

Writing Assignment #1: Cover Letter and Resume
Rough draft due: Tuesday, February 6
Final draft due, Thursday, February 8

There are two parts to this assignment (for which you will get one grade).

Attached is an announcement for a job that a legal studies major might be interested in. Your assignment is to write a letter applying for the job, attaching a copy of your resume. Although the job is fictitious, your resume must be real and it must be yours. If there is some other job or internship to which you are planning to apply, you may use that instead of this job. **If you write a letter for something other than this job, you must attach a copy of the announcement with a description of the job.**

There is no one particular form for a resume. The point of a resume is to present your pertinent information in a neat, orderly way. Generally it should include:

- Name and contact information (address, email, telephone)
- Objective (sometimes people put a initial line stating their goal)
- Education (degree, date, institutions, majors, honors and awards)
- Work experience (for each job, give job title, name and location of employer, dates of employment, and your duties)
- Interests and activities

Word processing programs have templates for resumes. They often work well to set up the information. If you need more assistance, the Campus Career Network and the DuBois Library have a lot of resources. For on-line help, the Campus Career Network website is <http://www.umass.edu/careers/> (click on "Career Resources"). The Career Network has links to a free on-line resume writing services. Also, writing guides, such as the one by Diana Hacker, will have a suggested format.

See sample resume entries on page 3.

The purpose of the cover letter is to get noticed. The same resources are available for this document, e.g. word processing program templates, Campus Career Network, Library, and writing guides. In the cover letter, try to distinguish yourself from among the dozens (hundreds?) of qualified applicants and convince the firm to interview you for the job. Your goal is to get your foot in the door. Don't just repeat everything that is in your resume; instead, highlight the relevant information or job experience. You need to explain how you have the qualifications the employer is seeking. The letter should be about the employer's needs, and how you fulfill them.

See sample cover letter on page 4.

Do the best you can. Bring your rough draft to class on Tuesday, February 7, and we will answer any questions you have about format or content.

LAW FIRM SEEKING TRIAL ASSISTANT

College graduate to assist busy trial lawyers in fast-paced criminal defense practice.

Duties include:

- Locating and interviewing witnesses
- Filing and serving pleadings and other court documents
- Locating public records
- Preparing and serving subpoenas
- Finding relevant case law
- Reviewing and organizing discovery material (e.g. fingerprint, ballistic, and handwriting lab reports; photo spreads; witness statements; incident reports; surveillance reports)
- Organizing trial evidence and exhibits
- Docketing appeals

Requirements include:

- College degree in relevant field
- Basic legal research skills
- Computer expertise in word processing and data management
- Familiarity with (or willingness to learn) New York state and federal court systems and criminal trial process
- Ability to work well with diverse populations of people

Position begins June 1, 2007. Competitive salary with full benefits; review after six months. Send letter of application and resume to Holmes, Wolf & Labrador, Attorneys-at-Law, 120 Duane Street, Suite 400, New York, NY 10007.

[Note: If you are a junior, treat this as a summer job, not a permanent job after graduation.]

Sample resume entries

In both of the examples below, see how much stronger the second version sounds.

Night Manager, Big Y Market, Southampton, MA.

I was responsible for inventory and reporting security problems.

Reconciled register accounts.

Reports to management about traffic.

Given 5 people to supervise.

Night Manager, Big Y Market, Southampton, MA.

Summers 2004 and 2005

- Supervised inventory takers
- Reported security problems to management and law enforcement
- Reconciled register reports and produced inventory reports for management
- Recorded traffic and buyer preferences
- Managed five employees including preparing their pay and promotion reports

Joe's Lobster Shack, Cape Cod

Waitressed for three summers.

Joe's Lobster Shack, Cape Cod. Waitress, Summers 2003-2005.

Job involved waiting on tables, ran cash register, worked in kitchen on food prep.

Waitress, Joe's Lobster Shack, Cape Cod, Summers 2003-2005.

- Interacting with customers in a busy, crowded restaurant
- Giving orders to kitchen and serving 200 people per shift
- Operating computer/cash register
- Training new employees
- Assisting kitchen staff with food preparation

Here's how you might relate this to the Legal Assistant job in your cover letter:

As a waitress in a very busy seafood restaurant over the past three summers, I learned how to interact with a wide variety of people in a respectful, tolerant manner. This training will help me adjust quickly to the pace of your office and will enable me to work with your clients, potential witnesses, court personnel, and government officials. I am comfortable around many different types of people and enjoy the variety of experiences New York City has to offer.

418 North Pleasant Street, #108
Amherst, MA 01002
February 7, 2007

Holmes, Wolf & Labrador
Attorneys-at-Law
120 Duane Street, Suite 400
New York, NY 10007

Dear Attorney Holmes:

Please accept my application for your Trial Assistant opening. Currently, I am a senior at the University of Massachusetts Amherst, with a double major in Legal Studies and History. I will be graduating in May, 2006 with a GPA of 3.3, and I am planning to pursue a career in law.

My experience matches many of your requirements. Many of the duties, such as locating and interviewing witnesses, serving subpoenas, and filing court documents require someone with good interpersonal skills. As a waitress in a very busy seafood restaurant over the past three summers, I learned to deal with a wide variety of people in a respectful, tolerant manner. This training will help me adjust quickly to the pace of your office and will enable me to work with your clients, potential witnesses, court personnel, and government officials. Other duties, such as organizing discovery material and trial evidence, require someone with good organizational and computer skills. I am proficient in all Microsoft applications. Since I have worked part time throughout college to pay for my tuition, I had to be well organized in order to fulfill my obligations to my professors and my employers. My course work also prepared me for your job. I learned to use Lexis-Nexis, as well as many internet sites, to conduct research for papers and projects. I have taken courses in Legal Research and Writing, Due Process and the Criminal Trial, and Women and the Law.

I am comfortable around many different types of people and enjoy the variety of experiences New York City has to offer. I am excited about the possibility of beginning my career in a small firm that specializes in criminal defense work. Please don't hesitate to contact me if you need any more information. I am available for an interview at any time and can be reached at (413) 545-1000. My email address is student@umass.edu.

Sincerely,

Samantha B. Student

Writing Assignment #2: *McGuiggan* case brief
First draft due: Tuesday, February 13
Final draft due: Thursday, February 15

The purpose of a case brief is to: (1) identify the parties to the action; (2) summarize succinctly and clearly the facts giving rise to the legal controversy; (3) state the precise legal issue(s) presented by the facts; (4) summarize the reasoning the court used to reach its decision (this will be the longest section); and (5) state the new principle of law established by the case. The audience for your case brief is yourself or someone else who needs a brief, accurate, and complete summary of the case. All cases have a unique set of facts that the court analyzes by applying general principles of law. Your case brief should state the legal principles the court relies on and explain how the court applied those principles to the facts of the case. The outcome of the case will establish a new principle of law that future courts will apply to other fact patterns.

Be sure to follow these guidelines, as well as the guidelines in the syllabus, for all case briefs. **Double space your brief and number the pages.** You should set up your brief using the format below. You may have written briefs for other classes using a different format; please use this format for this assignment.

There is a sample case brief on page 6.

At the top of the first page, put your name in the upper right hand corner. In the center of the page, cite the case like this:

McGuiggan v. New England Telephone and Telegraph, Co.
398 Mass. 152 496 N.E.2d 141 (1986)

PARTIES: Identify the parties in the case and their relationship to each other. The party bringing the lawsuit is called a plaintiff and the party defending the lawsuit is called the defendant. If the case is an appeal, the party bringing the appeal is called the appellant and the party defending the appeal is called the appellee.

FACTS: Write a **short** narrative of the events leading up to this court action. Include only the facts that are necessary to make sense out of the case. Omit facts that are not relevant to the court's reasoning. End this section with an explanation of how the case got to court, e.g. who brought the case to court and what the legal claims were. If the case is an appeal, include what happened in the lower courts, e.g. who won and why.

ISSUE: Define the legal dispute before the court in the form of a question. Frame your issue as precisely as you can and make it specific to this case and these facts. Each issue should be stated in a separate question. This is not easy to do at first. Do the best you can; you will get better at it. Here's an example of a legal issue: "Did defendant's hiring of a lesser-qualified candidate who was 20 years younger violate plaintiff's Fifth Amendment right to equal protection of the law?"

REASONING: This is the main body of your brief. In it, you will summarize how the court analyzes the legal issue(s) presented by this case. You must address *all* the claims discussed by the court. For each claim (this should correspond to each of the issues in the prior section), first state the general principle of law that is involved and then explain how the court applied the facts of this case to the law. Describe the steps of logic the court went through to reach a conclusion, as well as any public policy determinations the court may have made along the way. Note any standards the court may have used to decide between contending positions. Repeat this process for *each* claim.

RULE: This is the new rule of law that comes from this case. It is not the court's holding, e.g. "Judgment for plaintiff." Rather, it is the legal principle that this case establishes that can be applied to future cases. Another way of looking at the rule is that it answers the question stated in the issue section.

Sample brief

Curtis v. School Committee of Falmouth
420 Mass. 749, 652 N.E.2d 580 (1995)

PARTIES: The plaintiffs are parents of children enrolled in the junior and senior high schools of Falmouth, Massachusetts. Defendants are elected members of the Falmouth School Committee.

FACTS: In 1992, the Falmouth School Committee authorized the Superintendent of Schools to implement a new program making condoms available to students in the junior and senior high schools. The program was voluntary. If students wanted free condoms, they went to the school nurse who counseled them about sexually transmitted diseases before giving out condoms. At the high school, students could buy condoms from vending machines without being counseled. There was no “opt out” provision in the programs for parents who did not want their children exposed to condoms or counseling nor was there a provision requiring the school to notify parents when their children requested condoms. When the Superintendent of Schools took steps to implement the new program, parents of students sued the School Committee claiming it violated their rights to parental liberty, familial privacy, and freedom of religion.

ISSUE: Is a voluntary, junior and senior high school condom-availability program, without provisions permitting parents to opt out of the program or notifying parents if their child requests a condom, an unnecessary governmental intrusion on parents’ constitutional rights to parental liberty, familial privacy, or religious freedom?

REASONING: The fourteenth amendment prohibits government from unnecessarily intruding on parental decisions about child rearing. The Supreme Court has ruled that a government program is unnecessarily intrusive if it “causes a coercive or compulsory effect” on parents’ choices about how to raise their children. Upholding this principle, the Court struck down laws

requiring Amish parents to send their children to secular schools and forbidding Catholic parents from sending their children to parochial schools. In this case, the parents argued that the condom-availability program coerced them into allowing their children to have access to information which they found morally repugnant. The Massachusetts Supreme Court rejected the parents' argument. Although students are required to attend school, the court reasoned, they are not required to participate in the condom-availability program. Because the program is voluntary, the constitution does not require opt out or notification provisions for dissenting parents.

The parents also argued that the condom-availability program burdened their free exercise of religion because it sanctioned views counter to their religious beliefs. The court found that state conduct violates the First Amendment when it "conditions receipt of an important benefit on conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by a religious belief." Here, participation in the program was entirely voluntary and not a requirement of school attendance. Thus, there was no undue burden placed on the parents' free exercise of their religion. Nor did peer pressure to participate in the program create a burden of constitutional dimension. According to the court, "mere exposure to offensive programs does not amount to a violation of free exercise. Parents have no right to tailor public school programs to meet their individual religious or moral preferences."

RULE: Public secondary schools may offer voluntary programs to their students that contradict individual parents' moral or religious beliefs.

Library Assignment #1

Due Thursday, February 22

Read through the five fact patterns below which raise issues concerning the liability of a social host. Using the principles of law from the *McGuiggan* case, try to figure out in each case what arguments the plaintiff would have made and what arguments the defendant would have made. Then try to figure out how the court would have decided the case.

FACT PATTERNS ON SOCIAL HOST LIABILITY

Based on what you have learned about the law in Massachusetts regarding the liability of a social host for injuries caused by the negligent driving of a drunken guest, consider the following fact patterns. For each one, decide how you would argue the case if you were the plaintiff and how you would argue it if you were the defendant. Applying the principles of law from the *McGuiggan*, try to reach agreement in your group as to the outcome of the case.

1. Jeffrey and two of his friends, all under the age of 21 which was the legal drinking age at the time, started drinking in the early evening and Jeffrey's house. They drove to a nearby liquor store, paid \$5 to a passerby to buy them a bottle of vodka, and then drove to another friend's house who was having a BYOB party. 40-50 people attended the party. The host of the party, Matthew, made space for his guests' beer in his refrigerator, as well as providing juice for mixing drinks, glasses, and ice. Jeffrey brought his own vodka into the kitchen and mixed himself a drink. Matthew did not serve Jeffrey any liquor. Matthew circulated throughout the house, beer in hand, socializing with guests. He did not tell anyone to stop drinking. He chatted with Jeffrey while Jeffrey was in the kitchen stirring a pitcher of vodka and pineapple juice. At the time, Jeffrey was unsteady on his feet and visibly drunk. Matthew did not say anything to Jeffrey about his condition. After staying at the party about 1 ½ hours, Jeffrey left in his car, crossed the center line going about 60 mph and struck a police officer on a motorcycle. As a result of the accident, the police officer suffered severe and permanent physical injuries. Is Matthew liable for the injuries to the police officer?

2. John and two friends, all 17 years of age, partied at John's house in the early evening when John's parents were not at home. One of John's friends brought 2 cases of beer from his car into John's house and put it on the kitchen counter. Four other friends came over and the group played drinking games for the next 2 hours while helping themselves to the beer in John's kitchen. After a while, four of the drinkers left; the others got into John's family's station wagon and brought the remaining beer along and went to another friend's house. Around midnight, Jordon, one of John's friends got a ride back to John's house to pick up his car. After retrieving his car, he crossed the center line of the road and collided with the on-coming vehicle. Jordon was intoxicated at the time. The driver of the on-coming car was killed. Is John liable for the injuries caused by Jordon?

3. Steve, age 24, had lived on and off with his uncle, Ronald. One evening, Steve went to Ronald's house, fixed himself something to eat and took a beer from the refrigerator. He went out to the garage to work on his car and helped himself to more beers from the refrigerator in the garage. There were also sodas stored in the garage refrigerator. Steve drank 5 or 6 bottles of beer.

Ronald was also drinking with Steve, although he drank less. About 3 hours later, Steve and Ronald went to a neighborhood bar, Pete & Henry's. While they waited for their take-out orders, Ronald bought Steve 2 16-ounce cans of beer. Steve headed off to where he was living about 30 miles away. When he left, Ronald asked him if he was okay to drive. Steve knew when he left Pete & Henry's that he was "pretty well intoxicated." While he was driving, he crossed the center line and collided head-on with a vehicle going in the opposite direction, causing severe injuries. Was Ronald liable for the injuries caused by Steve? Was Pete&Henry's liable for the injuries caused by Steve?

4. Margaret gave her daughter, a high school student, permission to have a party at her house. She was not home when the party was taking place. Margaret never kept alcohol in her house, there was none on the premises when she left, and she did not permit her daughter to drink. She did not see anyone consuming alcohol before she left. One of the guests, Darren, brought beer to the party which he consumed. Although he did not appear drunk when he left the party, due to his intoxication he negligently drove his car into another car, causing injuries to the driver. Is Margaret liable for the injuries caused by Darren?

5. Audrey reluctantly allowed her 17 year old daughter to have a party at their house. She decided to stay there while the party was going on to chaperone. The party consisted of 3 girls and 4 boys. When the boys arrived, Audrey greeted them. They were carrying beer which they made no effort to hide. The party was in the downstairs den and Audrey remained upstairs. She went downstairs twice to check on things; everyone was drinking beer and made no effort to hide it. Later, some other boys came over and got into a fight with the boys who had been drinking at the party. They were armed with sticks and tire irons. One of the boys sustained serious injuries. Was Audrey liable for the injuries caused by her drunken guests?

After you have discussed the fact patterns in your groups, you will go to the library or use Lexis-Nexis to look up the cases that they come from. The citations for the case corresponding to the numbered fact patterns are:

1. *Ulwick v. DeChristopher*, 411 Mass. 401, 582 N.Ed.2d 954 (1991)
2. *Cremins v. Clancy*, 415 Mass. 289, 612 N.E.2d 1183 (1993)
3. *Makynen v. Mustakangas*, 39 Mass. App. Ct. 309, 655 N.E.2d 1284 (1995)
4. *Langemann v. Davis*, 398 Mass. 166, 495 N.E.2d 847 (1986)
5. *Wallace v. Wilson*, 411 Mass. 8, 575 N.E.2d 1134 (1991)

Decide with the rest of your group members if you want to divide up the cases. Everybody must read at least one of the above cases. You may read more than one if you choose to do so.

You do not need to write a formal case brief for the case(s) you read but you do need to be able to explain to the rest of your group members the court's reasoning and the principles of law from the case. If the court decided the case differently than your group had decided, see how the court's analysis differs from your group's analysis. On Thursday, we will want to see your notes or some evidence that you have completed this assignment.

Writing Assignment #3: Memorandum on Social Host Liability
First draft due, Tuesday, February 27; Final draft due, Thursday, March 1

Jeremy is a U.Mass senior. His family lives nearby in Hatfield. He is the youngest of three brothers, all of whom attended U.Mass. One of Jeremy's older brothers, Matt, lives at home with his parents.

Jeremy's 21st birthday in May falls on the day before graduation. Since Jeremy's parents are going to be gone that week and will be coming home the morning of graduation, Matt told Jeremy to invite his friends to their house for a birthday party. At around 11 p.m., Jeremy, Matt, and all the guests will leave the Hatfield house and go to Amherst to a pre-graduation fireworks display. Matt said that he will pay for some of the food and drinks but that Jeremy's friends have to share some of the costs. Jeremy collected \$200 from his friends and gave it to Matt. The plan is that Matt will buy a keg of beer, some vodka and mixers, soft drinks, pizza, birthday cake, and party decorations using the \$200 and making up the difference with his money. They expect around 30 people to come to the birthday party. Many of the guests will be minors.

Kristen, Jeremy's girlfriend, doesn't like this plan at all. She knows how much Jeremy and his friends drink. She also knows that they will be driving from Hatfield to Amherst on Route 9 at around 11 pm the night before graduation. She doesn't think much of Matt's ability to control the drinking since Matt drinks more than Jeremy does. Amy is also concerned about what might happen when they get to the fireworks display. One of Jeremy's friends, Trevor, is notorious for getting into fights when he's been drinking too much. Last summer, Trevor got into a fight over a bad call at a local softball game. Jeremy and some of his friends jumped into the fight too and one of them ended up with a broken nose.

Kristen could go to Jeremy's parents and tell them what's being planned but she doesn't want to be seen as spoiling the birthday fun. She knows you are a legal studies major and asks you to find out how much trouble they could get into if things get out of hand. She's hoping to scare them into acting responsibly.

Write a 2-3 page letter or memorandum to Amy explaining the potential civil liability of Jeremy, Matt, and their parents for any harm caused by the negligent actions of the intoxicated birthday party guests. You decide what the tone should be. Put yourself in the position of the reader; what do you think will make the information most accessible for your reader. You do not need to discuss the potential criminal penalties (e.g. serving alcohol to minors, drunk driving) since this is about civil liability. Your goal is to equip Amy with accurate, relevant information. Remember to explain, clearly and accurately, any legal terms or concepts you use.

The format can be informal since this is being written to a friend. You decide what is best. You might want to just say, Dear Kristen, at the top, or you might want to set it up as a memorandum. A memorandum format looks like this:

MEMORANDUM

To: Kristen student
From: Amanda Student
Date: March 2, 2007
Subject: Social Host Liability

The body of your memorandum should be double spaced and divided into paragraphs.

Be sure to number all your pages. A strong memorandum will cover these topics: definition of social host liability, discussion of Jeremy's and Matt's potential liability, significance of collecting money, relevance of having minors at the party, and potential for the parents' liability. You may want to conclude with some suggestions.

Whether you use the "Dear Kristen" format or this memorandum format, please be sure to double-space and number your pages. The memo should be two to three pages long. Good luck!

Writing Assignment #4: OP ED on social host liability
First draft due, Tuesday, March 6; Final draft due, March 8, 2007

For this assignment, you will write an OP-ED (“OPinion-EDitorial”) piece on the subject of social host liability.

OP-ED pieces run opposite the editorial page of a newspaper or magazine. Unlike editorials, they are signed and usually are written by someone who is not on the newspaper’s staff. OP-ED pieces take a position on a specific (and usually controversial) issue.

Your piece should be about two pages long. For this assignment, you will decide the newspaper for which you are writing. This is important because it will determine who your audience is. For instance, you might write a different kind of piece for the *Collegian* than you would for the *Boston Globe* or your hometown newspaper. Please specify the paper. At the top of the first page, put your name in the upper right hand corner. Then, make up a catchy title and state who your audience is.

“Don’t Let Your Guests Drive Drunk!”
An OP-ED for the *Boston Globe*

You may write about anything related to the case you have read or issues we have discussed in class pertaining to social host liability for drunk driving.

Feel free to approach the topic from any angle you want: serious, funny, wise, ironic, critical, supportive, etc. Even if the tone of your piece is very informal, your writing must be grammatically correct. Avoid using slang and swear words; do not insult your reader.

The following is a good format to use:

1. State your position on the topic clearly in the first paragraph. The reader should have no question what the debate is about and which side you are on.
2. In the next paragraphs, develop your reasoning to support your position. A strong OP-ED will present well developed arguments to back up your position. Feel free to do more research if you think it would strengthen your OP-ED. If you use any statistics or outside information, you must indicate where you got it from.
3. After you have given reasons supporting your argument, a strong OP-ED will anticipate the opposing argument and counter it. This is the part where students usually have the hardest time.
4. Conclude your essay by restating your position.

Writing Assignments #5&6: Research paper on Guantanamo detainees
Outline and thesis statement due Tuesday, March 27
Research (library assignment #2) due Thursday, March 29
Rough draft due Tuesday, April 3; Final draft due Thursday, April 5

For purposes of grading, this assignment counts double. You are strongly encouraged to do a revision of this assignment. Use a traditional, formal, paper format for this assignment, with footnotes or endnotes and bibliography in the “Chicago style.” We will spend some class time going over the proper format. Sample footnotes and bibliography begin on page 16.

Drawing on the issues raised and the legal reasoning in the majority and dissenting opinions of *Rasul v. Bush* and *Hamdi v. Rumsfeld*, supplemented with your own research, write a 5-6 page paper on any legal issue raised in these cases.

The introductory paragraph should state your theme or thesis. Not doing this is one of the most common mistakes students make. In an essay, like an OP ED, your reader should know what your position is from the beginning. After you have set out your thesis in the introduction, then you want to prove it. This is the body of your essay. Another common mistake students make is not to be specific enough. Be sure to give examples to support your arguments. Your mastery of the Court's reasoning in these cases is where you have the opportunity to show how well you understand these cases.

Your thesis should hold the paper together as you move from one topic to another. Be sure to use good topic sentences for each paragraph. In your conclusion, you want to return to your thesis and restate it.

In addition to the cases we read and discussed in class, you must also cite at least two references from **law reviews** in support of your argument. (National newspapers, e.g. *New York Times*, *Boston Globe*, and legal newspapers don't count.) Use Lexis-Nexis to find relevant law review articles. You need to incorporate this material into your paper and show how it supports your argument. This constitutes the second library assignment.

Because this is a formal research paper, do not use “I.” Although you are stating your opinion, it should be in the form of an argument, supported with logical reasoning. Thus, instead of writing “I will show that using a number system in affirmative action is constitutional even though the Supreme Court rejected this method,” restate this as a declarative sentence, “Using a number system in affirmative action is constitutional even though the Supreme Court rejected this method.”

The **outline and thesis statement** must be handed in on time one week before the rough draft is due. We will not accept your paper if you haven't worked on an outline in advance. Also, you must complete the **research** and hand in citations for the two references you plan to use and a one-paragraph summary of how the article helps your argument. This constitutes the second library assignment.

Do not plagiarize. Do not do anything that has even the appearance of plagiarism or any other form of academic dishonesty. If you have any questions at all about what constitutes plagiarism or cheating, talk to one of the instructors. Whenever you take someone else's language or ideas, you must give credit to that author. This includes anything you may find on the Internet. See p. 17 for examples of plagiarism.

Some things to check before handing in the final draft:

1. Do you have a clear thesis statement?
2. Do you use topic sentences to guide the reader through your paper?
3. Are your footnotes/endnotes in proper format?
4. Is your bibliography in proper format?
5. Are the pages numbered?
6. Do you use one-inch margins and 11 point or 12 point font?
7. Have you checked spelling and grammar?
8. Are you having fun?

Sample paragraph with footnotes in Chicago style

Many legal scholars with military backgrounds support Justice O'Connor's assertion that affording basic due process to detainees will not have a "dire impact on the central function of wargaming that the Government forecasts."¹ Lieutenant Jane Smith, an attorney with the Army Judge Advocate General Corps, claims that "resolving the status of prisoners in a prompt and efficient manner promotes security on the battlefield."²

Retired Major Richard Johnson, a former lecturer at the Naval War College, argues that the military is well equipped to handle these hearings in the field or at a base, such as Guantanamo Bay, so long as the procedures and standards are clearly stated."³ Problems may arise, according to Johnson, if there is ambiguity in the language of the rules and regulations.⁴

¹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004).

² Jane Smith, "The Need for Consistent Treatment of Enemy Combatants," *Harvard Law Journal*, volume 112, page 235, June 2003.

³ Richard Johnson, "Due Process in Military Proceedings," *Military Law Journal*, volume 12, page 164, Spring 2004.

⁴ *Ibid.*

Bibliography

Cases

Hamdi v. Rumsfeld, 542 U.S. 507, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004).

Rasul v. Bush, 542 U.S. 466, 124 S.Ct. 2686, 159 L.Ed. 2d 548 (2004).

Rasul v. Bush, 542 U.S. 466, 124 S.Ct. 2686, 159 L.Ed. 2d 548 (2004) (Scalia, dissenting).

Books and articles

Ellis, James, John Brown and Eleanor Gray. *The Evolution of Military Law*. Amherst: University of Massachusetts Press, 2002.

Johnson, Richard. "Due Process in Military Proceedings." *Military Law Journal*. Volume 12, page 164, Spring 2004.

Smith, Jane. "The Need for Consistent Treatment of Enemy Combatants." *Harvard Law Review*. Volume 112, page 235, June 2003.

Other

Military Commission Order No. 1 (March 21, 2002). <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> (accessed July 1, 2005).

Avoiding plagiarism (from D. Hacker, *A Writer's Reference*, 4th Ed., p. 84-85)

Original source: Early colonists viewed the lion as a threat to livestock, as a competitor for the New World's abundant game, and most importantly, as the personification of the savage and godless wilderness they meant to cleanse and civilize. --Kevin Hansen, *Cougar*, p.1

Plagiarism: Early colonists took a dim view of the lion. According to Kevin Hansen, they saw it as a threat to livestock, as a competitor for the New World's abundant game, and most importantly, as the personification of the savage and godless wilderness they meant to cleanse and civilize.

Borrowed language in quotation marks: Early colonists took a dim view of the lion. According to Kevin Hansen, they saw it "as a threat to livestock, as a competitor for the New World's abundant game, and most importantly, as the personification of the savage and godless wilderness they meant to cleanse and civilize."

Original source: The park [Caspers Wilderness Park] was closed to minors in 1992 after the family of a girl severely mauled there in 1986 won a suit against the county. The award of \$2.1 million for the mountain lion attack on Laura Small, who was 5 at the time, was later reduced to \$1.5 million. --Reyes and Messina, "More Warning Signs," p. B1.

Plagiarism: Unacceptable Borrowing: Reyes and Messina report that Caspers Wilderness Park was closed to children in 1992 after the family of a girl brutally mauled there in 1986 sued the county. The family was ultimately awarded \$1.5 million for the mountain lion assault on Laura Small, who was 5 at the time.

Acceptable Paraphrase: Reyes and Messina report that in 1992 Caspers Wilderness Park was placed off-limits to minors because of an incident that had occurred there some years earlier. In 1986, a five-year-old, Laura Small, was mauled by a mountain lion and seriously injured. Her family sued the county and eventually won a settlement of \$1.5 million. (B1)

Another acceptable paraphrase: In 1992, officials banned minors from Caspers Wilderness Park. Reyes and Messina Explain that park officials took this measure after a mountain lion attack on a child led to a lawsuit. The child, five-year old Laura Small, had been severely mauled by a lion in 1986, and her parents sued the county. Eventually they received an award of \$1.5 million (B1).

More on plagiarism

From http://www.balancedpolitics.org/affirmative_action.htm:

Affirmative action generally means giving preferential treatment to minorities in admission to universities or employment in government & businesses. The policies were originally developed to correct decades of discrimination and to give disadvantaged minorities a boost. The diversity of our current society as opposed to that of 50 years ago seem to indicate the programs have been a success. But now, many think the policies are no longer needed and that they lead to more problems than they solve.

One notable example is a case currently being argued in the Supreme Court concerning admissions to the University of Michigan. The school has a policy of rating potential applicants on a point system. Being a minority student earns you more than twice as many points as achieving a perfect SAT score. Three white students have sued citing this as raced-based discrimination. School officials say that diversity is desirable and affirmative action is the only way to achieve true diversity.

The following sections explore the issue and show how things are much more complicated.

From student paper:

Affirmative action is commonly known as a policy giving special treatment to minorities during employment decisions or higher education admissions. The policies were first developed to correct years of discrimination and to give disadvantaged minorities a lift. Society's current state of diversity has changed over that past 50 years due to the help of affirmative action. However currently, many seem to think the policies are no longer needed and proved to be causing harm to society, but who cares right? At least now society and the school systems are diverse. The University of Michigan has a policy that rates applicants on a point system. In this system, being a minority student earns you more than twice as many points as achieving a perfect SAT score. Three white students have sued arguing they were discriminated against because of their race. School representatives say that diversity is desirable and affirmative action is the only way to achieve true diversity.

Is this plagiarism? What would you do if you were the instructor?

Using quotations in your text

This exercise demonstrates how to incorporate quotations in your text. If the quotation is long, usually two or more sentences, it should be indented and single spaced. You do not need to put quotations marks at the beginning and end if you indent. Here is an exact quotation from *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004). Any quotation of any length must be exactly the same as the original.

Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.

With due recognition of these competing concerns, we believe that neither the process proposed by the Government nor the process apparently envisioned by the District Court below strikes the proper constitutional balance when a United States citizen is detained in the United States as an enemy combatant. That is, "the risk of erroneous deprivation" of a detainee's liberty interest is unacceptably high under the Government's proposed rule, while some of the "additional or substitute procedural safeguards" suggested by the District Court are unwarranted in light of their limited "probable value" and the burdens they may impose on the military in such cases.

Here are some acceptable ways of using parts of this quotation in your text.

1. In *Hamdi v. Rumsfeld*, the Court opined that “[s]triking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat.”
2. The Court found the “‘risk of erroneous deprivation’ of a detainee’s liberty interest is unacceptably high” under these rules.
3. The Court rejected “the process proposed by the Government [and] the process . . . envisioned by the District Court. . .”
4. In *Hamdi v. Rumsfeld*, the Court reaffirmed the need to maintain core democratic values during wartime. “[It] is in those times of crisis that we must preserve our commitment at home to the principles for which we fight abroad.”

Writing Assignments #7&8: Memorandum on same-sex marriage

Library Assignment #3

Outline and thesis due: Tuesday, April 24; Research due Thursday, April 26

Rough draft due: Tuesday, May 1; Final draft due: Thursday, May 3

Based on the success of *Baker v. Vermont*, eight gay couples in Massachusetts filed a suit challenging the state's prohibition on their ability to marry. On November 18, 2003, the Massachusetts Supreme Judicial Court ruled that it was unconstitutional to deny same-sex couples the benefits of civil marriage. Beginning on May 17, 2004, same-sex couples were issued marriage licenses. Since then, over 8,000 same-sex couples have married in Massachusetts. Opponents of same-sex marriage collected 170,000 signatures on a petition to put a proposed amendment to the Massachusetts constitution on the 2008 ballot. The amendment would define marriage as between "one man and one woman." Before the proposed amendment is put on the ballot, it must be approved by 25% of Massachusetts legislators in two successive legislative sessions. On January 2, 2007, the legislature passed the amendment by a vote of 62-138; it must be voted on by the legislature one more time in 2007. If a majority of voters approve the amendment, then there will be no more same-sex marriages in Massachusetts.

For this assignment, you will write a memorandum to your state representative explaining your position on gay marriage and making an argument how you think the legislator should vote when it comes up again. You can find out who your representative is at <http://www.mass.gov/legis/citytown.htm>. You will need to find out what your representative's position is by calling or emailing his/her office. If you are not a resident of Massachusetts, address your memorandum to Governor Romney.

Your memorandum should be 5-6 pages long. Use the Memorandum format on page 10 of this course packet. For grading purposes, this assignment counts double. Please note that the third library assignment is incorporated in this memorandum. Use the same format as you did for the social host liability memorandum.

In your memorandum, you will need to cover the following issues:

- A. Give your opinion of gay marriage and explain why you agree or disagree with your legislator's position. You'll need to take a clear position in this memo.
- B. Discuss the legal issues and policy issues related to this topic.
- C. Using either Lexis-Nexis or Legaltrac, find two articles to support your position. Be sure to acknowledge all sources you consult for your memorandum. It is all right to use newspaper articles for this assignment.

This is **not** a formal research paper. As with the memorandum you wrote on field sobriety tests, think about who your audience is. You want to write in a style that makes a compelling argument but is accessible to your reader. You probably won't want to use formal footnotes, but you do need include the necessary information to look up any references you have. We will talk in class about how to do this.

Do not plagiarize. Do not do anything that has even the appearance of plagiarism or any other form of academic dishonesty. If you have any questions at all about what constitutes plagiarism or cheating, talk to one of the instructors. Whenever you take someone else's language or ideas, you must give credit to that author. This includes anything you may find on the Internet. See p. 17 for examples of plagiarism.

As with the last assignment, you must hand in an outline and citations to the articles you plan to use to support your argument. We will not accept your formal draft if we have not seen your outline and research first.

**Writing Assignment #9. OP ED on either Guantanamo detainees or same-sex marriage
Rough draft due, Tuesday, May 8; Final draft due, Thursday, May 10**

This is the same assignment as the first OP ED. You may write it on either of the last two topics we covered: Guantanamo detainees or gay marriage.

Daniel E. McGuiggan, Administrator v. New England Telephone and Telegraph Company, City of Peabody, et al., 398 Mass. 152, 496 N.E.2d 141 (1986) [some citations and footnotes omitted]

JUDGES: Wilkins, Abrams, Nolan, Lynch, & O'Connor, JJ. Lynch, J., concurring.

OPINION: We consider, on direct appellate review, whether a social host who furnished alcoholic beverages to an adult guest may be liable for a death caused shortly thereafter by that guest's negligent operation of a motor vehicle while under the influence of alcohol. We conclude that, although in certain circumstances liability properly could be imposed on such a social host, on the facts presented on the social hosts' motion for summary judgment, they are not liable. We, therefore, affirm the separate judgment entered in favor of the McGuiggans.

The McGuiggans held a high school graduation party for their eighteen year old son Daniel on June 11, 1978. Perhaps thirty people were present, most of whom were relatives considerably older than Daniel. Four of his contemporaries, including eighteen year old James Magee, were also present. Several people acted as bartender serving alcoholic beverages provided by the McGuiggans at a bar in the cellar playroom, and guests also served themselves. Mr. McGuiggan testified on deposition that he may have given Magee one drink when he arrived, but thereafter did not see him drinking and did not know how many drinks Magee had. He claimed that Magee seemed perfectly normal just before he left their home. Mrs. McGuiggan testified on deposition that she had spoken to Magee before he left with her son and three other young guests to drive David Doherty home. She knew Magee was driving and would have said something to him if she had believed him incapable of driving. Other passengers in the vehicle confirmed that Magee seemed sober. [n3](#) Magee, however, admitted that he had four or five rum-cokes that evening and that he was "pretty sure" he later pleaded guilty to a charge of operating under the influence.

While traveling with his friends in the vehicle driven by Magee on Lowell Street in Peabody, shortly after leaving the party, Daniel McGuiggan became sick to his stomach and leaned his head and upper body out of a window of the vehicle. Daniel's head apparently struck a cement post which the defendant telephone company maintained inside the curb to mark the location of an underground conduit. Daniel died at a local hospital about four hours later. [n4](#)

Approximately three hours after Magee left the party, a breathalyzer test administered to Magee recorded a value of .140. According to an affidavit of a physician submitted on the summary judgment motion, in the circumstances, a person who registered a .140 value on a breathalyser test three hours after his last drink would have had a blood alcohol content of between .185 and .215 three hours earlier. Unless tolerant to alcohol, a person with a blood alcohol content over .10 would be recognizably intoxicated, and one with a blood alcohol content of between .185 and .215 would be unmistakably intoxicated. No evidence indicated when Magee ate his dinner or when he took his last drink or how strong it was.

The claim against the McGuiggans is based on common law principles and does not rely in any respect on a statutory violation. Under traditional common law tort analysis, our inquiry is whether a social host violated a duty to an injured third person by serving an alcoholic beverage to a guest whose negligent operation of a motor vehicle, while adversely affected by the alcohol,

caused injury to a third person. Such an inquiry would require us to consider whether the social host unreasonably created a risk of injury to a person who the social host should reasonably have foreseen might be injured as a result of the guest's intoxication. If a social host acted negligently in serving an alcoholic beverage to a guest when there was such a foreseeable risk of injury to another and injury resulted from the guest's negligence caused by his intoxication, the law would ordinarily impose liability in tort on the social host, barring some statutory restriction or consideration of public policy weighing against the imposition of a duty in the circumstances.

Although this court has never announced a common law rule on the issue, the traditional view supported by the weight of authority has been that the drinker's voluntary consumption alone is the "proximate" cause of the third party's injury and that a person who sold or gave liquor to an intoxicated adult drinker is not liable for subsequent injuries caused by his intoxication. . . . Other courts have concluded simply as a matter of policy that the subject of tort liability is best determined by the Legislature. [n5](#)

In the case of licensed vendors, neither the "proximate cause theory" nor the concept of deference to the Legislature has attracted this court's favor. This court has held that a licensed commercial vendor of alcoholic beverages owes a duty to a third person who is injured in a motor vehicle accident caused by the negligence of a customer to whom the vendor sold a drink when he knew or reasonably should have known the customer was intoxicated. *Cimino v. Milford Keg, Inc.*, 385 Mass. 323, 327 (1982). In *Adamian v. Three Sons, Inc.*, 353 Mass. 498, 500 (1968), the court rejected arguments that liability could be imposed only by statute and that the drinker alone would be responsible for the consequences of his intoxication. Grounding liability on common law negligence (see *Three Sons, Inc. v. Phoenix Ins. Co.*, 357 Mass. 271, 275 [1970]), we held that injury to another on the highways was within "the foreseeable risk created by the sale of liquor to an already intoxicated individual." *Adamian v. Three Sons, Inc.*, *supra* at 501. Although the plaintiff must show that the vendor defendant was on notice that the consumer was intoxicated (*Cimino v. Milford Keg, Inc.*, *supra* at 328), we do not require specific proof that the vendor knew or reasonably should have known that the intoxicated customer would drive a motor vehicle. *Id.* at 330-331. The question for the trier of fact is whether the vendor failed "to exercise that degree of care for the safety of travelers that ought to be exercised by a tavern keeper of ordinary prudence in the same or similar circumstances." *Id.* at 331.

There are, of course, differences between the operation of a commercial establishment selling alcoholic beverages for consumption on the premises and the furnishing of alcoholic beverages to guests in one's home. Balancing these differences, courts have found it easier to impose a duty of care on the licensed operator than on the social host. The threat of tort liability may serve the public purpose of offsetting the commercial operator's financial incentive to encourage drinking. The means of serving beverages in a bar, tavern, or restaurant normally permits closer control and monitoring of customers and their consumption than is typically possible in private gatherings. The commercial vendor may generally (but certainly not always) have more experience in identifying intoxicated drinkers than would social hosts and would be better able to "shut off" consumption without the embarrassment that a social host would suffer. It has also been suggested that licensed operators can be expected to have insurance against loss whereas a private individual would not. Some courts have regarded these various differences sufficient to justify imposing a duty on licensed vendors but not on social hosts. *See, e.g., Harriman v. Smith*,

697 S.W.2d 219, 221 (Mo. Ct. App. 1985); *Settlemyer v. Wilmington Veterans Post No. 49*, 11 Ohio St. 3d 123, 127 (1984). Others have considered the distinctions insignificant in assessing whether a duty should be imposed, although the differences might have a bearing on whether particular conduct was negligent. See *Coulter v. Superior Court*, 21 Cal. 3d 144, 155(1978); *Kelly v. Gwinnell*, 96 N.J. 538, 547-548 (1984); *Koback v. Crook*, 123 Wis. 2d 259,267-268 (1985). . . .

A line of cases, most of which rely on statutory violations, imposes social host liability for the adverse consequences of serving alcoholic beverages to a minor. See, e.g., *Sutter v. Hutchings*, 254 Ga. 194, 198 (1985) (common law claim stated against social hosts who furnished beer to noticeably intoxicated seventeen year old); *Brattain v. Herron*, 159 Ind. App. 663, 676(1974) (violation of statute in knowingly giving liquor in defendant's home to minor who would be driving is negligence *per se*); *Longstreth v. Gensel*, 423 Mich. 675, 694-695 (1985) (claim stated against social hosts who allegedly violated statute in knowingly furnishing alcoholic beverage to minor who died in automobile accident); *Walker v. Key*, 101 N.M. 631, 635 (Ct. App. 1984)(violation of statute forbidding furnishing alcoholic beverages to minor warrants claim against social host for injury to third person); *Wiener v. Gamma Phi Chapter of Alpha Tau Omega Fraternity*, 258 Or. 632, 643 (1971) (claim properly alleged by passenger against fraternity which served alcoholic drinks to minor when it should have known he would be driving motor vehicle); *Congini v. Portersville Valve Co.*, 504 Pa. 157, 162-163 (1983) (defendants who furnished liquor to minor to point of intoxication violated statute, were negligent *per se*, and may be liable for injuries minor thereafter sustained in operating motor vehicle); *Koback v. Crook*, *supra* at 265-266 (social hosts, negligent *per se* for serving a minor in violation of statute, may be liable to third party injured by minor, where the consumption of alcohol was cause of third party's injury). *Contra Harriman v. Smith*, *supra* at 222-223 (no liability of social hosts for injuries caused to third person by intoxicated minor guest). [n7](#)

There are a few cases which have imposed social host liability when, as here, the intoxicated guest who operated a motor vehicle was an adult. In *Coulter v. Superior Court*, 21 Cal. 3d 144, 149-150 (1978), the Supreme Court of California concluded, on both statutory and common law grounds, that "a social host or other noncommercial provider of alcoholic beverages owes to the general public a duty to refuse to furnish such beverages to an obviously intoxicated person if, under the circumstances, such person thereby constitutes a reasonably foreseeable danger or risk of injury to third persons." [n8](#) The "social hosts" in the Coulter case were the owner-operator and the manager of an apartment complex alleged to have served a guest(apparently an adult) large quantities of alcoholic beverages when they knew or should have known that she was becoming "excessively intoxicated," that she customarily drank to excess, and that she would be driving a motor vehicle. *Id.* at 148.

On purely common law grounds, the Supreme Court of New Jersey held that a social host who serves liquor to an adult guest, "knowing both that the guest is intoxicated and will hereafter be operating a motor vehicle, is liable for injuries inflicted on a third party as a result of the negligent operation of a motor vehicle by the adult guest when such negligence is caused by the intoxication." *Kelly v. Gwinnell*, 96 N.J. 538, 548 (1984). The court emphasized that it was passing on the duty of a social host who "directly serves the guest and continues to do so even after the guest is visibly intoxicated." *Id.* at 556. Recently, the Supreme Court of Iowa ruled that

a claim was properly alleged against a social host where the host "was actually aware the guest was intoxicated" and then, in violation of a statute, made intoxicating beverages available to her which she drank before operating a motor vehicle, causing injury to the plaintiffs. *Clark v. Mincks*, 364 N.W.2d 226, 231 (Iowa 1985). The court relied in part on the violation of an Iowa statute providing that no person shall give (or sell or dispense) intoxicants to an intoxicated person. See *Ashlock v. Norris*, 475 N.E.2d 1167, 1169 (Ind. Ct. App. 1985) (claim stated against person who purchased drinks for an obviously intoxicated person at a lounge in violation of statute forbidding giving alcoholic beverage to a person known to be intoxicated). See also *Langle v. Kurkul*, 146 Vt. 153 (1986), for a case in which a majority of the court were unwilling to recognize a claim of social host liability where the inebriate was not a minor and the plaintiff's injury was not sustained in a motor vehicle accident.

The paucity of cases in this country imposing social host liability cannot be explained solely on the ground that a social host does not, as a matter of law, create a reasonably foreseeable risk of harm to highway travelers in serving an alcoholic drink to a drunken guest. The risk created by serving liquor to an intoxicated person who is about to operate a motor vehicle is far too apparent to permit the conclusion that the social host's act could not have been the "proximate" cause of a third person's injury. The reluctance of courts to impose liability in these circumstances has been founded, rightly or wrongly, on policy considerations, particularly consideration of the effect that a rule of social host liability would have on a multitude of personal relationships in a variety of social settings.

Virtually every case we have discussed in which social host liability was acknowledged as a possibility or as a fact has been decided in the past decade. This trend toward imposing liability is no doubt a response to the greater concern of society in recent years regarding the problems of drunken driving. It is understandable that the law of torts, which in many aspects measures one's duty by what is reasonable conduct in the circumstances, should begin to respond to society's increasing concern. But the problems and implications of imposing liability are extensive, prompting some courts to abandon the field entirely to their Legislatures. These concerns also explain why more cases impose liability for serving a minor than for serving an adult. It is easier to find a violation of a standard of reasonableness when the intoxicated guest is underage, a person to whom, generally in this country, it is thought to be wrong to furnish an alcoholic drink. Similarly, those cases which have recognized the liability of social hosts for serving adult guests have involved the most flagrant circumstances calling for liability, a defendant furnishing an alcoholic drink directly to a person who was obviously intoxicated.

Cases of this character must be decided one by one, applying common law principles. The facts here do not present a case for social host liability. There is no evidence that either of the McGuiggans knew that Magee was intoxicated at any time while he was at their home. Nor does the evidence show that Magee was obviously intoxicated at any relevant time. There is evidence, admittedly from the McGuiggans and from Magee's sister and friends, which tends to show that Magee was not obviously intoxicated that evening. We pass by the question whether a social host may avoid liability by letting his guests serve drinks to themselves and each other. The crucial consideration has been the condition of the guest (or customer) at the time the social host (or licensee) served him or her an alcoholic drink. Where, on this record, there is no showing that the McGuiggans knew Magee was intoxicated and there is a showing that he was not obviously

intoxicated at any time that night (thus including the time when he served himself or was served his last drink), there is no case for liability.

We would recognize a social host's liability to a person injured by an intoxicated guest's negligent operation of a motor vehicle where a social host who knew or should have known that his guest was drunk, nevertheless gave him or permitted him to take an alcoholic drink and thereafter, because of his intoxication, the guest negligently operated a motor vehicle causing the third person's injury. In deciding whether the social host exercised ordinary prudence in such circumstances, a relevant consideration will be whether the social host knew or reasonably should have known that the intoxicated guest might presently operate a motor vehicle. . .

Judgment affirmed.

n3 Doherty said on deposition that Magee acted normally in driving the vehicle; he seemed steady; and his speech sounded fine. Gina Magee, James Magee's sister, testified on deposition that her brother operated the vehicle in a regular way; his speech was fine; and at no time that evening was he under the influence of alcohol. Elisa Berger, whose father owned the vehicle which Magee drove, did not know how much Magee drank that evening but did say he ate a full dinner.

n4 There was evidence that Daniel had also been drinking rum-cokes that evening, that he had been sick before he entered the vehicle, and that his mother had not been watching him as closely as she usually had. The telephone company's claim here is based on the McGuiggans' liability to Daniel's estate for serving alcoholic drinks to Magee and is not based on their serving alcoholic drinks to their son, causing him negligently to extend his upper body out of a moving motor vehicle at night. . . .

n5 We acknowledge that the Legislature generally may establish, limit, or bar a social host's liability for injuries caused by the alcohol-induced negligent conduct of a guest to whom the host served an alcoholic beverage. Barring a controlling statute, however, the subject is one to which this court may properly apply common law principles. . . .

n7 The legal drinking age at the relevant time in this case was eighteen. See G. L. c. 138, § 34, as amended through St. 1977, c. 929, § 14. The legal drinking age is now twenty-one. See G. L. c.138, § 34, as amended through St. 1984, c. 312, § 5. In deciding whether a guest was a minor or an adult, for purposes of determining the tort liability of a social host, the legal drinking age under the law at the time the alcoholic beverages are served is the appropriate consideration.

n8 The California Legislature rather promptly adopted statutory provisions rejecting the concept of social host liability expressed in the Coulter opinion. Cal. Bus. & Prof. Code § 25602 (b), (c)(West 1985); Cal. Civ. Code § 1714 (b) (West 1985).

Hamdan v. Rumsfeld
___ U.S. ___, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006)
[most citations and footnotes omitted]

JUSTICE STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I through IV, Parts VI through VI-D-iii, Part VI-D-v, and Part VII, and an opinion with respect to Parts V and VI-D-iv, in which JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join.

Petitioner Salim Ahmed Hamdan, a Yemeni national, is in custody at an American prison in Guantanamo Bay, Cuba. In November 2001, during hostilities between the United States and the Taliban (which then governed Afghanistan), Hamdan was captured by militia forces and turned over to the U.S. military. In June 2002, he was transported to Guantanamo Bay. Over a year later, the President deemed him eligible for trial by military commission for then-unspecified crimes. After another year had passed, Hamdan was charged with one count of conspiracy "to commit . . . offenses triable by military commission."

Hamdan filed petitions for writs of habeas corpus and mandamus to challenge the Executive Branch's intended means of prosecuting this charge. He concedes that a court-martial constituted in accordance with the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 801 *et seq.* (2000), would have authority to try him. His objection is that the military commission the President has convened lacks such authority, for two principal reasons: First, neither congressional Act nor the common law of war supports trial by this commission for the crime of conspiracy--an offense that, Hamdan says, is not a violation of the law of war. Second, Hamdan contends, the procedures that the President has adopted to try him violate the most basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him.

The District Court granted Hamdan's request for a writ of habeas corpus. The Court of Appeals for the District of Columbia Circuit reversed. Recognizing, as we did over a half-century ago, that trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure, *Ex parte Quirin*, 317 U.S. 1, 19, 63 S. Ct. 2, 87 L. Ed. 3 (1942), we granted certiorari.

For the reasons that follow, we conclude that the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions. Four of us also conclude, see Part V, *infra*, that the offense with which Hamdan has been charged is not an "offense that by . . . the law of war may be tried by military commissions."

I

On September 11, 2001, agents of the al Qaeda terrorist organization hijacked commercial airplanes and attacked the World Trade Center in New York City and the national headquarters of the Department of Defense in Arlington, Virginia. Americans will never forget the devastation wrought by these acts. Nearly 3,000 civilians were killed.

Congress responded by adopting a Joint Resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force (AUMF), 115 Stat. 224, Acting pursuant to the AUMF, and having determined that the Taliban regime had supported al Qaeda, the President ordered the Armed Forces of the United States to invade Afghanistan. In the ensuing hostilities, hundreds of individuals, Hamdan among them, were captured and eventually detained at Guantanamo Bay.

On November 13, 2001, while the United States was still engaged in active combat with the Taliban, the President issued a comprehensive military order intended to govern the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57833 (hereinafter November 13 Order or Order). Those subject to the November 13 Order include any noncitizen for whom the President determines "there is reason to believe" that he or she (1) "is or was" a member of al Qaeda or (2) has engaged or participated in terrorist activities aimed at or harmful to the United States. Any such individual "shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including imprisonment or death." The November 13 Order vested in the Secretary of Defense the power to appoint military commissions to try individuals subject to the Order . . .

On July 3, 2003, the President announced his determination that Hamdan and five other detainees at Guantanamo Bay were subject to the November 13 Order and thus triable by military commission. In December 2003, military counsel was appointed to represent Hamdan. Two months later, counsel filed demands for charges and for a speedy trial pursuant to Article 10 of the UCMJ, 10 U.S.C. § 810. On February 23, 2004, the legal adviser to the Appointing Authority denied the applications, ruling that Hamdan was not entitled to any of the protections of the UCMJ. Not until July 13, 2004, after Hamdan had commenced this action in the United States District Court for the Western District of Washington, did the Government finally charge him with the offense for which, a year earlier, he had been deemed eligible for trial by military commission.

The charging document, which is unsigned, contains 13 numbered paragraphs. The first two paragraphs recite the asserted bases for the military commission's jurisdiction -- namely, the November 13 Order and the President's July 3, 2003, declaration that Hamdan is eligible for trial by military commission. The next nine paragraphs, collectively entitled "General Allegations," describe al Qaeda's activities from its inception in 1989 through 2001 and identify Osama bin Laden as the group's leader. Hamdan is not mentioned in these paragraphs.

Only the final two paragraphs, entitled "Charge: Conspiracy," contain allegations against Hamdan. Paragraph 12 charges that "from on or about February 1996 to on or about November 24, 2001," Hamdan "willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with [named members of al Qaeda] to

commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism." There is no allegation that Hamdan had any command responsibilities, played a leadership role, or participated in the planning of any activity.

Paragraph 13 lists four "overt acts" that Hamdan is alleged to have committed sometime between 1996 and November 2001 in furtherance of the "enterprise and conspiracy": (1) he acted as Osama bin Laden's "bodyguard and personal driver," "believing" all the while that bin Laden "and his associates were involved in" terrorist acts prior to and including the attacks of September 11, 2001; (2) he arranged for transportation of, and actually transported, weapons used by al Qaeda members and by bin Laden's bodyguards (Hamdan among them); (3) he "drove or accompanied Osama bin Laden to various al Qaeda-sponsored training camps, press conferences, or lectures," at which bin Laden encouraged attacks against Americans; and (4) he received weapons training at al Qaeda-sponsored camps. . .

Meanwhile, a Combatant Status Review Tribunal (CSRT) convened pursuant to a military order issued on July 7, 2004, decided that Hamdan's continued detention at Guantanamo Bay was warranted because he was an "enemy combatant." n1 ⁵ Separately, proceedings before the military commission commenced.

. . . On November 7, 2005, we granted certiorari to decide whether the military commission convened to try Hamdan has authority to do so, and whether Hamdan may rely on the Geneva Conventions in these proceedings.

II

. . . The DTA, which was signed into law on December 30, 2005, addresses a broad swath of subjects related to detainees. It places restrictions on the treatment and interrogation of detainees in U.S. custody, and it furnishes procedural protections for U.S. personnel accused of engaging in improper interrogation. . .

III . . .

IV

The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity. See W. Winthrop, *Military Law and Precedents* 831 (rev. 2d ed. 1920) (hereinafter Winthrop). Though foreshadowed in some respects by earlier tribunals like the Board of General Officers that General Washington convened to try British Major John

⁵ n1 An "enemy combatant" is defined by the military order as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." Memorandum from Deputy Secretary of Defense Paul Wolfowitz re: Order Establishing Combatant Status Review Tribunal § a (Jul. 7, 2004), available at <http://www.defense link.mil/news/Jul2004/d20040707review.pdf> (all Internet materials as visited June 26, 2006, and available in Clerk of Court's case file).

Andre for spying during the Revolutionary War, the commission "as such" was inaugurated in 1847. As commander of occupied Mexican territory, and having available to him no other tribunal, General Winfield Scott that year ordered the establishment of both "military commissions" to try ordinary crimes committed in the occupied territory and a "council of war" to try offenses against the law of war.

When the exigencies of war next gave rise to a need for use of military commissions, during the Civil War, the dual system favored by General Scott was not adopted. Instead, a single tribunal often took jurisdiction over ordinary crimes, war crimes, and breaches of military orders alike. As further discussed below, each aspect of that seemingly broad jurisdiction was in fact supported by a separate military exigency. Generally, though, the need for military commissions during this period -- as during the Mexican War -- was driven largely by the then very limited jurisdiction of courts-martial. . .

Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8 and Article III, § 1 of the Constitution unless some other part of that document authorizes a response to the felt need. And that authority, if it exists, can derive only from the powers granted jointly to the President and Congress in time of war.

The Constitution makes the President the "Commander in Chief" of the Armed Forces, Art. II, § 2, cl. 1, but vests in Congress the powers to "declare War . . . and make Rules concerning Captures on Land and Water," Art. I, § 8, cl. 11, to "raise and support Armies," *id.*, cl. 12, to "define and punish . . . Offences against the Law of Nations," *id.*, cl. 10, and "To make Rules for the Government and Regulation of the land and naval Forces," *id.*, cl. 14. The interplay between these powers was described by Chief Justice Chase in the seminal case of *Ex parte Milligan*, 71 U.S. 2 (1866):

"The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President . . . Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature."

Whether Chief Justice Chase was correct in suggesting that the President may constitutionally convene military commissions "without the sanction of Congress" in cases of "controlling necessity" is a question this Court has not answered definitively, and need not answer today. For we held in *Ex parte Quirin*, 371 U.S. 1 (1943) that Congress had, through Article of War 15, sanctioned the use of military commissions in such circumstances. Article 21 of the UCMJ, the language of which is substantially identical to the old Article 15 and was preserved by Congress after World War II, reads as follows:

"Jurisdiction of courts-martial not exclusive.

"The provisions of this code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals." 64 Stat. 115.

We have no occasion to revisit *Quirin's* controversial characterization of Article of War 15 as congressional authorization for military commissions. Contrary to the Government's assertion, however, even *Quirin* did not view the authorization as a sweeping mandate for the President to "invoke military commissions when he deems them necessary." Rather, the *Quirin* Court recognized that Congress had simply preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions -- with the express condition that the President and those under his command comply with the law of war. That much is evidenced by the Court's inquiry, following its conclusion that Congress had authorized military commissions, into whether the law of war had indeed been complied with in that case.

The Government would have us dispense with the inquiry that the *Quirin* Court undertook and find in either the AUMF or the Detainee Treatment Act specific, overriding authorization for the very commission that has been convened to try Hamdan. Neither of these congressional Acts, however, expands the President's authority to convene military commissions. First, while we assume that the AUMF activated the President's war powers, and that those powers include the authority to convene military commissions in appropriate circumstances, there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ.

Likewise, the DTA cannot be read to authorize this commission. Although the DTA, unlike either Article 21 or the AUMF, was enacted after the President had convened Hamdan's commission, it contains no language authorizing that tribunal or any other at Guantanamo Bay. The DTA obviously "recognizes" the existence of the Guantanamo Bay commissions in the weakest sense, because it references some of the military orders governing them and creates limited judicial review of their "final decisions," But the statute also pointedly reserves judgment on whether "the Constitution and laws of the United States are applicable" in reviewing such decisions and whether, if they are, the "standards and procedures" used to try Hamdan and other detainees actually violate the "Constitution and laws."

Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the "Constitution and laws," including the law of war. Absent a more specific congressional authorization, the task of this Court is, as it was in *Quirin*, to decide whether Hamdan's military commission is so justified. It is to that inquiry we now turn.

V

The common law governing military commissions may be gleaned from past practice and what sparse legal precedent exists. Commissions historically have been used in three situations. First, they have substituted for civilian courts at times and in places where martial law has been

declared. Their use in these circumstances has raised constitutional questions, but is well recognized. n25⁶ Second, commissions have been established to try civilians "as part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function." Illustrative of this second kind of commission is the one that was established, with jurisdiction to apply the German Criminal Code, in occupied Germany following the end of World War II. n26⁷ The third type of commission, convened as an "incident to the conduct of war" when there is a need "to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war," *Quirin*, 317 U.S., at 28-29, has been described as "utterly different" from the other two.n27⁸ Not only is its jurisdiction limited to offenses cognizable during time of war, but its role is primarily a factfinding one -- to determine, typically on the battlefield itself, whether the defendant has violated the law of war. The last time the U.S. Armed Forces used the law-of-war military commission was during World War II. In *Quirin*, this Court sanctioned President Roosevelt's use of such a tribunal to try Nazi saboteurs captured on American soil during the War.

Quirin is the model the Government invokes most frequently to defend the commission convened to try Hamdan. That is both appropriate and unsurprising. Since Guantanamo Bay is

⁶ n25 The justification for, and limitations on, these commissions were summarized in *Milligan*:

"If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war."

⁷ n26 The limitations on these occupied territory or military government commissions are tailored to the tribunals' purpose and the exigencies that necessitate their use. They may be employed "pending the establishment of civil government," which may in some cases extend beyond the "cessation of hostilities."

⁸ n27 So much may not be evident on cold review of the Civil War trials often cited as precedent for this kind of tribunal because the commissions established during that conflict operated as both martial law or military government tribunals and law-of-war commissions. Hence, "military commanders began the practice [during the Civil War] of using the same name, the same rules, and often the same tribunals" to try both ordinary crimes and war crimes. "For the first time, accused horse thieves and alleged saboteurs found themselves subject to trial by the same military commission." The Civil War precedents must therefore be considered with caution; as we recognized in *Quirin*, 317 U.S., at 29, 63 S. Ct. 2, 87 L. Ed. 3, and as further discussed below, commissions convened during time of war but under neither martial law nor military government may try only offenses against the law of war.

neither enemy-occupied territory nor under martial law, the law-of-war commission is the only model available. At the same time, no more robust model of executive power exists; *Quirin* represents the high-water mark of military power to try enemy combatants for war crimes.

The classic treatise penned by Colonel William Winthrop, whom we have called "the 'Blackstone of Military Law,'" describes at least four preconditions for exercise of jurisdiction by a tribunal of the type convened to try Hamdan. First, "[a] military commission, (except where otherwise authorized by statute), can legally assume jurisdiction only of offenses committed within the field of the command of the convening commander." The "field of command" in these circumstances means the "theatre of war." Second, the offense charged "must have been committed within the period of the war." No jurisdiction exists to try offenses "committed either before or after the war." Third, a military commission not established pursuant to martial law or an occupation may try only "[i]ndividuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war" and members of one's own army "who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war." Finally, a law-of-war commission has jurisdiction to try only two kinds of offense: "Violations of the laws and usages of war cognizable by military tribunals only," and "[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war."

All parties agree that Colonel Winthrop's treatise accurately describes the common law governing military commissions, and that the jurisdictional limitations he identifies were incorporated in Article of War 15 and, later, Article 21 of the UCMJ. It also is undisputed that Hamdan's commission lacks jurisdiction to try him unless the charge "properly set[s] forth, not only the details of the act charged, but the circumstances conferring jurisdiction." The question is whether the preconditions designed to ensure that a military necessity exists to justify the use of this extraordinary tribunal have been satisfied here.

The charge against Hamdan alleges a conspiracy extending over a number of years, from 1996 to November 2001. All but two months of that more than 5-year-long period preceded the attacks of September 11, 2001, and the enactment of the AUMF -- the Act of Congress on which the Government relies for exercise of its war powers and thus for its authority to convene military commissions. Neither the purported agreement with Osama bin Laden and others to commit war crimes, nor a single overt act, is alleged to have occurred in a theater of war or on any specified date after September 11, 2001. None of the overt acts that Hamdan is alleged to have committed violates the law of war.

These facts alone cast doubt on the legality of the charge and, hence, the commission, as Winthrop makes plain, the offense alleged must have been committed both in a theater of war and during, not before, the relevant conflict. But the deficiencies in the time and place allegations also underscore -- indeed are symptomatic of -- the most serious defect of this charge: The offense it alleges is not triable by law-of-war military commission.

There is no suggestion that Congress has, in exercise of its constitutional authority to "define and punish . . . Offences against the Law of Nations," U.S. Const., Art. I, § 8, cl. 10, positively identified "conspiracy" as a war crime. As we explained in *Quirin*, that is not necessarily fatal to

the Government's claim of authority to try the alleged offense by military commission; Congress, through Article 21 of the UCMJ, has "incorporated by reference" the common law of war, which may render triable by military commission certain offenses not defined by statute. When, however, neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous. To demand any less would be to risk concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution.

This high standard was met in *Quirin*; the violation there alleged was, by "universal agreement and practice" both in this country and internationally, recognized as an offense against the law of war. . .

At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war. That burden is far from satisfied here. The crime of "conspiracy" has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions -- the major treaties on the law of war. Winthrop explains that under the common law governing military commissions, it is not enough to intend to violate the law of war and commit overt acts in furtherance of that intention unless the overt acts either are themselves offenses against the law of war or constitute steps sufficiently substantial to qualify as an attempt.

. . . Finally, international sources confirm that the crime charged here is not a recognized violation of the law of war. As observed above, none of the major treaties governing the law of war identifies conspiracy as a violation thereof. And the only "conspiracy" crimes that have been recognized by international war crimes tribunals (whose jurisdiction often extends beyond war crimes proper to crimes against humanity and crimes against the peace) are conspiracy to commit genocide and common plan to wage aggressive war, which is a crime against the peace and requires for its commission actual participation in a "concrete plan to wage war." The International Military Tribunal at Nuremberg, over the prosecution's objections, pointedly refused to recognize as a violation of the law of war conspiracy to commit war crimes and convicted only Hitler's most senior associates of conspiracy to wage aggressive war. As one prominent figure from the Nuremberg trials has explained, members of the Tribunal objected to recognition of conspiracy as a violation of the law of war on the ground that "the Anglo-American concept of conspiracy was not part of European legal systems and arguably not an element of the internationally recognized laws of war."

. . . In sum, the sources that the Government and JUSTICE THOMAS rely upon to show that conspiracy to violate the law of war is itself a violation of the law of war in fact demonstrate quite the opposite. Far from making the requisite substantial showing, the Government has failed even to offer a "merely colorable" case for inclusion of conspiracy among those offenses cognizable by law-of-war military commission. Because the charge does not support the commission's jurisdiction, the commission lacks authority to try Hamdan.

The charge's shortcomings are not merely formal, but are indicative of a broader inability on the Executive's part here to satisfy the most basic precondition -- at least in the absence of specific congressional authorization -- for establishment of military commissions: military necessity. Hamdan's tribunal was not appointed by a military commander in the field of battle . . . Hamdan is charged not with an overt act for which he was caught redhanded in a theater of war and which military efficiency demands be tried expeditiously, but with an agreement the inception of which long predated the attacks of September 11, 2001 and the AUMF. That may well be a crime, but it is not an offense that "by the law of war may be tried by military commission." None of the overt acts alleged to have been committed in furtherance of the agreement is itself a war crime, or even necessarily occurred during time of, or in a theater of, war. Any urgent need for imposition or execution of judgment is utterly belied by the record; Hamdan was arrested in November 2001 and he was not charged until mid-2004. These simply are not the circumstances in which, by any stretch of the historical evidence or this Court's precedents, a military commission established by Executive Order under the authority of Article 21 of the UCMJ may lawfully try a person and subject him to punishment.

VI

Whether or not the Government has charged Hamdan with an offense against the law of war cognizable by military commission, the commission lacks power to proceed. The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the "rules and precepts of the law of nations," including, inter alia, the four Geneva Conventions signed in 1949. The procedures that the Government has decreed will govern Hamdan's trial by commission violate these laws.

A

The commission's procedures are set forth in Commission Order No. 1, which was amended most recently on August 31, 2005 -- after Hamdan's trial had already begun. Every commission established pursuant to Commission Order No. 1 must have a presiding officer and at least three other members, all of whom must be commissioned officers. § 4(A)(1). The presiding officer's job is to rule on questions of law and other evidentiary and interlocutory issues; the other members make findings and, if applicable, sentencing decisions. § 4(A)(5). The accused is entitled to appointed military counsel and may hire civilian counsel at his own expense so long as such counsel is a U.S. citizen with security clearance "at the level SECRET or higher." §§ 4(C)(2)-(3). The accused also is entitled to a copy of the charge(s) against him, both in English and his own language (if different), to a presumption of innocence, and to certain other rights typically afforded criminal defendants in civilian courts and courts-martial. See §§ 5(A)-(P). These rights are subject, however, to one glaring condition: The accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to "close." Grounds for such closure "include the protection of information classified or classifiable . . .; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests." § 6(B)(3).

Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer's discretion, be forbidden to reveal to his or her client what took place therein.

Another striking feature of the rules governing Hamdan's commission is that they permit the admission of any evidence that, in the opinion of the presiding officer, "would have probative value to a reasonable person." § 6(D)(1). Under this test, not only is testimonial hearsay and evidence obtained through coercion fully admissible, but neither live testimony nor witnesses' written statements need be sworn. See §§ 6(D)(2)(b), (3). Moreover, the accused and his civilian counsel may be denied access to evidence in the form of "protected information" (which includes classified information as well as "information protected by law or rule from unauthorized disclosure" and "information concerning other national security interests," §§ 6(B)(3), 6(D)(5)(a)(v)), so long as the presiding officer concludes that the evidence is "probative" under § 6(D)(1) and that its admission without the accused's knowledge would not "result in the denial of a full and fair trial." § 6(D)(5)(b). Finally, a presiding officer's determination that evidence "would not have probative value to a reasonable person" may be overridden by a majority of the other commission members. § 6(D)(1).

Once all the evidence is in, the commission members (not including the presiding officer) must vote on the accused's guilt. A two-thirds vote will suffice for both a verdict of guilty and for imposition of any sentence not including death (the imposition of which requires a unanimous vote). § 6(F). Any appeal is taken to a three-member review panel composed of military officers and designated by the Secretary of Defense, only one member of which need have experience as a judge. § 6(H)(4). The review panel is directed to "disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission." Once the panel makes its recommendation to the Secretary of Defense, the Secretary can either remand for further proceedings or forward the record to the President with his recommendation as to final disposition. § 6(H)(5). The President then, unless he has delegated the task to the Secretary, makes the "final decision." § 6(H)(6). He may change the commission's findings or sentence only in a manner favorable to the accused.

B

Hamdan raises both general and particular objections to the procedures set forth in Commission Order No. 1. His general objection is that the procedures' admitted deviation from those governing courts-martial itself renders the commission illegal. Chief among his particular objections are that he may, under the Commission Order, be convicted based on evidence he has not seen or heard, and that any evidence admitted against him need not comply with the admissibility or relevance rules typically applicable in criminal trials and court-martial proceedings.

The Government objects to our consideration of any procedural challenge at this stage on the grounds that . . . (2) Hamdan will be able to raise any such challenge following a "final decision" under the DTA, and (3) "there is . . . no basis to presume, before the trial has even commenced, that the trial will not be conducted in good faith and according to law." [N]either of the latter two is sound.

First, because Hamdan apparently is not subject to the death penalty (at least as matters now stand) and may receive a sentence shorter than 10 years' imprisonment, he has no automatic right to review of the commission's "final decision" before a federal court under the DTA. Second, contrary to the Government's assertion, there *is* a "basis to presume" that the procedures employed during Hamdan's trial will violate the law: The procedures are described with particularity in Commission Order No. 1, and implementation of some of them has already occurred. One of Hamdan's complaints is that he will be, and *indeed already has been*, excluded from his own trial. Under these circumstances, review of the procedures in advance of a "final decision"--the timing of which is left entirely to the discretion of the President under the DTA--is appropriate. We turn, then, to consider the merits of Hamdan's procedural challenge.

C

In part because the difference between military commissions and courts-martial originally was a difference of jurisdiction alone, and in part to protect against abuse and ensure evenhandedness under the pressures of war, the procedures governing trials by military commission historically have been the same as those governing courts-martial. Accounts of commentators from Winthrop through General Crowder--who drafted Article of War 15 and whose views have been deemed "authoritative" by this Court--confirm as much. As recently as the Korean and Vietnam wars, during which use of military commissions was contemplated but never made, the principle of procedural parity was espoused as a background assumption.

. . . [T]he UCMJ's codification of the Articles of War after World War II expanded the category of persons subject thereto to include defendants in . . . Hamdan's position,ⁿ⁴⁷ and the Third Geneva Convention of 1949 extended prisoner-of-war protections to individuals tried for crimes committed before their capture.

The uniformity principle is not an inflexible one; it does not preclude all departures from the procedures dictated for use by courts-martial. But any departure must be tailored to the exigency that necessitates it. That understanding is reflected in Article 36 of the UCMJ, which provides:

(a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

⁹ n47 Article 2 of the UCMJ now reads: "(a) The following persons are subject to [the UCMJ]:

(9) Prisoners of war in custody of the armed forces. . .

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands." 10 U.S.C. § 802(a). Guantanamo Bay is such a leased area.

(b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.

Article 36 places two restrictions on the President's power to promulgate rules of procedure for courts-martial and military commissions alike. First, no procedural rule he adopts may be "contrary to or inconsistent with" the UCMJ--however practical it may seem. Second, the rules adopted must be "uniform insofar as practicable." That is, the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable.

Hamdan argues that Commission Order No. 1 violates both of these restrictions; he maintains that the procedures described in the Commission Order are inconsistent with the UCMJ and that the Government has offered no explanation for their deviation from the procedures governing courts-martial, which are set forth in the Manual for Courts-Martial. Among the inconsistencies Hamdan identifies is that between § 6 of the Commission Order, which permits exclusion of the accused from proceedings and denial of his access to evidence in certain circumstances, and the UCMJ's requirement that "[a]ll . . . proceedings" other than votes and deliberations by courts-martial "shall be made a part of the record and shall be in the presence of the accused. Hamdan also observes that the Commission Order dispenses with virtually all evidentiary rules applicable in courts-martial.

The Government has three responses. First, . . . Second, the Government contends, military commissions would be of no use if the President were hamstrung by those provisions of the UCMJ that govern courts-martial. Finally, the President's determination that "the danger to the safety of the United States and the nature of international terrorism" renders it impracticable "to apply in military commissions . . . the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts." November 13 Order is, in the Government's view, explanation enough for any deviation from court-martial procedures.

Hamdan has the better of this argument. Without reaching the question whether any provision of Commission Order No. 1 is strictly "contrary to or inconsistent with" other provisions of the UCMJ, we conclude that the "practicability" determination the President has made is insufficient to justify variances from the procedures governing courts-martial. . .

The President here has determined, pursuant to subsection (a), that it is impracticable to apply the rules and principles of law that govern "the trial of criminal cases in the United States district courts," to Hamdan's commission. We assume that complete deference is owed that determination. The President has not, however, made a similar official determination that it is impracticable to apply the rules for courts-martial. And even if subsection (b)'s requirements may be satisfied without such an official determination, the requirements of that subsection are not satisfied here.

Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case. There is no suggestion, for example, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of

relevance and admissibility. Assuming *arguendo* that the reasons articulated in the President's Article 36(a) determination ought to be considered in evaluating the impracticability of applying court-martial rules, the only reason offered in support of that determination is the danger posed by international terrorism. Without for one moment underestimating that danger, it is not evident to us why it should require, in the case of Hamdan's trial, any variance from the rules that govern courts-martial.

The absence of any showing of impracticability is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself: the right to be present. Whether or not that departure technically is "contrary to or inconsistent with" the terms of the UCMJ, the jettisoning of so basic a right cannot lightly be excused as "practicable."

Under the circumstances, then, the rules applicable in courts-martial must apply. Since it is undisputed that Commission Order No. 1 deviates in many significant respects from those rules, it necessarily violates Article 36(b).

The Government's objection that requiring compliance with the court-martial rules imposes an undue burden both ignores the plain meaning of Article 36(b) and misunderstands the purpose and the history of military commissions. The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter. Exigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections. That history explains why the military commission's procedures typically have been the ones used by courts-martial. That the jurisdiction of the two tribunals today may sometimes overlap does not detract from the force of this history; Article 36 strikes a careful balance between uniform procedure and the need to accommodate exigencies that may sometimes arise in a theater of war. That Article not having been complied with here, the rules specified for Hamdan's trial are illegal.

D

The procedures adopted to try Hamdan also violate the Geneva Conventions. . . The conflict with al Qaeda is not, according to the Government, a conflict to which the full protections afforded detainees under the 1949 Geneva Conventions apply because Article 2 of those Conventions (which appears in all four Conventions) renders the full protections applicable only to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." Since Hamdan was captured and detained incident to the conflict with al Qaeda and not the conflict with the Taliban, and since al Qaeda, unlike Afghanistan, is not a "High Contracting Party"--*i.e.*, a signatory of the Conventions, the protections of those Conventions are not, it is argued, applicable to Hamdan. . .

[T]here is at least one provision of the Geneva Conventions that applies here . . . Article 3, often referred to as Common Article 3 because, like Article 2, it appears in all four Geneva Conventions, provides that in a "conflict not of an international character occurring in the

territory of one of the High Contracting Parties, each Party n62¹⁰ to the conflict shall be bound to apply, as a minimum," certain provisions protecting "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by . . . detention." One such provision prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

[T]he Government asserts that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being "international in scope," does not qualify as a "conflict not of an international character." That reasoning is erroneous. The term "conflict not of an international character" is used here in contradistinction to a conflict between nations. . . . Common Article 2 provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." High Contracting Parties (signatories) also must abide by all terms of the Conventions vis-a-vis one another even if one party to the conflict is a nonsignatory "Power," and must so abide vis-a-vis the nonsignatory if "the latter accepts and applies" those terms. Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory "Power" who are involved in a conflict "in the territory of" a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase "not of an international character" bears its literal meaning.

Although the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of "conflict not of an international character," i.e., a civil war, the commentaries also make clear "that the scope of the Article must be as wide as possible." In fact, limiting language that would have rendered Common Article 3 applicable "especially [to] cases of civil war, colonial conflicts, or wars of religion," was omitted from the final version of the Article, which coupled broader scope of application with a narrower range of rights than did earlier proposed iterations.

Common Article 3, then, is applicable here and, as indicated above, requires that Hamdan be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." While the term "regularly constituted court" is not specifically defined in either Common Article 3 or its accompanying commentary, other sources disclose its core meaning. The commentary accompanying a provision of the Fourth Geneva Convention, for example, defines "regularly constituted" tribunals to include "ordinary military

¹⁰ n61 Hamdan observes that Article 5 of the Third Geneva Convention requires that if there be "any doubt" whether he is entitled to prisoner-of-war protections, he must be afforded those protections until his status is determined by a "competent tribunal." Because we hold that Hamdan may not, in any event, be tried by the military commission the President has convened pursuant to the November 13 Order and Commission Order No. 1, the question whether his potential status as a prisoner of war independently renders illegal his trial by military commission may be reserved.

courts" and "definitely exclude all special tribunals." And one of the Red Cross' own treatises defines "regularly constituted court" as used in Common Article 3 to mean "established and organized in accordance with the laws and procedures already in force in a country."

The Government offers only a cursory defense of Hamdan's military commission in light of Common Article 3. As JUSTICE KENNEDY explains, that defense fails because "the regular military courts in our system are the courts-martial established by congressional statutes." At a minimum, a military commission "can be 'regularly constituted' by the standards of our military justice system only if some practical need explains deviations from court-martial practice." As we have explained, see Part VI-C, *supra*, no such need has been demonstrated here.

Inextricably intertwined with the question of regular constitution is the evaluation of the procedures governing the tribunal and whether they afford "all the judicial guarantees which are recognized as indispensable by civilized peoples." . . . [T]his phrase is not defined in the text of the Geneva Conventions. But it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. . . Many of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I). Although the United States declined to ratify Protocol I, its objections were not to Article 75 thereof. . . Among the rights set forth in Article 75 is the "right to be tried in [one's] presence." Protocol I, Art. 75(4)(e). n66¹¹

We agree with JUSTICE KENNEDY that the procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by any "evident practical need," and for that reason, at least, fail to afford the requisite guarantees. We add only that, as noted in Part VI-A, *supra*, various provisions of Commission Order No. 1 dispense with the principles, articulated in Article 75 and indisputably part of the customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him. n67¹² That the Government has a compelling interest in denying Hamdan access to certain sensitive information is not doubted. But, at least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him.

¹¹ n66 Other international instruments to which the United States is a signatory include the same basic protections set forth in Article 75. See, e.g., International Covenant on Civil and Political Rights, Art. 14, P3(d), Mar. 23, 1976, 999 U. N. T. S. 171 (setting forth the right of an accused "to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing").

¹² n67 The Government offers no defense of these procedures other than to observe that the defendant may not be barred from access to evidence if such action would deprive him of a "full and fair trial." Commission Order No. 1, § 6(D)(5)(b). But the Government suggests no circumstances in which it would be "fair" to convict the accused based on evidence he has not seen or heard. More fundamentally, the legality of a tribunal under Common Article 3 cannot be established by bare assurances that, whatever the character of the court or the procedures it follows, individual adjudicators will act fairly.

Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But requirements they are nonetheless. The commission that the President has convened to try Hamdan does not meet those requirements.

VII

We have assumed, as we must, that the allegations made in the Government's charge against Hamdan are true. We have assumed, moreover, the truth of the message implicit in that charge -- viz., that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent such harm. But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.

JUSTICE BREYER, with whom JUSTICE KENNEDY, JUSTICE SOUTER, and JUSTICE GINSBURG join, concurring.

The dissenters say that today's decision would "sorely hamper the President's ability to confront and defeat a new and deadly enemy." They suggest that it undermines our Nation's ability to "prevent future attacks" of the grievous sort that we have already suffered. That claim leads me to state briefly what I believe the majority sets forth both explicitly and implicitly at greater length. The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a "blank check." Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.

Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine -- through democratic means -- how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.

JUSTICE KENNEDY, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join as to Parts I and II, concurring in part.

Military Commission Order No. 1, which governs the military commission established to try petitioner Salim Hamdan for war crimes, exceeds limits that certain statutes, duly enacted by Congress, have placed on the President's authority to convene military courts. This is not a case, then, where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's

authority. Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches. Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.

These principles seem vindicated here, for a case that may be of extraordinary importance is resolved by ordinary rules. The rules of most relevance here are those pertaining to the authority of Congress and the interpretation of its enactments.

It seems appropriate to recite these rather fundamental points because the Court refers, as it should in its exposition of the case, to the requirement of the Geneva Conventions of 1949 that military tribunals be "regularly constituted" -- a requirement that controls here, if for no other reason, because Congress requires that military commissions like the ones at issue conform to the "law of war." Whatever the substance and content of the term "regularly constituted" as interpreted in this and any later cases, there seems little doubt that it relies upon the importance of standards deliberated upon and chosen in advance of crisis, under a system where the single power of the Executive is checked by other constitutional mechanisms. All of which returns us to the point of beginning -- that domestic statutes control this case. If Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so.

JUSTICE SCALIA, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

...

III

...

The principal opinion on the merits makes clear that it does not believe that the trials by military commission involve any "military necessity" at all: "The charge's shortcomings . . . are indicative of a broader inability on the Executive's part here to satisfy the most basic precondition . . . for establishment of military commissions: military necessity." This is quite at odds with the views on this subject expressed by our political branches. Because of "military necessity," a joint session of Congress authorized the President to "use all necessary and appropriate force," including military commissions, "against those nations, organizations, or persons [such as petitioner] he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." In keeping with this authority, the President has determined that "to protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order . . . to be detained, and, when tried, to be tried for violations of the laws of war and other

applicable laws by military tribunals." Military Order of Nov. 13, 2001. It is not clear where the Court derives the authority -- or the audacity -- to contradict this determination. . .

Moreover, a third consideration counsels strongly in favor of abstention in this case. . . [C]onsiderations of interbranch comity at the federal level weigh heavily against our exercise of equity jurisdiction in this case. Here, apparently for the first time in history, a District Court enjoined ongoing military commission proceedings, which had been deemed "necessary" by the President "to protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks." Such an order brings the Judicial Branch into direct conflict with the Executive in an area where the Executive's competence is maximal and ours is virtually nonexistent. We should exercise our equitable discretion to avoid such conflict. Instead, the Court rushes headlong to meet it. . .

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, and with whom JUSTICE ALITO joins in all but Parts I, II-C-1, and III-B-2, dissenting.

For the reasons set forth in JUSTICE SCALIA's dissent, it is clear that this Court lacks jurisdiction to entertain petitioner's claims. The Court having concluded otherwise, it is appropriate to respond to the Court's resolution of the merits of petitioner's claims because its opinion openly flouts our well-established duty to respect the Executive's judgment in matters of military operations and foreign affairs. The Court's evident belief that it is qualified to pass on the "military necessity" of the Commander in Chief's decision to employ a particular form of force against our enemies is so antithetical to our constitutional structure that it simply cannot go unanswered. I respectfully dissent.

I

Our review of petitioner's claims arises in the context of the President's wartime exercise of his commander-in-chief authority in conjunction with the complete support of Congress. Accordingly, it is important to take measure of the respective roles the Constitution assigns to the three branches of our Government in the conduct of war.

As I explained in *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004), the structural advantages attendant to the Executive Branch -- namely, the decisiveness, "activity, secrecy, and dispatch" that flow from the Executive's "unity," -- led the Founders to conclude that the "President has primary responsibility -- along with the necessary power -- to protect the national security and to conduct the Nation's foreign relations." Consistent with this conclusion, the Constitution vests in the President "the executive Power," Art. II, § 1, provides that he "shall be Commander in Chief" of the Armed Forces, § 2, and places in him the power to recognize foreign governments, § 3. This Court has observed that these provisions confer upon the President broad constitutional authority to protect the Nation's security in the manner he deems fit.

Congress, to be sure, has a substantial and essential role in both foreign affairs and national security. . . [T]he fact that Congress has provided the President with broad authorities does not imply -- and the Judicial Branch should not infer -- that Congress intended to deprive him of particular powers not specifically enumerated. . .

[T]he President's decision to try Hamdan before a military commission for his involvement with al Qaeda is entitled to a heavy measure of deference. In the present conflict, Congress has authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force (AUMF). . .

Although the Court concedes the legitimacy of the President's use of military commissions in certain circumstances, it suggests that the AUMF has no bearing on the scope of the President's power to utilize military commissions in the present conflict. Instead, the Court determines the scope of this power based exclusively on Article 21 of the Uniform Code of Military Justice (UCMJ), the successor to Article 15 of the Articles of War . . .

I note the Court's error respecting the AUMF not because it is necessary to my resolution of this case -- Hamdan's military commission can plainly be sustained solely under Article 21 -- but to emphasize the complete congressional sanction of the President's exercise of his commander-in-chief authority to conduct the present war. In such circumstances, as previously noted, our duty to defer to the Executive's military and foreign policy judgment is at its zenith; it does not countenance the kind of second-guessing the Court repeatedly engages in today. . .

II

A

. . . [T]he plurality concludes that the legality of the charge against Hamdan is doubtful because "Hamdan is charged not with an overt act for which he was caught redhanded in a theater of war . . . but with an agreement the inception of which long predated . . . the [relevant armed conflict]." The plurality's willingness to second-guess the Executive's judgments in this context, based upon little more than its unsupported assertions, constitutes an unprecedented departure from the traditionally limited role of the courts with respect to war and an unwarranted intrusion on executive authority. And even if such second-guessing were appropriate, the plurality's attempt to do so is unpersuasive.

As an initial matter, the plurality relies upon the date of the AUMF's enactment to determine the beginning point for the "period of the war," thereby suggesting that petitioner's commission does not have jurisdiction to try him for offenses committed prior to the AUMF's enactment. But this suggestion betrays the plurality's unfamiliarity with the realities of warfare and its willful blindness to our precedents. The starting point of the present conflict (or indeed any conflict) is not determined by congressional enactment, but rather by the initiation of hostilities. Thus, Congress' enactment of the AUMF did not mark the beginning of this Nation's conflict with al

Qaeda, but instead authorized the President to use force in the midst of an ongoing conflict. Moreover, while the President's "war powers" may not have been activated until the AUMF was passed, the date of such activation has never been used to determine the scope of a military commission's jurisdiction. n3¹³ . . .

Moreover, the President's determination that the present conflict dates at least to 1996 is supported by overwhelming evidence. According to the State Department, al Qaeda declared war on the United States as early as August 1996. See Dept. of State Fact Sheet: Usama bin Ladin (Aug. 21, 1998); Dept. of State Fact Sheet: The Charges against International Terrorist Usama Bin Laden (Dec. 20, 2000). In February 1998, al Qaeda leadership issued another statement ordering the indiscriminate -- and, even under the laws of war as applied to legitimate nation-states, plainly illegal -- killing of American civilians and military personnel alike. This was not mere rhetoric; even before September 11, 2001, al Qaeda was involved in the bombing of the World Trade Center in New York City in 1993, the bombing of the Khobar Towers in Saudi Arabia in 1996, the bombing of the U.S. Embassies in Kenya and Tanzania in 1998, and the attack on the U.S. S. Cole in Yemen in 2000. In response to these incidents, the United States "attacked facilities belonging to Usama bin Ladin's network" as early as 1998. Dept. of State Fact Sheet: Usama bin Ladin (Aug. 21, 1998). Based on the foregoing, the President's judgment -- that the present conflict substantially predates the AUMF, extending at least as far back as al Qaeda's 1996 declaration of war on our Nation, and that the theater of war extends at least as far as the localities of al Qaeda's principal bases of operations -- is beyond judicial reproach.

B . . .

C

. . . The common law of war is marked by two important features. First, as with the common law generally, it is flexible and evolutionary in nature, building upon the experience of the past and taking account of the exigencies of the present. . . Second, the common law of war affords a measure of respect for the judgment of military commanders. . .

¹³ n3 Even if the formal declaration of war were generally the determinative act in ascertaining the temporal reach of the jurisdiction of a military commission, the AUMF itself is inconsistent with the plurality's suggestion that such a rule is appropriate in this case. The text of the AUMF is backward looking, authorizing the use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Thus, the President's decision to try Hamdan by military commission -- a use of force authorized by the AUMF -- for Hamdan's involvement with al Qaeda prior to September 11, 2001, fits comfortably within the framework of the AUMF. In fact, bringing the September 11 conspirators to justice is the primary point of the AUMF. By contrast, on the plurality's logic, the AUMF would not grant the President the authority to try Usama bin Laden himself for his involvement in the events of September 11, 2001.

In one key respect, the plurality departs from the proper framework for evaluating the adequacy of the charge against Hamdan under the laws of war. The plurality holds that where, as here, "neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent [establishing whether an offense is triable by military commission] must be plain and unambiguous." This is a pure contrivance, and a bad one at that. .

The plurality's newly minted clear-statement rule is also fundamentally inconsistent with the nature of the common law which, by definition, evolves and develops over time . . . Similarly, it is inconsistent with the nature of warfare, which also evolves and changes over time, and for which a flexible, evolutionary common-law system is uniquely appropriate. n6¹⁴ Though the charge against Hamdan easily satisfies even the plurality's manufactured rule, the plurality's inflexible approach has dangerous implications for the Executive's ability to discharge his duties as Commander in Chief in future cases. We should undertake to determine whether an unlawful combatant has been charged with an offense against the law of war with an understanding that the common law of war is flexible, responsive to the exigencies of the present conflict, and deferential to the judgment of military commanders.

1

Under either the correct, flexible approach to evaluating the adequacy of Hamdan's charge, or under the plurality's new, clear-statement approach, Hamdan has been charged with conduct constituting two distinct violations of the law of war cognizable before a military commission: membership in a war-criminal enterprise and conspiracy to commit war crimes. . .

The common law of war establishes that Hamdan's willful and knowing membership in al Qaeda is a war crime chargeable before a military commission. Hamdan, a confirmed enemy combatant and member or affiliate of al Qaeda, has been charged with willfully and knowingly joining a group (al Qaeda) whose purpose is "to support violent attacks against property and nationals (both military and civilian) of the United States." Moreover, the allegations specify that Hamdan joined and maintained his relationship with al Qaeda even though he "believed that Usama bin Laden and his associates were involved in the attacks on the U.S. Embassies in Kenya and Tanzania in August 1998, the attack on the USS COLE in October 2000, and the attacks on the United States on September 11, 2001." These allegations, against a confirmed unlawful combatant, are alone sufficient to sustain the jurisdiction of Hamdan's military commission. . .

¹⁴ n6 Indeed, respecting the present conflict, the President has found that "the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm -- ushered in not by us, but by terrorists -- requires new thinking in the law of war." Under the Court's approach, the President's ability to address this "new paradigm" of inflicting death and mayhem would be completely frozen by rules developed in the context of conventional warfare.

The conclusion that membership in an organization whose purpose is to violate the laws of war is an offense triable by military commission is confirmed by the experience of the military tribunals convened by the United States at Nuremberg. . .

Moreover, the Government has alleged that Hamdan was not only a member of al Qaeda while it was carrying out terrorist attacks on civilian targets in the United States and abroad, but also that Hamdan aided and assisted al Qaeda's top leadership by supplying weapons, transportation, and other services. These allegations further confirm that Hamdan is triable before a law-of-war military commission for his involvement with al Qaeda.¹⁵

2

. . . Hamdan has been charged with "conspiring and agreeing with . . . the al Qaeda organization . . . to commit . . . offenses triable by military commission." Those offenses include "attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism." This, too, alleges a violation of the law of war triable by military commission. . .

The Civil War experience provides support for the President's conclusion that conspiracy to violate the laws of war is an offense cognizable before law-of-war military commissions. Indeed, in the highest profile case to be tried before a military commission relating to that war, namely, the trial of the men involved in the assassination of President Lincoln, the charge provided that those men had "combined, confederated, and conspired . . . to kill and murder" President Lincoln. . .

The plurality further contends . . . that conspiracy is not an offense cognizable before a law-of-war military commission because "it is not enough to intend to violate the law of war and commit overt acts in furtherance of that intention unless the overt acts either are themselves offenses against the law of war or constitute steps sufficiently substantial to qualify as an attempt." . . . The plurality's approach . . . requires that any overt act to further a conspiracy must itself be a completed war crime distinct from conspiracy -- which merely begs the question the plurality sets out to answer, namely, whether conspiracy itself may constitute a violation of the law of war. And, even the plurality's unsupported standard is satisfied here. Hamdan has been charged with the overt acts of providing protection, transportation, weapons, and other services to the enemy, acts which in and of themselves are violations of the laws of war.

3

Ultimately, the plurality's determination that Hamdan has not been charged with an offense triable before a military commission rests not upon any historical example or authority, but upon the plurality's raw judgment of the "inability on the Executive's part here to satisfy the most basic

¹⁵ n10 Even if the plurality were correct that a membership offense must be accompanied by allegations that the "defendant 'took up arms,'" that requirement has easily been satisfied here. Not only has Hamdan been charged with providing assistance to top al Qaeda leadership (itself an offense triable by military commission), he has also been charged with receiving weapons training at an al Qaeda camp.

precondition . . . for establishment of military commissions: military necessity." This judgment starkly confirms that the plurality has appointed itself the ultimate arbiter of what is quintessentially a policy and military judgment, namely, the appropriate military measures to take against those who "aided the terrorist attacks that occurred on September 11, 2001." AUMF § 2(a), 115 Stat. 224. The plurality's suggestion that Hamdan's commission is illegitimate because it is not dispensing swift justice on the battlefield is unsupportable. Even a cursory review of the authorities confirms that law-of-war military commissions have wide-ranging jurisdiction to try offenses against the law of war in exigent and nonexigent circumstances alike. Traditionally, retributive justice for heinous war crimes is as much a "military necessity" as the "demands" of "military efficiency" touted by the plurality, and swift military retribution is precisely what Congress authorized the President to impose on the September 11 attackers in the AUMF.

Today a plurality of this Court would hold that conspiracy to massacre innocent civilians does not violate the laws of war. This determination is unsustainable. The judgment of the political branches that Hamdan, and others like him, must be held accountable before military commissions for their involvement with and membership in an unlawful organization dedicated to inflicting massive civilian casualties is supported by virtually every relevant authority, including all of the authorities invoked by the plurality today. It is also supported by the nature of the present conflict. We are not engaged in a traditional battle with a nation-state, but with a worldwide, hydra-headed enemy, who lurks in the shadows conspiring to reproduce the atrocities of September 11, 2001, and who has boasted of sending suicide bombers into civilian gatherings, has proudly distributed videotapes of beheadings of civilian workers, and has tortured and dismembered captured American soldiers. But according to the plurality, when our Armed Forces capture those who are plotting terrorist atrocities like the bombing of the Khobar Towers, the bombing of the U.S. S. Cole, and the attacks of September 11 -- even if their plots are advanced to the very brink of fulfillment -- our military cannot charge those criminals with any offense against the laws of war. Instead, our troops must catch the terrorists "redhanded" in the midst of the attack itself, in order to bring them to justice. Not only is this conclusion fundamentally inconsistent with the cardinal principal of the law of war, namely protecting non-combatants, but it would sorely hamper the President's ability to confront and defeat a new and deadly enemy.

After seeing the plurality overturn longstanding precedents in order to seize jurisdiction over this case, and after seeing them disregard the clear prudential counsel that they abstain in these circumstances, . . . it is no surprise to see them go on to overrule one after another of the President's judgments pertaining to the conduct of an ongoing war. . . The plurality's willingness to second-guess the determination of the political branches that these conspirators must be brought to justice is both unprecedented and dangerous.

III

The Court holds that even if "the Government has charged Hamdan with an offense against the law of war cognizable by military commission, the commission lacks power to proceed" because of its failure to comply with the terms of the UCMJ and the four Geneva Conventions signed in 1949. This position is untenable.

A

As with the jurisdiction of military commissions, the procedure of such commissions "has [not] been prescribed by statute," but "has been adapted in each instance to the need that called it forth." *Madsen v. Kinsella*, 343 U.S. 341 (1952). Indeed, this Court has concluded that "in the absence of attempts by Congress to limit the President's power, it appears that, as Commander in Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions." *Id.*, at 348, 72 S. Ct. 699, 96 L. Ed. 988. This conclusion is consistent with this Court's understanding that military commissions are "our common-law war courts." *Id.*, at 346-347, 72 S. Ct. 699, 96 L. Ed. 988. As such, "should the conduct of those who compose martial-law tribunals become [a] matter of judicial determination subsequently before the civil courts, those courts will give great weight to the opinions of the officers as to what the customs of war in any case justify and render necessary."

The Court nevertheless concludes that at least one provision of the UCMJ amounts to an attempt by Congress to limit the President's power. . . . Article 36 of the UCMJ authorizes the President to establish procedures for military commissions "which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." Far from constraining the President's authority, Article 36 recognizes the President's prerogative to depart from the procedures applicable in criminal cases whenever he alone does not deem such procedures "practicable." While the procedural regulations promulgated by the Executive must not be "contrary to" the UCMJ, only a few provisions of the UCMJ mention "military commissions," and there is no suggestion that the procedures to be employed by Hamdan's commission implicate any of those provisions.

Notwithstanding the foregoing, the Court concludes that Article 36(b) of the UCMJ which provides that "'all rules and regulations made under this article shall be uniform insofar as practicable,'" requires the President to employ the same rules and procedures in military commissions as are employed by courts-martial "insofar as practicable." The Court further concludes that Hamdan's commission is unlawful because the President has not explained why it is not practicable to apply the same rules and procedures to Hamdan's commission as would be applied in a trial by court martial. . . .

. . . [T]he Court's conclusion that Article 36(b) requires the President to apply the same rules and procedures to military commissions as are applicable to courts-martial is unsustainable. When Congress codified Article 15 of the Articles of War in Article 21 of the UCMJ it was "presumed to be aware of . . . and to adopt" this Court's interpretation of that provision as preserving the common-law status of military commissions, inclusive of the President's unfettered authority to prescribe their procedures. The Court's conclusion that Article 36(b) repudiates this settled meaning of Article 21 is not based upon a specific textual reference to military commissions, but rather on a one-sentence subsection providing that "all rules and regulations made under this article shall be uniform insofar as practicable." 10 U.S.C. § 836(b). This is little more than an impermissible repeal by implication.

Nothing in the text of Article 36(b) supports the Court's sweeping conclusion that it represents an unprecedented congressional effort to change the nature of military commissions from common-law war courts to tribunals that must presumptively function like courts-martial. And such an interpretation would be strange indeed. The vision of uniformity that motivated the adoption of the UCMJ, embodied specifically in Article 36(b), is nothing more than uniformity across the separate branches of the armed services. There is no indication that the UCMJ was intended to require uniformity in procedure between courts-martial and military commissions, tribunals that the UCMJ itself recognizes are different. To the contrary, the UCMJ expressly recognizes that different tribunals will be constituted in different manners and employ different procedures. Thus, Article 36(b) is best understood as establishing that, so far as practicable, the rules and regulations governing tribunals convened by the Navy must be uniform with the rules and regulations governing tribunals convened by the Army. But, consistent with this Court's prior interpretations of Article 21 and over a century of historical practice, it cannot be understood to require the President to conform the procedures employed by military commissions to those employed by courts-martial.

Even if Article 36(b) could be construed to require procedural uniformity among the various tribunals contemplated by the UCMJ, Hamdan would not be entitled to relief. Under the Court's reading, the President is entitled to prescribe different rules for military commissions than for courts-martial when he determines that it is not "practicable" to prescribe uniform rules. The Court does not resolve the level of deference such determinations would be owed, however, because, in its view, "the President has not . . . [determined] that it is impracticable to apply the rules for courts-martial." This is simply not the case. On the same day that the President issued Military Commission Order No. 1, the Secretary of Defense explained that "the president decided to establish military commissions because he wanted the option of a process that is different from those processes which we already have, namely the federal court system . . . and the military court system," Dept. of Defense News Briefing on Military Commissions (Mar. 21, 2002) (remarks of Donald Rumsfeld), available at http://www.dod.gov/transcripts/2002/t03212002_t0321sd.html (as visited June 26, 2006, and available in Clerk of Court's case file) (hereinafter News Briefing), and that "the commissions are intended to be different . . . because the President recognized that there had to be differences to deal with the unusual situation we face and that a different approach was needed." The President reached this conclusion because

"we're in the middle of a war, and . . . had to design a procedure that would allow us to pursue justice for these individuals while at the same time prosecuting the war most effectively. And that means setting rules that would allow us to preserve our intelligence secrets, develop more information about terrorist activities that might be planned for the future so that we can take action to prevent terrorist attacks against the United States. . . . There was a constant balancing of the requirements of our war policy and the importance of providing justice for individuals . . . and each deviation from the standard kinds of rules that we have in our criminal courts was motivated by the desire to strike the balance between individual justice and the broader war policy." Ibid. (remarks of Douglas J. Feith, Under Secretary of Defense for Policy (emphasis added)).

The Court provides no explanation why the President's determination that employing court-martial procedures in the military commissions established pursuant to Military Commission Order No. 1 would hamper our war effort is in any way inadequate to satisfy its newly minted "practicability" requirement. . . And, in the context of the present conflict, it is exactly the kind of determination Congress countenanced when it authorized the President to use all necessary and appropriate force against our enemies. Accordingly, the President's determination is sufficient to satisfy any practicability requirement imposed by Article 36(b).

The plurality further contends that Hamdan's commission is unlawful because it fails to provide him the right to be present at his trial, as recognized in 10 U.S.C. A. § 839(c) But § 839(c) applies to courts-martial, not military commissions. . .

B

The Court contends that Hamdan's military commission is also unlawful because it violates Common Article 3 of the Geneva Conventions. Furthermore, Hamdan contends that his commission is unlawful because it violates various provisions of the Third Geneva Convention. These contentions are untenable.

1 . . .

2

. . . Hamdan's claim under Common Article 3 of the Geneva Conventions is meritless. Common Article 3 applies to "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." "Pursuant to [his] authority as Commander in Chief and Chief Executive of the United States," the President has "accepted the legal conclusion of the Department of Justice . . . that common Article 3 of Geneva does not apply to . . . al Qaeda . . . detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character.'" Under this Court's precedents, "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." Our duty to defer to the President's understanding of the provision at issue here is only heightened by the fact that he is acting pursuant to his constitutional authority as Commander in Chief and by the fact that the subject matter of Common Article 3 calls for a judgment about the nature and character of an armed conflict.

The President's interpretation of Common Article 3 is reasonable and should be sustained. The conflict with al Qaeda is international in character in the sense that it is occurring in various nations around the globe. Thus, it is also "occurring in the territory of" more than "one of the High Contracting Parties." The Court does not dispute the President's judgments respecting the nature of our conflict with al Qaeda, nor does it suggest that the President's interpretation of Common Article 3 is implausible or foreclosed by the text of the treaty. Indeed, the Court concedes that Common Article 3 is principally concerned with "furnishing minimal protection to rebels involved in . . . a civil war," ante, at 68, precisely the type of conflict the President's interpretation envisions to be subject to Common Article 3. Instead, the Court, without

acknowledging its duty to defer to the President, adopts its own, admittedly plausible, reading of Common Article 3. But where, as here, an ambiguous treaty provision ("not of an international character") is susceptible of two plausible, and reasonable, interpretations, our precedents require us to defer to the Executive's interpretation.

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. . . In any event, Hamdan's military commission complies with the requirements of Common Article 3. It is plainly "regularly constituted" because such commissions have been employed throughout our history to try unlawful combatants for crimes against the law of war. . .

Hamdan's commission has been constituted in accordance with these historical precedents. As I have previously explained, the procedures to be employed by that commission, and the Executive's authority to alter those procedures, are consistent with the practice of previous American military commissions.

The Court concludes Hamdan's commission fails to satisfy the requirements of Common Article 3 not because it differs from the practice of previous military commissions but because it "deviates from [the procedures] governing courts-martial." But there is neither a statutory nor historical requirement that military commissions conform to the structure and practice of courts-martial. A military commission is a different tribunal, serving a different function, and thus operates pursuant to different procedures. The 150-year pedigree of the military commission is itself sufficient to establish that such tribunals are "regularly constituted courts."

Similarly, the procedures to be employed by Hamdan's commission afford "all the judicial guarantees which are recognized as indispensable by civilized peoples."

. . . [T]he plurality concludes that Hamdan's commission is unlawful because of the possibility that Hamdan will be barred from proceedings and denied access to evidence that may be used to convict him. But, under the commissions' rules, the Government may not impose such bar or denial on Hamdan if it would render his trial unfair, a question that is clearly within the scope of the appellate review contemplated by regulation and statute.

Moreover, while the Executive is surely not required to offer a particularized defense of these procedures prior to their application, the procedures themselves make clear that Hamdan would only be excluded (other than for disruption) if it were necessary to protect classified (or classifiable) intelligence, including the sources and methods for gathering such intelligence. The Government has explained that "we want to make sure that these proceedings, which are going on in the middle of the war, do not interfere with our war effort and . . . because of the way we would be able to handle interrogations and intelligence information, may actually assist us in promoting our war aims." News Briefing (remarks of Douglas J. Feith, Under Secretary of Defense for Policy). . .

In these circumstances, "civilized peoples" would take into account the context of military commission trials against unlawful combatants in the war on terrorism, including the need to keep certain information secret in the interest of preventing future attacks on our Nation and its

foreign installations so long as it did not deprive the accused of a fair trial. Accordingly, the President's understanding of the requirements of Common Article 3 is entitled to "great weight."

Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993) [most citations and footnotes omitted]

The plaintiffs-appellants Nina Baehr (Baehr), Genora Dancel (Dancel), Tammy Rodrigues (Rodrigues), Antoinette Pregil (Pregil), Pat Lagon (Lagon), and Joseph Melilio (Melilio) (collectively "the plaintiffs") appeal the circuit court's order (and judgment entered pursuant thereto) granting the motion of the defendant-appellee John C. Lewin (Lewin), in his official capacity as Director of the Department of Health (DOH), State of Hawaii, for judgment on the pleadings, resulting in the dismissal of the plaintiffs' action with prejudice for failure to state a claim against Lewin upon which relief can be granted. Because, for purposes of Lewin's motion, it is our duty to view the factual allegations of the plaintiffs' complaint in a light most favorable to them (i.e., because we must deem such allegations as true) and because it does not appear beyond doubt that the plaintiffs cannot prove any set of facts in support of their claim that would entitle them to the relief they seek, we hold that the circuit court erroneously dismissed the plaintiffs' complaint. Accordingly, we vacate the circuit court's order and judgment and remand this matter to the circuit court for further proceedings consistent with this opinion.

I. BACKGROUND

On May 1, 1991, the plaintiffs filed a complaint for injunctive and declaratory relief in the Circuit Court of the First Circuit, State of Hawaii, seeking, inter alia: (1) a declaration that Hawaii Revised Statutes (HRS) @ 572-1 (1985) -- the section of the Hawaii Marriage Law enumerating the [r]equisites of [a] valid marriage contract" -- is unconstitutional insofar as it is construed and applied by the DOH to justify refusing to issue a marriage license on the sole basis that the applicant couple is of the same sex;

. . . [T]he plaintiffs' complaint alleges the following facts: (1) on or about December 17, 1990, Baehr/Dancel, Rodrigues/Pregil, and Lagon/Melilio (collectively "the applicant couples") filed applications for marriage licenses with the DOH, (2) the DOH denied the applicant couples' marriage license applications solely on the ground that the applicant couples were of the same sex; (3) the applicant couples have complied with all marriage contract requirements and provisions under HRS ch. 572, except that each applicant couple is of the same sex; (4) the applicant couples are otherwise eligible to secure marriage licenses from the DOH, absent the statutory prohibition or construction of HRS @ 572-1 excluding couples of the same sex from securing marriage licenses; and (5) in denying the applicant couples' marriage license applications, the DOH was acting in its official capacity and under color of state law. . . .

B. The Right to Privacy Does Not Include a Fundamental Right to Same-Sex Marriage.

It is now well established that "'a right to personal privacy, or a guarantee of certain areas or zones of privacy,' is implicit in the United States Constitution." And article I, section 6 of the Hawaii Constitution expressly states that "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest." The framers of the Hawaii Constitution declared that the "privacy concept" embodied in article I, section 6 is to be "treated as a fundamental right[.]"

When article I, section 6 of the Hawaii Constitution was being adopted, the 1978 Hawaii Constitutional Convention, acting as a committee of the whole, clearly articulated the rationale for its adoption:

By amending the Constitution to include a separate and distinct privacy right, it is the intent of your Committee to insure that privacy is treated as a fundamental right for purposes of constitutional analysis. . . . This right is similar to the privacy right discussed in cases such as *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972), *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973). It is a right that, though unstated in the federal Constitution, emanates from the penumbra of several guarantees of the Bill of Rights. Because of this, there has been some confusion as to the source of the right and the importance of it. As such, it is treated as a fundamental right subject to interference only when a compelling state interest is demonstrated. By inserting clear and specific language regarding this right into the Constitution, your Committee intends to alleviate any possible confusion over the source of the right and the existence of it. . . .

Accordingly, there is no doubt that, at a minimum, article I, section 6 of the Hawaii Constitution encompasses all of the fundamental rights expressly recognized as being subsumed within the privacy protections of the United States Constitution. In this connection, the United States Supreme Court has declared that "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause." The issue in the present case is, therefore, whether the "right to marry" protected by article I, section 6 of the Hawaii Constitution extends to same-sex couples. Because article I, section 6 was expressly derived from the general right to privacy under the United States Constitution and because there are no Hawaii cases that have delineated the fundamental right to marry, this court, as we did in *Mueller*, looks to federal cases for guidance. . . .

It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. As the facts of this case illustrate, it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society. The woman whom appellee desired to marry had a fundamental right to seek an abortion of their expected child, *see Roe v. Wade, supra*, or to bring the child into life to suffer the myriad social, if not economic, disabilities that the status of illegitimacy brings Surely, a decision to marry and raise the child in a traditional family setting must receive equivalent protection. . . .

The foregoing case law demonstrates that the federal construct of the fundamental right to marry -- subsumed within the right to privacy implicitly protected by the United States Constitution -- presently contemplates unions between men and women. (Once again, this is hardly surprising inasmuch as such unions are the only state-sanctioned marriages currently acknowledged in this country.)

Therefore, the precise question facing this court is whether we will extend the present boundaries of the fundamental right of marriage to include same-sex couples, or, put another way, whether we will hold that same-sex couples possess a fundamental right to marry. In effect, as the applicant couples frankly admit, we are being asked to recognize a new fundamental right. . . .

. . . In the case that first recognized a fundamental right to privacy, *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965), the Court declared that it was "deal[ing] with a right . . . older than the Bill of Rights[.]" *Id.* at 486, 85 S. Ct. at 1682. And in a concurring opinion, Justice Goldberg observed that judges "determining which rights are fundamental" must look not to "personal and private notions," but to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." . . . The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . ." *Id.* at 493, 85 S. Ct. at 1686-87 (Goldberg, J., concurring) (citations omitted).

Applying the foregoing standards to the present case, we do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed. Accordingly, we hold that the applicant couples do not have a fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise.

Our holding, however, does not leave the applicant couples without a potential remedy in this case. As we will discuss below, the applicant couples are free to press their equal protection claim. If they are successful, the State of Hawaii will no longer be permitted to refuse marriage licenses to couples merely on the basis that they are of the same sex. But there is no fundamental right to marriage for same-sex couples under article I, section 6 of the Hawaii Constitution.

C. Applicant Couples Are Entitled to an Evidentiary Hearing . . .

1. Marriage is a state-conferred legal partnership status, the existence of which gives rise to a multiplicity of rights and benefits reserved exclusively to that particular relation.

The power to regulate marriage is a sovereign function reserved exclusively to the respective states. By its very nature, the power to regulate the marriage relation includes the power to determine the requisites of a valid marriage contract and to control the qualifications of the contracting parties, the forms and procedures necessary to solemnize the marriage, the duties and

obligations it creates, its effect upon property and other rights, and the grounds for marital dissolution.

In other words, marriage is a state-conferred legal status, the existence of which gives rise to rights and benefits reserved exclusively to that particular relationship. . . .

The applicant couples correctly contend that the DOH's refusal to allow them to marry on the basis that they are members of the same sex deprives them of access to a multiplicity of rights and benefits that are contingent upon that status. Although it is unnecessary in this opinion to engage in an encyclopedic recitation of all of them, a number of the most salient marital rights and benefits are worthy of note. They include: (1) a variety of state income tax advantages, including deductions, credits, rates, exemptions, and estimates; (2) public assistance from and exemptions relating to the Department of Human Services; (3) control, division, acquisition, and disposition of community property; (4) rights relating to dower, curtesy, and inheritance; (5) rights to notice, protection, benefits, and inheritance; (6) award of child custody and support payments in divorce proceedings; (7) the right to spousal support; (8) the right to enter into premarital agreements; (9) the right to change of name; (10) the right to file a nonsupport action; (11) post-divorce rights relating to support and property division; (12) the benefit of the spousal privilege and confidential marital communications; (13) the benefit of the exemption of real property from attachment or execution; and (14) the right to bring a wrongful death action. For present purposes, it is not disputed that the applicant couples would be entitled to all of these marital rights and benefits, but for the fact that they are denied access to the state-conferred legal status of marriage.

2. HRS @ 572-1, on its face, discriminates based on sex against the applicant couples in the exercise of the civil right of marriage, thereby implicating the equal protection clause of article I, section 5 of the Hawaii Constitution.

Notwithstanding the state's acknowledged stewardship over the institution of marriage, the extent of permissible state regulation of the right of access to the marital relationship is subject to constitutional limitations or constraints. It has been held that a state may deny the right to marry only for compelling reasons.

The equal protection clauses of the United States and Hawaii Constitutions are not mirror images of one another. The fourteenth amendment to the United States Constitution somewhat concisely provides, in relevant part, that a state may not "deny to any person within its jurisdiction the equal protection of the laws." Hawaii's counterpart is more elaborate. Article I, section 5 of the Hawaii Constitution provides in relevant part that "[n]o person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry." (Emphasis added.) Thus, by its plain language, the Hawaii Constitution prohibits state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex.

"The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free [people]." So "fundamental" does the United States

Supreme Court consider the institution of marriage that it has deemed marriage to be "one of the 'basic civil rights of [men and women.]'" . . .

Rudimentary principles of statutory construction render manifest the fact that, by its plain language, HRS @ 572-1 restricts the marital relation to a male and a female. . . . Accordingly, on its face and (as Lewin admits) as applied, HRS @ 572-1 denies same-sex couples access to the marital status and its concomitant rights and benefits. It is the state's regulation of access to the status of married persons, on the basis of the applicants' sex, that gives rise to the question whether the applicant couples have been denied the equal protection of the laws in violation of article I, section 5 of the Hawaii Constitution.

. . . Lewin contends that "the fact that homosexual [sic-- actually, same-sex] partners cannot form a state-licensed marriage is not the product of impermissible discrimination" implicating equal protection considerations, but rather "a function of their biologic inability as a couple to satisfy the definition of the status to which they aspire." Put differently, Lewin proposes that "the right of persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special relationship between a man and a woman." We believe Lewin's argument to be circular and unpersuasive

3. Equal Protection Analysis under Article I, Section 5 of the Hawaii Constitution

"Whenever a denial of equal protection of the laws is alleged, as a rule our initial inquiry has been whether the legislation in question should be subjected to 'strict scrutiny' or to a 'rational basis' test." This court has applied "strict scrutiny" analysis to "laws classifying on the basis of suspect categories or impinging upon fundamental rights expressly or impliedly granted by the [c]onstitution," in which case the laws are "presumed to be unconstitutional unless the state shows compelling state interests which justify such classifications," and that the laws are "narrowly drawn to avoid unnecessary abridgments of constitutional rights."

By contrast, "[w]here 'suspect' classifications or fundamental rights are not at issue, this court has traditionally employed the rational basis test." "Under the rational basis test, we inquire as to whether a statute rationally furthers a legitimate state interest." "Our inquiry seeks only to determine whether any reasonable justification can be found for the legislative enactment."

As we have indicated, HRS @ 572-1, on its face and as applied, regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex. As such, HRS @ 572-1 establishes a sex-based classification.

. . . [T]he current governing test under the Fourteenth Amendment [to the United States Constitution] is a standard intermediate between rational basis and strict scrutiny. "[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."

We need not deal finally with that issue, and reserve it for future consideration, since we conclude that the compelling state interest test would be satisfied in this case if it were to be held applicable. . .

. . . Accordingly, we hold that sex is a "suspect category" for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution and that HRS @ 572-1 is subject to the "strict scrutiny" test. It therefore follows, and we so hold, that (1) HRS @ 572-1 is presumed to be unconstitutional (2) unless Lewin, as an agent of the State of Hawaii, can show that (a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgments of the applicant couples' constitutional rights.

..

III. CONCLUSION

Because, for the reasons stated in this opinion, the circuit court erroneously granted Lewin's motion for judgment on the pleadings and dismissed the plaintiffs' complaint, we vacate the circuit court's order and judgment and remand this matter for further proceedings consistent with this opinion. On remand, in accordance with the "strict scrutiny" standard, the burden will rest on Lewin to overcome the presumption that HRS @ 572-1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights.

Vacated and remanded.

Baehr v. Miike, No. 91-1394
First Circuit Court, Hawaii (1996)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial before the Honorable Kevin S.C. Chang on September 10, 1996. . . . The Court having reviewed all the evidence admitted at the trial and having considered the arguments and other written submissions of counsel for the parties and the briefs filed by the amicus curiae, hereby makes the following Findings of Fact and Conclusions of Law. . . .

VI. SPECIFIC FINDINGS

116. The following are specific findings of fact for this case based on the credible evidence presented at trial.

117. Defendant presented insufficient evidence and failed to establish or prove any adverse consequences to the public resulting from same-sex marriage.

118. Defendant presented insufficient evidence and failed to establish or prove any adverse impacts to the State of Hawaii or its citizens resulting from the refusal of other jurisdictions to recognize Hawaii same-sex marriages or from application of the federal constitutional provision which requires other jurisdictions to give full faith and credit recognition to Hawaii same-sex marriages. See Article IV, Section 1 of the U.S. Constitution (The Full Faith and Credit Clause).

119. Defendant presented insufficient evidence and failed to establish or prove the legal significance of the institution of traditional marriage and the need to protect traditional marriage as a fundamental structure in society.

120. There is a public interest in the rights and well-being of children and families. See H.R.S. Chapters 571 and 577.

121. A father and a mother can, and do, provide his or her child with unique paternal and maternal contributions which are important, though not essential, to the development of a happy, healthy and well-adjusted child.

122. Further, an intact family environment consisting of a child and his or her mother and father presents a less burdened environment for the development of a happy, healthy and well-adjusted child. There certainly is a benefit to children which comes from being raised by their mother and father in an intact and relatively stress free home.

123. However, there is diversity in the structure and configuration of families. In Hawaii, and elsewhere, children are being raised by their natural parents, single parents, stepparents, grandparents, adopted parents, half parents, foster parents, gay and lesbian parents, and same-sex couples.

124. There are also families in Hawaii, and elsewhere, which do not have children as family members.

125. The evidence presented by Plaintiffs and Defendant establishes that the single most important factor in the development of a happy, healthy and well-adjusted child is the nurturing relationship between parent and child. More specifically, it is the quality of parenting or the "sensitive care-giving" described by David Brodzinsky, which is the most significant factor that affects the development of a child.

126. The sexual orientation of parents is not in and of itself an indicator of parental fitness.

127. The sexual orientation of parents does not automatically disqualify them from being good, fit, loving or successful parents.

128. The sexual orientation of parents is not in and of itself an indicator of the overall adjustment and development of children.

129. Gay and lesbian parents and same-sex couples have the potential to raise children that are happy, healthy and well adjusted.

130. Gay and lesbian parents and same-sex couples are allowed to adopt children, provide foster care and to raise and care for children.

131. Gay and lesbian parents and same-sex couples can provide children with a nurturing relationship and a nurturing environment which is conducive to the development of happy, healthy and well-adjusted children.

132. Gay and lesbian parents and same-sex couples can be as fit and loving parents, as non-gay men and women and different sex couples.

133. While children of gay and lesbian parents and same sex couples may experience symptoms of stress and other issues related to their non-traditional family structure, the available scientific data, studies and clinical experience presented at trial suggests that children of gay and lesbian parents and same-sex couples tend to adjust and do develop-in a normal fashion.

134. Significantly, Defendant has failed to establish a causal link between allowing same-sex marriage and adverse effects upon the optimal development of children.

135. As noted herein, there is a benefit to children which comes from being raised by their mother and father in an intact and relatively stress-free home. However, in this case, Defendant has not proved that allowing same-sex marriage will probably result in significant differences in the development or outcomes of children raised by gay or lesbian parents and same-sex couples, as compared to children raised by different-sex couples or their biological parents. In fact, Defendant's expert, Kenneth Pruett, agreed, in pertinent part, that gay and lesbian parents "are doing a good job" raising children and, most importantly, "the kids are turning out just fine."

136. Contrary to Defendant's assertions, if same-sex marriage is allowed, the children being raised by gay or lesbian parents and same-sex couples may be assisted, because they may obtain certain protections and benefits that come with or become available as a result of marriage. See *Baehr v. Lewin*, 74 Haw. 530, 560-561, 852 P.2d 44, 59 (1993), for a list of noteworthy marital rights and benefits.

137. In Hawaii, and elsewhere, same-sex couples can, and do, have successful, loving and committed relationships.

138. In Hawaii, and elsewhere, people marry for a variety of reasons including, but not limited to the following: (1) having or raising children; (2) stability and commitment; (3) Personal closeness (4) intimacy and monogamy; (5) the establishment of a framework for a long-term relationship; (6) personal significance; (7) recognition by society; and (8) certain legal and economic protections, benefits and obligations. In Hawaii, and elsewhere, gay men and lesbian women share this same mix of reasons for wanting to be able to marry.

139. Simply put, Defendant has failed to establish or prove that the public interest in the well-being of children and families, or the optimal development of children will be adversely affected by same-sex marriage.

CONCLUSIONS OF LAW

. . . 18. Defendant has not demonstrated a basis for his claim of the existence of compelling state interests sufficient to justify withholding the legal status of marriage from Plaintiffs. As discussed hereinabove, Defendant has failed to present sufficient credible evidence which demonstrates that the public interest in the well-being of children and families, or the optimal development of children would be adversely affected by same-sex marriage. Nor has Defendant demonstrated how same-sex marriage would adversely affect the public fisc, the state interest in assuring recognition of Hawaii marriages in other states, the institution of traditional marriage, or any other important public or governmental interest. The evidentiary record presented in this case does not justify the sex-based classification of HRS 572-1.

Therefore, the court specifically finds and concludes, as a matter of law, that Defendant has failed to sustain his burden to overcome the presumption that HRS 572-1 is unconstitutional by demonstrating or proving that the statute furthers a compelling state interest. Further, even assuming *arguendo* that Defendant was able to demonstrate that the sex-based classification of HRS 572-1 is justified because it furthers a compelling state interest, Defendant has failed to establish that HRS 572-1 is narrowly tailored to avoid unnecessary abridgments of constitutional rights.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. The sex-based classification in HRS 572-1, on its face and as applied, is unconstitutional and in violation of the equal protection clause of article I, section 5 of the Hawaii Constitution.

2. Defendant Lawrence H. Miike, as Director of Department of Health, State of Hawaii, and his agents, and any person in acting in concert with Defendant or claiming by or through him, is enjoined from denying an application for a marriage license solely because the applicants are of the same sex.

3. To the extent permitted by law, costs shall be imposed against Defendant and awarded in favor of Plaintiffs.

KEVIN S. C. CHANG, Judge of the Above-Entitled Court
Honolulu, Hawaii. December 3, 1996.

Baehr. v. Miike, No. 20371
Hawaii Supreme Court (December 9, 1999)
[footnotes and citations omitted]

Pursuant to Hawai'i Rules of Evidence (HRE) Rules 201 and 202 (1993), this court takes judicial notice of the following: On April 29, 1997, both houses of the Hawai'i legislature passed, upon final reading, House Bill No. 117 proposing an amendment to the Hawai'i Constitution (the marriage amendment). The bill proposed the addition of the following language to article I of the Constitution: "Section 23. The legislature shall have the power to reserve marriage to opposite-sex couples." The marriage amendment was ratified by the electorate in November 1998.

In light of the foregoing, and upon carefully reviewing the record and the briefs and supplemental briefs submitted by the parties and amicus curiae and having given due consideration to the arguments made and the issues raised by the parties, we resolve the defendant-appellant Lawrence Miike's appeal as follows:

On December 11, 1996, the first circuit court entered judgment in favor of plaintiffs-appellees Ninia Baehr, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Lagon, and Joseph Melillo (collectively, "the plaintiffs") and against Miike, ruling (1) that the sex-based classification in Hawai'i Revised Statutes (HRS) § 572-1 (1985) was "unconstitutional" by virtue of being "in violation of the equal protection clause of article I, section 5 of the Hawai[i] Constitution," (2) that Miike, his agents, and any person acting in concert with or by or through Miike were enjoined from denying an application for a marriage license because applicants were of the same sex, and (3) that costs should be awarded against Miike and in favor of the plaintiffs. The circuit court subsequently stayed enforcement of the injunction against Miike.

The passage of the marriage amendment placed HRS § 572-1 on new footing. The marriage amendment validated HRS § 572-1 by taking the statute out of the ambit of the equal protection clause of the Hawai'i Constitution, at least insofar as the statute, both on its face and as applied, purported to limit access to the marital status to opposite-sex couples. Accordingly, whether or not in the past it was violative of the equal protection clause in the foregoing respect, HRS § 572-1 no longer is. In light of the marriage amendment, HRS § 572-1 must be given full force and effect.

The plaintiffs seek a limited scope of relief in the present lawsuit, i.e., access to applications for marriage licenses and the consequent legally recognized marital status. Inasmuch as HRS § 572-1 is now a valid statute, the relief sought by the plaintiffs is unavailable. The marriage amendment has rendered the plaintiffs' complaint moot.

Therefore,

IT IS HEREBY ORDERED that the judgment of the circuit court be reversed and that the case be remanded for entry of judgment in favor of Miike and against the plaintiffs.

Faith and Credit Clause, U.S. Constitution

ARTICLE IV. UNITED STATES CONSTITUTION

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other States. And the Congress may by general Laws prescribe the Manner in which such Acts, Records an Proceedings shall be proved, and the Effect thereof.

DEFENSE OF MARRIAGE ACT, 110 Stat. 2419 (1996)

SECTION 1. SHORT TITLE.

This Act may be cited as the " Defense of Marriage Act" .

SECTION 2. POWERS RESERVED TO THE STATES.

(a) IN GENERAL.-CHAPTER 115 OF TITLE 28, UNITED STATES CODE, IS AMENDED BY ADDING AFTER SECTION 1738B THE FOLLOWING:

"1738C. Certain acts, records, and proceedings and the effect thereof

"No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."

SECTION 3. DEFINITION OF MARRIAGE.

(a) IN GENERAL.-CHAPTER 1 OF TITLE 1, UNITED STATES CODE, IS AMENDED BY ADDING AT THE END THE FOLLOWING:

"7. Definition of 'marriage' and 'spouse'

"In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

JUDGES: PRESENT: Jeffrey L. Amestoy, Chief Justice. Concurring: John A. Dooley, Associate Justice, James L. Morse, Associate Justice, Marilyn S. Skoglund, Associate Justice.

AMESTOY, C.J. May the State of Vermont exclude same-sex couples from the benefits and protections that its laws provide to opposite-sex married couples? That is the fundamental question we address in this appeal, a question that the Court well knows arouses deeply-felt religious, moral, and political beliefs. Our constitutional responsibility to consider the legal merits of issues properly before us provides no exception for the controversial case. The issue before the Court, moreover, does not turn on the religious or moral debate over intimate same-sex relationships, but rather on the statutory and constitutional basis for the exclusion of same-sex couples from the secular benefits and protections offered married couples.

We conclude that under the Common Benefits Clause of the Vermont Constitution, which, in pertinent part, reads, That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community, Vt. Const., ch. I, art 7., plaintiffs may not be deprived of the statutory benefits and protections afforded persons of the opposite sex who choose to marry. We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel "domestic partnership" system or some equivalent statutory alternative, rests with the Legislature. Whatever system is chosen, however, must conform with the constitutional imperative to afford all Vermonters the common benefit, protection, and security of the law.

Plaintiffs are three same-sex couples who have lived together in committed relationships for periods ranging from four to twenty-five years. Two of the couples have raised children together. Each couple applied for a marriage license from their respective town clerk, and each was refused a license as ineligible under the applicable state marriage laws. Plaintiffs thereupon filed this lawsuit against defendants -- the State of Vermont, the Towns of Milton and Shelburne, and the City of South Burlington -- seeking a declaratory judgment that the refusal to issue them a license violated the marriage statutes and the Vermont Constitution.

The State, joined by Shelburne and South Burlington, moved to dismiss the action on the ground that plaintiffs had failed to state a claim for which relief could be granted. The Town of Milton answered the complaint and subsequently moved for judgment on the pleadings. Plaintiffs opposed the motions and cross-moved for judgment on the pleadings. The trial court granted the State's and the Town of Milton's motions, denied plaintiffs' motion, and dismissed the complaint. The court ruled that the marriage statutes could not be construed to permit the issuance of a license to same-sex couples. The court further ruled that the marriage statutes were constitutional because they rationally furthered the State's interest in promoting "the link between procreation and child rearing." This appeal followed.

I. The Statutory Claim

Plaintiffs initially contend the trial court erred in concluding that the marriage statutes render them ineligible for a marriage license. . . Although it is not necessarily the only possible definition, there is no doubt that the plain and ordinary meaning of "marriage" is the union of one man and one woman as husband and wife. . . The legislative understanding is also reflected in the enabling statute governing the issuance of marriage licenses, which provides, in part, that the license "shall be issued by the clerk of the town where either the bride or groom resides." "Bride" and "groom" are gender-specific terms. . .

Further evidence of the legislative assumption that marriage consists of a union of opposite genders may be found in the consanguinity statutes, which expressly prohibit a man from marrying certain female relatives and a woman from marrying certain male relatives. In addition, the annulment statutes explicitly refer to "husband and wife," as do other statutes relating to married couples.

These statutes, read as a whole, reflect the common understanding that marriage under Vermont law consists of a union between a man and a woman. Plaintiffs essentially concede this fact. They argue, nevertheless, that the underlying purpose of marriage is to protect and encourage the union of committed couples and that, absent an explicit legislative prohibition, the statutes should be interpreted broadly to include committed same-sex couples. Plaintiffs rely principally on our decision in *In re B.L.V.B.*, 160 Vt. 368, 369, 628 A.2d 1271, 1272 (1993). There, we held that a woman who was co-parenting the two children of her same-sex partner could adopt the children without terminating the natural mother's parental rights. Although the statute provided generally that an adoption deprived the natural parents of their legal rights, it contained an exception where the adoption was by the "spouse" of the natural parent. Technically, therefore, the exception was inapplicable. We concluded, however, that the purpose of the law was not to restrict the exception to legally married couples, but to safeguard the child, and that to apply the literal language of the statute in these circumstances would defeat the statutory purpose and "reach an absurd result." Although the Legislature had undoubtedly not even considered same-sex unions when the law was enacted in 1945, our interpretation was consistent with its "general intent and spirit."

Contrary to plaintiffs' claim, *B.L.V.B.* does not control our conclusion here. We are not dealing in this case with a narrow statutory exception requiring a broader reading than its literal words would permit in order to avoid a result plainly at odds with the legislative purpose. Unlike *B.L.V.B.*, it is far from clear that limiting marriage to opposite-sex couples violates the Legislature's "intent and spirit." Rather, the evidence demonstrates a clear legislative assumption that marriage under our statutory scheme consists of a union between a man and a woman. Accordingly, we reject plaintiffs' claim that they were entitled to a license under the statutory scheme governing marriage.

II. The Constitutional Claim

Assuming that the marriage statutes preclude their eligibility for a marriage license, plaintiffs contend that the exclusion violates their right to the common benefit and protection of the law

guaranteed by Chapter I, Article 7 of the Vermont Constitution. They note that in denying them access to a civil marriage license, the law effectively excludes them from a broad array of legal benefits and protections incident to the marital relation, including access to a spouse's medical, life, and disability insurance, hospital visitation and other medical decision making privileges, spousal support, intestate succession, homestead protections, and many other statutory protections. They claim the trial court erred in upholding the law on the basis that it reasonably served the State's interest in promoting the "link between procreation and child rearing." They argue that the large number of married couples without children, and the increasing incidence of same-sex couples with children, undermines the State's rationale. They note that Vermont law affirmatively guarantees the right to adopt and raise children regardless of the sex of the parents and challenge the logic of a legislative scheme that recognizes the rights of same-sex partners as parents, yet denies them -- and their children -- the same security as spouses.

In considering this issue, it is important to emphasize at the outset that it is the Common Benefits Clause of the Vermont Constitution we are construing, rather than its counterpart, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. It is altogether fitting and proper that we do so. . .

As we explain in the discussion that follows, the Common Benefits Clause of the Vermont Constitution differs markedly from the federal Equal Protection Clause in its language, historical origins, purpose, and development. While the federal amendment may thus supplement the protections afforded by the Common Benefits Clause, it does not supplant it as the first and primary safeguard of the rights and liberties of all Vermonters. . .

A. . . .

B. . . .

C. . . .

D. Analysis under Article 7

The language and history of the Common Benefits Clause thus reinforce the conclusion that a relatively uniform standard, reflective of the inclusionary principle at its core, must govern our analysis of laws challenged under the Clause. Accordingly, we conclude that this approach, rather than the rigid, multi-tiered analysis evolved by the federal courts under the Fourteenth Amendment, shall direct our inquiry under Article 7. As noted, Article 7 is intended to ensure that the benefits and protections conferred by the State are for the common benefit of the community and are not for the advantage of persons "who are a part only of that community." When a statute is challenged under Article 7, we first define that "part of the community" disadvantaged by the law. We examine the statutory basis that distinguishes those protected by the law from those excluded from the State's protection. . .

We look next to the government's purpose in drawing a classification that includes some members of the community within the scope of the challenged law but excludes others. Consistent with Article 7's guiding principle of affording the protection and benefit of the law to

all members of the Vermont community, we examine the nature of the classification to determine whether it is reasonably necessary to accomplish the State's claimed objectives.

We must ultimately ascertain whether the omission of a part of the community from the benefit, protection and security of the challenged law bears a reasonable and just relation to the governmental purpose. . .

E. The Standard Applied

With these general precepts in mind, we turn to the question of whether the exclusion of same-sex couples from the benefits and protections incident to marriage under Vermont law contravenes Article 7. The first step in our analysis is to identify the nature of the statutory classification. As noted, the marriage statutes apply expressly to opposite-sex couples. Thus, the statutes exclude anyone who wishes to marry someone of the same sex.

Next, we must identify the governmental purpose or purposes to be served by the statutory classification. The principal purpose the State advances in support of the excluding same-sex couples from the legal benefits of marriage is the government's interest in "furthering the link between procreation and child rearing." The State has a strong interest, it argues, in promoting a permanent commitment between couples who have children to ensure that their offspring are considered legitimate and receive ongoing parental support. The State contends, further, that the Legislature could reasonably believe that sanctioning same-sex unions "would diminish society's perception of the link between procreation and child rearing . . . [and] advance the notion that fathers or mothers . . . are mere surplusage to the functions of procreation and child rearing." The State argues that since same-sex couples cannot conceive a child on their own, state-sanctioned same-sex unions "could be seen by the Legislature to separate further the connection between procreation and parental responsibilities for raising children." Hence, the Legislature is justified, the State concludes, "in using the marriage statutes to send a public message that procreation and child rearing are intertwined."

Do these concerns represent valid public interests that are reasonably furthered by the exclusion of same-sex couples from the benefits and protections that flow from the marital relation? It is beyond dispute that the State has a legitimate and long-standing interest in promoting a permanent commitment between couples for the security of their children. It is equally undeniable that the State's interest has been advanced by extending formal public sanction and protection to the union, or marriage, of those couples considered capable of having children, i.e., men and women. And there is no doubt that the overwhelming majority of births today continue to result from natural conception between one man and one woman.

It is equally undisputed that many opposite-sex couples marry for reasons unrelated to procreation, that some of these couples never intend to have children, and that others are incapable of having children. Therefore, if the purpose of the statutory exclusion of same-sex couples is to "further[] the link between procreation and child rearing," it is significantly under-inclusive. The law extends the benefits and protections of marriage to many persons with no logical connection to the stated governmental goal.

Furthermore, while accurate statistics are difficult to obtain, there is no dispute that a significant number of children today are actually being raised by same-sex parents, and that increasing numbers of children are being conceived by such parents through a variety of assisted-reproductive techniques. . .

Thus, with or without the marriage sanction, the reality today is that increasing numbers of same-sex couples are employing increasingly efficient assisted-reproductive techniques to conceive and raise children. The Vermont Legislature has not only recognized this reality, but has acted affirmatively to remove legal barriers so that same-sex couples may legally adopt and rear the children conceived through such efforts. See 15A V.S.A. § 1-102(b) (allowing partner of biological parent to adopt if in child's best interest without reference to sex). The State has also acted to expand the domestic relations laws to safeguard the interests of same-sex parents and their children when such couples terminate their domestic relationship. See 15A V.S.A. § 1-112 (vesting family court with jurisdiction over parental rights and responsibilities, parent-child contact, and child support when unmarried persons who have adopted minor child "terminate their domestic relationship").

Therefore, to the extent that the State's purpose in licensing civil marriage was, and is, to legitimize children and provide for their security, the statutes plainly exclude many same-sex couples who are no different from opposite-sex couples with respect to these objectives. If anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes their children to the precise risks that the State argues the marriage laws are designed to secure against. In short, the marital exclusion treats persons who are similarly situated for purposes of the law, differently.

The State also argues that because same-sex couples cannot conceive a child on their own, their exclusion promotes a "perception of the link between procreation and child rearing," and that to discard it would "advance the notion that mothers and fathers . . . are mere surplusage to the functions of procreation and child rearing" Apart from the bare assertion, the State offers no persuasive reasoning to support these claims. Indeed, it is undisputed that most of those who utilize non-traditional means of conception are infertile married couples and that many assisted-reproductive techniques involve only one of the married partner's genetic material, the other being supplied by a third party through sperm, egg, or embryo donation. The State does not suggest that the use of these technologies undermines a married couple's sense of parental responsibility, or fosters the perception that they are "mere surplusage" to the conception and parenting of the child so conceived. Nor does it even remotely suggest that access to such techniques ought to be restricted as a matter of public policy to "send a public message that procreation and child rearing are intertwined." Accordingly, there is no reasonable basis to conclude that a same-sex couple's use of the same technologies would undermine the bonds of parenthood, or society's perception of parenthood.

The question thus becomes whether the exclusion of a relatively small but significant number of otherwise qualified same-sex couples from the same legal benefits and protections afforded their opposite-sex counterparts contravenes the mandates of Article 7. . .

As noted, in determining whether a statutory exclusion reasonably relates to the governmental purpose it is appropriate to consider the history and significance of the benefits denied. What do these considerations reveal about the benefits and protections at issue here? In *Loving v. Virginia*, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967), the United States Supreme Court, striking down Virginia's anti- miscegenation law, observed that "the freedom to marry has long been recognized as one of the vital personal rights." The Court's point was clear; access to a civil marriage license and the multitude of legal benefits, protections, and obligations that flow from it significantly enhance the quality of life in our society.

The Supreme Court's observations in *Loving* merely acknowledged what many states, including Vermont, had long recognized. . .

While the laws relating to marriage have undergone many changes during the last century, largely toward the goal of equalizing the status of husbands and wives, the benefits of marriage have not diminished in value. On the contrary, the benefits and protections incident to a marriage license under Vermont law have never been greater. They include, for example, the right to receive a portion of the estate of a spouse who dies intestate and protection against disinheritance through elective share provisions, under 14 V.S.A. §§ 401-404, 551; preference in being appointed as the personal representative of a spouse who dies intestate, under 14 V.S.A. § 903; the right to bring a lawsuit for the wrongful death of a spouse, under 14 V.S.A. § 1492; the right to bring an action for loss of consortium, under 12 V.S.A. § 5431; the right to workers' compensation survivor benefits under 21 V.S.A. § 632; the right to spousal benefits statutorily guaranteed to public employees, including health, life, disability, and accident insurance, under 3 V.S.A. § 631; the opportunity to be covered as a spouse under group life insurance policies issued to an employee, under 8 V.S.A. § 3811; the opportunity to be covered as the insured's spouse under an individual health insurance policy, under 8 V.S.A. § 4063; the right to claim an evidentiary privilege for marital communications, under V.R.E. 504; homestead rights and protections, under 27 V.S.A. §§ 105-108, 141-142; the presumption of joint ownership of property and the concomitant right of survivorship, under 27 V.S.A. § 2; hospital visitation and other rights incident to the medical treatment of a family member, under 18 V.S.A. § 1852; and the right to receive, and the obligation to provide, spousal support, maintenance, and property division in the event of separation or divorce, under 15 V.S.A. §§ 751-752.

While other statutes could be added to this list, the point is clear. The legal benefits and protections flowing from a marriage license are of such significance that any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned. Considered in light of the extreme logical disjunction between the classification and the stated purposes of the law -- protecting children and "furthering the link between procreation and child rearing" -- the exclusion falls substantially short of this standard. The laudable governmental goal of promoting a commitment between married couples to promote the security of their children and the community as a whole provides no reasonable basis for denying the legal benefits and protections of marriage to same-sex couples, who are no differently situated with respect to this goal than their opposite-sex counterparts. Promoting a link between procreation and child rearing similarly fails to support the exclusion. We turn, accordingly, to the remaining interests identified by the State in support of the statutory exclusion.

The State asserts that a number of additional rationales could support a legislative decision to exclude same-sex partners from the statutory benefits and protections of marriage. Among these are the State's purported interests in "promoting child rearing in a setting that provides both male and female role models," minimizing the legal complications of surrogacy contracts and sperm donors, "bridging differences" between the sexes, discouraging marriages of convenience for tax, housing or other benefits, maintaining uniformity with marriage laws in other states, and generally protecting marriage from "destabilizing changes." The most substantive of the State's remaining claims relates to the issue of child rearing. It is conceivable that the Legislature could conclude that opposite-sex partners offer advantages in this area, although we note that child-development experts disagree and the answer is decidedly uncertain.

The argument, however, contains a more fundamental flaw, and that is the Legislature's endorsement of a policy diametrically at odds with the State's claim. In 1996, the Vermont General Assembly enacted, and the Governor signed, a law removing all prior legal barriers to the adoption of children by same-sex couples. See 15A V.S.A. § 1-102. At the same time, the Legislature provided additional legal protections in the form of court-ordered child support and parent-child contact in the event that same-sex parents dissolved their "domestic relationship." Id. § 1-112. In light of these express policy choices, the State's arguments that Vermont public policy favors opposite-sex over same-sex parents or disfavors the use of artificial reproductive technologies, are patently without substance.

Similarly, the State's argument that Vermont's marriage laws serve a substantial governmental interest in maintaining uniformity with other jurisdictions cannot be reconciled with Vermont's recognition of unions, such as first-cousin marriages, not uniformly sanctioned in other states. In an analogous context, Vermont has sanctioned adoptions by same-sex partners notwithstanding the fact that many states have not. Thus, the State's claim that Vermont's marriage laws were adopted because the Legislature sought to conform to those of the other forty-nine states is not only speculative, but refuted by two relevant legislative choices which demonstrate that uniformity with other jurisdictions has not been a governmental purpose. . .

Finally, it is suggested that the long history of official intolerance of intimate same-sex relationships cannot be reconciled with an interpretation of Article 7 that would give state-sanctioned benefits and protection to individuals of the same sex who commit to a permanent domestic relationship. We find the argument to be unpersuasive for several reasons. First, to the extent that state action historically has been motivated by an animus against a class, that history cannot provide a legitimate basis for continued unequal application of the law. As we observed recently in *Brigham*, 166 Vt. at 267, 692 A.2d at 396, "equal protection of the laws cannot be limited by eighteenth-century standards." Second, whatever claim may be made in light of the undeniable fact that federal and state statutes -- including those in Vermont -- have historically disfavored same-sex relationships, more recent legislation plainly undermines the contention. See, e.g., Laws of Vermont, 1977, No. 51, § 2, 3 (repealing former § 2603 of Title 13, which criminalized fellatio). In 1991, Vermont was one of the first states to enact statewide legislation prohibiting discrimination in employment, housing, and other services based on sexual orientation. See 21 V.S.A. § 495 (employment); 9 V.S.A. § 4503 (housing); 8 V.S.A. § 4724 (insurance); 9 V.S.A. § 4502 (public accommodations). Sexual orientation is among the categories specifically protected against hate-motivated crimes in Vermont. See 13 V.S.A. §

1455. Furthermore, as noted earlier, recent enactments of the General Assembly have removed barriers to adoption by same-sex couples, and have extended legal rights and protections to such couples who dissolve their "domestic relationship." See 15A V.S.A. §§ 1-102, 1-112.

Thus, viewed in the light of history, logic, and experience, we conclude that none of the interests asserted by the State provides a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law. Accordingly, in the faith that a case beyond the imagining of the framers of our Constitution may, nevertheless, be safely anchored in the values that infused it, we find a constitutional obligation to extend to plaintiffs the common benefit, protection, and security that Vermont law provides opposite-sex married couples. It remains only to determine the appropriate means and scope of relief compelled by this constitutional mandate.

F. Remedy

It is important to state clearly the parameters of today's ruling. . .

We hold only that plaintiffs are entitled under Chapter I, Article 7, of the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples. We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate, other than to note that the record here refers to a number of potentially constitutional statutory schemes from other jurisdictions. These include what are typically referred to as "domestic partnership" or "registered partnership" acts, which generally establish an alternative legal status to marriage for same-sex couples, impose similar formal requirements and limitations, create a parallel licensing or registration scheme, and extend all or most of the same rights and obligations provided by the law to married partners. . . Absent legislative guidelines defining the status and rights same-sex couples, consistent with constitutional requirements, uncertainty and confusion could result. Therefore, we hold that the current statutory scheme shall remain in effect for a reasonable period of time to enable the legislature to consider and enact implementing legislation in an orderly and expeditious fashion . . .

III. Conclusion

While many have noted the symbolic or spiritual significance of the marital relation, it is plaintiffs' claim to the secular benefits and protections of a singularly human relationship that, in our view, characterizes this case. The State's interest in extending official recognition and legal protection to the professed commitment of two individuals to a lasting relationship of mutual affection is predicated on the belief that legal support of a couple's commitment provides stability for the individuals, their family, and the broader community. Although plaintiffs' interest in seeking state recognition and protection of their mutual commitment may -- in view of divorce statistics -- represent "the triumph of hope over experience," the essential aspect of their claim is simply and fundamentally for inclusion in the family of State-sanctioned human relations.

. . . The extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity.

The judgment of the superior court upholding the constitutionality of the Vermont marriage statutes under Chapter I, Article 7 of the Vermont Constitution is reversed. The effect of the Court's decision is suspended, and jurisdiction is retained in this Court, to permit the Legislature to consider and enact legislation consistent with the constitutional mandate described herein.

Vermont Statutes Annotated
Title Fifteen. Domestic Relations. Chapter 23. Civil Unions
15 V.S.A. § 1201 (2001)

§ 1201. Definitions

As used in this chapter:

- (1) "Certificate of civil union" means a document that certifies that the persons named on the certificate have established a civil union in this state in compliance with this chapter and 18 V.S.A. chapter 106.
- (2) "Civil union" means that two eligible persons have established a relationship pursuant to this chapter, and may receive the benefits and protections and be subject to the responsibilities of spouses.
- (3) "Commissioner" means the commissioner of health.
- (4) "Marriage" means the legally recognized union of one man and one woman.
- (5) "Party to a civil union" means a person who has established a civil union pursuant to this chapter and 18 V.S.A. chapter 106.

§ 1202. Requisites of a valid civil union

For a civil union to be established in Vermont, it shall be necessary that the parties to a civil union satisfy all of the following criteria:

- (1) Not be a party to another civil union or a marriage.
- (2) Be of the same sex and therefore excluded from the marriage laws of this state.
- (3) Meet the criteria and obligations set forth in 18 V.S.A. chapter 106.

§ 1203. Person shall not enter a civil union with a relative

- (a) A woman shall not enter a civil union with her mother, grandmother, daughter, granddaughter, sister, brother's daughter, sister's daughter, father's sister or mother's sister.
- (b) A man shall not enter a civil union with his father, grandfather, son, grandson, brother, brother's son, sister's son, father's brother or mother's brother.
- (c) A civil union between persons prohibited from entering a civil union in subsection (a) or (b) of this section is void.

§ 1204. Benefits, protections and responsibilities of parties to a civil union

(a) Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.

(b) A party to a civil union shall be included in any definition or use of the terms "spouse," "family," "immediate family," "dependent," "next of kin," and other terms that denote the spousal relationship, as those terms are used throughout the law.

(c) Parties to a civil union shall be responsible for the support of one another to the same degree and in the same manner as prescribed under law for married persons.

(d) The law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union.

(e) The following is a nonexclusive list of legal benefits, protections and responsibilities of spouses, which shall apply in like manner to parties to a civil union:

(1) laws relating to title, tenure, descent and distribution, intestate succession, waiver of will, survivorship, or other incidents of the acquisition, ownership, or transfer, inter vivos or at death, of real or personal property, including eligibility to hold real and personal property as tenants by the entirety (parties to a civil union meet the common law unity of person qualification for purposes of a tenancy by the entirety);

(2) causes of action related to or dependent upon spousal status, including an action for wrongful death, emotional distress, loss of consortium, dramshop, or other torts or actions under contracts reciting, related to, or dependent upon spousal status;

(3) probate law and procedure, including nonprobate transfer;

(4) adoption law and procedure;

(5) group insurance for state employees under 3 V.S.A. § 631, and continuing care contracts under 8 V.S.A. § 8005;

(6) spouse abuse programs under 3 V.S.A. § 18;

(7) prohibitions against discrimination based upon marital status;

(8) victim's compensation rights under 13 V.S.A. § 5351;

(9) workers' compensation benefits;

(10) laws relating to emergency and nonemergency medical care and treatment, hospital visitation and notification, including the Patient's Bill of Rights under 18 V.S.A. chapter 42 and the Nursing Home Residents' Bill of Rights under 33 V.S.A. chapter 73;

- (11) terminal care documents under 18 V.S.A. chapter 111, and durable power of attorney for health care execution and revocation under 14 V.S.A. chapter 121;
 - (12) family leave benefits under 21 V.S.A. chapter 5, subchapter 4A;
 - (13) public assistance benefits under state law;
 - (14) laws relating to taxes imposed by the state or a municipality other than estate taxes;
 - (15) laws relating to immunity from compelled testimony and the marital communication privilege;
 - (16) the homestead rights of a surviving spouse under 27 V.S.A. § 105 and homestead property tax allowance under 32 V.S.A. § 6062;
 - (17) laws relating to loans to veterans under 8 V.S.A. § 1849;
 - (18) the definition of family farmer under 10 V.S.A. § 272;
 - (19) laws relating to the making, revoking and objecting to anatomical gifts by others under 18 V.S.A. § 5240;
 - (20) state pay for military service under 20 V.S.A. § 1544;
 - (21) application for absentee ballot under 17 V.S.A. § 2532;
 - (22) family landowner rights to fish and hunt under 10 V.S.A. § 4253;
 - (23) legal requirements for assignment of wages under 8 V.S.A. § 2235; and
 - (24) affirmance of relationship under 15 V.S.A. § 7.
- (f) The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.

§ 1205. Modification of civil union terms

Parties to a civil union may modify the terms, conditions, or effects of their civil union in the same manner and to the same extent as married persons who execute an antenuptial agreement or other agreement recognized and enforceable under the law, setting forth particular understandings with respect to their union.

§ 1206. Dissolution of civil unions

The family court shall have jurisdiction over all proceedings relating to the dissolution of civil unions. The dissolution of civil unions shall follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of marriage in accordance with chapter 11 of this title, including any residency requirements.

§ 1207. Commissioner of health; duties

- (a) The commissioner shall provide civil union license and certificate forms to all town and county clerks.
- (b) The commissioner shall keep a record of all civil unions.

[most references and notes omitted]

MARSHALL, C.J. Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. In return it imposes weighty legal, financial, and social obligations. The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may not. The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens. In reaching our conclusion we have given full deference to the arguments made by the Commonwealth. But it has failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples.

We are mindful that our decision marks a change in the history of our marriage law. Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. Neither view answers the question before us. Our concern is with the Massachusetts Constitution as a charter of governance for every person properly within its reach. "Our obligation is to define the liberty of all, not to mandate our own moral code." *Lawrence v. Texas*, 123 S. Ct. 2472, 2480 (2003) (Lawrence), quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992).

Whether the Commonwealth may use its formidable regulatory authority to bar same-sex couples from civil marriage is a question not previously addressed by a Massachusetts appellate court. It is a question the United States Supreme Court left open as a matter of Federal law in *Lawrence* where it was not an issue. There, the Court affirmed that the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner. The Court also reaffirmed the central role that decisions whether to marry or have children bear in shaping one's identity. The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life.

Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law.

The plaintiffs are fourteen individuals from five Massachusetts counties. As of April 11, 2001, the date they filed their complaint, the plaintiffs Gloria Bailey, sixty years old, and Linda Davies, fifty-five years old, had been in a committed relationship for thirty years; the plaintiffs Maureen Brodoff, forty-nine years old, and Ellen Wade, fifty-two years old, had been in a committed relationship for twenty years and lived with their twelve year old daughter; the plaintiffs Hillary Goodridge, forty-four years old, and Julie Goodridge, forty-three years old, had been in a committed relationship for thirteen years and lived with their five year old daughter; the plaintiffs Gary Chalmers, thirty-five years old, and Richard Linnell, thirty-seven years old, had been in a committed relationship for thirteen years and lived with their eight year old daughter and Richard's mother; the plaintiffs Heidi Norton, thirty-six years old, and Gina Smith, thirty-six years old, had been in a committed relationship for eleven years and lived with their two sons, ages five years and one year; the plaintiffs Michael Horgan, forty-one years old, and David Balmelli, forty-one years old, had been in a committed relationship for seven years; and the plaintiffs David Wilson, fifty-seven years old, and Robert Compton, fifty-one years old, had been in a committed relationship for four years and had cared for David's mother in their home after a serious illness until she died.

The plaintiffs include business executives, lawyers, an investment banker, educators, therapists, and a computer engineer. Many are active in church, community, and school groups. They have employed such legal means as are available to them -- for example, joint adoption, powers of attorney, and joint ownership of real property -- to secure aspects of their relationships. Each plaintiff attests a desire to marry his or her partner in order to affirm publicly their commitment to each other and to secure the legal protections and benefits afforded to married couples and their children.

The Department of Public Health (department) is charged by statute with safeguarding public health.. Among its responsibilities, the department oversees the registry of vital records and statistics (registry), which "enforce[s] all laws" relative to the issuance of marriage licenses and the keeping of marriage records and which promulgates policies and procedures for the issuance of marriage licenses by city and town clerks and registers The registry is headed by a registrar of vital records and statistics (registrar), appointed by the Commissioner of Public Health (commissioner) with the approval of the public health council and supervised by the commissioner.

In March and April, 2001, each of the plaintiff couples attempted to obtain a marriage license from a city or town clerk's office. . . . [T]hey completed notices of intention to marry on forms provided by the registry, and presented these forms to a Massachusetts town or city clerk, together with the required health forms and marriage license fees. In each case, the clerk either refused to accept the notice of intention to marry or denied a marriage license to the couple on the ground that Massachusetts does not recognize same-sex marriage. Because obtaining a marriage license is a necessary prerequisite to civil marriage in Massachusetts, denying marriage licenses to the plaintiffs was tantamount to denying them access to civil marriage itself, with its appurtenant social and legal protections, benefits, and obligations.

On April 11, 2001, the plaintiffs filed suit in the Superior Court against the department and the commissioner seeking a judgment that "the exclusion of the [p]laintiff couples and other qualified same-sex couples from access to marriage licenses, and the legal and social status of

civil marriage, as well as the protections, benefits and obligations of marriage, violates Massachusetts law." The plaintiffs alleged violation of the laws of the Commonwealth, including but not limited to their rights under . . . the Massachusetts Constitution.[\[7\]](#),

The department, represented by the Attorney General, admitted to a policy and practice of denying marriage licenses to same-sex couples. It denied that its actions violated any law or that the plaintiffs were entitled to relief. The parties filed cross motions for summary judgment.

A Superior Court judge ruled for the department. In a memorandum of decision and order dated May 7, 2002 . . . he held that the marriage exclusion does not offend the liberty, freedom, equality, or due process provisions of the Massachusetts Constitution, and that the Massachusetts Declaration of Rights does not guarantee "the fundamental right to marry a person of the same sex." He concluded that prohibiting same-sex marriage rationally furthers the Legislature's legitimate interest in safeguarding the "primary purpose" of marriage, "procreation." The Legislature may rationally limit marriage to opposite-sex couples, he concluded, because those couples are "theoretically . . . capable of procreation," they do not rely on "inherently more cumbersome" noncoital means of reproduction, and they are more likely than same-sex couples to have children, or more children.

After the complaint was dismissed and summary judgment entered for the defendants, the plaintiffs appealed. Both parties requested direct appellate review, which we granted. . .

III

A

The larger question is whether, as the department claims, government action that bars same-sex couples from civil marriage constitutes a legitimate exercise of the State's authority to regulate conduct, or whether, as the plaintiffs claim, this categorical marriage exclusion violates the Massachusetts Constitution. We have recognized the long-standing statutory understanding, derived from the common law, that "marriage" means the lawful union of a woman and a man. But that history cannot and does not foreclose the constitutional question.

The plaintiffs' claim that the marriage restriction violates the Massachusetts Constitution can be analyzed in two ways. Does it offend the Constitution's guarantees of equality before the law? Or do the liberty and due process provisions of the Massachusetts Constitution secure the plaintiffs' right to marry their chosen partner? In matters implicating marriage, family life, and the upbringing of children, the two constitutional concepts frequently overlap, as they do here. Much of what we say concerning one standard applies to the other.

We begin by considering the nature of civil marriage itself. Simply put, the government creates civil marriage. In Massachusetts, civil marriage is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution. No religious ceremony has ever been required to validate a Massachusetts marriage.

In a real sense, there are three partners to every civil marriage: two willing spouses and an

approving State. While only the parties can mutually assent to marriage, the terms of the marriage -- who may marry and what obligations, benefits, and liabilities attach to civil marriage -- are set by the Commonwealth. Conversely, while only the parties can agree to end the marriage (absent the death of one of them or a marriage void ab initio), the Commonwealth defines the exit terms.

Civil marriage is created and regulated through exercise of the police power "Police power" (now more commonly termed the State's regulatory authority) is an old-fashioned term for the Commonwealth's lawmaking authority, as bounded by the liberty and equality guarantees of the Massachusetts Constitution and its express delegation of power from the people to their government. In broad terms, it is the Legislature's power to enact rules to regulate conduct, to the extent that such laws are "necessary to secure the health, safety, good order, comfort, or general welfare of the community"

Without question, civil marriage enhances the "welfare of the community." It is a "social institution of the highest importance." Civil marriage anchors an ordered society by encouraging stable relationships over transient ones. It is central to the way the Commonwealth identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds, and tracks important epidemiological and demographic data.

Marriage also bestows enormous private and social advantages on those who choose to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. "It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). Because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.

Tangible as well as intangible benefits flow from marriage. The marriage license grants valuable property rights to those who meet the entry requirements, and who agree to what might otherwise be a burdensome degree of government regulation of their activities. The Legislature has conferred on "each party [in a civil marriage] substantial rights concerning the assets of the other which unmarried cohabitants do not have." *Wilcox v. Trautz*, 427 Mass. 326, 334 (1998).

The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death. The department states that "hundreds of statutes" are related to marriage and to marital benefits. With no attempt to be comprehensive, we note that some of the statutory benefits conferred by the Legislature on those who enter into civil marriage include, as to property: joint Massachusetts income tax filing (G. L. c. 62C, § 6); tenancy by the entirety (a form of ownership that provides certain protections against creditors and allows for the automatic descent of property to the surviving spouse without probate) (G. L. c. 184, § 7); extension of the benefit of the homestead protection (securing up to \$300,000 in equity from creditors) to one's spouse and children (G. L. c. 188, § 1); automatic rights to inherit the property of a deceased spouse who does not leave a will (G. L. c. 190, § 1); the rights of elective share

and of dower (which allow surviving spouses certain property rights where the decedent spouse has not made adequate provision for the survivor in a will) (G. L. c. 191, § 15, and G. L. c. 189); entitlement to wages owed to a deceased employee (G. L. c. 149, § 178A [general] and G. L. c. 149, § 178C [public employees]); eligibility to continue certain businesses of a deceased spouse (e.g., G. L. c. 112, § 53 [dentist]); the right to share the medical policy of one's spouse (e.g., G. L. c. 175, § 108, Second [a] [3] [defining an insured's "dependent" to include one's spouse), see *Connors v. Boston*, 430 Mass. 31, 43 (1999) [domestic partners of city employees not included within the term "dependent" as used in G. L. c. 32B, § 2]); thirty-nine week continuation of health coverage for the spouse of a person who is laid off or dies (e.g., G. L. c. 175, § 110G); preferential options under the Commonwealth's pension system (see G. L. c. 32, § 12 [2] ["Joint and Last Survivor Allowance"]); preferential benefits in the Commonwealth's medical program, MassHealth (e.g., 130 Code Mass. Regs. § 515.012 [A] prohibiting placing a lien on long-term care patient's former home if spouse still lives there); access to veterans' spousal benefits and preferences (e.g., G. L. c. 115, § 1 [defining "dependents"] and G. L. c. 31, § 26 [State employment] and § 28 [municipal employees]); financial protections for spouses of certain Commonwealth employees (fire fighters, police officers, prosecutors, among others) killed in the performance of duty (e.g., G. L. c. 32, §§ 100-103); the equitable division of marital property on divorce (G. L. c. 208, § 34); temporary and permanent alimony rights (G. L. c. 208, §§ 17 and 34); the right to separate support on separation of the parties that does not result in divorce (G. L. c. 209, § 32); and the right to bring claims for wrongful death and loss of consortium, and for funeral and burial expenses and punitive damages resulting from tort actions (G. L. c. 229, §§ 1 and 2; G. L. c. 228, § 1

Exclusive marital benefits that are not directly tied to property rights include the presumptions of legitimacy and parentage of children born to a married couple (G. L. c. 209C, § 6, and G. L. c. 46, § 4B); and evidentiary rights, such as the prohibition against spouses testifying against one another about their private conversations, applicable in both civil and criminal cases (G. L. c. 233, § 20). Other statutory benefits of a personal nature available only to married individuals include qualification for bereavement or medical leave to care for individuals related by blood or marriage (G. L. c. 149, § 52D); an automatic "family member" preference to make medical decisions for an incompetent or disabled spouse who does not have a contrary health care proxy, see *Shine v. Vega*, 429 Mass. 456, 466 (1999); the application of predictable rules of child custody, visitation, support, and removal out-of-State when married parents divorce (e.g., G. L. c. 208, § 19 [temporary custody], § 20 [temporary support], § 28 [custody and support on judgment of divorce], § 30 [removal from Commonwealth], and § 31 [shared custody plan]; priority rights to administer the estate of a deceased spouse who dies without a will, and requirement that surviving spouse must consent to the appointment of any other person as administrator (G. L. c. 38, § 13 [disposition of body], and G. L. c. 113, § 8 [anatomical gifts]); and the right to interment in the lot or tomb owned by one's deceased spouse (G. L. c. 114, §§ 29-33).

Where a married couple has children, their children are also directly or indirectly, but no less auspiciously, the recipients of the special legal and economic protections obtained by civil marriage. Notwithstanding the Commonwealth's strong public policy to abolish legal distinctions between marital and nonmarital children in providing for the support and care of minors, the fact remains that marital children reap a measure of family stability and economic security based on

their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of one's parentage.

It is undoubtedly for these concrete reasons, as well as for its intimately personal significance, that civil marriage has long been termed a "civil right." The United States Supreme Court has described the right to marry as "of fundamental importance for all individuals" and as "part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). See *Loving v. Virginia*, ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men").^[14]

Without the right to marry -- or more properly, the right to choose to marry -- one is excluded from the full range of human experience and denied full protection of the laws for one's "avowed commitment to an intimate and lasting human relationship." Because civil marriage is central to the lives of individuals and the welfare of the community, our laws assiduously protect the individual's right to marry against undue government incursion. Laws may not "interfere directly and substantially with the right to marry."

Unquestionably, the regulatory power of the Commonwealth over civil marriage is broad, as is the Commonwealth's discretion to award public benefits. Individuals who have the choice to marry each other and nevertheless choose not to may properly be denied the legal benefits of marriage. But that same logic cannot hold for a qualified individual who would marry if she or he only could.

B

For decades, indeed centuries, in much of this country (including Massachusetts) no lawful marriage was possible between white and black Americans. That long history availed not when the Supreme Court of California held in 1948 that a legislative prohibition against interracial marriage violated the due process and equality guarantees of the Fourteenth Amendment, *Perez v. Sharp*, 32 Cal. 2d 711, 728 (1948), or when, nineteen years later, the United States Supreme Court also held that a statutory bar to interracial marriage violated the Fourteenth Amendment, *Loving v. Virginia*, 388 U.S. 1 (1967). As both *Perez* and *Loving* make clear, the right to marry means little if it does not include the right to marry the person of one's choice, subject to appropriate government restrictions in the interests of public health, safety, and welfare. See *Perez v. Sharp*, ("the essence of the right to marry is freedom to join in marriage with the person of one's choice"). In this case, as in *Perez* and *Loving*, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance -- the institution of marriage -- because of a single trait: skin color in *Perez* and *Loving*, sexual orientation here. As it did in *Perez* and *Loving*, history must yield to a more fully developed understanding of the invidious quality of the discrimination.

The Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both

Constitutions employ essentially the same language. That the Massachusetts Constitution is in some instances more protective of individual liberty interests than is the Federal Constitution is not surprising. Fundamental to the vigor of our Federal system of government is that "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.

The individual liberty and equality safeguards of the Massachusetts Constitution protect both "freedom from" unwarranted government intrusion into protected spheres of life and "freedom to" partake in benefits created by the State for the common good. Both freedoms are involved here. Whether and whom to marry, how to express sexual intimacy, and whether and how to establish a family -- these are among the most basic of every individual's liberty and due process rights. See, e.g., *Lawrence*; *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Roe v. Wade*, 410 U.S. 113, 152-153 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Loving v. Virginia*. And central to personal freedom and security is the assurance that the laws will apply equally to persons in similar situations. "Absolute equality before the law is a fundamental principle of our own Constitution." *Opinion of the Justices*, 211 Mass. 618, 619 (1912). The liberty interest in choosing whether and whom to marry would be hollow if the Commonwealth could, without sufficient justification, foreclose an individual from freely choosing the person with whom to share an exclusive commitment in the unique institution of civil marriage.

The Massachusetts Constitution requires, at a minimum, that the exercise of the State's regulatory authority not be "arbitrary or capricious. Under both the equality and liberty guarantees, regulatory authority must, at very least, serve "a legitimate purpose in a rational way"; a statute must "bear a reasonable relation to a permissible legislative objective."

The plaintiffs challenge the marriage statute on both equal protection and due process grounds. With respect to each such claim, we must first determine the appropriate standard of review. Where a statute implicates a fundamental right or uses a suspect classification, we employ "strict judicial scrutiny." *Lowell v. Kowalski*, 380 Mass. 663, 666 (1980). For all other statutes, we employ the "'rational basis' test." *English v. New England Med. Ctr.*, 405 Mass. 423, 428 (1989). For due process claims, rational basis analysis requires that statutes "bear[] a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare. For equal protection challenges, the rational basis test requires that "an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class."

The department argues that no fundamental right or "suspect" class is at issue here.^[21] and rational basis is the appropriate standard of review. For the reasons we explain below, we conclude that the marriage ban does not meet the rational basis test for either due process or equal protection. Because the statute does not survive rational basis review, we do not consider the plaintiffs' arguments that this case merits strict judicial scrutiny.

The department posits three legislative rationales for prohibiting same-sex couples from marrying: (1) providing a "favorable setting for procreation"; (2) ensuring the optimal setting for child rearing, which the department defines as "a two-parent family with one parent of each sex";

and (3) preserving scarce State and private financial resources. We consider each in turn.

The judge in the Superior Court endorsed the first rationale, holding that "the state's interest in regulating marriage is based on the traditional concept that marriage's primary purpose is procreation." This is incorrect. Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family. General Laws c. 207 contains no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus. Fertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married. People who cannot stir from their deathbed may marry. While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.

Moreover, the Commonwealth affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual.^[24] If procreation were a necessary component of civil marriage, our statutes would draw a tighter circle around the permissible bounds of nonmarital child bearing and the creation of families by noncoital means. The attempt to isolate procreation as "the source of a fundamental right to marry," overlooks the integrated way in which courts have examined the complex and overlapping realms of personal autonomy, marriage, family life, and child rearing. Our jurisprudence recognizes that, in these nuanced and fundamentally private areas of life, such a narrow focus is inappropriate.

The "marriage is procreation" argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage. Like "Amendment 2" to the Constitution of Colorado, which effectively denied homosexual persons equality under the law and full access to the political process, the marriage restriction impermissibly "identifies persons by a single trait and then denies them protection across the board." *Romer v. Evans*, 517 U.S. 620, 633 (1996). In so doing, the State's action confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect.

The department's first stated rationale, equating marriage with unassisted heterosexual procreation, shades imperceptibly into its second: that confining marriage to opposite-sex couples ensures that children are raised in the "optimal" setting. Protecting the welfare of children is a paramount State policy. Restricting marriage to opposite-sex couples, however, cannot plausibly further this policy. "The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household." *Troxel v. Granville*, 530 U.S. 57, 63 (2000). Massachusetts has responded supportively to "the changing realities of the American family," and has moved vigorously to strengthen the modern family in its many variations. See, e.g., G. L. c. 209C (paternity statute); G. L. c. 119, § 39D (grandparent visitation statute; *E.N.O. v. L.M.M.*, 429 Mass. 824, cert. denied, 528 U.S. 1005 (1999) (de facto parent); and *Adoption of Tammy*, 416

Mass. 205 (1993) (coparent adoption). Moreover, we have repudiated the common-law power of the State to provide varying levels of protection to children based on the circumstances of birth. The "best interests of the child" standard does not turn on a parent's sexual orientation or marital status.

The department has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children. There is thus no rational relationship between the marriage statute and the Commonwealth's proffered goal of protecting the "optimal" child rearing unit. Moreover, the department readily concedes that people in same-sex couples may be "excellent" parents. These couples (including four of the plaintiff couples) have children for the reasons others do -- to love them, to care for them, to nurture them. But the task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws. While establishing the parentage of children as soon as possible is crucial to the safety and welfare of children, same-sex couples must undergo the sometimes lengthy and intrusive process of second-parent adoption to establish their joint parentage. While the enhanced income provided by marital benefits is an important source of security and stability for married couples and their children, those benefits are denied to families headed by same-sex couples. While the laws of divorce provide clear and reasonably predictable guidelines for child support, child custody, and property division on dissolution of a marriage, same-sex couples who dissolve their relationships find themselves and their children in the highly unpredictable terrain of equity jurisdiction. Given the wide range of public benefits reserved only for married couples, we do not credit the department's contention that the absence of access to civil marriage amounts to little more than an inconvenience to same-sex couples and their children. Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of "a stable family structure in which children will be reared, educated, and socialized."

No one disputes that the plaintiff couples are families, that many are parents, and that the children they are raising, like all children, need and should have the fullest opportunity to grow up in a secure, protected family unit. Similarly, no one disputes that, under the rubric of marriage, the State provides a cornucopia of substantial benefits to married parents and their children. The preferential treatment of civil marriage reflects the Legislature's conclusion that marriage "is the foremost setting for the education and socialization of children" precisely because it "encourages parents to remain committed to each other and to their children as they grow."

In this case, we are confronted with an entire, sizeable class of parents raising children who have absolutely no access to civil marriage and its protections because they are forbidden from procuring a marriage license. It cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents' sexual orientation.

The third rationale advanced by the department is that limiting marriage to opposite-sex couples furthers the Legislature's interest in conserving scarce State and private financial resources. The marriage restriction is rational, it argues, because the General Court logically could assume that same-sex couples are more financially independent than married couples and thus less needy of

public marital benefits, such as tax advantages, or private marital benefits, such as employer-financed health plans that include spouses in their coverage.

An absolute statutory ban on same-sex marriage bears no rational relationship to the goal of economy. First, the department's conclusory generalization -- that same-sex couples are less financially dependent on each other than opposite-sex couples -- ignores that many same-sex couples, such as many of the plaintiffs in this case, have children and other dependents (here, aged parents) in their care. The department does not contend, nor could it, that these dependents are less needy or deserving than the dependents of married couples. Second, Massachusetts marriage laws do not condition receipt of public and private financial benefits to married individuals on a demonstration of financial dependence on each other; the benefits are available to married couples regardless of whether they mingle their finances or actually depend on each other for support.

The department suggests additional rationales for prohibiting same-sex couples from marrying, which are developed by some amici. It argues that broadening civil marriage to include same-sex couples will trivialize or destroy the institution of marriage as it has historically been fashioned. Certainly our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries. But it does not disturb the fundamental value of marriage in our society.

Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law. Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race. If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.

It has been argued that, due to the State's strong interest in the institution of marriage as a stabilizing social structure, only the Legislature can control and define its boundaries. Accordingly, our elected representatives legitimately may choose to exclude same-sex couples from civil marriage in order to assure all citizens of the Commonwealth that (1) the benefits of our marriage laws are available explicitly to create and support a family setting that is, in the Legislature's view, optimal for child rearing, and (2) the State does not endorse gay and lesbian parenthood as the equivalent of being raised by one's married biological parents. These arguments miss the point. The Massachusetts Constitution requires that legislation meet certain criteria and not extend beyond certain limits. It is the function of courts to determine whether these criteria are met and whether these limits are exceeded. In most instances, these limits are defined by whether a rational basis exists to conclude that legislation will bring about a rational result. The Legislature in the first instance, and the courts in the last instance, must ascertain whether such a rational basis exists. To label the court's role as usurping that of the Legislature, is to misunderstand the nature and purpose of judicial review. We owe great deference to the

Legislature to decide social and policy issues, but it is the traditional and settled role of courts to decide constitutional issues.

The history of constitutional law "is the story of the extension of constitutional rights and protections to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996) (construing equal protection clause of the Fourteenth Amendment to prohibit categorical exclusion of women from public military institute). This statement is as true in the area of civil marriage as in any other area of civil rights. As a public institution and a right of fundamental importance, civil marriage is an evolving paradigm. The common law was exceptionally harsh toward women who became wives: a woman's legal identity all but evaporated into that of her husband. Thus, one early Nineteenth Century jurist could observe matter of factly that, prior to the abolition of slavery in Massachusetts, "the condition of a slave resembled the connection of a wife with her husband, and of infant children with their father. He is obliged to maintain them, and they cannot be separated from him." *Winchendon v. Hatfield*, 4 Mass. 123, 129 (1808). But since at least the middle of the Nineteenth Century, both the courts and the Legislature have acted to ameliorate the harshness of the common-law regime. In *Bradford v. Worcester*, 184 Mass. 557, 562 (1904), we refused to apply the common-law rule that the wife's legal residence was that of her husband to defeat her claim to a municipal "settlement of paupers." In *Lewis v. Lewis*, 370 Mass. 619, 629 (1976), we abrogated the common-law doctrine immunizing a husband against certain suits because the common-law rule was predicated on "antediluvian assumptions concerning the role and status of women in marriage and in society.". Alarms about the imminent erosion of the "natural" order of marriage were sounded over the demise of antimiscegenation laws, the expansion of the rights of married women, and the introduction of "no-fault" divorce.[Marriage has survived all of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution.

We also reject the argument suggested by the department, and elaborated by some amici, that expanding the institution of civil marriage in Massachusetts to include same-sex couples will lead to interstate conflict. We would not presume to dictate how another State should respond to today's decision. But neither should considerations of comity prevent us from according Massachusetts residents the full measure of protection available under the Massachusetts Constitution. The genius of our Federal system is that each State's Constitution has vitality specific to its own traditions, and that, subject to the minimum requirements of the Fourteenth Amendment, each State is free to address difficult issues of individual liberty in the manner its own Constitution demands.

Several amici suggest that prohibiting marriage by same-sex couples reflects community consensus that homosexual conduct is immoral. Yet Massachusetts has a strong affirmative policy of preventing discrimination on the basis of sexual orientation. See G. L. c. 151B (employment, housing, credit, services); G. L. c. 265, § 39 (hate crimes); G. L. c. 272, § 98 (public accommodation); G. L. c. 76, § 5 (public education). See also, e.g., *Commonwealth v. Balthazar*, 366 Mass. 298 (1974) (decriminalization of private consensual adult conduct); *Doe v. Doe*, 16 Mass. App. Ct. 499, 503 (1983) (custody to homosexual parent not per se prohibited).

The department has had more than ample opportunity to articulate a constitutionally adequate justification for limiting civil marriage to opposite-sex unions. It has failed to do so. The

department has offered purported justifications for the civil marriage restriction that are starkly at odds with the comprehensive network of vigorous, gender-neutral laws promoting stable families and the best interests of children. It has failed to identify any relevant characteristic that would justify shutting the door to civil marriage to a person who wishes to marry someone of the same sex.

The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual. "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (construing Fourteenth Amendment). Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.

IV

We consider next the plaintiffs' request for relief. We preserve as much of the statute as may be preserved in the face of the successful constitutional challenge.

Here, no one argues that striking down the marriage laws is an appropriate form of relief. Eliminating civil marriage would be wholly inconsistent with the Legislature's deep commitment to fostering stable families and would dismantle a vital organizing principle of our society. We face a problem similar to one that recently confronted the Court of Appeal for Ontario, the highest court of that Canadian province, when it considered the constitutionality of the same-sex marriage ban under Canada's Federal Constitution, the Charter of Rights and Freedoms (Charter). Canada, like the United States, adopted the common law of England that civil marriage is "the voluntary union for life of one man and one woman, to the exclusion of all others." In holding that the limitation of civil marriage to opposite-sex couples violated the Charter, the Court of Appeal refined the common-law meaning of marriage. We concur with this remedy, which is entirely consonant with established principles of jurisprudence empowering a court to refine a common-law principle in light of evolving constitutional standards

We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others. This reformulation redresses the plaintiffs' constitutional injury and furthers the aim of marriage to promote stable, exclusive relationships. It advances the two legitimate State interests the department has identified: providing a stable setting for child rearing and conserving State resources. It leaves intact the Legislature's broad discretion to regulate marriage.

In their complaint the plaintiffs request only a declaration that their exclusion and the exclusion of other qualified same-sex couples from access to civil marriage violates Massachusetts law. We declare that barring an individual from the protections, benefits, and obligations of civil

marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution. We vacate the summary judgment for the department. We remand this case to the Superior Court for entry of judgment consistent with this opinion. Entry of judgment shall be stayed for 180 days to permit the Legislature to take such action as it may deem appropriate in light of this opinion.

So ordered.

FOOTNOTES:

[14] Civil marriage enjoys a dual and in some sense paradoxical status as both a State-conferred benefit (with its attendant obligations) and a multi-faceted personal interest of "fundamental importance." *Zablocki v. Redhail*, 434 U.S. 376, 383 (1978). As a practical matter, the State could not abolish civil marriage without chaotic consequences. The "right to marry," *id.* at 387, is different from rights deemed "fundamental" for equal protection and due process purposes because the State could, in theory, abolish all civil marriage while it cannot, for example, abolish all private property rights.

[21] Article 1 of the Massachusetts Constitution specifically prohibits sex-based discrimination. See post at (Greaney, J., concurring). We have not previously considered whether "sexual orientation" is a "suspect" classification. Our resolution of this case does not require that inquiry here.

[24] Adoption and certain insurance coverage for assisted reproductive technology are available to married couples, same- sex couples, and single individuals alike. See G. L. c. 210, § 1; *Adoption of Tammy*, 416 Mass. 205 (1993) (adoption); G. L. c. 175, § 47H; G. L. c. 176A, § 8K; G. L. c. 176B, § 4J; and G. L. c. 176G, § 4 (insurance coverage). See also *Woodward v. Commissioner of Social Sec.*, 435 Mass. 536, 546 (2002) (posthumous reproduction); *Culliton v. Beth Israel Deaconess Med. Ctr.*, 435 Mass. 285, 293 (2001) (gestational surrogacy).

Massachusetts constitutional amendment #2

Initiative Petition for proposed amendment. Go to <http://sage3.sage-systems.com/hosted/massequality/> to see list of people who have signed the petition by town.

"When recognizing marriages entered into after the adoption of this amendment by the people, the Commonwealth and its political subdivisions shall define marriage only as the union of one man and one woman."

January 2, 2007. Massachusetts legislature.
1st Ballot, 61-132. A "yes" vote was in favor of sending the ballot question to the voters; a "no" vote was against it.

HOUSE

Cory Atkins, D-Concord - N
Demetrius J. Atsalis, D-Hyannis - N
Bruce J. Ayers, D-Quincy - Y
Ruth B. Balsler, D-Newton - N
John J. Binienda, D-Worcester - Y
Daniel E. Bosley, D-North Adams - X
Garrett J. Bradley, D-Hingham - N
Arthur J. Broadhurst, D-Methuen - N
Antonio F. D. Cabral, D-New Bedford - N
Jennifer M. Callahan, D-Sutton - N
Christine E. Canavan, D-Brockton - Y
Gale D. Candaras, D-Wilbraham - Y
Stephen R. Canessa, D-New Bedford - N
Mark J. Carron, D-Southbridge - Y
Paul C. Casey, D-Winchester - Y
Cheryl A. Coakley-Rivera, D-Springfield - N
Virginia Coppola, R-Foxborough - Y
Robert Correia, D-Fall River - Y
Michael A. Costello, D-Newburyport - N
Robert K. Coughlin, D-Dedham - N
Geraldine Creedon, D-Brockton - Y
Sean Curran, D-Springfield - Y
Robert A. DeLeo, D-Winthrop - N
Viriato Manuel deMacedo, R-Plymouth - Y
Brian S. Dempsey, D-Haverhill - N
Salvatore F. DiMasi, D-Boston - N
Paul J. Donato, D-Medford - Y
Christopher J. Donelan, D-Orange - N
Joseph R. Driscoll, D-Braintree - N

January 2, 2007. Massachusetts legislature.
2nd Ballot, 62-134. A "yes" vote was in favor of sending the ballot question to the voters; a "no" vote was against it.

HOUSE

Cory Atkins, D-Concord - N
Demetrius J. Atsalis, D-Hyannis - N
Bruce J. Ayers, D-Quincy - Y
Ruth B. Balsler, D-Newton - N
John J. Binienda, D-Worcester - Y
Daniel E. Bosley, D-North Adams - N
Garrett J. Bradley, D-Hingham - N
Arthur J. Broadhurst, D-Methuen - N
Antonio F. D. Cabral, D-New Bedford - N
Jennifer M. Callahan, D-Sutton - N
Christine E. Canavan, D-Brockton - Y
Gale D. Candaras, D-Wilbraham - Y
Stephen R. Canessa, D-New Bedford - N
Mark J. Carron, D-Southbridge - Y
Paul C. Casey, D-Winchester - Y
Cheryl A. Coakley-Rivera, D-Springfield - N
Virginia Coppola, R-Foxborough - Y
Robert Correia, D-Fall River - Y
Michael A. Costello, D-Newburyport - N
Robert K. Coughlin, D-Dedham - N
Geraldine Creedon, D-Brockton - Y
Sean Curran, D-Springfield - Y
Robert A. DeLeo, D-Winthrop - N
Viriato Manuel deMacedo, R-Plymouth - Y
Brian S. Dempsey, D-Haverhill - N
Salvatore F. DiMasi, D-Boston - N
Paul J. Donato, D-Medford - Y
Christopher J. Donelan, D-Orange - N
Joseph R. Driscoll, D-Braintree - N

James B. Eldridge, D-Acton - N
 Lewis G. Evangelidis, R-Holden - Y
 James H. Fagan, D-Taunton - Y
 Christopher G. Fallon, D-Malden - N
 Mark V. Falzone, D-Saugus - N
 Robert F. Fennell, D-Lynn - N
 Michael E. Festa, D-Melrose - N
 Barry R. Finegold, D-Andover - N
 Jennifer Flanagan, D-Leominster - N
 David L. Flynn, D-Bridgewater - Y
 Linda Dorcena Forry, D-Boston - N
 Gloria L. Fox, D-Boston - N
 John P. Fresolo, D-Worcester - Y
 Paul K. Frost, R-Auburn - Y
 William C. Galvin, D-Canton - N
 Colleen M. Garry, D-Dracut - Y
 Susan W. Gifford, R-Wareham - Y
 Anne M. Gobi, D-Spencer - N
 Emile J. Goguen, D-Fitchburg - Y
 Thomas A. Golden Jr., D-Lowell - N
 Shirley Gomes, R-South Harwich - Y
 Mary E. Grant, D-Beverly - N
 William G. Greene Jr., D-Billerica - Y
 Dennis Guyer, D-Dalton - N
 Patricia A. Haddad, D-Somerset - N
 Geoffrey D. Hall, D-Westford - N
 Robert S. Hargraves, R-Groton - Y
 Lida E. Harkins, D-Needham - N
 Bradford Hill, R-Ipswich - N
 Kevin G. Honan, D-Boston - N
 Donald F. Humason Jr., R-Westfield - Y
 Frank M. Hynes, D-Marshfield - Y
 Bradley H. Jones Jr., R-North Reading - N
 Louis L. Kafka, D-Sharon - N
 Michael F. Kane, D-Holyoke - Y
 Rachel Kaprielian, D-Watertown - N
 Jay R. Kaufman, D-Lexington - N
 John Keenan, D-Salem - N
 Thomas P. Kennedy, D-Brockton - N
 Kay Khan, D-Newton - N
 Peter V. Kocot, D-Florence - N
 Robert M. Koczera, D-New Bedford - N
 Peter J. Koutoujian, D-Waltham - N
 Paul Kujawski, D-Webster - Y
 Stephen Kulik, D-Worthington - N
 William Lantigua, D-Lawrence - Y

James B. Eldridge, D-Acton - N
 Lewis G. Evangelidis, R-Holden - Y
 James H. Fagan, D-Taunton - Y
 Christopher G. Fallon, D-Malden - N
 Mark V. Falzone, D-Saugus - N
 Robert F. Fennell, D-Lynn - N
 Michael E. Festa, D-Melrose - N
 Barry R. Finegold, D-Andover - N
 Jennifer Flanagan, D-Leominster - N
 David L. Flynn, D-Bridgewater - Y
 Linda Dorcena Forry, D-Boston - N
 Gloria L. Fox, D-Boston - N
 John P. Fresolo, D-Worcester - Y
 Paul K. Frost, R-Auburn - Y
 William C. Galvin, D-Canton - N
 Colleen M. Garry, D-Dracut - Y
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 Paul Kujawski, D-Webster - Y
 Stephen Kulik, D-Worthington - N
 William Lantigua, D-Lawrence - Y

James Brendan Leary, D-Worcester - N
 Stephen P. LeDuc, D-Marlboro - N
 John A. Lepper, R-Attleboro - Y
 David P. Linsky, D-Natick - N
 Barbara A. L'Italien, D-Andover - N
 Paul J. Loscocco, R-Holliston - Y
 Elizabeth A. Malia, D-Boston - N
 Ronald Mariano, D-Quincy - N
 James J. Marzilli Jr., D-Arlington - N
 James R. Miceli, D-Wilmington - Y
 Michael J. Moran, D-Boston - N
 Charles A. Murphy, D-Burlington - N
 James M. Murphy, D-Weymouth - Y
 Kevin J. Murphy, D-Lowell - N
 David M. Nangle, D-Lowell - Y
 Patrick Natale, D-Woburn - N
 Harold P. Naughton Jr., D-Clinton - N
 Robert J. Nyman, D-Hanover - Y
 Thomas J. O'Brien, D-Kingston - N
 Eugene L. O'Flaherty, D-Chelsea - N
 Shirley Owens-Hicks, D-Boston - X
 Marie J. Parente, D-Milford - Y
 Matthew Patrick, D-Falmouth - N
 Anne M. Paulsen, D-Belmont - N
 Vincent A. Pedone, D-Worcester - N
 Alice H. Peisch, D-Wellesley - N
 Jeffrey D. Perry, R-Sandwich - Y
 Douglas W. Petersen, D-Marblehead - N
 George N. Peterson Jr., R-Grafton - Y
 Thomas M. Petrolati, D-Ludlow - Y
 Anthony Petruccelli, D-Boston - N
 William "Smitty" Pignatelli, D-Lenox - X
 Elizabeth A. Poirier, R-North Attleboro - Y
 Karyn E. Polito, R-Shrewsbury - Y
 Susan W. Pope, R-Wayland - Y
 Denise Provost, D-Somerville - N
 John F. Quinn, D-Dartmouth - N
 Kathi-Anne Reinstein, D-Revere - N
 Robert Rice, D-Gardner - N
 Michael J. Rodrigues, D-Westport - N
 Mary S. Rogeness, R-Longmeadow - Y
 John H. Rogers, D-Norwood - N
 Richard Ross, R-Wrentham - Y
 Michael F. Rush, D-Boston - Y
 Byron Rushing, D-Boston - N
 Jeffrey Sanchez, D-Boston - N

James Brendan Leary, D-Worcester - N
 Stephen P. LeDuc, D-Marlboro - N
 John A. Lepper, R-Attleboro - Y
 David P. Linsky, D-Natick - N
 Barbara A. L'Italien, D-Andover - N
 Paul J. Loscocco, R-Holliston - Y
 Elizabeth A. Malia, D-Boston - N
 Ronald Mariano, D-Quincy - N
 James J. Marzilli Jr., D-Arlington - N
 James R. Miceli, D-Wilmington - Y
 Michael J. Moran, D-Boston - N
 Charles A. Murphy, D-Burlington - N
 James M. Murphy, D-Weymouth - Y
 Kevin J. Murphy, D-Lowell - N
 David M. Nangle, D-Lowell - Y
 Patrick Natale, D-Woburn - N
 Harold P. Naughton Jr., D-Clinton - N
 Robert J. Nyman, D-Hanover - Y
 Thomas J. O'Brien, D-Kingston - N
 Eugene L. O'Flaherty, D-Chelsea - N
 Shirley Owens-Hicks, D-Boston - Y
 Marie J. Parente, D-Milford - Y
 Matthew Patrick, D-Falmouth - N
 Anne M. Paulsen, D-Belmont - N
 Vincent A. Pedone, D-Worcester - N
 Alice H. Peisch, D-Wellesley - N
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 George N. Peterson Jr., R-Grafton - Y
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 Anthony Petruccelli, D-Boston - N
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 Susan W. Pope, R-Wayland - Y
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 Richard Ross, R-Wrentham - Y
 Michael F. Rush, D-Boston - Y
 Byron Rushing, D-Boston - N
 Jeffrey Sanchez, D-Boston - N

Tom Sannicandro, D-Ashland -
Angelo M. Scaccia, D-Boston - Y
John W. Scibak, D-South Hadley - N
Carl Sciortino, D-Somerville - N
Frank Israel Smizik, D-Brookline - N
Todd Smola, R-Palmer - Y
Theodore C. Speliotis, D-Danvers - N
Robert P. Spellane, D-Worcester - N
Christopher N. Speranzo - D-Springfield - N
Joyce A. Spiliotis, D-Peabody - Y
Harriett L. Stanley, D-West Newbury - N
Thomas M. Stanley, D-Waltham - N
Marie P. St.Fleur, D-Boston - N
Ellen Story, D-Amherst - N
William M. Straus, D-Mattapoissett - N
David B. Sullivan, D-Fall River - N
Benjamin Swan, D-Springfield - N
Kathleen M. Teahan, D-Whitman - N
Walter F. Timilty, D-Milton - Y
A. Stephen Tobin, D-Quincy - Y
Timothy J. Toomey Jr., D-Cambridge - N
David M. Torrisi, D-North Andover - N
Philip Travis, D-Rehoboth - Y
Eric Turkington, D-Falmouth - N
Cleon Turner, D-Dennis - N
James E. Vallee, D-Franklin - Y
Anthony J. Verga, D-Gloucester - Y
Joseph F. Wagner, D-Chicopee - N
Brian P. Wallace, D-Boston - Y
Patricia A. Walrath, D-Stow - N
Martin J. Walsh, D-Boston - N
Steven M. Walsh, D-Lynn - N
Marty Walz, D-Boston - N
Daniel K. Webster, R-Hanson - Y
James T. Welch, D-West Springfield - N
Alice K. Wolf, D-Cambridge - N
SENATE
Robert A. Antonioni, D-Leominster - N
Edward M. Augustus, D-Worcester - N
Steven A. Baddour, D-Methuen - N
Jarrett T. Barrios, D-Cambridge - N
Frederick E. Berry, D-Peabody - N
Stephen M. Brewer, D-Barre - N
Scott P. Brown, R-Wrentham - Y
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Harriette L. Chandler, D-Worcester - N

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Frederick E. Berry, D-Peabody - N
Stephen M. Brewer, D-Barre - N
Scott P. Brown, R-Wrentham - Y
Stephen J. Buoniconti, D-West Springfield - N
Harriette L. Chandler, D-Worcester - N

Robert S. Creedon, D-Brockton - Y
Cynthia Stone Creem, D-Newton - N
Susan C. Fargo, D-Lincoln - N
John A. Hart, D-Boston - N
Robert A. Havern, D-Arlington - N
Robert L. Hedlund, R-Weymouth - Y
Patricia Jehlen, D-Somerville - N
Brian A. Joyce, D-Milton - N
Michael R. Knapik, R-Westfield - N
Brian P. Lees, R-East Longmeadow - N
Thomas M McGee, D-Lynn - N
Joan M. Menard, D-Somerset - N
Mark C. Montigny, D-New Bedford - N
Richard T. Moore, D-Uxbridge - Y
Michael W. Morrissey, D-Quincy - Y
Therese Murray, D-Plymouth - N
Andrea F. Nuciforo, D-Pittsfield - X
Robert D. O'Leary, D-Barnstable - N
Marc R. Pacheco, D-Taunton - N
Steven C. Panagiotakos, D-Lowell - Y
Pamela P. Resor, D-Acton - N
Stanley C. Rosenberg, D-Amherst - N
Karen E. Spilka, D-Ashland - N
Bruce E. Tarr, R-Gloucester - N
James E. Timilty, D-Walpole - N
Richard R. Tisei, R-Wakefield - N
Steve A. Tolman, D-Boston - N
Robert E. Travaglini, D-Boston - Y
Susan C. Tucker, D-Andover - N
Marian Walsh, D-West Roxbury - N
Dianne Wilkerson, D-Boston - N

Robert S. Creedon, D-Brockton - Y
Cynthia Stone Creem, D-Newton - N
Susan C. Fargo, D-Lincoln - N
John A. Hart, D-Boston - N
Robert A. Havern, D-Arlington - N
Robert L. Hedlund, R-Weymouth - Y
Patricia Jehlen, D-Somerville - N
Brian A. Joyce, D-Milton - N
Michael R. Knapik, R-Westfield - N
Brian P. Lees, R-East Longmeadow - N
Thomas M McGee, D-Lynn - N
Joan M. Menard, D-Somerset - N
Mark C. Montigny, D-New Bedford - N
Richard T. Moore, D-Uxbridge - Y
Michael W. Morrissey, D-Quincy - Y
Therese Murray, D-Plymouth - N
Andrea F. Nuciforo, D-Pittsfield - X
Robert D. O'Leary, D-Barnstable - N
Marc R. Pacheco, D-Taunton - N
Steven C. Panagiotakos, D-Lowell - Y
Pamela P. Resor, D-Acton - N
Stanley C. Rosenberg, D-Amherst - N
Karen E. Spilka, D-Ashland - N
Bruce E. Tarr, R-Gloucester - N
James E. Timilty, D-Walpole - N
Richard R. Tisei, R-Wakefield - N
Steve A. Tolman, D-Boston - N
Robert E. Travaglini, D-Boston - Y
Susan C. Tucker, D-Andover - N
Marian Walsh, D-West Roxbury - N
Dianne Wilkerson, D-Boston - N

Rule 1. Possessive nouns.

A possessive noun is a noun which modifies another noun and usually indicates ownership or possession, e.g. the dog's blanket. With a possessive noun, you have to decide whether and where to put an apostrophe. In the dog's blanket, dog is the possessive noun. Here is the rule:

A. If the possessive noun is singular, add 's, e.g. **dog's blanket**. In this example, you have one dog and one blanket. If the phrase were **dog's blankets**, you would still have one dog even though you have more than one blanket. Since the possessive noun, dog, is still singular, add 's.

B. If the possessive noun is plural, add s', e.g. **dogs' blanket**. In this example, you have more than one dog and one blanket. If the phrase were **dogs' blankets**, you would have more than one dog and more than one blanket.

Here's a wrinkle.

C. If the possessive noun is singular and ends in an s, then you have the choice of adding 's or s' depending on which one you think sounds better. For example, the noun Professor Holmes is a singular noun that ends in an s. The phrase Professor **Holmes's class** is boring could also be written as Professor **Holmes' class** is boring.

Practice:

1. I worked at Bubs Barbecue for three summers.
2. The court dismissed the defendants argument.
3. The court dismissed the defendants arguments.
4. Where is the womens locker room?
5. The countrys foreign debt is huge.
6. The countries foreign debt is huge.
7. The drama department is staging Sophocles plays all year long.
8. When is the basketball teams next game?
9. The lawyers briefcase was stolen.
10. Is the winter sports schedule available yet?

Rule 2. Commas after introductory word groups.

Sentences often begin with an introductory word group. A comma after the introductory word group tells the reader that the main part of the sentence is beginning. Usually the subject of the sentence follows the introductory word group.

Here are some examples:

Whenever Mike was ready to eat, his dog started begging for food.

The introductory word group is “whenever Mike was ready to eat,” and the subject of the sentence is dog, which follows.

As a double major in Legal Studies and History, I have learned how to manage my time carefully.

The introductory word group is “as a double major in Legal Studies and History,” and the subject is I, which immediately follows.

Excited about her new job, Jennifer rushed out to tell her friends.

The introductory word group is “excited about her new job,” and the subject is Jennifer, which immediately follows.

Practice:

1. As he was writing up the ticket the police officer heard a muffled noise in the trunk.
2. Throughout my experience as an undergraduate I have developed good organizational and research skills.
3. As the enclosed resume indicates I have pertinent experience in the field of law.
4. After talking with my advisor I have decided to apply to graduate school.
5. If you need any further information please don't hesitate to call me.
6. When the runaway car hit the gas tank exploded.
7. At the present time I am a senior at the University of Massachusetts and will graduate in May 2004.
8. On August 18, 2004 I will turn 21.

Rule 3. Commas between independent clauses.

An independent clause is a group of words that has a subject and a verb and could stand alone as a sentence. When two independent clauses are joined by one of the seven coordinating conjunctions--**and, but, or, nor, for, so, yet**--separate the two independent clauses with a comma.

Nearly everyone has heard of love at first sight, but I fell in love at first song.

In this example, **but** is the coordinating conjunction. Since both phrases are independent clauses, add a comma before the coordinating conjunction.

- nearly everyone has heard of love at first sight.
- I fell in love at first song.

Nearly everyone has heard of love at first but not love at first song.

In this example, **but** is the coordinating conjunction. Since both phrases are not independent clauses, you do not add a comma before the coordinating conjunction.

- nearly everyone has heard of love at first sight
- love at first song.

Practice:

1. My interest in criminal justice started in high school and developed through a variety of summer jobs.
2. I am very eager to have to opportunity work within the legal field and I hope to pursue a career as a lawyer.
3. I have an excellent employment record and consider myself to be a hard worker.
4. I would like to go to the movies with you tonight but I have to study for an exam.
5. The team has a disappointment record but it is still fun to watch their games.
6. I am eager to work in the New York City area but I do not have a car.
7. I am a senior at the University of Massachusetts and I will graduate in May 2004.
8. I am a senior at the University of Massachusetts and will graduate in May 2004.

Rule 4. Semicolon

A. The rule for using semicolons is very similar to the previous rule. First you have to have a sentence with two independent clauses (e.g. could stand alone as a sentence because it has a subject and a verb); in this case, however, there is no coordinating conjunction. Use a semicolon when your sentence has two closely related independent clauses **not** joined by a coordinating conjunction.

Love is blind; envy has its eyes wide open.

Love is blind, and envy has its eyes wide open. [Here there is at coordinating conjunction so you use a comma, not a semicolon.]

B. You also use a semicolon if you have two independent clauses linked with a **transitional word or phrase**, followed with a comma. These include:

Conjunctive adverbs: accordingly, also, anyway, besides, certainly, consequently, conversely, finally, furthermore, hence, however, incidentally, indeed, instead, likewise, meanwhile, moreover, nevertheless, next, nonetheless, otherwise, similarly, specifically, still, subsequently, then, therefore, thus

Transitional phrases: after all, as a matter of fact, as a result, at any rate, at the same time, eve so, for example, for instance, in addition, in conclusion, in fact, in other words, in the first place, on the contrary, on the other hand.

The study of law and society can be very exciting; conversely, it can be a real bore.

A good cover letter can make the difference between getting an interview and not getting one; for example, my boss was so impressed with my cover letter that she wanted to meet me.

Practice:

1. The law is very strict about drunk driving, nonetheless the consequences aren't very severe.
2. I am well qualified for your present opening, in fact I am overqualified.
3. I've been poor and I've been rich, rich is better.
4. The days are very long, the nights are very short.
5. The days are very long, and the nights are very short.
6. I am always ready for a good party, however, I don't want anyone to drive drunk.

Rule 5. More commas: parenthetical phrases

When you have a group of words that describe a noun whose meaning is already clearly defined, you set off the group of words with commas. The phrase is similar to a parenthetical expression that contains nonessential information. If you remove the phrase from the sentence, the meaning does not change drastically. Some meaning may be lost, but the essential characteristics remain.

For basketball camp, the children needed high quality sneakers, which were expensive.

In this example, the essential information is that the children needed good sneakers in order to go to basketball camp; the fact that the sneakers were expensive is more of an afterthought and thus it is set off with a comma.

The dessert made with fresh raspberries was delicious.
The dessert, made with fresh raspberries, was delicious.

The first example has no commas because the phrase “made with fresh raspberries” is essential information which tells the reader which of several desserts the writer is referring to. The second example has commas because the phrase “made with fresh raspberries” adds nonessential information about the dessert.

The rule of thumb here is that if you can remove the phrase from the sentence without losing any essential meaning, then it should be set off with commas.

Practice:

1. My older brother who played tight end on our high school football team now lives at The Oaks a condominium complex near Detroit.
2. The Ghostbuster Vac which is a 25 pound vacuum cleaner is designed to be worn on a maintenance person’s back.
3. The African American woman running for the House of Representatives from Georgia is the one who has a long history of community service.
4. The title role in Neil Simon’s comedy, Barefoot in the Park, was performed splendidly by the young actor, Matt LeBlanc.
5. Attending law school which has always been an ambition of mine now seems out of the question.
6. The driver of a car who is responsible for the safety of his passengers should be willing to take a breathalyzer test to demonstrate his capacity to drive safely.

Rule 6. Agreement in number.

A. Be sure to use a plural verb if you have a plural subject. This can be tricky when the subject is not immediately obvious; it may help to rearrange the sentence to determine if the subject is plural or singular.

There are an overwhelming number of drunk driving accidents.

This sentence may “sound right,” but see what happens when you rearrange it.

The number of drunk driving accidents is overwhelming.

The number of drunk driving accidents are overwhelming.

Now it is clear that the subject is *number*, which is singular. The correct sentence is

There is an overwhelming number of drunk driving accidents.

Although this doesn’t “sound right,” it is grammatically correct.

B. Be consistent with when using singular or plural nouns.

Is the driver endangering society if he refuses to take a field sobriety test?

Since the noun driver is singular, you must be consistent throughout the sentence.

Practice:

1. Should the driver of the car lose their license if they won’t take a breathalyser test?
2. The rule of law states that a driver who is pulled over for suspicion of drunk driving is not in custody and the police can ask them to take a field sobriety test
3. When a young driver is pulled over by a police officer, they should be courteous and cooperative.
4. Where are the players’ weight training room?
5. A good source of vitamin C are oranges and grapefruits
6. The driver must produce a valid license and registration if they are asked for it by the police officer.

Rule 7. Capitalization.

The only words that are capitalized are proper nouns which are names of specific persons, places, or things.

The Book of Job is found in the Old Testament.

Aunt Mary is my mother's sister.

Practice:

1. The U.S. Supreme Court is the highest Federal Court. The Supreme Judicial Court is the highest State Court in Massachusetts.
2. The southern state of Georgia is part of the deep south.
3. My father is a Republican and my mother is an independent.
4. The Massachusetts Supreme Court issued a ruling yesterday on gay marriage.
5. The court issued a ruling yesterday on gay marriage.
6. Amy, I hope you understand the consequences of Social Host liability.
7. I worked as a Bartender at a popular Dance Club during the summer.
8. I worked as a Bartender at Joey's, a popular Dance Club, during the summer.
9. I am taking a Legal Studies course and a History course this semester; they are Legal Studies 450 and History 150.
10. At the university of Massachusetts, my majors were legal studies and political science.

Rule 8. Active verbs.

Using the active voice makes your writing stronger and more direct. It is not grammatically incorrect to use the passive voice, but you should avoid it as much as you can. A passive verb consists of the verb “to be” followed by a past participle.

The motion for summary judgment was granted by the court.

Was granted is the passive verb in this sentence, consisting of the verb “to be”—was—and a past participle—granted. To put it in the active voice, eliminate the verb “to be” and change the past participle to an active verb. You may need to rearrange the words in the sentence to change to the active voice.

The court granted the motion for summary judgment.

Passive: The cookies were baked by Tom.

Active: Tom baked the cookies.

Passive: Being a teenager, I was rebellious against every rule set by my parents.

Active: Being a teenager, I rebelled against every rule set by my parents.

Practice:

1. The last five years of my life have been spent preparing myself for the exact requirements of the job you are offering.
2. I feel that my previous work has helped me prepared for this position.
3. In the past three years, I have gained a lot of experience in the legal field.
4. At the law firm, I was responsible for typing affidavits and conducting legal research for new cases.
5. It was determined by the court that the reciting the alphabet is not protected by the privilege against self incrimination.
6. When leaving the party, Jason was not observed acting drunk.
7. The appellant’s argument was dismissed by the court. In recent court cases, it has been ruled that drivers may not refuse to take field sobriety tests.
8. It was the driver’s claim that he should not have been required to recite the alphabet.
9. The cement post was owned by the telephone company.

Rule 9. Wordiness.

Like the passive voice, wordiness is not grammatically incorrect, but it weakens your writing. Do not try to just fill up a page with words. Try to be succinct and direct. Eliminate words and phrases that do not add anything to your writing. Here are some common pitfalls that lead to wordiness.

A. Redundancies. There is no need to say the same thing twice.

*I ran the last mile **panting and out of breath**.*
I ran the last mile out of breath.

*It is a **true fact** that I am going to law school.*
It is true that I am going to law school.

*He had to face his accuser in a **court of law**.*
He faced his accuser in court.

B. Repetition. Avoid using the same word in a sentence more than once.

*Our last **client**, sitting in the waiting room, is a wealthy **client**.*
Our last client, sitting in the waiting room, is wealthy.

*The **qualifications** for your job are all **qualifications** that I possess.*
I possess all the qualifications for your job.

C. Lengthy phrases that can be eliminated or reduced to a word or two.

*I **feel that** the Court should have upheld the affirmative action policy.*
The Court should have upheld the affirmative action policy.

***Because of the fact that** the guest was only served one drink, the social host is not liable.*
The social host is not liable because he only served the guest one drink.

*I will wait for you **until such time as** I have to leave.*
I will wait for you until I have to leave.

D. Passive voice.

As a waitress, I am responsible for serving customers and operating the cash register.
As a waitress, I serve customers and operate the cash register.

E. Avoid starting a sentence with *there is* or *it*.

***There is** another book that describes the fall of the Roman Empire.*
Another book describes the fall of the Roman Empire.

*It is important for students to complete all their assignments on time.
Students must complete all their assignments on time.*

F. Change clauses to phrases and phrases to single words.

*We visited the White House, **which is** the home of the American president.
We visited the White House, home of the American president.*

*Raphael's long pants, **which were made of wool**, were too warm for Disney World.
Raphael's long wool pants were too warm for Disney World.*

Practice

1. The fundamental problem that the Massachusetts Supreme Court was faced with was that it had to decide whether or not reciting the alphabet was a violation of a driver's right to not incriminate himself.
2. In fact, there is one and only one way to handle an encounter with law enforcement officers on the nation's highways and byways.
3. This would include submitting to a breathalyzer test that for all intensive purposes provides unequivocal proof in establishing guilt or innocence of the crime of driving under the influence of alcohol.
4. Roadside stops are an area in which there are many instances of the police being in control and acting intimidating around those individuals who have the misfortune of doing nothing more than being lazy and not getting a burnt out headlight fixed.
5. In this specific case, the officer appeared to be suspicious of Mr. Vanhouton when he couldn't find his driver's license that was in his lap and when he smelled alcohol on his breath.
6. A police officer has the duty to pull over a vehicle when he has reasonable grounds to believe the driver may be, has been or would be in the throes of driving while under the influence of alcohol or mind-altering drugs.

Editing symbols

	Editing mark for delete.
Awkward	The phrase or wording is awkward; it doesn't read smoothly.
Cap	Either a word is capitalized that should not be or a word is not capitalized that should be.
Out-of-order	The indicated sentence does not flow from the previous sentence; there is an abrupt change of topic or focus.
P	There is a punctuation error somewhere in the indicated line.
	Editing mark for paragraph break. The indicated paragraph is getting too long and need to be broken down into two paragraphs.
Passive	The verb in the sentence is in the passive voice; the sentence would be stronger if the verb were in the active voice.
Redundant, repetitive	The indicated phrase or sentence is unnecessary because the author has already conveyed this idea and there's no need to repeat it.
Run-on sentence	The sentence has too many ideas in it and it's hard for the reader to follow. It would read better if it were broken down into two sentences.
Sp	The indicated word is spelled incorrectly.
Word choice	The indicated word is spelled correctly, but it doesn't mean what the author has in mind or may not be appropriate for the audience.
Wordy	There are too many words used to convey the author's meaning. The writing would be stronger if the language were simplified and more direct.

