

Supreme Judicial Court for the
Commonwealth of Massachusetts

SJC-09163

Request for an Advisory (A-107)

Regarding Senate No. 2175 entitled
"An Act Relative to Civil Unions"

Memorandum Amicus Curiae

Submitted by

Arnold G. Reinhold
14 Fresh Pond Place
Cambridge, MA 02138
(617) 491-4937

Representing himself

January 12, 2004

I am writing as a private citizen to urge the Supreme Judicial Court to let the Massachusetts Legislature craft a civil union remedy for the problems the Court recognized in *Goodridge vs. Department of Public Health*.

Senate No. 2175 would allow same-sex couples to form civil unions with all "benefits, protections, rights and responsibilities" of marriage. So the only question is whether the creation of a parallel civil union institution, separate in name from marriage but otherwise identical, is a constitutionally acceptable way to right the wrongs identified in *Goodridge*. I believe it is for the following reasons:

1. As the Court recognized in *Goodridge*, the institution of marriage has religious roots. Same-sex marriage is offensive to many religious groups, while other religious groups have embraced the concept and now sanctify such marriages. It is difficult to legislate in this area without appearing to interfere with religious beliefs. Employing a neutral term is a rational solution to the conundrum of competing

constitutional rights. Indeed, it is common in legislation to coin neutral language to shift the focus from symbolism to substance.

2. Legislation and court opinions cannot force public acceptance. A more restrained solution that does not attempt to redefine marriage may produce a better outcome. The New York Times and CBS News recently conducted poll on this issue (*Strong Support Is Found For Ban On Gay Marriage*, by Katharine Q. Seelye And Janet Elder, NY Times, December 21, 2003). It found that Americans on the whole oppose a law allowing homosexuals to marry, 61% to 34%. On the other hand, Americans under the age of 30 support such a law, 56% to 40%, as do Americans of all ages who know a gay person, 49% to 46%. Time and increased familiarity are on the side of acceptance for same sex couples. Impatient maximalism may only harden attitudes.

3. The Legislature can surely recognize that this is a politically charged issue and conclude that compromising on the term civil union is the best

way to insure longevity for this reform. The same New York Times/CBS News poll shows Americans favoring a constitutional amendment allowing marriage only between a man and a woman, 55% to 40%. The article (as corrected) quotes President Bush as saying "If necessary, I will support a constitutional amendment which would honor marriage between a man and a woman, codify that." A remedy that lasts must be constitutionally superior to one likely to be struck down. This political calculation should be within the legislature's purview.

4. Some argue that civil union would create a "separate but equal" status for same sex couple similar to what was deemed unconstitutional by the U.S. Supreme Court in *Brown vs. Board of Education*. But the separation faced by black school children was not verbal or symbolic, but physical. Black children were barred from some schools and forced to attend others. *Brown* was decided in part on scientific evidence, collected by Professor Kenneth B. Clark, showing the invidious effects of segregated education. Later

forms of segregation that were struck down by the courts also involved physical separations that caused daily humiliation. Merely coining a different name for same sex unions does not automatically make them second-class. That concern can be revisited in the future, based on actual experience.

The New York Times (January 9) in an article on the passage by the New Jersey legislature of a same-sex domestic partnership bill, quotes Steven Goldstein, who directed lobbying for the bill for Lambda Legal, as saying: "I'm on Cloud 27. It's not just that we won. It's that we won without rancor." Rancor is an enemy of the normalcy that same-sex partners seek. The legislature should be allowed to pour water on this fire-storm of controversy and not gasoline.

Respectfully submitted,

Arnold G. Reinhold