Original

THE CASE FOR DOMESTIC PARTNERSHIP

by

Arthur C. Warner

for the

AMERICAN ASSOCIATION FOR PERSONAL PRIVACY

Princeton, New Jersey
January, 1996

FOREWARD

In 1993, the Hawaii Supreme Court issued a decision in *Baehr v. Lewin* that jolted the nation.[1] The plaintiffs in *Baehr* were three same-sex couples who had been denied a license to marry. They filed a lawsuit against the state and asked the Supreme Court to issue an injunction to force the state to issue a marriage license to them. The plaintiffs argued that issuing a marriage license to opposite-sex couples but not to same-sex couples violated the equal protection clause of the Hawaii Constitution which prohibits discrimination on the basis of sex. The Supreme Court agreed.

The Supreme Court remanded the case to the trial court, ordering a trial at which the state would have the burden of proving that the current ban on same-sex marriage serves a compelling state interest. That trial is currently scheduled to begin in July 1996. It is expected that the losing party will appeal the case again to the Supreme Court, which could issue a final decision sometime in 1997. If the Supreme Court legalizes same-sex marriage in Hawaii, gay rights activists predict that thousands of couples from virtually every state on the mainland will fly to Hawaii, get married, and return to their homes states demanding legal recognition of their marriages there. This scenario is likely to set off a political debate that will make the gays-in-the-military debacle look tame by comparison.

In the meantime, the Hawaii Legislature is considering a proposal to establish a new civil institution of domestic partnership, as a way of satisfying the demands of the constitution's equal protection clause by granting such partners all of the benefits and burdens of marriage. The Governor and many legislators in the Aloha state hope that such a system will not only avoid the intergovernmental conflicts with other states and the federal government if gay marriage becomes a reality in Hawaii, but will also soften the blow to religious organizations that consider marriage a sacrament and thus find gay marriage as anathema.

Many leaders in the gay and lesbian community are thrilled with the prospect of having confrontations with government officials and church leaders throughout the nation. They have made gay marriage a top priority and have little tolerance for any members of the gay community who hold differing views. In other words, many of these leaders view gay marriage as the only politically correct position that may be taken and they consider dissenters as traitors to the gay movement.

It is in the midst of this heated political and legal context that this article was written by Dr. Warner. His article is a testament to the principle that an honest academic dialogue should not bow to the altar of political correctness. The establishment of a system of domestic partnership, rather than court-mandated same-sex marriage, is an option worthy of consideration by the community at large, legislators, judges, and indeed, by the gay community itself. I hope that Dr. Warner's article will contribute to the discussions that no doubt will ensue in the coming months and years in courtrooms, statehouses, and living room parlors throughout the nation, as same-sex relationships become recognized by the law and are integrated into the fabric of American jurisprudence.

Thomas F. Coleman, Esq.
February 7, 1996
Los Angeles, California

---

[1] *Baehr v. Lewin* (1993) 74 Haw. 645, 852 P.2d 44.

FOREWORD AND ACKNOWLEDGMENTS

We live in a time of linguistic Puritanism which imposes a prescribed morality of language and enforces a penal code through self-appointed committees of linguistic safety. This Puritanism, like its earlier forebear, is fueled by a distorted sense of political rectitude, which exercises a minatory effect on linguistic expression and has hobbled the ability to write lucidly and trenchantly.

No one will deny that language, like music, can stir the savage breast, so that it creates moods and feelings which can both deepen or intensify, arouse or suppress, identify or occlude. Language can be used to wound, to denigrate, to distort and to destroy. This writer is especially sensitive to the fact that because these pages deal with matters of gender and sex, they are far more open than are other scripts to insensitivity and offence. Who would not recognize that the historic use of the appellation "boy" when whites addressed black males conjured up visions of Simon Legree? Who would condone the cutting references to the female anatomy which continue to sully the language of many men. Regrettably the current linguistic warders do not limit their sentry duties to legitimate cases of moral numbness. They prosecute whole categories of people from those who refuse to lay impious hands on the majestic cadences of the King James version to those who give umbrage to the faithful by failing to replace male substantives with malaproprian dyads.

Language is the clothing of thought where the rule still applies that "fine feathers make fine birds". A thought worthy to be expressed deserves to be appropriately attired. All civilized societies operate on the premise that there is a relationship between appearances and content. That is the reason why people are not encouraged to attend church sevices in their bath robes, and why judges do not sit on the bench in their pajamas. There are three similitudes of language which we ignore at

our peril. (1) Language is art, in the sense that its words and phrases, together with their juxtaposition, provide a tapestry or mosaic that conveys sentiment and feeling as well as meaning. (2) Lanugage is psyche, in that it touches -- particularly in its spoken form through intonation and gesture -- the deepest veins of human emotion. (3) Language is history, in that it limns the story of the people who speak it, and, through the "mystical chords of memory" convinces and persuades.

Linguistic barbarians need to understand some of the nuances of human thought. They might then realize that not all those who genuflect before pyx and chasuble are renegades to the reformed faith, any more than the display of crown and sceptre is necessarily the mark of a republican turncoat. It might then dawn upon them that in their Father's house are many mansions. They might even gain the humility to preach less of the supposed virtues of diversity, about which they know so little. Their professed ecological concerns have never extended to preserving the well of English undefiled. As the most flagrant polluters of the mother tongue, they are well on their way to reducing it to a Morse code of communication. In their linguistic zoo, communication will have been reduced to grunts, snorts, barks, howls, hisses and shrieks.

The foregoing must serve as the writer's response to the barbs he anticipates. He asks only that these pages be judged on their content, not on whether he be deemed Bourbon or bigot. He rests secure in the knowledge that the only remembrancer over Lincoln's tomb in Springfield, Illinois is the solitary encomium, "Master of the English Language."

Acknowledgments

This article is an ancillary consequence of an unusual collaboration that twice has conjoined the lives of this writer and that of his lifetime friend, Thomas F. Coleman, Esq., of Los Angeles. Over the course of more than two decades, he has had the pleasure of witnessing the rise of Mr. Coleman from an outstanding law student to the doyen of the sexual civil liberties bar. And the writer himself has seen his earlier role as mentor become that of student. Our first collaboration, at the time when Mr. Coleman shared with the writer the chairmanship of the National Committee for Sexual Civil Liberties, produced a stunning victory in the Supreme Court of California in the case of Pryor v. Municipal Court (1979) 599 P. 2d 636. It resulted in the judicial rewriting of the sexual solicitation provisions of the California Penal Code. One of the fruits of that partnership was this writer's submission of an amicus brief on behalf of the said National Committee -- now the American Association for Personal Privacy -- which was later published by Mr. Coleman in the Sexual Law Reporter, a journal which he had founded. Subsequently Mr. Coleman was appointed executive director of the Governor of California's Commission on Personal Privacy. He was also a member of the California legislature's Joint Select Task Force on the Changing Family. This was followed by Mr. Coleman's major victory in the California Court of Appeal, in which that court ruled that private employers throughout California are prohibited from discriminating against employees or applicants on the basis of sexual orienation.

Mr. Coleman's briefs amicus curiae have become a byword throughout the nation's appellate system from Alaska to Georgia. One of these involved his intervention in the landmark case of Braschi v. Stahl Associates in New York (1989) 74 N.Y. 201, in which that state's highest tribunal ruled that the term "family" was not necessarily limited to relationships based on blood, marriage, or adoption. Perhaps his most unexpected success came from his involvement in Georgia, where the state supreme court upheld in a

5 to 2 decision a registry for domestic partners which had been established by the City of Atlanta. It should be added that Mr. Coleman has been an adjunct professor at the University of Southern California Law Center, where he taught the "Rights of Domestic Partners."

These pages are a product of the writer's most recent and on-going collaboration with Mr. Coleman, prompted by the decision of the Supreme Court of Hawaii in 1993 in Baehr v. Lewin, 74 Haw. 645. Mr. Coleman testified at one of the Hawaii legislative hearings held subsequent to that ruling, as a consequence of which he was asked to return to Hawaii to give testimony before the Hawaii Commission on Sexual Orientation and the Law. That resulted in the commission chairman's requesting Mr. Coleman to draught a comprehensive domestic partnership law for submission to the Hawaii legislature. That draught statute is currently under consideration by the Hawaii Senate.

George H. Phillips is a business man and another lifelong friend. He assisted the writer for a number of years after the latter had served as consultant to the Judiciary Committee of the New Jersey Assembly during its three-year review of the entire corpus of legislation that subsequently emerged as the current New Jersey Criminal Code. After this writer had succeeded in having the homosexual solicitation provision excised from that code, arrests for conduct which had been decriminalized continued throughout the state despite the new enactment. Mr. Phillips provided yeoman assistance in marshalling witnesses and collecting data for a state conference of law enforcement officials and gay representatives, together with two deputy New Jersey attorneys-general and the then-chief of the New Jersey state police, as a consequence of which a final halt was made to these egregious practices. Mr. Phillips served as a much-needed sounding board and foil for many of the non-legal propositions put forward herein, a role which he has played ably in the past. As an experienced manager and proprietor of gay-oriented businesses he provided inestimable insights into the interstices

of gay life.

It should not be necessary to point out that none of the errors or misstatements which may come to light herein are attributable to either of the foregoing two worthies. For these the writer accepts full responsibility.

Princeton, New Jersey
January, 1996

Arthur C. Warner

INTRODUCTION

Before discussing the issues raised by Baehr v. Lewin, the writer wishes respectfully to commend the court for having framed them in terms of gender rather than sexual orientation. It is the burden of the following pages that only within the context of gender can these issues be understood and an appropriate institutional structure and jurisprudence be developed which address the legal and social problems involved.

The judgment in Baehr rests squarely on the "equal protection" clause of the Hawaii constitution. Like its companion clause -- "due process of law" -- "equal protection of the laws" has been recognized throughout its hallowed existence as reflecting a protean principle of civilized government, which, because of its seminal character, requires the adaptation of its broad precepts to the particulars of each case. Here we are not dealing with some municipal ordinance prohibiting parking, where the central issue is whether a vehicle was parked within the prescribed distance from the curb. What we have before us is the application of sweeping moral and constitutional imperatives to the lifetime relationships of millions of people, not only in Hawaii, but throughout the United States. In this process, some guidance may be gleaned from the "due process" clause with which "equal protection" is linked both linguistically and structurally within the same constitutional provision. Both provisions encompass overarching precepts of governance which transcend any paltry dictionary definition of the specific terms in which they are expressed, except that, in the case of "equal protection" the plural term "laws" is used, while in the case of "due process" the singular "law" is employed. This suggests that these provisions in the Hawaii constitution, like those of the 14th amendment to the Federal constitution from which they derive, may have contemplated more multiform methods of implementation in the case of "equal protection" than those

customarily established for "due process." This conclusion is fortified by none other than Roscoe Conkling, who had been a member of the joint Congressional Committee of Fifteen when it draughted what became the 14th amendment. Arguing before the Supreme Court of the United States in 1882, he stated:

> Those who devised the fourteenth amendment wrought in grave sincerity. They may have builded better than they knew.
>
> They vitalized and energized a principle as old and as everlasting as human rights. . . .
>
> They builded, not for a dey, but for all time; not for a few, or for a race, but for man. They planted in the Constitution a monumental truth, to stand foursquare whatever wind might blow. That truth is but the golden rule, so entrenched as to curb the many who would do to the few as they would not have the few do to them."[1]

This should remind us that the ultimate goal of "equal protection", just as with "due process", must always be equity in results, not merely equity or identicality in the methods employed. Identicality of methods can never be more than a useful instrument amongst many which need to be employed in order to attain an equitable goal. A problem arises when equitable goals are thought to require identicality of methods of implementation, so that the methods of implementation are allowed to become ends in themselves, thereby replacing equity in results as the ultimate desideratum. Because identical methods usually produces equitable results, people sometimes forget that this is not always so. The gravamen of this submission is to demonstrate that, in the case at bar, a wooden insistence on equality of methods can defeat the goal of equitable results.

Here it becomes necessary to repulse any suggestion that the reasoning below has any connection with the discredited body of segregationist thought which once used the legal device of "separate but equal" to prolong the incidents of slavery for more than a century after their constitutional demise. These pages are not intended to be a sterile exercise in sophistry. The thrust of this discussion is calculated to be in the best tradition of American liberty. We need to begin with the words of the court in Brown v. Board of Education:

> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.[2]

The Brown case made abundantly clear that the inequality which attached to the dual system of education stemmed from the distinctive character of the educational process itself, not from anything inherent in separateness. In truth, this writer is unaware of any judicial holding which has held that separateness, per se, is unequal. More to the point is Baehr itself, which has already identified the central issue as one of gender, not education, to which one might add the obvious difference that education is a process extending over years, while marriage involves a change in legal status that is accomplished within hours. In sum, it is respectfully submitted that none of the statements in Brown regarding "separate but equal" are either apt or relevant here. The succeeding discussion is intended to demonstrate that the establishment of a separate and distinct legal institution, coördinate with marriage, and affording its votaries the same benefits and obligations as matrimony, will not only fulfill all constitutional mandates identified in Baehr, but will insure equity of results both to same-gender and to opposite-gender couples in ways which the institution of marriage is structurally incapable of providing. To this must be added that a separate institution, known as domestic partnership, carries with it numerous public benefits which will inure to the commonweal.

This section concludes by pointing out that, whenever the institution of domestic partnership is used below, it is intended to describe an institution whose statutory foundation assures to those who come within its ambit the identical benefits and privileges which are consequent upon marriage. This will explain the absence of further discussion of the constitutional infirmities raised in Baehr.

THE HISTORICAL SETTING

Marriage as a Christian institution originated exclusively for the benefit of men -- not for women -- who needed to produce legitimate heirs for the purpose of keeping the ownership of their property within their own blood lines. It also provided them with an opportunity to acquire additional property from the family of the woman they married. It was entirely a business transaction, and, like most business transactions, it was formalized by a contract. However, it was a peculiar contract, in that the consideration, known as a dowry, was usually paid by the prospective bride or her family, who were thereby relieved of the obligation to support and protect what was considered to be an essentially non-income-producing asset, namely, their daughter. As the expression went, she was "married off" by her family. Neither love nor sexual desire entered into the transaction at all. If either of these elements were in fact present, it was entirely adventitious. When love in our modern sense did exist, it was expected to be satisfied by relationships outside of marriage. "A man 'married a fief', with the necessary encumbrance of a wife, who could easily be kept in hand at home."[1] As a distinguished medievalist once noted, society "did not commonly concern itself with bringing lovers to the altar."[2] Marriage in medieval times was an institution devised for the landed gentry, not for common people. Its purpose "was more often the joining of fiefs than a union of hearts." Love, by contrast, had "its own sanction" and did not need "the faint blessing of the priest." It "could only exist between knight and mistress, and not between husband and wife."[3] Marriages were often planned by families, who acted as surrogates for their children, not infrequently when the prospective spouses were as young as five or six years of age. The actual ceremony could take place years later.

A new concept of marriage began to evolve at the beginning of the 12th century with the entrance of love into the marriage relaship. It eventually became the transforming element responsible for the

metamorphosis of the primordial institution of marriage into what we today describe by the same name. But although the appearance of love in the marriage picture set in motion revolutionary changes in the institution, those changes were spread over a time period of almost a thousand years. Initially, and for many centuries, the new element of love continued to play a very subordinate role in matrimony, never a necessary one. In truth, love has never been a prerequisite for marriage. Well into the modern period the primary purpose of marriage continued to be the desire on the part of the would-be husband to produce legitimate heirs as the means of guaranteeing the retention of property within his family after his death.

The key word here was "legitimate", the need to produce bona fide heirs. It is not the same as the biological urge to beget offspring, even though the former may be subsumed under the latter. What is important is that the acceptance of the idea of love as a recognized element within the marriage relationship eventually dissolved the distinction between the wish to produce legitimate heirs and the biological desire to have children. Both sexual passion and the desire to have children came to be recognized as valid elements in matrimony. But these new elements never replaced the original proprietary purpose of marriage. No clearer confirmation of this can be demonstrated than the fact that impotency was never a bar to a valid marriage, either in the Church or by civil authorities. Such a marriage has always been voidable, and then only at the instance of one of the parties and after the successful conclusion of judicial proceedings.

It took centuries for the presence of love to make itself felt within the marriage relationship. The gross inequality between the sexes continued much as before. The wife was essentially her husband's property; to him she made her lifetime pledge "to love, honor and obey." Most of the obligations of the relationship fell on her, and few of these were reciprocal. The husband's responsibilities were often honored in the breach, for which there was little or no redress. Legal sanctions against assault

and battery by husbands against wives, and their effective enforcement in this country began only in this century, and are still not the rule everywhere. The principal difference now, compared with the past is that today the public hears about these cases, whereas in earlier times the wife suffered in silence. Removal of the spousal exemption to the rape statutes has still to be accomplished in a number of American states.[4]

Another husbandly perquisite was the right to determine the marriage domicilium, that is, the location where the couple would reside. In exercising this right, the husband could go so far as to seize his wife physically and take her to the abode of his choice. It could be looked upon as a type of spousal exception to whatever kidnapping laws then existed. As for the ownership of property, since the wife herself was considered a form of chattel, it was hardly to be expected that she would be allowed the ownership of anything in her own right. All property which she owned prior to her marriage passed to her husband upon marriage, together with that which her family had contributed in the form of a dowry.

It was in the adultery laws that the gender inequity was most apparent. Adultery was a crime that was applicable to both spouses, but not equally. Adultery consisted of sexual intercourse by a man, married or single, with a married woman not his wife. Thus a married man who had sexual relations with an unmarried woman committed no offence, but a married woman who had sexual relations with another man, whether he was married or not, was an adulteress. Here again, the raison d'etre for the distinction was property, not sex or love. As the Duke of Norfolk declared in the House of Lords in 1700, during consideration of his bill for divorce from his adulterous wife, "A man by his folly brings no spurious issue to inherit the land of his wife, but a woman deprives her husband of any legitimate issue."[5]

The situation was far worse when it came to actual sexual relations between the spouses because there the canon law reigned supreme. It started from the premise that all sex was evil, sinful, and dirty, and that

the only permissable exception was the Pauline concession, made with reluctance, that it was better to marry than to burn. It was reflected in the structure of the Church itself, which divided believers into two classes, the celebates and the non-celebates, thereby separating the clerical rulers from their subjects. The Pauline exception to sexual intercourse was itself enshrouded within an elaborate system of liturgical prohibitions, which had the practical effect of drastically reducing the actual amount of sexual activity permitted to married people. No sex was licit except in the so-called "missionary position." Sexual relations were not only restricted to one's married partner, but they had to be with that partner and not with oneself. This not only ruledout fornication and adultery, but prohibited "self-abuse" or the so-called "solitary vice." Coitus interruptus, the sin of Oman, was also proscribed. Furthermore, since the nude body, like sexual activity, was deemed to be dirty, only enough of the body was permitted to be exposed during sexual intercourse so as to permit intromission of the penis into the vagina.[6] In some regions, this ecclesiastical anti-sexual syndrome banned all sexual activity during daylight hours, so that the filth inherent in such conduct could be confined to the darkness of night.[7]

The foregoing, however, was only the beginning. In order for sexual relations between married couples to be licit, they had to take place only at legal times. Whole sections of the canonical year were off limits to any sexual activity. These included not only all Sundays and all liturgical holidays, but entire time periods, such as first Lent (the weeks before Easter), second Lent (the weeks before Christmas), and third Lent (before and after Pentecost). They also included the occasions for biological changes in the wife, such as pregnancy, childbirth, lactation and menstrual periods.[8] It has been said that "a fertile couple who seriously attempted to follow the . . . prescriptions on marital abstinance would rarely have been able to make love more than five times per month during their years of maximum sexual activity."[9]

Restrictions with respect to time were matched by equally draconian rules regarding the required mental state of those intending to have sexual intercourse with their spouses. Since the sole legitimate purpose of sex was procreation, the act of sexual congress had to be accompanied by the correct state of mind, that is, the desire to procreate. Any other mental state polluted the conduct, rendering it a confessable sin subject to appropriate ecclesiastical punishment. The most sinful purpose for which sexual activity could be indulged in was pleasure. Sexual relations for the purpose of giving pleasure to one's spouse were as sinful as if the culprit had intended his own gratification. Even if one's thoughts were initially pure, if, during the course of the sexual activity a smidgin of unintended pleasure were to seep in, the entire activity was contaminated. Under those circumstances, however, the punishment was mitigated, on the ground that the offence consisted in failing to resist with sufficient vigilance the temptations of the devil. But the reader should not laugh, for similar theocratic wisdom was recently offered by none other than Pope John Paul II himself, who, during a papal audience on 8 October 1980, ventured the opinion "that married men who felt sexual desire for their own wives were guilty of adultery."[10]

MARRIAGE: THE CONTEMPORARY INSTITUTION

None of the preceding diminishes one's acknowledgment of the phenomenal transformation of the earlier institution of marriage into the one we know today. These modifications and ameliorations have mainly worked to equalize the gross inequality in the status of the sexes, and have taken place in response to the gradual civilizing of Western society. Almost all of them have occurred within the past century and a half, which raises the not-unreasonable question as to how many generations must pass until the many remaining matrimonial encrustations are removed. For the nonce we can be celebratory for the removal in our own lives of such crimes as fornication, adultery and sodomy from the statute book of a majority of the states, and for the ending of the spousal exception to the rape laws in some of them. And we must certainly applaud the extension to both marriage partners equally or jointly privileges once the sole prerogative of the husband, such as the right to determine the marriage domicil and the right to own property. Equally praisworthy has been the development by the courts of equity of an extensive body of jurisprudential rules, such as "the best interest of the child" in custody cases, and the presumption that the custody of small children should ordinarily be awarded to the biological mother unless she be shown to be unfit -- a rule which, in its turn, has in some places been replaced by joint custody.

It is when we survey the untilled fields ahead that deep concerns must arise as to the wisdom of the current plans to force same-gender unions into the procrustean bed of marriage. The fact that, throughout its history, matrimony has always involved opposite-gender couples is probably the least important concern. More central is the fact that a huge edifice of jurisprudence has been built up over generations, based entirely on opposite-gender precedents, many of which are not amenable to assimilation with same-gender unions. Some of these concerns will be dealt with

below. But here it becomes necessary to advert to the intellectual postulates which continue to undergird the institution of matrimony, and which continue to determine its character.

There are in currency today three views as to the fundamental purpose of human sexuality. The first two are steeped in religion and custom, and have worked fairly much in tandem throughout Western history. Only in the twentieth century have they been seriously challenged, and then by a viewpoint much weaker. Though growing slowly, this third view has little prospect of gaining very wide acceptance except in terms of slow and very long-term change. This writer must now violate his long-standing opposition to extensive quotations by leaving the description of these views to a more competent hand:

> The model of sexuality that defines sex primarily as a reproductive mechanism, and therefore staunchly opposes contraception has demonstrated great hardiness. This view assumes that procreativity is the principal measure of the moral acceptability of each act of intercourse and, more broadly, of all sexual behavior. Writers who place primary emphasis on sex as reproduction, therefore, condemn homosexual relations as well as heterosexual oral and anal sex practices and often maintain that even the postures used in marital sex are morally good or bad depending on whether they hinder or promote conception. Those who consider reproduction the primary criterion of sexual morality usually deny any positive value to sexual pleasure and often assume that pleasure in sexual encounters varies in inverse proportion to reproductive potential. Partisans of procreation also argue that marriage must be permanent and indissoluble in order to maximize parental capacity for nurturing and rearing children. Those who take this view often picture marital sex as an unfortunate necessity to achieve a laudable goal -- a good use of a bad thing, as St. Augustine called it. Hence they minimize the value of sexual satisfaction as a binding mechanism of marriage. The primary force that holds married couples together, in their scheme of things, should be the welfare of their children, and moral duty will dictate that couples remain together, whether they care to or not. Those who favor the procreative emphasis almost invariably regard any form of nonmarital sex as wrong.
>
> Writers who take reproduction as the sole or primary goal of sex have virtually without exception dealt with human sexuality from an exclusively male perspective. Men are normally fertile from puberty to late old age, and male orgasm accompanies the emission of sperm. Thus the view that sex and reproduction are inextricably joined together reflects the experience of most men. Women experience sex differently. Females are fertile only for a fraction of their adult life, from puberty to menopause. The biological cycle of the human female, unlike that of most other mammals, does not involve a close link between ovulation and the female sex drive. Moreover, orgasm for women is primarily a function of the clitoris, which has no reproductive function at all. Thus the link between sexual satisfaction and reproduction is relatively weak from a woman's viewpoint. . . .

> The model of sexuality that lays primary emphasis on the impurity of sex also remains vigorous. This view entails some of the same consequences as the first one. Like the first model, the impurity school condemns nonmarital sex as morally wrong. Those who see sex as impure, like advocates of the reproductive model, attach no positive value to sexual pleasure, but rather consider it a lure that tempts men and women to debauchery. . . . Adherents of the sex-is-dirty school of thought, unlike the children-first school, see little difference between various sexual techniques and coital positions; all of them corrupt and defile mind, soul, and body. . . .
>
> The third model of sexuality views marital sex as a source of intimacy and affection, as both a symbol and a source of conjugal love. Subscribers to this school of thought regard sexual pleasure more positively than do adherents of the other two models. A few writers of this third persuasion even endow marital sex with spiritual virtue. They argue instead that the frequency of marital sex ought to depend on the needs and desires of the married couple, not on fluctuations of the liturgical calendar or the menstrual cycle.[11]

The first of these models of sexuality needs to be examined further, because this model constitutes the most intractible impediment to any rational understanding of human sexuality. What are its intellectual underpinnings, and what are its religious roots? The second can be quickly dismissed. Its religious roots are thin and spurious. Though the Biblical injunction "be fruitful and multiply" pervades the Jewish heritage, and was ultimately accepted by Christianity after some soul-searching, that is something quite different from banishing pleasure from the sexual act, and pronouncing it to be evil. To a substantial degree, this noxious exercise in morbidity corrupted the Christian creed through the remarkable influence of the converted Jew, Saul of Tarsus, who, as the St. Paul of history, succeeded in imbuing the nascent Christianity with his own serious psychological problems. There were other influences, to be sure, but the Pauline connection was dominant.

The intellectual foundations for the procreational purpose of sexuality are equally tawdry, the luminaries of the Church to the contrary notwithstanding. They boil down to the claim that the male organ can be seen by simple inspection to "fit" into the female vagina, and that this is the only way in which procreation can take place, ergo procreation is the purpose of the sexual act. Since the Church was also the progenitor of

the second model of sexuality, that sexuality was intrinsically filthy and evil, it followed logically that procreation had to be the ONLY legitimate purpose for sexual activity.

This "purpose" argument now warrants "strict scrutiny", as lawyers would say. Does sex necessarily have any purpose at all? Most persons, whether religious or not, will unthinkingly say, "Yes". They may not agree as to what the purpose or purposes of sex are, but they will maintain that it does have some purpose. Yet to maintain this, one must engage in a philosophical form of leger-de-main, by imputing purpose to an inanimate object, in this instance, the sexual act. True, we frequently engage in this kind of thinking in everyday life. We speak of the purpose of a hammer as if the hammer itself were capable of thought, and we say that its purpose is to drive nails into wood, or to smash some object, or even to kill someone. When we speak in this manner we appear to be saying that the hammer itself is a sentient mind with intentions and purposes of its own. In truth, we know better. When we speak unthinkingly of the purpose of the hammer, we know we are really referring to the intentions of the user of the hammer, or to the purpose of the maker of the hammer. A moment's reflection enables us to see that we are not discussing the purpose of the hammer at all. Everyone realizes that an inanimate object, like a hammer, is incapable of thought and therefore can have no purposes. Only a thinking mind can have purposes or intentions. As soon as we recognize this, we can see that there are as many different "purposes" of the hammer as there are human minds to use it. So too with sex. By itself sex can have no purpose. Purpose is involved only when human beings engage in sexual acts. Then, as in the case of the hammer, there are as many different purposes of sex as there are human beings who engage in it. Some persons have sex for procreative reasons, while others engage in it solely for physical pleasure. There are those who have sex for sadistic purposes, for masochistic purposes, for commercial purposes, for vindictive purposes, for reasons of compassion or pity -- the list is end-

less. Whatever the reason why people engage in sex, the conduct itself remains without purpose.

The philosophic game of imputing purpose to inanimate objects was a characteristic of Greek philosophy, which the Church adopted in order to propagate its own doctrines. By imputing purpose to sexual acts, the Church was better able to spread the idea that sex exists for reasons quite apart from the intentions of the actors, thus reinforcing its doctrine that the purpose of sex lies in a higher mind, that of Him who she claimed created man together with his sexuality. According to the Church, God created sex for the sole purpose of procreation. But this is essentially what those persons say who argue that the purpose of sex is self-evident from anatomical inspection. What, then, is meant when the claim is made that the purpose of sex is discoverable by examining the male and female bodies? Just as in the case of the hammer, the only purpose which such an inspection can disclose is either the purpose of the person who engages in the sexual act of that of whoever created the human body. Hence if the purpose of sex is not that of the person who actually engages in the sexual act, the only other purpose it can be is that of Him who is alleged to have created the human body. In short, the claim that the purpose of human sexuality can be readily ascertained by inspecting the male and female bodies rests ultimately on nothing but a religious construct.[12]

GAY PEOPLE AND DOMESTIC PARTNERSHIP

DOMESTIC PARTNERSHIP

At this point it should be self-evident that same-gender relationships represent a total repudiation of the postulates of both the first and the second models of human sexuality which have been described. But to pose the issue on the narrow ground of equity for same-gender couples would constitute an even greater injustice to the far greater number of opposite-gender couples who have an equal or even greater stake in the development of a rational jurisprudence based on the third model of human sexuality. Thus the situation in Hawaii serves to obfuscate the underlying question, leaving most people to conclude that the issue of gay marriage versus an alternative system of legalized same-gender unions devolves into a sterile contest between two alternative government agencies competing for the right to issue certificates of legalization to same-gender couples. Framed in this manner, the discussion becomes an exercise in futility. It is only when one understands that what is at issue are some of the most cherished assumptions on which our Judeo/Christian society rests that the immensity of the problem becomes apparent. Only then can one appreciate that the situation in Hawaii represents a God-given opportunity to create an institution -- domestic partnership -- parallel to marriage and available to all people, which, for the first time in Western history, can be so structured that it will be able to address the transcendent question. That question is this:

> Does every human being have an inalienable right of absolute dominion over his or her body consistent with a like dominion by every other post-partum human being over their own bodies?

Once the focus is placed on this ultimate question, the entire scene changes. It then becomes clear that there is a unifying dimension to every one of the corporeal issues which haunt our age. In short, abortion, adultery, fornication, monogamy, sodomy, pre-marital sex, bisexuality, masturbation, birth control, circumcision, homosexuality, genetic engineering, euthanasia, surrogate parenthood, suicide, artificial insemination are all of a piece. They cannot be treated in isolation. A system of

domestic partnership provides a long-overdue opportunity, free from the horrendous incubus of the first two sexual models, to create a new institution, one which can rationally respond to the variegated problems involved. We stand today at the threshold of a biologic and genetic revolution, in the course of which mankind is about to violate the ultimate prohibition imposed on Adam and Eve, now that it is poised, through genetic engineering, to pluck the forbidden fruit of the second tree in Eden, the tree of life. Do we not need new legal institutions to assist in its digestion?

Examples of the incredible weight and perdurance of the traditional sexual ethic abound on all sides. Those about to be instanced must serve as surrogates for scores of others. The second model of human sexuality -- that all sex is inherently filthy -- is so pervasive that it has warped our sense of logic and violated our most cherished legal principles, often without our even being aware of what has occurred. Why is the crime of rape not treated as merely another form of assault and battery, the seriousness of which could be reflected in the punishment imposed? This writer has heard it explained as due to the possibility of an unintended pregnancy and an illegitimate birth. Yet clearly that cannot be the answer, for the assault could always have been punished as an assault and the illegitimacy disposed of as are other illegitimacies. The only plausible explantion is that because the assault was <u>sexual</u> in character, it was treated differently. A similar distortion of logic involves the legal euphemism "morals offence." A stranger to our jurisprudence would conclude that the phrase refers to some serious crime, a grave violation of the moral code. Then one learns that the term attaches exclusively to a group of minor, non-violent offences, the distinguishing feature of which usually consists of some harmless sexual language or gesture, involving no threat of bodily contact, such as a private solicitation to have sexual relations, which conduct may itself be legal! These legal anomalies not only defy all logic, they frequently violate our most hallowed legal and moral principles.

In turning now to the legalization of same-gender relationships we intend no insensitivity to the far more manifold problems facing opposite-gender couples in their attempts to escape from the inequitable fetters of matrimony. The fact that there appear today to be more heterosexual pairs living outside of legal marriage than within it testifies to its continuing inability to adapt to the inexorable demands of urban and industrialized societies. Marriage is still based on the inflexible assumption that it is a lifetime commitment, "until death do us part." Thus it starts with a lie at the very beginning. The reality is that more than half of all marriages end in some form of divorce, annulment, or separation. The same disparity between religiously-imposed assumptions and reality is found regarding monogamy, which is now honored only in the breach.[15] In considering the legalization of same-gender unions, three interests need to be recognized. These are (1) same-gender couples, (2) opposite-gender couples, and (3) the public interest. Gay marriage would do a disservice to all three. The constitutional requirements raised in Baehr need not delay us here; our earlier discussion disposed of the issue by demonstrating that these are met equally through either the institution of matrimony or through the coördinate institution of domestic partnership. What the legal recognition of same-gender unions will raise are problems which are entirely novel, and it will compound gender differences which have always existed and which marriage, as an institution, has never had to face.

Here one must dispel the widespread misapprehension that legalization of same-gender unions merely involves recognition of one new class of couples. Nothing could be further from the truth. Legalization of same-gender unions involves recognition of two new classes of couples, same-gender males and same-gender females. Each differs not only from opposite-gender couples, but, more radically, from its same-gender counterpart. Among lesbians and gay men there is little mixing of the sexes. Men and women not only do not share each other's beds, they do not

ordinarily socialize together, they infrequently live together, they rarely vacation together, and they simply do not engage in the manifold number of inter-gender activities which characterize the customary lives of opposite-gender people. To speak of a "gay lifestyle" is in fact a misnomer. There are two same-gender lifestyles, each radically different from the other.

This may come as a surprise to many of those who have accepted the public perception of gay people as comprising a single homogeneous group. This public image is true so far as coördinated political and professional activities are concerned, which are fueled by the common discrimination to which both lesbians and gay men continue to be exposed. But it breaks down completely when one ventures beyond these areas. There one finds gay people riven by gender.[16] They certainly do not participate in the many inter-gender activities in which heterosexuals engage. Since marriage is not a state into which people ordinarily enter for political or professional reasons, it should be apparent that the inclusion of same-gender male and same-gender female relationships within the institution of matrimony will introduce two extremely disparate types of couples into a guild which was established for couples in which the masculinity of the man has always been counterbalanced by the femininity of the woman. The result will be a kind of spectrum, in which the traditional opposite-gender couple will constitute the mean, and the two extremes will be composed respectively of lesbian pairs on the one hand and gay male pairs on the other.

These differences need to be examined further. Instead of the gender balance that characterizes opposite-gender couples, there occurs in the case of same-gender couples a compounding of the characteristics of the single gender to which both members of the couple belong. This is of transcendant importance, especially in the light of the significan research that has taken place during the past thirty years, which has greatly illumined our knowledge of the implications of sex and gender.

Beginning about the time of Kinsey, an impressive corpus of scientific information began to accumulate which seriously eroded the then-conventional wisdom that men and women are identical except for their sexual paraphernalia. The initial building block of this increasingly impressive research was the work of two members of the Yale faculty, and was published as Patterns of Sexual Behavior.[17] One of their discoveries was the fact that sexual promiscuity is an attribute of men -- not of women -- and that it is a characteristic which men share with the males of all the higher primates. This research was followed by significant work in other disciplines, including anatomy, biology, and genetics, during the course of which striking differences between the two sexes were discovered. One such discovery was the location of the elements which are responsible for sexual attraction between human beings. The male elements were found to be located in a different hemisphere of the brain from their female counterparts. This same expanding body of knowledge began to provide the first scientifically-verifiable answers to the age-old questions about gender that have so haunted the human race. For the first time in history there appeared rational biological reasons for women's hostile attitude toward pornography, and for the fact -- long recognized -- that they do not generally patronize adult book stores.[18]

The weight of this burgeoning knowledge flew in the face of some of the most cherished presuppositions of classical liberalism, which had always been grounded in the proposition that all people are created equal. It is true that, in order to bring this doctrine into conformity with visual observation, most liberals had found it necessary to reformulate their creed by stating that it meant only that all human beings had a right to an equal opportunity to develop themselves to the limit of their capacity. Even so, the liberal ethic has always enjoyed an uneasy co-existence with the results of empirical observation, particularly when confronted with the findings of modern science. One did not need biology, let alone genetics, to know that men and women are not equal in any physical or biologic

sense if what is meant by the term "equal" is "identical". Yet confusing "equal" with "identical" has often led liberals to insist on the employment of identical remedies on the road to justice. This is impossible in some instances without distorting the outcome, which can never be identicality or sameness, but justice or equity. Justice for one group is not always achievable by the same methods that assure justice for a different group. Equality in implementation may make for injustice in results. This becomes more apparent in matters involving gender. Government cannot ignore biology or genetics, but these create no problem if the focus is on fairness of results rather than on equality of methods.

The same reasoning applies with equal logic to homosexuals and heterosexuals. Like those of gender, the differences between them involve biological functions. The old liberalism inherited the centuries-old distinction between "mind" and "body", and limited its concerns primarily to activities of the mind, such as religious beliefs, political opinions, speech and writing. Except for the rights of assembly and petition, it did not generally recognize the concept of diversity when it came to bodily conduct -- sepecially sexual conduct -- as it so strongly did when freedom of expression was involved. This was not surprising, since liberalism sprang from the same Christian tradition which held that sex was dirty and unmentionable. Sexual conduct was never included within the liberal pantheon. This explains why courts in this country have frequently acted as if there were a specific pornography exception to the Constitution's first amendment.

We return now to gender differences, and to the matter of promiscuity, which is an important factor in those differences. Low promiscuity is a central reason why lesbian relationships are likely to be the most stable of the three types under discussion -- same-gender female, same-gender male, and opposite-gender. Another reason, of course, is gender compounding. The essentially monogamous psyches of the two women comprising a lesbian couple reënforces the chances that the relationship will be entirely

monogamous, and hence very stable. While this does not always mean that such a union will be more stable than its heterosexual or same-gender male counterparts, the presence of a monogamy-oriented biologic underpinning provides an important bond making for harmony and cohesion. By contrast, same-gender male couples lack this biologic cementing element. Some gay-male couples have working arrangements which allow for extra-marital encounters that are mutually accepted and recognized so that they do not affect their relationship. But this form of mutual toleration is not always present. At all events, the higher incidence of promiscuity amongst males causes a significant number of gay men to abandon all interest in permanent relationships.

The effects of gender compounding are likely to become most evident in such matters as health, medical costs, and insurance. It is well recognized that women have special medical needs, and that their lifetime medical expenses are significantly higher than those of men. These lifetime costs are not solely a consequence of women's longer life expectancy. They are due to medical conditions specific to their gender. The list only begins with pregnancies. Same-gender female couples face the possibility of pregnancies of both of the spouses. Breast cancer and some other forms of cancer are other illnesses to which women are far more subject than men. Add to this the continuing entrance of women into the workforce, which increases medical risks, and we are left with a substantial differential in the lifetime medical costs of the two sexes. This same-gender medical-costs differential will be compounded when same-gender couples are involved.[19]

It must be conceded that the presence of AIDS seriously skews these projections, if only because AIDS continues to be concentrated amongst homosexual men, especially in the United States. But in the shaping of legislation, the long-term view must prevail, and AIDS will not be with us always. When it is finally conquered medically, the disparity in lifetime medical costs between lesbians and gay men will become much more apparent. Gay male couples, largely childless, are far more dedicated to physical fit-

ness than their heterosexually-married counterparts. They suffer less from what is euphemistically described as "matrimonial spread" -- the post-marital physical deterioration that occurs with many husbands who once had outstanding pre-marital physiques. This is but a further factor conducing to the disparity in medical costs, not only between male and female same-gender couples, but between them and married opposite-gender couples.

These gender differences highlight the need for a separate coördinate agency prepared to address the many differences which are distinctive with same-gender unions. For example, compared with the plethora of statistics and information on the health and medical costs pertaining to opposite-gender married couples, parallel information for same-gender couples constitutes a virtual terra incognita. There exist no reliable actuarial data on which meaningful policies of insurance for same-gender couples can be written. Working with data from married couples would be senseless in view of the gender compounding already discussed. And using data from single persons, though helpful, would produce results far from accurate, and certainly not fair to those who will be seeking insurance. Much of the needed information will be obtainable only from actual histories of same-gender couples, something which the current system of marriage cannot be expected to provide to the degree which will become necessary. Only an independent agency, such as domestic partnership, can fill the statistical void.

SAME-GENDER RELATIONSHIPS AND THE LAW

A new jurisprudence. Annulment of the relationship in the case of same-gender couples could create problems. It is true that refusal to consummate a marriage is no longer a specific statutory ground for annulment in Hawaii, but the decision of the Supreme Court of Hawaii in Ah-Leong v. Ah-Leong allows the courts to grant annulments on this ground through their inherent authority to grant annulments for reasons which have traditionally been recognized by courts of equity.[20] This means that the problem is the same in Hawaii as in many other American states which may be faced with annuling a gay marriage on grounds of refusal to consummate. It has taken judges centuries to define what particular sexual act on the part of each of the spouses constitutes consummation, so that only the refusal or inability to engage in that specific sexual act creates ground for annulment. But what specific sexual act will constitute the ground for annulment in the case of same-gender male relationships? And what value would such a definition have for same-gender female relationships? Here the absurdity of attempting to force same-gender unions into the procrustean bed of marriage becomes manifest. Problems such as these can never arise within a system of domestic partnership because the statute creating it would contain a specific provision that, in developing a body of jurisprudence for domestic partnership unions, courts would not have to apply marriage-law precedents if doing so would create absurd results or produce inequitable consequences.

This illumines the fact that the institution of domestic partnership allows for the growth of a jurisprudence directly adapted to same-gender unions, untrammeled by opposite-gender precedents. Advantages from this will accrue not only to same-gender couples, but to opposite-gender couples as well, for they will not be exposed to the risk of having the existing jurisprudence of marriage distorted in order to accomodate same-gender marriages.

Legal age for marriage. The Hawaii Commission on Sexual Orientation and the Law recommended a minimum age of eighteen for entering into a domestic partnership arrangement.[21] By contrast, the existing Hawaii Marriage law permits persons as young as fifteen to marry. This means that, if same-gender unions were given legal recognition in Hawaii by subsuming them under the state's marriage law, the possibility would arise for same-gender, teenage couples as young as fifteen to enter into matrimony, some of whom might even be visitors from other states. By passing a comprehensive domestic partnership act, distinct from marriage, the legislature can avoid serious public policy issues of this kind. This is but a sample of the anomalies and absurdities which are likely to arise in any jurisdiction that attempts to assimilate same-gender relationships to opposite-gender marriage.

An alternative for all people. The widespread misapprehension as to the consequences of including same-gender unions within the marriage fold is paralleled by similar ignorance when it comes to an understanding of who will constitute the domestic-partner group. Current wisdom mistakenly believes that domestic partners will consist almost entirely of persons homosexual in orientation. All available evidence strongly suggests that, by far the greater number of per persons who will seek domestic partnership arrangements will be heterosexuals. This is already overwhelmingly true for those who enroll as domestic partners in the existing limited domestic partnership arrangements currently operated by private businesses, universities, and some municipalities for the benefit of their employees. A sizeable number of these programs have been specifically limited to gay employees because the cost would be too great if the large number of heterosexual employees who wish to apply were admitted. The reason usually given for this limitation is that heterosexual employees have the option of matrimony if they wish to obtain its benefits. But this only confirms what is already known -- that domestic partnership holds a wide appeal to heterosexuals who qualify for marriage and who want to have an ongoing relationship,

but who, for reasons known unto themselves, do not wish to enter into marriage. When we add to this group the pairs who have no sexual ties, or who are not qualified for marriage, but whose domestic arrangements and commitment to each other equitably entitle them to the economic advantages of matrimony or the equivalent as proposed under comprehensive domestic partnership legislation, then the heterosexual component of those who wish to become domestic partners increases greatly, so that it constitutes a substantial majority of those who will opt for a domestic partnership arrangement. Who are these couples? They cover a wide range; the following are merely examples:

widows & widowers
lifetime spinsters
retired people in general
singles who wish to delay marriage
singles whose parents object to their marrying
singles whose careers might be harmed by marriage
couples who wish to conceal their cohabitation
divorced persons whose children oppose remarriage
divorced persons with religious scruples against remarriage

In short, over time domestic partners are likely to be comparable to married couples in number, age, gender, and sexual orientation. It will be a broad-based group.

A completely secular institution. This could be domestic partnership's adventitious dividend for Hawaii and states with similar marriage laws. The present Hawaii marriage law has never been completely desacralized. Its use of terms such as "solemnized", "celebration", and "rite" reflects its failure to divest itself of its religious aspects. It is noteworthy that representatives of the Mormon Church and from evangelical and fundamentalist Christian bodies testified before the Hawaii Commission on Sexual Orientation and the Law against the legalization of same-gender marriage so as to retain the law's Christian character. Much of their testimony maintained that "same-gender relations were against God's will and therefore should be banned."[22] Buddhists, however, who represent the second largest religious denomination in Hawaii, do not believe in God. They testified before the same commission

that legal recognition should be given to "stable relationships between loving people regardless of whether those loving people are of the same gender."[23] Clearly, the existing Hawaii marriage statute reflects aspects of the Christian belief system. Whether or not these violate the constitutional divide between Church and State entrenched in both the Hawaii and the federal constitutions needs not be addressed here. What is evident is that the law is not reflective of the diverse religious character of the Hawaiian people, and, as such, it does not meet contemporary standards of governmental neutrality toward all religions. Legalization of same-gender relationships within the existing Hawaii marriage statute will not cure this defect, even though it would meet all the constitutional requirements of Baehr. A domestic partnership law will not only comply with that decision, but would create a thoroughly secular institution, free from sectarian residues.

All deliberate speed. This paper began with a discussion of Brown v. Board of Education in its introductory pages. That discussion pointed out that the substantive issue in Brown was not relevant to the situation of domestic partnership. There is, however, one aspect of Brown which was not discussed, and which is relevant to domestic partnership. That has to do with the method by which the Brown decision was implemented. In legal history that method has come to be known as "all deliberate speed", from the words in the decision itself. "All deliberate speed" is a judge-made construct crafted especially for the purpose of implementing judicial rulings which run drastically counter to the weight of custom or current public opinion. It was best described by one of its principal architects, Chief Justice Warren. Speaking for a unanimous bench, he stated:

> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. . . . Courts of equity may properly take into account the public interest . . . in a systematic and effective manner.[24]

The lower courts were then ordered "to take such proceedings and enter such orders and decrees . . . as are necessary and proper . . . with all deliberate speed."[25]

The most significant aspect of the foregoing, and one which has not been addressed in all the rhetoric, public and private, that has followed upon the Baehr decision, is the public interest. Alone of all the responses to Baehr, domestic partnership addresses the public interest. It does this by employing the implementational method sired in Brown. It establishes a system for promoting not only the interests of same-gender and opposite-gender couples, but the public interest as well. Thus it enables the Hawaii legislature to comply immediately with the constitutional demands of Baehr whilst simultaneously meeting the social and political eruption created by that ruling with "all deliberate speed." And it gives future Hawaii legislatures the flexibility to amend, to adjust, and to modify same-gender jurisprudence free from the burden of having to concern themselves as to whether, in doing so, they may inadvertently have adversely affected opposite-gender married couples. This could all too frequently occur if the two types of relationships were subjected to a common marriage law.

In sum, domestic partnership reflects not only enlightened jurisprudence, but insures equal justice under law. It would add yet another laurel to the vision of those who framed the 14th amendment to the Constitution of the United States, and would constitute a fitting tribute to those who now guard its scion in the Constitution of Hawaii.

9dd

NOTES

1 Roscoe Conkling as quoted in Benjamin B. Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction (Negro Universities Press, New York, 1969), p. 34.

2 Brown et al. v. Board of Education of Topeka et al., 347 U.S. 483 (1954) at 495. Italics this writer's.

3 James Westfall Thompson & Edgar N. Johnson, An Introduction to Medieval Europe, 300-1500 (New York, 1937), p. 322.

4 Henry Osborn Taylor, The Mediaeval Mind (Cambridge, Mass., 1949), I, p. 587.

5 Ibid., p. 602.

6 As of 1984 more than three quarters of the states still retained the spousal exception. See James A. Brundage, "Survivals of Medieval Sex Law in the United States and the Western World", being Appendix #3 of his Law, Sex, and Christian Society in Medieval Europe (Chicago & London, 1987).

7 W. B. Howell, ed., William Cobbett, Complete Collection of State Trials (London, 1809-1828), XIII, p. 1357, as quoted in Lawrence Stone, Road to Divorce: England 1530-1987, (Oxford, 1990), p. 316.

8 For information on the pollutional aspects of sexuality, see Michael F. Valente, Sex: The Radical View of a Catholic Theologian (New York, 1970), p. 31ff.

9 See Brundage, op. cit., p. 161, note 156.

10 For some measure of the extent of ecclesiastical proscriptions, see Ibid., p. 155ff and the chart on p. 162, which has been reproduced in this writing as Appendix A.

11 Ibid., p. 160.

12 As reported in Ibid., p. 589, note 20. Vatican II was supposed to have legitimized sexual relations for pleasure between married couples.

13 Ibid., pp. 580-581.

14 Call this "nature" if one wishes, but those who impute a purpose to nature, which purpose is binding on all men, have simply endowed nature with divine attributes and are speaking of God under another label. The discussion of "purpose" has been taken from the writer's unpublished article entitled Is Homosexuality Natural?, written several years ago for the American Association for Personal Privacy.

15 See Lena Williams, "A New Level of Tolerance for Adultery", New York Times, 4 January 1996, p. C8. The Governor of Hawaii is reported to have stated publicly that Government should remove itself from the marriage business entirely, leaving the matter entirely to religious bodies. He believes that a system of domestic partnership should be the only state institution for those who wish to have their relationships legally recognized. Marriage in its traditional form would be left entirely to the churches. Presumably this would mean that the Government's role would be limited to defining the conditions under which two people would be able to secure legal recognition of their desire to share their lives together for whatever reasons, sexual or non-sexual, permanently or temporarily, and exclusively with each other or not.

16 This extends even to the use of nomenclature. The early movement for homosexual civil liberties used the term "homophile" in order to avoid the use of "homosexual", which was

NOTES

considered pejorative. However, it was soon eclipsed intramurally by the neologism "gay", which eventually entered common currency. Gay remained the preferred collective until protests from lesbians caused it to be replaced by the politically-acceptable dual designations "lesbians" and "gay men", although it retains its unimpeachable standing in many quarters as well as in these pages. The linguistic history here is not dissimilar to that of "black" and "Afro-American", except that the one was propelled by considerations of gender and the other by ethnicity. Both replaced linguistic facility with ponderosity.

17 Clellan S. Ford & Frank A. Beach, Patterns of Sexual Behavior (New York, 1951).

18 Two excellent books on the subject, both intended for the lay reader with little scientific knowledge, are Jo-Durden Smith & Diane Desimone, Sex and the Brain (New York, 1983) and Anne Moir & David Jessel, Brain Sex: The Real Difference between Men and Women (London, 1989).

19 A valuable survey of gender medical disparities will be found in the Summary Report of the National Institutes of Health, entitled Opportunities for Research on Women's Health (Hunt Valley, Maryland, 1991).

20 29 Haw. 770 (1927).

21 Draft Report (Honolulu, 27 November 1995), Appendix E, p. E-3.

22 Ibid., p. 33 & note 120.

23 Ibid.

24 Brown v. Board of Education of Topeka, op. cit., at p. 300. Italics this writer's.

25 Ibid., at p. 301.