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Review of Law & Social Change

Crossing the Threshold:
Equal Marriage Rights
for Lesbians and Gay Men
and the Intra-community Critique
Evan Wolfson

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CROSSING THE THRESHOLD: EQUAL MARRIAGE RIGHTS FOR LESBIANS AND GAY MEN AND THE INTRA-COMMUNITY CRITIQUE

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INTRODUCTION

How the world can change,
It can change like that,
Due to one little word:
"Married."¹

For the first time since an ancient spate of cases in the early 1970s,² lesbians and gay men today are in court challenging the denial of our equal right to marry. For the first time ever, with the Hawaii Supreme Court's recent ruling in *Baehr v. Lewin*,³ we stand on the verge of victory, with all

1. JOHN KANDER & FRED EBB, *Married, on CABARET* (First Night Records 1986).

2. *E.g.*, Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973) (holding that women are not entitled to have issued to them a license to marry each other); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972) (holding that the statute governing marriage does not authorize marriage between persons of the same sex); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974) (holding that a provision against same-sex marriages did not violate the constitutional provision that equality of rights under the law shall not be denied or abridged on account of sex). I refer to these cases as ancient because they arose very early in the modern lesbian and gay civil rights movement. They were decided prior to considerable evolution in legal doctrines regarding equal protection and the right to marry. *See, e.g.*, Turner v. Safley, 482 U.S. 78, 95 (1987) (holding that prisoners have a right to marry despite their inability to partake in some elements of marriage); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (mentioning need for heightened standard of review for legislative classifications based on gender); Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (holding that "private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"); Zablocki v. Redhail, 434 U.S. 374, 384 (1978) ("[T]he right to marry is of fundamental importance for all individuals."). When the early marriage cases were litigated, courts and society had not yet experienced the lesbian and gay movement's breakthroughs in the 1980s, AIDS, or the sea change they wrought in social acknowledgment of the reality and diversity of the lives of gay people.

3. 852 P.2d 44, *clarified on grant of reconsideration in part*, 852 P.2d 74 (Haw. 1993) (holding that the denial of marriage licenses to same-sex couples appears to violate the state constitutional guarantee of equal protection).

equal marriage rights has passed.¹³ Because lesbians and gay men are on the verge of winning our equal marriage rights, it seems to me that we must now unite in preparing to protect and build on that victory.

We know there will be a backlash against us following a final win in Hawaii.¹⁴ As Martin Luther King, Jr. wrote in *Why We Can't Wait*, "We must use time creatively, in the knowledge that the time is always ripe to do right."¹⁵ Since, as King put it, "[i]n this Revolution, no plans have been written for retreat," we must ready ourselves to defend our victory and advance toward other goals.¹⁶

I

BAEHR V. LEWIN OPENS THE DOOR TO EQUAL MARRIAGE RIGHTS FOR LESBIANS AND GAY MEN¹⁷

Why are people gay, all the night and day,
Feeling as they never felt before?

. . . .

Love is sweeping the country.
Waves are hugging the shore.
All the sexes, from Maine to Texas,
Have never known such love before.¹⁸

On May 5, 1993, while most Americans had their limited gay-issue attention span focused on Washington, D.C. and the rumblings from the congressional hearings on anti-gay discrimination in the military, on the other

13. See Evan Wolfson, *No Time For a Luau*, ADVOC., July 26, 1994, at 5. As I wrote then:

When Ben Franklin emerged from the Constitutional Convention, he was asked, "What kind of government have you given us?" His answer: "A republic, if you can keep it." The right to marry is the coming battleline. For gay people, history is upon us now; we have at best two years lead time in which to show that we can not only win, but keep, our rights and our equal place in society.

14. We expect a backlash because the radical right continually mounts assaults on all our basic equal rights, including even our fundamental right to participate in the political process. See *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, No. C-1-93-773, 1994 WL 442746 at 10. (S.D. Ohio Aug. 9, 1994) (invalidating charter amendment intended to repeal and prevent civil rights protections for lesbians and gay men).

15. MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 86 (1963).

16. *Id.* at 133.

17. Part I is based on an edited, updated version of an article in Lambda's newsletter on the *Baehr* victory. See Evan Wolfson, *Hawaii Supreme Court Paves Way for Same-Sex Marriage*, LAMBDA UPDATE, Summer 1993, at 1. That article summarized our goal in the marriage challenges, and thus the position and analysis that Polikoff considers in error. It also exemplified our rhetoric in litigating for equal marriage choice, an issue that Polikoff demands we examine. Polikoff, *supra* note 11, at 1541-46, 49.

18. GEORGE & IRA GERSHWIN, *Love is Sweeping the Country*, on OF THEE I SING (Broadway Angel Records 1952).

side of the country the earth moved. *Baehr v. Lewin*,¹⁹ the landmark decision by the Hawaii Supreme Court paving the way for recognition of gay people's equal marriage rights, was nothing less than a tectonic shift, a fundamental realignment of the landscape, possibly the biggest lesbian and gay rights legal victory ever.

A. *Baehr v. Lewin*

In *Baehr*, a court for the first time took a giant step toward allowing lesbians and gay men to marry. The case began when three same-sex couples — Ninia Baehr and Genora Dancel, Pat Lagon and Joseph Melillo, and Antoinette Pregil and Tammy Rodrigues — were denied marriage licenses by the State. Ruling without any kind of evidentiary hearing or record, the lower court rejected the couples' constitutional challenge to this "different-sex restriction" imposed by the State on their choice of a marital partner. The lower court applied the lowest level of judicial review, concluding that the restriction had a rational basis because the denial of gay people's right to marry "is obviously [*sic*] designed to promote the general welfare interests of the community by sanctioning traditional man-woman family units and procreation."²⁰

Holding that the refusal to issue marriage licenses to same-sex couples appeared to violate the state constitutional right to equal protection,²¹ the state supreme court reversed the lower court's decision. In a plurality opinion, the court ordered a trial in which the State would have to come up with "compelling" reasons for discriminating, not just the unsubstantiated

19. *Baehr v. Lewin*, 852 P.2d 44, *clarified on grant of reconsideration in part*, 852 P.2d 74 (Haw. 1993).

20. *Baehr v. Lewin*, No. 91-1394-05, slip op. at 5-6 (Haw. Ct. App. Oct. 1, 1991) *rev'd and remanded*, 852 P.2d 44, *clarified on grant of reconsideration in part*, 852 P.2d 74 (Haw. 1993). Governmental actions that burden individuals unequally but are not based on a "suspect" classification or which are not invasive of a "fundamental right" need only be "rationally related to a legitimate governmental purpose" to survive judicial scrutiny. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). Where either a fundamental right, such as the right to marry, or a "suspect" classification, such as (in Hawaii) sex, is at stake, a court must apply heightened or even "strict" scrutiny. The government must then either adduce a "compelling" interest that is narrowly tailored to the purpose at issue, or cease discriminating. *Baehr v. Lewin*, 852 P.2d 44, 67, *clarified on grant of reconsideration in part*, 852 P.2d 74 (Haw. 1993). Because the lower court erroneously applied only the lowest level of review, neither the court nor the State ever defended the State's assertions regarding procreation and so-called "traditional man-woman family units," or explained how denying gay people their equal rights promoted these or any other State objectives.

21. *Baehr*, 852 P.2d at 68.

repetitions of the usual anti-gay arguments upon which the State had always been able to rely.²² Three weeks later, in a subsequent ruling clarifying the scope of the remand, a majority of the court adopted the approach of the plurality.²³

Under the strict scrutiny standard set out by the court, and with its recognition that "constitutional law may mandate, like it or not, that customs change with an evolving social order,"²⁴ it appears virtually certain that the state will not be able to defend on remand its denial of licenses based on sex. In Hawaii, then, lesbians and gay men seeking their equal right to marry may have begun to cross the threshold.

The court's ruling was as ingenious as it was thrilling. Hawaii, like the U.S. and all the other states, has a constitutional provision requiring that the government treat people equally, without prejudice. Hawaii's provides:

No person shall be deprived of life, liberty, or property without due process of law, nor be denied the equal protection of the laws . . . or be discriminated in the exercise thereof because of race, religion, sex, or ancestry.²⁵

The enumeration of sex as an explicitly protected category did for Hawaii what the proposed Equal Rights Amendment (ERA)²⁶ would have done for the federal constitution: it provided the strongest possible legal weapon against gender discrimination in all forms. In *Baehr v. Lewin*, the court used that weapon.

Noting that "[p]arties to a same-sex marriage could theoretically be either homosexuals or heterosexuals,"²⁷ Justice Steven H. Levinson wrote that, given the evident state discrimination before the court, the sexual orientation of the plaintiffs was irrelevant.²⁸ Perhaps as an act of political

22. *Id.*; see also *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, No. C-1-93-773, 1994 WL 442746 at 9 (S.D. Ohio Aug. 9, 1994) (arguments made in support of radical right anti-civil rights initiative consist of the same litany of anti-gay assertions characterized by court as "unreliable data, irrational misconceptions, and insupportable misrepresentations about homosexuals"); *Meinhold v. Dep't of Defense*, 808 F. Supp 1455, 1458 (C.D. Cal. 1993) (stating that the government's justifications for its anti-gay policy based on "cultural myths and false stereotypes"), *remanded on other grounds*, 991 F.2d 808 (9th Cir. 1993).

23. Upon the State's motion for an order clarifying the scope of the remand, a majority of the court declared that the sole issue before the lower court on remand is whether the "different-sex restriction" can survive "strict scrutiny." *Baehr*, 852 P.2d at 74-75 (Justice Paula Nakayama joining Chief Justice Ronald Moon and Justice Steven Levinson, also joined in part by concurring panelist Chief Judge James Burns).

24. *Baehr*, 852 P.2d at 63.

25. HAWAII CONST. art. I, § 5 (emphasis added).

26. H.R.J. Res. 208, S.R.J. 8, 92d Cong., 1st Sess. (1971) Congress passed the ERA on March 23, 1972. CONG. QUARTERLY 692 (March 25, 1972). Hawaii was the first state to ratify the amendment, acting less than two hours after the Senate vote. 118 CONG. REC. H2423 (daily ed. March 23, 1972).

27. *Baehr v. Lewin*, 852 P.2d 44, 52 n.11, *clarified on grant of reconsideration in part*, 852 P.2d 74 (Haw. 1993).

28. *Id.* at 54 n.14.

savvy, the court so far has declined to frame the case as primarily a matter of gay rights, equal protection for gay people, or the right of gay people to marry.²⁹ Indeed, the court has for now rejected our claim that denial of one's ability to choose a same-sex spouse violates substantive constitutional guarantees such as the right to privacy, the right of personal liberty, and the fundamental right to marry as such.³⁰

Instead, the court held: "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 [they] have been denied the equal protection of the laws. . . ."³¹ For now at least, the court has thus carefully stepped around the minefield left by those who seek to delegitimize privacy analysis,³² resting its historic decision on the surer footing of a solid, enumerated textual foundation.

29. *Id.* at 54-55. *But see* Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, No. C-1-93-773, 1994 WL 442746, at *17 (S.D. Ohio Aug 9, 1994) (holding that in a case involving a measure targeting lesbians and gay men per se, sexual orientation is a "quasi-suspect classification" warranting heightened scrutiny).

30. *Baehr*, 852 P.2d at 55-57. I continue to believe that this portion of the court's otherwise brilliant and solid opinion was in error, even if it was intended as a strategic maneuver. All Americans have a fundamental right to marry. *Loving v. Virginia*, 388 U.S. 1, 12 (1961); *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978). That fundamental right to marry includes a right to choose one's partner in life. *E.g.*, *Perez v. Lippold*, 198 P.2d 17, 19 (Cal. 1948) ("[T]he right to marry is the right to join in marriage with the person of one's choice."). Since gay and non-gay people share the same rights, *see Bowers v. Hardwick*, 478 U.S. 186, 218-19 (1986) (Stevens, J., dissenting), gay people have the same right to marry as non-gay people. In Justice Stevens' words:

[E]very free citizen has the same interest in 'liberty' that the members of the majority share. From the standpoint of the individual, the homosexual and the heterosexual have the same interest in deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions.

Id. Thus, the fundamental right in question is not a "right to same-sex marriage," *Baehr*, 852 P.2d at 56, but rather a right to choose one's partner in marriage free of arbitrary interference, such as same-race or different-sex restrictions imposed by the state. That choice is protected not just by the guarantee of equal protection identified by the *Baehr* court, but also by the right to privacy (i.e., the free individual's right to make important decisions and shape her own life), the freedom of intimate association, and the fundamental right to marry itself. As the *Baehr* court itself acknowledged in its May 1993 ruling, there is nothing intrinsically heterosexual about the values, aspirations, or fundamental institutional nature of marriage.

To date, the *Baehr* court appears to have split the difference, hewing closely and cautiously (if unnecessarily) to the United States Supreme Court's recent cramped interpretation of the federal right to privacy, *Baehr*, 852 P.2d at 57, while at the same time resting its correct outcome on the secure foundation of the equal protection provisions of the Hawaii Constitution. Justice Levinson both reached the right result, and was cautious in doing so. *See supra* text accompanying notes 27-30. Still, ultimately, I believe that the very sex discrimination contained in the different-sex restriction and condemned by the court under the equal protection provisions also runs afoul of the substantive rights to marry, to privacy, and to choose one's intimate associates.

31. *Baehr*, 852 P.2d at 60.

32. *See Hardwick*, 478 U.S. at 194 ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable

As we urged in our briefs, the court relied heavily on the 1967 case of *Loving v. Virginia*.³³ In *Loving*, a black woman and a white man were convicted for violating Virginia's miscegenation law, which imposed a same-race restriction on marriage.³⁴ Exiling the Lovings from their home state for twenty-five years and declaring their marriage not just illegal, but definitionally "void," the trial judge stated:

Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents The fact that he separated the races shows that he did not intend for the races to mix.³⁵

In *Loving*, the U.S. Supreme Court rejected this parochial moralizing in the guise of reasoning;³⁶ in *Baehr*, the Hawaii Supreme Court rejected the

roots in the language or design of the Constitution."). Justice White's disingenuous, distorted, and tendentious formulation in *Hardwick*—part of his campaign against the privacy doctrine embodied, of course, in *Roe v. Wade*, 410 U.S. 113 (1973)—has been widely criticized. See Evan Wolfson, *Civil Rights, Human Rights, Gay Rights: Minorities and the Humanity of the Different*, 14 HARV. J.L. & PUB. POL'Y 21, 35 n.59 (1991). Indeed, "[c]ommentators have been virtually unanimous in their criticism of *Hardwick's* reading of the Court's privacy jurisprudence." *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1523 n.30 (1989). Justice Lewis Powell, who contributed the swing vote that gave Justice White his 5-4 majority in *Hardwick*, has since conceded that, in retrospect, he "probably made a mistake," and that "the dissent had the better of the arguments." Wolfson, *supra*, at 36 n.59. Nevertheless, in today's right to privacy cases, the aura of contestedness remains. Having an alternative route to the right result, the *Baehr* court chose, for now at least, to avoid the privacy path.

33. *Baehr*, 852 P.2d at 60-63 (citing *Loving v. Virginia*, 388 U.S. 1 (1961)).

34. The same-race restriction on marital choice struck down in *Loving* was a "measure[] designed to maintain White Supremacy," *id.* at 11, much as the "different-sex restriction" challenged in *Baehr* serves only to promote heterosexism and to perpetuate the historical subordination of women. See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994) [hereinafter Koppelman, *Why Discrimination*]. See also Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988) [hereinafter Koppelman, *The Miscegenation Analogy*]; Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscegenation Analogy*, 25 SUFFOLK U. L. REV. 981 (1991). Neither of these, needless to say, is a legitimate state objective in a constitutional scheme that values individual choice and the diversity that results. See *Hardwick*, 478 U.S. at 204-06 (Blackmun, J., dissenting).

35. *Loving*, 388 U.S. at 3. The lower court ruling, upheld by the Virginia Supreme Court, is permeated by assertions that marriage by definition contains a same-race restriction; the court therefore treated the restriction as simply inherent in the nature of things. This is much how the different-sex restriction on marriage is characterized today, while people forget how intensely the same arguments were made just a few decades ago. See, e.g., *Scott v. Georgia*, 39 Ga. 321, 323 (1869) (claiming racial intermarriage is "unnatural," and would lead to children who are "generally sickly, and effeminate . . . and inferior in physical development and strength"). See also Hunter, *supra* note 11, at 13-15. For a cautionary example of how quickly people can be led to forget even their recent past, see GEORGE CHAUNCEY, *GAY NEW YORK* (1994) (documenting how the anti-gay repression from the 1930s to the 1960s effaced gay institutions and even the memory of the relative openness of the early 20th century).

36. *Loving*, 388 U.S. at 11 ("There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies [a racial] classification.").

"tautological and circular nature"³⁷ of the State's argument that same-sex couples cannot marry because marriage is inherently for different-sex couples.

Like the *Loving* Court the *Baehr* court required the state either to come up with compelling reasons, backed by evidence, or to stop discriminating.³⁸ Unlike the courts hearing same-sex couples' marriage cases twenty years ago, the Hawaii Supreme Court refused to accept the usual anti-gay "tortured and conclusory sophistry."³⁹ Now the State will have to prove in the trial court that denial of marriage licenses to same-sex couples is necessary to achieve its asserted legitimate ends and is "narrowly drawn to avoid unnecessary abridgements of constitutional rights."⁴⁰ For once, the arguments against gay equality in marriage will be subjected to real, indeed, *strict* scrutiny.

B. *The State's Attempts to Defend the Different-Sex Restriction*

So far, attorneys representing the State have tentatively proffered the following interests to justify Hawaii's restriction on marriage:⁴¹ "[There is a] compelling State interest in fostering procreation;"⁴² "a child is best

37. *Baehr v. Lewin*, 852 P.2d 44, 63, *clarified on grant of reconsideration in part*, 852 P.2d 74 (Haw. 1993).

38. *See id.* at 68.

39. *Id.* at 63. Compare *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973) (reasoning that a same-sex couple must be denied a license to marry because they are incapable of marriage as the term is defined). *See Mohr, supra* note 11, at 304-07.

40. *Baehr*, 852 P.2d at 68.

41. *See* Defendant's Response to Plaintiffs' First Request for Answers to Interrogatories, Dec. 17, 1993, at 6-10 (on file with Lambda) [hereinafter Defendant's Response]. As stated earlier, in this article I will not refute at length the non-gay (or anti-gay) arguments made by the State's attorneys, reserving that for our briefs in the months ahead. I note again, however, that it is uncanny how the arguments made to defend the different-sex restriction echo those offered to defend the same-race restriction at issue in the miscegenation cases, *see Hardwick*, 478 U.S. at 210 n.5 (Blackmun, J., dissenting), and appalling to see such illogical and offensive arguments made with a straight face (as it were). As one commentator wrote in 1992:

Only 25 years ago and it was a crime for a black woman to marry a white man. Perhaps 25 years from now we will find it just as incredible that two people of the same sex were not entitled to legally commit themselves to one another. Love and commitment are rare enough; it seems absurd to thwart them in any guise.

Quindlen, *supra* note 5, at A23.

42. Defendant's Response, *supra* note 41, at 6. *But see* Tom C. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOY. L.A. L. REV. 1, 9 (1969) (quoting a former Supreme Court Justice observing that "[p]rocreation is certainly no longer a legitimate or compelling State interest in these days of burgeoning populations."). Even if the State's claim were true, it does not, and cannot, make any showing that discriminating in the issuance of marriage licenses furthers, let alone is narrowly tailored to, the promotion of procreation. The fit is both under- and over-inclusive. Many non-gay people marry without procreating, without intent to procreate, and even without the ability to procreate; they are nonetheless married. Marriage licenses, after all, are not issued with a "sunset provision" whereby you have two years to produce a child or your marriage expires. On the other hand, many lesbians and gay men *do* parent, and wish to raise their children within the kind of structure that marriage offers. Moreover, preventing one group of people from marrying

parented by its biological parents living in a single household;"⁴³ "same[-]sex couples cannot, as between them, conceive children;"⁴⁴ "allowing same[-]sex couples to marry conveys in socially, psychologically, and otherwise important ways approval of non-heterosexual orientations and behaviors;"⁴⁵ "all Hawaii marriages [would become] unenforceable in one or

the partners of their choice does nothing to encourage or facilitate procreation by another group of people. Presumably non-gay men and women will continue to procreate and marry, even once lesbians and gay men are treated equally in our right to love and marry.

43. Defendant's Response, *supra* note 41 at 6. This proposition is both offensive and unproven. Today we recognize that "[w]hatever the content of American fantasies surrounding the nuclear family, decreasing numbers of Americans actually live in them." Aissa Friedman, *The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family*, 3 BERKELEY WOMEN'S L.J. 134, 135 (1988); *Only One U.S. Family in Four is "Traditional,"* N.Y. TIMES, Jan. 30, 1991, at A19. Children raised in families that differ from the model that the State—with no evidence—asserts to be the best, grow up healthy, happy, and entitled to equal respect. See *Bottoms v. Bottoms*, 444 S.E.2d 276, 283 (Va. Ct. App. 1994) (holding that homosexuality does not per se render a parent unfit for custody). Moreover, even were it somehow true that one form of family were the best, the appropriate remedy cannot be to deprive the children of other parents (nonbiological, single, divorced, or gay) of the benefits, opportunities, and meaning that their parents may seek in marriage.

44. Defendant's Response, *supra* note 41, at 7-8. This is simply untrue. Gay men and lesbians do parent children, and usually seek to raise them together with the partners of their choice, just like non-gay people. See, e.g., *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993) (granting second-parent adoption to a lesbian couple); *Adoptions of B.L.V.D. and E.L.V.B.*, 628 A.2d 1271 (Vt. 1993) (same). The number of children raised in households with gay or lesbian parents ranges from six million to fourteen million. Frederick W. Bozett, *Children of Gay Fathers*, in GAY AND LESBIAN PARENTS 39 (Frederick W. Bozett ed., 1987); JOY SCHULENBERG, GAY PARENTING (1985) (reporting 6 million children living in gay households); ABA Annual Meeting Provides Forum for Family Law Experts, 13 FAM. L. REP. (BNA) No. 41 at 1513 (1987) (reporting 8 to 10 million children living in gay households). Moreover, "[t]here is no evidence that children who are raised with a loving couple of the same sex are any more disturbed, unhealthy, or maladjusted than children raised by a loving couple of mixed sex." *Bottoms*, 444 S.E.2d at 283 (quoting *Bezio v. Patenaude*, 410 N.E.2d 1207, 1215-16 (Mass. 1980); *In re Evan*, 583 N.Y.S.2d 997, 1002 n.1 (Surr. Ct. N.Y. 1992); see also Saralie Bisnovich Pennington, *Children of Lesbian Mothers*, in GAY AND LESBIAN PARENTS 34.

Perhaps most important, the Hawaii Supreme Court identified the denial of child custody and support payments as one of the harms that the deprivation of equal marriage rights inflicts on lesbians and gay men. It thereby has already recognized gay partners' procreation- and parenting-related interests. *Baehr v. Lewin*, 852 P.2d 44, 59, *clarified on grant of reconsideration in part*, 852 P.2d 74 (Haw. 1993).

45. Defendant's Response, *supra* note 41, at 7. This pernicious asserted State interest is neither "compelling" nor legitimate. It is not for the State to approve or disapprove of "non-heterosexual orientations and behaviors;" indeed, under our constitutional scheme, the State has no business dictating an orthodoxy or ideology of superiority or subordination, whether in creed, religion, sexual orientation, gender, or race. See, e.g., *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("[N]o official, high or petty, can prescribe what shall be orthodox."); see also *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."). The State has even less business enforcing its approval by stigmatizing a particular group or class, branding its members second-class citizens, or denying their right to marry and participate equally in society. See *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (holding that government's "bare . . . desire to harm a politically unpopular group" is constitutionally illegitimate); *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971) ("[M]ere public

more other jurisdictions;"⁴⁶ "same-sex couples will have disproportionate incentives to move to and/or remain in Hawaii," costing money and "distort[ing] the job and housing markets;"⁴⁷ "[it] will alter the state of Hawaii's desirability as a visitor destination."⁴⁸

Further, after more than a year of ferment and debate in response to *Baehr*, the state legislature labored to produce its own "compelling" interest for continued discrimination. What it came up with as its sole identified justification was the aforementioned "procreation" cluster of arguments.⁴⁹

intolerance or animosity cannot be the basis for abridgment" of constitutional rights such as association.).

46. Defendant's Response, *supra* note 41, at 8. Although a comprehensive examination of the constitutional and federalist obligation of other states to recognize marriages validly contracted in Hawaii is beyond the scope of this article, *see infra* note 196 and accompanying text, this particular assertion by the State is absurd. As a legal matter, the issue of recognition will arise when a particular individual or couple presents a claim. It will not arise from some abstract, across-the-board "declaration of war" on the marriages of Hawaii in a hostile "states-rights" gesture from mainland legislatures. Even if some states were to seek to resist recognition of, or respect for, same-sex couples' marriages, there is no constitutional provision, common law doctrine, or precedent to serve as a basis for a wholesale rejection of all Hawaii marriages.

47. Defendant's Response, *supra* note 41, at 9. The State, of course, cannot adduce a compelling interest from an asserted economic dislocation; individual rights may not be sacrificed in a discriminatory fashion solely for the financial benefit of others. *See* *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263 (1974) ("[A] State may not protect the public fisc by drawing an invidious distinction between classes of its citizens."); *see also* *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969) (holding that a one-year residency requirement for receiving welfare benefits is "invidious discrimination"); *Plyler v. Doe*, 457 U.S. 202, 215 (1982) (holding that illegal aliens are entitled to equal protection). Moreover, the state's economic claim is unfounded. The better argument—and the only evidence brought forth so far—is that eliminating discrimination will entail economic benefits for the state and the community, as well as the individuals directly concerned. *See, e.g.*, Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. (forthcoming Mar. 1995).

48. Defendant's Response, *supra* note 41, at 6-10.

49. In response to the *Baehr* decision, the state legislature passed a law reiterating its desire to perpetuate the different-sex restriction on marriage. 1994 HAW. SESS. LAWS 217. The law berates the Hawaii Supreme Court for its ruling, and, indeed, for presuming to rule at all on the lawfulness of discriminatorily withholding marriage from same-sex couples, which the legislature characterized as a matter of "policy . . . inappropriate for judicial response." *Id.* at § 1.

The law is most remarkable, however, for what it does not do—demonstrate a truly compelling state interest for discriminating. The sole justification the legislature asserts is the claim that "Hawaii's marriage licensing statutes, as originally enacted, were intended to foster and protect the propagation of the human race through male-female marriages." *Id.* As the *Baehr* court already noted, 852 P.2d at 49, whatever else can be said about this dubious assertion, *see* text surrounding notes 41-53, it is inconsistent with the legislature's own previous actions deleting a requirement that "marriage applicants show that they are not impotent or physically incapable of entering into a marriage." 1994 HAW. SESS. LAWS 217, § 1.

Ultimately, of course, all these arguments must fail: in America today, marriage is not a mere dynastic or property arrangement; it is not best understood as a tool or creature of the state or church;⁵⁰ and it is not simply, primarily, or necessarily about parenting, let alone procreation. Whatever the history, today marriage is first and foremost about a loving union between two people who enter into a relationship of emotional and financial commitment and interdependence, two people who seek to make a public statement about their relationship, sanctioned by the state, the community at large, and, for some, their religious community.⁵¹ And that concept of marriage, no more and no less, should hold for gay people seeking to marry.

It should be well settled in our modern, secular America that the decision whether to bear or raise children belongs to the individual and to the couple alone, and that marriage rights cannot be subjected to professed state policies on procreation.⁵² As the U.S. Supreme Court wrote decades ago, decoupling marriage from procreation:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. *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.*⁵³

Marriage is an association in which, for deep personal and social reasons, lesbians and gay men seek the equal right to partake.

Given the "interests" it has presented for excluding us, claims that are hardly "compelling," the State is unlikely to prevail on remand. The different-sex restriction challenged in *Baehr* will go the way of the same-race

50. Of course, our litigation in *Baehr* involves the denial of a marriage license by the State, and has nothing to do with private religious doctrines or ceremonies. Each religion remains free to grant or withhold its sanction to same-sex unions, wholly independently of a civil marriage. Parenthetically, there is little clamor from Catholic, Protestant, Jewish, or other religious denominations when licenses are granted for marriages performed by other faiths, even though they may not recognize such marriages as consonant with the doctrines of their respective religions; there, the line between civil and religious marriage is understood and respected.

51. See 1 HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 74 (2d ed. 1987) (The American institution of marriage has changed "from the days when it was an economic producing unit of society with responsibilities for child rearing and training, to the present, when its chief functions seem to be furnishing opportunities for affection, companionship, and sexual satisfaction.").

52. See, e.g., *Carey v. Population Services Int'l*, 431 U.S. 678, 693 (1977) (holding that forbidding the sale of non-prescription contraceptives to minors is not a compelling state interest); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (finding unconstitutional a statute prohibiting distribution of contraceptives to unmarried people); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that the use of contraception is a privacy right of married couples).

53. *Griswold*, 381 U.S. at 486 (emphasis added).

restriction challenged in *Loving*: discarded as an unconscionable intrusion on people's right to love and marry.

C. *The Meaning of Baehr v. Lewin*

The *Baehr* decision, then, although imperfect,⁵⁴ is remarkable. Inclusion at the level of marriage is uniquely revolutionary, conservatively subversive, singularly faithful to true American and family values in a way that few, if any, other gay and lesbian victories would be. This is true not only because of marriage's central symbolic importance in our society and culture, but also because of what the court called the "encyclopedic" multiplicity of rights and benefits that are contingent upon that status.⁵⁵

The reasoning of the decision itself shows the transformative potential of fighting for our equal right to marry. The court grasped what many even in our own community have not: the fundamental issues in these cases are choice and equality,⁵⁶ not the pros and cons of a way of life, or even the "right" choice.

Lambda and my co-counsel Daniel R. Foley argued what many lesbians and gay men feel: marriages between two men or two women can fulfill the same mix of interests as marriages between a man and a woman—a public affirmation of emotional and financial commitment and interdependence, access to legal and economic benefits and protections, a structure in which to raise children together, support for a relationship important to the individuals involved as well as to society, and a celebration of individuals'

54. See *supra* note 30 and accompanying text.

55. The court wrote:

The applicant couples correctly contend that the [State'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; (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 under the Uniform Probate Code; (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.

Baehr v. Lewin, 852 P.2d 44, 59, *clarified on grant of reconsideration in part*, 852 P.2d 74 (Haw. 1993) (internal citations omitted); see also Duclos, *supra* note 11, at 52-54 (listing benefits); Craig A. Bowman & Blake M. Cornish, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1167-68 (1992).

56. *Baehr*, 852 P.2d at 60.

religious beliefs.⁵⁷ But equally important, many feel that the government should not tell people what they can and cannot do based on their sex or their sexual orientation. Brilliantly sidestepping the legal thicket of sexual orientation politics, the court's opinion cut to the core of most anti-gay discrimination—not just heterosexism, but sexism.⁵⁸

Since the decision there has been political fallout. This country's well-funded, reactionary, radical right does not just roll over.⁵⁹ We must prepare for the battles that will follow an ultimate victory in the Hawaii Supreme Court, lest the "State's Rights" crowd once again attempt to gut or evade the constitutional precept that an American's fundamental rights remain with her wherever in the country she may travel or live. We must also keep the entire range of lesbian and gay concerns at the forefront; as with the fight for the right to serve openly in the military, inclusion need not mean co-optation.

But while fighting and preparing, we should take a moment to savor this seismic win and the enlarged possibilities it brings to us as individuals, as lovers, as gay people, and as Americans. The Supreme Court decision in *Baehr* shifted the very ground underlying gay people's second-class status, and one of the, if not the major, barriers to our full and equal citizenship has cracked wide open. If choice, inclusion, and love are the true foundations of gay people's pursuit of happiness, then with this victory out of Hawaii, the earth moved.

II

RESPONDING TO THE INTRA-COMMUNITY CRITIQUE

Let me not to the marriage of true minds
Admit impediments.⁶⁰

57. In *Turner v. Safley*, 482 U.S. 78, 95-96 (1987), the Supreme Court upheld prisoners' fundamental right to marry, notwithstanding "the limitations imposed by prisoner life," because of these "important attributes of marriage:"

First, inmate marriages, like others, are expressions of emotional support and public commitment. . . . In addition, many religions recognize marriage as having spiritual significance; for some inmates and their spouses, therefore, the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication. Third, . . . most inmate marriages are formed in the expectation that they ultimately will be fully consummated. Finally, marital status is often a precondition to the receipt of government benefits . . . , property rights . . . , and other, less tangible benefits. . . . [T]hese incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement. . . .

58. See *infra* text accompanying notes 133-35.

59. See Susan Miller, *Reason to Celebrate: An Interview With Dan Foley, Esq.*, ISLAND LIFESTYLE, June 1994, at 34 (describing political and legislative response to *Baehr* in Hawaii).

60. WILLIAM SHAKESPEARE, *Sonnet 116*, in SHAKESPEARE'S SONNETS 269 (W.G. Ingram ed., Hoddard and Stoughton Educational 1978) (1609).

Of course, some lesbians and gay men have a different opinion about the desirability of fighting for gay marriage rights. In her article, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"*⁶¹ Polikoff argues that gay people should not demand equal marriage rights for three asserted reasons: (1) marriage is an "inherently problematic institution" that gay people should not seek to join;⁶² (2) gay people will betray themselves by the rhetorical and ideological compromises that they will be forced to adopt through their effort to win equal marriage rights;⁶³ and (3) working for and winning the right to marry may thwart a fairer distribution of social goods such as health care and other necessities.⁶⁴ I disagree with each of these assertions and with their underlying premises.

A. *The Critique that Marriage is an "Inherently Problematic" Institution*

In an argument typical of many intra-community critics of marriage challenges, Polikoff contends: "[T]he desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism."⁶⁵

There are at least two disturbing premises embedded in this argument.

1. *The Desire of Gay People to Attain the Equal Right to Marry*

First, why is a lesbian's aspiration to marry "an attempt to mimic," rather than a genuine expression of her desires? Professor Mary C. Dunlap quotes one lesbian's observation:

[I]t was strange to me when people in our community talked about commitment ceremonies as mocking heterosexual experience, because for me the creation of our Brit Ahavah [Jewish wedding ritual] was so different from a heterosexual wedding. The fact that gays and lesbians do this against all odds makes the whole process completely different.⁶⁶

Nor is this woman's desire to get married unusual.⁶⁷ In the words of one gay man, "if it is freely chosen, a marriage license is as fine an option as

61. Polikoff, *supra* note 11.

62. *Id.* at 1536.

63. *Id.* at 1541-50.

64. *Id.* at 1549.

65. *Id.* at 1536.

66. Dunlap, *supra* note 11, at 81 n.47 (quoting Rosanne Leipzig & Judy Mable, *Tikkun Olam—Healing of the World*, in CEREMONIES OF THE HEART: CELEBRATING LESBIAN UNIONS 298 (Becky Butler ed., 1990)).

67. The marriage-litigation plaintiffs I have worked with, Ninia Baehr and Genora Dancel, Pat Lagon and Joe Melillo, Craig Dean and Patrick Gill, and others, all speak from the heart (and from years of togetherness) of their love and desire to make a public commitment to share their lives. See, e.g., Beth Harrison, *We're Going to the Chapel*, THE FRONT

sexual license. All I ask is the right to choose for myself, but that is exactly the right that society has never granted. . . ."⁶⁸ One historian generalizes that "[g]ays and lesbians are raised in the same culture as everyone else. When they settle down they want gold bands, they want legal documents, they want kids."⁶⁹ Even though equal marriage rights, until recently, seemed a dream, all available evidence suggests that the vast majority of gay and non-gay people alike share such sentiments.

In a 1994 survey by *The Advocate*, the largest existing poll of gay men on the subject, nearly two-thirds of the respondents stated unequivocally that they would marry a man if they were legally able to; 85 percent responded "yes" or "maybe;" only 15 percent said they would not marry.⁷⁰ A significantly smaller, earlier poll by another journal presented similar results: 83 percent of lesbians and gay men in the study said they would "definitely" get married if they could.⁷¹

PAGE, NOV. 25, 1994, at 3 (interview with marriage plaintiffs, describing how they met and fell in love and why they want to get married); Kimberley Griffin, *To Have and To Hold: Gay Marriage, The Next Frontier*, WINDY CITY TIMES, June 2, 1994, at 1; Kristen Cook, *Traditional Church Wedding Will Unite Grooms Only*, ARIZ. DAILY STAR, Sept. 10, 1993, at B1; Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 552-53 (1992); Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home*, 1994 WIS. L. REV. 1033 n.12.

68. Arnie Kantrowitz, *Till Death Do Us Part: Reflections On Community*, ADVOC., Mar. 1983, at 27. Kantrowitz concludes:

[T]he right to choose marriage still remains the ultimate normalization of relations between nongay and gay society. It extends the impact of gay anti-discrimination laws because it not only recognizes the right to be different, it recognizes the right to be equal. It acknowledges not only gay pain, but gay pride and pleasure. It says that our friends not only pity us, they respect us and believe our love is as real as their own. But they do not.

Id. at 27. As I wrote in law school eons ago when I first read these words, it is time to lift that sentence off the heads of gay women and men in America.

69. Eloise Salholz, *For Better or For Worse*, NEWSWEEK, May 24, 1993, at 69 (quoting Eric Marcus). Gay people, for the most part, grow up among the non-gays in our shared popular culture (my preferred, if stereotypical, slice of which is represented by the quoted romantic show tunes).

70. "Question 48 - If marriage to a man were legal in the United States, would you want to marry a man someday?" Yes (58.9%); Maybe (26.1%); No, but I do want a lifelong relationship (12.1%); No, and I do not want a lifelong relationship (2.8%). Janet Lever, *Sexual Revelations*, ADVOC., Aug. 1994, at 17, 24 (results on file with author). The survey distinguished clearly between marriage and a nonmarital lifelong relationship. Still, only 15 percent of gay men polled said they do not want marriage. The *Advocate* will conduct a similar survey of lesbians later this year.

71. *Readers Favor Legal Marriage*, PARTNERS MAGAZINE FOR GAY & LESBIAN COUPLES, July/August 1990. In one recent *Newsweek* poll, lesbians tended to rank equal marriage rights a far higher priority than the gay men surveyed. *Newsweek* Poll, *Most Gays Believe President Clinton is not Taking Gay Issues Seriously Enough*, at 7-8 (on file with Lambda). Asked to evaluate the importance of several goals for gay people, only 7 percent of the lesbians responding said equal marriage rights were "not too important," compared to 19 percent of the gay men. *Id.* Sixty percent of lesbians surveyed said equal marriage rights were "very important," an answer selected by 39 percent of the gay men. *Id.* While no one poll or set of polls under present circumstances provides a dispositive answer to the

Like non-gay people, many lesbians and gay men offer less romantic explanations of their desire for equal marriage rights. For instance, noting the difficulties that gay people experience in terminating relationships and securing legal assistance, one attorney remarks: "I used to say, 'Why do we want to get married? It doesn't work for straight people.' . . . But now I say we should care: They have the privilege of divorce and we don't. We're left out there to twirl around in pain."⁷² Many emphasize the social value in ending the denial of marriage to gay couples:

[T]he current frontier justice that obtains when gay couples part will eventually be replaced by a more civilized standard as more states and municipalities recognize gay couples as a legal unit. . . . Some lawyers contend that the complexities of gay divorce will eventually prove the strongest argument yet for gay marriages, since it would establish the right to a fair process when those relationships fall apart.⁷³

Gay people share the same mix as non-gay men and women of practical and emotional, social and individual reasons for wanting the right to marry.

For several years now, Lambda's intake has reflected a constant, high level of interest in marriage within our communities. During the 1987 March on Washington, thousands of lesbians and gay men participated in an event pointedly billed "The Wedding," in which they celebrated their relationships by exchanging personal vows before an officiant in front of the Internal Revenue Service Building.⁷⁴ In his travels across the United States⁷⁵ and again around the world,⁷⁶ Neil Miller chronicled gay person after person either seeking marriage or indeed, as far as possible, actually wedding their partners.

Consider, for example, the experience of one couple that Miller encountered:

somewhat misleading question, "what do gay people want?," it is clear that there is enormous desire for equal marriage rights, just as there is among non-gay people.

72. See Kirk Johnson, *Gay Divorce: Few Markers in This Realm*, N.Y. TIMES, Aug. 12, 1994, at A20 ("Because gay people cannot be legally married in the United States, there is, for starters, no access to divorce court.").

73. *Id.*

74. Linda Wheeler, *2000 Gay Couples Exchange Vows in Ceremony of Rights*, WASH. POST, Oct. 11, 1987, at B1. This gathering took place years before equal marriage rights seemed within reach.

75. NEIL I. MILLER, *IN SEARCH OF GAY AMERICA* 28 (1989) (Gene and Larry, Oklahoma City, OK); *id.* at 96 (Sandy and Sue, Bismarck, ND); *id.* at 103-04 (Craig and Jonathan, Rapid City, SD); *id.* at 159 (Trinity and Desiree, San Francisco, CA); *id.* at 162-63 (Dana and Prudence, San Francisco, CA).

76. NEIL I. MILLER, *OUT IN THE WORLD: GAY AND LESBIAN LIFE FROM BUENOS AIRES TO BANGKOK* 363 (1992) (Lesbian and gay marriages "seemed to capture the imagination of gay people, from the black townships of South Africa, where a gay community was just emerging, to countries such as Denmark, where there had been a strong gay movement for years.").

Des was reluctant. She didn't believe in marriage and was opposed to imitating what she viewed as the heterosexual model. "I had a women's studies point of view," she noted. But gradually Trinity convinced her that marriage simply represented an expression of love and commitment that was neither intrinsically heterosexual or homosexual.⁷⁷

While Desiree is certainly entitled to her original as well as her subsequent views, so is Trinity. Desiree's original critique—her "women's studies point of view"—may also have been quite accurate. But ultimately, the view she came to share with Trinity seems more empowering, for she and Trinity made marriage what they wanted it to be—not by flailing at it, not by fleeing it, but instead by claiming it.

The suggestion that lesbians and gay men who want equal marriage rights do not know what is best for them as gay people is not uncommon in the intra-community arguments against pursuing marriage. In the charge that the demand for equal marriage rights is insufficiently radical or liberationist, a contemptable desire to "mimic" or "emulate" the non-gay world, or a sell-out of less "assimilationist" or less "privileged" gay people,⁷⁸ there is an inescapable whiff of imputed false consciousness.⁷⁹ However, given the diversity and number of women and men within our communities who strongly want the equal right to marry, the imputation seems wrong, as well as unfair.

Indeed, Polikoff and others of us in the movement repeatedly declare our deep commitment to the values of diversity and choice. These values are essential elements of "the promise of both lesbian and gay liberation and radical feminism" that Polikoff invokes.⁸⁰ A good-faith commitment to diversity and choice must include the acknowledgement that not all gay people (to say the least) consider marriage—especially their own desired marriages—as innately problematic.

77. *Id.* at 159.

78. See *infra* text accompanying notes 160-63.

79. Polikoff's reductionist claim that gay people's "desire to marry . . . is [just] an attempt to mimic the worse of mainstream society," Polikoff, *supra* note 11, at 1536, is hardly unique. For example, while acknowledging the force of some arguments made against hinging legitimacy and benefits on institutions such as marriage, Professor Dunlap has criticized one of Polikoff's epigoni for her "gross stereotyping of subgroup motivations and ambitions" in automatically attributing anti-marriage views to those whom she labeled "more marginal members of the lesbian and gay community (women, people of color, working class[,] and poor)." Dunlap, *supra* note 11, at 78; see also Eskridge, *supra* note 11, at 1491-93.

80. Polikoff, *supra* note 11, at 1536.

We lesbians and gay men are "a remarkably diverse group;"⁸¹ we are, as we say, everywhere. Many of us, perhaps even most of us, are not always visible, even to those lesbians and gay men who are the most visible. Unlike the members of most other minority groups, we are not born into our identity or our community; we have to find our way there largely on our own, after working through negative socialization from family and other institutions that most others rely on for self-identification, solidarity, and support. We have to understand and even construct our lesbian or gay identity around complex issues that American society handles singularly poorly: sex, intimacy, gender roles, and same-sex attraction. Our community (or communities) is shaped by these facts, as well as by the corollary notion that most gay people can "pass" and thus need not partake in gay identity on an all-or-nothing basis. Accordingly, "assimilationist" or not, many of us do not identify or live our lives as gay in precisely the ways and terms that others of us would choose, or even deem gay or lesbian.⁸² Ironically, despite this fact, when it comes to the marriage issue, the gay community—men *and* women—has been far ahead of the "leaders," the organizations, and most of us in what passes our movement's chattering classes.⁸³ They have made the personal, political; they know what they want, and it includes equal marriage rights.

81. ALAN P. BELL & MARTIN S. WEINBERG, *HOMOSEXUALITIES* 217 (1978); *see also* C.A. TRIPP, *THE HOMOSEXUAL MATRIX* 119 (1987) (The lesbian and gay community consists of "individuals who are about as diffusely allied with each other as the world's smokers or coffee-drinkers, and who are defined more by social opinion than by any fundamental consistency among themselves."). While I obviously believe we can meaningfully speak of "the gay community," there are ways in which it is also accurate to see us as "communities" or even (I hope at least) a "coalition." *See* Bernice J. Reagon, *Coalition Politics: Turning the Century*, in *HOME GIRLS: A BLACK FEMINIST ANTHOLOGY* 356, 359-62 (Barbara Smith ed., 1983) (defining "coalition" as an association of diverse people grouped together or who join together for what they have in common, not to create uniformity).

82. Polikoff has written before of her frustration over this fact. *See* Nancy D. Polikoff, *Lesbian Mothers, Lesbian Families: Legal Obstacles, Legal Challenges*, 14 N.Y.U. REV. L. & SOC. CHANGE 907, 908-09 (1986) (describing, for example, her "horrified" reaction to findings about the "sex-role behaviors and attitudes toward ideal child behavior" of some of her "lesbian sisters" and her efforts to urge "lesbian mothers not to see themselves as having more in common with heterosexual mothers than they have with lesbians who have no children"). I myself write as a gay man who has chosen to be totally "out" virtually all the time, believing that gay identity in a heterosexist society has a political dimension (and is also more true to myself; fortunately it works for me). But I also believe there is more than one right way to be gay or lesbian. For a different, radical version of this seemingly unradical proposition, *see*, for example, Adrienne C. Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* 177, 192 (Ann Snitow, Christine Stansell & Sharon Thompson eds., 1983) (describing a "lesbian continuum" whereby behavior, identity, and choices of women may be understood as lesbian regardless of how others see them).

83. This is not exactly a novel phenomenon in civil rights movements. Martin Luther King, Jr. commented in 1963:

It was the people who moved their leaders, not the leaders who moved the people. Of course, there were generals, as there must be in every army. But the command post was in the bursting hearts of millions of Negroes. When such a people begin to move, they create their own theories, shape their own destinies, and choose the

What many gay people do not want is an all-or-nothing model imposed on their lesbian or gay identity; they want both to be gay *and* married, to be gay *and* part of the larger society.⁸⁴ For these lesbians and gay men, being gay is not just about being different, it is also about being equal. Their deeply-held convictions about how they want to live their lives and liberation are not mere mimicry. They are entitled to respect within our community as well as by the state.⁸⁵

leaders who share their own philosophy. A leader who understands this kind of mandate knows that he must be sensitive to the anger, the impatience, the frustration, the resolution that have been loosed in his people. Any leader who tries to bottle up these emotions is sure to be blown asunder in the ensuing explosion.

KING, *supra* note 15, at 144. I have already alluded to the ideological deadlock that originally sidelined national lesbian and gay groups during the major marriage challenges of the past few years. Now we scramble to assure that there is a strategy behind our efforts and to foster the requisite nitty-gritty follow-through in political organizing and public education that must accompany legal activism. See *infra* part III.

84. See, e.g., *Shahar v. Bowers*, 836 F. Supp. 859 (N.D. Ga. 1993). In *Shahar* a lesbian sought protection for both her marriage to another woman (performed by a rabbi) and her government job. The lower court permitted Georgia Attorney General Michael Bowers to withdraw an offer of government employment from attorney Robin Joy Brown because she and her female partner, Francine M. Greenfield, had held a religious wedding ceremony, and had adopted the shared last name Shahar. *Id.* at 864-65. The court declared that although Shahar's relationship was constitutionally protected, it could be invoked by the State as grounds for denying her a job. *Id.* Bowers supported his anti-gay and anti-gay marriage discrimination by claiming that lesbian and gay intimate relationships are not protected, citing the case that will doubtless be his most enduring monument, *Bowers v. Hardwick*. Defendant's Motion to Dismiss, *Shahar v. Bowers*, 836 F. Supp. 859 (N.D. Ga. 1993), cited in *Shahar v. Bowers*, No. 1:91-CV-2397-RCF, 1992 U.S. Dist. LEXIS 7791, at *11. See discussion *supra* note 32 and accompanying text.

Ironically, the *Hardwick* Court had ostensibly based its reasoning on the claim that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated. . . ." *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986). Cases such as *Shahar* and *Baehr* attempt to correct that purported deficiency in the *Hardwick* record, emphatically emphasizing the connections that gay people have to family, to loving relationships, to procreation, and, yes, to marriage. See Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 534 (1989) (urging "substantive" answer to *Hardwick* majority that highlights similarities between same-sex and different-sex unions, with reference to marriage). This is one of the Catch-22's often imposed on gay people: our basic rights, including sexual privacy, are not protected because we are not married, but we are denied the right to marry (and are fired, as in *Shahar*, when we try to). How odd that the proud women and men who are plaintiffs in these cases, asserting their identity and equality as open and loving lesbians and gay men, should find themselves reduced to the label of "assimilationist."

85. I also believe that that same respect should be accorded others, gay and non-gay, who live their lives as unconventional, nonconforming, "queer," or separatist. See Wolfson, *supra* note 32, at 33 ("[B]eing different is part of being human, not a reduction of it, and not a justification for dehumanization or denial of rights."). That, to me, is the richness of our free society, ideally based on respect for the individual and appreciation of human difference. See, e.g., *Cohen v. California*, 403 U.S. 15, 24 (1971) (the Constitution puts "the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., joined by Holmes, J., concurring) ("[T]he final end of the state is to make [people] free to develop *their* faculties") (emphasis added), *overruled on other grounds* by *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

2. *The Historical Nature and Transformability of Marriage as an Institution*

The second premise embedded in Polikoff's argument that I dispute is the one that Trinity also challenged: the idea that the institution of marriage is in fact "*inherently* problematic" even if one were to concede that it has been *historically* problematic.⁸⁶ As Professor William N. Eskridge, Jr. notes, "marriage is not a naturally generated institution with certain essential elements."⁸⁷ In his view,

Polikoff comes perilously close to essentializing marriage as an inherently regressive institution That Western marriages have traditionally been the social instrument by which women have been subordinated does not mean that marriage "causes" that subordination. Women's subordination may be more deeply related to social attitudes about gender differences than to the formal construct of marriage per se. If that is true, same-sex marriage does not buy into a rotten institution; it only buys into an institution that is changing as women's roles and status are changing in our society.⁸⁸

Similarly, while we acknowledge the history of marriage and the institutional changes still necessary, "[t]o give actual marriage the patriarchal identity and texture of law and legal history undermines the creative and liberating actions of individuals, couples, and subcultures in society."⁸⁹ Both historically and individually, marriage is not the fixed, flawed institution that Polikoff and other critics insist it is and must be.

Adding his voice and scholarship to Eskridge's sweeping survey of the history of same-sex couples' marriages, the late Professor John Boswell has demonstrated that marriage unions and ceremonies between people of the same sex existed throughout most of Western history and that the nature and understanding of marriage itself have changed constantly in the eyes of society, religion, and the state to meet the needs and values of people at any given time.⁹⁰ For example, Boswell notes:

86. For that critique, see, e.g., Eskridge, *supra* note 11, at 1486-88. Professor Eskridge also served as co-counsel in a recent marriage challenge brought by two gay men denied a license. *Dean v. District of Columbia*, No. 90-13892 (D.C. Ct. App. Jan. 19, 1995) (court rejects claims under D.C. marriage statute, D.C. human rights law, and federal constitution, although dissenter would remand for hearing under equal protection claim).

87. Eskridge, *supra* note 11, at 1434. Eskridge continues:

[T]he social construction of marriage is dynamic. Linked as it is to other institutions and attitudes, marriage will change as they change. Conceptualized around certain practices dividing society's constituents, marriage should change as the subordinated groups identify their own oppression and decide to resist it.

Id.

88. *Id.* at 1488.

89. Dunlap, *supra* note 11, at 71.

90. JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* (1994).

[I]t is difficult, perhaps impossible, to map onto the grid of premodern heterosexual relationships what modern speakers understand by "marriage": nothing in the ancient world quite corresponds to the idea of a permanent, exclusive union of social equals, freely chosen by them to fulfill both their emotional needs and imposing equal obligations of fidelity on both partners.⁹¹

Boswell's work offers lessons that both gay and non-gay people often resist: the world has not always been as we see it now, and we must enlarge our sense of possibilities to imagine (or reclaim) a society in which diverse family arrangements are respected.

Ironically, in much of her work, Polikoff is quite sensitive to the socially constructed, and thus transformable, nature of other powerful social institutions. For example, she has written cogently of the need and means to develop lesbian-conscious family law, despite the fact that the family has been a mutable and sometimes "problematic" institution, and despite the fact that the "legal system [itself] is not friendly to lesbians and gay men."⁹² Although some judges may choose not to, most of us understand that even "[t]he word 'family' in the sense of residential and biological unit is relatively new."⁹³ As an institution, the family, like marriage, has undergone radical change throughout history.⁹⁴ Polikoff's own involvement in family law activism suggests that the family's roots in a history that has included the subordination of women, class stratification, the maltreatment of children, and slavery⁹⁵—some of which continue today—hardly mean that we should not seek recognition of our family relationships. Polikoff does not

91. *Id.* at 38. Boswell documents the ambivalence of the Christian church toward marriage. He notes the often-ignored fact that marriage was only declared a sacrament or deemed to require the participation of a priest until the year 1215. *Id.* at 111. Just one of several relationships in which people might have partaken at any given moment, *id.* at 29-33, 172, the institution of marriage was often challenged and ill-defined, *id.* at xxi-xxiii, 109, 171-72, and of course changed substantially over time:

In premodern Europe marriage usually began as a property arrangement, was in its middle mostly about raising children, and ended about love. . . . By contrast, in most of the modern West, marriage *begins* about love, in its middle is still mostly about raising children (if there are children), and ends—often—about property, by which point love is absent or a distant memory.

Id. at xxi-xxii (original emphasis), 40, 48, 162, 170-71, 200, 281.

92. Polikoff, *supra* note 82, at 907.

93. FRANCES GIES & JOSEPH GIES, *MARRIAGE AND THE FAMILY IN THE MIDDLE AGES* 4 (1987) ("Before the eighteenth century no European language had a term for the mother-father-children grouping."). The Latin word *familia*, derived from a word meaning *house*, meant "the people who lived in a house, including servants and slaves." *Id.*; see also WITOLD RYBCZYNSKI, *HOME: A SHORT HISTORY OF AN IDEA* (1986) (discussing the evolution of ideas that today we take, not just for granted, but as "traditional").

94. See JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* (1988); see also Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 200.

95. E.g., GIES & GIES, *supra* note 93, at 4-37; JOHN BOSWELL, *THE KINDNESS OF STRANGERS: THE ABANDONMENT OF CHILDREN IN WESTERN EUROPE FROM LATE ANTIQUITY TO THE RENAISSANCE* (1988).

conclude that the institution's flaws are an argument against participating in the institution; rather, she calls upon us to redefine it.⁹⁶

Much of the same attack Polikoff makes about the "inherently problematic" institution of marriage she has also made about other social institutions, such as motherhood:

I have asked others to examine, as I continue to examine, how the institution of motherhood functions to maintain and promote patriarchy. I have argued that our lesbianism, by itself, does not negate or transform that institution.⁹⁷

However, in her work, so much of which is devoted to developing legal protection for lesbian mothers, Polikoff stops short of claiming that the institution of motherhood is not transformable. She does not follow her own reasoning to conclude that it is not worth demanding equal rights in parenthood.

Despite her own uncertainty regarding lesbians' and gay men's choice to marry, Professor Catharine A. MacKinnon has conceded:

I do think it might do something amazing to the entire institution of marriage to recognize the unity of two 'persons' between whom no superiority or inferiority could be presumed on the basis of gender.⁹⁸

In that vein, for example, Professor Marc A. Fajer quotes a non-gay woman who looked to lesbians as models for her own relationships. As she put it, "heterosexuals have no role models for positive, equal relationships."⁹⁹ Indeed, Boswell's research shows that same-sex romances, in marriage or otherwise, were "the predominant public ethos of eroticism in a number of times and places;" furthermore, they were often considered *ideal* relationships because they denoted equality between the partners and were based on the purer motivations of love and commitment, rather than mere procreation, patriarchy, subordination, dynastic obligations, or property arrangements.¹⁰⁰

96. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 572 (1990) (calling on society to redefine parenthood to include anyone whom a legally recognized parent considers part of the parent-child relationship).

97. Polikoff, *supra* note 82, at 909. Of course, there have been other powerful critiques presenting motherhood as the primary institution subordinating women. See, e.g., DOROTHY DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE* (1976); NANCY J. CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978).

98. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 27 (1987).

99. Fajer, *supra* note 67, at 616 (quoting SUSAN E. JOHNSON, *STAYING POWER: LONG-TERM LESBIAN COUPLES* 15-16 (1990)).

100. BOSWELL, *supra* note 90, at 56-61, 74-75, 83, 136, 159-61, 280.

One need not idealize either gay relationships or marriage to conclude that gay people should have equal choices, or that there is value in the demand for equality itself. It is true that marriage is an imperfect social institution, with a long, troubled history.¹⁰¹ It is also true that marriage as a legal matter may have far less "theoretical coherence" than we like to believe.¹⁰² However, it is also true that marriage is something that we can shape and that, like any social institution, it ought to serve real people and their real needs, including our individual and familial need for equality, inclusion, and respect.

B. The Critique that Compromises in Rhetoric or Tactics Undermine Larger Goals

In addition to her belief that access to the institution of marriage itself is not a desirable goal, Polikoff is concerned that "a concerted effort to achieve the legalization of lesbian and gay marriage will valorize the current institution of marriage . . . [and] would work to persuade the heterosexual mainstream that lesbians and gay men seek to emulate heterosexual marriage as currently constituted."¹⁰³ This is bad, she argues, because we, too, will come to believe our rhetoric, become co-opted or divided, and thereby lose our liberationist vision.¹⁰⁴ Such a critique posits that social change results from the rhetorical goals and arguments a social movement adopts, is confined by the tactics it uses, and is correspondingly endangered when that rhetoric or those tactics are muted, moderated, limited, or discarded.¹⁰⁵

101. See Homer, *supra* note 11, at 520-21; see also Deborah Schupack, *Starter Marriages: So Early, So Brief*, N.Y. TIMES, July 7, 1994, at C1.

102. Homer, *supra* note 11, at 521 ("[T]he tradition of heterosexual marriage to which courts like *Baehr* refer is not so much a historical, descriptive tradition as it is an ahistorical, prescriptive ideal."). Homer is correct and insightful about the social romanticization of, and moralizing about, marriage, as well as about the murkiness of much of the legal writing and doctrine on the subject. Where he and I part company is in what to do about it.

In my view Homer, like other intra-community critics, errs in idealizing gay people's "outlaw status." *Id.* at 527-28, 530. He devalues the transformative potential of inclusion, mischaracterizes what the effort to obtain equal marriage rights is about, and presents us with false choices to support his anti-marriage position. *Id.* at 527-28. Like other critics, Homer is so focused on accentuating our "difference" that he simply undervalues the importance in itself of demanding equality, including our equal right to marry. See Maggie Tannis, *A Proposal of Marriage*, NEW ORLEANS SECOND STONE, May/June 1994, at 3 ("By not pursuing the right to marry, we are saying in effect that it is acceptable to treat gay and lesbian couples differently than heterosexual couples. That is not acceptable to me."). See also discussion, *infra*, at note 174. Finally, like other critics, Homer is selective in his intolerance of imperfection. As a fellow alumnus, I am sure he would agree with me that Harvard Law School is an institution with its share of pluses and minuses. Yet Homer elected to enter it, and presumably would agree that we should fight a ban on lesbians and gay men studying there.

103. Polikoff, *supra* note 11, at 1541.

104. *Id.*

105. A similarly wooden understanding of how social change is achieved flaws Homer's often insightful analysis of the institution and law of marriage. Homer, *supra* note 11, at

In perhaps the central passage of her essay, Polikoff states:

If my hypothesis about the process of change is correct, then we must measure the value of the work it will take to legalize lesbian and gay marriage by how closely the arguments we make in advocating this change match what we really believe about and want for our relationships and our community.¹⁰⁶

Here I find myself differing with Polikoff on at least three points.

First, I believe her hypothesis that social change is the result primarily of rhetoric and revolution is incorrect, or at least incomplete. In my view, social change occurs through the possibilities enlarged by each gain in altered reality and evolution. Thus, I also believe we should measure the value of our work by what it actually achieves, not by our tactics or by the purity, presence, or prominence of some or all of the arguments possible.¹⁰⁷ Finally, I suspect I have a different understanding of, or emphasis on, who "we" are.¹⁰⁸

1. *Theories of Social Change, "Rhetoric" Versus "Reality," and Lessons From the Battles for Abortion Rights*

Polikoff lays out her hypothesis about the process of social change in a discussion of the battle for abortion rights in America. She contends that by discarding "the rhetoric of radical transformation" and thus "shifting their strategy, abortion rights activists lost the transformative potential of women's ready access to abortion."¹⁰⁹ Here, I must contest her emphasis on rhetoric rather than on reality (by which, in the abortion context, I mean the actual improvement in access to abortion, or actual progress in eliminating restrictions on choice).

Granted, both rhetoric and reality possess transformative potential. However, waving the red flag of "abortion on demand" in a losing war, while perhaps pure, hardly compares in importance with actually securing women's access to abortion on the ground, and *then* revisiting the newly transformed landscape to liberate new territory over time. In the specific

512-13. Contrary to Homer's implication in his critique of the transformative potential of *Baehr*, a court decision's impact begins, not ends, with its literal holding and formal doctrines. Homer is not the only legal commentator to overstate his case in that regard while still offering valuable guidance to judges and advocates. See Kenneth L. Schneyer, *Avoiding the Personal Pronoun: The Rhetoric of Display and Camouflage in the Law of Sexual Orientation*, 46 RUTGERS L. REV. 1313, 1381-89 (1994) (criticizing Justice Levinson's conservative rhetoric in *Baehr* and its limited doctrinal foundations). Perhaps the fault lies in a focus on law to the exclusion of other loci of social change. As Mark Twain put it, "If the only tool you have is a hammer, all your problems start to look like nails."

106. Polikoff, *supra* note 11, at 1549.

107. In any case, in seeking marriage, we have frequently spoken in a rhetoric of transformative potential and revolutionary gain. See, e.g., LAMBDA UPDATE, *supra* note 17, at 23.

108. See *supra* text accompanying notes 81-85.

109. Polikoff, *supra* note 11, at 1541-42.

cases of abortion and feminist liberation, the choice in tactics initially accomplished real improvements and created the opportunity for just such further progress.¹¹⁰ With the abortion victory won and access secured, the movement could have gone on to protect, and then to build on, its indispensable, prerequisite gain. Whatever we called it at any particular moment, that new *reality* would have meant progress in freeing women from the obligations of unwanted or unplanned pregnancy, in decoupling sex from procreation, and in empowering women to make life choices for themselves. Any rhetorical shift employed to secure the new reality may have been disappointing, but need hardly be considered conclusive or irrevocable.

It is true that a period of regression has followed the legal victory in *Roe v. Wade*¹¹¹ and the improvements it wrought for women in securing access to abortion and other areas of privacy and choice.¹¹² However, the cause of this regression was not the shift in strategy and rhetoric to which Polikoff points. Rather, as stated in a passage Polikoff herself quotes, the

110. See DAVID J. GARROW, *LIBERTY AND SEXUALITY* 78 (1994) (arguing that the real impact of a court decision such as *Griswold v. Conn.*, 381 U.S. 479 (1965) (upholding married people's right to use contraceptives) is a revolution in the actual availability of contraception and thus choice); *id.* at 577-78, 617 (the uncertainty involved in winning access to abortions prior to the revolution effected by *Roe v. Wade*, 410 U.S. 113 (1973)); see also Steven Polgar & Ellen S. Fried, *The Bad Old Days: Clandestine Abortions Among the Poor in New York City Before Liberalization of the Abortion Law*, 8 FAM. PLAN. PERSP. 125, 125 (1976) (noting that before *Roe*, "[p]oor and minority-group women were virtually precluded from obtaining safe, legal procedures, the overwhelming majority of which were obtained by White women in the private hospital services on psychiatric indications"); RACHEL BENSON GOLD, *THE ALAN GUTTMACHER INSTITUTE, ABORTION AND WOMEN'S HEALTH: A TURNING POINT FOR AMERICA?* 3 (1990) (stating that in the two-and-a-half years before *Roe*, almost 350,000 women left their home states to obtain abortions more readily available under New York's more liberal laws). As with the parallels between the same-race and different-sex restrictions, it is important not to forget how bad things were before reform.

111. 410 U.S. 113 (1973) (holding that state criminal abortion laws that except from criminality only a life-saving procedure on the mother's behalf violate the due process clause of the Fourteenth Amendment, which protects the right to privacy).

112. See *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (holding that restrictions on abortion are only unconstitutional when they impose an undue burden on a woman's right to choose); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (holding that state restrictions on the use of public employees and facilities does not constitute an undue government burden on a woman's right to choose abortion, even when those restrictions amount to a complete ban on the performance of nontherapeutic abortions in public hospitals).

The organized, often violent efforts of extremist anti-choice organizations and individuals—only belatedly countered by those committed to choice and women's rights, and inadequately addressed by the law—have led to a decline in the availability of abortion services in the past several years. See *Abortion Clinics Seek Doctors But Find Few*, N.Y. TIMES, Mar. 31, 1993, at A14; see also Stanley K. Henshaw & Jennifer Van Vort, *Abortion Services in the United States, 1987 and 1988*, 22 FAM. PLAN. PERSP. 102, 106 (1990) (noting that abortion services are available in only 17 percent of the counties in the United States); NATIONAL ABORTION FEDERATION, SUMMARY OF EXTREME VIOLENCE AGAINST ABORTION PROVIDERS AS OF JUNE 1, 1993: OTHER REPORTED INCIDENTS OF SERIOUS VIOLENCE (1993). This is not a question of the rhetoric employed; it is a matter of sticking with the battle over the long haul against ferocious opposition.

setback occurred because "[t]he abortion rights movement essentially folded after abortion became legal."¹¹³

It is *this* strategic error to which we can more accurately attribute the renewed erosion in women's position vis-a-vis meaningful access to abortion. Had we kept up the fight, the transformative potential of women's reproductive (and other) freedom would have remained in the forefront, and we would not subsequently have lost so much ground in the reality of access to abortion itself. Polikoff's rhetoric-centered contention that the big problem was that "[t]he pro-choice movement attempted to sanitize its own demands" simply does not stand up.¹¹⁴ The far more basic problem is that the movement "essentially folded" in its efforts to safeguard and further extend the post-victory altered reality.¹¹⁵ It is this I hope to avoid in the pre- and post-*Baehr* phases of the battle for the right to marry.¹¹⁶

Critics of our work for marriage rights repeatedly confuse the disappointment that arises from our failure to build on our gains with the notion that winning without full rhetorical flourish is the cause of setbacks. Their overemphasis on rhetoric thus misses the transformative potential of new

113. Polikoff, *supra* note 11, at 1542 n.29 (quoting Marlene Fried, *Transforming the Reproductive Rights Movement: The Post-Webster Agenda*, in FROM ABORTION TO REPRODUCTIVE FREEDOM 5-6 (Marlene Fried ed., 1990)). The danger of complacency was not lost on those involved in the struggle up through the victory in *Roe v. Wade*, 410 U.S. 113 (1973). See GARROW, *supra* note 110, at 604 (quoting one activist's observation that "one of the most dangerous things that could happen now is that women could sit back and think that they have won"). Of course, the election of hostile presidents throughout the 1980s, and the cramped constitutional vision of most of the judges they appointed, help explain much of the regression that followed *Roe* (as well as our 5-4 defeat in *Hardwick*).

114. Polikoff, *supra* note 11, at 1542 n.29. Nor is this true. The rhetoric deployed to win the rights at stake shifted throughout the 50-year battle leading up to *Roe v. Wade*, including Sarah Weddington's decision not to extol abortion itself in her argument before the Supreme Court. See also GARROW, *supra* note 110 at 274, 571.

115. See GARROW, *supra* note 110, at 629-33 (noting the increasingly defensive posture of the pro-choice movement in light of successful Congressional and judicial efforts to limit access to abortion during 1978-79).

116. The error of failing to build on victories is similarly characteristic of the lesbian and gay movement, although we more often "fold" after setbacks or err in choosing only one methodology to begin with. Part of Homer's critique of *Baehr* is the contention that "[s]tates with same-sex sodomy laws may recognize same-sex marriages performed in Hawaii," but only in some second-class fashion. Homer, *supra* note 11, at 513-16. He also suggests, as Polikoff implies, that winning marriage rights might divide unmarried and married lesbians and gay men, "introduc[ing] into gay culture, for the first time, the concept of pre-marital sex." *Id.* at 513. Like other critics, Homer seems to consider the fact that winning equal marriage rights is "no magic wand to cure" all discrimination or injustice to be an argument against marriage or equal marriage rights themselves. *Id.* at 506. His arguments seem to assume that we would just "fold" after a win in *Baehr*.

While I disagree with Homer's speculations as to the limited value of winning equal marriage rights and the legality (or likelihood) of a hierarchy of marriages (with gay people's marriages treated as legally inferior), his arguments should serve as reminders that our work is not finished when we win any particular battle. We must assure gay and lesbian equality, eliminate marital status discrimination, protect and support all families, and empower people to shape their own lives with due respect for others. No one vehicle or victory will do it all.

reality. Oddly, they undervalue actual gains that tangibly improve real people's lives while putting far too much weight on any one vehicle—be it the substantive achievement of increased access to abortion or equal choice regarding marriage, or such social change mechanisms as litigation or the courts themselves.¹¹⁷ Any of these objectives may be *necessary* for liberation: to be free and equal, a woman must have control over her body, sexuality, and life plan; to be free and equal, lesbians and gay men must be able to participate in all the institutions of society; to protect the vulnerable and assure individual liberty, courts must defend constitutional rights. No one vehicle, however, need be deemed *sufficient* for the ultimate achievement of liberation.

A look at *Baehr v. Lewin* further limns the error in emphasizing rhetoric over reality as the way to value the potential for social change. Because Polikoff never mentions our victory in *Baehr*, she never discusses the grounds of that victory: that the restriction on same-sex marriage constitutes gender discrimination under the equal protection guarantees of Hawaii's constitution's equal rights amendment. Over and over, opponents of the ERA contended in gleefully horrified tones that the ERA would require same-sex marriage.¹¹⁸ Most ERA supporters were more than willing to "concede" (futilely, as it turned out) that it would not.¹¹⁹ Despite (or maybe because of) such sanitizing and refusing to go to the mat rhetorically, sure enough we got an equal rights amendment in Hawaii (although not nationally),¹²⁰ and the breakthrough ruling in *Baehr v. Lewin* followed.

117. Clearly, judicial triumphs can have revolutionary impact, but not in themselves be revolutionary. See, e.g., GARROW, *supra* note 110, at 599; Schneyer, *supra* note 105, at 1381-89 (criticizing Judge Levinson's ruling in *Baehr* for failing to address issues of sexuality in same-sex marriages while recognizing the right to same-sex marriage). Ultimately, to fully secure revolutionary social change, we need more than just a judicial strategy or outcome. As Professor Fowler V. Harper, one of the chief architects of *Griswold v. Conn.*, 381 U.S. 479 (1965), stated in 1948: "[law] is not changed by argument. It is changed by necessity." GARROW, *supra* note 110, at 705.

118. See, e.g., *Singer v. Hara*, 522 P.2d 1187, 1190 n.5 (Wash. Ct. App. 1974); Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 583-89 (1973).

119. See Law, *supra* note 94, at 232. Professor Law notes that ERA advocates were not alone in trying to advance their cause by deflecting claims about its transformative potential: "Opponents of the fourteenth amendment claimed that a constitutional guarantee of racial equality would authorize interracial marriage. Opponents of the Equal Rights Amendment claimed it would require lesbian and gay marriage. In both cases, those who supported expanded equality denied the charge." *Id.*; see also *Singer v. Hara*, 522 P.2d 1187, 1190 n.5 (Wash. Ct. App. 1974) (describing public debate prior to the vote on the ERA in the state of Washington); *The Legality of Homosexual Marriage*, *supra* note 118, at 584; Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224, 1232 (1966). The parallels continue; despite the tactical and rhetorical choices made in securing passage of the Fourteenth Amendment and of the ERA, choices that Polikoff deplores, we now have both *Loving* and *Baehr*.

120. In *Baehr*, the Supreme Court of Hawaii noted that the state Equal Rights Amendment is "substantially identical with the proposed Equal Rights Amendment of the United States Constitution." 852 P.2d 44, 65 *clarified on grant of reconsideration in part*, 852 P.2d 74 (Haw. 1993).

Which made more of a difference: the rhetoric and tactics involved in attempting to win an ERA, or the reality of securing one and then returning to the scene of the victory and building on it?

Our victory in *Baehr* illuminates another way in which the process of social change is more complex than Polikoff hypothesizes in her critique. *Baehr* is not only the first court decision upholding gay people's equal marriage rights: it is also the case that "resolve[d] once and for all the question left dangling . . . [as to whether] sex is a 'suspect category' [deserving strict scrutiny] for purposes of equal protection"¹²¹ For this reason, too, civil rights and women's rights advocates have hailed the decision and have rallied to solidify the gain.¹²²

2. *Lessons From the Battles To End Anti-Gay Discrimination By the Military*

Polikoff also draws on our battle against anti-gay discrimination in the military as an analogy to support her hypothesis of the process of social change.¹²³ She argues:

[R]hetoric voiced in the campaign to end the military's practice of excluding lesbians and gay men is useful in imagining how a campaign to end the exclusion of lesbians and gay men would be shaped . . . [:] neither critiquing the institution of marriage nor acknowledging the transformative potential of allowing lesbians and gay men to enter into state-sanctioned unions.¹²⁴

As a result, Polikoff contends, the necessary "underlying critique of the institution, be it the military or marriage, becomes not only secondary but marginalized, even silenced," with disastrous consequences for lesbians and gay men. We, she believes, are better served by a "rhetorical strategy" that emphasizes differences rather than similarities, and by shunning what she and many others consider flawed social institutions, rather than engaging with them.¹²⁵

121. *Id.* at 67. At the federal level, sex is a "quasi-suspect classification" that receives intermediate, as opposed to strict, scrutiny. *Craig v. Boren*, 429 U.S. 190, 204 (1976) (finding that gender-based classifications must serve important governmental objectives and be substantially related to those objectives); *see also*, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding that gender-based classifications are inherently suspect and must be subject to strict scrutiny).

122. Feminist and civil rights groups in Hawaii have applauded the *Baehr* decision and called for its implementation. Supporters include the Hawaii Women's Lawyers Association, the Hawaii Women's Political Caucus, the National Abortion Rights Action League of Hawaii, Planned Parenthood, the University of Hawaii Women's Center, the American Association of University Women, the Afro-American Lawyers Association, the Japanese-American Citizens League, the Native Hawaiian Legal Corporation, the National Asian Pacific American Bar Association, the American Civil Liberties Union of Hawaii, the National Employment Lawyers Association, and the Hawaii Civil Rights Commission.

123. Polikoff, *supra* note 11, at 1543.

124. *Id.*

125. *Id.* at 1549.

In some respects, I believe the military analogy is apt. Our efforts to be included in that important social institution raise similar issues of choice, equality, civic participation, and respect for diversity in opinion, class, and social circumstance. On the other hand, marriage is vastly different from the military. Most lesbians and gay men, like most Americans, probably have little or no desire to subject themselves to the demands or ethos of military life. By contrast, most gay people, like our non-gay sisters and brothers, undoubtedly do desire the commitment, affirmation, support, and benefits that marriage represents.¹²⁶

a. The Transformative Potential of Gay People's Inclusion in the Military and in Marriage

Even on their own terms, the lessons Polikoff proposes to draw from the 1993 chapter of our struggle to end military discrimination do not prove her point about our fight for marriage rights. First, whatever the rhetoric or tactics used, securing the fortified presence of open lesbians and gay men in the military, as with women and, in a different manner, racial minorities, would indeed have transformative potential.¹²⁷ Indeed, Polikoff candidly concedes this point: "[T]he potential for transformation does exist if the ban is limited."¹²⁸

Despite Polikoff's doubts, the same is true for marriage. As Professor Sylvia Law has written:

Gay people and feminists violate conservative ideology of family in many ways. . . . [W]hen homosexual people build relationships of caring and commitment, they deny the traditional belief and prescription that stable relations require the hierarchy and reciprocity of male/female polarity. In homosexual relationships authority cannot be premised on the traditional criteria of gender. For this reason lesbian and gay couples who create stable loving

126. See, e.g., PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES* 45 (1983) ("'Couplehood,' either as a reality or an aspiration, is as strong among gay people as it is among heterosexuals."); Letitia Ann Peplau & Hortensia Amaro, *Understanding Lesbian Relationships*, in *HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES* (William Paul, James D. Weinrich, John C. Gonsiorek & Mary E. Hotvedt eds., 1982). The *Advocate's* 1994 survey reported that "[m]ost gay men state a clear preference for long-term relationships." Lever, *supra* note 70, at 23-24. For additional information and materials on the reality of lesbian and gay lives and relationships, contact Lambda Legal Defense & Education Fund, 666 Broadway, 12th Floor, New York, NY 10012.

127. Polikoff, *supra* note 11, at 1547-48 (citing Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 *UCLA L. REV.* 499, 545-46 (1991)). Professor Karst is also the author of the landmark article, *The Freedom of Intimate Association*, 89 *YALE L.J.* 624 (1980), and an advocate of equal marriage rights. While I agree with Karst's insights into the transformative potential of desegregating and uncloaking gay participation in the military, I think the case for the transformative potential inherent in same-sex couples marrying is even stronger. After all, one merely *joins* the military, whereas each couple is married, and has its *own* marriage.

128. Polikoff, *supra* note 11, at 1547.

relationships are far more threatening to conservative values than individuals who simply violate the ban against non-marital or non-procreative sex.¹²⁹

Law's claim that in gay relationships "authority *cannot* be premised on the traditional criteria of gender" is not precisely true, as Polikoff points out in her critique of Eskridge's cross-cultural history of marriage by same-sex couples.¹³⁰ Like non-gay people, gay people grow up in a gendered and discriminatory world and are thus capable of recreating unequal gender roles. For the most part, we, too, are not saints.¹³¹ Moreover, gender is more than just sex.¹³² Gender classifications involve a complex set of expectations and stereotypes about appropriate behavior and roles beyond a person's physical status as male or female—defined genitally, chromosomally, or otherwise. For better or worse, same-sex couples, too, can reflect social attitudes about masculinity, femininity, and gender roles. They can also create roles of their own—sometimes empowering ones.¹³³

Even so, Law's main point, that same-sex couples getting married can powerfully challenge gender roles and thus destabilize sexism, is clearly true. The evolving and evolved conceptions of marriage in our society distinguish a same-sex couple's marriage, from that, say, of the Native American *berdache*, where a male for ceremonial and social reasons "take[s] on some of the characteristics and perceived responsibilities of the opposite sex," and "dresse[s] in female garb."¹³⁴ In our America and in our movement, marriages between women or between men will be at least as much a match of equals as marriages of different-sex couples. Our marriages will indeed present a challenge to anti-feminist marriages and the subordination of women.

129. Law, *supra* note 94, at 218; see also Mary Ann Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1663 n.85 (1993); ("The perceived danger posed by homosexual relationships is that they present an opposing and threatening metaphor of equality, mutuality and respect that, if adopted as a model for heterosexual relationships, would seriously endanger male prerogatives of freedom, excess and authority which men have been taught to expect and hold dear."); *The Final Report of the Task Force on Family Diversity for the City of Los Angeles*, Supp. Part I, S-206-07; Koppelman, *The Miscegenation Analogy*, *supra* note 34, at 159 ("Homosexuality threatens not the family as such, but a certain traditional ideology of the family.").

130. Polikoff, *supra* note 11, at 1537-41. See also GEORGE CHAUNCEY, *GAY NEW YORK* (1994) *passim* (describing a taxonomy of gender roles and gay identity, attraction, and activity far more complex than Law's formulation).

131. *But see* BOSWELL, *supra* note 90, at 135, 160 (noting that lesbian and gay "paired saints" are prevalent in Christian rituals, including ceremonial unions).

132. See, e.g., EVE KOSOVSKY SEDGWICK, *THE EPISTEMOLOGY OF THE CLOSET* 27-30 (1990) (arguing that the study of sexuality is not coextensive with the study of gender).

133. See Polikoff, *supra* note 11, at 1540 n.23 (describing lesbian "butch-femme" relationships).

134. See Eskridge, *supra* note 11, at 1419, 1454, 1435-69 (noting that such institutions as *berdache*, decoupling gender roles from sex alone, also have power).

Interestingly enough, despite the fact that married lesbian or gay couples may be deemed, in Law's words, "threatening to conservative values,"¹³⁵ other commentators make the "conservative case for gay marriage."¹³⁶ That conservative case holds that equal marriage rights for lesbians and gay men would "foster social cohesion, emotional security, and economic prudence," much as marriage ostensibly does for non-gay people, without being a "radical break with social custom."¹³⁷ Thus, one conservative commentator argues that "legal gay marriage could also help bridge the gulf often found between gays and their parents. It could bring the essence of gay life—a gay couple—into the heart of the traditional straight family in a way the family can most understand. . . ."¹³⁸ He concludes: "Given the fact that we already allow legal gay relationships, what possible social goal is advanced by framing the law to encourage those relationships to be unfaithful, underdeveloped, and insecure?"¹³⁹

Feminists, and apparently the *Baehr* court, see equal marriage rights for lesbians and gay men as connected to the fight against sexism. Some conservatives see equal marriage rights as stabilizing and socially advantageous. Most lesbians and gay men see the right to marry as, first and foremost, a fundamental choice they wish to make for themselves as a basic part of their life plan together.¹⁴⁰ The brilliance of our movement's taking on marriage is that marriage is, at once and truly, both conservative and transformative, easily understood in basic human terms of equality and respect, and liberating in its individual and social potential.

b. Tactics, Timing: Legal Obstacles, Legal Challenges

Having conceded the transformative potential of winning the battle against military discrimination in "reality," Polikoff returns to her critique of the "rhetoric" deployed (and not deployed). She states that the ad-hoc and abortive Washington, D.C.-based Campaign for Military Service and

135. Law, *supra* note 94, at 218.

136. Andrew Sullivan, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, NEW REPUBLIC, Aug. 28, 1989, at 20 (emphasis added); see also Lewis, *supra* note 11, at 1799 (stating that the substantive right to equality is an "affirmative right to connection to and response from the community" and homosexuals' "right to marry originates from this broader right of attachment"); Stephen Chapman, *Gay Moms and Gay Marriage: Can We Find a Better Way?*, CHI. TRIB., Dec. 1, 1994, at 31 (pragmatic argument for equal marriage rights, concluding that with reference to solving social problems, "what's good for gays would also be good for everyone else."); Jonathan Rauch, *A Pro-Gay, Pro-Family Policy*, WALL ST. J., Nov. 29, 1994, at A22 (similar).

137. Sullivan, *supra* note 136, at 22.

138. *Id.*

139. *Id.*

140. My co-counsel observes: "You get your intellectuals, scholars, and activists in debate. It's a good debate, and it has to take place. But most people out there, their concerns are health benefits, security, better lives for their partners and children. They're not interested in politics—gay, straight, or any other kind." Kimberley Griffin, *To Have and To Hold: Gay Marriage, The Next Frontier*, WINDY CITY TIMES, June 2, 1994, at 1, 32 (quoting *Baehr* co-counsel Dan Foley).

other gay groups elected not to make all the arguments,¹⁴¹ "subjugated" their own "antimilitarist" sentiments, and erred by failing to engage full time and up front in the threatening discourse of revolutionizing the military.¹⁴²

Just as [such anti-military discourse and deeper transformative objectives] are not politically viable reasons to advocate ending the military ban, so are they unlikely grounds around which to build support for legalizing lesbian and gay marriage. *The danger in both instances is that the underlying critique of the institution, be it the military or marriage, becomes not only secondary but marginalized, even silenced.*¹⁴³

This is untrue even on its own terms. The advocates' choice of rhetoric and tactics is more fairly characterized as "prioritizing" rather than as "marginalizing" or "silencing" other or later tactics or critiques. Nevertheless, it suggests another point about the process of social change. The desirability of multi-faceted discourse and strategy is one reason why it is fortunate that we have different people in different positions: street and community activists, lobbyists, organizers, and academics, as well as advocates and attorneys with specific cases. No one vehicle or voice can or must do it all.

Consider the methodology of social transformation represented by the story of the Trojan Horse.¹⁴⁴ We are told that after ten years of "in your face" aggression, leading Greek warriors hid inside the wooden horse in silence. The Trojans were suspicious and would not have brought the horse within their walls until another Greek, Sinon, posing as a traitor, tricked them into doing so. He persuaded the Trojans to breach their walls by telling them that such action was the last thing the Greeks would have wanted, and that doing so would secure Troy's immortal prosperity. Sinon did not say, "We want you to bring our horse into your city so that we can tear the city down in keeping with our radical vision." Despite his tactical

141. For example, Polikoff suggests that activists did not make the argument that "the presence of lesbians and gay men would transform social attitudes towards homosexuality as a result of the close contact between heterosexual and homosexual service personnel." Polikoff, *supra* note 11, at 1549. In fact, at Lambda we often make just this point, citing the body of evidence that indicates that those who know openly gay people shed their intolerance. See Wolfson, *supra* note 32, at 39 n.69. Although we do not cite this dynamic as the key reason to lift the military ban, we quote President Clinton to further drive home how policies punishing openly gay identity make the government not just an accomplice to, but also the perpetuator of, the real and presumed anti-gay prejudice of some in the military: "[T]hose who have studied this issue extensively have discovered an interesting fact[:] People in this country who are aware of having known homosexuals are far more likely to support lifting the ban." Clinton: *Policy on Gays in Military is 'Sensible Balance'*, WASH. POST, July 20, 1993, at A12 (announcing the Clinton Administration's version of the discriminatory military policy).

142. Polikoff, *supra* note 11, at 1544-49.

143. *Id.* at 1549 (emphasis added).

144. See VIRGIL, THE AENEID II, at 18-370.

choice of a more modest discourse, and notwithstanding the silence of the Greek warriors actually inside the horse, transformation did occur—a fairly radical one, in fact—once the Greeks got their horse within the walls of Troy. The story illustrates the point that sometimes the people arguing cases or battling in the trenches are not best placed to say just anything or to reveal everything.

Polikoff herself has described this quandary in other legal contexts. In one important article, she observed: “The courtroom is no place in which to affirm our pride in our lesbian sexuality, or to advocate alternative child-rearing designed to produce strong, independent women.”¹⁴⁵ While I think (and Polikoff may now agree) that this flat claim is overstated, it helps prove the point that in each forum we must carefully select our rhetoric and tactics. Moreover, we may do so without necessarily betraying ourselves or foreclosing future progress on other parts of our vision, however radical. Our choices must be shaped, in Polikoff’s words, by “remember[ing] that our efforts are not made in a vacuum. . . .”¹⁴⁶

Polikoff’s pioneering custody rights articles, for example, counsel litigants that “[a] lesbian mother is very likely to lose [custody of her children] if the civil rights of lesbian mothers in general are allowed to take center stage. . . .”¹⁴⁷ Moreover, Polikoff counsels a pragmatic approach toward courts’ misconception that “a child raised by a homosexual is likely to become homosexual.” She details how to refute the factual underpinnings of the premise, rather than as a matter of tactics, urging litigants to seize that moment to put forward a more radical response embracing the premise in an anti-heterosexist diatribe.¹⁴⁸ Some might say that the latter tactic is why we have academics (let alone law reviews).¹⁴⁹

Nonetheless, Polikoff contends: “There is no way to publicly critique the military and simultaneously ask to be let into it”¹⁵⁰ She thus

145. See Polikoff, *supra* note 82, at 907.

146. *Id.* at 910.

147. Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 *BUFF. L. REV.* 691, 721 (1976). In this article, Polikoff counsels that the “first goal is to keep lesbianism out of the trial altogether, not to debate it in detail.” *Id.*

148. *Id.* at 723-24.

149. Lest this be misconstrued as a swipe, I hasten to point out that just as I wear at least two hats (gay rights advocate at Lambda and adjunct law professor at Columbia University), so does Polikoff (law professor at American University and long-time activist attorney). Many people engaged in this and other marriage debates, such as Nan Hunter, Bill Eskridge, and Mary Dunlap, have been involved in both academic and activist advocacy. However, while academic articles usefully explore gaps and idealizations in legal and strategic thinking, they may also be somewhat removed from the actual possibilities, challenges, and work at hand.

150. Polikoff, *supra* note 11, at 1545.

suggests, referring to the conclusions of one gay journalist, that "the advantages of a campaign for military inclusion do not outweigh the disadvantages" ¹⁵¹ "By the same token," Polikoff writes, "I believe that an effort to legalize lesbian and gay marriage would make a public critique of the institution of marriage impossible." ¹⁵²

To this contention, I find myself again responding that this is simply not true. It is not all or nothing. Does everyone who gets married, from Ruth Bader Ginsburg to Catherine MacKinnon, endorse every retrograde aspect of marriage? Does everyone who participates in an institution, whether it be the National Gay & Lesbian Task Force or the practice of law, become co-opted and incapable of proposing or achieving reform? And just what or whose exact public critique are we talking about anyway? While many gay people may share Polikoff's anti-military sentiments, it seems to me that the most pertinent critique of our 1993 efforts against anti-gay discrimination in the military is not that we failed to deconstruct the military, but rather that we failed to end the discrimination.

Polikoff further laments that in the context of marriage challenges, "[l]ong-term, monogamous couples would almost certainly be the exemplars of the movement. . . ." ¹⁵³ This is probably more or less true, just as our military cases over the past twenty years have tended to involve outstanding service personnel such as Joe Steffan, Dusty Pruitt, and Greta Cammermeyer. ¹⁵⁴ But the same tactical phenomenon is true for most test cases, ¹⁵⁵ including those we bring in the areas I believe Polikoff agrees we

151. *Id.*

152. *Id.* at 1546.

153. *Id.*

154. *Steffan v. Aspin*, 8 F.3d 57, 59 (D.C. Cir. 1993), *rev'd on other grounds*, *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc) (referring to plaintiff Steffan as "one of the Academy's ten highest ranking midshipmen" with an "exceptional," "exemplary" record); *Pruitt v. Cheney*, 963 F.2d 1160, 1161 (9th Cir. 1991), *cert. denied*, 113 S.Ct. 655 (1992) (affirming dismissal of First Amendment claim and remanding Equal Protection claim to allow the military to show a rational basis, despite Army Major's "outstanding record in both active and reserve service. . . ."); *Cammermeyer v. Cheney*, 850 F. Supp. 910, 912 (W.D. Wash. 1994) (hailing colonel and chief nurse in Washington State National Guard, who was awarded the Bronze Star for distinguished service in Vietnam, hailed as "remarkable").

155. Indeed, Professor Case points out that the same critique can be made of the decision in *Braschi v. Stahl Assocs.*, 543 N.E.2d 49, 53 (N.Y. 1989) (defining family to include gay couples), *cited in* Case, *supra* note 129, at 1664-66. *Braschi* is a victory always touted by those in our community who are less disposed to advocating for gay people's right to marry. *Id.* For a fuller discussion of *Braschi*, see *infra* note 159.

should proceed, such as domestic partnership¹⁵⁶ and second-parent adoptions.¹⁵⁷ We tell stories, and often select plaintiffs, not only to educate the public, but also to help us win cases and the battle at hand.¹⁵⁸ The choice of this tactic, hardly unique to the lesbian and gay rights movement, does not govern the scope of our objectives. Clearly, our objectives must include serving all gay people—not just the relatively less disenfranchised.¹⁵⁹

Several marriage critics express a concern that winning the right to marry may somehow “delegitimiz[e] some of us in the eyes of other gays and lesbians in the name of legitimizing all of us in the eyes of heterosexuals.”¹⁶⁰ This will only be true if we let it be true.¹⁶¹ Professor Ruthann

156. “Domestic partnership” refers broadly to recognized committed relationships between people who cannot or choose not to marry. The term is also used to refer to specific relationships formalized under government ordinances or private institutional policies. A comprehensive survey of domestic partnership is beyond the scope of this essay. For such a survey, see Craig A. Bowman & Blake M. Cornish, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164 (1992); see also LAMBDA LEGAL DEFENSE & EDUCATION FUND, NEGOTIATING FOR EQUAL EMPLOYMENT BENEFITS: A RESOURCE PACKET (July 1994) (updated periodically); David J. Jefferson, *Gay Employees Win Benefits for Partners At More Corporations*, WALL ST. J., Mar. 18, 1994, at A1.

In Lambda’s groundbreaking “domestic-partnership” case seeking equal health benefits for the lesbian and gay life partners of New York City employees, *Gay Teachers Ass’n v. Bd. of Educ.*, No. 43069/88 (N.Y. Sup. Ct. Aug. 12, 1991) (denying motion to dismiss), *aff’d*, 585 N.Y.S. 2d 1016 (N.Y. App. Div. May 12, 1992), our plaintiffs were distinguished, long-term employees and were all in long-term, committed relationships that were explicitly marriage-like. The case was successfully resolved in a settlement requiring that unmarried employees, both gay and non-gay, receive coverage identical to that provided to married employees for their partners and dependents. See Mireya Navarro, *New York Extends Health Benefits to Domestic Partners of City Employees*, N.Y. TIMES, Dec. 27, 1993, at B1; Peter Freiberg, *City Workers Get Partner Benefits*, WASH. BLADE, Nov. 5, 1993, at 21.

157. See, e.g., *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993) (granting adoption to petitioners, a surgeon and a nationally recognized expert in the field of breast cancer, who were both on the Harvard Medical School faculty).

158. See generally Fajer, *supra* note 67, at 511 (arguing that for gay rights litigation to succeed, advocates must tell the stories of the lives of lesbians and gay men, to help dispel non-gay myths about gay life).

159. As New York’s high court suggested in *Braschi v. Stahl Assocs.*, 543 N.E.2d 49, 53 (N.Y. 1989), important legal benefits and protections “should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order. [Benefits and protections] should not rest on fictitious legal distinctions or genetic history, but should instead find [their] foundation in the reality of family life.” Eschewing a litmus-test, the court identified the kinds of factors that should be looked to when assessing a familial relationship, in lieu of sole reliance on marriage:

[T]he exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services. . . . [I]t is the totality of the relationship as evidence by the dedication, caring, and self-sacrifice of the parties that should, in the final analysis, control.

Id. at 55.

160. See Homer, *supra* note 11, at 528.

161. In any case, without equal rights, such an argument seems to put the carriage before the horse. See Eskridge, *supra* note 11, at 1492-93 (refutation of the “new insiders” critique).

Robson, no supporter of equal marriage rights, frankly concedes: "[L]egalized lesbian marriage would not invent the good lesbian/deviant lesbian dichotomy."¹⁶² By contrast, it is certainly likely that winning marriage rights would alter society's understanding of, and attitude toward, gay people and same-sex love generally—the rising tide that raises all boats. We must stick with the fight for a better world through our victories, as well as through our setbacks.¹⁶³

C. The Critique that Equal Marriage Rights Will Thwart Universal Health Care and a Fairer Distribution of Social Benefits

Polikoff's concern about the use of "exemplars" actually enfolds yet another claim: "Marriage would be touted as the solution to these couples' problems; the limitations of marriage, and of a social system valuing one form of human relationship above all others, would be downplayed."¹⁶⁴ She thus invokes a third argument against working for equal marriage rights: "Advocating lesbian and gay marriage will detract from, even contradict, efforts to unhook economic benefits from marriage and make basic health care and other necessities available to all."¹⁶⁵ Again, I disagree with this fallacious all-or-nothing choice imposed on social change work, as well as the short shrift such a claim gives to gay people's desire for, and entitlement to, full, equal rights.

Polikoff's claim that advocating equal marriage rights will impede other worthwhile social goals is no truer for marriage than it is for either domestic partnership or parenting, which is to say that it is not necessarily

162. RUTHANN ROBSON, *LESBIAN (OUT)LAW* 128 n.12 (1992) (citing JOAN NESTLE, *A RESTRICTED COUNTRY* 123 (1987)). This concession is critical, as Homer relies upon an earlier work of Robson's to support his "new insiders" critique of marriage. Homer, *supra* note 11, at 528 (citing Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 *TEMP. L.Q.* 511, 540 (1990)).

163. This, too, is a lesson from the battles against military discrimination. Contrary to the public perception shaped by the actions of the President, the Department of Defense, and Congress, and the unprecedented publicity they generated, challenges to the anti-gay policy did not begin in 1993. Lambda, the ACLU, and courageous plaintiffs have been litigating against military discrimination for over 20 years. See Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 *CREIGHTON L. REV.* 381, 398-424 (1994). Since 1993, moreover, we have continued battling in the courts, where we are generally meeting success in rulings by judges who, having been educated by the political process and the lesson that the policy rests solely (and hypocritically) on impermissible prejudice, find that the discrimination lacks even a rational basis. See *Able v. United States*, 847 F. Supp. 1038 (E.D.N.Y. 1994) (granting a preliminary injunction in first challenge to congressional enactment of latest version of policy); see also, e.g., *Meinhold v. U.S. Dep't of Defense*, 34 F.3d 1469 (9th Cir. 1994); *Dahl v. Secretary of the Navy*, 830 F. Supp. 1319 (E.D. Cal. 1993); *Elzie v. Aspin*, 841 F. Supp. 439 (D.D.C. 1993); *Selland v. Aspin*, 832 F. Supp. 12 (D.D.C. 1993); but see *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc decision upholding military discrimination against gay service members), *vacating*, 8 F.3d 57 (D.C. Cir. 1993).

164. Polikoff, *supra* note 11, at 1546.

165. *Id.* at 1549.

true at all.¹⁶⁶ As I have argued elsewhere, we can, and should, advocate for universal health care alongside marriage, as well as alongside domestic partnership.¹⁶⁷ It is not antithetical to believe that gay people should be able to exercise the equal right to marry, and at the same time believe that other family forms—including perhaps, but not limited to, domestic partnership—are valuable and should be treated fairly.

In fact, more often domestic partnership is held out as a substitute for equal marriage rights. For example, in response to *Baehr*, the Hawaii legislature considered legislation that would have created statewide domestic partnership for same-sex couples and confined marriage to different-sex couples.¹⁶⁸ The bill's sponsor bluntly conceded that the domestic partnership bill was intended to ward off an ultimate ruling by the Supreme Court in favor of equal marriage rights.¹⁶⁹

Intra-community critics of equal marriage rights efforts also frequently invoke domestic partnership as the alternative the movement should pursue as its priority, often presenting the decision as an either-or. For example, one frequently-cited marriage critic has been quoted as opposing cases such as *Baehr v. Lewin* in part because of her belief that "[i]f gays and lesbians were allowed to marry tomorrow, I can guarantee that the entire

166. I thus disagree with Professor Robson, who nevertheless carries Polikoff's ideas to their logical conclusion. Robson attacks not only the goal of equal marriage rights for gay people, but the strategy of seeking family recognition, whether in cases Polikoff and others of us applaud, such as *In re Guardianship of Kowalski*, 478 N.W.2d 790, 796 (Minn. 1991) (Sharon Kowalski's lover, Karen Thompson, had to fight a seven-year legal battle to see her after Sharon was injured in a car accident), or through domestic partnership:

I find the arguments against marriage convincing, even when they extend to quasi-marriage arrangements offered by the state, including domestic partnership. . . .

My own conclusion is that our quest for lesbian survival is not furthered by embracing the law's rule of marriage. Our legal energy is better directed at abolishing marriage as a state institution and *spouse* as a legal category.

This conclusion also applies to our arguments to be included within the legal definition of *family*. While the "family of affinity" recognized . . . in the Kowalski case contributes to a good result, its reasoning is not necessarily cause for acclaim. The legal category of *family* is a bit more diffuse than the legal category of *spouse*, but ultimately it may be just as domesticating.

RUTHANN ROBSON, LESBIAN (OUT)LAW 126-27 (1992).

167. Evan Wolfson, Same-Sex Marriage and More, Address at the Fourth Annual Lesbian, Bisexual, and Gay Studies Conference at Harvard University (Oct. 27, 1990); Evan Wolfson, Developments in Family Relationships, Address at Lambda Law (Dec. 4, 1989); see also Wolfson, *supra* note 32, at 31 n.42. Because I believe there is no inconsistency among these demands, I have pressed for our right to marry at the same time as I have worked to win equal health benefits for the unmarried partners of gay and non-gay New York City employees. See *Gay Teachers Ass'n v. Bd. of Educ.*, No. 43069/88 (N.Y. Sup. Ct. Aug. 12, 1991), *aff'd*, 585 N.Y.S.2d 1016 (N.Y. App. Div. May 12, 1992) (settled successfully Oct. 30, 1993) (on file with Lambda Legal Defense & Education Fund).

168. S.Res., 17th Leg., 1994 Haw. Reg. Sess. The legislature ultimately adopted an even less satisfactory version of this bill, which reiterated the different-sex restriction on marital choice while creating a commission to study the needs of same-sex couples who have been discriminated against by denial of equal marriage rights. 1994 HAW. SESS. LAWS 217.

169. Derek Ferrar, *Sleeping with the Legislature*, HONOLULU WEEKLY, Feb. 23, 1994.

domestic-partnership movement would dry up tomorrow. . . ."¹⁷⁰ Coming from a marriage critic, this, if true, is a revealing insight into the lesbian and gay community's relative support for marriage vis-a-vis domestic partnership, once given a meaningful option (as we will have been, when the Hawaii Supreme Court hands down its final ruling). Assuming her assertion to be true, is she suggesting that the proper course for the movement is to foist domestic partnership on those who would prefer a choice regarding marriage? Or does she mean to suggest that losing marriage as an option is an acceptable price to pay for fueling the domestic partnership "movement"? Moreover, we need not assume her assertion to be true. If Polikoff and others who profess a broad social agenda in fact speak for large numbers of gay and non-gay people, clearly there are many of us committed to meeting the needs of all families and individuals without sole regard to marriage.

The recent trends toward adopting domestic partnership ordinances and policies locality-by-locality and increasing efforts to equalize access to employment benefits company-by-company are welcome and important innovations.¹⁷¹ However, we should make one thing clear: domestic partnership is not marriage.¹⁷² Insisting that lesbians and gay men enter into domestic partnerships, while reserving marriage for different-sex couples, perpetuates without justification (let alone a compelling state interest) the discrimination challenged in *Baehr*. Like most non-gay people, most gay men and lesbians want the equal right to *marry*, not merely access to some other domestic status. If *all* were free to *choose* either domestic partnership or marriage, then it might be appropriate for the state to proffer such an additional status. However, when the state arbitrarily restricts people's choice, whether based on gender or any other invidiously discriminatory factor, it does not eliminate inequality, but rather reinforces second-class citizenship.

And domestic partnership is indeed second-class. Not only is it unequal to marriage in the sense that " 'separate but equal' . . . [is] inherently

170. Chris Bull, *Till Death Do Us Part*, *ADVOC.*, Nov. 30, 1993, at 40, 46.

171. In recent years there has been an explosion in the number of jurisdictions, companies, universities, and other entities attempting to eliminate marital-status discrimination and to provide some recognition and benefits to gay and often non-gay partners. While five years ago it was possible to name them all off the top of one's head, now the best way to remain up-to-date is to consult *LESBIAN & GAY LAW ASS'N, LESBIAN/GAY LAW NOTES* (Prof. Arthur S. Leonard, ed.) (monthly publication), which is arguably the single most important resource for legal practitioners and academics interested in legal issues regarding gay rights or HIV.

172. For example, even in Denmark, widely regarded as a place where gay people can get "married," the law in fact provides for a different, if still exceptionally progressive, status and recognition. See Danish Registered Partnership Act, Danish Act 372 (June 7, 1989). The act accords same-sex couples most of the rights, benefits, and protections granted different-sex couples who marry, but glaringly excludes important parenting rights and eligibility to adopt.

unequal,"¹⁷³ but under the domestic partnership ordinances and policies adopted so far, the benefits themselves are not equal to those provided to married partners. For example, many of the ordinances require domestic partners to undertake the responsibilities and legal obligations that accompany marriage, but do not in exchange give domestic partners all the benefits of marriage. Nor do they provide equal recognition. Because they are local, the ordinances do not, and cannot, assure domestic partners the full range of benefits extended married partners at the state level. Even if a state adopted statewide domestic partnership,¹⁷⁴ it would be unable to deliver federal or out-of-state benefits and protections. The ordinances do not—and most likely, under federal law, could not—mandate that private employers treat domestic partners the same as married partners.¹⁷⁵ They thus fail to provide domestic partners parental protections and benefits that are provided to married partners. Marriage is *sui generis* under the United States constitutional, federal, and legal scheme. At the same time, ironically, under most of these laws, the criteria for establishing a domestic partnership are far more onerous than those imposed on a couple seeking to marry.

Thus, in part because of the way our society exalts marriage, domestic partnership falls between two stools: it neither provides the symbolism and substance of marriage, nor resolves the problems of access to needed benefits and protections identified by marriage critics. Domestic partnership fails to resonate with the emotional, declarative, and often religious power most people feel inheres in marriage. It also fails to equalize access to benefits because it is hampered by legal obstacles and itself still excludes people who do not meet the criteria set forth in the ordinances, even though they may be in committed, interdependent, or caretaking relationships.

The domestic partnership approach is a healthy step toward eliminating both marital status discrimination and arbitrariness in the recognition

173. See *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954).

174. To date, no state has established domestic partnership as a defined legal status with benefits and protections, although Vermont recently offered state employees health coverage for their unmarried same-sex and different-sex partners. *Vermont Workers Win Health Benefits*, N.Y. TIMES, June 13, 1994, at A13. France offers similar health coverage to the partners of all employees. Since 1989, Denmark, Norway, and Sweden have gone even further, establishing legal "registered partnerships" or marital unions for same-sex couples, with most, though not all, of the benefits and protections of marriage. See Lawrence Ingrassia, *Danes Don't Debate Same-Sex Marriages, They Celebrate Them*, WALL ST. J., June 8, 1994, at A1. The creation of a separate spousal relationship with the reservation of marriage to different-sex couples can be attributed to the fact that these countries, unlike the United States, have established churches. As a legal matter, marriage *qua* marriage is both civil and religious in those countries.

175. See Bowman & Cornish, *supra* note 156, at 1194 n.152, 1203, 1210 (the ability of local governments to mandate private employees' provision of health insurance benefits "is greatly limited by the federal Employee Retirement Income Security Act (ERISA)," 29 U.S.C. §§ 1001-1461 (1988)).

of valuable family relationships. Recognizing domestic partnerships or adopting policies equalizing access to benefits may even be the best step a locality, private institution, company, or university—as distinguished from a state—can take. Such steps demonstrate the marital nature of gay relationships while illustrating the lack of any compelling state interest that could justify their disparate treatment or segregated status. But, ultimately, domestic partnership alone is not enough. As one non-gay commentator put it in coming out for equal marriage rights: “[T]here is no secular reason that we should take a patchwork approach of corporate, governmental, and legal steps to guarantee what can be done simply, economically, conclusively, and inclusively with the words, ‘I do.’”¹⁷⁶

Our demand as gay people for equal choices and recognition with regard to our family relationships does not undermine our demand as conscientious citizens to decouple benefits from arbitrary criteria of any kind. But, equally, our desire to achieve a more just, contextual allocation of benefits should not require us to accept an inferior status with regard to marriage or other choices. Domestic partnership may fall between the stools; gay men and lesbians should not have to.

D. Critiquing the Critique: Lessons from Other Movements for Social Change

In *Why We Can't Wait*, Martin Luther King, Jr. wrote: “It is an axiom of social change that no revolution can take place without a methodology suited to the circumstances of the period.”¹⁷⁷ No one methodology will be sufficient,¹⁷⁸ nor need we lament “[t]he fact that different organizations place varying degrees of emphasis on certain tactical approaches. . . .”¹⁷⁹ This, of course, was a hard-won lesson of the African-American civil rights movement, in which King and others clashed constantly over pace, direction, priorities, and tone, even when they could agree on the prize.

Contrary to Polikoff's premise regarding rhetoric and betrayal,¹⁸⁰ not only was the radicalization of the civil rights movement's demands gradual, it was non-linear. Each new stage, indeed, each new campaign and strategy, saw various tactical efforts at limitation and focus. For example, during the Montgomery bus boycott, “King conceded to reporters that [the local organizers' original demand] was modest and had cost the protestors the active support of the NAACP.”¹⁸¹ Throughout the civil rights battle,

176. Quindlen, *supra* note 5, at A23.

177. KING, *supra* note 15, at 24.

178. *Id.* at 33 (“Direct action is not a substitute for work in the courts and the halls of government. . . . Indeed, direct action and legal action complement one another; when skillfully employed, each becomes more effective.”).

179. *Id.* at 133.

180. Polikoff, *supra* note 11, at 1541.

181. DAVID J. GARROW, BEARING THE CROSS 53 (1986).

key figures such as Bayard Rustin, Stanley Levison, and King himself, struggled with how radical to be in their rhetoric and in their goals.¹⁸²

King grappled with his own role: "I have to be militant enough to satisfy the militant yet I have to keep enough discipline in the movement to satisfy white supporters and moderate Negroes."¹⁸³ King conceded only slowly that he could not achieve a "synthesis," that he would have to elect his own voice and goals, and accept the "cycles" and multiplicity of the movement.¹⁸⁴ One aspect of King's genius was that, even when he was at his most revolutionary, he rarely put his rhetoric or larger vision ahead of the tactics that he thought would work, the goals that he believed were obtainable, or his fundamental principles of non-violence and shared humanity.

Benefiting from these lessons, lesbians, gay men, and non-gay allies of our movement must avoid placing absolutist demands on each other regarding our tactics, rhetoric, and—in a diverse community dedicated to making the world safe for diversity—our goals. We should not poison our debates with false choices, such as marriage *or* universal health care, assimilation *or* liberation, equality *or* difference.¹⁸⁵ In avoiding such absolutist demands and false choices, however, we must be very clear about two things. First, just as "the movement can head into a cul-de-sac if it can see no real progress without radical alteration of the nation,"¹⁸⁶ so will we be marching down a blind alley if we cannot recognize radical alteration when it is not announced with radical rhetoric. Second, those who say they are not opposing our right to marry, but are merely opposing our "making [it] a priority,"¹⁸⁷ are in effect accepting the state's denial of our equal rights. Saying "let's not work for this" is in effect saying "you should not have this," for, as King instructs, "it is a historical fact that privileged groups seldom give up their privileges voluntarily. . . . [F]reedom is never voluntarily given by the oppressor; it must be demanded by the oppressed."¹⁸⁸

Because I ultimately disagree with a rhetoric-centered hypothesis about the process of change, I also cannot agree that we should:

182. *Id.* at 420, 455; see also GARROW, *supra* note 110, *passim*. The same was true in the reproductive freedom movement, with debates occurring over legislative versus litigation strategies, repeal versus reform, and how best to frame demands and arguments.

183. GARROW, *supra* note 181, at 496.

184. *Id.* at 536-37.

185. See Howard Lesnick, *The Wellsprings of Legal Responses to Inequality: A Perspective on Perspectives*, 2 DUKE L.J. 413, 441, 449, 452-53 (1991) (noting characteristic defects in "conservative," "liberal," and "radical" perspectives).

186. GARROW, *supra* note 181, at 420 (quoting Stanley Levison's exhortation to King).

187. Polikoff, *supra* note 11, at 1537.

188. KING, *supra* note 15, at 80. I am indebted to my friends, Janet Weinberg and Roz Richter, for helping me thrash out this point.

measure the value of the work it will take to legalize lesbian and gay marriage by how closely the arguments we make in advocating this change match what we really believe about and want for our relationships and our community.¹⁸⁹

I do know that attorneys for the State in Hawaii have argued that our work there "allowing same[-]sex couples to marry conveys in socially, psychologically, and otherwise important ways approval of non-heterosexual orientations and behaviors."¹⁹⁰ That feels like a pretty good start to me.

III

WINNING AND KEEPING EQUAL MARRIAGE RIGHTS: WHAT IS TO BE DONE

Each girl and boy alike, sharing joy alike,
Feels that passion'll soon be national.
Love is sweeping the country.
There never was so much love.¹⁹¹

189. Polikoff, *supra* note 11, at 1549.

190. Defendant's Response, *supra* note 41, at 7. Those calling the shots in defense of military discrimination also appear to regard same-sex couples marrying as a particular threat above and beyond statements of gay identity. See, e.g., Memorandum from Les Aspin, Secretary of Defense, to the Joint Chiefs of Staff, Policy on Homosexual Conduct [sic] in the Armed Forces, July 19, 1993, at 1-2 ("Homosexual conduct [sic] is a homosexual act, a statement by the servicemember that demonstrates a propensity or intent to engage in homosexual acts, or a *homosexual marriage or attempted marriage*." (emphasis added); see also Valdes, *supra* note 163, at 469-70 (critiquing the military's penalization of "homosexual marriage," as well as "attempted marriage"). Is there anything more revealing of the absurdity, and offensiveness, of the government's position than its enumerated penalty for "attempted marriage?"

Likewise, Pope John Paul II is reported to have recently characterized marriage between lesbians or gay men as "a serious threat to the future of the family and *society itself*." Alan Cowell, *Pope Deplores Gay Marriage*, N.Y. TIMES, Feb. 23, 1994, at A2 (emphasis added). As Garrow demonstrates, similar sweeping predictions of doom were made, for example, regarding birth control. E.g., GARROW *supra* note 110, at 23 (permitting contraception "opens the way for every girl to become a prostitute . . . [and] seventy-five percent of them will."); *id.* at 27 (predicting that were birth control legislation to pass, "twenty-five years from today the State of Connecticut will be a mass of crumbling ruins."); *id.* at 108 ("Japanese birth control devices in the homes of America can be more destructive than Japanese bombers over Pearl Harbor."). I refrain from discussing the obvious church-state separation issues, except to observe once again that our litigation concerns the issuance of civil marriage licenses, not religious ceremony or doctrine.

Describing courts' tendency to "conflate same-sex marriage, flaunting, and activism," Professor Case contrasts the experience of plaintiffs who have sought recognition for their marriages or marriage-like relationships, with that of gay and lesbian plaintiffs who have not. Case, *supra* note 129, at 1669-75. Professor Mary Dunlap concludes: "'Marriage' represents, among other things, a kind of coming out to stay that feels especially dangerous now. Those who have tried to be married have been widely punished for it by the current legal system." Dunlap, *supra* note 11, at 82. Clearly, some people *outside* our community see equal marriage rights as transformative.

191. GERSHWIN, *supra* note 18.

Because of *Baehr v. Lewin*, lesbians' and gay men's equal right to marry now truly "shimmers or lurks—depending on one's point of view—on the horizon of the law."¹⁹² For the first time in living memory, we can realistically hope to see lesbian and gay couples happily joined on an equal footing with our non-gay brothers and sisters — if those who favor equality can put aside their divisions and unite to secure ultimate victory. For this reason, I have urged that we end, or at least suspend, the intra-community debate over whether to seek marriage.¹⁹³ The ship has sailed.

What then is to be done? As indicated above, Lambda gets many calls from lesbian and gay couples who would like to get married in their state. The landmark preliminary triumph in *Baehr* seems to have fueled many people's sense of urgency and hope. We believe people should make informed, careful choices about how we can all best win our rights. People should neither simply go for a "quick fix," nor just sit back and wait. Accordingly, Lambda's marriage strategy is to do everything possible to secure a final victory in Hawaii while temporarily holding back on marriage litigation in states or particular cases in which the prospects for defeat seem great.¹⁹⁴ Impact litigation and test-cases are not the be-all and end-all of social change, and wanting equal choice regarding marriage does not in itself validate every couple's rushing out today to file a lawsuit heedless of the realities where they live. Bringing the wrong suit in the wrong way, even for the right objective, could do serious injury not only to our right to marry, but also to the broader range of lesbian and gay rights. The wrong case, wrong judge, or wrong forum could literally set us all back years, if not decades. There are other ways to do this work.

192. Hunter, *supra* note 11, at 10.

193. As a marriage rights advocate I see value in, and even share, many of the important insights set forth in Homer's *Against Marriage*, see Homer, *supra* note 11. It is hard, however, to see how social change can meaningfully come about from the rhetoric of his brave conclusion: "If we come to heterosexuals and their [*sic*] institution [of marriage], we valorize the mechanism of our oppression. Let them come to us." Homer, *supra* note 11, at 530. It is one thing to reach for the stars, but meanwhile we should remain on this planet. Nor do I think Homer's worldview is shared by most gay people, who decline to accept Homer's "all-or-nothing" choice between "assimilation" and "a false symmetry between gays and lesbians and heterosexuals" on the one hand, and "outlaw status" or romanticized radical difference for its own sake on the other. *Id.* at 506, 530. No matter what either extreme (gay or non-gay) may claim, there is abundant middle ground. We must try to keep our feet on it.

194. This means that bringing lawsuits in other states may not be the best strategic use of resources now, pending the progress in Hawaii. Together with other attorneys and groups who litigate for lesbian and gay rights, we at Lambda have identified several factors to be considered when determining whether or not to pursue litigation. These include whether a state has a "sodomy" law, or has an equal rights or privacy provision in its constitution; whether a state has good case law or legislation regarding personal autonomy, sexual orientation, marital and family status, and gender discrimination; the actual wording of, and decisions regarding, the state's marriage and domestic relations laws; the political climate in the state; and, perhaps most important, the composition of the state judiciary.

At Lambda we constantly point out that courts are only one forum for achieving social change, the right to marry, and respect as a family. Other critical methodologies of social change which we ignore at our peril (as the struggle against military discrimination shows), include political organizing, public education, institution building, and asking for¹⁹⁵ (not just demanding) support from local religious, political, and community leaders and groups.

We must begin the hard work of public education and political organizing now—nationwide and state by state. As with interracial marriage and slavery in the past, the radical right and others will doubtless attempt to invoke “state’s rights” rhetoric to thwart recognition and benefits for gay people who return from Hawaii as married couples or who seek equal marriage rights at home. We must ensure that other states and the federal government fulfill their constitutional obligation to recognize marriages validly contracted in Hawaii. No American should have to have her “marriage visa” stamped every time she crosses a state border.¹⁹⁶

195. Former House Speaker Tip O’Neill used to tell of the critical political lesson he learned:

from Mrs. O’Brien, our elocution- and- drama teacher in high school, who lived across the street. The night before the election, she said to me, “Tom, I’m going to vote for you even though you didn’t ask me to.”

I was shocked. “Why, Mrs. O’Brien,” I said, “I’ve lived across from you for eighteen years. I cut your grass in the summer, I shovel your walk in the winter. I didn’t think I had to ask for your vote.”

“Tom,” she replied, “let me tell you something: *people like to be asked.*”

TIM NOVAK, *MAN OF THE HOUSE: THE LIFE AND POLITICAL MEMOIRS OF SPEAKER TIP O’NEILL* 25 (1987). We, too, must heed this lesson, and begin asking for support even from people, organizations, and institutions that may not say yes the first time. By asking and then paving the way through education and personal encounters, we may even surprise ourselves with who understands the justice and rightness of our demands.

196. I am working with a team of Lambda cooperating attorneys and law students to prepare for the litigation that may arise, following a final victory in Hawaii or elsewhere, if lesbians and gay men are discriminatorily denied recognition of our marriages by other states or the federal government. In a forthcoming article, we will show how nationwide recognition is required under constitutional principles such as “full faith and credit,” as well as under other legal doctrines of federalism, conflicts law, and comity. See Evan Wolfson & Gregory McCurdy, *Let No One Set Asunder: Nationwide Recognition of Gay and Non-Gay People’s Validly Contracted Marriages* (forthcoming) (provisional title).

Other articles addressing this important subject include Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, — S. CAL. L. REV. (forthcoming Mar. 1995); Barbara J. Cox, *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033; Joseph W. Hovermill, *A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii’s Recognition of Same-Sex Marriages*, 53 MD. L. REV. 450 (1994); Deborah M. Henson, *Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States’ Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii’s Baehr v. Lewin*, 32 U. LOUISVILLE J. FAM. LAW 551 (1994); Thomas Keane, — STAN. L. REV. (forthcoming 1995).

Those who wish to help prepare for the recognition battles should contact Lambda’s Marriage Project Legal Clearinghouse, *supra* note 126.

As in any major civil rights effort, our struggle demands vision, strategy, courage, dedication, teamwork, patience, and luck. We are in this for the long haul, and ought to pace our efforts and choose our tactics accordingly. By working with a local or national organization, or sitting at home with a pen and paper, everyone can make an individual contribution to this nitty-gritty social change work—beginning by explaining why gay people should share, and be allowed to share, in the rights and responsibilities of marriage.¹⁹⁷

To disagree about forum, timing, rhetoric, or tactics does not necessarily mean disagreement over ultimate vision, just as we can disagree over the ultimate vision, and still march and work together on much along the way. King's advisor, Stanley Levison, was both right and wrong when he urged:

It is certainly poor tactics to present to the nation a prospect of choosing between equality and freedom for Negroes with the revolutionary alteration of our society, or to maintain the status quo with discrimination. The American people are not inclined to change their society in order to free the Negro. They are ready to undertake some, and perhaps major, reforms, but not to make a revolution.¹⁹⁸

He was right that such an all-or-nothing rhetorical formulation would have been a fatally poor tactic indeed, at least in a democracy. But, like the critics of our marriage work, he was wrong about what makes a revolution.

Having learned a lesson from the abortion rights and civil rights movements, activists in Hawaii did not stop their efforts to promote social change in the wake of our initial legal victory. Nor did they leave the work of creating change solely to the lawyers. *Baehr v. Lewin* engendered a broad coalition¹⁹⁹ and tremendous political activism that have truly begun a sea change throughout the social institutions of Hawaii. Such diligence and vigilance will remain necessary during the political cycles leading up to

197. Robert F. Kennedy described the importance of what may seem like drop-in-the-bucket efforts:

Few will have the greatness to bend history itself; but each of us can work to change a small portion of events, and in the total of all those acts will be written the history of this generation. It is from numberless diverse acts of courage and belief that human history is shaped. Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends a tiny ripple of hope, and crossing each other from a million different centres of energy and daring those ripples build a current which can sweep down the mightiest walls of oppression and resistance.

ARTHUR M. SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES 745-46 (1978) (speech in South Africa).

198. GARROW, *supra* note 181, at 420.

199. See discussion *supra* note 122; Miller, *supra* note 59, at 34. As the *Equality Foundation* court noted, "[C]oalition building plays a crucial role in a group's ability to obtain legislation in its behalf." *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, No. C-1-93-773, 1994 WL 442746, at *8 (S.D. Ohio Aug. 9, 1994).

and following the final word of the Hawaii Supreme Court. Meanwhile, in the rest of the country, the work awaits us *now*.

CONCLUSION

Prior to *Baehr v. Lewin*, equal marriage rights for lesbians and gay men were something that most non-gay Americans were never called upon to think about seriously. While it is clear that most people easily dismissed marriage by same-sex couples when it seemed at most a hypothetical question, now it is about to be reality. Just as gay men and lesbians will have to examine the true value of our relationships to ourselves and society in a whole new way,²⁰⁰ so will all but the "willfull[y] blind"²⁰¹ in the non-gay world have to think through their commitment to equality, federalism, inclusion, fairness, and love. I believe we must enlarge, not sell short, our sense of the possibilities.

Again, the Hawaii experience is instructive.²⁰² Consider the following remarkable words, put forward not by a lesbian or gay activist, but by the (presumptively non-gay) voice of one of the two leading newspapers in Hawaii. Under the headline *State Should Drop Ban on Same-sex Marriage*, the editorial urges an end to efforts to thwart the ruling in *Baehr*:

There is no compelling reason for banning same-sex marriage. Rather, there is an emotional repugnance to homosexuality that is overwhelming rational consideration of this issue.

Homosexuality is condemned in some religions. To their adherents, same-sex marriage is a desecration of a holy rite. These people are of course free to hold such an opinion, but when they and other opponents lobby against government recognition of same-sex marriage they are trying to impose their private values

200. Having at last the same marriage option as different-sex couples will be an opportunity for many same-sex couples to fulfill a long-desired conception of their relationships and their place in society. For many other gay people, it will come as a jolt, forcing them to consider afresh how they feel about their life-plans, their values, and perhaps even their particular partners. Just as non-gay people have much to learn about gay people, see, e.g., Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 LAW & SEXUALITY 133 (1991), and much to examine in how we as a society treat families and individuals in and out of marriage, so lesbians and gay men might benefit from the opportunity to think anew from the vantage point of greater inclusion.

201. *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting). See Wolfson, *supra* note 32, at 38 n.69, 34 n.59.

202. See Ingrassia, *supra* note 174, at A1 (documenting the "wide[] acceptance" of the 1989 "registered partnership" law recognizing same-sex unions, even among those originally opposed). The *Wall Street Journal* reported that religious leaders and "even opponents say that the law resulted in no social ills." *Id.* While both Hawaii and Denmark are models of tolerance, and thus perhaps somewhat unrepresentative of parts of the American polity, they also offer a vision of what can be better, and thus might well inspire and summon the best.

on the law. Homosexuality is a moral and religious issue. It should not become [*sic*²⁰³] a political one.

Government must remain neutral on such intimate questions and focus on the need to protect the rights of the individual to equal treatment. Government recognition of same-sex marriage should not be confused with moral approval—which the state cannot give in any case. Dropping the ban would merely accept the rights of homosexuals to the same legal protection accorded heterosexuals, impairing no one's rights and conferring important financial and legal benefits that should not be withheld. . . .

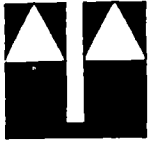
In fact there is no legitimate reason whatever why the State should not recognize the right of homosexuals to marry, and the Supreme Court will probably so rule.

The real reason for opposition is simply disapproval of homosexuality, and that should not be accepted by the court.²⁰⁴

Perhaps where those against marriage and I part company is that I see this rhetoric itself as a breathtaking transformation. If these words, and the underlying victories they represent and presage, are the measure of the social change work my colleagues in the movement and I are doing, I am prepared to stand on them. Happily. And then get on with the work ahead.

203. As long as there is sexism, discrimination against lesbians and gay men, or a desire to enforce an ideology or structure of heterosexual superiority, "homosexuality" will be a "political" issue. *See, e.g., Gay Law Students Ass'n v. Pacific Tel. & Tel.*, 595 P.2d 592, 610 (Cal. 1979) ("[O]ne important aspect of the struggle for equal rights is to induce homosexual individuals to 'come out of the closet,' acknowledge their sexual preferences, and to associate with others in working for equal rights."); *see also* Law, *supra* note 94; Schneyer, *supra* note 105, at 1366 n.173 ("All weddings [gay and non-gay] are political acts (and ethical acts too), because they create communities and define relationships within those communities. We normally do not see this, because the communities and relationships are identical to those we are used to seeing. . . .") But on the key point here —separation of church and state—the newspaper's position on civil marriage rights for gay people is clearly correct.

204. *State Should Drop Ban on Same-sex Marriage*, HONOLULU STAR-BULLETIN, Feb. 4, 1994, at A12; *see also Same-Sex Marriage*, HONOLULU ADVERTISER, Feb. 21, 1994, at A6 ("[T]o provide underlying equality of civil rights . . . same-sex couples have as much right to a marriage license as any couple composed of a man and a woman.").



Lambda Legal Defense and Education Fund, Inc.

Marriage Project: *Historical Parallels*

Over the years, the laws governing civil marriage (as distinguished from religious marriage, which is appropriately left to each denomination) have evolved. Americans increasingly recognize that each individual should have the right to marry the person she or he loves and cares for, regardless of race, class, religion and the like. But this has not always been the case; loving relationships some deemed "immoral" or "unnatural" historically were proscribed. In our lifetime, it was illegal for individuals of different races to marry. Before that, it was illegal for African-Americans to marry at all.

Today, the freedom to marry continues to be unavailable to same-sex couples. Through a landmark case underway in Hawaii, lesbians and gay men are on the verge on winning the freedom to marry, with all its implications. A victory in the case will open the door for same-sex couples around the country to share in the same benefits and responsibilities available to different-sex couples.

Just as every historic step toward inclusion triggers some backlash, the first wave of what is expected to be a major political battle has already begun. By mid-1995—even before the equal right to marry in Hawaii has been won—radical right legislators in three states proposed anti-marriage legislation aimed at thwarting recognition of the lawful marriages of same-sex couples. In Utah, an anti-marriage bill was furtively brought to the floor minutes before midnight and passed into law; similar bills have been introduced in Alaska. In South Dakota, legislation purporting to block recognition of same-sex couples' marriages was defeated, an exciting early victory.

These opening skirmishes are revealing. The South Dakota bill read:

"Be it enacted by the legislature of the State of South Dakota:... Any marriage between persons of the same gender is null and void from the beginning." S. D. House Bill 1184.

It bore a disturbing resemblance to the Virginia law that prohibited marriages between people of different races:

"All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process." Va. Code Ann. § 20-57.

Such miscegenation laws were common several decades ago. Shortly after getting married in 1958, Mildred Jeter, a black woman, and Richard Loving, a white man, were arrested for violating Virginia's miscegenation law (a felony) and faced up to five years in prison. A court upheld their conviction by relying on attitudes about "unnatural" relationships that are directly parallel to those that are today used against same-sex couples:

"Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races show that he did not intend for the races to mix."

As punishment for the "crime" of marrying the "wrong kind of person," the trial judge forbade the couple from setting foot in their home state for 25 years! Their case, *Loving v. Virginia*, went to the U.S. Supreme Court, which in 1967 overturned the laws in sixteen states containing such "same-race restrictions" on people's choice of a marriage partner.

As lesbian and gay couples around the country demand their freedom to marry, it should not be forgotten that the arguments used against same-sex marriages were once used, not long ago, against those who wished to marry a person of a different race. The freedom to marry, the right to a civil marriage license from the state, and the choice of whom to marry, should belong to each man and women, not the government.

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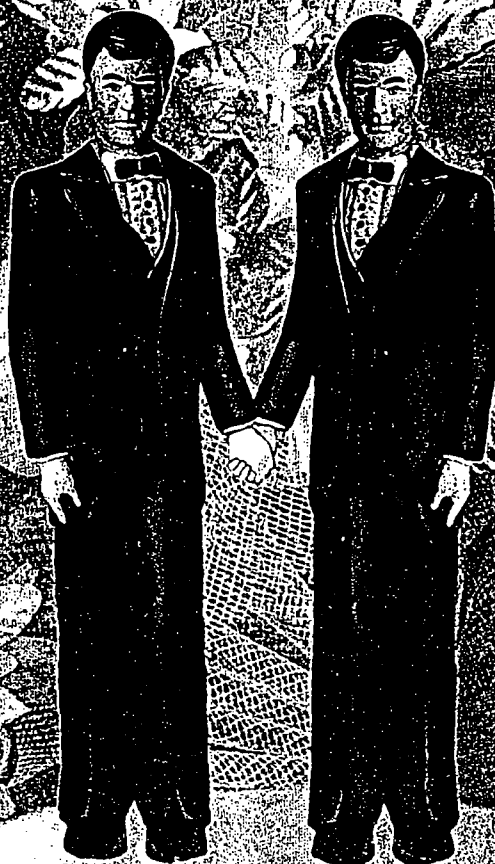
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Let them wed



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Let them wed

MARRIAGE may be for the ages—but it changes by the year. And never, perhaps, has it changed as quickly as since the 1960s. In western law, wives are now equal rather than subordinate partners; interracial marriage is now widely accepted both in statute and in society; marital failure itself, rather than the fault of one partner, may be grounds for a split. With change, alas, has come strain. In the 25 years from 1960, divorce rates soared throughout the west—more than sextupled in Britain, where divorce appears inevitable for the world's most celebrated marriage, that of Charles and Diana Windsor. Struggling to keep law apace with reality, Britain's Tory government is even now advancing another marriage reform, seeking, on the whole sensibly, to make quick or impulsive divorce harder but no-fault divorce easier.

That, however, is not the kind of reform which some decidedly un-Tory people are seeking—and have begun to achieve. Denmark, Norway and Sweden now allow homosexual partners to register with the state and to claim many (though not all) of the prerogatives of marriage. The Dutch are moving in the same direction. In France and Belgium, cities and local governments have begun recognising gay partnerships. And, in the American state of Hawaii, a court case may legalise homosexual marriage itself.

As of today, however, there is no country which gives homosexuals the full right of marriage. And that is what gay activists in more and more places are seeking (see pages 68-71). Marriage, one might think, is in turbulent enough waters already. Can gay marriage be a good idea—now?

Home, hearth and health

To understand why the answer is yes, first set aside a view whose appealing simplicity is its undoing. "Governments are not elected to arrange nuptial liaisons, much less to untangle them," writes Joe Rogaly in the *Financial Times*. "It is a purely private matter." On this libertarian view, the terms of a marriage contract should be the partners' business, not the state's. With the help of lawyers and sympathetic churchmen, homosexuals can create for themselves what is in all practical respects a marriage; if they lack a government licence, so what?

The government-limiting impulse motivating this view is admirable. But, in truth, the state's involvement in marriage is both inevitable and indispensable. Although many kinds of human pairings are possible, state-sanctioned marriage is, tautologically, the only one which binds couples together in the eyes of the law. By doing so it confers upon partners unique rights to make life-or-death medical decisions, rights to inheritance, rights to share pensions and medical benefits; just as important, it confers upon each the legal responsibilities of guard-



ianship and care of the other. Far from being frills, these benefits and duties go to the very core of the marriage contract; no church or employer or "commitment ceremony" can bestow them at one blow. If marriage is to do all the things that society demands of it, then the state must set some rules.

Just so, say traditionalists: and those rules should exclude homosexuals. Gay marriage, goes the argument, is both frivolous and dangerous: frivolous because it blesses unions in which society has no particular interest; dangerous because anything which trivialises marriage undermines this most basic of institutions. Traditionalists are right about the importance of marriage. But they are wrong to see gay marriage as trivial or frivolous.

It is true that the single most important reason society cares about marriage is for the sake of children. But society's stake in stable, long-term partnerships hardly ends there. Marriage remains an economic bulwark. Single people (especially women) are economically vulnerable, and much more likely to fall into the arms of the welfare state. Furthermore, they call sooner upon public support when they need care—and, indeed, are likelier to fall ill (married people, the numbers show, are not only happier but considerably healthier). Not least important, marriage is a great social stabiliser of men.

Homosexuals need emotional and economic stability no less than heterosexuals—and society surely benefits when they have it. "Then let them 'unchoose' homosexuality and marry someone of the opposite sex," was the old answer. Today that reply is untenable. Homosexuals do not choose their condition; indeed, they often try desperately hard, sometimes to the point of suicide, to avoid it. However, they are less and less willing either to hide or to lead lives of celibacy. For society, the real choice is between homosexual marriage and homosexual alienation. No social interest is served by choosing the latter.

To this principle of social policy, add a principle of government. Barring a compelling reason, governments should not discriminate between classes of citizens. As recently as 1967, blacks and whites in some American states could not wed. No one but a crude racist would defend such a rule now. Even granting that the case of homosexuals is more complex than the case of miscegenation, the state should presume against discriminating—especially when handing out something as important as a marriage licence. Thus the question becomes: is there a compelling reason to bar homosexuals from marriage?

One objection is simply that both would-be spouses are of the same sex. That is no answer; it merely repeats the question. Perhaps, then, once homosexuals can marry, marital anarchy will follow? That might be true if homosexual unions were arbitrary configurations, mere parodies of "real" marriage. But

LEADERS

the truth is that countless homosexual couples, especially lesbian ones, have shown that they are as capable of fidelity, responsibility and devotion as are heterosexual couples—and this despite having to keep their unions secret, at least until recently. Would gay marriage weaken the standard variety? There is little reason to think so. Indeed, the opposite seems at least as likely: permitting gay marriage could reaffirm society's hope that people of all kinds settle down into stable unions.

The question of children in homosexual households—adoption, especially—is thorny. That question, however, is mainly separate from the matter of marriage as such. In settling a child with guardians who are not the natural parents, the courts and adoption agencies will consider a variety of factors,

just as they do now; a couple's homosexuality may be one such factor (though it need not, by itself, be decisive).

In the end, leaving aside (as secular governments should) objections that may be held by particular religions, the case against homosexual marriage is this: people are unaccustomed to it. It is strange and radical. That is a sound argument for not pushing change along precipitously. Certainly it is an argument for legalising homosexual marriage through consensual politics (as in Denmark), rather than by court order (as may happen in America). But the direction of change is clear. If marriage is to fulfill its aspirations, it must be defined by the commitment of one to another for richer for poorer, in sickness and in health—not by the people it excludes.

Gay moms and gay marriage: Can we find a better way?

We all agree that in an age of widespread divorce and rampant illegitimacy, public policy should do everything possible to foster stable families and two-parent homes. But despite the torrents of rhetoric to that effect, the impulse apparently does not run very deep.

When a Cook County court this week rejected separate adoption petitions from two lesbian couples, it showed that sometimes we are ready to sacrifice children merely to accommodate prejudice. And it furnished yet another reason

Stephen Chapman

why our policy on homosexual unions badly needs updating.

Prejudice or no, it's impossible to prevent lesbians from bearing children, through fleeting contact with men or artificial insemination. Many lesbian mothers live with female partners, which is why Heather has two mommies.

In practice, that is. In legal fact, however, most states don't allow a homosexual to adopt a live-in partner's child. Mommy B may be present when the kid is conceived, born and toilet-trained, but as far as the law is concerned, she has no parental rights. In Illinois, the court ruled, unmarried couples may not adopt children. Of course, since the state doesn't permit same-sex unions, lesbians may not marry.

What difference does it make if the law doesn't sanction such arrangements? Plenty. If Mommy A decides to leave her partner, she can deprive the partner and Heather of any contact with each other. If Mommy B is the one to split, she can't be held responsible for child support.



MERRY CHRISTMAS

Illustration by Elizabeth Ladd

Or, if Mommy A dies, Heather has no assurance she'll remain with her surviving parent. If she does, Heather may not be able to get health insurance coverage through Mom. She doesn't have the usual inheritance rights. And so on.

None of these problems prevents lesbian couples from setting up households and braving the terrors of child-rearing. All they do is make such families less secure and less able to protect the interests of the kids. Society may want to express its disapproval of lesbian couples, but Heather is the one who suffers.

Defenders of the Illinois policy can say it is aimed not at gay couples but at unmarried ones. A heterosexual couple living together without benefit of matrimony is also disqualified from adopting—on the assumption that anyone who isn't serious enough to marry isn't serious enough to be an adoptive parent. But the assumption doesn't fit gays and lesbians, who aren't allowed to tie the knot.

The obvious solution is to stop forcing homosexuals to cohabit informally and extend to them the rights and obligations that go with marriage. That would serve the same purposes as heterosexual marriage: discouraging sexual promiscuity, cultivating long-term commitment and affording security to children. The status quo, by contrast, fosters nothing but irresponsible and destructive behavior—to the detriment of gays, their kids and society at large.

Marriage would also solve other problems that arise when gay and lesbian couples are involved. Employers have to decide whether to provide the same benefits to live-in homosexual partners as to heterosexual spouses, which raises the complication of whether live-in heterosexual partners should also be included.

In both cases, the absence of a marital bond raises the potential for fraud: People can shack up just to get benefits. Allowing gays to marry, on the other hand, would grant them the same privileges as married couples—if they accept the constraints of matrimony.

No state permits same-sex marriage. But every state may soon have to address the issue. Last year, Hawaii's Supreme Court said the ban there conflicted with the state constitution and sent the dispute back to a lower court. Next spring, it is supposed to make a final ruling.

If the Hawaii court says gays are allowed to marry, other states may have to recognize such unions. The U.S. Constitution requires every state to give "full faith and credit" to the "public acts, records and judicial proceedings of every other state"—which means that when a legal matter is resolved in one state, the outcome is honored by other states.

But the Supreme Court has never said exactly how far this obligation extends. So if a lesbian couple living in Hawaii were to marry, move to California and become embroiled in a legal dispute between the partners, the California courts might decline to treat them as spouses. Or the California legislature might pass a law refusing to recognize such unions. Or judges and lawmakers might decide it's not worth the trouble and agree to treat gay Hawaiian marriages like any other Hawaiian marriage.

However the issue plays out in courts and elected assemblies, it will force Americans to consider something that most of them instinctively dislike. They may eventually see that what's good for gays would also be good for everyone else.

A Pro-Gay, Pro-Family Policy

By JONATHAN RAUCH

If you listen carefully, you can hear the sound of a taboo cracking. In September, William Bennett told the Christian Coalition: "In terms of damage to the children of America, you cannot compare what the homosexual movement has done to what divorce has done. It is not even close." Last month, when Rep. Steve Gunderson (R., Wis.) publicly came out of the closet, Rep. Newt Gingrich pronounced the matter of no political importance. Then this month, The Washington Blade quoted Mr. Gingrich as saying that the GOP's stance on homosexuality "should be toleration."

Maybe Republicans are ready, at last, to decouple the debate about family from the obsession with homosexuality. They now have the chance to build pro-family policies that embrace all responsible Americans, homosexual and heterosexual alike. In pleading for those policies I address myself to Republicans not because I am one (I'm not) but because Republicans are uniquely positioned to build a stable, principled and humane position between the politics of intolerance and the politics of radicalism. And if they let the moment slip by, the cost to society may be steep—as we have seen once before.

Avoid the Race Mistake

During the debate on race in the 1960s, Republicans stood on the sidelines and on occasion pandered to racist whites. "We Republicans had a great history, and we turned it aside," Jack Kemp wrote in 1993.

Republicans could have constructed stable, principled ground between the politics of white backlash and of affirmative action. They could have severed the cause of colorblindness from the taint of white bigotry. Instead, racial policies tumbled into the morass of color tests, race-norming and ethnic entitlements—policies

that exacerbate and institutionalize racial tensions. All Americans, black and white, suffer as a result.

Now another historic window opens. This time the issue is homosexuality and the family. At a stroke, the pro-family movement could enlarge its tent, disarm the charge that "family values" means intolerance and, most important, bolster the family itself.

To recognize this opportunity, pro-family advocates must first acknowledge reality. To wit: Homosexuals exist and are not going away. Any policy insisting that homosexuals lead lives of loveless celibacy or furtive secrecy is futile and inhumane, to say nothing of unrealistic. Because fewer and fewer homosexuals are willing to hide, the old deal—homosexuals pretending to be heterosexual and heterosexuals pretending to believe them—is off.

"That may be," say anti-gay activists, "but homosexuality is a threat to the family." But this is a canard. Divorce, illegitimacy and infidelity are the enemies of the family. Homosexuality is a peculiar and rare human trait that affects only a small percentage of the population and is of little

inherent interest to the rest. To see it as a threat to the family, you need to believe that millions of heterosexual Americans will turn gay if not actively restrained—an absurd notion. And it is perfectly possible to venerate the traditional family without despising those who are, for whatever reason, unable to have one.

Yet two claims made by anti-gay activists are true. Many activists on the gay (and nongay) left are hostile to traditional institutions in general and the family in particular. And the American family is in trouble. Half of all new marriages end in divorce; 30% of children are born out of wedlock and a fourth live in fatherless homes. Sexual license has had dire consequences—illegitimacy, child abandonment, child poverty and more.

Those facts underpin all of the country's most serious problems. But they have

At a stroke, the pro-family movement could enlarge its tent, disarm the charge that "family values" means intolerance and, most important, bolster the family itself.

nothing to do with homosexuality. Whatever one may think of gay people's sexual practices, they do not produce illegitimate children or account for more than a tiny fraction of divorces. Conversely, condemning homosexuality does no good for the beleaguered family. Indeed, anti-gay rhetoric is today an obstacle to dealing squarely with the crisis of the family, on both sides of the debate.

On the one side, blaming homosexuals for the decline of the family leads the family's friends to avoid the real issues. It fools them into believing they are talking about saving the family when in fact they are merely talking about hammering homosexuals. David Boaz of the Cato Institute recently counted reports and articles by "pro-family" groups and discovered that they devoted obsessive attention to homosexuality while virtually ignoring divorce. This is pro-family?

On the other side, blaming homosexuals for the decline of the family also allows the enemies of the family to avoid the real issues. Instead of confronting the real problems, they can point to the ugly rhetoric of anti-gay activists and say: "See what 'family values' really means? It means beating up on people who are different and snooping in our bedrooms." (In just that same way, advocates of ethnic entitlements have been able to point to racists and say, "See what 'colorblind' really means?")

In recent years an alternative has emerged, a principled, pro-family but not anti-gay position:

"No," family advocates might say, "we are not anti-gay. We are pro-responsibility. We welcome open homosexuals who play by the rules of monogamy, fidelity and responsibility. And we frown upon heterosexuals and homosexuals who do not play by those rules."

"We believe that marriage and fidelity are crucial social institutions that channel lust into love and caprice into commitment. We believe faithful relationships are not only good for children but help keep men settled and help keep the burdens of caring for one another off society's shoulders. And we support extending these norms to all Americans, gay and straight."

"We do not insist that homosexuals change, which is impossible, or that they live lives of lovelessness and despair; we do ask that they—and heterosexual Americans—settle down into patterns of responsibility. We believe in the genuine universality of family values. We embrace all who embrace those values, without regard to sexual orientation."

Here is a fully consistent and staunchly pro-family position, one whose benefits are manifold. It elevates family values to genuine universality. It separates the real issue (responsibility vs. license) from the phony one (straight vs. gay). It hurts radical activists by putting them in the position of arguing for license rather than for toleration of minorities.

This paradigm opposes partner benefits for unmarried heterosexuals, who should get married if they want the benefits of marriage. But it may accept partner benefits for homosexuals, who can't get married but should be encouraged to settle down. It holds that the two-parent family is special and should be favored by public policy—not at the expense of homosexuals per se, but at the expense of single people (including homosexuals) and childless couples (again including homosexuals).

Consider the Alternative

This view doesn't require family advocates to like homosexuality, but it does require them to accept the importance of settled relationships for homosexuals. No easy sell, perhaps, but consider the alternative. More non-fringe, non-radical homosexuals emerge into public view every day. As the stereotype of the homosexual as antisocial deviant crumbles, a party or faction that tolerates gay-baiting rhetoric in the name of "family values" makes "family values" look more and more like common bigotry.

That would be tragic, since there is no problem more urgent than shoring up the family. But as long as family advocates imply that it is better to be an adulterous or licentious heterosexual than a faithful and monogamous homosexual, the chance to rescue the pro-family position from the taint of intolerance goes unclaimed.

Mr. Rauch is author, most recently, of "Demosclerosis: The Silent Killer of American Government" (Times Books).



A Conservative Argument for Gay Marriage

■ Forming families leads to social stability. Why fight it?

From Hawaii, best known for surfing, suntanning and hula dancing, comes news that could be the Pearl Harbor of social issues in the 1990s—gay marriage.

In a ruling last month, Hawaii's Supreme Court held that "marriage is a basic civil right" for same-sex couples, too. More litigation will surely follow elsewhere.

Having fought the leftist politics of gay liberation, does the right now fight the conservative instinct to form families? Choosing to act as if all gays are members of Queer Nation will alienate the majority of gays who seek to join the mainstream.

The most explosive opponent of gay politics is Sen. Jesse Helms (R-N.C.). He led the fight against Roberta Achtenberg's nomination to be an assistant secretary of Housing and Urban Development. His reason? She's a "damn lesbian." These words helped Helms get on the national news but hurt the Republican Party. Consider the consequences.

First, Achtenberg was confirmed. She's now free to pursue her agenda, able to slough off future criticism as merely more lesbian-bashing. Second, the GOP's image as the party of homophobes is reinforced. That may be the goal of some conservatives, but it's hard to call that a winning strategy for the party—look at the 1992 elections. Other Republicans of a more live-and-let-live bent had better speak up, lest Helms be seen as speaking for the party. Gays aren't going away. They are organizing, fund-raising and voting. And they have friends and family. If the issue is abetting intolerance, silence equals death for the GOP.

Principles are worth fighting for. There was a legitimate case to be made against Achtenberg as an inexperienced left-wing ideologue. Unfortunately, that case wasn't made, or if it was, it was buried under the fusillade of personal epithet. The vast majority of Americans, who don't really care what Achtenberg does at home, dismissed the whole thing as just another unpleasant Washington incident.

What should conservatives think about gay marriage? The best answer comes from Ross Perot, who dismisses all social issues with his refrain: "I don't have time to talk about it, I'm too busy trying to rebuild the job base of this country!" But Andrew Sullivan, the gay conservative editor of the New Republic, argues that the institution of gay marriage would actually

'Gays and lesbians are a permanent part of our melting pot. . . It's counterproductive to make them fugitives inside the legal system. We have enough real problems to worry about.'

advance the conservative cause. "It would foster social cohesion, emotional security and economic prudence," Sullivan echoes George Gilder, the visionary conservative author. In "Men and Marriage," Gilder maintains that marriage is conservatizing because it lengthens time horizons beyond immediate gratification. "Men need marriage," he writes. Society does, too, because we all have an interest in getting men to settle down. Gilder calls it "converting barbarians into useful citizens." Admittedly, Gilder is talking about heterosexual relationships, but the same logic applies to everyone. Doesn't the social order consist of all of us?

The left has failed to solve the riddle of "diversity." Its favored solution, political correctness, has been a totalitarian fiasco. Now it's time for the right to step back into the debate with a constructive plan. Fortunately, it has already been written. Two centuries ago, the Founding Fathers wrestled with the dilemma of difference among Americans, and they came up with a wonderful solution: federalism. Nobody expects Salt Lake City to have the same ordinances as San Francisco, but it doesn't help the commonweal if holy war erupts over those differences. In other words, different strokes for different folks. In Federalist Paper No. 51, Madison wrote: "In a free government, the security for civil rights must be the same as that for religious rights."

Gays and lesbians are a permanent part of our melting pot. Most experts—not to mention gays themselves—agree that homosexuals are born that way. If so, it's counterproductive to make them fugitives inside the legal system. We have enough real problems to worry about.

Lincoln had a better idea: You conquer your political opponents by making them your friends. The first Republican President also knew that he had to focus on one challenge at a time. The news that economic growth was an anemic .9% for the first quarter, combined with rising gold prices, is an early warning that all of us, straight and gay alike, are sinking into the quicksand of Carteresque stagflation. To pull ourselves out, we're going to need all the friends we can get. If the real battle is against taxes and bureaucracy, conservatives should not open up a second front against potential allies.

James P. Pinkerton is the John Locke Foundation fellow at the Manhattan Institute's Washington office.

MARCH 4, 1996

Seeking a Right to the Rite

Gay activists advance the concept of homosexual marriage.

RANDY FRAME

Martha Barnette is the daughter of a seminary professor and the sister of a Southern Baptist minister. She has been involved in a committed relationship for more than seven years. "Like other couples," Barnette says, "we work hard, fret over bills, worry about things like public education, pay taxes, and savor quiet evenings at home and romantic dinners out. We're totally monogamous, and we're in this relationship for the duration."

Unlike most couples, however, Barnette and her partner are lesbians. They have joined a growing list of homosexual couples who regard marriage, in Barnette's words, as "a set of special rights for heterosexuals." These couples want the freedom to visit their partners in hospital emergency wards instead of being denied access because they are not considered family. They want the legal license to make decisions in the event a partner is declared legally incompetent. They want to be able to collect pension and other benefits upon the death of a spouse without having to jump through legal hoops. In short, they are seeking recognition as married partners

stories of real-life couples, stories that will challenge the stereotype."

Opponents of legal recognition for same-sex marriage maintain that it will contribute to a decline in public morality, to the dissolution of the traditional family, and to social instability. "Marriage, defined in terms of one man and one woman, has served this planet well for about 6,000 years," says Bill Devlin of the Philadelphia Family Policy Council (FFPC). "Heterosexuality, even with faults such as a high divorce rate, still needs to be upheld as the norm for a civilized society."

Devlin and other opponents of same-sex unions fear a domino effect if homosexual marriage gains legal acceptance. "Business owners could be charged with discrimination for not extending marital benefits to same-sex couples," Devlin says. "Children would be taught in public schools that homosexuality is as normal and healthy as heterosexuality."

Steve McFarland, director of the Christian Legal Society's (CLS) Center for Law and Justice in Annandale, Virginia, says legalization of same-sex marriage could curtail religious expression of individuals or organizations that oppose it on moral grounds.

"I can't think of a more critical and potentially divisive issue that we face today," McFarland says. "On it rests the future of the family as we know it in America."

ALL EYES ON HAWAII: Wolfson maintains that same-sex marriage is neither abnormal nor unhealthy. Defining marriage as a "relationship of financial and emotional dependence between

be alone. Observers on both sides of this policy debate predict that tens of thousands of homosexual couples would find their way to Hawaii, though it is far from settled whether their marriages would be recognized back on the mainland.

The Hawaii case involves three homosexual couples who sued the state in 1992 after being denied marriage licenses. The Hawaii Supreme Court ruled that denying the licenses violates Hawaii's constitution unless the state can demonstrate a "compelling interest." The case has been returned to a lower court to determine whether a compelling interest exists. A trial is scheduled for July.

In 1994, the state legislature defined marriage exclusively in terms of union between a man and a woman. However, last year the Hawaii Commission on Sexual Orientation and the Law, a panel formed by the legislature, proposed legalizing homosexual marriage. Claiming the commission unfairly favors homosexual marriage, conservatives in the state took legal action to withhold the commission's report from legislators.

Among conservatives, several organizations have emerged to oppose homosexual marriage. According to Mike Gabbard, president of the Honolulu-based Srop Promoting Homosexuality America, public opinion is solidly opposed to legalizing same-sex unions. Gabbard says the movement consists not only of conservative Protestants, but also Catholics, Mormons, Buddhists, Hindus, and atheists. They share the conviction that, whether ordained by God or nature, marriage is intended to take place only between men and women.

Gabbard and others maintain that legalizing same-sex unions would wreak havoc on the lives of children who are reared by same-sex couples by denying them access to both male and female role models they need to mature emotionally, socially, and spiritually.

"More than ever, people understand that tampering with the mother-father household as a model for the family is not good," says Peter LaBarbera, editor of *Lambda Report*, which monitors homosex-



Differing views: Exodus's Davies, MCC's White, Lambda Report's LaBarbera.

and all the legal and social privileges that accompany such a designation.

The New York City-based Lambda Legal Defense and Education Fund (LLDEF) is coordinating an aggressive public-relations effort aimed at changing the country's perception—and its laws—regarding same-sex marriage. Says LLDEF's marriage project coordinator Evan Wolfson, "We want public discussion in every state and every community. Americans deserve to hear the real-life

two people in love who make a legal and public commitment to each other," he says there is "no good reason" for limiting the institution to a man and a woman.

If a pending court case in Hawaii turns out as Wolfson and Barnette would like, the door to same-sex marriage would open not only in the island state but across the country. "If marriage passes in Hawaii, Debra and I will call our travel agent the minute we hear about it so we can get married legally," Barnette says. They would not



Exchanging vows: While homosexual marriages are not legally recognized, that does not stop couples from having wedding ceremonies with ministers, rings, and flowers.

ual activism. "Some places are even trying to retrench liberalized divorce laws."

CHANGING TIMES: Conservative resistance notwithstanding, the country is clearly moving in the direction of more liberalized political and social policies and attitudes relating to homosexuality. Thirty-five years ago, all 50 states had laws banning sodomy. Though these laws were not enforced—and though their scope was not limited to homosexual sex—they nevertheless testified to a public morality that stood against homosexual behavior. The laws have been dropped in 27 states.

Several hundred companies now extend benefits to homosexual partners of employees. Among them are Walt Disney, Time Warner, Levi Strauss, Apple Computer, Lotus Development, Microsoft, Coors, and the Hertz Corporation. More than 20 cities, including Atlanta, Boston, and Seattle, and two states—Vermont and New York—offer domestic partnership benefits for government employees. At least 21 states now allow homosexual partners to adopt children, according to ILDEF.

On January 29, San Francisco's Board of Supervisors unanimously passed an ordinance authorizing civil ceremonies with marriage-like vows for homosexual couples

who register with the city as domestic partners. The ceremony carries no legal weight.

The Log Cabin Club, which represents homosexual Republicans, has announced its support for legalizing same-sex marriage. In the minds of many, this gives the cause a measure of respectability, in part by carrying it across the boundaries of party politics. Most major Christian denominations are home to pro-homosexual rights caucuses that push for the ordination of homosexuals and the acceptance of same-sex unions. As of now, no traditional denomination officially supports same-sex marriages, though individual churches within denominations—such as the United Church of Christ and the Episcopal Church—have performed ceremonies of commitment for homosexual couples. The topic likely will be discussed at this year's Presbyterian Church U.S.A. general assembly and United Methodist Church general conference.

The cultural shift, however, has had little if any effect on the convictions of those evangelicals who maintain that the Bible clearly regards homosexual behavior as sinful. This is the position taken by Westmont College New Testament professor Thomas E. Schmidt in his 1995 book *Straight & Narrow? Compassion and Clarity in the Homosexuality Debate* (InterVarsity).

Schmidt contends that, from the Creation story through the New Testament, heterosexual monogamy is the only form of marriage consistently affirmed by Scripture. He also challenges pro-homosexual revisionist interpretations of such verses as Romans 1:26–7, passages traditionally understood as admonitions against homosexual behavior.

In addition, Schmidt focuses on the pathological nature of homosexual practice. He cites various studies, including one in 1978 by researchers A. P. Bell and M. S. Weinberg, which reported that 74 percent of male homosexuals had more than 100 sexual partners during their lives, with 28 percent having had more than 1,000 partners. Schmidt concludes that for "the vast majority of homosexual men, and for a significant number of homosexual women," sexual behavior "is obsessive, psychopathological, and destructive to the body." He writes, "If there were no specific biblical principles to guide sexual behavior, these considerations alone would constitute a compelling argument against homosexual practice."

Metropolitan Community Church (MCC) justice ministry volunteer Mel White, however, disputes both Schmidt's findings and his conclusions.

DAVID WOLF/IN PHOTOS



Working together: Embracing and hand-holding are common sights at White Rock Community Church in Dallas, which has a large homosexual attendance.

"Tom Schmidt is a propagandist, as is CHRISTIANITY TODAY," White says. "CT has never been interested in exploring the issue neutrally."

"The studies show that gay people and straight people are equally promiscuous," says White, who has lived with a homosexual partner for 11 years. He says this contention has been confirmed by his experiences within the 28-year-old MCC, which has 300 congregations and a church membership of 250,000, about 95 percent of whom, according to White, are active homosexuals.

LLDEF's Wolfson, citing David McWhirter's *The Male Couple* (Prentice Hall, 1985), says there is not a big difference in heterosexual and homosexual promiscuity. Wolfson says homosexuals would be more committed to each other if society accepted same-sex rites.

White, a former ghostwriter for evangelical leaders such as Billy Graham, Pat Robertson, and Jerry Falwell, says that same-sex marriage is ultimately a pastoral issue and concern: "It is not about statistics or studies. It is about people who are suffering and a way to help end that suffering." Homosexual orientation is "a gift from God to be embraced, celebrated, lived with integrity. If you don't see that premise, gay marriage looks ridiculous, if not insane," says White, a former evangelical filmmaker and former pastor of Pasadena (Calif.) Covenant Church.

Opponents of homosexual marriage, such as Bob Davies, however, maintain that dealing pastorally with the issue entails a thorough assessment of the bib-

lical evidence and an open self-examination of factors that may have contributed to homosexual orientation. Davies is president of the San Rafael, California-based Exodus International, an umbrella organization that supports people striving to overcome homosexual orientation. He favors efforts aimed at understanding and growth, as opposed merely to assigning blame.

"I believe that many [advocates of homosexual marriage] have had a genuine experience with Christ and are very sincere," Davies says. "But at the same time, I believe they have been sincerely deceived."

"The struggle against homosexual feelings is the battle of a lifetime," Davies says. "A lot of people have given up on the struggle too soon and so have adopted a theology that supports their homosexuality." Davies maintains that children reared by same-sex couples will have a particularly difficult road toward emotional and psychological stability.

FOCUS ON PUBLIC POLICY: While the biblical debate on homosexuality is not likely to be settled anytime soon, the public-policy debate appears ready to accelerate. Based on a long-standing constitutional provision known as the Full Faith and Credit clause, it is generally presumed that states should honor the laws and policies of other states. This explains the expected mass migration to Hawaii if it legalizes same-sex unions.

One exception, however, is if one state's law conflicts with another state's strongly established public policy. (In the past, the public-policy exception has been

debated by states with differing views on common law marriage.) If Hawaii does legalize same-sex marriage, it is likely that attorneys across the United States will be scrambling to set forth their positions on what constitutes a strongly established public policy.

In such an environment, antisodomy statutes would take on considerable symbolic importance. Those who support legal recognition for homosexual couples likely will argue that repealing antisodomy laws constitutes movement toward public policies in support of same-sex marriage. Legislators in Utah have attempted to settle the matter

before it becomes an issue by passing legislation denying legal recognition of homosexual marriage. Lawmakers in at least six other states—South Dakota, Alaska, California, Utah, Iowa, and Washington—are attempting to do the same. The PPFC's Devlin is working with Pennsylvania legislators toward this end. "It's a shame that we have to specify that marriage is limited to a man and a woman," he says, "but at this point we do."

The situation in Hawaii also could trigger action at the federal level if same-sex partners begin filing their tax returns as married couples. (Currently the IRS defines marriage based on the law in the state where the marriage takes place.) Because of the potential federal-level implications, some are urging presidential candidates to give the issue of homosexual marriage increased priority.

MOBILIZING FOR DEBATE: *Lambda Report's* LaBarbera predicts that the coming debate on homosexual marriage will "make the gays-in-the-military debate seem like a little fist fight." LaBarbera says that conservatives, unlike proponents of homosexual marriage, have been hesitant to address the issue out of concern for being regarded as "hatemongers." LaBarbera says, "The side that's able to talk freely and proudly and righteously about their cause, I think, is the long-term winner. I'm worried if we don't talk about it, we're going to lose."

According to Stop Promoting Homosexuality America's Gabbard, conservatives' efforts to mobilize around the issue

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GAY RIGHTS from page 66

are accelerating as like-minded organizations convene for various meetings and strategy planning sessions. The ad hoc Alliance for Traditional Marriage is circulating a resolution declaring that marriage is "an essential element of the foundation of a healthy society." It calls on government to "continue to reserve the special sanction of civil marriage for one man and one woman as husband and wife."

The Lambda Legal Defense and Education Fund has a different policy goal in mind. According to the resolution it is circulating, marriage is "a basic human right," and "the State should not interfere with same-gender couples who choose to marry and share fully and equally in the rights, responsibilities, and commitment of civil marriage." The strategy also calls for trying to influence newspapers to include coverage of ceremonies of homosexual commitment in their wedding sections. The *Los Angeles Times* and *Virginian-Pilot* are among the papers accepting such announcements.

GUIDING PRINCIPLES: While the public-policy debate rages, some, including Dwight Ozard, editor of Evangelicals for Social Action's *Prism* magazine, are concerned about the purity of the church's witness regarding marriage. "We have given in to our culture's and to most other cultures' notion that marriage is essentially an economic partnership or a legal or social contract," Ozard says. "But marriage is not fundamentally that. It is two people being made one flesh in a spiritual act that God makes a reality through the church."

Ozard believes that state recognition and church recognition of marriage should be distinct. "This would allow the church to make a moral statement against same-sex marriages without denying what are perceived as civil rights."

According to the LLDEF's Wolfson, arguments rooted in the Bible or religion should not be recognized in the public debate. "For government to interfere with the freedom of an individual—whether religious or personal—there must be valid secular reasons." But the CLS's McFarland maintains the Supreme Court has long rejected Wolfson's approach.

"The framers of this country not only assumed, but were depending upon, the citizens to bring their religious viewpoints to matters of public policy," McFarland

says. "To suggest that Americans leave their religion inside the four walls of the church and out of the public square and out of the legislature sets on its head the foundation of this country."

The PFPC's Devlin says the interfaith coalition that in 1993 successfully opposed a domestic partnership initiative in Philadelphia steered clear of biblical arguments. "We contended, based on statistics and research, that a child who has a mother and father at home is more likely to do well," Devlin says. "We also pointed out that, if the city approved domestic partnerships, it would not be able to afford benefits for all those who might come forward, such as relatives, to register as domestic partners."

James Skillen, director of the Center for Public Justice in Washington, D.C., maintains that to allow same-sex partners to marry constitutes a "misidentification" of the relationship. He explains that a homosexual relationship is properly identified as a friendship, not a marriage. As with Devlin, Skillen is concerned that if legal recognition is granted, "two brothers or a woman and her grandmother could seek recognition as married partners." He asks, "Why should one form of friendship be given recognition that others don't have?"

Skillen believes that many homosexual activists are ultimately searching for the moral approval of the majority culture. "In American culture, more so than in some, legal recognition has often meant the same as moral approval."

The discussion of homosexual marriage raises challenges to both sides regarding principles that should guide the public-policy debate. What principle, for example, would prevent three, four, or eight people from being legally married, as some advocates of homosexual rights have proposed?

On the other hand, if same-sex marriages negatively influence public morality, how far should the society go toward criminalizing homosexual relationships? Gabbard maintains that landlords should have the legal right to refuse to rent to homosexual or unmarried heterosexual partners.

Where the society will draw the line between tolerance and civic morality remains to be seen. Meanwhile, those on both sides agree that this debate has the potential to shake the very foundations of U.S. public policy. □

FAMILY

Do You, Tom, Take Harry...

Many gay couples want to get married. But every state says no. Is it time for the law to change?

BY ANNE UNDERWOOD
AND BRUCE SHENITZ

NINIA BAEHR HAS CONCOCTED elaborate plans for the wedding of her dreams. Why not? She's 35 and "crazy in love." She will rent a fabulous estate outside Honolulu and string lights in the trees. The reception will be a traditional Hawaiian luau. Breaking tradition, Baehr will wear a slinky black evening gown dotted with sequins.

There is, however, another tradition waiting to be broken in this fantasy wedding. The person Baehr wants to marry is another woman, Genora Dancel, her lover

since 1990. But instead of just having some sort of ceremony and the grand party, the couple wants something else: a marriage license from the state. Baehr and Dancel, along with two other gay couples, first applied five years ago. After a fight that has already gone to the Hawaii Supreme Court—which made a finding in Baehr's favor, but sent the issue back to a lower court—legal experts say she may actually get her wish within the next two years.

Much more than Baehr's happiness is at stake here, though. No other state recognizes homosexual marriages, and opinion polls show that nearly 65 percent of Americans oppose the idea. But states usually recognize legal marriages performed in another jurisdiction, so if Hawaii legalizes same-sex weddings, it automatically raises the issue for the entire country. "We will be [in Hawaii] five minutes after it's ratified," said New Yorker Christine Edwards, who is engaged to Marjorie Hill. Anticipating such a situation, Utah's legislature already voted in March not to recognize out-of-state marriages that would not be legal under its own laws.

In facing the issue, states will have to bear in mind that marriage has two dimensions: the spiritual one of love and commitment, and the worldly one of health plans and inheritance rights. The fight in Hawaii is mostly about the paperwork. Baehr and Dancel are already free to take their vows before any minister willing to perform the ceremony, and the change in the law they seek would not compel a priest, say, to officiate.



Waiting: Baehr (left) and Dancel, 'crazy in love'

Gay church weddings, virtually unheard of before 1968, are now officially sanctioned in a few denominations, and quietly taking place in others (although in recognition that only the state can ratify a marriage, they are usually called something like "blessings of a holy union"). A lot depends, though, on where one lives. Some Episcopal priests are happy to perform gay marriages, but a year ago, when Jim Black and Thom Monahan sought to get married in Seattle's Episcopal Cathedral of St. Mark's, Bishop Vincent Warner forbade it, provoking the couple to stage a 10-day fast in the cathedral. The sympathetic bishop told them they were "on the side of the angels," but they needed to get the Episcopal House of Bishops on their side as well, and so far that hasn't happened.

As for the other aspect of marriage, society has already begun moving, although haltingly, toward a recognition of the legal and financial rights of gay couples. Amazingly enough, it is big business



After 17 years, wedded bliss at last: Williams and Eustace with their two adopted sons, Kyle and Corey

that is leading the way, in the interest of employee morale or, perhaps, elementary fairness. In a trend pioneered just four years ago by Lotus Development Corp., more than 200 American companies and municipalities now extend at least some spousal benefits to their gay employees' partners. These "domestic partnership" programs typically provide for such benefits as health and life insurance, as well as leaves for paternity or maternity, illness and bereavement. Among the companies are such rock-ribbed members of the mainstream as Coors Brewing Co. and the law firm of Covington & Burling (chart). Disney recently joined the list—and is now facing a call for a boycott by the Florida chapter of the American Family Association.

Gay leaders strongly applaud domestic-partnership programs. But many also insist that these programs are weak imitations of the benefits routinely afforded heterosex-

ual couples. A report commissioned by the Hawaii state legislature lists dozens of rights that matrimony confers on heterosexuals but domestic partnerships don't. Among them: spouses can claim a tax deduction for a dependent partner and can qualify for payments under their partner's social security. Bob Stauffer, a heterosexual member of the Hawaiian Commission on Sexual Orientation and the Law, says: "It's like saying to Rosa Parks, 'We're going to put air conditioning in the back of the bus.' All the examples of domestic partnership are separate but unequal."

Horror stories: Many gay couples try to duplicate marriage benefits by having lawyers write wills, powers of attorney and other legal documents to protect property, inheritances and the right to make health-care decisions. But horror stories abound, like that of Karen Thompson and Sharon Kowalski, two lesbians who lived together for four years in Minnesota. A car accident

in 1983 left Kowalski with severe brain injuries. Thompson wanted to care for Kowalski at home, but Kowalski's family placed their daughter in a nursing home. Only after a bitter nine-and-a-half-year legal fight was Thompson allowed to bring her lover home to St. Cloud, where they continue to live together.

In that light, it's not surprising that the issue should have arisen at a time when many gay couples face illness and the possibility of early death. Just a few years ago, the situation was different: many gay leaders considered marriage an institution somehow alien to gay culture, or a cause that would distract from more important issues. Now, though, most gay organizations endorse legalized marriage. Marriage "is about the legal equality of our love for each other," says Andrew Sullivan, editor of *The New Republic*. "I think it's as important to us as interracial marriage was to African-American civil rights."

he truth is that countless homosexual couples, especially lesbian ones, have shown that they are as capable of fidelity, responsibility and devotion as are heterosexual couples—and this despite having to keep their unions secret, at least until recently. Would gay marriage weaken the standard variety? There is little reason to think so. Indeed, the opposite seems at least as likely: permitting gay marriage could reaffirm society's hope that people of all kinds settle down into stable unions.

The question of children in homosexual households—adoption, especially—is thorny. That question, however, is mainly separate from the matter of marriage as such. In settling a child with guardians who are not the natural parents, the courts and adoption agencies will consider a variety of factors,

just as they do now; a couple's homosexuality may be one such factor (though it need not, by itself, be decisive).

In the end, leaving aside (as secular governments should) objections that may be held by particular religions, the case against homosexual marriage is this: people are unaccustomed to it. It is strange and radical. That is a sound argument for not pushing change along precipitously. Certainly it is an argument for legalising homosexual marriage through consensual politics (as in Denmark), rather than by court order (as may happen in America). But the direction of change is clear. If marriage is to fulfill its aspirations, it must be defined by the commitment of one to another for richer for poorer, in sickness and in health—not by the people it excludes.

When Marriage Is a Tough Proposal



BY CHRIS STEWART/THE CHRONICLE

Ninia Baehr (left) and Genora Dancel of Hawaii relaxed while in S.F. to raise money for a court battle over same-sex marriage

Women's suit at heart of debate over same-sex unions

By Elaine Herscher
Chronicle Staff Writer

What Ninia Baehr and Genora Dancel wanted was to make each other beneficiaries of their life insurance.

When they tried, their native state of Hawaii told them they could not; they had to be married. And so the two women enlisted in what many believe will become the highest-profile lesbian and gay issue of the decade: They sued for the right to wed.

Legal experts say their lawsuit, expected to be resolved by late 1996, is likely to result in legal marriage for lesbian and gay couples in Hawaii. Already, the case has ignited de-

bate over whether same-sex unions will become legal in every state.

Gay organizers are convinced that the issue of same-sex marriages will be more controversial and far-reaching than the issue of gays in the military. It affects a broader cross-section of people, and many say it is likely to tap much deeper into fears and preconceptions about gay and lesbian relationships.

It also comes at a time when gay people are not altogether united on the political and personal importance of winning the right to matrimony.

"It is coming at us like a 3,000-ton locomotive. We can pretend it's not and risk another

gays-in-the-military debacle, or we can educate ourselves and foster a discussion in our own community and drive the issue from the grass-roots up," said Robert Bray of the National Gay and Lesbian Task Force, one of a group of organizations involved in a national gay marriage campaign.

Lawyers for Dancel and Baehr and two other couples say the basis for their optimism was formed two years ago in a stunning state Supreme Court ruling. The court found that Hawaii's refusal to grant marriage licenses to same-gender couples appears to violate the equal-protection guarantee of the state con-

DEBATE: Page A10 Col. 1

Debate Growing as Same-Sex Marriage Lawsuit Moves Forward

From Page 1

stitution, which prohibits discrimination based on gender.

In the majority opinion, Justice Steven H. Levinson wrote that "marriage is a basic civil right" and that Hawaii's law "denies same-sex couples access to the marital status and its concomitant rights and benefits."

The Supreme Court sent the case back to the trial court, directing the state to demonstrate a "compelling state interest" for discrimination. But legal experts agree that the state cannot succeed in showing such a "compelling interest" when the case is heard in September. So it likely will be up to the state Supreme Court either to follow its original line of thought and to approve gay marriage — or to depart from its strong initial ruling.

Meanwhile, the Hawaii state Legislature weighed in last year, enacting a law saying that marriage is meant for "one man and one woman." To soften the blow, it also appointed a commission charged with remedying inequities faced by same-sex couples — a move that could lead to a statewide domestic partner law.

But many gay activists say that although a state domestic partner law would be unprecedented, it would create a second-class category, excluding same-sex couples from the full recognition and benefits enjoyed by married heterosexuals.

If Hawaii allows same-gender marriage — anticipated by next

year or in 1997 — gay activists expect a flood of same-sex couples to wed in Hawaii and return home. Many of them are expected to insist that their marriages be recognized at home — and to take their cases to state courts if the unions are not recognized.

"It's our opinion that every other state in the union will have to recognize same-gender marriage," said Amelia Craig, managing attor-

neity for the western region of New York-based Lambda Legal Defense and Education Fund.

That has certainly been the case for Baehr and Dancel, both 34, who met in 1990. Baehr vividly remembers their first meeting.

"It was June 20 at 11 a.m., and I was wearing an orange dress," Baehr said with a laugh while she snuggled on a couch with Dancel

'It's our opinion that every other state in the union will have to recognize same-gender marriage'

— AMELIA CRAIG, LAMBDA ATTORNEY

while on a trip to California to raise money for their case.

Baehr, who worked at a university women's center, instantly fell in love: "I was just totally smitten. Two weeks later, I told my mom that I just had this feeling I'm going to be with this woman for the rest of our lives."

Dancel, a television station engineer, proposed marriage three months later. Wanting to prod the government into recognizing their relationship so they could provide for each other financially, they filed for a marriage license in December 1990, which was denied. The following year, they, along with a gay male couple and another lesbian couple, filed suit against the state of Hawaii, claiming the ban on same-sex marriage violated their rights of privacy and equal protection.

They have the support of Hawaii's gay organizations, the Honolulu media and many mainstream groups, including Buddhist temples and the Japanese American Citizens League. But a tenuous attitude remains among some gay men and lesbians.

"At first they said, 'You'll never win. Why should we spend our resources on this?'" Baehr said. "When the Supreme Court ruled for us, they said, 'You might win, but we're not so sure we like gay marriage.' Now they say we shouldn't do it because there will be a backlash."

Still, the couple's position is clear. "It's like voting. You should have the right," Dancel said. Her partner agreed: "We're pro-choice on marriage."

Advocates of same-sex marriage say that lesbian and gay couples in committed relationships are entitled to the same rights and responsibilities as heterosexual married people. Those include tax benefits, health insurance rights, parental rights, immigration rights and spousal property inheritance advantages.

Bray of the National Gay and Lesbian Task Force said that every day, he is reminded that his relationship with his male partner "is second-class and not valid." Despite a long-term partnership, Bray must check the "single" box when filing his tax returns, and the couple cannot rent a car together without paying extra money.

Bray and others say they must

start now to educate people that commitment between two people is the issue, not sexuality. And they all agree that the response against their message will be swift, powerful and highly organized.

The Rev. Lou Sheldon of the Traditional Values Coalition said his and other conservative organizations have met with some of the country's Republican leadership

— which include laws in 23 states against sodomy — could be exploited to create special "gay and lesbian exceptions," gay groups fear.

Utah already has passed a law nullifying gay marriages performed anywhere in the United States, and similar attempts have surfaced in other states. Dissension has arisen in Hawaii as well, where

'If you destroy the heterosexual ethic, then you are destroying a major pillar of Western civilization'

— REV. LOU SHELDON, TRADITIONAL VALUES COALITION

to start building a strategy against same-gender marriage.

"This is a front-burner issue, because if you destroy the heterosexual ethic, then you are destroying a major pillar of Western civilization," Sheldon said. "I don't think Hawaii wants to be known in a pejorative way as favoring homosexual marriage. It's too much of a family resort place."

If Hawaii moves forward on the issue, Sheldon said conservatives may push for an amendment striking down the "full faith and credit" provision of the U.S. Constitution.

Under the provision, states generally recognize the public acts of other states. That means that marriages performed in one state are recognized in another state, unless the marriage conflicts with local public policy. Such conflicts

there is a burgeoning sovereignty movement by native Hawaiians to become independent from the United States. The movement represents thousands of people who feel discriminated against and want land returned to native people. Some are hostile to granting more rights to gays while native Hawaiians struggle for economic rights, said Ku'umeaaloha Gomes, who heads Na Mamo o Hawaii, a group of gay and lesbian native Hawaiians trying to bridge the conflict.

"Marriage is viewed by some people as an issue of privilege, an issue of leaving property to someone, of sharing health benefits," Gomes said. "The gay community here has felt marginalized, and they really are anticipating marriage from the perspective of gaining their freedom."

Journal

FRANK RICH

Beyond the Birdcage

Same-sex marriage comes out.

Who would have guessed that we live in a country where Robin Williams and Nathan Lane are a sexier box-office pair than Robert Redford and Michelle Pfeiffer? Not me or anyone in Hollywood. But that's a fact: "The Birdcage," a comedy celebrating a gay couple's 20-year bond, sold \$18 million worth of tickets last weekend while "Up Close & Personal," which it knocked out of the No. 1 slot, had opened to a mere \$11 million.

A fluke? Perhaps. Many gay and straight critics have viewed "The Birdcage" as a safe retread of "La Cage aux Folles" with "tried and true gay stock characters" — in the words of Jeffrey Friedman, the co-director of "The Celluloid Closet," the documentary charting Hollywood's often shabby treatment of homosexuals. Yet the popularity of "The Birdcage" comes only months after two of TV's most popular sitcoms — "Friends" and "Roseanne" — staged sincere, even sentimental gay weddings, to sky-high ratings and mere ripples of protest. Could the public be ahead of politicians in its live-and-let-live attitude toward same-sex marriage?

The question is important because same-sex marriage could be the next bloody battleground of the culture wars. In August, on the eve of both political conventions, a Hawaii court will hear a case that experts on both sides believe will lead to that state's legal recognition of marriages between homosexuals. Since the "full faith and credit" clause of the Constitution might require other states to recognize Hawaiian same-sex marriages, the legislatures of 20 states are now rushing to pass laws that will try to void those marriages once the couples cross state lines.

Why would gay people want a government-sanctioned civil wedding as opposed to the religious or spiritual ceremonies already being performed on both TV and in real life? The most practical explanations come from those who are already booking their tickets to Hawaii. Fran De Benedictis and Emma Llaurado, New York City police officers who've been together for 12 years, talk of how much costlier and more cumbersome it is to jointly adopt their child without legal benefit of marriage. Nor could either collect the other's considerable "line-of-duty" death benefits under their pension plans.

Russell Reish and his partner of 25 years, Albert Masse, who could have stepped right out of "The Birdcage," are proud of having raised two of Mr. Reish's nieces who were abandoned by their own parents. (The girls are now married with children of their own.) Speaking by phone from Los Angeles, Mr. Reish expressed concern that when he dies, other, hostile members of his family will try to wrest his estate from Mr. Masse — because even an ironclad will and his hiring of "a very nasty attorney" do not guarantee his wishes being carried out.

Couldn't the equal benefits denied same-sex couples, from tax, Social Security and health-plan advantages

to the right to make medical decisions for an infirm loved one, be achieved through strong "domestic partnership" laws? Some pragmatic gay activists argue for such an incremental strategy, even though domestic partnership could not equalize all marital benefits, since it avoids raising the red flag of "marriage." No major national politician in either party, after all, has come anywhere near endorsing same-sex marriage.

But that's why the popularity of "The Birdcage" and TV's gay marriages may be more telling than what politicians do or don't do. From the start, the most eloquent proponents of same-sex marriage have not been gay people on the left, some of whom oppose marriage in any event, but gay conservatives who argue that marriage promotes mainstream ideals — "social cohesion, emotional security and economic prudence," in the words of Andrew Sullivan, editor of *The New Republic*. Or as Rich Tafel, head of the Log Cabin Republicans, argues in debates with religious-right opponents of his party: "You can't have it both ways — accusing gays of being promiscuous and then denying us the right to incorporate into monogamous, legally recognized relationships."

In "The Birdcage" and its TV cousins, same-sex marriage is presented in exactly that conservative fashion — as an enclave of familial stability in a country full of broken homes. If Nielsen and box-office numbers tell us anything, it's that this message has a huge constituency. Politicians who plan to run this year on a platform of exclusionary family values had better stop by the mall to check out what their voters are applauding in the multiplex. □

Same-Sex Marriages Face a Legal Swamp

By Gabriel Rotello

THE DREADED long-distance call comes in the middle of the night. Your spouse has had an accident and is in critical condition, and doctors are frantically searching for next of kin to give permission to operate. If they don't find someone fast, it'll be too late. You sputter into the phone yes, go ahead, perform the operation. But after a moment's hesitation the doctor informs you that your permission is not valid. Why? Because even though you and your spouse have been legally married for many years, your marriage is not recognized in the state where the accident occurred, the state where your spouse lies dying. According to the laws of that state, you and your spouse are not next of kin at all, and never were.

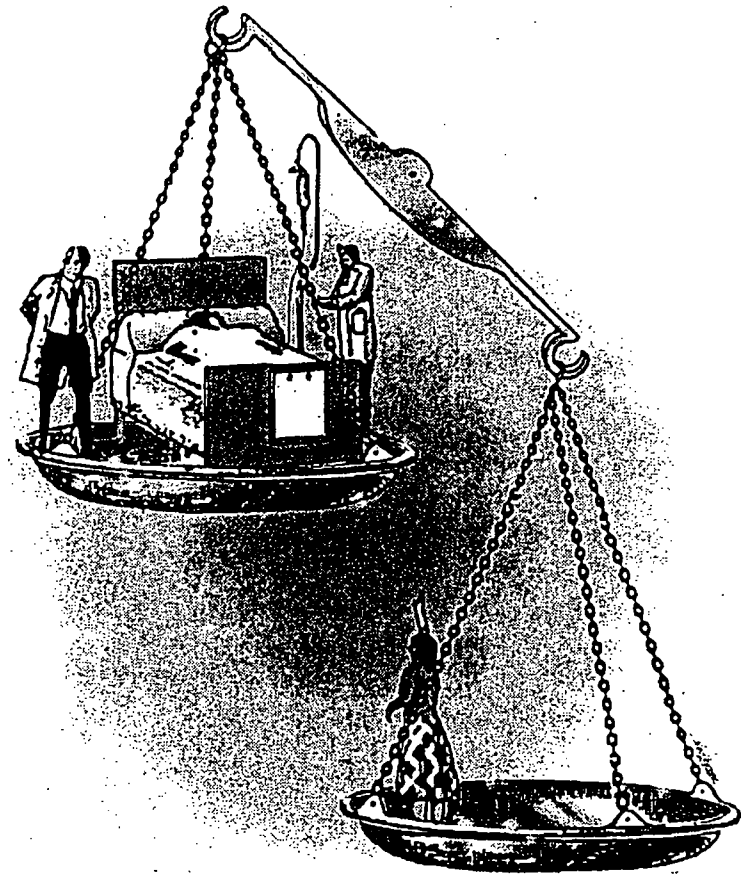
This may sound like something out of the Twilight Zone, but such scenarios may soon be commonplace. The reason is that the United States is on the verge of becoming a nation in which couples of the same sex can marry and have their marriages legally recognized in some states but not others. Hawaii's supreme court is widely expected to legalize same-sex marriages soon, and as of this week 21 states have introduced laws designed to deny recognition to what may soon be called "Hawaiian marriages." So far three have rejected such laws (Maine, New Mexico, Mississippi) and two have passed them (Utah, South Dakota), leading to the likelihood that once same-sex marriage is legalized

Due to a production error, portions of two Viewpoints articles were dropped yesterday. Charles Krauthammer's column is reprinted in full on Page A50 and Khalil Shikaki's article will run tomorrow.

in Hawaii and lesbians and gay men flock there to get married, their marriages will be considered legal in some parts of the nation but not others. A couple driving cross country might discover they were alternately married and unmarried almost every time they crossed a state line.

Practically everything about Hawaii's upcoming action has such potentially astounding implications, but, unfortunately, very few people are thinking those implications through. Polls show that most folks have a set opinion on the matter, with about two thirds of Americans opposed to same-sex marriage and one third in favor. But even a cursory glance at the questions raised by the issue shows that it resists simplistic "for" or "against" opinions.

I'm strongly in favor of same-sex marriage, but let's say for the sake of argument that you're not. That's certainly your right, but now let's take it a step further. What do you think should be done in the example above, where someone needs to make a life-or-death medical decision for their spouse in a state that doesn't recognize their legally contracted marriage? Should the accident victim be allowed to die if no other next of kin can be found? Or what about financial laws? If a bank makes a loan to my spouse based on my spousal guarantee, what happens if we move to a state that doesn't recognize our marriage? Can



Newsday / Ned Levine

that state enforce the guarantee, or can my spouse default on the loan and keep the cash? Or what about inheritance laws? If I live in a state that recognizes my same-sex marriage, but I own property in a state that does not, and I die without a will, should my spouse be denied that inheritance? Or corporate law? If the corporation I work for grants me spousal benefits and then transfers me to a state that does not recognize my marriage,

— Continued on Next Page

Marriages Face a Legal Swamp

— Continued from Preceding Page

does it take away the benefits? And what about criminal law? Can I be compelled to testify against my spouse in a criminal trial in a state that does not recognize our marriage?

Questions like these are just the tip of the legal iceberg posed by those who would deny recognition of Hawaiian marriages.

It was precisely to avoid such complications that the framers inserted the full faith and credit clause into the Constitution, which mandates that any contract (including marriage) that is legally entered into in any state must be fully recognized in all others. It's one of the basic principles that glues the nation together. If Hawaii legalizes same-sex

marriage and lots of states vote not to recognize those marriages, what about that?

As you can see, it is not simply a moral question of whether you're for or against same-sex marriage, legitimate though that question may be. The fact is that same-sex marriage is coming, thanks to the enlightened jurists in Hawaii.

So the far more pertinent question is how to address the thousands of significant legal and ethical issues sure to arise in every state the moment Hawaii acts. Right-wingers have so far framed this as a moral debate in which so-called "family values" are deployed to forbid lesbians and gay men like me from forming legal families.

But while I'm as interested as anybody in high-minded moral debates, I also want a few practical answers from those who are proposing laws that will forbid recognition of my marriage. Such as, if I ever got that dreaded call in the middle of the night, would my spouse have to die to satisfy somebody's definition of family?



Gabriel Rotello is a columnist for The Advocate, a news magazine for the national gay and lesbian community.

The Marrying Kind

By Bruce Bawer

Same-sex marriage? The idea is, in one sense, breathtaking. Since the word "marriage" has always denoted a male-female pairing, can so fundamental an institution be redefined so radically, so quickly?

In another sense, however, such a change seems utterly innocuous. Whom, after all, would it hurt? It is an essentially conservative act to encourage couples, whether gay or straight, to settle down and take responsibility for each other. Isn't it wrong for the same right-wing activists who have decried gay promiscuity to now deny gay love and commitment?

If the religious right succeeded three years ago in getting middle Americans worked up over gays in the military, one can only imagine what it can accomplish with same-sex marriage, which has become an

issue because Hawaii may soon sanction such unions.

At a recent Christian Coalition rally in Iowa, broadcast on C-Span, the audience was shown a videotape on same-sex marriage. It contained no rational arguments, only mendacious emotional appeals. It cut back and forth between idealized Hallmark card images of wholesome-looking brides and grooms — who, truth to tell, bore little resemblance to the mostly dour people in attendance — and Gay Pride Day shots of screaming, bare-chested leathermen — who bore little resemblance to most gay men (and no resemblance to lesbians).

The video was crude and grotesquely dishonest, but looking into the faces of the audience one could see its effectiveness. These people apparently wanted to believe that their own marriages and families, however dysfunctional, were like those Hallmark images. They also wanted to believe in those stereotypical notions of homosexuals. The video helped people feel that they had something precious in their lives, something worth defending — and that somebody was trying to take it away.

This is the essence of the argument against same-sex marriage: that it is an assault on the sanctity and integrity of heterosexual marriage. The argument is irrational but viscerally powerful.

Given a few years to discuss same-sex marriage, Americans might be able to recognize where fairness lies. But we won't have the luxury of years of discussion. Hawaii's Supreme Court will almost certainly legalize same-sex marriage by the end of 1997. Two state legislatures have voted to deny recognition of these marriages; 19 are considering such measures.

Under the circumstances, it's especially urgent that there be articulate heterosexual champions of same-sex marriage speaking out against the Christian Coalition. For instance, when the Iowa House of Representatives debated a bill banning such unions, Representative Ed Fallon told his colleagues: "There isn't a limited amount of love in Iowa. It isn't a nonrenewable resource. Marriage licenses aren't distributed on a first-come, first-served basis. Heterosexual couples don't have to rush out and claim marriage licenses now, before

Conservatives
should applaud
same-sex unions.

they are all snatched up by gay and lesbian couples."

If there is any hope for same-sex marriage, it lies in the expectation that other political and religious leaders will have the courage to follow in Mr. Fallon's footsteps. Yet who will carry that message? In 1993, during the controversy over gays in the military, a gratifying number of prominent heterosexuals, in and out of the armed forces, stood up against bigotry. This time around, however, outspoken support of the sort offered by Mr. Fallon has been rare.

Will this silence end? Or is same-sex marriage so explosive an issue that even usually reliable champions of equal rights for homosexuals will dodge the duties of moral leadership? □

Bruce Bawer is author of "A Place at the Table: The Gay Individual and American Society."

Bashing to Victory

What happened in Iowa may be old news now that the horse race gallops on to New Hampshire. But for anyone who saw the gay-bashing rally that ended the caucus campaign on a chilling note Saturday night, Iowa cannot be forgotten so easily.

At the First Federated Church in Des Moines, the Christian Coalition and seven other national religious-right organizations came together to demonize homosexuals and the prospect of "same-sex marriage" as the source of all ills in America, urging a national C-Span audience to "send this evil life style back to Satan where it came from!" And every G.O.P. Presidential candidate with the single honorable exception of Richard Lugar endorsed the event — by either showing up on stage or distributing a public letter of support.

This was not, unfortunately, an isolated incident. Gay bashing was a major strain of the G.O.P. campaign in Iowa from the start. Now the Iowa paradigm will spread from state to

Robertson, as a "toothy flake." Since Mr. Forbes's views about social issues were (and are) too blurry to stigmatize, the religious right attacked him by innuendo instead — for having a gay father. A week ago Mr. Horn spread the news that a Forbes company yacht boasted a seascape by a gay artist, Robert Mapplethorpe. (Good thing Forbes never bought the Mona Lisa.)

Steve Forbes at first responded to such McCarthyite tactics by taking on the Christian Coalition by name — the only candidate since Arlen Specter with the guts to do so — but he quickly retreated under fire, until he was reduced to fudging his positions on abortion and gays in the military and parading his wife and children around Iowa. By the end of the week his campaign had sent its own message of support to Saturday's rally — even as that night's episode of "Saturday Night Live," confirming the efficacy of the Iowa smear campaign, featured a Dole impersonator gay-baiting his Forbes counterpart.

Where will this ugliness lead? For all Mr. Dole's kowtowing to the religious right's troops, Mr. Buchanan remains by far their candidate of choice. Nor is there any evidence to suggest that demonizing homosexuals helps win national elections. Quite the contrary. Mr. Dole's campaign went into a tailspin after it returned the Log Cabin Republicans' donation. On Monday, Log Cabin's executive director, Richard Tafel, likened Saturday's rally to the self-immolating Houston convention of '92 and singled out Mr. Dole and Lamar Alexander, both of whom issued letters legitimizing the event, for "blatant pandering to gay bashers."

But there is more than politics at stake. In a conversation over the weekend, Bill Crews, a lifelong, church-going Republican who is the Mayor of Melbourne, Iowa — and openly gay — told me how he and other gay Iowans have been the victims of vandals and beatings in the aftermath of past local rabble-rousing. Mr. Crews, who had been planning to vote for Mr. Alexander, publicly withdrew his support on the eve of the caucus because of his candidate's tacit endorsement of Saturday's rally.

But what does Mr. Alexander care? He and his peers have taken their act to New Hampshire now, oblivious to the hatred they helped stir up in Iowa and callously indifferent to how it rains down on the lives they've left behind. □

An anti-gay rally in Iowa.

state under the twin banners of Pat Buchanan and Ralph Reed unless supposed "moderate" conservatives like Bob Dole and Lamar Alexander find the courage they have so far lacked to stand up to the bullies of the religious right.

In Iowa, the ugliness began last year when Phil Gramm joined a successful effort by Bill Horn — the same anti-gay zealot who organized Saturday's rally — to oust a longtime Des Moines school board member because he was gay. (The campaign's target had to wear a bulletproof vest before the school board election was over.) When Mr. Gramm then tied Mr. Dole in the Iowa straw poll, Mr. Dole's panicked campaign got into the gay-bashing act itself by returning a contribution it had solicited from the gay Log Cabin Republicans.

In recent weeks, the gay bashing has been aimed, none too subtly, at Steve Forbes. Whatever else is to be said of Mr. Forbes, his ballooning popularity posed a threat to the perceived power of the Christian Coalition, because he was rising in polls without its support and despite having once dismissed its leader, Pat

Panel in Hawaii Recommends Legalizing Same-Sex Marriage

By DAVID W. DUNLAP

A state commission in Hawaii will recommend to the Legislature this week that it grant marriage rights and responsibilities to couples of the same sex.

Coming from a panel appointed by the Governor, the recommendation is another step in a legal contest over marriage in Hawaii that began in 1993, when the State Supreme Court opened the door to same-sex unions.

The report, which also calls for the recognition of domestic partnerships, will provide ammunition for advocates of same-sex marriage.

"It is historical and unprecedented," said Daniel R. Foley, a lawyer for the three couples who brought the case decided by the State Supreme Court.

But no one expects the report to sway the Legislature, which last year banned same-sex marriages. It acted after the Supreme Court had found that the denial of marriage licenses to gay couples would be unconstitutional unless the state demonstrated a compelling interest for doing so.

It sent the case back to a lower court, which postponed its hearing to await the recommendations of the Commission on Sexual Orientation and the Law, whose members were

"This is an equal-protection question, and they should not be denied this right on the basis of their gender," said Thomas P. Gill, the commission chairman. He is a lawyer, a former Democratic member of Congress and a former lieutenant governor who joined the American Civil Liberties Union in the 1940's.

About gay couples who sought civil recognition for their unions, Mr. Gill said: "These are people. We have a lot of them. And they have rights. Let's keep this an open society."

Another commission member, Bob Stauffer, a writer and lecturer at the University of Hawaii, said, "I hope, I pray we'll see the end of this apartheid against our gay and lesbian citizens."

The commission said the state had not demonstrated a compelling interest in withholding marriage licenses.

"The opposition can't come up with a compelling state interest other than Leviticus 18," Mr. Gill said. (Verse 22 of that chapter declares, "Thou shalt not lie with mankind, as with womankind: it is abomination.")

"Procreation is used as an argument," Mr. Gill continued, "but interestingly enough, no heterosexual couples are asked that question. If two 75-year-olds walk in for a marriage license, they don't say, 'What the hell are you doing here?'"

Mr. Gill was in the House of Representatives when the civil rights bill of 1964 was debated. "Many of the arguments I'm hearing now sound very much like the arguments we heard in the early 60's — 'blacks are inferior,' et cetera," he said.

For opponents of the recommendation, the issue is not civil rights but the fabric of society itself, which they see being torn apart by the destruction of the traditional family.

"Heterosexual and homosexual coupling are not equivalent," said Lloyd James Hochberg Jr., a commission member who voted against the recommendation. He is a former president of the Hawaii office of the Rutherford Institute, a conservative

legal group specializing in religious liberties cases.

"Since homosexuality is an emotional disturbance, according to many psychologists," Mr. Hochberg said, "why would we want to take a pathological condition and make it the equivalent of heterosexual marriage as a goal that society is teaching children? Once homosexual marriage or domestic partnership is permitted, the schools are going to have to teach that it's equivalent."

The staff lawyer for the commission, Pamela Bell Martin, said the report would be sent to legislative leaders this week.

Robert H. Knight of the conservative Family Research Council dismissed the report, saying the commission "was leaning toward gay activism from the first day."

"And I don't think it will effect the Legislature's views," Mr. Knight said, "because they already know too much about the issue to be taken in by it."

A committee's advice is unlikely to change lawmakers' minds on homosexuality.

appointed by Gov. Benjamin J. Cayetano, a Democrat.

On Friday, by a 5-to-2 vote, the commission concluded that the denial of a marriage license to two men or two women deprived the applicants of important legal and economic benefits on the basis of their sex.

Among those benefits are the right to have joint parental custody, obtain insurance and health benefits, file joint tax returns, receive alimony and child support, inherit property automatically and visit a spouse or child in a hospital.

The Washington Post

TUESDAY, MARCH 26, 1996

E. J. Dionne Jr.

Split Over Morality

It is remarkable how quickly political talk these days turns to the question: What does the religious right want? Variations on the theme include: How much must Bob Dole do to get the votes of Christian conservatives? Can't President Clinton help himself by hanging the religious right around Dole's neck?

All this might be taken as a great victory by Ralph Reed and the Christian Coalition he directs. The obituary of the religious right has been written over and over since the rise of the Moral Majority in 1980. Yet none of this has stopped the Christian conservative movement from expanding its influence.

Reed and his troops have already gotten a lot of credit for helping Dole stop Pat Buchanan's surge dead in the South Carolina primary. That is the very definition of political power.

Reed and his followers have every right to do what they are doing. Religious people have the same rights as union members, environmentalists, business groups and feminists. President Clinton himself has spoken at hundreds of black churches. The president is often at his most effective from the pulpit, an exceptionally good venue for his favorite speeches about the links between personal responsibility and social justice, crime and unemployment.

Democrats thus have no grounds for challenging Reed's argument that his people deserve "a place at the table" of national politics. What does need real debate is more important. It has to

do with *how* moral issues should be discussed in politics, and also how they should be defined.

A lot of Americans—including many who want nothing to do with Ralph Reed—have a vague but strong sense that what's going wrong in American life is not just about economics. It also entails an ethical or moral crisis. Evidence for this is adduced from family breakdown, teen pregnancy, high crime rates (especially among teenagers), and trashy movies, television and music.

But unlike many on the Christian Right, these same Americans see strong links between moral and economic issues. Their sense that commitments are not being honored includes family commitments, but it also includes the obligations between employer and employee and the question of whether those "who work hard and play by the rules," as the president likes to put it, are getting just treatment.

Democrats, liberals and other assorted critics of the religious right have no problem in discussing these economic matters. But they have made the reverse mistake of Reed and his friends: The religious right's foes have only rarely (and only relatively recently) been willing to understand that many American families see the moral crisis whole. It's possible, and reasonable, to be worried about both trashy entertainment and the rewards that go to the hard-working. Human beings are both economic and moral creatures. But liberals often cringe when the word "morality" is even mentioned.

Giving the Christian right a near monopoly on

moral discussion has narrowed the moral debate. This narrowing needs to be challenged.

To hear leaders of the religious right talk in recent weeks, for example, one of the preeminent moral issues of our time is whether gay marriages should be sanctioned by state or local governments. But surely this is not even the 10th or the 25th most important issue for most Americans. The resolution of this question one way or the other will do virtually nothing about the moral issues such as crime or family breakup that actually do trouble lots of people.

It's easy enough to recognize why tradition-minded Americans are uneasy with this broadening of the definition of "marriage." But turning this question into yet another political litmus test will only push the political debate toward yet another ugly round of gay-bashing. Is that what 1996 should be about?

What needs to be fought is a tendency described movingly by Stephen Carter in his new book, "Integrity." It is a tendency Carter quite fairly discerns all across the political discussion.

"I must confess that the great political movements of our day frighten me with their reckless certainties and their insistence on treating people as means to be manipulated rather than as the ends for which government exists," he writes. "Too many partisans seems to hate their opponents, who are demonized in terms so creative that I weep at the waste of energy, and, as one who struggles to be a Christian, I find the hatred painful." So should we all.

Commentary

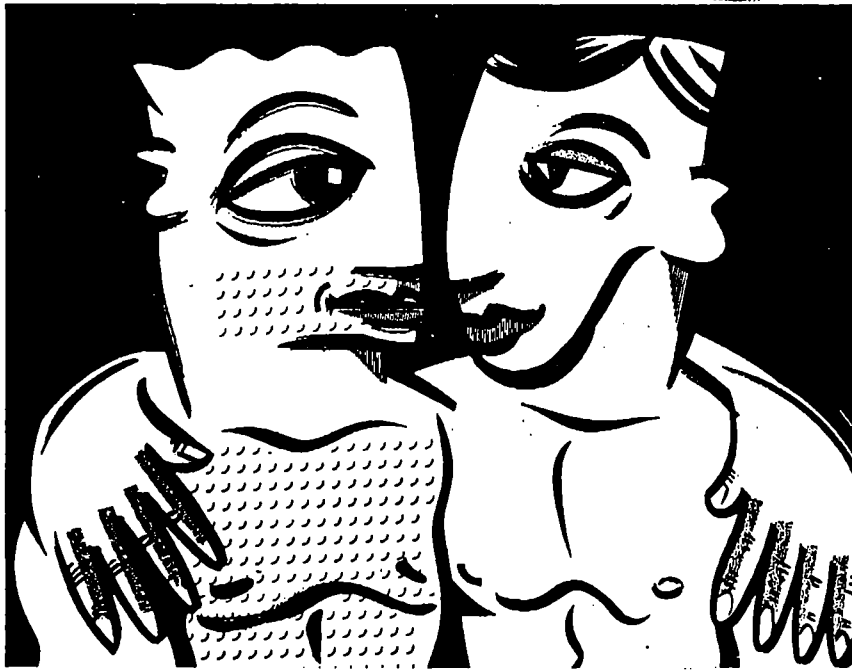


Illustration by David Calasho

Unspeakable unions?

The flimsy case against gay marriage

Aspecter is haunting conservatives: gay marriage. The state of Hawaii is moving toward sanctioning homosexual unions, and that prospect has induced something approaching apoplexy on the right. Some opponents regard this as one of the defining political issues of the day. They want other states to refuse to recognize such marriages—a departure from the custom that a marriage transacted in one state is accepted by all.

But why is there such resistance? This is not a zero-sum game. If homosexuals win the right to wed, the victory doesn't come at the expense of heterosexuals, who will retain all the pleasures, prerogatives and duties that come with matrimony.

Much of the opposition stems from religious objections. "We just believe it's plain immoral," said Tim Wildmon, vice president of the American Family Association. "It goes against the Holy Scriptures."

It may come as a revelation to Wildmon that American law and the 10 Commandments are two different things. We call ourselves a free society partly because we permit all sorts of things that "go against the Holy Scriptures"—blasphemy, fornication, making graven images, Sabbath-breaking, coveting your neighbor's maidservant and more.

The supposed moral offense that upsets conservatives is sexual relations between gays—which is already permitted nearly everywhere. If Americans can tolerate gay sex, why not gay marriage?

Conservatives, of course, do not willingly tolerate gay sex. But some of their thinkers have tried to come up with reasons to oppose gay marriage that are somewhat more persuasive than invoking Leviticus. The effort only demonstrates the emptiness of their cause. What they are engaged in is not reasoning but rationalization.

The primary objection from Christian Action Network president Marlin Mawyer is that if gays gain the right to wed, "marriage as an institution will be rendered meaningless." Society encourages marriage, he says, solely because "it is likely to produce a greater good, namely children, who are necessary for any society's existence."

But not everyone who gets married has children, and not everyone who has children gets married. We allow unions between people who don't want children and people who can't have children.

Marriage, conservatives argue, provides a vital framework for raising children. But gay couples also raise children—either children one of them has produced or children they have adopted. There is no

Stephen Chapman



law to stop a lesbian mother from bringing up her own son in a household that includes her female partner.

Robert Knight of the Family Research Council says homosexual conduct has to be discouraged to preserve traditional marriages, which are precious because "the stability they bring to a community benefits all." But allowing gay marriage would advance the same interest by discouraging promiscuity and encouraging commitment—the opposite of what current policy does. If it's good for society when straight couples settle down in permanent, legally sanctioned relationships, why is it bad when gay couples do likewise?

Because it would set a terrible precedent, according to Amherst College professor Hadley Arkes. Next thing you know, he warns, we'll have to allow marriage between men and boys, between fathers and daughters, even between multiple partners. Knight goes further, fearing that some men will want to marry dogs.

Here we have passed into outright hallucination. Why does legalizing gay marriage lead to man-boy unions, any more than allowing heterosexual marriage leads to man-girl unions? Children may not marry for a simple reason that is irrelevant to gay marriage: They can't give true consent.

As for incestuous pairings, they would doubtless remain illegal because they undermine a taboo that is crucial to the protection of children and because they carry health risks for potential offspring.

Polygamy? If two women are happy to marry the same man and live together in a family, subject to the same strictures as two-partner marriages, there is no obvious reason to stop them. But such arrangements would be rare. There are lots of unmarried gay couples in America but very few unmarried men cohabiting with several women.

These arguments serve mainly to obscure the issue, not illuminate it. Conservatives say they abhor gay marriage because they value marriage. The truth is they abhor gay marriage because they abhor gays.

35TH STORY of Level 1 printed in FULL format.

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Pittsburgh Post-Gazette

February 1, 1996, Thursday, SOONER EDITION

SECTION: EDITORIAL, Pg. A8

LENGTH: 604 words

HEADLINE: Same-sex partners encounter tax disadvantages that married couples do not

BYLINE: CHRISTINE BIANCHERIA Biancheria, Eriksen & Maliver, P.C. Attorneys at Law Downtown

BODY:

As the ACLU attorney for Deborah Henson, I would like to respond to Raymond Priest's Jan. 25 letter (''Benefits for the Married'') and amplify several points in this important case. Mr. Priest opposed Ms. Henson's complaint that the University of Pittsburgh, her employer, has discriminated against her based on her sexual orientation by refusing to extend health-insurance benefits to her same-sex partner as it would to an opposite-sex spouse.

Sadly, in so doing, Pitt has failed to take a leadership role in the emerging trend among universities toward offering such benefits, and forced a confrontation over its failure to comply with its own promises of fairness as well as with city anti-discrimination law.

In support of Pitt's multilevel failure, Mr. Priest reasons that benefits are awarded to married couples to offset the tax and other economic burdens of marriage and concludes that Pitt should not give more privileges to the unmarried.

Unfortunately, Mr. Priest bypasses the central issue: Whether Pitt's shortsighted failure constitutes illegal discrimination under city law. Treating lesbian and gay employees differently from heterosexual ones is discriminatory regardless of what the tax laws provide.

After missing the issue, Mr. Priest compounds his error by inaccurately portraying the economic ''burdens'' of marriage. First, unmarried gay and lesbian couples encounter tremendous tax disadvantages that married couples do not.

For example, unlike married couples who automatically can own property jointly, gay and lesbian partners face gift and income taxes when they share or transfer money and property. (In fact, when a gay or lesbian employee does receive fringe benefits for a partner, the value is likely to be taxable as income).

Moreover, contrary to Mr. Priest's assertions, gay and lesbian couples do not benefit from avoiding divorce proceedings when they break up. Gays and lesbians involved in long-term relationships often have unequal and intertwined finances and property. When they break up, there are no divorce laws to help them. If they cannot agree, they will incur significant legal expenses in the ensuing fight, and once the property is divided, again, they face gift and income

Pittsburgh Post-Gazette, February 1, 1996

taxes, whereas the division of marital property is tax neutral.

Married couples reap countless other gains not available to unmarried same-sex couples (including the kind of health benefits at issue).

For instance, married couples are entitled to spousal workers' compensation benefits; inheritance rights and accompanying tax breaks upon the death of a spouse; spousal veteran's benefits; survivor's Social Security benefits; rights to sue for death or injury to a spouse; spousal unemployment compensation benefits; spousal immigration rights, visitation privileges in hospitals and other institutions; discounted family memberships in various organizations; lower auto, homeowner's and other insurance rates and the right to make decisions for an incapacitated spouse. Clearly, marriage has its privileges.

Lastly, Mr. Priest takes the position that the American Civil Liberties Union should not be "championing this action to make it profitable to avoid marriage." Is Mr. Priest saying that Deborah Henson and her same-sex partner are avoiding marriage and should be denied health benefits so as to encourage them to marry if they want the benefits?

Perhaps Mr. Priest could clue us all in if he knows where gay and lesbian couples can go in the United States to obtain a legal marriage. I'm sure a lot of people, including Deborah Henson, would be appreciative.

NOTES:

Editor's note: Sen. Wagner, a Democrat from Beechview, represents the 42nd district.

CORRECTION:

The sponsors of the Outstanding Citizen/Jefferson awards are the Post-Gazette, Eat'n Park and KDKA-TV2. They were incorrectly listed in a letter yesterday.

TYPE: LETTERS TO THE EDITOR

LOAD-DATE: February 2, 1996

3/23/96

Editorial: Gay marriage ban isn't needed

You don't have to support same-sex marriages to oppose Rep. Jeff Groscost's proposed ban on recognizing such bonds granted in other states.

Probably unconstitutional, Groscost's mean bill proposes a meddlesome, anxious and divisive law that can only disturb Arizona's relative tranquility on matters of identity and sex.

The bill - set to be heard this morning at a special meeting of the House Committee on State's Rights and Mandates - targets a very few Arizonans with an unnecessary stigmatization.

Designed to raise walls around Arizona, Groscost's strike-all amendment to HB 1063 would erase for a few Arizona's recognition of any valid marriage, and enact at the same time a moralistic ban on the acceptance here of same-sex ties formalized and recognized elsewhere.

In doing that, the Mesa Republican's unnecessary bill would clearly run Arizona afoul of the U.S. Constitution's guarantee that acts like marriage be recognized in every state - opening the way to probable years of court challenge.

But Groscost's handiwork would also throw in Arizona's lot with the minority of states that choose to signal their intolerance and nervousness, rather than their charity and confidence. This is especially worrisome, since those latter values - the positive ones - also turn out to be the ones more and more prized by desirable newcomers and potential employers.

Finally, in the absence of clearly stated positive arguments for taking this step, most Arizonans should probably just scorn the simple over-zealousness and lack of neighborliness of Groscost's measure.

The bill attacks for no clear reason an essentially conservative act, taken elsewhere, that actually formalizes the desire of many homosexuals to commit to and take responsibility for each other.

Arizona may not want now or soon to formally legalize same-sex unions. But it has no need to aggressively and mean-spiritedly refuse to recognize same-sex marriages performed elsewhere.

NOTE: Comments/Letters to the editor can be sent to letters@azstarnet.com

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Copyright 1996 The Atlanta Constitution
The Atlanta Journal and Constitution

February 7, 1996, Wednesday, CONSTITUTION EDITION

SECTION: EDITORIAL, Cynthia Tucker

LENGTH: 592 words

HEADLINE: My Opinion;
General Assembly: Is this really the best way to spend a session?

BYLINE: Cynthia Tucker

BODY:

It's a comfort to know just how hard members of the Georgia Legislature are working on behalf of the citizens of this great state. You would not believe the dangerous trends they are attempting to halt, the treacherous practices they are seeking to wipe out, the scurrilous ideas they are working valiantly to hold back. Oh, the dedication of those lawmakers!

They are busy trying to resurrect chain gangs so those uppity prisoners can be kept in line. It is so much better when prisoners out on work detail have their ankles chained together so if one falls down, they all suffer the same fate, like dominos. It strengthens their sense of brotherhood, you know.

Courageous legislators are attacking the plague of sex education. And rightly so. If youngsters are kept in the dark about human anatomy, they can never figure out how to . . . well, you know. A group of lawmakers has turned its attention to the secret efforts of HIV-positive babies to corrupt other babies and poison them with this deadly disease. The only way to expose this plot, those legislators believe, is to require the state to keep a registry of all HIV-positive infants.

State Rep. Ron Crews (R-Tucker) wants to turn back the tide a creeping up on our shores, any day now a of same-sex marriages. Apparently, the senator believes the state of Georgia does not go far enough in merely failing to recognize same-sex marriages. It is not enough that they have no legal standing in this state. Nope. Those marriages must be expressly forbidden, lest some errant couple tries to sneak something past an unsuspecting justice of the peace.

And let us not leave out state Sen. Mike Crotts (R-Conyers). He deserves special congratulations for spotting a loophole in Georgia law that had left the citizens exposed to a well, who knows? Did you know that it is perfectly legal for any Georgia legislator to introduce a bill in a foreign language a say, Swahili or Gujarati or French? Well, my goodness!

Crotts could not let that go unaddressed. He pushed through the Senate a bill making English the official language of Georgia; it now awaits a vote by the House. Elevating English has become a crusade under the Gold Dome. This is the fourth year a bill of this kind has been introduced. (Last year, Gov. Zell Miller vetoed a similar bill.)

The Atlanta Journal, February 7, 1996

The senator is at pains to explain what his bill does not do: It does not wipe out bilingual education; it does not forbid local governments to print official documents in other languages; it does not bar high school language classes in, say, French or German or Spanish.

It merely makes English "official." I see his point. The English language is daily disrespected under the Gold Dome, where legislators draw out syllables, suppress word endings and generally mangle diction. Hardly a day passes when some lawmaker does not launch into a tangled tirade full of redundancies ("true facts"), oxymorons ("hard-working legislators") and meaningless cliches ("Let's put the hay down where the goats can get at it."). Rumor has it that recently a visiting elementary school grammar teacher fell down in a dead faint.

Let's hope Crotts doesn't stop here. Let's hope he goes on to crusade for a law requiring all Georgia legislators to speak standard English, with conformist grammar and recognizable diction: No more "y'alls," drawls, "ain'ts," "cain'ts," twangs, tangled syntax or subject-verb disagreements. The state would surely be a more secure place then, for legislative activities would be severely circumscribed.

LOAD-DATE: February 8, 1996

COLORADO SPRINGS GAZETTE TELEGRAPH

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(NOTE: The Gazette Telegraph welcomes letters to the editor from anyone in the country.)

Tuesday, March 26, 1996

OUR VIEW (Editorial)

NOTHING IS RESOLVED ON SAME-SEX MATRIMONY

Gov. Roy Romer's veto of an explicit ban on same-sex marriages Monday, despite all the furor, was hardly a defining moment in a debate that was likely to go on and on whatever Romer did.

Whatever the governor's agenda may be on this controversial topic in general -- he has sent out mixed signals -- the veto itself ultimately resolves nothing for either side in the tug of war.

FOR THE MANY Coloradans who hope to ensure the state won't recognize same-sex marriages sanctioned in other states (so far only Hawaii might), the bill Romer nixed may well not have provided an additional safeguard anyway. That's because it arguably would have been superseded by a portion of the U.S. Constitution.

The Constitution's so-called Full Faith and Credit Clause requires each state to honor the "public acts, records and judicial proceedings of every other state." The ban's critics and backers alike already agree that, without the ban that Romer turned down, the clause might force Colorado to recognize another state's same-sex marriages. That probably remains to be determined in court, of course, and some opponents of same-sex marriage contend that case law on the clause suggest it might not be applicable on this nettlesome subject.

But even with the Legislature's proposed ban -- reaffirming Colorado's current policy against same-sex marriage and stating no such unions from other states will be recognized -- everything likely would still have hinged on that one constitutional clause. If courts were to find that the clause requires one state to honor a gay marriage by another state, that ruling probably would trump the ban as well. On the other hand, if the courts ruled that the clause doesn't compel states to heed others' same-sex marriages, that finding probably wouldn't be on account of the ban.

Either way, the courts' reading of the clause "would trump state law," the University of Denver's Alan Chen, a constitutional law professor, tells us.

AS FOR THOSE Coloradans who opposed the ban because they harbor hopes the state will permit same-sex marriage or at least some formalized "domestic partner" status, as Romer himself has hinted he prefers -- that's unlikely.

Right now, Colorado recognizes marriage only between men and women. No one has suggested that's about to change. There's certainly no mood for it in a

Legislature that just attempted to enact a ban on it.

Indeed, this whole debate has gotten a good bit ahead of itself.

A Hawaiian court, as many Coloradans know by now, is weighing whether that state's refusal to recognize gay or lesbian marriages is unconstitutional. A trial is pending. Some observers speculate that the courts in Hawaii will favor the homosexual couples that are suing because that state's highest court already has decreed that the state must show a "compelling" reason to deny marriage licenses on the basis of gender. That's a tough legal standard to meet.

But what that portends at this stage is anybody's guess. Hawaii could wind up not permitting same-sex marriages after all. And meanwhile, no state right now will marry two men or two women.

THE BIGGER ISSUE of whether society should officially sanction so historically unconventional a bond is itself far from any resolution and remains unaffected by this week's events in Denver.

Many Coloradans and Americans in general are no doubt deeply offended by the thought of same-sex marriage and, polls show, most of the public opposes it. Marriage, they say, is for a man and a woman, period.

At the same time critics of the current system, though a minority by most accounts, say allowing homosexuals to marry is both morally right and constitutionally fair. Same-sex marriage, many gay-rights activists contend, simply would let them share in the same level of commitment, not to mention assorted public and private benefits, that husbands and wives now enjoy.

And this whole dilemma is unlike the more conventional gay-rights debate over protecting sexual orientation from discrimination in housing or jobs -- considerations that, editorially, we long have maintained should be left to the private sector to sort out. A person's sex life is not a subject on which government should dictate standards to private employers or landlords.

By contrast marriage is by definition a government matter.

That's what makes this issue so problematic in terms of public policy. In the end, is it the government's place to define marriage on the basis of the majority's values? Does government have a "compelling" interest in doing so? Or does it have any interest in sanctioning marriage at all, heterosexual or otherwise?

The discussion must go on and it will. Nothing that happened this week changes any of that.

Marriage nobody's business but yours

KIHEI, Hawaii — Why should you or the government care if the two men next door want to get married?

You shouldn't, and neither should the government.

Why should you or the government care if the man and woman across the street want to get divorced?

You shouldn't, and neither should the government.

Yet folks and politicians are getting all lathered up and trying to stop some people from getting married while stopping others from getting divorced.

It makes no sense. If they believed in equal rights and the pursuit of happiness, they'd be arguing the other way.

Since the 1960s, some clergy have been "marrying" same-sex couples. No state recognizes these unions, though, so the partners get none of the benefits that marriage traditionally bestows: societal acceptance, inheritance rights, the right not to testify against each other, and, often, the right to sign up on a spouse's employee-benefits program.



Counterpoints

By Michael Gartner

In 1991, three same-sex couples — a pair of men and two lesbian couples — said the equal-rights amendment in Hawaii gave them the right to marry, and the state Supreme Court agreed. It said the state had to show a "compelling state interest" to bar such marriages.

The state was given a chance to try to show that interest, and another court date has been set for the week of July 15 in Honolulu. Unless the legislature intervenes — and both houses of the Hawaii legislature were maneuvering last week — the court is likely to rule that gay marriages are indeed valid here.

That has people all worked up. In Iowa, where I live, the Legislature apparently fears every gay in the state will rush to Hawaii to get married. The Iowa House has passed a bill that would bar the state from recognizing same-sex marriages performed in other states. People elsewhere are upset, too.

Why? If it's family values you want, gay marriage delivers. It encourages stable relationships, two-parent households and long-term commitment. Gay activists say it also would do everything from lowering the risk of AIDS to easing alcohol problems to eliminating the social pressure on closet gays to marry heterosexuals, which they say would lower divorce rates.

Most of all, it would provide self-esteem to people who feel discriminated against. It also would be the fair thing to do.

The arguments against gay marriage today are the same arguments put forth against interracial marriage a generation ago and interfaith marriage two generations ago. They're couched in the language of morality and tradition and family values, but they boil down to discrimination.

It is many of these same people, ironically, who are pressing states to make it tougher for heterosexuals to divorce. They want to eliminate no-fault divorce unless both parties are agreeable. They would force people to prove adultery or desertion or abuse before they could divorce. What nonsense.

First of all, divorce is not a growing problem. The divorce rate has been falling for 20 years, the average duration of marriage has been rising, and the number of children affected by divorce has been declining.

Second, none of that makes any difference. The state's interest should be in protecting children and ensuring equality in dividing assets. It shouldn't be trying to keep unhappy people together or forcing them to cheat and lie in order to divorce.

People who want to divorce should be free to divorce. Any time they want. And people who want to marry should be free to marry. Anyone they want.

COUNTERPOINTS' four columnists provide views from diverse perspectives on today's issues. **Wednesday:** Linda Chavez on the disconnection between Republicans and their religious roots. **Thursdays:** Susan Estrich. **Mondays:** Tony Snow. **Tuesdays:** Michael Gartner.

OPINION USA

USA TODAY • TUESDAY, MARCH 5, 1996 • 11

Gay Marriage: Who Should Decide?

If you think abortion is the most contentious issue dividing Americans today, just wait for one now on the Western horizon—gay marriage. You don't have to be a constitutional scholar to know that neither the word "abortion" nor "marriage" appears in the Constitution. But just as the U.S. Supreme Court invented a constitutional right to abortion in its 1973 *Roe v. Wade* decision, the Supreme Court of Hawaii appears on the brink of inventing a right for homosexuals to marry. If that happens, under the U.S. Constitution all 49 other states may have to recognize same-sex marriages performed in Hawaii,

Rule of Law

By Melanie Kirkpatrick

like it or not. As with abortion, the wishes of the people of the United States will have nothing to do with it.

For the moment at least, the issue is out of the hands of the people and firmly in the hands of the courts, specifically the courts of Hawaii. In August, on the order of the state Supreme Court, a lower court is scheduled to rehear a 1990 case in which three gay couples claimed the state constitution gives them the right to obtain marriage licenses. *Baehr v. Lewin* first reached the state Supreme Court in 1993, at which time the court agreed with the couples. It ruled that the denial of the marriage licenses amounted to unconstitutional discrimination on the basis of sex (not sexual orientation) unless the state could show a compelling public policy reason for the denials.

In an effort to bolster the state's arguments, the Legislature passed a law in 1994 defining marriage as a union solely between a man and a woman. It also appointed a special commission to study the issue of same-sex marriage. The court de-

layed rehearing *Baehr* until the commission could issue its report, which it did last December. In a 5-2 vote it recommended legalization, a move equal to an admission that there is no compelling state interest in barring gay marriages.

The upshot of all this is that when *Baehr* finally reaches the state Supreme Court again, probably next year, few expect the state to prevail. And so despite the express wishes of the elected representatives of the people, Hawaii is likely to become the first state to sanction same-sex marriage.

Baehr is the first gay marriage suit to progress this far. Unlike a dozen or so failed suits, *Baehr* was carefully crafted to raise no federal constitutional challenges. It is purely a state constitutional issue, with no higher appeal than the state Supreme Court. "Much lesbian- and gay-rights legislation has been done under state constitutions instead of in the federal courts," says Evan Wolfson of the Lambda Legal Defense and Education Fund and a co-counsel in *Baehr*. "Some states offer more protection than the U.S. Constitution."

Much as they might want to, other states can't dismiss *Baehr* as a far-away state coming up with a far-out idea that they want no part of. For under the Full Faith and Credit Clause of the U.S. Constitution, all states must recognize the "public acts, records and judicial proceedings of every other state." In short, if you're married in Hawaii, you're married in the other 49.

Although the Supreme Court has never explicitly ruled that Full Faith and Credit applies to marriage, it almost always has in practice. Southern states that didn't permit interracial marriages nevertheless recognized interracial marriages performed in other states. Common-law marriage doesn't exist under New York law, but the state recognizes the common-law marriages approved by other states.

Divorce law provides even richer ex-

amples of how Full Faith and Credit works. Historian Daniel Boorstin writes that in the latter half of the 19th century, Western states vied for the divorce business by offering alternatives to "a married person who found the divorce laws of his own state inconvenient." In our own century, Nevada built its entertainment business around the leisure time of visitors there for quickie divorces. (Hawaiian tour operators, by the way, reportedly are gearing up to target gays for the state's \$50 million a year wedding business.)

Under the Full Faith and Credit Clause of the Constitution, if you're married in Hawaii, you're married in the other 49 states.

Anticipating how Hawaii's Supreme Court may rule, other states are trying to avoid having to recognize same-sex marriages should they become legal in the Aloha State. Utah, which has its own historical experience with nontraditional marriages, passed a law last year that denies recognition to out-of-state marriages that do not conform to Utah law. In February, South Dakota enacted a law that defines marriage as between a man and a woman. Similar legislation is pending in 18 other states. The usual argument is that the state has an interest in encouraging heterosexual marriages as the best environment for raising children.

Lynn Wardle, a law professor at Brigham Young University in Utah, argues that the Full Faith and Credit Clause does not require a state to go against its own public policy and says that the constitutional "question turns on whether that form of marriage violates

public policy." Like virtually every other legal scholar who has studied gay marriage, he agrees that there's likely to be a long period of chaos.

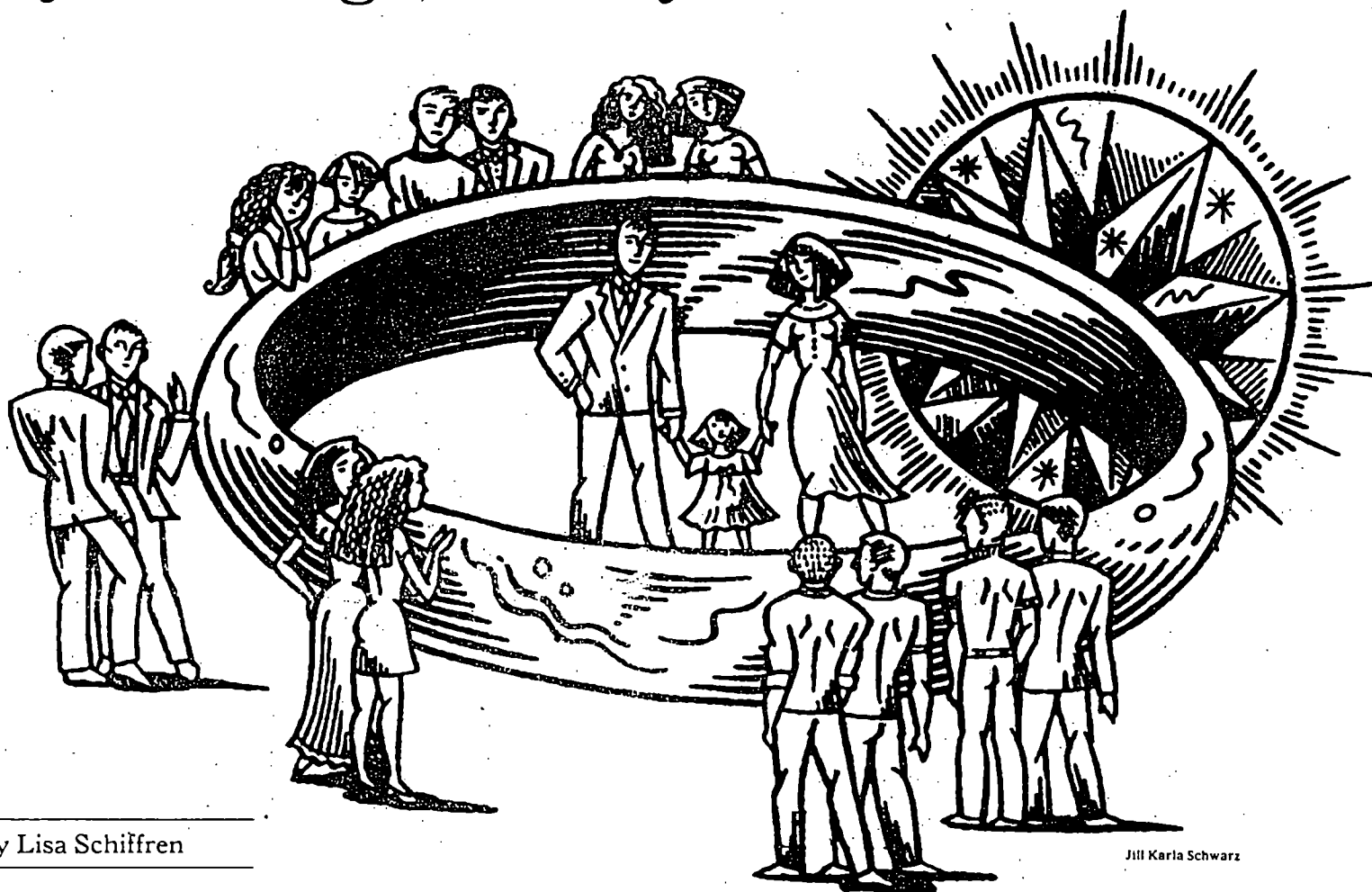
"Nobody knows how Full Faith and Credit would work," says Mary Ann Glendon, a Harvard law professor. She notes that France dropped its public policy exception to polygamy in the case of Muslim marriages performed outside France. This leads to another intriguing legal question: If gay marriages become legal, what would be the constitutional bar to other voluntary relationships such as incest, polygamy or polyandry?

In the U.S., the law on homosexual relations, which is governed by the states, has moved from prohibition toward tolerance over past 25 years. Many states have repealed their antisodomy laws, and a number of municipalities have domestic partnership laws that recognize the permanent relationships of homosexual couples. But now gay-rights activists are asking for more than tolerance. Marriage holds a preferred status under the law, and activists want that special legal status applied to same-sex relationships that many Americans find abhorrent on religious or moral grounds.

Marriage has long been a stabilizing force in society, and there's a good argument to be made that gay marriage would serve the same purpose. In short, there are respectable positions on both sides of the issue. They deserve a hearing—but the question is where? Under our system of government, it is the people, not the courts, who are sovereign. The proper role of the courts is to limit themselves to enforcing rights actually protected in the Constitution. If we're going to tinker with a definition of marriage that has been around for about 6,000 years, let the people decide.

Ms. Kirkpatrick is assistant editor of the Journal's editorial page.

Gay Marriage, an Oxymoron



Jill Karla Schwarz

By Lisa Schiffren

As study after study and victim after victim testify to the social devastation of the sexual revolution, easy divorce and out-of-wedlock motherhood, marriage is fashionable again. And parenthood has transformed many baby boomers into advocates of bourgeois norms.

Indeed, we have come so far that the surprise issue of the political season is whether homosexual "marriage" should be legalized. The Hawaii courts will likely rule that gay marriage is legal, and other states will be required to accept those marriages as valid.

Considering what a momentous

change this would be — a radical redefinition of society's most fundamental institution — there has been almost no real debate. This is because the premise is unimaginable to many, and the forces of political correctness have descended on the discussion, raising the cost of opposition. But one may feel the same affection for one's homosexual friends and relatives as for any other, and be genuinely pleased for the happiness they derive from relationships, while opposing gay marriage for principled reasons.

"Same-sex marriage" is inherently incompatible with our culture's understanding of the institution. Marriage is essentially a lifelong compact between a man and woman committed to sexual exclusivity and the creation and nurture of offspring. For most Americans, the marital union — as distinguished from other sexual relationships and legal and economic partnerships — is imbued with an aspect of holiness. Though many of us are uncomfortable using religious language to discuss social and political issues, Judeo-Christian morality informs our view of family life.

Though it is not polite to mention it, what the Judeo-Christian tradition has to say about homosexual unions could not be clearer. In a diverse, open society such as ours, tolerance of homosexuality is a necessity. But for many, its practice depends on a trick of cognitive dissonance that allows people to believe in the Judeo-Christian moral order while accepting, often with genuine regard, the different lives of homosexual acquaintances. That is why, though homosexuals may believe that they are merely seeking a small expansion of the definition of marriage, the majority of Americans perceive this change as a radical deconstruction of the institution.

Some make the conservative argument that making marriage a civil right will bring stability, an end to promiscuity and a sense of fairness to gay men and women. But they miss the point. Society cares about stability in heterosexual unions because it is critical for raising healthy children and transmitting the values that are the basis of our culture.

Whether homosexual relationships endure is of little concern to society. That is also true of most childless marriages, harsh as it is to say. Soci-

ety has wisely chosen not to differentiate between marriages, because it would require meddling into the motives and desires of everyone who applies for a license.

In traditional marriage, the tie that really binds for life is shared responsibility for the children. (A small fraction of gay couples may choose to raise children together, but such children are offspring of one partner and an outside contributor.) What will keep gay marriages together when individuals tire of each other?

Similarly, the argument that legal marriage will check promiscuity by

Don't redefine an important institution.

gay males raises the question of how a "piece of paper" will do what the threat of AIDS has not. Lesbians seem to have little problem with monogamy, or the rest of what constitutes "domestication," despite the absence of official status.

Finally, there is the so-called fairness argument. The Government gives tax benefits, inheritance rights and employee benefits only to the married. Again, these financial benefits exist to help couples raise children. Tax reform is an effective way to remove distinctions among earners.

If the American people are interested in a radical experiment with same-sex marriages, then subjecting it to the political process is the right route. For a court in Hawaii to assume that it has the power to radically redefine marriage is a stunning abuse of power. To present homosexual marriage as a fait accompli, without national debate, is a serious political error. A society struggling to recover from 30 years of weakened norms and broken families is not likely to respond gently to having an institution central to most people's lives altered.

Lisa Schiffren was a speechwriter for Vice President Dan Quayle.

The New York Times

A 13

WEDNESDAY, MARCH 6, 1996

Fearing a Toehold for Gay Marriages, Conservatives Rush to Bar the Door

By DAVID W. DUNLAP

SACRAMENTO, Calif., March 1 — Fearful that a court case will lead to the sanctioning of marriages of lesbian and gay couples in Hawaii by the end of 1997, conservatives are campaigning across the nation to insure that the recognition of same-sex marriages will not spread to other states.

California is one of 19 states considering measures that would deny government recognition to same-sex marriages performed within the state or elsewhere. South Dakota and Utah have already enacted such laws. And a Defense of Marriage Act is being drafted in the United States Senate.

The legislative battle has picked up momentum in recent months as more conservatives have become convinced that they must act before Hawaiian courts pave the way to civil marriage rights for couples of the same sex. They envision a time in the not-too-distant future when lesbian and gay residents of their own states will fly to Hawaii and return with official marriage licenses. If they do not act and that should come to pass, their states will be left with an obligation under the United States Constitution to recognize those marriages.

It is too early to predict how many of the measures precluding same-sex marriages will be passed. Some have already been killed or tabled.

What brought the same-sex issue to the fore was a 1993 ruling by the Supreme Court of Hawaii that the denial of marriage licenses to three homosexual couples amounted to unconstitutional discrimination on the basis of sex — not sexual orientation — unless the state could show a compelling reason for the denials. That question is expected to be taken up by a lower court in August.

Even though the Hawaiian Legislature passed a bill in 1994 affirming marriage as intended for "man-woman units" capable of procreation, conservatives and civil rights advocates expect that the state will be unable to convince the courts that it has a compelling interest in denying marriage licenses to couples of the same sex.

AT ISSUE

Legislation to Bar Same-Sex Marriages

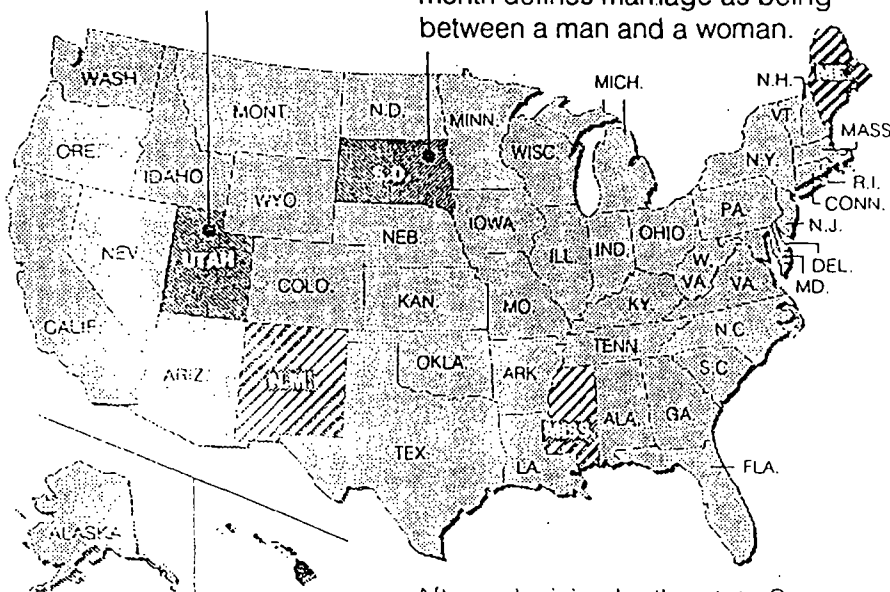
In the next year or two, as a result of an anticipated court decision, Hawaii might issue marriage licenses to same-sex couples, which other states would have to recognize under current law.

Conservatives have mounted an effort in many states to enact laws to prevent any such recognition, as well as other measures that would effectively ban same-sex marriages.

■ MEASURES PASSED ▨ MEASURES FAILED ▩ MEASURES PENDING

UTAH Law enacted last year denies recognition to marriages performed elsewhere that do not conform to Utah law.

SOUTH DAKOTA Law enacted last month defines marriage as being between a man and a woman.



HAWAII After a decision by the state Supreme Court, legislature enacted a law in 1994 specifically defining marriage as between a man and a woman. Further legislation is also being considered there.

Source: Lambda Legal Defense and Education Fund

The conflict in many Statehouses will be fierce. Conservatives see themselves in a fundamental crusade to preserve the traditional family structure as it has been understood through history. They argue that it is not only morally necessary to do so but also that it is in the best

interest of children, who benefit from having both a mother and father.

Lesbian and gay couples are seeking the economic and legal benefits of marriage for their long-term relationships, which can involve the rearing of children. The benefits of civil marriage — as distinct from a union recognized by a religious authority — include the right to hold joint parental custody, obtain family insurance and health benefits, file joint tax returns, inherit property automatically and visit a spouse or child in a hospital.

Many of these couples are so eager to wed that they are already planning their flights to Honolulu, even though it could be a year or two before Hawaii begins issuing licenses, if it does so at all. Nowhere on the mainland is the interest in

Hawaiian marriages for same-sex couples as palpable as in California, which has a large homosexual population and is a gateway to Hawaii.

Laurie McBride, executive director of the Lobby for Individual Freedom and Equality, a lesbian and gay group here, said, "California is going to have literally thousands of couples who are going to come back from Hawaii expecting their marriage to be treated with the respect and dignity given every other marriage."

When Ms. McBride was asked whether she and her partner of 11 years, Donna Yutzy, would be among those couples, she answered, "In a heartbeat."

The issue of same-sex marriages, almost unimaginable a generation ago, has become so potent that it is affecting the Republican Presidential campaign. A "marriage protection" rally in Des Moines on the eve of the Iowa caucuses drew Patrick J. Buchanan in person, as well as written support from Senator Bob Dole, Steve Forbes and former Gov. Lamar Alexander.

"It strikes at the very core of who we are as a people," said Jay A. Sekulow, chief counsel at the American Center for Law and Justice in Virginia Beach, Va., which is headed by the religious broadcaster Pat Robertson. "Marriage defined as a man and a woman has been around more than 6,000 years and has served most cultures very well."

"The Supreme Court has set the highest standard with the 'compelling interest' test," Mr. Sekulow said. "It may well be, by the end of the year, that there are same-sex marriages in Hawaii."

Such marriages would have to be recognized in other states under the United States Constitution, which says that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

Alarmed at that possibility, legislators on the mainland are seeking an exemption from the "full faith and credit" provision on the grounds that same-sex marriages would violate the public policies of their states as defined by law. They are backed by conservative groups like the Christian Coalition, Concerned Women for America and Eagle Forum.

"My concern is that a limited number of judges in Hawaii will be dictating public policy in California," said Assemblyman William J. Knight, a Republican from the Antelope Valley, outside Los Angeles.

Mr. Knight introduced a bill that would invalidate "any marriage contracted outside this state between individuals of the same gender." It was passed by the Assembly, 41 to 33, on Jan. 31.

Mr. Knight's bill was opposed by Assemblywoman Sheila James Kuehl, Democrat of Santa Monica, and other Democrats who consider it to be discriminatory. The withholding of marriage rights, Ms. Kuehl said, has been a familiar tool used to "deny the humanity" of minorities.

She said she hoped that the bill could be stopped in the Senate Judiciary Committee, where it goes next. Meanwhile, Mr. Knight has introduced a second bill specifying that California's marriage laws apply "only to male-female couples" as a matter of public policy that cannot be changed by the courts.

Legislation is also pending in Alabama, Alaska, Colorado, Georgia, Idaho, Illinois, Iowa, Kentucky, Maryland, Missouri, Rhode Island, South Carolina, Tennessee, Virginia, Washington, Wisconsin and Wyoming, according to the Lambda Legal Defense and Education Fund, a gay and lesbian group. In Hawaii, further legislation is being considered, including an effort to amend the state constitution. Measures have failed to reach the floor in Maine, Mississippi and New Mexico.

Evan Wolfson, senior staff attorney for the Lambda group, said, "Religious extremists are trying to shut down the nation's discussion on how the denial of marriage rights harms real-life couples before most Americans have even had a chance to think about it." Mr. Wolfson is a co-counsel on the Hawaii case.

Staff members in the United States Senate are preparing a Defense of Marriage Act to define marriage in Federal policies and acts of Congress as the legal union of one man and one woman, said Robert H. Knight of the Family Research Council in Washington. He has been shown drafts of the bill but would not identify the prospective sponsors.

"If defending marriage is likened to offensive action, then so be it," Mr. Knight said. "The onus should not be on those defending marriage but on the tiny minority of people who are attempting to radically redefine it. I, for one, won't submit to the tactic of portraying tradition-minded Americans as radicals and close-minded bigots."

In Illinois, State Senator Peter G. Fitzgerald, a Palatine Republican who has introduced a bill adding same-sex couples to the list of those

who may not be married under state law, said it was necessary to act now.

"To not pass this bill is to change our marriage laws fairly radically, if Hawaii changes its laws," Mr. Fitzgerald said. "If we were to act after Hawaii, I don't believe we could constitutionally strip marriages retroactively of those vested rights."

Last month, Gov. William J. Janklow of South Dakota, a Republican, signed a law defining marriage as a relationship between a man and a woman arising out of a civil contract. "We put in statutory law what I believe the majority of people in the state believe has always been the definition of marriage," said the bill's sponsor, State Representative Roger Hunt, Republican of Brandon.

But Barry Wick, president of a group called Free Americans Creating Equal Status, said: "The government of this state has allowed the legislation of hate and the creation of a second-class citizen. This second class of citizen is defined by love."

The conservative campaign has forced lesbian and gay groups to focus suddenly on an issue that was not a priority a year or two ago, compared with things like job and housing discrimination. Indeed, the goal of marriage is far from universally embraced among homosexuals.

But the fight has been joined. A group called the Freedom to Marry Task Force of Northern California recently collected 1,600 letters in the heart of San Francisco's largest gay neighborhood, opposing Mr. Knight's bill. They delivered them to Ms. Kuehl on Wednesday. Marc Gofstein, a task force member, said, "When we stand there with the Freedom to Marry banner, people swarm over."

The New York Times

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NEW YORK, WEDNESDAY, MARCH 15, 1995 PAGE A18 COLUMN 1

Some States Trying to Stop Gay Marriages Before They Start

By DAVID W. DUNLAP

A battle over the very definition of marriage, which began two years ago in Hawaii, is spreading through Western states as lawmakers hasten to foreclose any possible legalization of homosexual matrimony.

Homosexual marriages are not now legally recognized anywhere in the nation, but commitment ceremonies have become an increasingly common feature of gay life.

Anticipating that Hawaii may one day sanction gay weddings, Utah legislators voted overwhelmingly this month to deny recognition to marriages performed elsewhere that do not conform to Utah law. This would include same-sex unions.

On the same day, March 1, a bill rendering any same-sex marriage "null and void" failed by one vote to get on the calendar of the South Dakota Senate. It had already been approved by the state's House of Representatives.

Two days later, a bill was introduced in the Alaska House by Representative Norman Rokeberg, a Republican, to make it explicit that "marriage is a civil contract entered into by one man and one woman."

This legislative trend has alarmed gay and lesbian organizations.

What lies at the heart of the notion of family?

"Radical-right legislators will attempt to block recognition of marriages once we win them in the future," said Evan Wolfson, senior staff attorney of the Lambda Legal Defense and Education Fund, "and will prevent the American people from having a serious discussion about the denial of marriage rights."

For opponents of same-sex marriages, however, there is nothing to discuss and nothing radical about the proposition that the family has a man and a woman at its nucleus. This traditional structure cannot be expanded to embrace gay couples, they say.

"Marriage is the basis of family life, and families are central to civilization," said Robert H. Knight, director of cultural studies for the Family Research Council in Washington.

"The law doesn't discriminate against homosexuals," Mr. Knight



University of Utah

No state recognizes same-sex marriages, but several legislatures are considering steps against legalizing homosexual matrimony. Whitney Hannah, left, and Dina Hannah at a commitment ceremony with the Rev. Bill Hamilton-Holway last year in Salt Lake City.

said. "It merely says that each sex must be represented in marriage. Same-sex couples do not qualify. It might be called a partnership, but if it's called marriage, it's a counterfeit version. And counterfeit versions drive out the real thing."

What Mr. Knight sees as counterfeit, many gay and lesbian organizers see as a legitimate expansion of what family means. "We're labeled as promiscuous," said Robert Bray, of the National Gay and Lesbian Task Force, "but when we ask for recognition of our long-term relationships, we're denied."

Chris Ryan, president of the Utah Log Cabin Club, a group of gay Republicans, said, "All we want are the legal rights that go along with marriage." He mentioned visiting a partner in the hospital, inheriting property, providing insurance coverage, filing a joint tax return and distributing assets in a divorce.

In 1993, the Hawaii Supreme Court ruled that a refusal to grant marriage licenses to three same-sex couples presumptively violated the State Constitution. It sent the case back to a lower court.

That case is pending and, depending on the outcome, could pave the way to legalized gay marriage.

Such a development would set off not only a social debate but also a constitutional one, over the applicability of Article 4, which says in part: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

Unless a state explicitly declares an exception, State Representative Roger Hunt of South Dakota said, "it may be obligated to give full faith and credit to a marriage entered into by two people of the same gender in another state."

"I believe, by and large, that would be counter to what, in this state, has been the sanctity of families for the last 100 years," said Mr. Hunt, a Brandon Republican who was the legislation's main sponsor.

But Barry Wick, executive director of the South Dakota Gay, Lesbian and Bisexual Federation, called the bill "patently offensive to anyone who remembers the miscegenation laws of the South that banned interracial marriage" as late as 1967.

Lynn D. Wardle, a law professor at Brigham Young University, said the new Utah law was designed to close a loophole that might have compelled local authorities to recognize marriages of gay or lesbian couples — including Utah residents — who

traveled to Hawaii to be wed.

The law would also ban recognition of marriages performed in other states or countries if they involved incest, bigamy or minors under the age of 14.

"No one is going to lose any rights they didn't already have," said State Representative Norm L. Nielsen, the Orem Republican who introduced the bill. "All it did was make our laws consistent."

A spokeswoman for Gov. Michael O. Leavitt of Utah, a Republican said Mr. Leavitt was likely to sign the bill when it reached his desk.

58TH STORY of Level 1 printed in FULL format.

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St. Louis Post-Dispatch

December 19, 1995, Tuesday, FIVE STAR LIFT Edition

SECTION: EDITORIAL; Pg. 11B

LENGTH: 827 words

HEADLINE: COURT RATIFIES RADICAL ASSAULT ON MARRIAGE

COLUMN: COMMENTARY COLUMN

BYLINE: Gary L. Bauer

BODY:

Early last month, New York's highest court delivered, in one punch, a body blow to marriage and children. In a tandem ruling, the jurists said that children can be adopted by unmarried and homosexual couples.

This means that the bond of marriage is no longer the coin of the realm for family life in New York state.

It means that men and women who will not commit themselves to each other in marriage will be deemed as stable and worthy a household for children as those who have taken solemn vows before God and man. It means that homosexuality will now be regarded, wrongly and inaccurately, as normal, healthy and of no moral or social consequence to society - or to children.

And it means that New York's highest court has achieved a new standard in usurping legislative power.

Chief Judge Judith S. Kaye justified this radical assault on marriage by noting that "fundamental changes" are taking place in American life. This is a little like gutting the laws against theft because burglaries are on the rise, all in the name of reflecting "reality."

Families are not "changing," they are melting down. The answer is not to validate lesser commitments and therefore encourage them but to reinforce the gold standard of relationships - marriage.

Cultures the world over have instituted through law and custom a protected place for marriage-based families as the best environment in which to raise children. Marriages are the foundation of kinship, which, in turn, forms the foundation of society itself.

It is through marriage that family names are established, property passed down and family ties secured for generations. It is through families that outsiders (such as sons-in-law) are brought into a closer relationship with the blood relatives of their own children. As sociologist Charles Murray has pointed out, a father is far more likely to aid the household of his son-in-law than some guy just living with his daughter.

Those who think marital status is of little consequence need look no further than Rome, Greece or other cultures that devalued marriage and then passed

St. Louis Post-Dispatch, December 19, 1995

into the dust heap of history. We are often told that the onus should be on marriage's defenders to prove that placing children in homosexual or unmarried households will do them harm. But as Brigham Young University family sociologist J. Craig Peery has noted, the burden of proof should be on the radicals, not the traditionalists.

There is no credible evidence that children are as well off in unmarried or homosexual households, yet there is ample evidence that children do best in marriage-based families. New York's venture into pseudo-sociology puts children at risk by definition. Societies that protect children do not deliberately place them in situations that are unknown in their effects.

As for the handful of studies that purportedly show that homosexual households have no effect on children, they are often the product of homosexual activists and have tiny sample sizes and biased recruitment models. And, taken as a whole, they actually show that children in these households are four times as likely to develop homosexual orientations as children in non-homosexual households.

This might not worry gay activists, but most parents do not think that children turning out gay is inconsequential. Besides, common sense and the accumulated wisdom of thousands of years of human experience should tell us what these flawed studies do not: Children need mothers and fathers, and they do best when the parents are married.

Research indicates strongly that unmarried couples who live together are more likely to get divorced once they tie the knot. So the question remains: Why accord live-in relationships the same status as marriage if the partners are unwilling to make the same commitment as married people?

Kaye cites the need for "permanency" in children's lives at the same time she is kicking the stilts out from under the one institution that does this best. This decision trivializes marriage in the same way that counterfeit money undermines the value of real currency.

And, contrary to her argument that, somehow, children need more options, the National Council on Adoption reports that there are more than a million married couples waiting for children to adopt. There is no excuse for experimenting with something less.

As Judge Joseph W. Bellacosa wrote in his powerful dissent, the court has not shown that the legislators who crafted the adoption laws had any intention of extending the privilege to homosexuals or unmarrieds. By citing sociological psychobabble instead of the law, the majority judges are openly legislating from the bench.

It's time to end judicial abuses and to reaffirm the importance of marriage as the building block of civilized life. Children deserve no less. New York Gov. George Pataki's administration should take legislative action to restore the primacy of the marriage bond.

LANGUAGE: English

LOAD-DATE: December 19, 1995

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The Boston Herald

December 12, 1995 Tuesday ALL EDITIONS

SECTION: EDITORIAL; Pg. 030

LENGTH: 193 words

HEADLINE: EDITORIAL; Keep marriage special

BODY:

A commission appointed by the governor of Hawaii is expected to recommend that the state become the first to legalize the marriage of homosexuals. Despite proponents' naive pronouncements that it's strictly a civil liberties issue, the move would further weaken the family.

Members claim there's no "compelling state interest" in denying licenses to gay couples. If they're serious, they haven't thought hard enough.

Anything Hawaii does to put alternative relationships (and this includes straight domestic partners) on a par with married heterosexual couples lowers the special status of marriage everywhere, since other states would have to recognize the homosexual unions as legitimate.

At a time of rising illegitimacy, society must do everything reasonably possible to strengthen the family. Legitimizing competing arrangements weakens it.

And the norm - married couples, man and wife, mother and father - is the only tried and true environment for raising emotionally healthy, responsible children.

The state has a compelling interest in the survival of society, which in turn hinges on the health of families. It's as simple as that.

LOAD-DATE: December 13, 1995

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January 29, 1996

SECTION: Editorial; Pg. A7

LENGTH: 772 words

HEADLINE: At issue: the right to same-sex marriage; Current law based on child-rearing

BYLINE: Martin Mawyer

BODY:

In 1993 America squared off on the issue of homosexuals in the military. Health care was the dominant issue of 1994. In '95, talk around workplace water coolers focused on O.J. - guilty or innocent? And homosexual activists will again be in the spotlight in 1996 as they attempt to force the legalization of same-sex marriage.

Like the issue of gays in the military, which virtually exploded overnight, government recognition of same-sex marriage may be a reality before many Americans have an opportunity to fully consider its adverse consequences.

How will this come about? In July, a Hawaii court will hear arguments in the case of Baehr vs. Lewin, in which six plaintiffs are challenging the state's marriage regulations and claiming sex discrimination because they and their same-sex partners are being denied licenses to marry. The state has lost the first round in this battle.

In 1993, the Hawaii Supreme Court ruled that unless state officials can show a compelling interest in prohibiting same-sex marriages, the plaintiffs' complaint of sex discrimination will be viewed as valid, the court will overturn the prohibition, and Hawaii will be the first state to sanction homosexual marriage. Although the state is challenging the court's decision, Gov. Ben Cayetano of Hawaii is said to favor the legalization of same-sex nuptials. Cayetano's position makes an appeal by the state unlikely should it lose its compelling-interest arguments in July.

A decision against the State of Hawaii in the Baehr case will affect the laws of every state. Homosexual couples from across the mainland will fly to Hawaii, get married and return to their home states. The "full faith and credit clause" of the U.S. Constitution will force federal, state and local governments and businesses to recognize the couples as legally married and confer upon them all the benefits and recognition of traditionally married couples.

The cause for concern is abundant. Government recognition of same-sex marriage will forever change the American family as we know it. Acceptance of homosexuality will be forced upon America. In public schools, homosexual marriage will be taught as a normal, healthy alternative to male-female relationships. Homosexual adoption and foster parenting will be widespread. The military's "don't ask, don't tell" policy will be rendered meaningless, and homosexual soldiers will be permitted to serve openly. Military, Social Security and welfare benefits will all be available for "spouses" of "married"

Austin American-Statesman, January 29, 1996

homosexuals.

What the courts in Hawaii must realize is the underlying reason for government conferral of financial and legal benefits to married couples. Government involves itself in the sacred union of marriage because of the possibility that the marriage will produce children. The interest of the state lies in the continuation of society and the protection of the children should the parents be unable to care for them.

Between them, a same-sex couple is inherently incapable of creating offspring, and as such does not qualify for the benefits offered by the state to ease a family's burdens. Because of their inability to produce future generations, the community is under no obligation and has no interest in placing homosexual relationships on the same pedestal as traditionally married couples. Simply put, the return on investment for the state is zero.

Look at the benefits married couples receive - tax breaks, inheritance rights, insurance benefits, the right to file wrongful death claims and decision-making capabilities for an incapacitated spouse. These are awarded to encourage married couples to have children. They exist for the protection of children.

However, this does not mean the state should withhold marriage licenses to male-female couples who choose not to have children, or to couples who, for medical reasons, can't have children. When issuing marriage licenses, the state must assess the possibility of procreation in the least intrusive manner possible.

President Clinton, through a spokeswoman, has offered his support of same-sex marriage. His deputy press secretary, Ginny Terzano, told Newsweek magazine, "The president doesn't think that same-sex marriages should be outlawed."

But despite Bill Clinton's ruminations, the reasons we limit marriage to members of the opposite sex are logical and compelling. They have withstood the test of time. Same-sex marriage is an oxymoron that must not be permitted to become otherwise.

Mawyer is president of Christian Action Network, a pro-family lobbying organization based in Forest, Va.

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St. Louis Post-Dispatch

February 2, 1996, Friday, FIVE STAR LIFT Edition

SECTION: EDITORIAL; Pg. 7B

LENGTH: 716 words

HEADLINE: CHILDREN ARE VICTIMS IN SAME-SEX MARRIAGE

COLUMN: COMMENTARY COLUMN

BYLINE: Lawrence F. Burtoft

BODY:

Is marriage a unique and irreplaceable social good, deserving of state-sanctioned protections and benefits?

Do a man and a woman who take the immense step of committing themselves publicly to mutual care and responsibility, to sexual fidelity and to the care and nurture of the children they may bear deserve the special favor of society?

Do the children of America need and deserve the distinctive influence that only the combination of a father and mother can provide?

If state legislatures take their cues from Hawaii's Supreme Court, the answer to each of these questions will be "No!" Legalizing same-sex marriage is becoming one of the hottest issues in many states across the country. And Hawaii is the first battleground.

In May 1993, the Hawaii Supreme Court decided that the state must prove that it has a "compelling interest" in not legalizing same-sex marriage. This legal jargon means that the court can't imagine any reason to limit marriage to a man and a woman, and it dares the state to find one. The court has, in effect, declared that it's high time for a new social experiment - with marriage, the family and children once again the guinea pigs.

Thirty years ago, the courts tried to experiment with marriage and the family when no-fault divorce was introduced in California and then soon spread across the United States. The results are not pretty.

According to the Council on Families in America, no-fault divorce not only failed to bring about the happiness and freedom it promised, it has actually victimized women and children as well. The experiment failed tragically - and inevitably - for it pandered to human weakness and moral delinquency.

Ironically, the no-fault failure has given us information that may help us to avoid the grievous consequences of another ill-thought-out experiment. For we now have the empirical evidence that (astonishing as it may be to some) children do best when they are nurtured by both a mother and a father.

David Popenoe, professor of sociology at Rutgers University and co-chair of the Council on Families in America, writes: "Unlike the workplace, family organization is based on very real, biological differences between men and

St. Louis Post-Dispatch, February 2, 1996

women. . . . The sexes are not interchangeable in child care."

Gay activists now want the courts to ignore such evidence and conduct a new test on marriage and the family. In their push to legalize homosexual marriage, the gay activists would have us believe that gay or lesbian couples can raise a child as well as any mother and father. This is another unproven hypothesis.

Studies on children raised by homosexual parents are few and inconclusive - and for good reason. American courts have rarely, and only recently, allowed this experiment on children to take place, and the "subjects" available for study are few.

Should we expand this number of experimental children by granting gay men the adoption and custody rights that marriage affords? At a time when both liberals and conservatives agree on the importance of fathers to children, do we want to further sanction the artificial insemination of lesbians so we can toy with the psycho-sexual development of their children?

As some consider this, they should remember what the no-fault divorce experiment demonstrated: if Heather has two mommies, she'd be far better off if she could trade one for a dad.

But this profound concern has gone unheeded by the 1995 Hawaii Commission on Sexual Orientation and the Law. Its majority report is troubling for it treats the welfare of children as insignificant: "The commission . . . rejects the idea of nurturing procreation as a compelling state interest" in denying same-sex marriage.

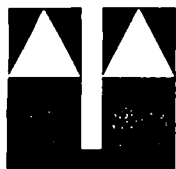
The majority of the commission evidently believes the state has a greater interest in sanctioning sodomy than it does in raising healthy children.

What will other states around the country consider to be the greater interest?

For the sake of America's children, our state legislators should act to protect the integrity of marriage and the lives of children by prohibiting same-sex marriage. We shouldn't have to wait another 30 years for this next experiment to prove the obvious. Because just as "no-fault divorce" is an oxymoron, so too, is "same-sex marriage."

LANGUAGE: English

LOAD-DATE: February 2, 1996



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Evan Wolfson ▼ March 11, 1996

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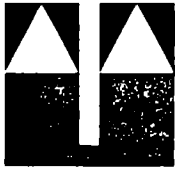
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**Anti-Marriage Bills 1996 -- State-By-State Status Report
Evan Wolfson, Director of the Marriage Project
April 1, 1996**

In all fifty states today, same-sex couples are denied the freedom to marry -- no matter how long they have been together, no matter how committed their relationship, and no matter how much their families need the protections, benefits, and responsibilities that come with civil marriage. With a court challenge in Hawaii likely to end this discrimination sometime within the next two years, right-wing political extremists are mounting a state-by-state preemptive backlash aimed at thwarting legal recognition of the lawful civil marriages that same-sex couples hope to celebrate some day.

All other Americans take for granted that this is one country, and if you are married, you are married; no one believes that married couples should have to have a marriage visa stamped every time they cross a state border. But if the religious-political extremists have their way in promoting "anti-marriage bills," couples, their families, states, taxpayers, employers, creditors, and others will literally face the legal and practical nightmare of "now you're married/now you're not." Harkening back to the not-so-long-ago ugly days of past discrimination against those who chose to marry the "wrong" kind of person (such as interracial or interreligious couples), and the days when Americans had to "go to Reno" just to get a civil divorce, these anti-marriage bills are unconstitutional, wrong, and cruel. They can and must be stopped now.

SUMMARY

Pending Anti-Marriage Bills: AL, AK, AZ, CA, FL, GA, HI, IL, KS, MI, MO, OK, SC, TN, WI (15)

Anti-Marriage Bills Rejected, Vetoed, or Failed to Advance: CO, IA, KY, ME, MD, MS, NM, RI, VA, WA, WV, WY (12)

Anti-Marriage Bills Adopted: ID, SD, UT (3)

Alabama

(Session ends 5/22)

House Bill 142

Declares that "marriage between persons of the same sex shall not be deemed legitimate and shall be declared void." Reported from Judiciary Committee Feb. 13.

Senate Bill 396

Introduced by Senator Armistead. Prohibits marriages between persons of the same sex in Alabama, prohibits legal recognition of lawful marriages celebrated elsewhere, and fines officials who celebrate a marriage for a same-sex couple \$1000. Referred to Judiciary.

Alaska

(4/22)

House Bill 227

Introduced by Rep. Norman Rokeberg on March 3, 1995. The bill would restrict marriage to "between a man and a woman." Passed the House February 28, 1996.

Senate Bill 308

Introduced by Rep. Lyda Green March 14, 1996. Restricts marriage to opposite-sex couples, and provides that a same-sex couple's marriage lawfully contracted elsewhere will be "void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state." Passed the Health, Education & Social Services Committee on March 20. Now goes to Senate Judiciary Committee.

Arizona

House Bill 1063

Introduced by Rep. Jeff Groscost. Would specify that marriage between people of the same sex is "illegal," and would refuse to recognize lawful marriages performed in other states. Died in the States Rights and Mandates Committee on March 25, 1996.

California

(9/1)

Assembly Bill 1982

Introduced by Assembly Member Pete Knight on September 15, 1995. The bill was amended on January 12, 1996 and stipulates that only a man and a woman may be allowed to obtain a license and authorization for marriage in the state of California. The bill further provides that the state of California will not recognize same-sex couples' marriages even if lawfully performed in other states. Passed the Assembly on a largely partisan vote, and now goes to the State Senate.

Assembly Bill 3227

Introduced by Assembly Member Pete Knight on February 23, 1996. Spells out more explicitly the discriminatory bases of non-recognition of same-sex couples' lawful marriages.

Colorado - VICTORY!

(5/8)

House Bill 1291

Introduced by Rep. Musgrave on January 31, 1996. Passed the House by one vote. Voted out by the Senate March 11. Vetoed as "divisive" and mean-spirited by Governor Roy Romer on March 25.

Florida

House Bill 2369

Bill introduced by Rep. Buddy Johnson. Assigned to House Judiciary Committee on March 6. Bill withdrawn on March 12. No further information at this time.

Georgia

(3/15)

House Bill 1580

Introduced by Rep. Crews. Would insert an explicit limitation of marriage as only "between a man and a woman." Passed the House. On February 27, passed by Senate Special Judiciary Committee, 4-2.

Senate Bill 681

Introduced by Senators Gochenour, Perdue, and Edge. Declares it the "public policy of this state to recognize the union only of man and woman. No same-sex marriage shall be recognized as entitled to the benefits of marriage." Further prohibits marriages between persons of the same sex, declare out-of-state marriages "null and void", and says that "any contractual rights granted by virtue of such license, including its termination [!], shall be unenforceable in the courts of this state." Senate Judiciary committee approved, 4-2. Passed Senate. Now goes to Governor Zell Miller.

Hawaii
(5/3)

House Bill 2366

On March 1, House Speaker Souki prompts suspension of rules to consider constitutional amendment that would provide that "Marriage shall be defined in the State of Hawaii as the legal association reserved exclusively for the lawful union of a man and a woman." Measure passed House; died in Senate where leadership saw it had little support. Had it been passed by the Senate with a 2/3 vote, would have gone on the November ballot for ratification by the voters.

House Bill 609

Introduced by Rep. Alcon on January 23, 1995. Would amend the state constitution to discriminate in marriage by defining marriage as only "between a man and a woman." Unlikely to advance.

House Bill 2172

Introduced by House Speaker Souki on January 27, 1995. Amends the state constitution to restrict marriage to "between a man and a woman." Pending in House Judiciary Committee.

House Bill 2367

Introduced by House Speaker Souki on January 19, 1996. Proposed ballot question.

Senate Bill ____

On February 26, Senate Judiciary Committee rejected bill that would have amended state constitution to prohibit equal marriage rights.

Idaho - DEFEAT
(mid-March)

House Bill 658

Introduced by several House Members on January 12, 1996. Amends Section 32-209 of the Idaho Code to read, "All Marriages contracted without this state, which would be valid by the laws of the state or country in which the same were contracted, are valid in this state, unless they violate the public policy of this state. Marriages that violate the public policy of this state include, but are not limited to, same-sex marriages, and marriages entered into under the laws of another state or country with the intent to evade the prohibitions of marriage laws of this state." Passed the House and Senate; signed into law by Governor Phil Bratt.

Illinois
(5/31)

Senate Bill 1773

Introduced by Sen. Fitzgerald on February 9, 1996. Prohibits marriages "between two individuals of the same sex" and declares such lawful marriages to be "against public policy." Passed by Senate Judiciary Committee March 6, 1996. Passed State Senate on March 29, 1996. On to the House.

Iowa - VICTORY!

(4/26)

House Bill 2183

Introduced February 9, 1996 by Rep. Hurley and Rep. Grubbs. States that "[o]nly a marriage between a male and a female" is valid. Passed House Feb. 20 without public hearings. Failed in Senate Judiciary Committee March 21.

Kansas

House Amendment to Senate Bill 515

Amends marriage statute to say that marriage is a "civil contract between two parties who are of opposite sex. All other marriages are declared to be contrary to the public policy of this state and void." Passed House March 21 without hearings. After procedural maneuvering by sponsors to circumvent a House-Senate conference committee, the bill was returned to that committee March 26 on an unprecedented roll call vote in the Senate.

Kentucky - VICTORY!

(4/12)

House Bill 500

Proposed by Rep. Sheldon Baugh, to provide that "a marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky," as shall such marriages in Kentucky. Similar language is also pending in a second House measure introduced by Rep. Kathy Hogancamp (Floor Amendment 1 to H.B. 219). Legislature adjourned without further action, thus killing the bill.

House Bill 882

Assigned to Judiciary Committee. No further details.

Senate Bill 339

Assigned to Senate Judiciary Committee. No further details.

Maine - VICTORY!

Bill would have prohibited recognition of same-sex couples' lawful marriages, but was withdrawn on January 24, 1996. An anti-marriage non-binding resolution was also rejected.

Maryland - VICTORY!

(4/8)

House Bill 1268

Introduced on February 15 by Delegate Emmit Burns to ban recognition of lawful out-of-state marriages by same-sex couples who move into or return to Maryland. Rejected by House of Delegates Judiciary Committee 14-8.

Michigan

(12/31)

House Bill 5661

Introduced by Rep. Deborah Whyman. Would prohibit same-sex couples from marrying.

House Bill 5662

Introduced by Rep. Whyman. Would declare null and void any lawful marriage of same-sex couple from another state.

pursuant to this chapter." Tabled by Rhode Island House Judiciary Committee at a public hearing at the State House in Providence on February 1, 1996.

South Carolina

(6/6)

House Bill 4502

Introduced by Rep. Simrill on January 25, 1996. Provides that same-sex couples' marriages performed in other states are not valid or recognized in South Carolina. Referred to Judiciary Committee.

Senate Bill 1151

Referred to Judiciary Committee 2/15.

South Dakota - DEFEAT

House Bill 1143

Defines marriage as being "between a man and a woman." The House voted on January 29, 1996 to pass bill. Passed in the Senate under pressure from right-wing extremist groups such as the Family Research Council. Signed into law by Governor February 21. Unless repealed, will be subject of litigation by couples forced to protect their lawful marriages and families, as well as employers, creditors, and civil rights groups.

Tennessee

(5/16)

Senate Bill 2305

Introduced by Sen. Holcomb. Amends Tennessee Code Annotated, Title 36, Chapter 3, Part 5 by adding that it is the state's public policy "to recognize the union of only a man and a woman," and that marriages between persons of the same sex "are prohibited in this state." Additionally, an amendment has been proposed to spell out legislative policy "to recognize the family, which begins with the marriage of one (1) man and one (1) woman...." Passed by Senate.

House Bill 2907

Identical companion bill. Passed by House Judiciary Committee.

Virginia - VICTORY!

(3/15)

House Bill 1189

Introduced in House of Delegates by James McClure. Subsequently stricken from docket with the consent of the sponsor. Unlikely to advance.

Washington - VICTORY!

(3/8)

House Bill 2262

Introduced on January 8, 1996 by Rep. Thompson. Provided that same-sex couples' marriages performed in other states are not valid or recognized in Washington. Passed the House 60-36. The Senate declined to act on the bill prior to adjournment on March 8, thus killing it.

West Virginia - VICTORY!

House Bill 4730

Introduced by Rep. Steve Harrison on last day of session. Provides that out-of-state marriages will be recognized as valid except for certain marriages, including those "between persons of the same sex." Bill failed to advance.

Senate Bill 937

Introduced by Sen. William Van Regenmorter. Would prohibit same-sex couples from marrying. Assigned to Families, Mental Health & Human Services Committee.

Senate Bill 938

Introduced by Sen. Van Regenmorter. Would declare null and void any lawful marriage of same-sex couples from another state. Assigned to same committee.

Mississippi - VICTORY!

(4/8)

Senate Bill 2863

Bill proposed, but failed to meet legislative deadline. No further information.

Missouri

(5/17)

Senate Bill 895

Introduced by Sen. Kinder on February 6, 1996. Would declare same-sex couples' marriages presumptively void. Senate Civil and Criminal Jurisprudence Committee voted "do pass" on March 6.

House Bill 1458

Sponsored by Rep. James Froelker. Purports to permit the "solemnization of same-sex relationships by religious organizations [while denying them] the benefits, burdens, or obligations of marriage under the laws of Missouri." Pending in House Committee on Children, Youth, and Families.

House Bill 1454

Sponsored by Reps. Glenn Hall and Connie Cierpiot; adds "persons of the same sex" to list of those prohibited from marrying. Same Committee.

New Mexico - VICTORY!

Senate Joint Resolution 10, a proposed constitutional amendment to prevent legal recognition of same-sex couples' lawful marriages, failed to be brought to the floor and thus died in the Senate on February 15.

Oklahoma

House Bill 2554

Introduced by Rep. Tim Pope. Says "A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage." Passed by House without hearings. Now goes to Senate Judiciary Committee.

House Res. 1045

Non-binding resolution introduced by Rep. Hamilton. As part of an attack on the National Education Association, declares that "persons who engage in same-sex marriages should not be permitted to adopt or provide foster care to children in this state."

Rhode Island - VICTORY!

(4/29)

House Bill 7587

Introduced by Reps. Flaherty and Knowles on January 23, 1996. Amendment to Chapter 15-3 of the General Laws entitled "Solemnization of Marriages" states that Rhode Island will only recognize as valid a marriage that "comports with and meets all conditions and requirements

Wisconsin

(5/17)

Bill proposed but not introduced.

Wyoming - VICTORY!

(3/15)

House Bill 142

Proposal to declare the "invalidity of same-sex marriages" failed to receive enough votes for introduction.

1995

In 1995 three states were asked to adopt anti-marriage laws (AK, SD, UT); two refused. Only one state, Utah, actually adopted one of these unconstitutional anti-marriage laws, thereby guaranteeing that its taxpayers, like those of South Dakota, will be face costly and likely losing litigation brought by couples (and others) seeking to defend lawful marriages (once marriage discrimination is ended through a case such as that pending in Hawaii).

Thanks to Human Rights Campaign, National Gay & Lesbian Task Force, and other National Freedom to Marry Coalition partners for assistance in gathering this information.



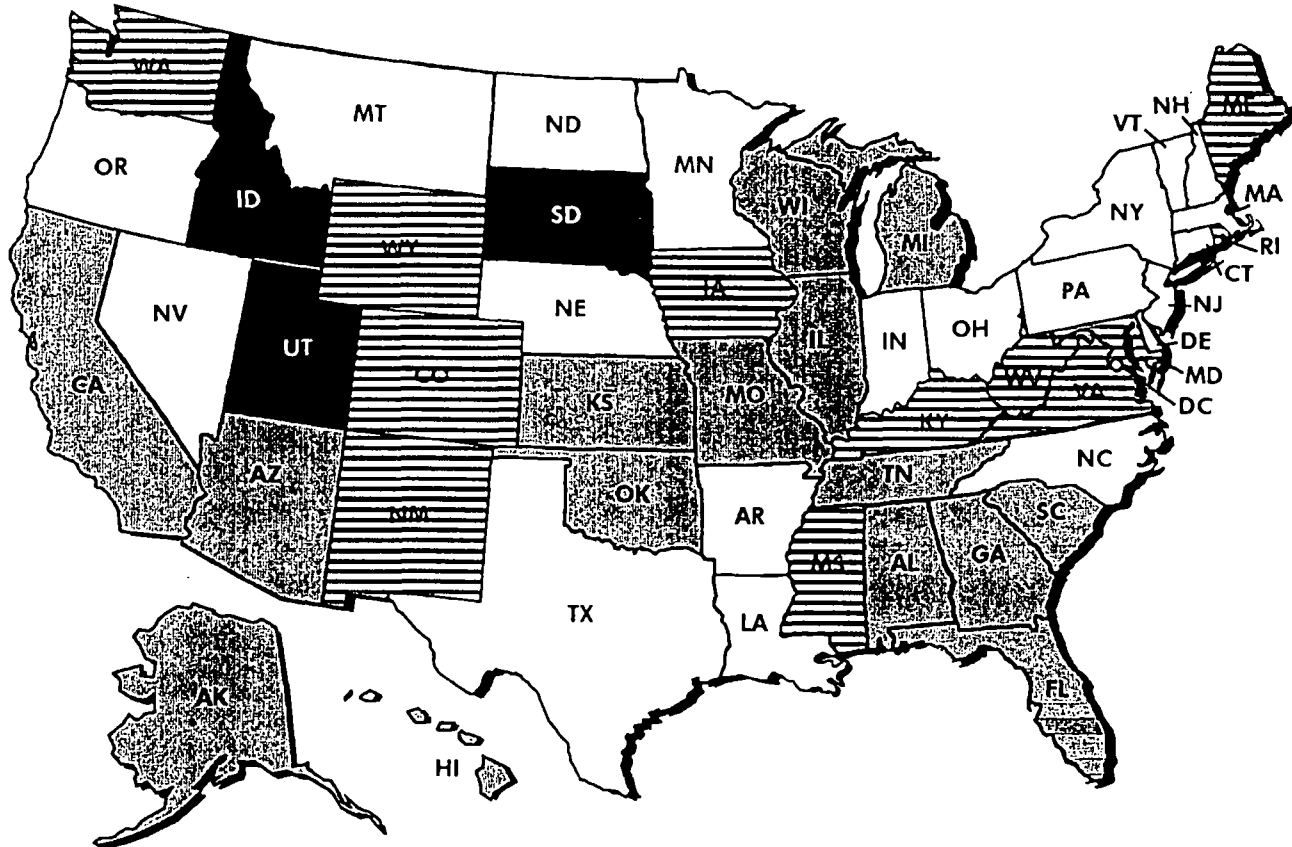
Lambda Legal Defense and Education Fund, Inc.

Anti-Marriage Bills: State-by-State Status Report -- April 2, 1996

In all fifty states today, same-sex couples are denied the freedom to marry — no matter how long they have been together, no matter how committed their relationship, and no matter how much their families need the protections, benefits, and responsibilities that come with civil marriage. With a court challenge in Hawaii likely to end this discrimination sometime within the next two years, right-wing political extremists are mounting a state-by-state preemptive backlash aimed at thwarting legal recognition of the lawful civil marriages that same-sex couples hope to celebrate some day.

All other Americans take for granted that this is one country, and if you are married, you are married; no one believes that married couples should have to have a marriage visa stamped every time they cross a state border. But if the religious-political extremists have their way in promoting "anti-marriage bills," couples, their families, states, taxpayers, employers, creditors, and others will literally face the legal and practical nightmare of "now you're married/now you're not." Harkening back to the not-so-long-ago ugly days of past discrimination against those who chose to marry the "wrong" kind of person (such as interracial or interreligious couples), and the days when Americans had to "go to Reno" just to get a civil divorce, these anti-marriage bills are unconstitutional, wrong, and cruel. They can and must be stopped now.

State-by-State Anti-Marriage Legislation



-  States in which anti-marriage legislation is pending (15)
-  States in which anti-marriage bills failed to advance (12)
-  States that have guaranteed themselves costly litigation by passing anti-marriage bills (3)

* In 1995 three states were asked to adopt anti-marriage laws (AK, SD, UT); two refused. Only one state, Utah, actually adopted one of these unconstitutional anti-marriage laws, thereby guaranteeing that its taxpayers, like those of South Dakota and Idaho, will face costly and likely losing litigation brought by couples (and others) seeking to defend lawful marriages (once marriage discrimination ends in a state such as Hawaii).