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Marriage vs. Domestic Partnership: Will We Ever Protect Lesbians' Families?

Cindy Tobisman†

Despite the prospect that Hawaii may become the first state to recognize marriages of same-sex couples, many opponents to such recognition cite tradition and refuse to see marriage as an evolving institution with regard to extending access to same-sex couples. However, the institution of marriage is not monolithic and unchanging. For example, while marriage has traditionally been defined as a union between people of different sexes, it was also traditionally defined as a union between persons of the same race. As recently as 1967, state governments denied interracial couples the right to marry.¹ Traditionally, marriage also afforded a husband the right to unilaterally dispose of his wife's property however he saw fit. In fact, a married woman traditionally had no independent legal status of her own.²

Because such disparate treatment of individuals appeared unfair, courts found such practices illegal³ and legislatures abandoned such traditions. As a result, race and gender-based legal differences have gradually eroded through legislative and judicial means.⁴

The Supreme Court has held that the right to marry is of fundamental importance for all individuals.⁵ This importance stems in part from the fact that the Court has given categorical preference to married people.⁶ This categorical preference for marriage is particularly marked in the granting of parental rights.⁷

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1. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating Virginia's laws forbidding and punishing interracial marriage on both equal protection and due process grounds).
2. See 1 WILLIAM BLACKSTONE, COMMENTARIES 430 (1765). "The very being or legal existence of the woman is suspended during marriage, or at least is incorporated into that of the husband under whose wing, protection and cover she performs everything."
3. See, e.g., *Loving*, 388 U.S. at 12 (declaring anti-miscegenation statutes unconstitutional).
4. See *Kirschberg v. Feenstra*, 450 U.S. 455 (1981) (invalidating Louisiana's community property statute giving the husband, as the family's "head and master," the unilateral right to dispose of property jointly owned with his wife without her consent).
5. See *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).
6. See *Michael H. v. Gerald D.*, 491 U.S. 123, 129 (1989) (holding the State's categorical preference for the husband of the marriage over the biological father in matters of parental rights constitutional).
7. See *id.*

For instance, a child born to a married woman is considered a child of the marriage even if a man other than the woman's legal husband is the child's biological father.⁸ In such a case, the child's biological father will have far fewer rights with regard to the child than the nonbiological father because the public interest in protecting the family unit outweighs the biological father's interest.⁹

As a result of the law's tendency to protect families headed by married people, the failure to formally recognize same-sex unions results not only in inequities at work with respect to granting same-sex partners spousal benefits, but it also adversely affects lesbian families' security. For instance, because lesbians cannot marry, a lesbian mother's partner cannot benefit from the presumption of paternity granted to husbands of marriages. As a result, lesbian-headed families lack legal protection. Furthermore, without marriage, lesbian co-parents are prohibited both from jointly adopting and from adopting their partners' children. As such, company domestic partnership policies which may afford employees' same-sex partners health benefits, are an insufficient substitute for the familial protections which only marriage can afford.

BACKGROUND: THE HAWAII CASE

Hawaii is the only state to suggest that it may afford marriage access to same-sex couples. In *Baehr v. Lewin*, the Hawaii Supreme Court overturned a circuit court judgment dismissing three same-sex couples' claims that they should be allowed to marry.¹⁰ The court ruled that Hawaii's marriage law allowing heterosexual, but not homosexual couples to obtain marriage licenses constituted sex discrimination prohibited by the State Constitution's Equal Protection Clause.¹¹ The court held that Hawaii denied marriage licenses to the plaintiffs due to the gender of their partners, thus discriminating on the basis of sex.¹² Because sex is a "suspect category," the court remanded to allow the state to meet its burden of "overcom[ing] the presumption that HRS § 572-1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights."¹³

On December 3, 1996, Circuit Court Judge Kevin S.C. Chang ruled that lawyers for the state of Hawaii had failed to show any compelling reason for the existing ban on same-sex unions.¹⁴ Holding the ban unconstitutional, the judge ordered the state to stop denying marriage licenses to same-sex cou-

8. *See id.*

9. *See id.*

10. *See Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *reconsideration granted in part*, 852 P.2d 74 (Haw.).

11. *See id.* at 54.

12. *See id.* at 64.

13. *Id.* at 73-74.

14. *See Baehr v. Miiike*, No. 91-1394 at 21 (Haw. 1st Cir., Dec. 3, 1996).

ples.¹⁵ Chang's opinion cited substantial expert testimony that gay and lesbian couples can be good parents, and concluded that the state

failed to present sufficient credible evidence which demonstrates that the public interest in the well-being of children and families, or the optimal development of children would be adversely affected by same-sex marriage. Nor has [the state] demonstrated how same-sex marriage would adversely affect the public fisc, the state interest in assuring recognition of Hawaii marriages in other states, the institution of traditional marriage, or any other important public or governmental interest.¹⁶

Judge Chang has stayed his decision pending an appeal to the state Supreme Court.

THE DEBATE

Opponents to affording legal recognition to same-sex unions claim that the purpose of marriage is reproduction and thus fail to see the connection between same-sex unions and marital family units. This sentiment echoes that expressed by the United States Supreme Court in *Bowers v. Hardwick*, which provided, in part, "no connection between family, marriage or procreation on the one hand and homosexual activity on the other has been demonstrated."¹⁷ The alleged lack of nexus between same-sex unions and families serves as a primary justification for denying such unions the status of marriage.

However, a 1988 study by the American Bar Association found that eight to ten million children are currently being raised in three million gay and lesbian households.¹⁸ This statistic suggests that around six percent of the U.S. population is made up of gay and lesbian families with children.¹⁹

Despite the existence of millions of gay and lesbian-headed households, the Hawaii Legislature passed a bill to reaffirm that its current marital law is "intended to foster and protect the propagation of the human race through male-female marriages."²⁰ However, the Hawaii Bill further provides that the 1984 Hawaii Legislature's purpose in deleting the requirement that marriage applicants show they are not impotent was to remove any impediment that may have prevented the elderly or physically handicapped from marrying.²¹ Thus Hawaii reserves marriage for those couples whose genetic makeup suggest the possibility of offspring. However, there is no

15. *See id.* at 22.

16. *Id.* at 21.

17. *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986) (upholding the constitutionality of a Georgia sodomy law because engaging in homosexual behavior is not implicit in the concept of ordered liberty).

18. *See* EDITORS OF THE HARVARD LAW REVIEW, *SEXUAL ORIENTATION AND THE LAW* 119 (1990).

19. *See* Craig R. Dean, *Legalize Gay Marriage*, N.Y. TIMES, Sept. 28, 1991, § 1 at 19.

20. 1994 Haw. Sess. Laws 217.

21. *See id.*

fertility requirement for obtaining a marriage license, in Hawaii or in any other state. Nor do any states revoke marriage licenses for failure to reproduce. Apparently Hawaii wishes to pursue the laudable goal of promoting the appearance of potential reproduction.

Opponents to affording recognition to same-sex unions also contend that prohibiting same-sex couples from marrying somehow protects the idea of the family. Contrarily, instead of protecting families, the lack of access to marriage for same-sex couples has led to significant stresses on gay and lesbian-headed families. Without the right to marry, gay and lesbian-headed families lack basic protections. For instance, without marriage, if a birth mother's partner is not an American citizen, she will be unable to immigrate to stay with the birth mother and her child. A nonbiological parent likewise has no right to stay home from work to care for her ailing child.

Furthermore, without the protection that marriage confers, if a lesbian birth mother dies or breaks off contact with her partner, her partner is a legal stranger to the child whom she has raised.²² In such a case, the California Court of Appeals noted that "the absence of any legal formalization of [the birth mother's partner's] relationship to the children has resulted in a tragic situation."²³ Nonetheless, the court refused to expand the definition of parent in order to avoid such a result.²⁴

While waiting for the Hawaii Supreme Court to decide whether to confer marriage rights to same-sex couples, the federal government has passed the Defense of Marriage Act (DOMA),²⁵ which allows states to choose not to recognize same-sex marriages performed in other states.²⁶ Several states have enacted similar measures which would effectively deny recognition to any marriage between same-sex spouses.²⁷ If and when the Hawaii Supreme Court affirms lifting the ban on same-sex marriage, such laws will face constitutional challenges under the Full Faith and Credit Clause,²⁸ as well as the Equal Protection Clause.²⁹

22. See *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (Cal. Ct. App. 1991) (holding that a woman had no visitation nor custody rights of her former lesbian partner's child because she did not meet the legal definition of a parent).

23. *Id.* at 219.

24. See *id.*

25. 28 U.S.C. § 1738C. The statute provides in relevant part that "no state . . . shall be required to give effect to any public act, record or judicial proceeding of any other state . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state." Chapter 1 of Title 1 U.S.C. is amended by adding at the end the following: "Section 7. Definition of 'marriage' and 'spouse' . . . 'marriage' means only a legal union between one man and one woman . . . and the word 'spouse' refers only to a person of the opposite sex."

26. The Defense of Marriage Act passed in both the Senate and House of Representatives by September 10, 1996. President Clinton signed it into law on September 21, 1996.

27. During the 1995-96 legislative session, anti-gay marriage bills were introduced in more than thirty states. Of those proposals, twenty were blocked and sixteen passed (AL, AZ, DE, GE, ID, IL, KS, MI, MO, NC, OK, PA, SC, SD, TN, UT). See ACLU On-line, Sept. 15, 1996.

28. U.S. CONST. art. IV, § 1 (providing that states are required to give "full faith and credit" to public acts, records and judicial proceedings of other states). It is debatable whether this section applies to marriages.

29. U.S. CONST. art. XIV, § 1 (providing that "no State shall make or enforce any law which shall abridge the privileges of citizens nor deny to any person the equal protection of the laws").

SEPARATE AND UNEQUAL: DOMESTIC PARTNERSHIP IS INSUFFICIENT

The *Baehr* decision has spawned the development of domestic partnership law across the United States. These domestic partnership policies are not, however, viable substitutes for marriage.

Major corporations,³⁰ schools,³¹ and the California Bar Association³² continue to promote and adopt domestic partnership plans that extend spousal benefits to their employees' gay and lesbian partners. Over thirty municipalities, beginning with Berkeley in 1984, and including San Francisco, New York City, and Seattle have done the same, establishing in some cases a system of civic registrations for same-sex couples.³³ In 1994, Vermont became the first state to extend health insurance coverage to the same-sex partners of its state workers.³⁴

Although domestic partnerships receive public support that gay and lesbian access to marriage lacks,³⁵ domestic partnerships fail to provide lesbian-headed families and their children with the broad range of substantive protections afforded to families through legal marriage. At work, for instance, while domestic partnerships may afford a lesbian the ability to take advantage of certain "invisible cost" benefits, such as bereavement leave if her domestic partner is killed, it does not assure that she will be afforded health care benefits. Furthermore, the benefits afforded to the partners differ from company to company, and municipality to municipality. The lack of uniformity or mutual recognition of domestic partnerships means that a lesbian cannot leave her job if her partner is incapacitated and dependent on health care provided through work.

The shortcomings of domestic partnership laws have become apparent in Scandinavian countries, where domestic partnership law is more developed than in the United States.³⁶ For instance, although domestic partners in

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30. See Richard D. Mohr, *The Case for Gay Marriage*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 215, 237 (1995) (citing *Universities Give Gay Partners Same Benefits as Married Couples*, N.Y. TIMES, Dec. 24, 1992, at A10) (stating that AT&T, Bank of America, Apple Computer, and Levi Strauss and Co. have adopted domestic partnership policies).
 31. See *id.* (stating that Harvard, Columbia, Stanford and the University of Chicago have adopted domestic partnership policies).
 32. See State Bar of California news release, Sept. 19, 1996 (stating that the State Bar of California's Board of Governors unanimously approved a resolution stating a commitment to end bias against gays and lesbians in the legal workplace and calling upon legal employers to consider the adoption of benefits packages with the same set of benefits for all employees).
 33. See Celia W. Dugger, *Workers' Partners Added to Health Plan by Dinkins*, N.Y. TIMES, Oct. 31, 1993, § 1, at 40.
 34. See *Vermont Union Wins Benefits for Partners*, N.Y. TIMES, June 13, 1994, at A13.
 35. A national post-election poll of 1007 people who voted in federal elections around the country found that while most people oppose marriage for gay couples, they simultaneously believe that homosexual couples should have certain rights of marriage, such as inheritance rights, health care benefits, and hospital visits. See Greenberg Research, Inc., for the Human Rights Campaign, Nov. 5-8, 1996.
 36. See Mohr, *supra* note 30, at 236 (stating that recently, three Scandinavian countries enacted broad domestic partnership laws. These countries recognize each others' domestic partnerships. The countries that have enacted these laws are Denmark (Danish Registered Partnership Act, No. 372, enacted on June 7, 1989), Norway (Norwegian Act on Registered Partnership for Homosexual Couples, No. 40, enacted on April 30, 1993), and Sweden (Law Regarding Registered Partnership, enacted on June 23, 1994)).

Denmark and Sweden receive economic benefits such as health coverage, they are not eligible to receive joint custody or to adopt.³⁷ Furthermore, they are not considered married for purposes of international treaties, may not claim the benefits of marriage laws defining marital status in terms of biological gender (e.g. presumption of paternity laws), and may not participate in artificial insemination.³⁸

As is apparent in these Scandinavian countries, the shortcomings of domestic partnerships particularly involve the creation and protection of lesbians' families. In their quest for legal recognition of their relationships, the plaintiff couples in *Baehr* seek protections which married couples take for granted, such as those related to the bearing and raising of children. Without the protection of marriage, lesbian-headed couples have faced tragedy. Courts have denied life partners life insurance benefits,³⁹ the right to elect against a will,⁴⁰ and the right to petition for custody or visitation of children they helped raise.⁴¹

To prevent such situations, innovative lawyers created second parent adoptions, whereby a lesbian birth mother's partner adopts her child. However, such legal inventions have not met with judicial approval in all states.⁴² As a result, second-parent adoption, much like domestic partnership laws, remains an imperfect substitute for the protections which legal marriage alone would afford lesbian-headed families.

CONCLUSION

The injustices promulgated by the lack of recognition and protection for lesbian-headed families dictate against the use of domestic partnership laws as a substitute for full marital rights. Although domestic partnership registries are a step in the right direction, they fail to provide substantive protections for the families of lesbians and gay men. Furthermore, because marriage has remained largely the province of the individual states, federal domestic partnership legislation likely would be ineffective to provide substantive protections for families.

37. *See id.*

38. *See* Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U. L. REV. 1, n.8 (citing Linda Nielsen, *Family Rights and the "Registered Partnership" in Denmark*, 4 INT'L. J.L. & FAM. 297 (1990); Marianne H. Pedersen, *Denmark: Homosexual Marriages and New Rules Regarding Separation and Divorce*, 30 J. FAM. L. 289 (1991-92); Law Regarding Registered Partnership, §§ 2-4 (Sweden)).

39. *See* *Rovira v. AT&T*, 817 F. Supp. 1062 (S.D.N.Y. 1993) (denying lesbian life partner and her two children the right to be declared beneficiaries of a life insurance policy).

40. *See In re Estate of Cooper*, 564 N.Y.S.2d 684, 685 (Surrogate's Ct. 1990) (holding that same-sex partner does not have a right or standing to elect against decedent's will), *aff'd*, 592 N.Y.S.2d 797 (App. Div.).

41. *See* *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (Cal. Ct. App. 1991).

42. *See In re T.K.T. & K.A.K.*, 1996 Colo. App. LEXIS 176 (holding that a lesbian couple cannot adopt each other's children under state law; that the couple must be married to make such adoptions, and Colorado does not recognize same-sex marriages).

According to an exit poll conducted after the 1996 elections, although over half of Americans supported DOMA,⁴³ over half of Americans believed gay and lesbian families should be protected from dismemberment and that life partners should be provided inheritance rights.⁴⁴ Over two-thirds of Americans believed gays and lesbians should not be subjected to discrimination at work.⁴⁵ Such a disparity in attitude indicates that while many Americans believe same-sex unions are entitled to the same protections afforded to heterosexual unions, many Americans are reluctant to call it "marriage." Such a semantic reluctance is dangerous to lesbian-headed families. Without the protections which only marriage can afford, gay and lesbian-headed families remain vulnerable to discrimination, disruption and dismemberment. As such, proponents of recognizing same-sex unions must make clear to many Americans that failure to recognize such marriages results in discrimination at home and at work. Proponents must also demonstrate that recognizing same-sex unions does not "threaten" the institution of marriage. Rather, including same-sex unions preserves the institution of marriage by reinsuring that it continues to dynamically respond to and reflect social realities.

Indeed, the current state of the law is incongruent with society, in that it does not recognize social realities for millions of Americans. Accordingly, the institution of marriage must remain dynamic by accommodating and protecting same-sex couples and their families.

43. In a post-election poll of 1007 respondents, 55% favored DOMA. *See* Greenberg Research, Inc. for the Human Rights Campaign, Nov. 5-8, 1996.

44. In a post-election poll, 54% believed gays and lesbians should be protected from having their children taken away from them, and 62% favored providing inheritance rights to gay spouses. *See id.*

45. In a post-election poll, 70% believed gays and lesbians should be protected from discrimination in the workplace. *See id.*