767 Kupulau Dr.
Kihei Hi 96753
October 16, 1995

Committee on Sexual Orientation
and the Law
c/o Legislative Reference Bureau
State Capitol 4th Fl.
Honolulu, Hi 96813.

Dear Sir:
I will never accept marriage or legal domestic partnerships for homosexuals. I urge you to oppose legal benefits for these groups. Polls state two thirds of our State oppose benefits for these groups. This is democracy and we as Citizens expect your Commission to uphold our views. Morality is important and many laws uphold morality (such as murder).
No legal benefits for homosexuals.

Sincerely yours,
Sandra Pelosi

Sandra Pelosi
767 Kupulau Dr.
Kihei, HI. 96753-9349

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University of Hawai'i at Mānoa

The William S. Richardson School of Law
2515 Dole Street • Honolulu, Hawai'i 96822

Testimony of

Professor Jon M. Van Dyke
William S. Richardson School of Law
October 25, 1995

before the

Commission on Sexual Orientation and the Law

BAEHR V. LEWIN, 74 Haw. 530, 852 P.2d 44 (1993)

HOLDINGS:

** Sex is a "suspect category" under Article I, Section 5 of the Hawaii Constitution.

** HRS 572-1 (restricting the marital relation to opposite-sex couples) "regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex," and thus "establishes a sex-based classification." (64)

** This statute is therefore "presumed to be unconstitutional" unless the state can show that

** "(a) the statute's sex-based classification is justified by compelling state interests and

** "(b) the statute is narrowly drawn to avoid unnecessary abridgements of the applicant couples' constitutional rights." (67)

** The state's argument that "marriage" is innately a relationship between a man and a woman is rejected as "circular and unpersuasive" (61), "tautological and circular" (63), and "tortured and conclusory sophistry." (63)

ACT 217 (June 22, 1994)

** "The legislature finds that Hawaii's marriage licensing laws were originally and are presently intended to apply only to male-female couples, not same-sex couples. This determination is one of policy. Any change in these laws must come from either the legislature or a constitutional convention, not the judiciary."

** "The Hawaii supreme court's recent plurality opinion in Baehr v. Lewin...effaces the recognized tradition of marriage in this State and, in so doing, impermissibly negates the constitutionally mandated role of the legislature as a co-equal, coordinate branch of government."

** "The Hawaii state legislature, as the elected representatives of the people of the State of Hawaii, is, along with the executive branch, the appropriate source of major policy initiatives. The Hawaii supreme court in Baehr has in effect substituted its own judgment for the will of the people of this State."

ACT 217 (June 22, 1994)

** "[T]he Hawaii supreme court in Baehr has interpreted Article I, section 5 in a manner not intended by the framers of Hawaii's Constitution, by analyzing the equal protection issue presented in that case in terms of sexual orientation or preference classification in place of gender classifications."

** "The legislature further finds that section 572-1...[was] intended to foster and protect the propagation of the human race through male-female marriages."

** Legislature recognizes that "same-sex relationships do exist" and

** "Provides assurances consistent with Article I, section 4, of the Hawaii Constitution that the laws of the State do not prohibit religious organizations from solemnizing same-sex relationships;" and

** Establishes seven-member commission on sexual orientation.

THE STRICT SCRUTINY TEST

The burden is on the government to demonstrate:

(1) that it has a compelling state interest AND

(2) that the means chosen to achieve that goal is "narrowly drawn" or is "necessary." Another way the government can meet this second element is to establish that it is using the least drastic alternative to achieve its goal.

When this high level of scrutiny is being utilized, the court will also examine whether the state is consistent and evenhanded in applying its rationale.

COMPELLING STATE INTEREST

In 1993, the state provided a list of the "compelling" interests it believed justified HRS Section 572-1:

** "[a] compelling state interest in fostering procreation," because same-sex couples cannot, as between them, conceive children" and "a child is best parented by its biological parents."

** "same-sex couples will have disproportionate incentives to move and/or remain in Hawaii" costing the state money and distort[ing] the job and housing markets: and "alter[ing] the State of Hawaii's desirability as a visitor destination"

** "allowing same-sex couples to marry conveys in socially, psychologically, and otherwise important ways approval of non-heterosexual orientations and behaviors"

Examples of situations where the US or Hawaii Supreme Court has found "compelling state interests":

United States v. Paradise, 480 U.S. 149 (1987)--"pervasive, systematic, and obstinate discriminatory conduct" in the hiring and promotion practices of the Alabama State Troopers justified a narrowly tailored race-based affirmative action program.

Lee v. Washington, 390 U.S. 333 (1968)--racial tensions in prison justified temporary racial segregation of prisoners.

Regents of the University of California v. Bakke, 438 U.S. 265 (1978)--the goal of racial diversity in the classroom was deemed to be a "compelling state interest" that would justify preferences based on race, but the specific program at issue in that case was struck down because it established a rigid quota and thus was not the "least drastic alternative" that could have been used to promote diversity; the Court indicated that giving minority students a "plus" with regard to admissions would be "less drastic" and therefore permissible.

Holdman v. Olim, 59 Haw. 346, 581 P.2d 1164 (1978)--"the maintenance of security in the prison is sufficient...to establish...a compelling state interest" to justify requirement that female visitors to the prison wear undergarments. Requiring prison to individually determine whether lack of undergarments on individual female visitors "would be regarded as sexually provocative by male residents of the prison...[would create] such intolerable difficulties in making subjective decisions at the prison door as to exclude its use as a less burdensome alternative."

CONSISTENTLY APPLIED?

To meet the Strict Scrutiny Test, legislation must be consistent in its application to the goals identified by the legislature.

In 1984, Hawaii's Legislature deleted the requirement that marriage applicants show that they are not impotent or not physically incapable of entering into a marriage.

"The intent of this amendment was to remove any impediment that may have prevented persons who were physically handicapped or elderly, or who had temporary physical limitations, from entering into a valid marriage." (from Act 217)

LEAST DRASTIC ALTERNATIVE?

Burden is on the government to demonstrate that it has chosen the least drastic, least onerous, and least burdensome method of achieving its goal.

If any other method can be identified to achieve the government's goal, then the method at issue will not be deemed to be "necessary" and "narrowly tailored" to the achievement of that goal.

"Substantial Public Policy Reasons"

** Fundamental Concepts of Fairness, Equality, Openness, and Toleration

** Respect for the Autonomy and Privacy of the Individual

** Respect for History and Tradition, and for Religious and Ideological Diversity

** Governmental Neutrality

THE DOMESTIC PARTNERSHIP OPTION

Grant same-sex couples all the benefits (and burdens) now given to "married couples," but establish a different category--called "domestic partnership," or something similar.

Advantages:

**** Would probably render the current litigation "moot," because the same-sex couples would no longer suffer any tangible "injury" and hence would not have "standing" to pursue the case.**

**** Would provide benefits and a sense of legitimacy to the same-sex couples and thus would be consistent with the state's commitment to fairness and tolerance.**

**** Would respect the views held by some that "marriage" is a special and sacred relationship that should be reserved to opposite-sex couples.**

Full Faith and Credit Clause

U.S. Constitution, Article IV, Section 1: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

** **Ordinarily requires states to enforce court judgments from to other states.**

** **Exceptions exist when fundamental public policy concerns are violated by the other state's decision.**

** **"no state . . . can enact laws to operate beyond its own dominions." Dred Scott v. Sandford (1857)**

WOULD A RESIDENCY REQUIREMENT BE LEGITIMATE?

Yes.

Sosna v. Iowa, 419 U.S. 393 (1975), allowed Iowa to maintain a one-year residency requirement for persons seeking a divorce.

Even though this requirement imposed a burden on the right to travel, the Court accepted the legitimacy of Iowa's stated interest in avoiding becoming "a divorce mill for unhappy spouses" and in having its divorce decrees accepted by other states under the Full Faith and Credit Clause of the U.S. Constitution, Article IV, Section 1.

MEMORANDUM

TO: Chairman Thomas P. Gill, Commission on Sexual Orientation and the Law

FROM: Frederick W. Rohlfing III

DATE: Wednesday, October 25, 1995

RE: Appropriate Recommendations to the Legislature

As you know, I am an attorney in private practice. I was a member of the Commission on Sexual Orientation created by Act 217 of the 1994 Hawaii Session Laws, which has been superseded by the present Commission created by Act 5 of the 1995 Hawaii Session Laws. I am submitting this testimony in response to your invitation to brief the Commission as to the positive and negative aspects of different types of legislation that the Commission could present to the legislature.

I. Background

In order to effectively evaluate possible recommendations to the legislature, it is critical to analyze the judicial decision that set in motion the events leading up to the creation of this Commission and the tasks assigned to it. That decision, of course, is Baehr v. Lewin, 74 Hawaii 530, 852 P.2d 44 (1993).

A. Baehr v. Lewin overview

In Baehr v. Lewin, the Hawaii Supreme Court vacated a Circuit Court judgment dismissing homosexual marriage claims, and ruled that Hawaii's marriage law allowing only heterosexual couples and not same-sex couples to obtain a marriage license constitutes sex discrimination under the State Constitution's equal protection and equal rights provisions.

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The case began in 1991 when three same-sex couples who had been denied marriage licenses by the State Department of Health ("DOH") brought suit in state court against the DOH Director. Hawaii law requires couples wishing to marry to obtain a marriage license (common law marriage is not authorized). H.R.S. § 572-1 (1985). While the marriage license law did not explicitly prohibit homosexual marriage at the time, it used terms of gender in such a way as to make clear that only heterosexual couples could marry. The plaintiffs sought a judicial declaration that the Hawaii marriage license law is unconstitutional insofar as it prohibits homosexual marriage, and an injunction prohibiting state officials from denying marriage licenses to homosexual couples on account of the heterosexuality requirement.

The Hawaii Supreme Court vacated the Circuit Court judgment, in part, and remanded the case for trial, finding unresolved factual questions. Justice Levinson's opinion was joined in by Chief Justice Moon.

In the first part of his opinion, Justice Levinson analyzed the argument of the homosexual couples that the limitation of marriage to heterosexual couples violated the constitutional right of privacy. Justice Levinson noted: "In this connection, the United States Supreme Court has declared that 'the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause.'" 74 Hawaii at 552, 852 P.2d at 55, quoting Zablocki v. Redhail, 434 U.S. 374, 384 (1978).

Justice Levinson's correct resolution of this issue is often overlooked. He rightly held that there was no "fundamental constitutional right to same-sex marriage" because such a relationship is not "rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all

our civil and political institutions." 74 Hawaii at 557, 852 P.2d at 57. It is ironic that while Justice Levinson relies almost wholly on the holding of the United State Supreme Court in Loving v. Virginia, 388 U.S. 1 (1967) to support his equal protection analysis, he nevertheless found no fundamental constitutional right to same-sex marriage, where the Court in Loving by contrast held that the prohibition on inter-racial marriage deprived an interracial couple "of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment." Id. at 12.

It is only after concluding that there is no fundamental constitutional rights to same-sex marriage that Justice Levinson gets off the track. Having determined that there was no fundamental constitutional right to same-sex marriage, he then proceeded to examine whether homosexual couples seeking marriage licenses were denied the equal protection and equal rights guarantees of the Hawaii Constitution. Woodenly analogizing from the equal protection inquiry of Loving v. Virginia, Levinson declared that Hawaii's marriage license law facially "discriminates based on sex against the applicant couples," thereby presenting an apparent violation of the state constitution provisions protecting equality. 74 Hawaii at 557-583, 852 P.2d at 57-62. After suggesting that none of the prior cases rejecting homosexual marriage claims had directly addressed equal protection claims, Judge Levinson held that sex is a "suspect category," and that laws discriminating on the basis of sex must be subject to "strict scrutiny." 74 Hawaii at 580, 852 P.2d at 67.

On motion for reconsideration or clarification, Chief Justice Moon, Associate Justice Levinson, and newly appointed Associate Justice Paula Nakamura declared that the heterosexual marriage requirement was presumptively unconstitutional unless the state established that it furthers "compelling state interests and is narrowly drawn to avoid unnecessary abridgements of

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constitutional rights." 74 Hawaii at 646, 852 P.2d at 67.

B. Critique

1. Justice Levinson failed to understand the historical basis for the Loving v. Virginia equal protection analysis.

What is striking about Justice Levinson's decision is his failure to perceive the crucial distinctions between the Virginia's anti-miscegenation law and Hawaii's heterosexuality requirement in its marriage law. This is all the more surprising in view of Justice Levinson's prior holding that Hawaii's marriage law did not violate the right of privacy because there was no "fundamental constitutional right to same-sex marriage." Since there is no fundamental constitutional right to same-sex marriage, the role of gender in Hawaii's marriage law required more respectful treatment than being summarily thrown upon Justice Levinson's procrustean bed of equal protection analysis.

Justice Levinson's sex-discrimination analogy to the racial discrimination found in Loving overlooks the unique type of discrimination that was the specific, emphatic crux of the Loving decision: White-Supremacy racism. The U.S. Supreme Court specifically described in Loving the White-Supremacist policy that historically and explicitly undergirded the Virginia laws. See 388 U.S. at 6, 7. The Court emphasized: "The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintenance White Supremacy." 388 U.S. at 11.

As stated by Cass Sunstein, one of my law professors at the University of Chicago:

> The key sentence in Loving says that "the racial classifications [at issue] must stand on their own justification, as measure designed to maintain White Supremacy." This striking reference to White Supremacy--by a unanimous court, capitalizing both words and

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> speaking in thses terms for the only time in the nation's history--was designed to get at the core of Virginia's argument that discrimination on the basis of participation in mixed marriages was not discrimination on the basis of race. . . . Viewed in context--in light of its actual motivations and its actual effects--the ban was thus part of a system of racial caste.

Cass R. Sunstein, Homosexuality and the Constitution, 70 Ind. L.J. 1, 17-18 (1994).

Justice Levinson should have recognized, as Judge Heen did, that the identical treatment of both men and women under the Hawaii marriage law makes it consistent with the equal protection provisions of Hawaii's Constitution. See 74 Hawaii at 590-93, 852 P.2d at 71-72. The heterosexual marriage requirement does not discriminate on the basis of sex because it does not "draw a line" between what men and women are permitted to do, or the governmental benefits they may obtain. Men and women are treated exactly the same by the heterosexual marriage requirement. Both genders are equally required to marry only persons of the other gender. It does not give any advantage to one gender or the other.

Justice Levinson's response to Judge Heen's insight is to impatiently refer, without any analysis, to Loving's rejection of the equal application argument in the context of Virginia's anti-miscegenation statute. Justice Levinson brushes Judge Heen's objection aside without noting that the Supreme Court in Loving did not declare that equal application to both classes was an irrelevant consideration or an unacceptable answer to a charge of violation of equal protection generally. The Supreme Court only rejected the specific equivalence argument in the context of racial discrimination in a scheme designed to enforce White Supremacy.

2. Justice Levinson failed to analyze the marriage institution in relation to equal rights for women

In order overcome the facial neutrality of Hawaii's heterosexuality requirement, there

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would need to be convincing evidence that the marriage law's intent or effect was to unfairly favor one sex over another. No such analysis was even attempted by Justice Levinson. There is certainly no evidence in the record of this Commission supporting such a thesis.

3. Justice Levinson failed to recognize the sex-integrative role of marriage

Statutes prohibiting homosexual marriage do not convey any sexist message about the inferiority or superiority of one gender in relation to the other. Indeed, by requiring one person of each sex, such laws convey an unmistakable message about the indispensable equality, equal worth, and equal contribution of both sexes.

If I can draw an analogy, it would be to envision a society consisting exclusively of black and white individuals, with the biological possibility of children resulting only from interracial marriages. Curiously, the children born to these unions are either black or white. Tradition over the course of millennia requires one black and one white to any marriage. In addition to the obvious benefit of continued procreation of offspring, this social convention has effectively integrated the races and promotes interracial harmony. An attempt by two whites or two blacks to argue they should be allowed to practice racial separatism would be seen as obviously not in society's best interests, and would be justifiably rejected.

For Justice Levinson to analogize Hawaii's heterosexual marriage law requirement to Virginia's White Supremacist anti-miscegenation law is the ultimate irony. Justice Levinson should have recognized that the sexual apartheid implicit in homosexual marriage is the more valid analogy to the anti-miscegenation statutes of the South.

If after careful consideration and discussion of these arguments, Justice Levinson still was unable to agree that Hawaii's marriage law does not discriminate on the basis of sex, Justice

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Levinson could have applied most the type of intermediate standard urged by Justices Brennan, White, Marshall, and Blackmun in Regents of the University of California Regents v. Bakke, 438 U.S. 265 (1978). These justices held that strict scrutiny should not be applied to racial classifications intended to remedy past racial discrimination. Instead, the intermediate standard of review developed by the Supreme Court in sex discrimination cases was more appropriate. Yet even this more limited standard of review is arguably inappropriate in such instances. See Laurence H. Tribe, American Constitutional Law (1988) at 1521-1544.

4. Justice Levinson did not consider the intent of the framers of Hawaii's equal protection and equal rights provisions.

Most disconcerting is Justice Levinson's failure to consider the intent of the framers of Hawaii's equal protection and equal rights provisions. There is simply no discussion about the intent of the drafters or of the voters who ratified these constitutional provisions.

Whatever else may be said about the Fourteenth Amendment to the U.S. Constitution, it is undeniable from both its text and its history that it was precisely intended to outlaw state action designed to foster White-Supremacy racism by forcing acceptance of the idea of the racial inferiority of Black Americans, like Mrs. Loving, and to protect the legal rights of white Americans, like Mr. Loving, who accepted to full personal and social equality of Blacks.

By contrast, nothing in the text or history of the Hawaii equal protection and equal rights provisions discloses a comparable intent to protect or promote the social, legal or political equality of homosexual relations. Had Justice Levinson attempted to ascertain the intent of the framers of Hawaii equal protection provisions, it is likely he would have reached the same [illegible] as Mr. Britt of the Commission has. It appears equally clear the Hawaii supporters of

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the State's special gender guaranties and equal protection guarantees, did not entertain ending gender discrimination in marriage." Memorandum, October 20, 1995 to Chair Thomas Gill, and Commissioners, Commission on Sexual Orientation and the Law.

C. **Legislative response**

After the Hawaii Supreme Court decision in Baehr, the Hawaii legislature amended the law to clarify in unmistakable language that marriage is permitted only between a man and a woman. Hawaii 1994 Session Laws, 1994 Regular Session of the 17th Legislature, Act 217. As a political price for the clarifying statute, however, liberal legislators obtained a provision in the legislation establishing an eleven-member Commission on Sexual Orientation and the Law.

After federal lawsuit resulted in the removal of four members of the Commission, the legislature passed and Governor Cayetano approved a new bill authorizing the appointment of a new seven-member commission. Hawaii 1995 Session Laws, 1995 Regular Session of the 18th Legislature, Act 5.

Act 5 tasks the Commission to:

> (1) Examine the precise legal and economic benefits extended to married opposite-sex couples, but not to same-sex couples;
>
> (2) Examine whether substantial public policy reasons exist to extend or not to extend such benefits in part or in total to same-sex couples; and
>
> (3) Recommend appropriate action which may be taken by the legislature to extend such benefits to same-sex couples.

II. **Legislative action?**

Comprehension of the errors contained in Justice Levinson's Baehr v. Lewin opinion

is critical to responding to the legislature's charge to the Commission to "[r]ecommend appropriate action which may be taken by the legislature to extend [legal and economic benefits extended to married opposite-sex couples] to same-sex couples." This reference to "benefits" has its genesis in Justice Levinson's assertion that because homosexual couples are not allowed to marry, they are deprived "of access to a multiplicity of rights and benefits that are contingent upon [marital] status." 74 Hawaii at 560, 852 P.2d at 59.

It appears that the legislature believes itself hostage to Justice Levinson's analysis, and has decided that if it can extend the same "legal and economic benefits" to homosexual couples as are extended to married couples, the "problem" of Baehr v. Lewin will be solved politically, and perhaps marriage can remain an exclusively heterosexual institution. The problem with this approach is that it is futile. The fundamental "legal and economic benefits" of marriage are so bound up with the institution of marriage as it has developed over the course of millennia as to be inseparable from marriage. Justice Levinson notwithstanding, marriage is not a creature of the state, even where the state claims the right to exclusively license it, and the legal and economic benefits of marriage extend much further back in time than the creation of the State of Hawaii.

Moreover, as Professor Randall W. Roth stated to this Commission in his review several legal consequences of marriage: "All could be considered 'benefits,' but in most cases have the potential to be 'detriments.' . . . These brief comments about just a few, selected areas of the law illustrate that marriage can have powerful legal consequences--sometimes good, sometimes not."

There are three legal responses to actions of individuals. The category concerning least favored conduct can be called "prohibited conduct." This includes activities and associations that the law proscribes, outlaws, bans and forbids--usually by means of criminal prohibition. The

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second category can be called "permitted relationships and behavior." This includes connections and actions that are tolerated, condoned, and allowed. The third category can be called "preferred relationships and conduct." It includes those relations and activities that are singled out for special approval, encouragement, and preference, including those officially endorsed as fundamental to our society, culture, and democratic way of life.

Historically, homosexual relations have been consistently placed in the prohibited category. Since the passage of the penal code, Hawaii has not punished private homosexual relations between consenting adults. Nor does it punish adultery or fornication. Several other states also now take this approach. But no state has yet to move to reclassify the status of homosexual relations from "prohibited" to generally "preferred" behavior. That is precisely what the proposal to legalize homosexual marriage or marriage-like domestic partnerships would do. Marriage is one of the oldest and most widely-respected types of preferred, specially protected relations. The gay/lesbian demand that homosexual couples be allowed to marry is a demand for special preferred status for homosexual relations. The demand for same-sex marriage is not merely a demand for "tolerance" of homosexual relations. Rather, it is a claim for the highest type of specially preferred, exceptionally secured status that the law confers.

The domestic partnership proposals that I have reviewed lack a persuasive rationale other than as a response to Justice Levinson's view of constitutional law. Why is domestic partnership to be limited to just two individuals? Business partnerships usually include more than two persons. Why is an individual limited to just one domestic partnership? Business partners, unless they agree otherwise, can also belong to other partnerships. Any why do we want to encourage the formation of these partnerships anyway? Why should people who are single and

choose to live alone be required to pay taxes that are not only used to favor married couples through the provision of government economic benefits, but favor pairings of homosexual couples?

The reference in one piece of proposed legislation to marital status discrimination in employment in the legislative findings section is puzzling, since such discrimination is already prohibited by law.

Domestic partnerships are the means of conferring preferred status upon homosexual couples, but without calling it marriage. It will thereby dilute the significance of marriage, and encourage the sexual apartheid I have described above. I therefore believe this Commission should inform the legislature that any means of extending the traditional benefits and obligations of marriage to homosexual couples is inappropriate.

As an alternative, I would propose that certain government bestowed economic benefits based upon marital status might be viewed as unnecessary to the continued viability of marriage, and simply eliminated. Such removal would make the law more neutral with regard to marital status, without conferring preferred status upon homosexual groupings.

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THE HAWAII LEGISLATURE HAS COMPELLING REASONS TO ADOPT A COMPREHENSIVE DOMESTIC PARTNERSHIP ACT

by Thomas F. Coleman

In May 1993, the Hawaii Supreme Court issued its landmark decision in *Baehr v. Lewin* (1993) 74 Haw. 645, 852 P.2d 44. In *Baehr*, the judicial branch of government essentially challenged the executive and legislative branches to justify the state's current legal treatment of same-sex couples. Invoking the equal protection clause of the Hawaii Constitution, the justices ordered the state to show cause why same-sex couples should not be allowed to get married under Hawaii law and thereby obtain all of the benefits and incur all of the obligations of state-sanctioned marriage.

The executive branch, through the office of the Attorney General, has been preparing to defend the status quo in an upcoming trial that will commence in July 1996. Under the status quo, same-sex couples may not marry. As a result, gay and lesbian partners who have long-term committed relationships are denied scores of benefits associated with marriage. For example, a spouse can sue a drunk driver who wrongfully kills her mate. Same-sex couples have no such right to sue. An employee can put his or her spouse on a health plan at work. Same-sex couples have no right to such health benefits. Married couples can file a joint tax return if they find it financially beneficial to do so. Same-sex couples can't. The list of benefits currently available to married couples but that are denied to same-sex couples could go on and on.

Under the status quo, an opposite-sex couple who is married for just one day is entitled to dozens of special legal protections and benefits. However, same-sex partners who have lived together in an intimate and interdependent relationship for 20 years are basically considered strangers in the eyes of the law. It is hard to imagine legally sound reasons for such disparate treatment. As a result, most legal scholars and commentators believe that the Attorney General of Hawaii will be unsuccessful in defending the status quo in court, that is, unless the Legislature changes the status quo before the *Baehr* case returns to the Supreme Court.

Although the Legislature has criticized the decision of the Supreme Court in *Baehr* and has steadfastly refused to legalize same-sex marriage through the legislative process, it has nonetheless expressed a willingness to reexamine the status quo with an eye toward possible legal reform. The Legislature established a Commission on Sexual Orientation and the Law to study legal, economic, social, and policy issues that may be involved in such reform, directing the Commission to recommend an appropriate legislative response to the challenge presented by the Supreme Court's decision in *Baehr*.

An analysis of the legislation that created the Commission suggests that the Legislature is looking for a solution -- a mechanism to eliminate unjust treatment of same-sex couples -- that does not require the legalization of same-sex marriage. Some legislative leaders have spoken openly of a domestic partnership act as an appropriate legislative action. The Governor has indicated that he would sign such measure if it is presented to him by the Legislature.

This article explores reasons why the Legislature may prefer a comprehensive Domestic Partnership Act as an alternative to court-mandated same-sex marriage. If lawmakers fail to pass such a bill, the Supreme Court will not have the opportunity to evaluate the constitutionality of this option.

The Commission on Sexual Orientation and the Law should recommend this approach so that all policy choices are ulti-

mately considered by the Legislature and the Supreme Court before *Baehr v. Lewin* is finally decided.

The factual information, and legal precedents, cited in this article reflect realities that should be considered as the Commission on Sexual Orientation and the Law deliberates what to recommend to the Hawaii Legislature. The purpose of this article is not to support or justify the status quo, but to report it accurately so that policy recommendations are based on historical precedents, evolving social attitudes, and current political realities.

Some of the court decisions cited within are more than 10 or 20 years old, and as a result, the judges writing those opinions did not have the benefit of considering many of the social and legal changes that have occurred in American society in subsequent years. Nonetheless, these decisions have not been overturned and therefore remain as valid judicial precedents that may not be rejected out of hand.

It is hoped that the information and arguments contained in this article will fill an advocacy void that currently exists in the debate over same-sex marriage.

The viewpoints from both ends of the political spectrum, i.e., those advocating same-sex marriage and those advocating no change at all, have been well represented in the judicial and legislative processes so far. What has been missing from the debate is a voice for those caught in the middle -- persons who respect diversity and who want to see an end to unjust discrimination, but who believe that legalizing same-sex marriage is not the appropriate approach, at least not at this time in history.

The people in the middle, those with moderate political views on this subject, include gays and straights, men and women, republicans, democrats, and independents. Some simply prefer gradual social and legal change. Others, especially some in the gay and lesbian community, fear a political backlash if same-sex marriage is legalized at a time when two-thirds of the public opposes such a move.[1]

In an attempt to find common ground among persons of good will from all political perspectives, this article proposes the passage of a comprehensive domestic partnership act as a political solution that may satisfy the equal protection requirements of the Hawaii Constitution.

THE LEGISLATIVE HAS COMPELLING REASONS TO CHOOSE DOMESTIC PARTNERSHIP OVER SAME-SEX MARRIAGE

There are many reasons why the Hawaii Legislature may decide to pass a comprehensive domestic partnership act rather than have the judiciary order the state to issue marriage licenses to same-sex couples. Even if each reason alone would not be sufficient to satisfy the Supreme Court, collectively these state interests may be compelling enough to: (1) prompt the Legislature to pass such an act, and (2) convince the court to accept domestic partnership as an adequate remedy to provide same-sex couples equal protection under Hawaii law.

1. The Legislative Process Normally Involves Gradual Change Rather than Radical Reform

Most legislators, like most people, are usually moderate in their political and social views. They understand that life is not static. In order to be responsive to the needs of their constituents, legislators know that public policies, and the laws that reflect those policies, must adapt to keep pace with the changing conditions of society.

The Hawaii Legislature has passed law reform measures over the past two decades that reflect changing attitudes about homosexuality. It was one of the first state legislatures to decriminalize private homosexual acts between consenting adults. (*1972 Hawaii Laws*, ch. 9, sec. 1.) Four years ago, legislators took another major step forward by

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prohibiting sexual orientation discrimination in employment, housing, and public accommodations. (*1991 Hawaii Laws*, ch. 2, sec. 1.) Passage of a domestic partnership act would be the logical next step as the process of law reform continues.

When fundamental rights are not being denied, the federal Constitution gives much leeway to legislators as they respond to demands for reform. The United States Supreme Court has acknowledged the prerogative of the legislative branch to opt for gradual change rather than radical reform, stating: "[A] legislature need not 'strike at all evils at the same time,' and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' ...." (*Katzenbach v. Morgan* (1966) 384 U.S. 641, 657.)

The Hawaii Supreme Court has acknowledged that same-sex marriage is not a fundamental right under the federal Constitution. The nation's highest court "was obviously contemplating unions between men and women when it ruled that the right to marry was fundamental." (*Baehr v. Lewin, supra*, 852 P.2d, at p. 56.)

The court declined to recognize a new fundamental right to same-sex marriage under the state Constitution, stating:

"[W]e do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed. Accordingly, we hold that the applicant couples do not have a fundamental constitutional right to same-sex marriage arising out of the right of privacy or otherwise." (*Baehr, supra*, 852 P.2d, at p. 57.)

The court emphasized that judges are not free to declare fundamental rights on the basis of their own "personal and private notions," but must look to the "traditions and collective conscience" of the people to determine whether a principle is so rooted there as to be ranked fundamental. (*Ibid.*) The court accepted the fact that marriage has traditionally been limited to opposite-sex couples. However, it suggested that the state's equal protection clause would provide "a potential remedy" to same-sex couples.

The decision in *Baehr* clearly underscored the government's need to respect societal traditions and the collective conscience of the people. However, it also highlighted the need to eliminate unjust discrimination.

By passing a comprehensive domestic partnership act, the Legislature could balance these competing interests, and at the same time continue the process of incremental change. Such an act would confer all the rights and obligations normally associated with marriage upon same-sex couples who obtained a Certificate of Domestic Partnership from the state.

Passage of such an act may also satisfy the demands of the equal protection clause of the Hawaii Constitution to the extent that domestic partners are given all the rights and obligations that Hawaiian law confers on married couples.

2. The Public Overwhelmingly Opposes Same-Sex Marriage but Favors Domestic Partnership

The Legislature is the political branch of government. As elected officials, legislators have a duty to represent their constituents. In a representative democracy, legislators usually carry out the will of the people.

Public opinion plays an important role in the political process. Therefore, in the debate over whether to legalize same-sex marriage, public opinion on the subject of homosexuality must be taken seriously.

It seems that nearly everyone who considers the issue of same-sex marriage understands that the issue of homosexuality is involved in the debate.

The plaintiffs in *Baehr* themselves injected the issue of homosexuality into the case by "Proclaiming their homosexuality and asserting a constitutional right to sexual orientation." (*Baehr, supra*, 852 P.2d, at p. 52.) The Attorney General countered that the plaintiffs did not have a right "to enter into state-licensed homosexual marriages." (Id, at p. 51.) The trial court concluded that "homosexual marriage" is not a fundamental right. (Id, at p. 54.) Justice Burns, who wrote a concurring opinion in the Supreme Court felt that the outcome of the case hinged on the nature and origins of sexual orientation in general, and homosexuality in particular.

A majority of Supreme Court justices, however, insulated themselves from dealing with the issue of homosexuality by declaring that the sole issue in the case was that of sex discrimination. According to them, homosexuality had nothing to do with the issue of same-sex marriage.

In a sense, these Supreme Court justices exalted form over substance. They were correct that the case involved sex discrimination inasmuch as marriage has been limited to partners of opposite genders. However, by unrealistically narrowing their judicial focus, and ignoring human experience, the Supreme Court majority erroneously concluded that homosexuality was irrelevant to the issue of same-sex marriage.

The concept of "marriage" carries with it implications or assumptions of sexual intimacy between the marriage partners. No one would seriously question the fact that the overwhelming majority of persons who get married are involved in a sexual relationship with each other. Although the status of marriage does not *require* sexual relations between spouses, nearly all persons who marry would contemplate such intimacy as part of the marriage relationship.

Laws are enacted in contemplation of probabilities, not theoretical possibilities. Therefore, when the Legislature considers the issue of same-sex marriage, it is reasonable for the Legislature to assume that most same-sex couples who would get married, if marriage were available to them, would be involved in a homosexual relationship. As a result, the Legislature may appropriately consider public opinion concerning homosexuality as it grapples with the prospect of same-sex marriage.

The general public is overwhelmingly opposed to the legalization of same-sex marriage. National opinion polls consistently show that the general public is opposed to gay marriage by a 2 to 1 margin. A survey of registered voters would probably show 70% opposed to legalizing same-sex marriage.[2]

Polling in Hawaii has shown similar attitudes about same-sex marriage, with 67% of respondents opposed, 25% in favor, and 8% unsure.[3] If the "unsure" respondents were forced to choose and assuming they split evenly, the result would be that 71% of the general adult population in Hawaii is opposed to same-sex marriage. Making adjustments for more conservative attitudes of *voters*, in contrast to the public at large, this could translate into 75% of Hawaiian voters being against the legalization of same-sex marriage.

Contrast this with growing support for domestic partnership rights. In 1984, the city of Berkeley, California became the first employer in the nation to grant employee benefits, such as health and dental coverage, to the domestic partners of its employees. Today, hundreds of public and private employers offer such benefits.

Public employers have done so through the democratic process. City council members, as elected representatives of the people, have voted to support domestic partnership benefits. In two instances where the issue was placed on the ballot, voters in San Francisco and Seattle supported the concept of domestic partnership.

Actions of California legislators also provide some indication of public attitudes about domestic partnership versus same-sex marriage. In 1977, the Legislature voted to

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restrict marriage to opposite-sex couples. In 1991, a bill was introduced (AB 167) to legalize same-sex marriage. The bill died when it was unable to gain the support of even one member of the democrat-controlled Assembly Judiciary Committee.

In sharp contrast, both houses of the California Legislature passed AB 2810 in 1994. The bill would have established a statewide domestic partnership registry, entitling domestic partners to various benefits. Although the bill was ultimately vetoed by the Governor, its passage through the legislature demonstrated a growing public acceptance of domestic partnership rights, despite continuing strong opposition to same-sex marriage.

Gains made by employees in the private sector also evidence growing public support for domestic partnership. Today, hundreds of private employers, and dozens of unions, provide domestic partner employment benefits such as sick leave, bereavement leave, medical and dental insurance, and sometimes pension survivor benefits.

Public support for domestic partnership benefits stems from several attitudes. Although the public takes a narrow view of "marriage," the contrary is true with respect to the concept of "family." For example, a national poll conducted in 1989 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% stuck to a rigid definition of family as "a group of people related by blood, marriage, or adoption."

The concept of same-sex domestic partnership rights seems to reconcile conflicting public attitudes about homosexuality. Although 61% of adults believe that "gay sex is always wrong,"[4] 63% oppose making consenting adult homosexual relations a crime,[5] and more than 70% oppose discrimination against gays in employment and housing, and a majority of adults would support a civil rights bill to prohibit such discrimination.[6]

The public seems to be sending a clear message to its elected representatives. They oppose discrimination against gays and lesbians, but do not want lawmakers to legalize same-sex marriage. However, with growing public support for the use of inclusive definitions of "family" and increasing comfort with the concept of domestic partnerships, passage of a comprehensive domestic partnership act is the appropriate political remedy to eliminate unjust discrimination against same-sex couples.

3. Legalizing Gay Marriage in Hawaii Would Create Havoc in Intergovernmental Relations

Although Hawaii consists of several islands, the government of Hawaii is not isolated from the rest of the world. Hawaii has formal legal ties to the federal government and to each of the other 49 states. It also has legal and economic connections with many foreign nations.

As it ponders how to respond to the constitutional challenge presented in *Baehr v. Lewin*, the legislature must consider the impact that legalizing same-sex marriage, or recognizing domestic partnerships, would have on intergovernmental relations.

Passage of a domestic partnership act could provide same-sex couples all of the rights and obligations that Hawaii legislators have the authority to confer within the territorial and legal jurisdiction of the state of Hawaii. Domestic partnership rights could be limited to bone fide residents of Hawaii, with a short waiting period before partners could register their relationships. Such a measure would have few intergovernmental ramifications since neither the federal government nor any state has adopted a comprehensive domestic partnership law.

Legalizing same-sex marriage in Hawaii, on the other hand, has intergovernmental implications that are mind boggling since every state and every nation has marriage laws, and marriages in one jurisdiction are generally recognized as valid everywhere. However, since no state or nation currently

recognizes same-sex marriages, and since opposition to such recognition seems universally strong, it is likely that governments outside of Hawaii would refuse to recognize same-sex marriages performed in Hawaii.

Evan Wolfson, cocounsel for the plaintiffs in *Baehr v. Lewin*, has warned the gay community that if same-sex marriage is legalized, "there will be a tidal wave out of Hawaii that will reach ever corner of the country."[7] A "Million Couple March on Hawaii" is not out of the question. Leaders in the gay and lesbian community predict that couples from each state in the nation will fly to Hawaii, get married, and return to their home states with marriage certificates in hand. An ongoing confrontation with each state government and a myriad of federal agencies would then begin. The state of Hawaii would be caught in the middle of these legal battles for years to come.

Confrontation with Congress

The legalization of same-sex marriage in Hawaii will automatically create a confrontation with Congress since the term "spouse" appears more than 1,400 times in federal statutes. Although federal law usually has deferred to state law to determine whether a couple is married, judicial precedent suggests that federal law will not recognize same-sex marriages as valid.

In *Adams v. Howerton* (9th Cir. 1982) 673 F.2d 1036, 1040, a unanimous Court of Appeals stated: "The term 'marriage' ordinarily contemplates a relationship between a man and a woman . . . . The term 'spouse' commonly refers to one of the parties in a marital relationship so defined. Congress has not indicated an intent to enlarge the ordinary meaning of those words." The court held that even if a gay couple secured a marriage certificate from a state government, federal law would not recognize the couple as "spouses" without specific Congressional approval.[8]

It is unlikely that such approval will be forthcoming anytime soon. Both houses of Congress are currently controlled by conservative legislators. It is no secret that conservative representatives, whether democrat or republican, generally favor "traditional family values" and oppose "gay rights." While a recent national poll showed that 61% of all adults think "homosexual relations are always wrong," 70% of republicans and 75% of all conservatives felt that way.[9]

Hawaii administers federal laws and receives federal funds for such programs as public housing, public assistance, medicare, social security, and FHA housing loans. If it legalizes same-sex marriage, Hawaii will become embroiled in costly lawsuits and possibly lose federal funds for a variety of programs when the federal government refuses to recognize two men or two women as "spouses" under federal law.

Confrontations with Other States

No state in the nation recognizes marriages between two men or between two women as legally valid. In fact, the trend during the past decade has been to replace gender-ambiguous marriage laws with statutes specifying that marriage is a relationship between a man and a woman.

Litigation over the definition of marriage has always resulted in the same judicial conclusion: marriage contemplates a relationship between persons of the opposite sex.[10]

Same-sex couples have filed lawsuits claiming that they have a constitutional right to marry. Outside of Hawaii, these lawsuits have invariably been unsuccessful.

In *Baker v. Nelson* (1972) 409 U.S. 810, the United States Supreme Court ruled that the federal constitution does not require states to issue marriage licenses to same-sex couples.[11] More recently, in *Dean v. District of Columbia* (1995) 653 A.2d 307, the District of Columbia Court of Appeal ruled that same-sex marriage is not a fundamental right protected by the due process clause of the federal Constitution.

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State courts have also denied constitutional challenges to marriage laws that recognize only opposite-sex relationships. In *Singer v. Hara* (1974) 552 P.2d 1187, 1191, an appellate court in the state of Washington ruled that denying a marriage license to same-sex couples did not violate the equal protection clause of the state constitution. Recently, an appeals court in New York ruled that the state's refusal to consider same-sex couples as "spouses" did not deny them equal protection of the law. (*In re Cooper* (1993) 592 N.Y.S.2d 797.)

With the Hawaii Supreme Court on the verge of legalizing same-sex marriage, legislators in some states have introduced bills to reaffirm that same-sex marriages performed out of state will not be recognized in their home state.

Full Faith and Credit. Many gay rights activists hope that the Full Faith and Credit Clause of the federal Constitution will require each of the other 49 states to legally recognize same-sex marriages performed in Hawaii. However, such a result is unlikely.

As one law review article has summed up the problem:

"Because each state possesses a great interest in the marital relationships within its borders, each state has traditionally been sovereign to decide for itself who should be able to occupy these relationships. Therefore, a situation may arise where citizens from other states will flock to Hawaii to obtain same-sex marriages and then return to their domiciles. If all states are forced to recognize these marriages, Hawaii will effectively encroach upon the sovereignty of other states."[12]

Another legal commentator has predicted that many states "will fight tooth and nail to preserve the status quo and to prevent same-sex couples from entering their territory."[13] Rather than compelling interstate recognition of marriage under the Full Faith and Credit Clause, he forecasts that the United States Supreme Court "will most likely consign the question to the 'dismal swamp' of conflicts law" and as a result, "the battle for recognition of same-sex marriages will be fought state by state. . . ."

Some precedents suggest that the Full Faith and Credit Clause will not prove to be the legal magic wand that many gay rights activists are hoping for. For example, in *Pacific Employers Ins. Co. v. Industrial Accident Commission of California* (1939) 306 U.S. 493, 504-505, the federal Supreme Court stated that "Full faith and credit does not here enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." This is because there is a "public policy" exception to the Full Faith and Credit Clause.

In *Nevada v. Hall* (1979) 440 U.S. 410, 424, the Supreme Court ruled that the Full Faith and Credit Clause did not require California to enforce a Nevada statute where doing so would "be obnoxious to its statutorily based policies."

The court explained the public policy exception another way in *Carroll v. Lanza* (1955) 349 U.S. 408, 412:

"The Full Faith and Credit Clause does not require a State to substitute for its own statute, applicable to persons and events within it, the statute of another state reflecting conflicting and opposed policy."

The Supreme Court has refused to force state governments across the nation to recognize the right of consenting adults of the same sex to have intimate relations in the privacy of their own home. In *Bowers v. Hardwick* (1986) 487 U.S. 186, the court upheld the authority of the states to impose criminal penalties on such conduct. It seems unlikely that the Supreme Court would authorize the criminalization of homosexual conduct, and at the same time require every state to recognize Hawaiian same-sex marriages as valid everywhere, with all of the rights and benefits attached thereto.

Therefore, if Hawaii legalizes same-sex marriage, one can realistically expect

dozens, if not hundreds, of lawsuits filed throughout the nation demanding legal recognition everywhere. The end result will likely be a Supreme Court decision declaring that there is no federal right to such recognition, thus prompting a new round of lawsuits under state constitutional law.

The state of Hawaii, however, will not merely sit on the sidelines as a spectator watching the explosion of lawsuits. Hawaiian courts, and other agencies of Hawaiian government, will be drawn into legal battles involving invididuals, corporations, and government agencies in other states.

Interstate Compacts. The state of Hawaii is a signatory to a variety of Multistate or Interstate Compacts. For example, Hawaii has signed the Multistate Tax Compact (HRS § 255-1), the Adoption Assistance Compact (HRS § 350C-4), the Interstate Compact on Placement of Children (HRS § 350E-1), the Interstate Compact on Juveniles (HRS § 582-1), and the Western Interstate Corrections Compact (HRS § 355-1).

These are binding and enforceable contracts. One party to such a contract may not unilaterally change its terms. Since "marriage" and "spouse" have always been considered to involve only opposite-sex relationships, what will happen if Hawaii changes the definition to include same-sex couples? If other signatory states resist, as they likely will, litigation will result. At what cost to the taxpayers of Hawaii, for how long, and with what result?

Imagine litigation under the Western Interstate Corrections Compact. Hawaii prisoners who are temporarily housed in California may demand conjugal visits with a same-sex spouse. If California refuses, will the state of Hawaii sue California for breach of contract because a convicted murdered or arsonist is being denied equal rights as guaranteed by the interstate compact?

Will Utah or Nevada agree to the placement of children in Hawaiian same-sex marriages on the same terms and conditions as opposite-sex marriages? If not, will they withdraw from the compact or sue Hawaii for breach of contract because Hawaii unilaterally changed a material term of the agreement?

These problems are avoided by passage of a comprehensive domestic partnership act. Domestic partners would receive the same rights and obligations of spouses under *Hawaii law*, but states signing interstate compacts with Hawaii would not be forced to recognize such relationships as marriages, unless and until the signatory states signed a new interstate compact to that effect.

Uniform Codes. Hawaii also has adopted more than a dozen uniform state laws, such as the Uniform Partnership Act (HRS § 425-104), Uniform Commercial Code (HRS § 490:1-102), Uniform Transfers to Minors Act (HRS § 553-A-23), Uniform Probate Code (HRS § 560:1-102), Uniform Fraudulent Transfer Act (HRS § 651C-1), and the Uniform Reciprocal Enforcement of Support Act (HRS § 576-23), to name a few.

If Hawaii is the only state to legalize same-sex marriage, one of the purposes of adopting a uniform code will be frustrated. States that adopt uniform laws basically agree to be team players.

For example, the Hawaii Legislature has declared a strong public policy in favor of judicial interpretation of uniform codes consistent with other adopting states. HRS § 1-24 instructs the Hawaii judiciary that "All provisions of uniform acts adopted by the state shall be so interpreted and construed as to effectuate their general purpose to make uniform the laws of the states and territories which enact them."

The legislature has emphasized the importance of this public policy by including a specific mandate of uniform interpretation in many of the specific uniform codes." The state's interest in being a team player and adopting common definitions of basic terms such as "spouse" or "marriage" is undermined if Hawaii "does its own thing" on same-sex marriage.

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However, passage of a domestic partner act could avoid this unfavorable consequence. The definition of "spouse" in the uniform codes could remain unchanged. The domestic partnership act would be contained in a separate omnibus statute that would create a new institution called "domestic partnership." This act, however, would clarify that, for purposes of all Hawaii laws, domestic partners would receive the same benefits and obligations as spouses. As a result, Hawaii could continue to be a team player in the uniform code system, but offer equivalent benefits and obligations to same-sex spouses under different terminology.

International Relations

Same-sex *marriage* is not currently recognized by any nation. However, "registered partnership" laws have been enacted in Sweden, Norway, and Denmark, but these nations have not opened up the institution of marriage to same-sex couples.[15]

The United States is not alone when it comes to political and legal protests against the exclusion of same-sex couples from legalized marriage.

In Canada, the Ontario Divisional Court recently ruled that denying marriage licenses to same-sex couples does not violate Canada's Charter of Rights and Freedoms, which is equivalent to the U.S. Constitution. (*Layland v. Ontario* (1993) 104 D.L.R.4th 214.) Just this year, the Canadian Supreme Court ruled in a 5 to 4 decision that the Charter did not require the federal government to provide old-age pensions to same-sex couples. (*Egan v. Canada*, File No. 23636, May 25, 1995.) On the political front, only this year the Canadian House of Commons rejected a proposal to extend legal recognition to same-sex marriages. The vote was 124 to 52, a 70% to 30% ratio that is strikingly similar to public opinion in the United States.[16]

Germany's high court upheld that nation's ban on same-sex marriage on October 13, 1993. Although the court ruled that the ban was not unconstitutional, the justices acknowledged that gay couples need more legal rights.[17] Gay civil rights activists are currently pressing the German Parliament to pass a domestic partnership law.

In Israel, court decisions have brought limited benefits to gay couples. On November 30, 1994, the Israel Supreme Court ruled that El Al airlines must extend the same benefits to partners of gay employees as it does to partners of heterosexuals.[18] However, earlier this year an Israeli judge ruled that the same-sex lover of any army colonel was not entitled to survivor benefits.[19]

It is worthy of note that Canada, Germany, and Israel are among the more politically and socially enlightened nations of the world. If they have recently refused to recognize same-sex marriage, one can only imagine the level of resistance that must exist in most other parts of the world.

However, despite international reluctance to recognize same-sex marriage, it is possible that beginning in 1996, Hungary may become the first nation to break ranks with the rest of the political world on the issue of same-sex marriage.

On March 8, 1995, the Constitutional Court of Hungary issued a ruling involving same-sex marriages.[20] The court upheld the exclusion of same-sex couples from ceremonial marriages. "Despite growing acceptance of homosexuality [and] changes in the traditional definition of family, there is no reason to change the law on [civil] marriages," the justices wrote.[21]

However, the court ruled that excluding same-sex couples from the benefits of common law marriage was unconstitutional. "It is arbitrary and contrary to human dignity ... that the law [on common law marriages] withholds recognition from couples living in economic and social union simply because they are of the same sex," Reuters wire service quoted the court as saying.[22]

A couple who permanently live together and are in a sexual relationship are

legally defined as being in a common law marriage in Hungary. Under that nation's laws, common law marriages provide partners with the same privileges granted to couples who have civil ceremonies.

The Hungarian Supreme Court ordered Parliament to make the changes necessary to implement common-law gay marriage by March 1, 1996. Thus, by next year, Hungary may be the first nation to legalize same-sex marriage, albeit as a "separate but equal" institution to ceremonial marriage.

Holland is also considering the idea of legalizing same-sex marriage. According to a Dutch newspaper, the minister of justice and the secretary of state for internal affairs submitted a plan to Parliament to change the marriage rules in that nation. With 150 members of parliament, political activists estimate that 94 are in favor of legalizing same-sex marriage, 42 are opposed, and the rest are unsure.[23]

However, with public opinion divided, it may be more likely that Holland will join Scandanavian neighbors in passing a "registered partnership" act instead. Forty-four percent of the Dutch public favor opening the existing marriage laws to gays.[24] Another 34 percent believe that a separate law should be enacted in favor of gay marriage, with restrictions on adoption, pensions, and inheritance. Only 15 percent oppose any reform.

If Hawaii legalizes same-sex marriage, it will remove itself from the recognized international consensus that marriage is an institution for opposite-sex couples. It would join the ranks of possibly one other nation, Hungary, that has gone its own way on this issue. The ramifications of such a move by Hawaii, in terms of international relations, are unknown.

4. Domestic Partnership Would Distance the State from a Volatile Religious Dispute

In the United States, the definition of marriage, the rights and responsibilities implicit in that relationship, and the protections and preferences afforded to marriage, are now governed by the civil law. However, the institution of marriage stems from deep religious origins in Anglo-American jurisprudence. As one court aptly explained:

"The English civil law took its attitudes and basic principles from canon law, which in early times, was administered in the ecclesiastical courts. Canon law in both Judaism and Christianity could not possibly sanction any marriage between persons of the same sex because of the vehement condemnation in the scriptures of both religions of all homosexual relationships. Thus there has been for centuries a combination of scriptural and canonical teaching under which a 'marriage' between persons of the same sex was unthinkable and, by definition, impossible." (*Adams v. Howerton* (C.D. Cal. 1980) 486 F.Supp. 1119, 1124.)[25]

Although times have changed, and many religious denominations are discussing the issue of homosexual relationships with some degree of openness, the fact remains that homosexual conduct still is considered a sin by nearly all major organized religions.

Although many lay persons disagree with church dogma on issues such as contraception or divorce, most agree with official church teaching on homosexuality. For example, in a national poll of nearly 1,000 Catholics in 1987, 69% agreed that homosexual conduct was a sin.[26] In a national poll of 1,115 adults in 1994, more than 75% of respondents who categorized themselves as white Protestant "Born-Agains" said that homosexual relations are always wrong, and 87% of white Protestant fundamentalists felt the same.[27] In time, however, such strong opposition may fade.[28]

The Catholic Church is one of the largest denominations opposed to the legalization of same-sex marriage. Over the past decade, it has taken strong public positions on issues involving homosexuality.

For example, in 1986 the Vatican issued a letter, with the pope's approval,

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instructing bishops to stamp out pro-homosexual views and to oppose any attempt to condone homosexuality through legislation or other means.[29] In 1992, the Vatican issued another document contesting moves to give gays equal rights, particularly in the United States. Just last year, Pope John Paul personally made a public statement against the legalization of same-sex marriage.[30] His statement was in response to a resolution adopted by the European Parliament that urged member nations to allow gay and lesbian couples to marry.

The Hawaii Commission on Sexual Orientation and the Law has itself heard testimony from religious leaders both opposing and supporting the legalization of same-sex marriage. Such division is not uncommon, even within the same denomination.[31]

Some religious leaders have shown limited support for equal rights legislation, despite the fact that recent official church pronouncements leave them little room to maneuver. For example, Bishop Louis E. Gelineau of the Roman Catholic Diocese of Providence explained his support for a new Rhode Island law prohibiting sexual orientation discrimination:

"If proposed legislation attempts to condone or promote homosexual activity by equating morally all forms of sexual behavior, then it should be defeated. If it merely seeks to afford protection from unjust discrimination, which is not now afforded under our laws, then those laws should be changed."[32]

To the extent that the legalization of same-sex marriage essentially places homosexuality on the same moral par with heterosexuality, religious leaders of most major denominations would probably oppose such a change. However, the creation of a new civil institution, without any historical association with religion, could help distance the state from this religious debate.

Marriage continues to be a hybrid church-state institution in the mind of the average person. The state authorizes ministers to perform marriages that are then recognized by civil law. It is the church, not the state, that sets the rules as to who may perform such religious ceremonies within any given denomination. Probably the majority of marriages, even today, result from religious rituals rather than purely civil vows.

The legislature may decide *not to* entangle civil government any further with respect to marriage. The current thin wall between church and state may be constitutionally permissible for historical reasons, but the state could choose to fortify that wall with respect to same-sex couples.

Changing the definition of marriage to include same-sex couples, despite overwhelming opposition from all major religious faiths, and despite the historical ties of marriage to religion, would give the *appearance* of the state attempting to interfere with internal religious matters. Just as a judge must not only be impartial but must give the appearance of impartiality, there is virtue in the state not creating the appearance of intruding into religious matters.

Passage of a comprehensive domestic partnership law could achieve a beneficial result in terms of church-state relations. It would respect differing religious views on the subject of same-sex marriage, but would nonetheless end unjust discrimination against same-sex couples in civil law and secular society.

Under a domestic partnership act, same-sex couples would receive equal treatment with married couples under the laws of Hawaii. There would only be two differences from marriage.

One difference is the label. The other is that legalizing same-sex marriage would entangle the state of Hawaii in a myriad of disputes with each of the other 49 states, with the federal government, and with most of the international community. Passing a domestic partnership law, on the other hand, takes a major leap forward in the process of law reform and provides same-sex couples with equal rights under *Hawaii law*, without

the prospect of submerging government officials in legal and political quicksand.

Passage of a domestic partnership act, rather than same-sex marriage, will not deprive Hawaii of a prominent leadership role in the international movement for human rights. It would make Hawaii the first state in the nation to take such a positive step forward. Furthermore, a comprehensive domestic partnership law -- with *equal* rights to marriage under *state* law -- would even place Hawaii ahead of the Scandanavian nations that have been in the forefront of the movement for equal rights.

About the Author

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Endnotes

1. Scott K. Kozuma, "Baehr v. Lewin and Same-Sex Marriage: The Continued Struggle for Social, Political and Human Legitimacy," 30 Williamette L. Rev. 891 (Fall, 1994), fns. 98, 99; Evan Wolfson, "Crossing the Threshold: Equal Marriage rights for Lesbians and Gay Men and the Intra-Community Critique," 21 N.Y.U. Rev. L. & Soc. Change 567 (1994-1995), fn. 10; William N. Eskridge, "A History of Same-Sex Marriage," 79 W.Va. L. Rev. 1419 (October 1993), p. 1502.

2. Polls conducted by Time Magazine showed 60% of adults opposed to same-sex marriage in 1992, 65% opposed in 1993, and 64% opposed in 1994. A national poll done by EPIC/MRA Mitchell Research showed 63% of adults opposed in 1995. Respondents in these surveys were selected from random samples of adults. None of these polls were limited to registered voters, a constituency that tends to be more conservative that the adult population in general.

3. Jerry Burris, "Most don't support same-sex marriage," *Honolulu Advertiser*, February 25, 1994.

4. The Los Angeles Times took a national poll of 1,515 adults in July 1994. See "Morals, Religion, and Politics," *Los Angeles Times*, July 28, 1994, p. A19. A 1978 Gallup Poll produced similar results.

5. Louis Harris and Associates conducted this national survey of 2,254 adults in 1990. A national survey done by the San Francisco Examiner of 3,748 heterosexual adults in 1989 showed that even 63% of respondents who classified themselves as conservative felt that consenting adult homosexual relations in private should not be criminal.

6. A national Gallup Poll of 1,227 adults in 1989 showed that 71% supported equal job rights for gays. A national poll of 1,044 voters in 1977 by Time Magazine showed more than 70% said they would vote for a bill prohibiting sexual orientation discrimination in employment or housing.

7. Evan Wolfson, "No time for a luau," *The Advocate*, July 26, 1994, p. 5.

8. The Social Security Administration has also refused to recognize same-sex couples as "spouses" under federal law. In a letter from Frank Battistelli, Deputy Press Officer to Keith Clark (a San Francisco writer) in 1989, Battistelli stated: "Section 1614(d) of the Social Security Act, in discussing determinations of whether two individuals are married for SSI purposes, refers to 'a man and a woman.' . . . In addition, section 416.1806 of the SSI regulations, in discussing marital relations, refers specifically to 'an individual and an unrelated member of the opposite sex." (A copy of this letter is on file with the author of this article.)

9. See "Morals, Religion, and Politics," *Los Angeles Times*, July 28, 1994, p. A19.

10. In *Anonymous v. Anonymous* (1971) 325 N.Y.S.2d 499, a New York court ruled that a

marriage between two males was a nullity. In *Jones v. Hallahan* (1973) 501 S.W.2d 588, 589, the Kentucky Supreme Court ruled that a same-sex couple is incapable of entering into a marriage as that term is defined by state law. In *M.T. v. J.T.* (1976) 355 A.2d 204, a New Jersey appellate court concluded that a "lawful marriage requires performance of a ceremonial marriage of two persons of the opposite sex, a male and a female." In *Murphy v. State* (1983) 653 S.W.2d 567, the Court of Appeal of Texas held that under Texas law, "two males cannot obtain a marriage license or enter into common law marriage." In *De Santo v. Barnsley* (1984) 476 A.2d 952, the Pennsylvania Superior Court ruled that "two persons of the same sex cannot contract a common law marriage." In *Maryland Commission on Human Relations v. Greenbelt Homes Inc.* (1984) 475 A.2d 1192, the Court of Appeals of Maryland declared that the law of that state did not confer any marital status on the relationships of homosexuals or lesbians. In *Gajovski v. Gajovski* (1991) 610 N.E.2d 431, the Court of Appeals of Ohio observed that two women could not marry one another.

11. The Minnesota Supreme Court ruled that the refusal of the state to issue a marriage license to a same-sex couple did not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution. The couple appealed to the United States Supreme Court. The nation's highest court dismissed the appeal "for want of a substantial federal question." (409 U.S. 810) A vote to dismiss an appeal for want of a substantial federal question is a vote on the merits of the case, and such a decision by the Supreme Court is binding on all lower courts until such time as the Supreme Court informs them otherwise. (*Hicks v. Miranda* (1975) 422 U.S. 332, 344; *Metromedia Inc. v. City of San Diego* (1981) 453 U.S., 490, 499.)

12. Habbib A. Balian, "'Til Death Do Us Part: Granting Full Faith and Credit to Marital Status," 68 S.Cal.L.Rev. 397 (Jan. 1995), p. 400.

13. Thomas M. Keane, "Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages," 47 Stan.L.Rev. 499 (Feb. 1995), p. 531.

14. See HRS § 425-104(4), HRS § 490:1-102(2(c), HRS § 523A-40, HRS § 551D-6, HRS § 553A-23, HRS § 554B-20, HRS § 560:1-102(b)(5), HRS § 572D-9.

15. "Sweden Joins in Approving Partnership Law for Gay Couples," *Los Angeles Times*, June 15, 1994. The domestic partnership laws in these three nations grants all the rights and obligations of marriage to registered same-sex couples, except for adoption of children, artificial insemination, in-vitro fertilization, and church weddings. In all three nations, one partner must be a citizen living in his or her home country. Denmark created "registered partnership" in 1989, Norway in 1993, and Sweden's law went into effect on January 1, 1995.

16. "Same-Sex Couples in Canada Face Setback," *Frontiers*, October 20, 1994, p. 20; *Lesbian and Gay Law Notes*, 1995, p. 140.

17. Aras van Hertum, "Germany: Court upholds marriage ban," *The Washington Blade*, October 29, 1993.

18. "Israeli Court Rules in Gay Couple's Favor," *Los Angeles Times*, December 1, 1994, p. A10.

19. Jose Zuniga, "Israel: Court says colonel's lover not due benefits," *The Washington Blade*, September 22, 1995.

20. "Hungary legalizes common-law gay marriages," *Frontiers*, April 7, 1995.

21. "Hungary legalizes common-law gay marriage," *International Gay and Lesbian Association Bulletin*, February 1995.

22. Darice Clark, "Hungary: Constitutional court recognizes gay unions," *The Washington Blade*, March 17, 1995.

23. Rex Wockner, "Netherlands to legalize gay marriage," *Frontiers*, July 14, 1995.

24. "Dutch public approves of gay marriage," *The Washington Blade*, September 8, 1995.

25. One scholar, however, has demonstrated through painstaking research that same-sex

unions were not uncommon in premodern Europe, but with the passage of time, implicit religious acceptance of formalizing such relationships turned into active institutional opposition. John Boswell, "Same Sex Unions in Premodern Europe," (Villard Books, 1994).

26. Russell Chandler, "Americans Like Pope But Challenge Doctrine," *Los Angeles Times*, August 23, 1987, part I, p. 20.

27. "Morals, Religion, and Politics," *Los Angeles Times*, July 28, 1994, p. A19.\

28. A Gallup Youth Poll of 500 youth conducted over a three year span from 1991 through 1994 showed that 61% of Catholic teens and 55% of Protestant youth supported gay rights. (Source: Religious News Service, Los Angeles Times)

29. Donna Schanche, "Vatican Warning Seen Against Liberal Views on Sexuality," *Los Angeles Times*, October 31, 1986, part I, p. 10.

30. "Pope to Fight Resolution to Allow Gays to Marry," *Los Angeles Times*, February 12, 1994, p. B3.

31. For example, several years ago, the Episcopal Diocese of Newark, New Jersey, placed itself at odds with the majority of the nation's 3,000,000 Episcopalians when it adopted a resolution supporting the blessing of relationships of gay couples. In 1979, the church's General Convention had rejected a similar proposal by a vote of 100 to 23. ("N.J. Episcopal Group Approves Unwed Couples, Gay Lifestyles," *Los Angeles Times*, January 31, 1988.)

32. David W. Dunlap, "Rhode Island's Senate Sends Gay-Rights Bill to Governor," *New York Times*, May 20, 1995.

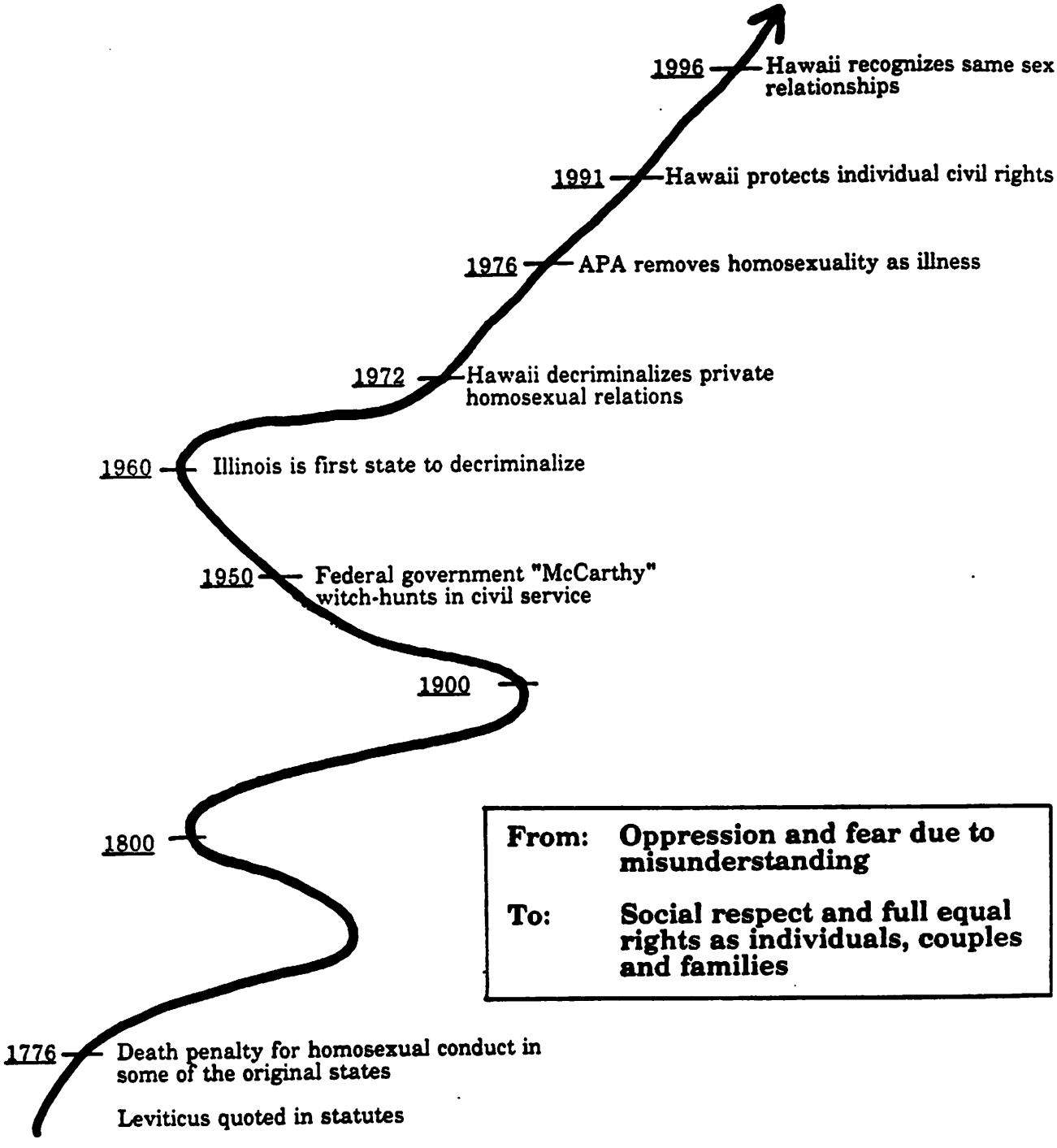
This paper was submitted to the Hawaii Commission on Sexual Orientation and the Law in connection with testimony given by Thomas F. Coleman at the Commission's meeting in Honolulu on October 25, 1995. Mr. Coleman was an invited speaker.

For further information, please contact: Spectrum Institute, P.O. Box 65756, Los Angeles, CA 90065 / (213) 258-8955.

T-40

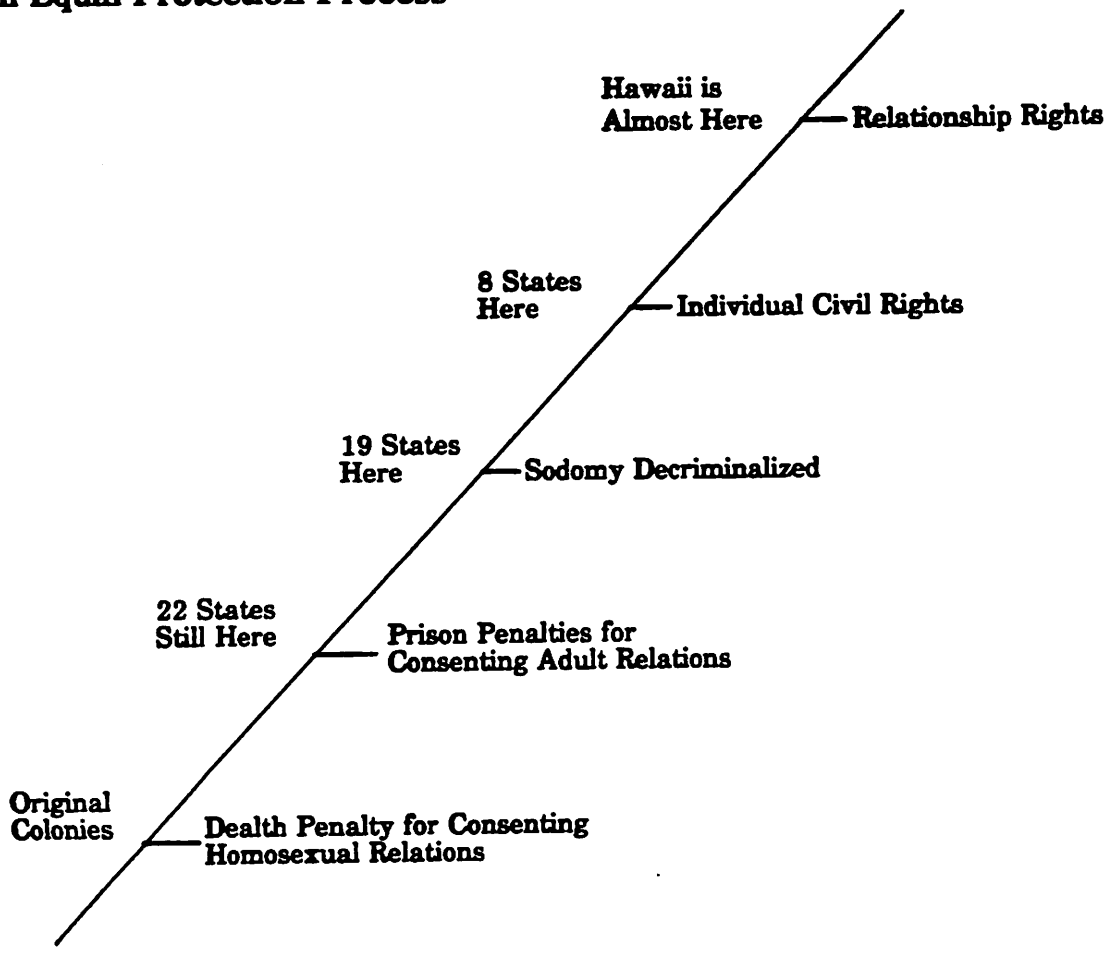
AN AMERICAN JOURNEY

To End Sexual Orientation Discrimination



HISTORICAL PROGRESSION

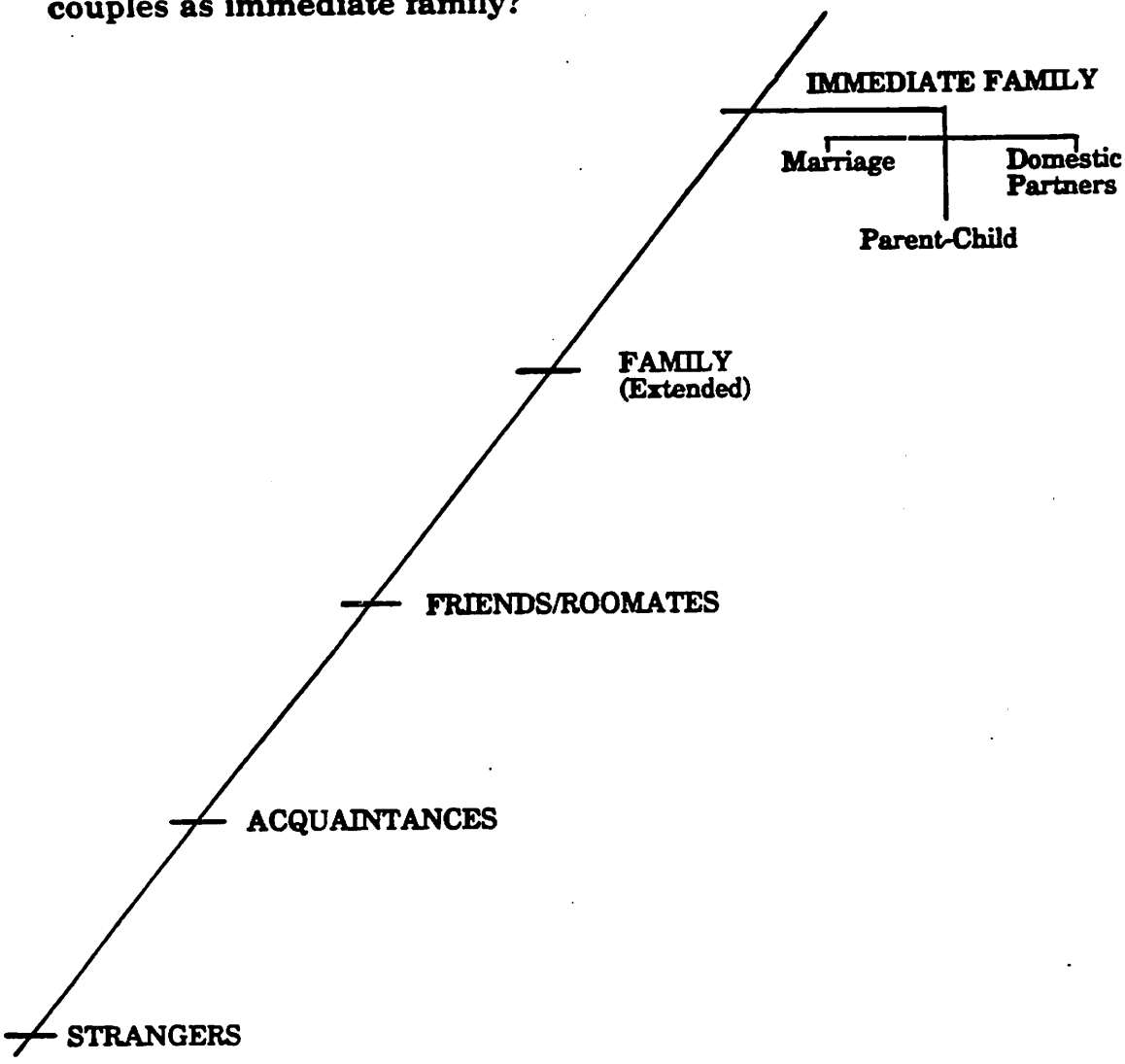
An Equal Protection Process



T-11-6

SPECTRUM OF THE STATUS OF RELATIONSHIPS

Is equal protection satisfied if Hawaii recognizes same-sex couples as immediate family?



NECESSARY INGREDIENTS FOR GOOD REFORM MEASURE

1. Reflects factual realities

1. • Family Diversity = Norm
   • Same-sex couples = Families
   • Discrimination = Widespread
   • Gradual Reform = Norm
   • Church-State Concerns
   • Intergovernmental relations, federal, states, foreign
   • Public opinion

2. Recognizes legitimate political concerns

30%	–	40%	–	30%
Same-sex Marriage		Moderate Reform		Criminalize

3. Awareness of basic legal principles

3. • No federal constitutional right is involved
   • Not a fundamental right under state constitution
   • State equal protection requires reform
     • Similar, but not identical treatment required
     • Equal protection as a process, viewed in context of historical progression, not one moment in time

T-Hill

MAJOR OPTIONS OF HAWAII LEGISLATURE

ACTION	LIKELY RESULT
1. Do nothing	1. Same-sex marriage is mandated by court order
2. Limited domestic partnership act (comment on draft bill)	2. Same result as No. 1
3. Comprehensive Domestic Partnership Act	3. Court may accept this as satisfying equal protection clause
4. Legalize same-sex marriage	4. Won't happen due to public opposition
5. Eliminate marriage as a civil institution	5. Won't happen due to public opposition

Testimony By
Mely McGivern
October 25, 1995

A famous Protestant minister Billy Graham has said, "If God doesn't judge America, He'll have to apologize to Sodom and Gomorrah."

Our own Hawaii nei, where I was born and raised, is very close to becoming the Sodom and Gomorrah of the world.

The actions of this commission could easily lead to same-sex marriage next year.

First, Governor Waihee signed into law Senate Bill 1811 which guaranteed no discrimination for sexual orientation.

Now, in the next legislative session, with a report from this commission, there will be a strong push for a domestic partnership law.

Some senators and representatives think that if they hand this to the gay community, it will help stop same-sex marriage.

In truth, it will do the exact opposite. The State Attorney General will have to uphold a domestic partnership law. Yes, gays will be protected by the law and will be treated as a special class.

This will help the attorney of the three couples in his arguments for same-sex marriage.

We could easily end up with both domestic partnership and same-sex marriage laws.

If this happens, Hawaii will not go unpunished by God.

Homosexual men and lesbian women will flock to Hawaii to marry and go back to their home states and countries, demanding that their marriages be recognized. What Hawaii does now could have an adverse affect on the whole nation and the whole world. I know, then, that God will not treat us lightly. Our island paradise will have become the Sodom and Gomorrah of the world.

T-4

Testimony By
Daniel P. McGivern
on October 25, 1995

When a person appears before a legislative body or a commission, it is expected that the members on the body are at least interested in what will be said. But this commission really isn't.

If 1,000 people testified against same-sex marriage and against domestic partnership laws, and only one person testified in favor, that person would have his or her view upheld by this commission.

This commission is not objective. It is a sham, a shibai, a fraud perpetrated on the public. The outcome of the commission's voting on whether marital benefits should be extended to homosexual and lesbian couples has been known since the commission was first appointed.

The real purpose of this commission is to hand a favorable report to the legislature, leading to a domestic partnership law in the next legislative session.

However, a domestic partnership law, which recognizes gays as a special class, will inevitably lead to same-sex marriage.

It is sad that this commission does not truly represent the community. This is the first time I've ever appeared before a body, knowing that what I and others have to say makes no difference.

If anything is said that is contrary to furthering the homosexual-lesbian agenda, it will be disregarded by the majority of this commission.

2

Two Quaker testimonies recently received by commissioner Bob Stauffer for forwarding.

#1:
The following minute [i.e., policy statement] was approved by Pacific Yearly Meeting [the regional organization of Quakers including California, Hawaii, and some other areas, including Mexico City] on Eighth-Month 4, 1995.

"A Loving Response to Hostility Against Sexual Minorities"

Background

Within the territory comprising our Yearly Meeting there are Friends [i.e., Quakers] and others who risk hostility, verbal abuse and physical violence because they are, or are perceived to be, members of sexual minorities (for example, lesbians, gays, bisexuals). There are growing campaigns to legalize discrimination based on sexual orientation.

All hostility separates us from God and from each other. As Friends, we seek a response that arises from the Light, and reaches out and cares for the needs and human dignity of those affected on all sides of this conflict.

Action Minute

Pacific Yearly Meeting of the Religious Society of Friends endorses all nonviolent efforts to establish and protect the civil rights of all persons despite their sexual orientation. We oppose all legislation or policy which disparages sexual minorities or abridges their basic constitutional rights.

#2:

The following minute was approved at Friends for Lesbian & Gay Concerns on Seventh-Month 6, 1995.

It is fundamental to Friends' faith and practice that we affirm the equality and integrity of all human beings. Equally, we hold that the purpose of recognizing and affirming committed relationships is to strengthen our families and communities.

Therefore, it is our belief that it is consistent with Friends' historical faith and testimonies that we practice a single standard of treatment for all committed relationships.

Given that the State offers legal recognition to opposite-gender marriage and extends significant privileges to couples who legally marry, we believe that a commitment to equality requires that same-gender couples be granted the same rights and privileges.

Therefore, we believe that the State should permit gay and lesbian couples to marry and share fully and equally in the rights and responsibilities of marriage.

We invite Monthly Meetings [i.e., individual congregations], Yearly Meetings [i.e., regional divisions] and Quaker Organizations to consider a minute of support for legal recognition of same-gender marriages, and to communicate this support to their elected representatives.

Because of pending legislation and litigation, we urge a timely response.