

# The Future of Gay Rights, Singles' Rights, and Family Diversity in Michigan

by Thomas F. Coleman

Political activists who have been working diligently for years to expand Michigan's civil rights laws must be frustrated by the lack of progress. Litigating in the courts and lobbying in the Legislature have produced a scenario of one step forward, two steps back.

Despite major changes in the living arrangements of Michigan residents, and significant changes in public attitudes on a wide range of policy issues, lawmakers and judges seem stuck in a 1950s mindset. Haven't they noticed that Ozzie and Harriet and Leave it to Beaver are relics of the past?

Marriage is still a viable social institution, but husband-wife-child households are now only one segment of a broad mosaic of family diversity. That diversity is accentuated by solo singles, unmarried couples, same-sex partners, and single parents.

Michigan's household demographics now mirror those of the nation as a whole. We have entered the era of the "unmarried majority." Most of Michigan's households, like most of those in the United States, are now headed by unmarried adults. Married-couple households are in the minority.

In fact, there are more households with solo singles than homes containing married couples with kids.

Let's face some other facts while we are at it. Most young people are sexually active before they become adults. People are simply not waiting until marriage to have sex. And a majority of couples cohabit prior to marriage. Cohabitation is not limited to "fringe" elements of society. It has gone mainstream. AARP has issued policy reports showing that even seniors are cohabiting in larger numbers than ever before.

Public opinion on premarital sex and unmarried cohabitation has changed dramatically over the years. A majority of the public finds nothing morally wrong with such behavior.

So how does Michigan law measure up to these changes in attitude and behavior? Not very well. The law is stuck in a bygone era.

Sound public policies should be grounded in reality – the reality of how people actually live and how they actually feel on political, legal, economic, and social issues. But Michigan's laws seem more in tune with the 1950s – an era in which virtually everyone married, almost no one divorced, unwed pregnancies were uncommon, unmarried cohabitation was rare, and gays and lesbians were mostly invisible.

Criminal laws against homosexual sex and unmarried cohabitation once served the purpose of reinforcing a religious notion that sexual conduct is only acceptable within the context of a heterosexual marriage. Attempts to have these criminal laws declared unconstitutional have

been ignored or rebuffed by Michigan judges for decades. Legislators have periodically put their finger to the political wind and found no benefit in protecting the rights of homosexuals or unmarried couples. So oppressive criminal laws have remained on the books.

Thankfully, the United States Supreme Court noticed the disconnect between law and reality and issued a ruling some six years ago that recognized the sexual privacy rights of consenting adults. But despite this landmark victory, attempts to revise state laws that criminalize oral sex and unmarried cohabitation have been rebuffed in Lansing.

Legislators don't care that laws against "gross indecency" or "lewd and lascivious cohabitation" are unconstitutionally vague. They seem content to ignore the fact that the presence of such laws on the statute books stigmatizes millions of unmarried adults who are sexually active. Apparently, it will take a renewed effort by lawyers and lobbyists to someday have Michigan's criminal laws conform to current constitutional doctrines.

The need for criminal law reform is just the tip of the civil rights iceberg. The lives of millions of Michigan residents are adversely affected by other areas of the law that are out of touch with reality. Laws dealing with hate crimes, job bias, employee benefits, housing discrimination, and consumer protection need to be updated.

Michigan laws need to protect gay rights, singles' rights, and family diversity.

## *Michigan's Civil Rights Laws Ignore Major Changes in What We Believe and the Way We Live*

## One step forward, two steps back

Equal rights advocates achieved a short-lived victory in the Michigan Supreme Court in 1998. The case involved an unmarried couple denied housing in Jackson by a landlord who objected to cohabitation for religious reasons.

Citing a criminal law against unmarried cohabitation, the Court of Appeals ruled that “marital status” in the Elliott Larsen Civil Rights Act did not prohibit discrimination against unmarried couples who live together. Court of Appeals Judges Taylor and Corrigan signed this opinion.

Attorney Rudy Serra and I filed an *amicus curiae* brief in the Michigan Supreme Court on behalf of the Triangle Foundation and Spectrum Institute. We urged the justices to reverse that decision. We also asked them to reject the landlord’s claim that the Michigan Constitution entitled him to a “religious” exemption from the state’s civil rights laws.

We were excited when, on December 22, 1998, the court ruled in favor of the tenants and rejected the landlord’s claim to a religious exemption. The decision was 4-2. Justice Taylor, who was now a member of the Supreme Court, did not participate. Apparently he recused himself to avoid a conflict of interest in reviewing his own decision in the Court of Appeals.

Then politics took over. Two Supreme Court justices (Mallet and Boyle) retired on December 30, 1998. As luck would have it, Justice Corrigan became a member of the court on January 1, 1999. The landlord filed a petition for rehearing and the newly constituted court voted on it on April 1, 1999.

Justices Corrigan and Taylor should have recused themselves, just as Taylor had previously done, since they were being asked to rule on the correctness of their own decision in the Court of Appeals. But that did not happen. The two new justices, both Republicans, joined with the other Republicans on the court, to set aside that portion of the decision that had denied the landlord a religious exemption. On a 5-2 vote, the case was remanded to the trial court for an evidentiary hearing on the religious exemption issue.

Because of the participation of Justices Taylor and Corrigan, the ultimate ruling of the Supreme Court says that unmarried couples are protected by the civil rights act, but that business people with religious objections to cohabitation might be entitled to an exemption from the law.

This ruling bodes ill for the gay and lesbian community when state lawmakers eventually add “sexual orientation” to the civil rights law. Passage of such an amendment to the law could be a hollow victory since it is likely that religion will be cited as the primary reason for sexual

orientation discrimination in employment or housing.

If such religious exemptions are granted by Michigan courts to businesses that discriminate, victims will need to resort to federal law to counter the state exemption. Federal law prohibits employment and housing discrimination on the basis of religion. So it could be argued that federal civil rights laws prohibiting religious discrimination supercede a state law or court ruling authorizing religious discrimination.

The second step backward occurred when voters amended the Michigan Constitution in 2004 to declare that “the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”

Four years later, the Michigan Supreme Court ruled, in a 5-2 decision, that the marriage amendment prohibits public entities from granting domestic partnership benefits to unmarried couples. This has put many public employers between a rock and a hard place. Those who want to extend benefits to unmarried partners will have to get creative.

So over a 10 year period, the bastion of last resort for justice and equality – the Republican-dominated Michigan Supreme Court – dealt severe blows to those seeking to end marital status discrimination in employment and housing.

## Out of sync with public opinion

Gay rights advocates have been trying for years to get laws passed by the Michigan Legislature to target hate crimes and to prohibit discrimination on the basis of sexual orientation. So far, the efforts have been unsuccessful.

By conservative estimates, there are at least 250,000 people in Michigan (about 3 percent of those 15 or older) who would identify as gay, lesbian, or bisexual. Some studies would suggest a higher number.

Hate crimes against LGBT people are on the rise, according to the Triangle Foundation. Discrimination in employment and housing is not uncommon. But laws in Michigan do not address these serious civil rights problems.

Are the people of Michigan intolerant? Do they favor discrimination? Do they oppose the passage of laws prohibiting sexual orientation discrimination? The answer to all three questions is “NO.”

According to a recent study published this year by researchers at Columbia University, public policy in Michigan is sorely out of sync with public opinion. (Lax and Phillips, 8-19-09, *Gay Rights in the States: Public Opinion and Policy Responsiveness*.)

Reviewing the results of public opinion polls from 2000 to 2008, the researchers found that 74% of Michigan residents support passage of a hate crime law to protect gays and lesbians from bias-related violence. Even more people (78%) favor a law against sexual orientation discrimination in housing.

Outlawing job bias against gays and lesbians is supported by 64% of the public in Michigan. Granting health benefits to same-sex partners of employees has 60% public support.

Although not yet a majority, 49% believe that same-sex couples should be allowed to enter into legally recognized civil unions, while 47% favor the ability of such couples to have a second-parent adoption to solidify their parenting rights. Polls consistently show that younger people have much stronger support for gay rights. So as time passes, and these supporters grow older, it is likely that second-parent adoptions, civil unions, and even same-sex marriage will win support from a majority of people in Michigan.

In the meantime, what is holding up the passage of laws on issues where there is already strong majority support? Partisan politics.

Courts cannot outlaw sexual orientation discrimination by private sector businesses. That is the prerogative of the legislative branch of government.

Bills have been introduced in the Legislature to add "sexual orientation" and "gender identity" to the state's hate crime laws. Legislation has been proposed to add "sexual orientation" to the Elliott Larsen Civil Rights Act.

So why have these bills been derailed? I hate to use the "R" word in polite company, but the opposition is coming from Republicans in the Legislature, especially in the Senate.

Of the 110 members of the House of Representatives, 67 members are Democrats while 43 are Republicans. Of the 38 Senate members, a majority, or 21, are Republicans. So despite having a Democrat as the Governor, and a majority of Democrats in the House, Republicans still have veto power over gay rights legislation.

When it comes to laws prohibiting sexual orientation discrimination, the primary opposition is rooted in conservative religious beliefs. Religious leaders with conservative philosophies have no problem getting Republican politicians to side with them. In some cases, they also seem to have power over moderate Democrats.

The answer to having gay rights legislation enacted in Michigan appears to be political. Perhaps equal rights proponents can find a few Republicans to break ranks. Absent that, advocates must make sure that Democrats control both houses of the Legislature and the Governor's office. That's no easy task.

While Democratic majorities might pass a hate crime law and might amend the civil rights laws, there is still the prospect that perpetrators of discrimination might claim a religious exemption from employment and housing nondiscrimination statutes.

Gay rights advocates in Michigan may decide it is too risky to put all their political eggs in one basket. Instead of concentrating all efforts on securing legislation in Lansing, some of their time, energy, and money could be directed to federal legislation. Passage of the Employment Nondiscrimination Act (ENDA) by Congress would likely be approved by President Barack Obama. This new law would apply to public and private employers in Michigan.

A more sophisticated strategy will have to be used to secure economic benefits and legal protections for same-sex couples who want to marry and for other people – regardless of sexual orientation – who can not marry or who prefer cohabitation or domestic partnership.

The decision of the Michigan Supreme Court makes it clear that such benefits and protections cannot be given through "domestic partnership" laws or programs to the extent that such benefits are extended to couples pursuant to an "agreement" between the parties.

This problem reminds me of a 1995 decision of the Georgia Supreme Court involving the validity of a domestic partner benefits plan adopted by the City of Atlanta. I filed an *amicus curiae* brief in that case and worked closely with the city attorney's office in defending the right of the city to offer such benefits to its employees.

When the court ruled that the city had overstepped its authority as a municipality by defining domestic partnerships as a family relationship similar to marriage, I read the wording of the ruling very carefully. After finding a "loophole" in the ruling, I advised the city not to seek a rehearing but to let the decision stand.

The city could conform its benefits plan to state law by expanding the list of dependents eligible for employment-related benefits. I advised them not to refer to domestic partners as "spousal equivalents" or as "family members" but instead offer the benefits to adult household "dependents."

## *Gays and Lesbians Are Protected by Hate Crime Laws in 32 States, Housing Laws in 15 States, and Employment Laws in 20 States.*

## *Michigan Offers No Protection At All.*

Statutory and case law in Georgia defined “dependent” in a very broad manner. Someone could have only partial financial dependency on another person and still be a “dependent.” An employee and an adult household member could be financially “interdependent” and the household member would qualify as a “dependent” of the employee. The city took my advice, revised the benefits law, and adult household dependents (formerly known as domestic partners) were able to get benefits. The new program was later held to be valid.

Another method would be for public employers to offer benefits to “reciprocal beneficiaries” which would be a relationship based on mutual designation but not an “agreement” to have a spousal-like relationship with legally enforceable obligations.

Some public universities in Michigan have taken a generic approach to benefits eligibility, by granting benefits to “other eligible individuals” and using criteria that avoids a direct confrontation with the Supreme Court ruling.

But this “loophole” approach is only a band-aid solution to fill the gap while advocates search for ways to challenge or overturn the “marriage amendment.” A successful challenge to the law in federal court is a long shot, although it should not be ruled out entirely – especially if one or more of the federal lawsuits against the federal Defense of Marriage Act is successful. But success can only be defined as a victory in the United States Supreme Court – something that may not happen for years.

Another method would be to propose an amendment to the Michigan Constitution. Advocates might consider asking the Legislature to place a measure on the ballot. This would require support from two-thirds of each house. Gaining this level of support might be possible if the proposed constitutional amendment were limited to authorizing state and local governments to provide rights and benefits to domestic partners.

Evidence suggests that Michigan voters never intended to prohibit domestic partner benefits when they voted for the marriage amendment. Public opinion polls also show growing support for such benefits.

If the Legislature will not refer the matter to the voters, then a direct initiative is the only political option. Perhaps advocates might consider circulating two proposals – one to make civil marriage available to same-sex couples, with the other authorizing the Legislature and municipalities to extend benefits and protections to domestic partners.

When it comes to equal rights advocacy, Michigan is a tough nut to crack. But success is possible.

Anyone seeking to create lasting change around gay rights, singles’ rights and family diversity should keep some key principles in mind:

- The process starts by acknowledging the truth. Know the facts and the law.
- Visualize your goals. Feel the passion. Then take action.
- Be prepared for a long series of battles. Lasting change seldom comes easy.
- Build coalitions. Make the cause about “us” rather than about “me.” The key to political success is to transform 10% support into 60% support.
- Look for opportunities to gain support. Educate the public. Use the media to reach the masses.
- Think outside of the box. Be creative. Be pro-active rather than re-active.

Advocates should remember that the process of securing equal rights is ongoing. There will be more to accomplish even when the Legislature passes a hate crime bill and amends the Elliot Larsen Civil Rights Act to include “sexual orientation.” There will be more battles to fight even when voters authorize domestic partnership rights or when courts open up marriage to same-sex couples.

Many single people are clamoring for equal rights – for an end to discrimination in insurance premiums or employment benefits. Blood relatives question their exclusion from domestic partnership programs or from tax breaks given to married couples.

Equal rights advocacy is needed beyond the borders of Michigan and beyond the shores of the United States. Millions of people in other parts of the world are experiencing oppression and discrimination because of their sexual orientation or marital status. So remember: the need for equal rights advocacy is not limited to Michigan or America. It extends worldwide. ♦ ♦ ♦



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