



A M E R I C A N
A S S O C I A T I O N F O R
S I N G L E P E O P L E

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Hawaii Materials:

Report of the Commission on Sexual Orientation and the Law

Special Report to the Vermont Legislature

Presented to the
House Judiciary Committee
January 27, 2000

Hawaii Materials: Report of the Commission on Sexual Orientation and the Law

The Commission on Sexual Orientation and the Law was created by the Hawaii Legislature to examine how state law treated same-sex couples and to make recommendations for possible legislative changes.

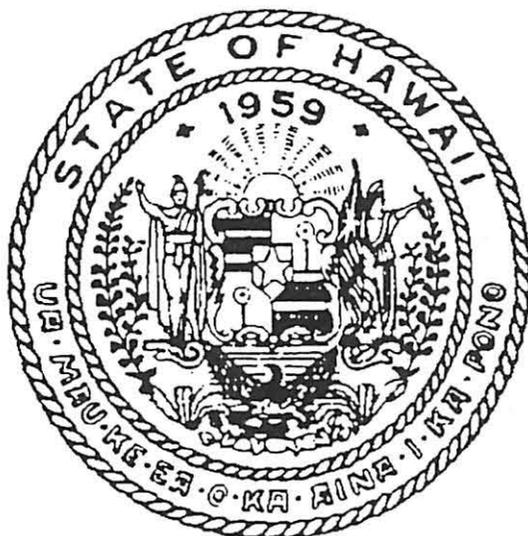
The Commission issued a report to the Legislature in December 1995. It recommended that the Legislature legalize same-sex marriage. Alternatively, it proposed that the Legislature enact a Comprehensive Domestic Partnership Act open to all unmarried couples regardless of their gender. Based on a model supplied by Los Angeles attorney Thomas F. Coleman, a national authority on family diversity, domestic partnership, and marital status discrimination, the Commission's report included the draft of a model domestic partnership act. That model act was mentioned by the Vermont Supreme Court in its recent opinion in *Baker v. State*.

During his testimony before the Commission in October 1995, constitutional law Professor Jon Van Dyke advised the Commission that in his opinion the Hawaii Supreme Court would uphold a decision of the Legislature to adopt a comprehensive domestic partnership act rather than legalizing same-sex marriage. He stressed, however, that in order to pass constitutional muster such a law would have to be truly "comprehensive" and confer all or most of state-law benefits and obligations of marriage to domestic partners. Professor Van Dyke reaffirmed this position during subsequent testimony before the Legislature in 1996.

The model domestic partnership act was introduced into the Hawaii Senate as SB 3113 in January 1996. The bill passed the Senate but was not voted on in the House. Inaction in the House was probably due to the fact that virtually no one was lobbying for the bill. Gay and lesbian rights activists, spurred on with hopes for a judicial victory, demanded nothing short of gay marriage. Conservatives, with backing from many religious leaders and organizations, opposed any reform whatsoever and insisted that the Legislature put a constitutional amendment on the ballot to prohibit same-sex marriage. As a result, the 1996 legislative session ended in a stalemate because Senate leadership was not willing to approve a constitutional amendment and House leaders were unwilling to pass a domestic partnership act.

The materials in this booklet include: (1) excerpts from the Commission's report; (2) summaries of the testimony of Professor Van Dyke and attorney Thomas F. Coleman before the Commission in October 1995; and (3) a special report published by Spectrum Institute which was distributed to commissioners at the request of Commission Chairperson Thomas Gill.

A second booklet has been prepared which contains relevant materials from legislative sessions in 1996 through 1999. A third booklet contains a law review article published in 1996 which discusses why the Hawaii Legislature had compelling reasons to pass a comprehensive domestic partnership act and why the state Supreme Court might find such a law constitutional.



Report of the Commission on Sexual Orientation and the Law

Thomas P. Gill, Chair
Morgan Britt
L. Ku`umeaaloha Gomes
Lloyd James Hochberg, Jr.
Nanci Kreidman
Marie A. "Toni" Sheldon
Bob Stauffer

December 8, 1995

SUMMARY

Pursuant to the requirements of Act 5, Session Laws of Hawaii 1995, the Commission met on numerous occasions from late September to early December 1995, received public statements, heard and examined numerous witnesses, and addressed the three tasks assigned to it by that Act. These tasks were, in brief: (1) examining major legal and economic benefits extended to married opposite-sex couples but not to same-sex couples; (2) examining the public policy reasons to extend or not to extend all or some of such benefits to same-sex couples; and (3) recommend legislative action to so extend such benefits. The Commission's tasks and structure arose from several interconnected judicial and legislative actions: the first was the State Supreme Court decision in *Baehr v. Lewin* (74 Haw. 530, 1993); the second was Act 217, Session Laws of Hawaii 1994, in which the Legislature, in reaction to the *Baehr* case, redefined marriage under Chapter 572, *Hawaii Revised Statutes*, as being between a man and a woman and then, interestingly and after the fact, attempted to create a legislative history for this concept; third, the first Commission, set up under Act 217, was unable to complete its work and collapsed because of court challenges to some of its members because of their selection by certain religious organizations; fourth and finally, the present Commission of seven members from the general public was selected according to said Act 5 and appointed by the Governor.

During the course of its work, the Commission identified a substantial number of such major benefits and divided these benefits into three categories: (1) "intangible" benefits related emotionally to the status of marriage, which do not necessarily have an economic value; (2) "quantifiable" benefits which can be tied to monetary amounts; and (3) "general" benefits which may not have major economic value, may be infrequently used, or which may be a combination of smaller benefits. These benefits are listed and described in detail in Chapter 1 of this report.

The Commission in Chapter 2 went on to identify four basic policy reasons why the right to legally marry should be extended to same-sex couples: (1) the denial of such right is a denial of the state and federal constitutional right to equal protection of the law; (2) the state Supreme Court's requirement in the *Baehr* case that the State show a "compelling state interest" for such denial and the reasons advanced by those who support this denial show a close parallel to the landmark case of *Loving v. Virginia* 388 U.S. 1 (1967) in which the United States Supreme Court found a Virginia statute outlawing interracial marriage to be invalid; (3) the argument that same-sex marriage should be barred because it would not lead to procreation was invalid, inconsistent and discriminatory because this standard was not applied to heterosexual marriage; and (4) the religious beliefs of some members of the community which would ban such marriages can certainly be adhered to by those persons or their churches but they cannot be imposed by state law on others who do not subscribe to such beliefs.

Pursuant to its third basic task--to recommend appropriate legislative action to extend such benefits to same-sex couples--the Commission recommends, and the simplest solution would be, amending the marriage statute to allow same-gender marriage and extend all the benefits and burdens of such status to those couples if they wished to assume them. In addition to its first recommendation, the Commission recommends a second suggestion which would be a comprehensive Domestic Partnership law. This law would not solve the question of equal protection because it would stop short of marriage, but it would allow all couples--same gender or opposite gender--to assume most of the rights and obligations of marriage without being married. These options are not mutually exclusive--the Legislature could choose either or both. Draft legislation covering these options is included in the Appendices.

Because of strong differences between a five-member majority of the Commission and the two minority members--Mr. Hochberg and Ms. Sheldon--the majority is submitting the Report of the Commission as outlined above and has asked the minority to prepare a minority opinion which is included in Chapter 5 of the Report.

Where appropriate, the materials in the Appendices attached are noted as pertaining to the Report or to the minority opinion.

This Report is being submitted to the Legislature pursuant to the timetable set forth in Act 5. The next move is up to that body.

PREFACE

This report is submitted by the Commission on Sexual Orientation and the Law to the Eighteenth Legislature as requested by Act 5, Session Laws of Hawaii 1995. Act 5 is attached to this report as Appendix A.

I. Background and Authority

The Commission on Sexual Orientation and the Law was convened by the Legislature to address some of the issues that have arisen in the case of *Baehr v. Lewin*, 74 Haw.530, (1993).

A. *Baehr v. Lewin*; An Overview

A lawsuit filed in May 1991 by three same-gender couples against the State of Hawaii, specifically against John Lewin, in his capacity as the Director of Health, complained of an unconstitutional marriage law that prohibited same-gender couples from obtaining marriage licenses. The complaint alleged a violation of the couple's right to privacy and equal protection under the Constitution of the State of Hawaii.¹ The trial court dismissed the case on the pleadings and the couples appealed to the Supreme Court of Hawaii. In May 1993 the Supreme Court reversed the trial court and remanded the case back for trial. Although the Supreme Court found that there is no fundamental right to same-sex marriage under the right to privacy,² the court did conclude that the marriage law does deny the same-gender couples equal protection rights in violation of article I, Section 5 of the Hawaii Constitution.³ The Hawaii Supreme Court held that the discrimination is based on the "gender" of an individual and is a "suspect category." Therefore, for purposes of the equal protection analysis, the marriage law is subject to a "strict scrutiny" test.⁴ This places the burden on the State to show that the statute's gender-based classification is justified by compelling state interests

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1. Right to privacy, Article 1, Section 6 of the Hawaii Constitution provides:

"The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The Legislature shall take affirmative steps to implement this right."

Right to Equal Protection, Article 1, Section 5 of the Hawaii Constitution 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, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry."

2. *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993) at 74 Haw. 557.
3. *Baehr*, 74 Haw. at 564.
4. *Baehr*, 74 Haw. at 580.

and the statute is narrowly drawn to avoid unnecessary abridgments of the applicant couples' constitutional rights.⁵

B. Legislative Action

The Legislature reacted to the Supreme Court's decision in *Baehr v. Lewin* by holding public hearings throughout the State in September and October of 1993. At the next legislative session the Legislature proceeded to pass Act 217, Session Laws of Hawaii 1994. Act 217 accomplished several things.

First, Act 217 provided a venue in its purpose section for the Legislature to express its position. The purpose section of Act 217 has been interpreted to create legislative history after the fact while at the same time telling the Supreme Court not to interpret the law in a different fashion. Second, Act 217 also amended the marriage law to specifically require a man and a woman to be eligible for a marriage license, but it did not prohibit the private solemnization of any ceremony. Third, Act 217 created the prior Commission on Sexual Orientation and the Law.

The Commission as created by Act 217 (hereafter the "Act 217 Commission") was an eleven-member Commission that had representatives from an assorted group of organizations, some religious in nature. In December of 1994, a federal lawsuit was filed in United States District Court against the Governor concerning the appointment of certain members of the Act 217 Commission. The suit complained of a constitutional violation that was based on the separation of church and state. Judge Harold Fong ultimately granted the plaintiff's motion to permanently enjoin the participation of those members of the Act 217 Commission who represented the Catholic Diocese and the Church of Jesus Christ Latter-Day Saints.⁶ In January of 1995 the eleven-member Act 217 Commission was left with seven members. The Legislature created a new Commission in Act 5, Session Laws of Hawaii 1995 (hereafter the "Act 5 Commission" or simply "the Commission").

II. The Commission Members

Act 5, Session Laws of Hawaii 1995 specified that a seven-member Commission be appointed by the Governor with at least two members selected from a list from the Senate President and two from a list provided by the Speaker of the House. In early August 1995 the Governor appointed Thomas P. Gill, Chairperson, and Morgan Birtt, Ku'umeaaloha Gomes, Lloyd James Hochberg, Jr., Nanci Kreidman, Marie "Toni" Sheldon, and Robert Stauffer to the Commission. Mr. Hochberg and Ms. Sheldon were selected from the Speaker's list and

5. *Id.*

6. *McGivern v. Waihee*, United States District Court, District of Hawaii, Civil No. 94-00843, HMF, Jan. 13, 1995.

Chapter 4

FINDINGS AND RECOMMENDATIONS

I. Findings

1. The Commission finds that the conferring of a marriage certificate can bestow benefits in other jurisdictions. While those may be beyond the scope of this Commission, the ability of the State to extend those benefits by providing a marriage certificate to individuals is significant.

2. The Commission finds that major legal and economic benefits conferred by the marriage certificate through the *Hawaii Revised Statutes* include intangible, substantial-quantifiable, and general benefits.

3. The Commission finds there are substantial public policy reasons to extend the those benefits in total to same-sex couples. Those public policy reasons include:

- a. Article I, sections 2, 3, and 5 of the Constitution of the State of Hawaii clearly states that all persons in Hawaii are entitled to equal protection under the law, including the right to enjoy their inherent and inalienable rights to life, liberty and pursuit of happiness, and be free from illegal discrimination or the denial of basic rights on the basis of gender.

The Commission finds that the denial of the benefits of marriage to same-gender couples, purely on the basis of their gender, is a violation of those basic constitutional rights.

- b. In the case which gave rise to the establishment of this Commission, *Baehr v. Lewin*, 74 Haw. 530 (1993), the Supreme Court of Hawaii recognized the relevance of the United States Supreme Court's 1967 decision to strike down a Virginia statute which prohibited miscegenation, or interracial marriage, *Loving v. Virginia*, 388 U.S. 1 (1967). The Hawaii Supreme Court has found that denial of same-gender marriage was presumed to be a violation of equal protection of the law unless the State could show a "compelling state interest" for such denial. The Commission finds that the various reasons advanced for denying same-gender marriages, including religious, moral and public health and safety, are similar to the *Loving* case and do not constitute a "compelling state interest" and, as a matter of public policy, should not be used to deny equal rights under the law to same-gender couples.

- c. The argument that same-sex marriage should be barred because it cannot lead to procreation is invalid, inconsistent, and discriminatory. Public policy should not deny same-sex couples the right to marriage and the right to raise a family if they wish to do so, on the excuse that they, between themselves, cannot procreate, when this reason is not applied to opposite-gender couples. State law does not require that opposite-sex couples prove that they are capable of procreation before they can be married, and many are obviously not, because of age, medical or other reasons. Individuals in a same-gender marriage may have children from a prior opposite-gender marriage, or can adopt children if they desire a family.
- d. Under our constitutional government the fact that some religions or churches condemn same-gender marriages does not mean that those religious beliefs can be imposed on others. Our separation of church and state prevents religious enforcement through state institutions, such as the Department of Health. Furthermore, the Constitution prohibits any religious group from having to perform the marriage of a couple that is not recognized by that religion.

4. The Commission finds that, based on the major legal and economic benefits and the substantial public policy, the only logical conclusion is to recommend that same-gender couples be allowed to marry under chapter 572, *Hawaii Revised Statutes*. The Commission also acknowledges that the extension of marriage to same-gender couples may not be a legislative alternative at this time.

5. In the event that same-gender marriage under chapter 572, *Hawaii Revised Statutes*, is not a legislative alternative, the Commission recommends a universal comprehensive domestic partnership act that confers all the possible benefits and obligations of marriage for two people regardless of gender.

II. Recommendations

Based on the findings stated above, the Commission first recommends the Legislature amend chapter 572 to allow two people to marry, regardless of their gender. The Commission also recommends the Legislature adopt a universal comprehensive domestic partnership act that confers all the possible benefits and obligations of marriage for two people, regardless of gender.

H.B. NO.

1 status discrimination in employment, housing, and public
2 accommodations. The enactment of this registration section is a
3 means of attempting to eliminate this discrimination.

4 § -3 Definitions. For the purposes of this chapter:

5 "Basic living expenses" means basic food and shelter. It
6 includes any other cost, such as medical care, if some or all of
7 the cost is paid as a benefit to one or both partners because
8 they have registered as domestic partners under this section.

9 "Declaration of domestic partnership" means a statement in a
10 form issued by the director that declares the intent of two
11 people to enter into a valid domestic partnership contract. By
12 signing it, two people swear under penalty of perjury that they
13 meet the requirements for a valid domestic partnership contract.

14 "Director" means the director of health.

15 "Domestic partners" means two adults who are parties to a
16 valid domestic partnership contract and meet the requisites for a
17 valid domestic partnership contract as defined in section -4.

18 "Joint responsibility" means that each partner agrees to
19 provide for the other's basic living expenses while the domestic
20 partnership is in effect if the partner is unable to provide for
21 himself or herself. It does not mean that the partners need
22 contribute equally or jointly to basic living expenses. Anyone
23 to whom these expenses are owed can enforce the responsibility
24 established by this chapter.

H.B. NO.

1 "Live together" means that two people share the same place
2 to live. It is not necessary that the legal right to possess the
3 place be in both of their names. Two people may live together
4 even if one or both have additional places to live. Domestic
5 partners do not cease to live together if one leaves the shared
6 place but intends to return.

7 § -4 Requisites of a valid domestic partnership contract.

8 In order to make a valid domestic partnership contract it shall
9 be necessary that the parties shall:

- 10 (1) Live together;
- 11 (2) Consider themselves to be members of each other's
12 immediate family;
- 13 (3) Agree to be jointly responsible for each other's basic
14 living expenses;
- 15 (4) Neither be married nor a member of another domestic
16 partnership;
- 17 (5) Not be related by blood in a way that would prevent
18 them from being married to each other under chapter
19 572;
- 20 (6) Each be at least eighteen years old;
- 21 (7) Each shall be competent to enter into a contract; and
- 22 (8) Each sign a declaration of domestic partnership as
23 provided for in section -5.

1 § -5 Establishing a domestic partnership. Two persons,
2 who meet the criteria set out in section -4, may establish a
3 domestic partnership by presenting a signed notarized declaration
4 of domestic partnership to the director, who shall file it and
5 give the partners a certificate of domestic partnership showing
6 that the declaration was filed in the names of the parties who
7 shall be known as "domestic partners".

8 § -6 Rights and obligations. Upon the issuance of a
9 certificate of domestic partnership by the director, the parties
10 named in the certificate shall have the same rights and
11 obligations under the law that are conferred on spouses in a
12 marriage relationship under Chapter 572. A "domestic partner"
13 shall be included in any definition or use of the terms "spouse",
14 "family", "immediate family", or "dependent" as those terms are
15 used throughout the law.

16 § -7 Dissolution of domestic partnerships. The family
17 court shall have jurisdiction over the dissolution of domestic
18 partnerships. The dissolution of domestic partnerships shall
19 follow the same procedures and be subject to the same substantive
20 rights and obligations that are involved in the dissolution of
21 marriage under chapter 572.

22 § -8 Records and Fees. The director shall keep a record
23 of all declarations. The director shall set the amount of the
24 filing fee for declarations, but in no case shall the fee be

H.B. NO.

1 higher than the fee for a marriage license. The fees charged
2 shall cover the State's costs of administering this section.

3 § -9 Preemption. This chapter shall supersede any state
4 law, or political subdivision ordinance to the contrary.

5 § -10 Private solemnization not required. Nothing in this
6 chapter shall be construed to require any religious organization
7 to solemnize a domestic partnership that does not recognize a
8 domestic partner relationship within their ideology; provided
9 that any rights and obligations of domestic partners are not
10 obstructed or violated."

11 SECTION 2. Section 368-1, Hawaii Revised Statutes, is
12 amended to read as follows:

13 "§368-1 Purpose and intent. The legislature finds and
14 declares that the practice of discrimination because of race,
15 color, religion, age, sex, sexual orientation, marital status,
16 including domestic partnership, national origin, ancestry, or
17 disability in employment, housing, public accommodations, or
18 access to services receiving state financial assistance is
19 against public policy. It is the purpose of this chapter to
20 provide a mechanism which provides for a uniform procedure for
21 the enforcement of the State's discrimination laws. It is the
22 legislature's intent to preserve all existing rights and remedies
23 under such laws."

24 SECTION 3. If any provision of this Act, or the application
25 thereof to any person or circumstance is held invalid, the

H.B. NO.

1 invalidity does not affect other provisions or applications of
2 the Act which can be given effect without the invalid provision
3 or application, and to this end the provisions of this Act are
4 severable.

5 SECTION 4. This Act does not affect rights and duties that
6 matured, penalties that were incurred, and proceedings that were
7 begun, before its effective date.

8 SECTION 5. This Act shall take effect upon its approval.

9

10

INTRODUCED BY: _____



Commission on Sexual Orientation and the Law
Legislative Reference Bureau
State Capitol, Room 446
Honolulu, HI 96813

Phone: (808) 587-0666 Facsimile: (808) 587-0681

Thomas P. Gill, Chairperson
Lloyd James Hochberg, Jr.
Robert H. Stauffer

Morgan Britt
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L. Ku'umeaaloha Gomes
Marie A. "Toni" Sheldon

MINUTES OF THE MEETING HELD
WEDNESDAY, OCTOBER 25, 1995
(Continued to October 26, November 1, 2, 5, 6, 7, 1995
as Adopted at January 4, 1996 Meeting)

I. Call to Order

The fourth meeting of the Commission on Sexual Orientation and the Law was called to order by Chairperson Thomas P. Gill at 9:10 a.m., at the State Office Tower, Senate Majority Caucus Room, Sixth Floor, 235 South Beretania Street, Honolulu. Members present were:

Thomas P. Gill, Chairperson
Morgan Britt
L. Ku'umeaaloha Gomes
Lloyd James Hochberg, Jr.

Nanci Kreidman
Marie A. "Toni" Sheldon
Robert H. Stauffer

Ms. Pamela Martin of the Legislative Reference Bureau also attended the meeting.

A one-page document entitled "Suggested Amendments to the Minutes of October 11-12 As Drafted" was distributed to the Commissioners and is attached as Attachment 1.

It was suggested by Mr. Hochberg, and the members agreed, for purposes of time and to accommodate the guest speakers that the Commission forego the approval of the minutes until after the invited guests gave their testimonies.

Dr. Stauffer moved to have the suggested written amendments to the minutes as stated accepted, *because they were available*. Ms. Gomes seconded the motion.

The Commissioners were given a few minutes' opportunity to review the suggested amendments. Dr. Stauffer added that Sister Chatfield's title on page 11 was not capitalized.

Chair Gill suggested that further discussion of the minutes be postponed until the continuation of the meeting and any other suggested amendments be submitted in writing. Mr. Gill stated that Mr. Hochberg reserved his opportunity to return to the minutes of the October 11, 1995, meeting to amend them.

The motion passed with Mr. Britt, Ms. Gomes, Ms. Kreidman and Dr. Stauffer voting aye and Mr. Hochberg and Ms. Sheldon voting nay.

Chair Gill summarized what the Commission would be attempting to do at the meeting. The topic for the guests would be item (3), section 2, of Act 5, Session Laws of Hawaii 1995 which states:

"(3) Recommend appropriate action which may be taken by the legislature to extend such benefits to same-sex couples."

He stated that after hearing testimonies, the Commission would discuss the various motions submitted or to be submitted relating to items (1) and (2) of Act 5.

Ms. Martin reviewed the list of invited guests and briefly summarized the materials handed out for the meeting. She informed the Commission that invited guests, Daniel P. McGivern and Mely McGivern, would also be speaking. She added that invited guest, Dr. Robert Bidwell, postponed and instead would be testifying on November 8, 1995.

Ms. Martin added that the handouts included written testimonies from Bruce Fernandes of Maui, a letter from Sandra Pelosi, also from Maui. She also circulated a postcard addressed to the Commission from Penelope Spiller of Molokai and additional petitions from Mary Woodard's group.

Jon Van Dyke, Esq. Professor of Constitutional Law, William S. Richardson School of Law addressed the Commission first. Mr. Van Dyke reviewed the holding of the Baehr decision that "sex" is a suspect class under Article 1, section 5, Hawaii Constitution. As such the marriage law is presumed to be unconstitutional that must have a compelling state interest that is narrowly drawn to justify this. This second part, "narrowly" drawn is also interpreted to mean the State has chosen the "least drastic alternative", or the "least onerous alternative." Mr. Van Dyke pointed out the dramatic confrontational factors between the Legislature and the Courts in this issue. He pointed to the Baehr decision where the court states in very strong language that it rejects the argument that marriage is innately between a man and a woman, saying the argument is "circular...and tortured." In contrast Act 217, Session Laws of Hawaii 1994, says also in strong language, that marriage is meant for only a man and a woman and its a matter of public policy. Act 217 looks to notions of separation of power and implicates the Legislature's power to determine the will of the people, specifically admonishing the court that it has incorrectly interpreted the Constitutional's framers intent.

Mr. Van Dyke discussed various race-oriented cases where compelling state interests were found. See Mr. Van Dyke's written testimony attached to these minutes in the testimony portion at page T-9, for a full explanation of these cases. He stated that it was unclear if the Hawaii case, Holdman, was still valid.

Mr. Van Dyke reviewed the alleged compelling state interests that have been presented by the State to justify section 572-1, Hawaii Revised Statutes are (1) to foster

procreation, (2) create disproportionate incentives to move or remain in Hawaii, costing the state money and distorting the job and housing markets as well as altering the desirability as a visitor destination; and (3) allowing same-sex couples to marry conveys approval of non-heterosexual behaviors (see pg. T-8). He did not believe that any of these would be successful arguments in court because (1), which invokes the traditional family and the idea that marriage is linked to procreation, is flawed because the State has moved away from this requirement and it has not been pursued. (2) and (3) are more subjective and controversial in terms of acceptability. Regarding (2), there is law that says you cannot exclude undesirable people from your state. There is the right of free movement in the State. Finally, addressing (3), *Mr. Van Dyke agrees that the government may set moral standards, but thinks it is hard to defend punishing people who don't meet that standard.* That is, to encourage one type of family structure is different than discriminating against others.

Mr. Van Dyke shared his belief that the procreation argument is a problem because the State has not consistently applied that interest. In fact, Mr. Van Dyke believes the State, generally discourages procreation. Mr. Van Dyke does not believe the State can successfully meet the "narrowly tailored" requirement.

Mr. Van Dyke presented some ideas as to the public policies that would push the Commission one way or the other. They appear in the testimony on pg. T-12. He commented that finding a solution that respects all these elements and is not overtly confrontational is probably good. He sees the Domestic Partnership option as possible. He looks at it as a win-win situation. You give the same-sex couples the benefits of marriage, but keep the name of "marriage" for opposite sex-couples. He believes this would "moot" the case because they would not have any tangible injury.

Mr. Hochberg asked if Mr. Van Dyke based his statement on his understanding that objections of the public were of the word "marriage" or the substance. Mr. Hochberg continued that he believes that people who have testified at earlier meetings objected to the substance of allowing marriage regardless of whether one calls it domestic partnership. Is that respect for the diversity of religious views? Mr. Van Dyke recognized that it is a partial-win/partial-win situation. The fact that Act 217 recognizes the solemnizations.

Mr. Britt asked about what benefits a domestic partnership could provide in the area of income taxes, adoption, or inheritance, there isn't equity with marriage. With regard to the sacred relationship left for opposite-sex couples, wouldn't that be more akin to setting up a second class citizenship? Mr. Van Dyke stated that the State could supply all the economic benefits within their jurisdiction, so there must necessarily be federal litigation to resolve those issues. Mr. Hochberg stated that based on that information nothing short of marriage would "moot" the case. Mr. Van Dyke agreed that could be a possible outcome, but not likely he predicted. He believes the state court would say this is the logical accommodation of competing forces and there is no injury that justifies further litigation. Standing has three components: injury, causation, and redressability. The redressability, would drop out and the Supreme Court would have only an advisory opinion. Dr. Stauffer asked Mr. Van Dyke to confirm that domestic partnership is a "separate but equal" category, *i.e. separate but unequal.* Mr. Van Dyke agreed that a new category is being created. Dr. Stauffer expressed



Commission on Sexual Orientation and the Law

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October 18, 1995

Thomas P. Coleman, Esq.
Executive Director
Spectrum Institute
P. O. Box 65756
Los Angeles, CA 90065

Dear Mr. Coleman:

Thank you for agreeing to appear before the Commission on Sexual Orientation and the Law at our October 25 meeting, starting at 9:00 a.m. in the Senate Majority Caucus Room, Room 605, 235 S. Beretania Street. The purpose of this meeting is to allow the Commission to hear a variety of positions and opinions relating to the third of three tasks assigned to it by the legislature in Act 5, Session Laws of 1995. The first task was to examine the legal and economic benefits extended to married couples but not to same-sex couples. The second task was to examine substantial public policy reasons to extend or not to extend such benefits in part or in total to same-sex couples. The item for discussion on the October 25 agenda reads:

"(3) Recommend appropriate action which may be taken by the legislature to extend such benefits to same-sex couples."

We hope you will be able to brief the Commission as to the positive and negative aspects of different types of legislation that the Commission could present to the legislature. If you wish to submit a memorandum or other written materials on these points it would be helpful to the Commission. There may also be questions from members of the Commission but we will try to keep your portion of the discussion within the limited ten-minute time period.

After the various resource witnesses, including yourself, have made their presentations, the Commission will hear testimony from the general public or other persons or groups who wish to put their positions or opinions on the record. The official notice and agenda of the meeting is enclosed for your reference. Enclosed is a draft of a proposed domestic partnership law that has been distributed to the Commission members and may be of interest to you.

Please call me or Pamela Martin at the Legislative Reference Bureau, at 587-0666, if you have any problems, questions, or need further information. Thank you for your help.

Sincerely,

Tom Gill
Thomas P. Gill
Chairperson

Encs.

Mr. Thomas P. Coleman, Esq., Executive Director of the Spectrum Institute. Spectrum helps government agencies and corporations with changing social and family diversity to reflect present day realities. He has been an attorney for 22 years and for all of those years he has been fighting to end sexual orientation and marital status discrimination. He has promoted inclusiveness in the definition of family and promoted the right to privacy. He has worked with all levels of government, City, State and Federal. So he is here today to talk about reform.

Mr. Coleman and Spectrum Institute recommend a comprehensive domestic partnership. The language of the current domestic partnership bill in the Commissioner's hands is more for a limited domestic partnership but a comprehensive domestic partnership bill would be shorter because it makes general statements authorize the status of spouse on the partners in a domestic partnership. He stated that no State of Nation has ever taken this step. Even in the Scandinavian countries there are caveats and exceptions in their domestic partnership laws. Mr. Coleman believes Hawaii has shown a progressive attitude towards the acceptance.

Mr. Coleman presented his testimony from a series of charts that are reproduced in the written testimony portion of these minutes attached as T-40a through T-40e.

"During Mr. Coleman's explanation of the factual situation versus the legal situation of same-gender "families" in Hawaii, Mr. Hochberg offered that heterosexual unmarried couples with biological children are not recognized as families either because we don't have common law marriage. Mr. Coleman replied that factually, they are still families too, even if the law doesn't recognize them. Ms. Sheldon asked if domestic partners would be included in the domestic violence laws, where if police were called to the scene, one of them would go to jail? Mr. Coleman replied, "Naturally. It would be the same."

Mr. Coleman referred to the numerous statutes in the list produced by the Legislative Reference Bureau that indicate that benefits exist and Mr. Hochberg interrupted to say that the Commission has not reviewed the statute list. The Chair asked Mr. Hochberg to allow Mr. Coleman to continue.

Mr. Coleman responded to what he has heard today regarding just keeping the status quo. He pointed out that national statistics of opinion polls reveal that 30% are absolutely against it and would like to re-impose criminal penalties, and there's 30% of the public that support the legalization of same-sex marriage and 40% say that some kind of reform is necessary but they don't feel comfortable with the solution of same-sex marriage. Mr. Hochberg interpreted Mr. Coleman's 30-30-40 breakdown to make him appear in the middle, and stated that no one in Hawaii has suggested criminalizing sodomy. Mr. Coleman clarified that in national polls those people that are Christian conservatives support criminalization of homosexual relationships. Mr. Coleman quoted a Los Angeles Times poll where one of the questions asked was how do you label yourself? Mr. Coleman said that he would provide the exact poll when he returned to the mainland.

Mr. Coleman suggested that there are five possible actions available to Hawaii: (1) do nothing which he predicts will result in a court-ordered same-sex marriage; (2) pass a Limited Domestic Partnership Act which he believes will have the same result as (1); (3) pass a Comprehensive Domestic Partnership Act which he predicts the Court may accept as satisfying the equal protection clause; and (5) eliminate marriage as a civil institution which Mr. Coleman predicts will not happen. See Chart at page T-40e attached.

When Mr. Coleman had finished his presentation, Mr. Hochberg suggested that there could be another suggested action on the list that would make it very clear that Baehr v. Lewin is overturned and that would be a constitutional amendment that prohibited any marriage except between one man and one woman. Mr. Coleman agreed that would be a sixth option, but he commented that he did not believe the votes were there in the Legislature for that option. Mr. Britt offered that there could be a federal Constitutional amendment, but that isn't going to happen either.

Dr. Stauffer, referred to one of his articles where he stated there are one thousand statutes that are driven by state-issued marriage certificates and as the Commission does not have the time or money to investigate this, do you have an article where these are enumerated? Mr. Coleman clarified that there are 1499 hits under a WestLaw search of marriage and spouse and further clarified that most likely the figure is closer to hundreds because one statute may use the terms more than once.

The Chair asked Mr. Coleman if he had a format for the comprehensive domestic partnership law and Mr. Coleman volunteered to send his recommendations upon return to the mainland, and it would be less than about two pages.



Commission on Sexual Orientation and the Law

Legislative Reference Bureau, 1177 Alakea St., 6th Floor, Honolulu, HI 96813

Phone: (808) 587-0666; Facsimile: (808) 587-0681

Thomas P. Gill, Chairperson
Lloyd James Hochberg, Jr.
Robert H. Stauffer

Morgan Britt
Nanet Kreidman

L. Ku'umeaaloha Gomes
Marie A. "Toni" Sheldon

August 24, 1995

Mr. Thomas F. Coleman, Esq.
Executive Director
P.O. Box 65756
Los Angeles, CA 90065

Dear Mr. Coleman,

As you may be aware Act 5, Session Laws of Hawaii 1995, repealed the Commission on Sexual Orientation and the Law that was convened as a result of Act 217, Session Laws of Hawaii 1994 and convened a new seven member commission. The press release on the members of the new commission follows.

The new commission chairperson, Tom Gill, would like to orient the new commission members to the issues before the first meeting is called. One of the documents he would like to send each member is the Spectrum Institute's Special Report of March 1995, related to Gay Marriage in Hawaii. The Commission would be grateful if you could forward at least eight copies to the above address. I understand the Institute also has a report on Domestic Partnership Laws also issued in March 1995 that may be helpful to the Commission. If available, we would appreciate copies of this as well. Mahalo for your assistance.

Sincerely,

A handwritten signature in cursive script that reads "Pamela Martin".

Pamela Martin
Staff Attorney for the
Commission on Sexual Orientation and the Law

LEGALIZATION OF SAME-SEX MARRIAGE IS A SURE BET IN HAWAII -- OR IS IT?

Lambda Legal Defense and Education Fund is sending Evan Wolfson around the nation to meet with leaders of lesbian and gay groups. Wolfson's message is blunt: it is inevitable that Hawaii will legalize gay marriage in less than two years and so these groups must prepare for the political firestorms that are sure to ignite in Congress and in every state legislature.

Wolfson is co-counsel for three same-sex couples who may be headed for a victory in the Hawaii Supreme Court in the case of *Baehr v. Lewin*. So far, the Supreme Court has ruled that it is probably unconstitutional for the state to deny marriage licenses to same-sex couples.

The court ordered a trial at which the Attorney General must prove compelling reasons to prohibit gay marriages. The trial is expected to begin in July 1996.

COMPROMISE IS POSSIBLE

Not every legal expert agrees totally with Wolfson's forecast of success in the Hawaii Supreme Court. Jay Kohorn, a legal veteran who has fought against sexual orientation discrimination for nearly a generation says that, while Wolfson's prediction may very well come true, it is still possible for the court to evade an ultimate constitutional decision ordering the state to grant marriage licenses to same-sex couples.

Another noted expert on these matters, Los Angeles attorney Thomas F. Coleman, agrees that there is still some "wobble room" for the Supreme Court -- but only if the state Legislature eliminates unjust discrimination against same-sex couples by enacting a comprehensive domestic partnership law before the case returns back to the Supreme Court for a final decision. His opinion about the outcome of the Hawaii case is based on more than speculation.

For some 23 years now, Coleman has been studying these issues. He has worked extensively with all three branches of government, at the national, state, and local levels, to end sexual orientation and marital status discrimination against unmarried couples.

POLITICIANS FACE TOUGH DECISION

According to Coleman, the decisive factor in this litigation may be how Hawaii Democrats handle the issue between now and early 1996, when the Legislature must decide whether to pass an alternative to same-sex marriage. Governor Ben Cayetano is a Democrat as are 80% of legislators in the Aloha state.

Cayetano was elected Governor in November 1994 after a tough four-way race. Each of the other three candidates came out against same-sex marriage. The results were 38% for Cayetano, with 30/30/2% for his opponents.

The anti-Cayetano votes closely match public opinion on the subject of same-sex marriage. A statewide poll done by the Honolulu Advertiser in February 1994 shows that 67% of respondents oppose legalizing same-sex marriage, with 25% in favor and 8% undecided.

After the Supreme Court first indicated its inclination to mandate the legalization of same-sex marriage, legislators overwhelmingly passed a new law reaffirming that marriage is a relationship between a man and a woman. Although the statute criticized the court's opinion, the law was purely a symbolic gesture to appease the public. Since the tentative decision of the Supreme Court to legalize gay marriages is based on the state constitution's equal protection clause, lawmakers lack the authority to directly overrule the court.

The Legislature can throw only two roadblocks in the court's path. Two-thirds of the legislators could put a constitutional amendment on the ballot to let voters decide the issue -- but political experts say that won't happen. The other option is to pass a domestic partnership law eliminating discrimination against same-sex couples -- but that will require strong leadership from the Governor and key legislators such as Senator Rey Graulty. It may also require some prodding from moderate and liberal officeholders and candidates in other states who will be hurt the most if, much to the delight of the religious right, Hawaii legalizes gay marriage and makes it a national issue in upcoming races.

THE SAME-SEX MARRIAGE DECISION OF THE HAWAII SUPREME COURT

Baehr v. Lewin (Hawaii 1993) 852 P.2d 4

On December 17, 1990, two lesbian couples and one gay male couple filed applications for marriage licenses with the Department of Health in Hawaii. The department denied the applications solely because the couples were of the same sex.

On April 12, 1991, a health department official wrote to the couples explaining the reason why their applications for a marriage license had been denied. The letter stated: "This will confirm our previous conversation in which we indicated that the law of Hawaii does not treat a union between members of the same sex as a valid marriage. We have been advised by our attorneys that a valid marriage within the meaning of ch. 572, Hawaii Revised Statutes, must be one in which the parties to the marriage contract are of different sexes. In view of the foregoing, we decline to issue a license for your marriage to one another since you are both of the same sex and for this reason are not capable of forming a valid marriage contract within the meaning of ch. 572. Even if we did issue a marriage license to you, it would not be a valid marriage under Hawaii law."

THE LAWSUIT

On May 1, 1991, the couples filed a complaint in Circuit Court seeking a declaration that the marriage statute's requirement that couples must be of the opposite sex was unconstitutional. They asked the court to issue an injunction prohibiting the future withholding of marriage licenses solely on the basis the sex of the applicants. They argued that the statutes violated the right of privacy and the right to equal protection of the law as guaranteed by the state constitution.

The Attorney General filed a motion for summary judgment, asking the court to dismiss the case because the state's refusal to grant marriage licenses to same-sex couples was not unconstitutional. On October 1, 1991, the Circuit Court granted summary judgment in favor of the state and dismissed the couples' complaint. The couples appealed.

THE SUPREME COURT DECISION

On May 5, 1993, the Hawaii Supreme Court reversed the decision of the Circuit Court. The court unanimously ruled that the right to same-sex marriage is not a fundamental constitutional right protected by the right to privacy. The court, however, was badly split on the equal protection issue, with two justices declaring that it looked as if the equal protection clause had been violated, another justice voting to require a trial although he was not willing to rule that sex discrimination had occurred, and two dissenting justices firmly stating that disallowing same-sex marriage did not violate any part of the state constitution.

Because the court was split, without a clear majority view on what should happen in the trial court, the parties filed a motion for reconsideration and clarification. Before the motion was granted, however, a new justice joined the Supreme Court. She replaced one of the dissenting justices.

The new justice did not expressly indicate her views on the correctness of the opinion of the two-member plurality. But she cast her vote with them to clarify that, when the case returns to the trial court, the statute will be presumed to be unconstitutional. Thus, the Attorney General will have the burden to prove what, if any, compelling state interests require marriage to be limited to opposite-sex couples.

THE UPCOMING TRIAL

Circuit Judge Kevin Chang has postponed the trial until July 15, 1996. The purpose of the delay is to allow the Commission on Sexual Orientation to complete its work, and to give the Legislature time to respond to the Commission's report, possibly by enacting a comprehensive domestic partnership act. Passage of such a law may be sufficient to satisfy the equal protection requirements of the Hawaii Constitution. However, without such a law, it is likely that the trial court will rule that same-sex marriage is constitutionally required.

SAME-SEX MARRIAGE IS DEBATED COAST TO COAST ***EXCERPTS FROM A SAMPLING OF NEWSPAPERS***

"Hawaii was thrown into a quandary when the state Supreme Court ruled last year that Hawaii violated anti-discrimination provisions in its state constitution when it denied homosexuals marriage licenses. Since then, the state legislature has been grappling with the issue and its ramifications.

"Should the state legalize gay marriages? Should it pass a domestic partnership law to create a status less than marriage but with legal protection?"

"Given the national political climate and the proliferation of anti-gay initiatives, compromise might be the better part of valor. As Hawaii House Judiciary Committee Chairman Terrance Tom, who supported the bill, observed, 'If this (Hawaii) Supreme Court decision is not reversed, mark my words: A (U.S.) constitutional amendment is inevitable and women's rights and homosexual rights will be battered from coast to coast.'"

— St. Louis Post Dispatch
April 29, 1994

"Hawaii is poised to redefine the American family by legalizing gay marriage — which no state has done — or passing the nation's first statewide domestic partnership act."

— Miami Herald
September 11, 1994

"Mormon Church leaders have called on their nearly 9 million members to actively oppose same-sex marriages Church spokesman Don LeFevre said the statement came in response to debate in Hawaii over efforts to legalize homosexual marriages."

— Arizona Republic
February 26, 1994

"What if homosexuals could legally marry? That conversational icebreaker could soon throw bombshells across America if Hawaii permits gay matrimony as its high court says it may have to.

"Would other states be obliged to honor Hawaiian vows? Law and history say yes, and no. Homosexual couples who plan a wedding in Hawaii may need a lawyer when the honeymoon is over."

— Phoenix Gazette
May 17, 1993

"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."

— St. Louis Post Dispatch
December 2, 1994

TWO BIG LURKING QUESTIONS:

WILL HAWAII LAWMAKERS PASS A DOMESTIC PARTNERSHIP LAW? WILL HAWAII COURTS ACCEPT IT AS A SUBSTITUTE FOR GAY MARRIAGE?

After the state Supreme Court issued its opinion questioning the constitutionality of Hawaii's marriage laws, the Legislature passed HB 2312 by overwhelming margins in both houses. In addition to criticizing the court's decision and reaffirming that only opposite-sex couples may marry, the bill established a Commission on Sexual Orientation and the Law.

STUDY COMMISSION CONVENED

Under HB 2312 the Commission was directed to:

- * examine the precise legal and economic benefits extended to opposite-sex married couples, but not to same-sex couples;
- * examine whether substantial public policy reasons exist to extend such benefits to same-sex couples and the reasons therefor; and
- * recommend appropriate action which may be taken by the Legislature to extend such benefits to same-sex couples.

The Commission's work was interrupted when a federal judge ruled that its composition was unconstitutional. Before it disbanded, the Commission issued an interim report indicating that it had already examined one-third of more than 1,000 state statutes that arguably confer benefits or impose burdens on married couples.

The Governor and legislative leadership decided to convene a new commission to pick up where the old commission had left off. Under SB 888, the new commission has until December 1995 to issue its final report.

The Governor has appointed all seven members of the new commission. Four members were nominated by legislative leadership. It is widely expected that the Commission will recommend that the Legislature enact a comprehensive domestic partnership law as a secular substitute for same-sex marriage.

The question is whether the Legislature will act on this recommendation in time to affect the outcome of the gay-marriage litigation.

CONTINUANCE OF TRIAL IS PIVOTAL

Had the trial occurred on September 25, 1995, as it was scheduled, neither the Commission's report nor the Legislature's response to that report would have affected the decision of the trial court. However, since the trial has been postponed until July 1996, the role of the Commission takes on added importance. If the Commission files its report in a timely manner (December 1995), the Legislature will have ample opportunity to pass a comprehensive domestic partnership act (if it so decides) before its session ends in May 1996.

ATTORNEY GENERAL POSITION

The attorney general's current arguments will not win the case for the state. It is not enough to argue that the primary purpose of marriage is procreation which, the attorney general says, same-sex couples cannot do.

As the Supreme Court has already noted in its first decision, opposite-sex couples who are incapable of procreating are not barred from marrying. Also, as the plaintiffs argue, same-sex couples can procreate through artificial insemination or surrogate methods. If the state does not use something more than the procreation argument, the state is likely to lose the case.

The state's position would be strengthened by a domestic partnership act imposing the same burdens and benefits that opposite-sex couples receive when they marry, possibly satisfying the state constitution's equal protection clause. This would avoid expensive conflicts with the federal government and 49 states, all or most of which are likely to reject same-sex marriages performed in Hawaii. It also minimizes entanglement with religion since domestic partnerships would not involve a religious ceremony. Plus, it avoids impairing existing contracts, uniform state laws, and interstate compacts, all of which rest on an understanding that marriage involves opposite-sex relationships.

Some Reasons to Enact a Domestic Partnership Law in Hawaii

When Hawaii lawmakers reconvene in January 1996, will they pass a domestic partnership act to eliminate unjust discrimination against same-sex couples? Or will they do nothing and wait for the Supreme Court to mandate the legalization of same sex marriage? When they finally focus on the issue, politicians may have sound reasons to favor a domestic partnership law over court-ordered gay marriage.

Eliminate Discrimination. Gay couples who live in long-term relationships are treated unfairly by the law. With marriages having a median length of less than eight years, gay life partners argue that it is unjust for their relationships, many of which last one or two decades or more, to receive little or no legal protection. Whether it is employee benefits, filing joint taxes at a lower rate, or survivor rights when one partner dies, same-sex couples insist that the law must be reformed. Without the necessity of legalizing same-sex marriage, the Hawaii Legislature could pass a domestic partnership law that would impose the same burdens and benefits on same-sex couples that opposite-sex married couples now receive.

Separation of Church and State. The Catholic Church, Mormon Church, and most other organized religions are vehemently opposed to the legalization of same-sex marriage. They argue that the state has inherited the institution of marriage from the church, pointing to the fact that the sacrament of marriage has religious origins. To minimize any entanglement with religion on the issue of same-sex marriage, the state could create a new secular institution, known as a domestic partnership, and confer on domestic partners obligations and benefits similar to spouses. Such a precedent exists in three European countries that enacted "registered partnership" laws for same-sex couples.

Interstate Conflict. Passage of a domestic partner act would eliminate discrimination *within the borders of Hawaii* without creating an automatic conflict with the federal government and the other 49 states. In contrast, legalizing same-sex marriage will cast a cloud on Hawaii marriages, provoking legal battles that will clog federal and state courts for many years.

Employers Offering Domestic Partner Benefits* (Partial Listing)

States:

Deleware
Massachusetts
Oregon
Vermont

Cities:

Ann Arbor, MI
Berkeley, CA
Boston, MA
Brookline, MA
Burlington, VT
Cambridge, MA
Chicago, IL
East Lansing, MI
Hartford, CT
Iowa, IO
Ithica, NY
Laguna Beach, CA
Los Angeles, CA
Madison, WI
New York, NY
Oakland, CA
Oak Park, IL
Portland, OR
Rochester, NY
Sacramento, CA
San Diego, CA
San Francisco, CA
Santa Cruz, CA
Santa Fe, NM
Seattle, WA
Tacoma Park, MD
W. Hollywood, CA
W. Palm Beach, FL

Counties:

Alameda, CA
Hennepin, MN
King, WI
Los Angeles, CA
Marin, CA
Multonohah, TX
San Mateo, CA
Santa Cruz, CA

Universities:

Brown University
New York University
Thomas Jefferson U.
U. of Michigan
U. of New Mexico
U. of New York
U. of Pennsylvania
Wellesley College

Private:

Advanced Micro Devices
Ben and Jerry's
Beth Isreal Medical Center
Blue Cross of Mass.
Boreland International
Bureau of National Affairs
Cambridge Technology Partners
Capital Cities/ABC
David Sarnoff Research Center
Garfinkel's Dept. Store
Genetech, Inc.
Hilton Corporation
Home Box Office
Kaiser, Northeast Mass.
Levi Strauss
Lotus Development Corp.
Mark Hopkins Hotel
Microsoft Corp.
MCA/ Universal
Montefiore Medical Center
Omni Corp.
Northern States Power
Novell Corporation
Paramount Pictures
Park Nicolet Medical Center
New York Times
SAS Institute, Inc.
Seattle Times
Silicon Graphics
Sheraton Corp.
Sony Entertainment
St. Paul Companies
Time Magazine
Warner Brothers
Woodward and Lothrop

* Benefits by each employer vary and may include either sick leave, bereavement leave, health, dental, or all of these.

THE TERM "FAMILY" IS HISTORICALLY BROAD ENOUGH TO INCLUDE DOMESTIC PARTNERS

In this country, the legal definition of marriage is understood to include two people of the opposite sex. From a global perspective, not one nation currently defines "marriage" broadly enough to include same-sex couples.

On the other hand, American law has treated the concept of "family" as a term of inclusiveness and flexibility. That is why courts in many states have invalidated zoning ordinances that attempted to prevent unmarried adults from living in neighborhoods zoned for single family use. That is also why nearly 200 public and private employers throughout United States have redefined "immediate family" in their employee benefits plans to include domestic partners, thus enabling workers to take sick leave when their partner is ill, bereavement leave when he or she dies, and to put a lifemate on the company's health plan.

The term "family" is derived from the Latin term "familia" which means household. In American law, the primary definition of "family" refers to a group of persons living in a single housing unit in a relationship that is intimate, permanent, and interdependent. The dictionary has secondary definitions which are narrower and which refer to a nuclear biological family of parents and children or to an extended blood family that includes all blood relatives in a kinship network. However, the primary definition of is not limited to blood, marriage or adoption.

A recent leading case regarding the definition of family is *Braschi v. Stahl Associates* (1989) 74 N.Y.2d 201. New York's highest court was called upon to determine whether a surviving same-sex life partner of a tenant could be considered a family member of the deceased tenant. While both men lived in the rent-controlled apartment for years, the lease was only in the name of one of them. When the named tenant died, the landlord tried to evict the survivor. The survivor claimed a right to remain in the apartment under a law that conferred such benefit to "surviving family members" who lived on the premises with the deceased tenant. The law in question did not define "family."

Citing the primary definition of "family"

in both *Webster's Dictionary* and *Black's Law Dictionary*, the Court of Appeal ruled in favor of the surviving domestic partner, concluding:

"The term family . . . should not be rigidly restricted to those people who have formalized their relationship by obtaining, for example, a marriage certificate or adoption order. The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment of interdependence. This view comports both with our society's traditional concept of 'family' and with the expectations of individuals who live in such nuclear units."

The conclusion of the New York court is reminiscent of a longstanding judicial precedent in California. In *Moore Shipbuilding Corp. v. Industrial Accident Commission* (1921) 185 Cal. 200, the California Supreme Court awarded worker's compensation survivor benefits to an unmarried woman who had lived with and who had been dependent upon a deceased worker. Ruling for her, the court declared:

"'Family' may mean different things under different circumstances. The family, for instance, may be . . . a group of people related by blood or marriage, or not related at all, who are living together in the intimate mutual interdependence of a single home or household."

"HAWAIIAN MARRIAGE TRAP" -- Op-Ed Article by Gabriel Rotello
Baltimore Evening Sun / April 21, 1994

Gay political leaders have been criticized for walking unprepared into some nasty ambushes recently, notably the gay/military debacle. Many now say that they'll never make another move before gauging the depth of the opposition. But if so, why are they stumbling blindly into what could easily be the mother of all ambushes: the Hawaiian marriage trap?

Hawaii's supreme court recently ruled that the ban on homosexual marriage probably violates that state's constitution. If things continue as they are, the court is expected to rule sometime in the next 18 months that such marriages are legal in Hawaii. Attempts by conservatives to derail the issue through legislation have failed so far, though they're not giving up.

On the surface, this pending victory might seem cause for a national gay celebration. U.S. reciprocity law mandates that marriages legally performed or dissolved in one state be recognized by all, which accounts for the historic popularity of quickie weddings and divorces in places like Nevada. Following that logic, many in the gay movement optimistically predict that homosexuals will soon be able to marry in Maui, then wing home and enjoy the fruits of wedded bliss in Anytown, USA.

But if the battle over the military's gay ban is any example, that flight of fancy may end in a fiery crash landing. Polls consistently show that the vast majority of Americans -- even those who support gay rights -- overwhelmingly oppose gay marriage. It doesn't take a Nostradamus to predict that if Americans wake up one morning and discover that a few judges in Hawaii have effectively legalized same-sex marriage nationwide, the ensuing backlash will dwarf the gay/military imbroglio.

At the very least it's likely that dozens of states, perhaps most, will seek to avoid Hawaii's fate by amending their constitutions to ban same-sex marriage. Conservatives in Congress, however, might not be satisfied with a piecemeal approach that leaves liberal states free to recognize gay marriages. Since the Constitution reserves marriage regulation to the states, the surest way effectively to ban same-sex marriage

nationwide is to amend the Constitution.

Such a reaction might seem extreme, and thus extremely unlikely. But recall the hysteria of the gay-military debate and imagine that multiplied manifold by the actual legalization of gay marriage in one U.S. state and the threat of its spread to others. In such a climate an amendment outlawing same-sex marriage would probably be supported by both parties and could conceivably sail through two-thirds of Congress and three-fourths of the states in record time.

Hardwiring homophobia into the very structure of the Constitution would be the Waterloo of gay rights. If worded carefully, such an amendment could result in official second-class status not only for gay relationships, but for homosexuals generally. Amending the constitutions of individual states would be equally damaging to lesbians and gays in those states. Even the mildest possible congressional response, a federal law, would be a catastrophic setback.

Therefore you'd think that, having been caught unprepared by the military mess, lesbian and gay leaders would either be desperately trying to avoid the marriage trap, or frantically preparing for it by alerting rank-and-file gays to the battle ahead, canvassing and lobbying Congress and state legislatures, and most of all trying to sway public attitudes about gay marriage now, before the deluge. Sadly, however, whether through overwork, underfunding, disagreement about marriage as a movement goal or just plain lack of foresight, gay political organizations seem utterly oblivious to the danger. They're limping toward this potential Armageddon as if it were Gays in Uniform, Part II.

Lesbian and gay victories have always been followed by vicious backlashes. Failing to predict that the last time was disastrous. Failing now could be fatal.

Gabriel Rotello is a columnist for New York Newsday.

STRONG PUBLIC OPPOSITION TO LEGALIZING GAY MARRIAGES, BUT GROWING SUPPORT FOR DOMESTIC PARTNER BENEFITS

Unless the Hawaii Legislature passes a comprehensive domestic partnership law by May 1996 as a secular substitute for same-sex couples – and comes up with compelling reasons for not legalizing same-sex marriage – many legal experts predict that the trial court by the end of 1996, and the state supreme court by the end of 1997, will order the state to begin issuing marriage licenses to gay and lesbian couples.

FEDERAL AND INTERSTATE CONFLICT

The legalization of same-sex marriage in Hawaii will automatically cause a confrontation with Congress since more than 1,000 federal statutes confer benefits or impose burdens on spouses. The same conflict will occur with the other 49 states (each of which has hundreds of statutes affecting the rights of "spouses") as same-sex couples fly to Hawaii for a vacation, get married, and return to their home states with a marriage certificate in hand. With limited exceptions, a home state has historically accepted a marriage performed in another state as valid for all purposes in the home state. Will state legislators or state courts declare same-sex marriage as an exception to the general rule?

POLITICAL CANDIDATES QUESTIONED

Candidates for state and federal offices should expect to be questioned on this issue. Do they favor legalized marriage for gay couples? If they are opposed, do they support a more modest domestic partnership law recognizing committed same-sex couples as one of America's diverse family structures, giving them various legal rights, such as protection against discrimination in housing, the right of one partner to put the other on his or her health and dental plan at work, or the right to sue a drunk driver for the wrongful death of a domestic partner? In other words, taking a position does not necessarily require an all-or-nothing choice between recognizing same-sex couples as legally married or continuing to have the law treat them as strangers with no relationship rights.

PUBLIC OPINION SURVEYS

Moral Values. A 1994 national poll by the Los Angeles Times shows that 61% of adults believe that "gay sex is always wrong." A 1978 Gallup Poll produced a similar response. But polls show that most people are against extreme governmental responses to same-sex couples.

Criminalization. In a 1990 Harris Poll, 63% opposed making consenting homosexual relations in private a crime. A 1986 Gallup Poll showed that 57% of adults opposed passage of criminal laws against homosexual activity.

Same-Sex Marriage. The public is against legalizing gay marriages by a 2-to-1 margin. Polls done by Time Magazine showed 67% opposed in 1992, 65% opposed in 1993, and 64% opposed in 1994. A national poll by EPIC/MRA Mitchell Research showed 63% opposed in 1995. A 1994 poll by the Honolulu Advertiser, revealed that 67% of Hawaii residents are against legalizing same-sex marriage.

Definition of Family. Although the public overwhelmingly supports a narrow view of the term "marriage," it accepts a definition of "family" that is broad enough to include domestic partners. A 1989 poll by Massachusetts Mutual Life Insurance Company showed that 74% of adults defined "family" as "a group of people who love and care for each other" while only 22% used a rigid definition of "a group of people related by blood, marriage, or adoption."

Domestic Partner Benefits. A 1989 poll by Time Magazine showed that 54% of adults agreed that gays should be able to get medical and insurance benefits from their partner's policies. In a 1986 poll by the Roper Organization, 88% of adults supported the concept of "equal pay for equal work." These attitudes may account for the fact that city workers in San Francisco and Seattle now receive the same health benefits for domestic partners as married workers get for spouses – a change occurring after voters in both cities approved domestic partner laws. Nationally, 100 private employers, 40 municipal employers, 50 colleges, and 20 unions have taken steps to eliminate discrimination against workers with domestic partners.