MARRIAGE WARS

by

David Link

On January 30, Evan Wolfson put the question to a room full of leaders of various grass-roots lesbian and gay organizations in Los Angeles: What do we do about Hawaii? Most people don't view Hawaii as any sort of problem, but that's about to change, and not just for interested lesbians and gay men. The issue that has been lurking at the fringes of American public policy debate since the inception of the gay rights movement is now ready to take furious bloom, with its roots in the tropical paradise. Like it or not, Wolfson said, the country is now inevitably headed for a raging controversy over same-sex marriage.

The only thing homosexual leaders can do, he told the crowd, is prepare for the pandemonium by getting all their arguments in order. It is by devising a campaign of public information and reasoned conviction that lesbians and gay men can avoid the chaos they confronted when Bill Clinton (it is thought) pressed the issue of gays in the military before gay leaders had a chance to get their ducks in a row.

The stage is certainly set for this debate. In *Baehr v. Lewin*, the Hawaii Supreme Court ruled that under the state constitution, it appeared that any denial of the right of same-sex couples to marry one another could not stand. Because the decision is not based on any federal constitutional rights, the Hawaii Supreme Court will have the final word in this case, with no review to the U.S. Supreme Court possible. The decision ultimately ordered a trial on the question of whether the state could show a compelling interest that would permit opposite-sex couples to marry while denying that right to same-sex couples. Under well-settled law, a compelling interest must be more than just a good reason--it is the highest level of scrutiny statutes are subject to under court review, and the least likely for them to survive. That trial is now set for September, and Wolfson, who is one of the attorneys working on the case on behalf of his organization, the Lambda Legal Defense and Education Fund, is rightly convinced that legal precedent suggests the state will not be able to win. Dan Foley, his co-counsel in Hawaii, is equally certain of a trial court win. Their efforts would make Hawaii the first state in the country to permit same-sex marriage.

On the other hand, little more than a week before Wolfson addressed the packed room in Los Angeles, the District of Columbia Court of Appeals ruled in *Dean v. District of Columbia* that a D.C. opposite-sex only marriage ordinance did not violate any of the statutory or constitutional rights a same-sex couple asserted. Neither the Hawaii decision nor the one in D.C. was easy: each divided up three ways, with judges falling all over the ideological map. The D.C. decision ran to 57 pages, the Hawaii decision weighed in at just under 30.

Dean v. District of Columbia is controversial, but there's no doubt that all the action's in Hawaii. If the plaintiffs there win in September, the massive sense of injustice that has been building in same-sex couples across the nation for having to accept second-class legal recognition of their relationships (in the rare instances when they have been recognized at all) will explode, and trips to Honolulu to get married will become as much the rage as trips to Reno used to be to get a divorce.

It's not at all clear that Wolfson's predictions of inevitability are correct. There are at least three proposals before the Hawaii legislature to amend the state constitution to prohibit same-sex couples from getting married. If any of them is approved, the existing case could become moot. But there is a very small chance that will occur before the trial begins. In addition, other cases nationally are already moving through the system that raise similar questions. In Georgia, Robin Shahar, a deputy District Attorney, was fired from her job after she had a religious ceremony blessing her same-sex union. A trial court ruled that under Georgia law, that was sufficient evidence to fire her, and the case is currently on appeal.

Members of the religious right might recognize in Shahar's case a straightforward punishment by the state for engaging in a fairly common exercise of religion (the ceremony was purely religious, and did not involve the sort of civil marriage that is at issue in Hawaii and the District of Columbia). If you can get fired for having a marriage ceremony in your own church, what other kinds of religious ceremonies might states find sufficient cause for firing workers? No one really believes for a moment, though, that the legal team at the Christian Coalition would consider the religious rights of same-sex couples as requiring defense against state persecution. In fact, just the opposite is true. Shahar's case, along with the D.C. and particularly the Hawaii case have already put the religious right into an uproar, with the predictable fundraising appeals already in the mail. In March, the Rev. Jim Kennedy is planning to gather 16,000 of the faithful in Ft. Lauderdale to stir them up with the sheer

godlessness of the claim that lesbians and gay men are trying to "take" the moral high ground of marriage.

In one sense, the country will be revisiting an issue that's been around for years. Fears of same-sex marriage were part of what made the national debate over the ERA so colorful two decades ago. Yet in the last twenty-five years, only four reported state cases dealt head-on with same-sex marriage--three between 1971-74 and one from 1984. All dismissed the marriage claims briefly, using language similar to this, from a decision out of Kentucky: "[M]arriage has always been considered as a union of a man and a woman. . . . It appears to us that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Clerk . . . to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined. . . . . In substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage."

The Hawaii Supreme Court found such arguments circular. There is no greater power in the law than the power to decide what question will be asked. As the Hawaii plurality noted, the debate in these cases is essentially about whether the question will be, Is marriage defined as (1) the union of two persons, or (2) the union of two persons of opposite sexes? If you ask the second question, same-sex couples are making a frivolous claim because they are defying a definition as inalterable as the law of gravity. If you ask the first question, same-sex couples may or may not be entitled to marry one another, depending on what you view as the underlying purposes of civil marriage. Same-sex couples are arguing that among the most important purposes of marriage is state encouragement of the mutual support, care and affection that publicly committed partners make to one another, and that their commitments are as important to social stability and order as the commitments of opposite-sex couples.

As most will recall, the specter of same-sex marriage during the ERA battle was buttressed by conjuring up the legal right to same-sex bathrooms. It's possible to look back on the bathroom argument from the relative comfort of 1995 as quaint, silly or petty. But it's easier to dismiss the claims than it is to dismiss the fear that makes them flutter so alluringly in some minds. It's not a very big step from same-sex bathrooms to Sam Nunn inspecting military showers and bunks to ascertain for himself (and the avid journalists who sucked up to his salacious photo-op) how little privacy military personnel have, and how intrusive it would be to delicate heterosexual sensibilities if openly gay men were allowed to shower or sleep right next to them. No one, of course, argued with any precision how not knowing the person showering or sleeping next to you is gay protects you from that perceived privacy problem.

Which is to say that good sense and keen argumentation don't characterize the debate over homosexuality, no matter what context it comes up in. It is that which makes some people uneasy with Wolfson's optimism about education being the key to winning the battle over same-sex marriage. To be fair, Wolfson admits that it is possible the gay community will once again get creamed in the public debate. Thomas F. Coleman is pretty sure that possibility is unavoidable.

Coleman, a lawyer in Los Angeles, has spent over two decades working to secure the rights of unmarried partners. He developed and taught one of the first courses in the country (in the late '80s, at the USC Law Center) which explored the theoretical and legal basis for recognizing domestic partners, couples living together with mutual commitments to one another who, for whatever reasons (including the legal inability to get married) believe their relationships are entitled to certain kinds of legal recognition. Coleman served as co-chair for a Los Angeles task force that laid the groundwork for the city to grant various benefits to the domestic partners of city employees, served as a member of a state commission in California exploring definitions of the term *family* under state law, and has argued his case in the media, from *Nightline* to the New York Times, and to the California and U.S. Supreme Courts. He has provided legal and practical advice to cities, counties, employee groups and commercial and academic giants in formulating domestic partnership proposals that are both workable and legally sound.

Coleman has always maintained a core pragmatism about the politics surrounding gay issues. His position is that you have to have support at the grass roots level before a legal decision will do you any good. He is fond of noting that "You don't build the penthouse until you've constructed the first nineteen floors." While there is increasing public support for equal treatment of lesbians and gay men as individuals in areas such as employment and housing, Coleman points to public opinion polls that consistently show very large majorities of Americans do not support equal marriage rights.

At the meeting in Los Angeles, Coleman made his case for holding off on legal challenges to same-sex marriage. While some lesbian and gay leaders are coming to view marriage as the core issue of the movement right now, most Americans see only that marriage and the family are under attack. This is a very narrow characterization, legally wrong, and morally objectionable. It is also the bedrock truth; same-sex marriage is a

shimmering red flag in the bullring of American politics. Coming so soon after the cataclysm of the military debate, gay marriage is not only a sure loser in the eyes of the public, it would serve as a double slap in the face to gay rights. All the manufactured hysteria about "the gay agenda" would be given the aura of actuality, gays would be seen as just one more overreaching minority who want the courts to grant them rights no reasonable voter would think them entitled to.

If the plaintiffs win in Hawaii, Coleman argues, voters there would take the decision as their cue to amend the state constitution to overturn the court's ruling. Every ten years Hawaii voters are required to vote on whether to have a constitutional convention, and the next scheduled vote on that issue is November, 1996, by which time a decision from the Hawaii trial court would be certain and one from its Supreme Court possible. Hawaii legislators and candidates would not be able to avoid addressing the issue of a constitutional amendment.

But the legal effects of a favorable ruling will not be confined to Hawaii. If the unavoidable influx of same-sex couples floods Hawaii while same-sex marriage is legal there, social conservatives across the country would storm the statehouses and propose state constitutions across the country be amended to prohibit any recognition of the vile ceremonies. Defensive proposals are already being proposed in several states, and a bill responding to the *Baehr* decision explicitly prohibiting any recognition of same-sex marriage was recently passed in South Dakota. It would be easy enough to go a step further and prohibit legal recognition of *any* same-sex relationship in any way--and to undo legislation that already exists about gay rights, from employment and housing discrimination protection to hospital visitation privileges. Many of these laws have been on the books for more than a generation now.

The problem to Coleman is not the concept of same-sex marriage, but the consequences. Under the federal constitution's Full Faith and Credit Clause, states have an obligation to recognize the legal and judicial acts and proceedings of fellow states. While there are narrow exceptions, this ordinarily means states will recognize marriages contracted in other states. Thus, even a single state that recognizes same-sex marriages opens up the debate nationally. Individual states would have to brawl it out in their courts over how they would apply Full Faith and Credit to same-sex marriages valid under Hawaii law. More important politically, this controversy would probably unfold during the 1996 presidential elections, forcing candidates for national office to take a stand on an issue most heterosexuals have barely thought about at all, much less taken the time to consider in any depth. In addition to the question of whether individual states will recognize same-sex marriages contracted in Hawaii, nearly a thousand federal statutes use the term "spouse" or "marriage," and usually defer to state law on how those terms are defined. Few Democrats could defend same-sex marriage without losing their shorts, and even the most moderate Republicans could safely draw the line at marriage without withholding what little support they have offered for employment and housing protection for individual lesbians and gay men.

In the midst of this hypercharged atmosphere, Coleman sees Hawaii as a unique opportunity. The Hawaii legislature is aware of the near impossibility of winning at trial, and has shown a keen interest in seeking compromise. After the Supreme Court decision was issued, they set up a task force to suggest solutions short of a full-blown trial, and according to Coleman, the evidence suggests they intend to take its recommendations seriously.

State recognition of same-sex domestic partnerships is expected to be the task force's primary recommendation. No one doubts that the rights available to same-sex couples under a domestic partnership statute would clearly fall short of the rights married couples take for granted. As many in the gay rights movement are painfully aware, domestic partnership is unquestionably a second-rate alternative to marriage, a relationship that is not only separate, but unequal. The differences at the state level, however, have mainly to do with recognition of the relationship outside of state lines. The Full Faith and Credit Clause issues that a Hawaii marriage license raises for the other 49 states would be foreclosed for domestic partnerships entered into under Hawaii law. Similarly, federal rights--such as joint income tax returns, immigration law, etc.--which are automatically conferred on state-recognized marriages, would not be affected by a Hawaii (or California or New York or Massachusetts) domestic partnership law. While it would be possible for Congress to accept domestic partnerships under federal law, the chances are virtually nil. The previous Congress defeated a purely symbolic domestic partnership proposal for the District of Columbia by a vote of 246-171 in a House that was considerably more Democratic then it is now.

The differences that make domestic partnership inferior to marriage, though, also serve as its political strength. Initially, Hawaii is a special case because it's the first time domestic partnership is actually available as the compromise position. Everyone in Hawaii recognizes that the state has an almost insurmountable burden to meet in order to justify discrimination that the state's Supreme Court has already identified with great preci-

sion. Thus, same-sex marriage is a very real possibility for the first time in this country's history. Domestic partnership, which has been proposed but not accepted by any state, has always been viewed as too radical a concept. Hawaii, though, has to consider an even more radical concept, and the choice between same-sex marriage (completely untried in modern times) and domestic partnership (which has a multitude of government and business applications already in existence) becomes much easier.

In addition to that, though, domestic partnership has a second political advantage, one that is especially important in a changed climate in Washington. Same-sex marriage automatically opens up the debate nationally because of the nature of marriage and long-settled law under the Full Faith and Credit Clause, and the federal statutes that recognize marital relationships. Domestic partnership, on the other hand, is a classic example of federalism, of the much-vaunted "laboratory of the states." Because it need not be recognized by any other state (although other states may choose to give it effect) and because it does not provide any automatic challenge to any currently existing federal laws, domestic partnership would not compel another national debate over gay rights in a context that's an almost sure loser for lesbians and gay men, and one that would come right in the middle of what is already sure to be a contentious and furious presidential election.

It is primarily for that reason that the Hawaii legislature has taken domestic partnership seriously. They don't want to be in the middle of a national firestorm over same-sex marriage, and domestic partnership is a compromise that solves that problem. When California's Governor Pete Wilson proclaimed that "California is not a colony of the federal government" he was declaring federalism's new appeal. Significantly, federalism is a hallmark of current Republican philosophy. If Hawaii wants to recognize for state purposes, relationships that South Carolina wouldn't touch with a ten-foot pole, why should South Carolina or Washington D.C. care? And why should national Republicans? Embattled Democrats can take a powder on the issue, or if they want to take a position, join Republicans in praising the wonders of the federal/state system.

Groups like Lambda have garnered national attention for promoting gay rights as a national issue, and there are some good reasons for avoiding a state-by-state approach. As the religious right's push for recent state initiatives has proved, individual states remain subject to the most pernicious arguments about homosexuality. Perhaps no cause is more vulnerable, still, to what Pat Moynihan has referred to as the "But what about Mississippi?" defense. If gay rights are thrown back to the states, and particularly the issue of recognizing same-sex relationships, there is no doubt that many of the states will resort to the crudest kind of political argumentation, and be able to turn back anything with even a whiff of homosexuality attached to it. If nothing else, the sheer scale involved when issues are debated on a national level sands off some of the rougher edges of a controversy. Gays in the military was bad, but anyone who heard the charges in Oregon last year that homosexuality is essentially an offshoot of Nazism knows what ugly looks like.

And it is also true, as Evan Wolfson notes, that there is a lot to be said for taking the principled position, even if it's a loser. As with gays in the military, there really is no argument uncolored by prejudice and stereotypes that supports giving different legal treatment to heterosexuals and homosexuals with respect to marriage. Jon Davidson of the Southern California A.C.L.U. argues forcefully that the bottom-line reason for treating marriage as an exclusively heterosexual institution is usually found to be reproduction. After the Supreme Court ruled in *Baehr v. Lewin*, the Hawaii legislature passed a non-binding resolution to reaffirm that its current law is "intended to foster and protect the propagation of the human race through male-female marriages." But there is no fertility requirement for getting a marriage license, in Hawaii or anywhere else; states do not revoke the marriage licenses of heterosexual couples who do not, will not or can not reproduce. Nor is it even true that homosexual couples don't qualify as reproducers, as the legions of lesbian and gay parents can attest. Thus, the best the state could argue is that Hawaii's "compelling" interest in keeping marriage an opposite-sex only proposition is promoting the *appearance* of *potential* reproduction. After the Supreme Court's divided but savvy decision in the first case, it is highly unlikely such thin reasoning would survive review.

But, Coleman's response is that, while principle is important, timing is everything. A court victory in Hawaii would almost certainly be short-lived. A poll of Hawaii residents taken several months after *Baehr* was decided showed that 67% actively opposed same-sex marriage, and that was with same-sex marriage as only a possibility, depending on the outcome of the trial. If same-sex marriage ripens into an actuality, prompting the inevitable national furor, there is a good possibility that there would be sufficient votes in Hawaii to either amend the state constitution or approve the constitutional convention to remove the offending provision. At the very least, the pressure from national religious groups on local Hawaiians would be considerable.

Thus, at best lesbians and gay men can hope for a brief interval of same-sex marriage in Hawaii, and the possibility of limited recognition in some other states--at the cost of a national political debate that ought to make gays in the military look tame. In contrast, according to Coleman, the time is right for domestic partnership at the state level, and nowhere is it righter than in Hawaii. States from California to Wisconsin to Massachusetts have been able to recognize the rights of individual lesbians and gay men to certain kinds of equal treatment, but they remain only a handful. Pressing now for the far more sophisticated protection of marital relationships is not only premature, but potentially disastrous. Unlike same-sex marriage, there is precedent for domestic partnership protection that Hawaii can look to, and there is a political ambience that makes domestic partnership a solution rather than a problem for the legislature there.

An additional advantage of a domestic partnership statute is not so obvious. Court decisions protecting rights are, or ought to be, a last resort. Constitutional protection of rights, whether state or federal, is not entirely independent of political winds. This country is not without examples of court-recognized rights that set politics into turmoil. A legislative determination that same-sex couples are entitled to certain benefits is a political victory of incredible magnitude precisely because it comes from the majoritarian legislature rather than from the minority-protecting courts. And it is momentous because it finally moves the debate beyond the recognition of individual lesbians and gay men. These are powerful factors to consider.

More important than timing, though, is the peculiar paradox that characterizes both same-sex marriage and gays in the military. For a constellation of reasons, all issues relating to homosexuality have a built-in aura of liberalism. But with these two issues in particular, lesbians and gay men who are asking to participate in the most conservative institutions in our society, and anyone who dares to support them, wind up tarred not only as liberals, but as wild-eyed radicals who are seeking to destroy the social order in an especially pernicious way. There is no winning for lesbians and gay men who want to identify themselves with patriotism or long-term commitment to a single partner, who want to reaffirm things it is argued they are out to obliterate.

That paradox colors all debate right now about same-sex marriage. No-doubt-about-it conservatives like the Cato Institute's David Boaz and James Pinkerton of the Manhattan Institute have argued for same-sex marriage, but their powerful essays are remarkable only for being so contrary to public opinion. While 54% of adults nationwide support certain benefits for same-sex partners (such as medical insurance), in the very same 1989 Time magazine poll, 69% opposed same-sex marriage. A Newsweek poll taken last year found that 62% of the respondents opposed same-sex marriage. Michael Kinsley has made the point that American opinion is frequently divorced from facts and actuality, and he is certainly right about that. He has not, however, argued that this chasm may be ignored by those to whom perception is everything.

And the confusion between conservative and liberal plays out in another way here. Wolfson's trust in the power of a strong public education campaign echoes an argument that was roundly rejected by the lesbian and gay leadership when it was proposed a few years ago in the much vilified book, *After the Ball.* The authors essentially proposed an all-purpose campaign to "sell" positive images of lesbians and gay men to the American public. The most liberal leaders in the gay community were falling all over themselves condemning such a crassly conceived "advertising" campaign. This was considered to be "selling out" the essentially "radical" nature of homosexuality, "assimilation" in the ugliest sense of that word. The gay left hasn't yet had an opportunity to respond to same-sex marriage, but it's a safe bet that, feeling further marginalized by gay leadership, they will not take the proposal kindly. It would be quite a spectacle to watch ACT-UP and the Christian Coalition lining up on an issue to oppose the Cato Institute and the Lambda Legal Defense and Education Fund.

The public education campaign is another manifestation of Bill Clinton's advice to lesbians and gay men during the debate over the military. Get out there and tell your stories, he said. Let people see what you've been going through, feel your pain. *That'll* convince them. The failure of that strategy didn't have anything to do with a lack of good personal stories, though. From Perry Watkins to Grethe Cammermeyer to Joe Steffan, the gay community brought out its best and its brightest. Randy Shilts wrote a whole book of the most compelling stories imaginable, and the result was don't-ask-don't-tell. The problem with this as a political strategy is that it misconstrues the nature of education. Education isn't something you give to people, it's something you offer. Lesbians and gay men offered up a storm during gays-in-the-military, but got pathetically few takers. Maybe more people will be ready to accept and understand the stories of same-sex couples who suffer the most humiliating injustice because their relationships are not treated equally under the law. Maybe.

Wolfson is adamant that this is not a fight he has chosen, it is one that has chosen him, and all he can do is prepare for it as best he can. But there are ways to avoid

a national debate over same-sex marriage that begins in an important presidential election year, and good reasons to wait. Sometimes the best is the enemy of the good. Domestic partnership is not the kind of "compromise" in quotes that don't-ask-don't-tell is. It provides concrete benefits and it sidesteps the nearly insoluble problem of appearing to challenge the religious right's desire to occupy the territory of marriage, with its ingrained mixture of the sacred and the civil. Nor would a domestic partnership law in Hawaii in any way foreclose the debate over same-sex marriage. That debate is as inevitable as it is necessary. Neither Coleman nor anyone else will be able to hold off that tide.

But there are real advantages to conducting the debate outside the media pressure cooker of 1996. No one disagrees that the best argument in favor of equal marriage rights for lesbians and gay men will be countering the stereotypes the religious right will certainly bring to the debate that civilization as we once knew it will go straight to hell in a handbasket if we legally recognize the relationships of same-sex couples. Well over 60% of Americans appear to believe such foolishness, or one of its less noxious variants. Proposals less sweeping than same-sex marriage, such as state-recognized domestic partnerships, can lay the groundwork for giving the lie to such hysteria. But it will take time to do that work. Coleman suggests that public support for gay marriage is a good ten years off. He wants to use domestic partnership in the interim to keep the political temperature down and give heterosexuals of good will a chance to get used to the idea of lesbians and gay men, not just as individuals, but as couples.

The question of what to do about Hawaii lands the gay community once again square in the middle of a dilemma that's as old as politics itself--the conflict between principle and pragmatism. As with most other questions, the positions are not mutually exclusive: Wolfson's principle is not utterly rash, Coleman's pragmatism doesn't lack principle. But with a trial pending and a state legislature pondering, this is the first time when some proposal concerning the legal rights of same-sex couples is unavoidable. Bill Clinton, whose presidency got off to a rocky start with one of the two most difficult issues affecting lesbians and gay men, may find his first term--and perhaps his presidency--ending with the other shoe dropping.

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