage, lacks procreative potential. Homosexual conduct, no matter what, can never

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<sup>80</sup> John Finnis, “Law, Morality and Sexual Orientation” (1994) *Notre Dame Law Review*, p. 1066 .

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> John Finnis, “Natural Law Theory and Limited Government” in *Natural Law, Liberalism, and Morality* Robert P. George, ed. (Clarendon Press, Oxford, 1996). Hereafter cited as NLLG.

<sup>84</sup> Finnis, NLLG, p. 15.

<sup>85</sup> John Finnis, “Law, Morality and Sexual Orientation”, p. 1067.

result in the procreation of life. Finnis argues that procreation is foundational to marriage.

However, marriage is not a tool used for the sake of the production of offspring, but a basic good in and of itself.<sup>86</sup> Due to physical constraints, same-sex couples cannot participate in the creation of life.

According to Finnis, “biologically connective intercourse” is insufficient; it must also include the mutual affection of friendship within the framework of a marriage. Finnis argues that marriage between heterosexuals represents a “double blessing.” A marriage essentially allows heterosexual unions to actualize both friendship and procreation.<sup>87</sup> As such, even sterile married couples who don’t have the ability to procreate can effectively participate in the marital good by actualizing their biological union and expression of their friendship. The Act does not promote this “double blessing” but rather creates an illusion for homosexual couples to participate in.

Since homosexual activity doesn’t promote the marital good, it only undermines the institution of marriage. The institution of marriage was based on the union between man and woman. Homosexual unions contradict the historical pedigree but also the basic goods which form the idea of marriage. Allowing homosexual individuals to participate in marriage would fundamentally undermine the marital acts of heterosexual unions. Homosexual unions effectively threaten the stability of existing and future marriages since sexual acts within a traditional marriage no longer can truly be actualized.

### **Friendship**

Friendship is a basic good “in its weakest form is realized by a minimum of peace and harmony amongst persons, and which ranges through the forms of human community to its strongest form in the flowering of full friendship.” Finnis argues that friendship involves acting

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<sup>86</sup> Finnis, NLLG, p. 13.

<sup>87</sup> Finnis, NLLG, p. 16.

for the sake of one's friend's well-being.<sup>88</sup> Although the Act does promote awareness and acceptance of the homosexual community, it does not effectively promote the basic good of friendship. Finnis argues that only conjugal love and sexual activity is the more perfect form of friendship and homosexual conduct is a mere imitation.<sup>89</sup>

Homosexual conduct does not build a deeper bond of friendship but rather is a vehicle for physical gratification. The lack of biological union within a homosexual relationship disenables those in the relationship to truly achieve a full friendship. A traditional marriage allows a man and woman to be united to each other not only through sexual intercourse but also by sharing together in the whole life of the marital household.

### **Religion**

Religion is a basic good concerns an order of things that transcends our individual interests. According to Finnis, "there is the order of means to ends, and the pursuit of life, truth, play, and aesthetic experience in some individually selected order of priorities and pattern of specialization..." Finnis asks, "does not one's own sense of responsibility, in choosing what one is to be and do, amount to a concern that is not reducible to the concern to live, play, procreate, related to others, and be intelligent?"<sup>90</sup> One of the main teachings of any religion is to be a moral individual. According to Finnis, homosexuality is in its essence immoral and is always harmful and degrading, thus unable to participate in the basic goods it imitates.<sup>91</sup> The Act promotes immoral conduct and therefore impedes on the basic good of religion.

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<sup>88</sup> John Finnis, *Natural Law and Natural Right*, p. 88.

<sup>89</sup> Finnis, NLLG, p. 16.

<sup>90</sup> John Finnis, *Natural Law and Natural Right*, page 89.

<sup>91</sup> Finnis, NLLG, p. 16.

## **B. Practical Reasonableness**

All basic goods cannot be simultaneously pursued to their fullest; as a result another set of principles, described as the basic requirements of practical reasonableness, is needed.<sup>92</sup> Finnis describes nine principles of practical reasonableness: (1) having a “coherent plan of life,” (2) not having an arbitrary preference amongst the basic goods, (3) not having arbitrary preference amongst persons, (4) having a sense of detachment from all specific and limited projects one undertakes, (5) not abandoning general commitments lightly, (6) acting to bring about good with efficiency, (7) respecting every basic value in every act by never choosing against a basic good, (8) favoring and fostering the common good of one’s communities, and (9) following one’s conscience.<sup>93</sup>

### ***Coherent Plan of Life***

Finnis maintains that one “must have a harmonious set of purposes and orientations, not as the ‘plans’ or ‘blueprints’ of a pipe-dream, but as effective commitments.”<sup>94</sup> Finnis believes that “it is unreasonable to live merely from moment to moment, following immediate cravings, or just drifting.”<sup>95</sup> This requires both direction, control of impulses and the undertakings of specific projects.<sup>96</sup> Finnis would argue that the Act doesn’t help promote or provide for a coherent plan because homosexuality is inherently immoral. It could be argued that the Act, by allowing same-sex couples a variety of rights and privileges previously afforded only to heterosexual married couples, it may promote a coherent plan.

Marriage Equality Act gives same-sex married couples a multitude of rights. These rights touch upon inheritance, health, housing, immigration, taxes, insurance and parenting. For

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<sup>92</sup> John Finnis, *Natural Law and Natural Right*, page 100.

<sup>93</sup> *Id.* at 101-125.

<sup>94</sup> *Id.* at 103-104.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

example, married same-sex couples in New York are able to file joint state tax returns, among other tax benefits. As a result, married same-sex couples can effectively plan out their lives a lot better than before. The Act helps combat the unforeseeable contingencies that may come up in life for homosexuals. However, since the underlying activity the Act promotes is immoral, the plan itself can never truly be coherent.

### ***No Arbitrary Preferences Amongst Values***

Finnis argues that “there must be no leaving out of account, or arbitrary discounting or exaggeration, of any of the basic human values.”<sup>97</sup> Any commitment to a coherent plan of life is going to involve “some degree of concentration on one or some of the basic forms of good, at the expense, temporarily or permanently of other forms of good.”<sup>98</sup> The Act does not promote any basic form of good but rather promotes homosexuality. And homosexuality, according to Finnis, is immoral and is always harmful and degrading, thus unable to participate in the basic goods it imitates. The Act promotes homosexuality at the expense of many basic goods such as the marital good or friendship. The legislature, in order to appeal to the homosexual community, made a decision to ignore many of the basic goods by enacting the Marriage Equality Act.

### ***No Arbitrary Preferences Amongst Persons***

Basic goods are “human goods, and can in principle be pursued, realized and participated in by any human being.”<sup>99</sup> Finnis argues that self-preference cannot be made through “selfishness, special pleading, double standard, hypocrisy, indifference to the goods of others whom one could easily help, and all other manifold forms of egoistic and group biases.”<sup>100</sup> The

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<sup>97</sup> *Id.* at 105.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 107.

<sup>100</sup> *Id.*

Act is singling out and targeting homosexual couples. The statute is at variance with the third methodological requirement of practical reasonableness.

### ***Detachment and Commitment***

In order to effectuate a coherent life plan, both detachment and commitment are essential. “There is no good reason to take up an attitude to any of one’s particular objectives, such that if one’s project failed and one’s objective eluded one, one would consider one’s life drained of meaning.” The requirement of detachment and commitment establishes “the balance between fanaticism and dropping out, apathy, unreasonable failure, or refusal to ‘get involved’ with anything.” It is basically the requirement that one must not abandon their commitments so lightly.<sup>101</sup> In the context of the Act, same-sex couples engaged in seeking marriage licenses have distorted the balance in their lives. They seek a project, which is immoral and doesn’t promote basic goods.

### ***The (Limited) Relevance of Consequences: Efficiency, Within Reason***

The following requirement “brings about good in the world by actions that efficient for their purposes. One’s actions should be judged by their effectiveness, by their fitness for their purpose, by their utility, their consequences.”<sup>102</sup> Finnis believes that efficiency must also be balanced amongst the other principles of practical reason. Thus, efficiency cannot be the primary factor in the decision making process. The Act seeks to provide an answer to lack of marital rights for same-sex couples. The Act does not bring about any basic form of good because it promotes the imitation of basic goods. There can be no efficiency in a statute which allows a homosexual community to imitate and participate in illusionary version of basic goods.

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<sup>101</sup> *Id.* at 110.

<sup>102</sup> *Id.* at 112.

### ***Respect for Every Basic Value in Every Act***

Finnis argues that no decision can directly attack or destroy a basic good. There must be respect for every basic good. Finnis explains:

Reason requires that every basic value be at least respected in each and every action. If one could ever rightly choose a single act which itself damages and itself does not promote some basic good, the one could rightly choose whole programs and institutions and enterprises that themselves damage and do not promote basic aspects of human well-being for the sake of their net beneficial consequences.<sup>103</sup>

The Act directly attacks several goods but most notably the marital good. The Act promotes homosexuality and allows same-sex couples to engage in the institution of marriage. The Act undermines the significance of the marriage between man and woman and the procreative significance of that union. Homosexual couples, whom can never procreate, are allowed to enter the world of marriage; a world built by other basic goods such as life and friendship. The Act also provides acceptance of homosexual behaviors, in direct contradiction to the marital good. These behaviors include sexual acts which can never lead to procreation.

### ***The Requirements of the Common Good***

The following requirement involves “favoring and fostering the common good of one’s communities.” Differing from a Utilitarian perspective, Finnis believes that the common good does not mean “the greatest good for the greatest number.” The common good is all encompassing for “human beings, inasmuch life, knowledge, play aesthetic experience, friendship, religion and freedom in practical reasonableness is good for any and every person.”<sup>104</sup> The requisite conditions for the common good constitute justice. Finnis maintains that “the objective of justice is not equally but the common good, the flourishing of all members of the community, and there is no reason to suppose that this flourishing of all is enhanced by treating

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<sup>103</sup> *Id.* at 115.

<sup>104</sup> *Id.* at 155.

everyone identically when distributing roles, opportunities, and resources.”<sup>105</sup> Distributive justice has five criteria: need, function, capacity, merit and who created the risk of harm.<sup>106</sup>

The Act, in its totality and objective does not promote the common good as contemplated by Finnis and therefore does not promote distributive justice. The Act arbitrarily favors the well-being of a class of people, homosexuals. In doing so, it impedes the realization of the gay community to attain for themselves reasonable objectives for the sake of their community. Therefore, the Act existence is a detriment to the common good.

### ***Following One's Conscience***

This final principle of practical reasonableness speaks of acting “in accordance with one’s conscience.”<sup>107</sup> This principle seeks to achieve a harmony between judgment and choice, and flows from an aspect of personal full-being, to be respected in every act.<sup>108</sup> Finnis states,

If one is not so fortunate in one’s inclinations or upbringing, then one’s conscience will mislead one, unless one strives to be reasonable and is blessed with a pertinacious intelligence alert to the forms of human good yet undeflected by the sophistries which intelligence so readily generates to rationalize indulgence, timeserving, and self-love.<sup>109</sup>

Finnis believes that acting in accordance with the conscience renders an action conscionable but not always moral. As such, the principle takes into account the dignity of the mistaken conscience.<sup>110</sup> The Act is a representation of the gay community and lifestyle. If those members of the community believe same-sex marriage is morally correct on the basis of flawed reasoning or error, they are nonetheless morally bound to follow their erroneous conscience. Therefore,

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<sup>105</sup> *Id.* at 174.

<sup>106</sup> *Id.* at 174-175.

<sup>107</sup> *Id.* at 125.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 125.

<sup>110</sup> *Id.* at 126.



although same-sex couples seeking marriage licenses accords with their conscience, it is still unreasonable in the final analysis.

### **Conclusion**

Under Finnis' moral framework all nine principles of practical reasonableness all work together and are mutually reinforcing. Finnis believes that the outcome of practical reasonableness produces a single moral action with no moral alternatives.<sup>111</sup> Based upon the nine principles examined in relation to the Act, it can be seen that the Act does not achieve the good sought. The Act does provide harmony and balance, does not recognizes all of the basic goods, shows arbitrariness among individuals and values, is not detached, does not respect every basic value, does not promote the common good and does not conform to one's conscience. As such, the Act has proven to be morally unreasonable.

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<sup>111</sup> *Id.* at 155.