

WHY DOMESTIC PARTNERSHIP?

by

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Domestic partnership is a new institution intended to recognize the well-nigh universal need for interpersonal bonding. It is intended to be a mainstream institution for the purpose of legitimizing stable bonding relationships without regard for procreational possibilities. Hence it has always been strictly neutral with respect to matters of gender and sexual orientation. Its largest potential constituency has always been cohabiting heterosexual couples who have rejected traditional matrimony either temporarily or permanently. It also has a great appeal to older persons who may have lost a spouse and who wish to cohabit for various reasons, usually without sexual intentions.

Here it needs to be understood that marriage has always carried with it numerous legal obligations and responsibilities, most of which have been dictated historically by its reproductive character. In recent times many of these distinctive matrimonial obligations have been attenuated or eliminated, but the bulk of them can never be entirely jettisoned without destroying the very *raison d'etre* on which marriage as an institution rests. These still constitute the distinguishing features of what is appropriately denominated "wedlock", since those who adopt the marital state become prisoners to a bewildering congeries of archaic restrictions which are at war with human biology. Modern technological societies have become increasingly aware of the importance to human life of interpersonal bonding unconnected with the bearing of children. From this there has developed the need to establish legal institutions capable of addressing this fundamental human desire. Domestic partnership is such an institution.

It is to be expected that the non-procreational features of domestic partnership have given it a special appeal to gay couples. From its inception gays have seen it as an answer to their wish to obtain legal recognition of their same-gender relationships. Regrettably they have often been insensitive to the legitimate interests of other groups in the course of pursuing their own goals. This has sometimes taken the form of efforts to con-

vert domestic partnership into a partisan instrument to redress the denial to gay couples of the right to marry. It has been accomplished by limiting access to domestic partnership to same gender couples. This does violence to all principles of equity, and runs counter to the entire rationale of domestic partnership as a broadly-based mainstream institution open to all persons.

However, there are more transcendent reasons for rejecting these exclusionary efforts. These stem from the fact that, whether marriage be obtained by means of a religious ceremony or through some form of civil proceeding, all forms of marriage are religious in their essence and ethics. This is true throughout the United States.* The legal rules, regulations, and proscriptions of matrimony are all sacral in origin and character, and the role of the public authorities in each state is limited to their administration and enforcement. Unlike the legal rationale underlying the prohibition of conduct such as murder, which has similar religious roots, the institution of matrimony has never been desacralized through the establishment of independent secular grounds for its retention in its present form. To this day it remains an anomaly in a society which claims to have separated mitre from sceptre.

Finally, were domestic partnership to become a parochial instrument for the exclusive benefit of gay persons, the opportunity would be lost for the development of a corpus of legal precedents through the slow accretion of judicial decisions which would be of benefit or relevance to the general population as a whole. The evolution of a comprehensive jurisprudence having to do with non-procreational forms of interpersonal bonding certainly outweighs the narrow concerns of any special group. Were this restriction to occur, domestic partnership would no longer serve the broad interests of the entire American public.

* The notion that a marriage performed through a civil ceremony is secular in character is a common misconception. It is no different than believing that the legislative enactment of the ten commandments and their enforcement by the civil authorities would convert them into secular mandates.

TEN REASONS FOR CREATING AN INSTITUTION OF DOMESTIC PARTNERSHIP AS A COORDINATE OF MARRIAGE

1. **Federalism.** Domestic partnership makes use of a time-honored feature of our constitutional system -- federalism -- and uses it in the public interest as well as for the benefit of both same-gender and opposite-gender relationships. And it does this while meeting all the requirements of the Hawaii Constitution.
2. **Intergovernmental Conflicts.** Domestic partnership ends the threat of serious interstate and state/national conflicts by providing a "laboratory" for the nation, which will enable it to determine in an orderly manner over time whether the legalization of same-gender unions will remain an isolated experiment in one state only -- as has been the case with Nebraska's unicameral legislature -- or whether the Hawaii example can serve to develop a national consensus, which could eventually lead to the enactment of domestic partnership laws throughout the nation. This is the way legal and social change has always been effected in the American federal system.
3. **Legislative flexibility.** Domestic partnership gives future Hawaii legislatures the ability to assess the legalization of same-gender relationships on its own distinctive merits and enables them to make any necessary changes. Most important, it allows legislators to reach the ultimate decision as to whether the separate system of domestic partnerships should be continued as an independent institution or melded into marriage.
4. **A new jurisprudence.** Domestic partnership provides an opportunity for the courts to fashion a jurisprudence peculiarly adapted to same-gender unions untrammelled by opposite-gender marriage precedents, and, in so doing, prevents the possibility of distorting the existing jurisprudence of marriage which is based entirely on opposite-gender couples. The legalization of same-gender marriage involves much more than the mere inclusion of a new class of couples within the institution of matrimony. It represents the addition of two new classes -- same-gender male couples and same-gender female couples. Each of these two new classes differs greatly from opposite-gender couples, and even more so from each other.
5. **Refusal to consummate.** Refusal or inability to consummate a marriage is a common ground for annulment throughout the Anglo-American legal world. It remains a ground for annulment in Hawaii. The courts have taken centuries to define what particular sexual act on the part of each spouse 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 ground for annulment in the case of a same-gender male relationship? And of 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 relationships, courts would not have to apply marriage-law precedents if doing so would create absurd results or produce inequitable consequences.
6. **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 relationship.¹ By contrast, existing Hawaii marriage law permits persons as young as fifteen to marry. By passing a comprehensive domestic partnership statute, the legislature can avoid the serious public policy issues resulting from the legal recognition of same-gender teen-age couples as young as fifteen, some of whom might even be visitors from other states.

¹ Commission on Sexual Orientation and the Law, *Draft Report* (Honolulu, 27 November 1995), Appendix E, p. E-3

7. **All deliberate speed.** A domestic partnership system will enable the Hawaii legislature and judiciary to act in accordance with the well-established principle of "all deliberate speed" without foreclosing any of their ultimate options. "All deliberate speed" was specifically crafted for judicial rulings which demand social or political changes that run drastically counter to the weight of inherited custom or current public opinion. It provides the mechanism for immediate compliance with the constitutional mandates stemming from *Baehr v. Lewin*, while simultaneously handling the social and political eruption created by that decision "with all deliberate speed."

8. **An institution for Hawaiians.** Domestic partnership enables the legislature to structure an institution fitted for the needs of Hawaiians in Hawaii without having continually to "look over their shoulders" to consider the effects of their actions on other states or foreign countries. This will further its ability to evaluate the effects of legalizing same-gender relationships within the state of Hawaii and defuse the political climate by eliminating the possibility of being confronted by outsiders who might wish to capitalize on the idea of same-gender marriages as a tourist attraction or as a means to instigate political confrontation on the mainland.

9. **A completely secular institution.** The current Hawaii marriage law has never been completely desacralized. In its use of terms such as "solemnized", "rite", and "celebration" it has never fully divested itself from its religious/Christian roots. It is noteworthy that representatives of the Mormon Church and from evangelical and fundamentalist Christian bodies testified before the Commission on Sexual Orientation and the Law against legalization of same-gender marriage so as to retain the Christian character of the current law. Much of their testimony maintained that "same-gender relations were against God's will and therefore should be banned."² 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."³ 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 federal constitutions need 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 law will not cure this defect, even though it would meet all of the constitutional requirements of *Baehr v. Lewin*. A domestic partnership system will not only comply with that decision, but will create a thoroughly secular institution, free from sectarian residues.

10. **Civil rights leadership.** Domestic partnership involves a process in keeping with Hawaii's recognized position in the van of the American civil rights movement, yet avoids the pitfalls which follow from precipit and abrupt efforts at social change. In so doing it would enable Hawaii to capitalize on its religious, racial and ethnic pluralism, and further its stature as a leader in the nascent world movement for civil rights.

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² Draft Report, p. 33 & note 120.

³ *Ibid.*