

CHAPTER 32

GENDER EQUALITY

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“Should same-sex couples be allowed to marry?”

This issue can be difficult to discuss. People who answer the question in the negative are sometimes called homophobic or just plain intolerant of others. The yes crowd often are accused of promoting homosexual activity or labeled “politically correct” (the 1990s version of “bleeding heart liberal”). Rather than answer this question directly, I’ll try to list all the arguments against same-sex marriages, and possible responses to each one. I hope this will help you think through the issues and form an opinion that makes sense or feels right to you.

Background. It’s not illegal in Hawai’i to be homosexual or to engage in homosexual activity. Perhaps this is a reflection of Hawai’i’s liberal political tradition, or maybe it has something to do with our cultural backgrounds. For example, UH professor Lilikala Kame‘eleihiwa tells us that bisexuality has been accepted for centuries throughout eastern Polynesia, and UH professor and director of ethnic studies Franklin Odo has pointed out that the Japanese historically have been tolerant of homosexuality among samurai, Buddhist monks, and kabuki actors.

Prior to a 1993 Hawai’i Supreme Court decision (the “Baehr case”), the law in Hawai’i was that members of the same sex could not marry. The Baehr case at least clouded things and probably turned them upside down. The legal analysis is fascinating to lawyers but confusing to others. Basically, it goes something like this: because the law lets

persons of the opposite sex marry, it is discrimination to not allow marriage simply because the persons to be married are of the same sex. Importantly, the Hawai'i Constitution generally forbids discrimination based solely on sex, just as it does when race is the basis.

In a way, the rationale is logical and simple. But there's no getting around the fact that same-sex marriage is revolutionary. No other state has yet to do what Hawai'i has done with the Baehr case, regardless of how logical it might be.

The Hawai'i Supreme Court's decision in Baehr was not the final word. The state *can* discriminate if it can show a compelling reason to do so. Whether it has a compelling reason to prevent same-sex marriage must now be argued in a lower court, but most lawyers are predicting that the state will lose and that same-sex marriages will be allowed.

There is also talk that the administration will support a "domestic partnership" law which would, with limited exceptions, provide the rights and responsibilities of marriage—it just wouldn't be called marriage. And unlike marriage, it wouldn't be recognized outside Hawai'i.

Arguments and responses. Here are the primary arguments being made in the community against same-sex marriages, with a possible response to each one:

"Same-sex marriages are wrong because homosexuality is wrong." Whether or not it's "wrong," homosexuality is legal. Consequently, homosexuality is not a proper legal basis for restricting any of the benefits currently being provided to others.

"The state should not sanction a union in which procreation is impossible." It must be remembered that marriage is possible for senior citizens well past childbearing age, sterile individuals, and heterosexual couples who have no intention of ever having children. The intention to procreate is not a requirement for marriage.

"Marriage will be abused by homosexuals seeking only tax breaks, health care coverage, Social Security benefits, and other such possible advantages." Hawai'i law does not currently prevent heterosexual individuals from marrying even if done to get these same benefits. Moreover, some of

these rights and benefits carry concomitant obligations. Although tax structures may benefit married couples in a traditional household where only one spouse is the breadwinner, two individuals who both work (the more likely scenario for a same-sex couple) typically pay *more* in taxes as a married couple. Also, spouses generally have a legal obligation to support one another. This, for example, can prevent one from qualifying for welfare or medicaid.

Same-sex couples are more likely than the average married couple to both be in the working force; consequently, they are more likely to be earning many benefits (e.g., Social Security, health insurance) on their own and less likely to be dependent on a spouse for such benefits.

"The state has a right to uphold religious values." Religious groups and denominations do not universally agree on the issues of homosexuality and same-sex marriages. Those opposed to same-sex marriage, however, would not be required to perform, sanction, or even recognize such marriages. They could even condemn them if they so chose. Perhaps this is a bit like divorce, which is not recognized by some religions yet is recognized and sanctioned under the law of every state.



"The state should respect deeply held community values." This argument might be more convincing if its proponents could demonstrate how they would be adversely affected by same-sex marriages. Perhaps an analogy can be made to miscegenation laws, which for decades prevented interracial couples from marrying in some states. After all, interracial marriage did offend the sensibilities of many people in the states that had such laws. Yet most Americans today realize that miscegenation laws deprived individuals of a basic civil right. Here in Hawai'i, nearly half our marriages involve individuals of different races!

The lower court decision in the Baehr case recognized that Hawai'i has a "history of tolerance for all people and their cultures." Along these lines, Hawai'i already has statutory protection against discrimination in the workplace on the basis of sexual orientation. If our duly elected officials have made it wrong to discriminate in this way in the workplace, perhaps such discrimination should be just as wrong at the altar.

"Same-sex marriage will make Hawai'i a haven for homosexuals." Homosexuals may indeed flock to Hawai'i to marry. However, because the U.S. Constitution requires that each state respect the laws of all other states, the home states of same-sex couples who marry here are supposed to accept the marriage as legal. Domestic partnership laws, however, are recognized only in states that have adopted such legislation. Consequently, gay couples would be more likely to settle here permanently should domestic partnerships be legalized as an alternative to allowing same-sex marriages. It also could be argued that gays and lesbians—including those who don't care to "tie the knot"—will be attracted to Hawai'i, perceiving the people here as more tolerant of their lifestyle.

Migratory behavior is notoriously difficult to predict, but let's assume for a moment that gays will be attracted to Hawai'i in relatively large numbers. From a purely economic standpoint, that may be very good news for Hawai'i. It is well documented that the homosexual population's household and per capita income are well in excess of national averages. According to the July 18, 1991, issue of the *Wall Street Journal*, the average annual income of homosexuals at that time was \$55,430, compared to a national average of \$32,144. The April 1992 issue of *Honolulu Magazine* reported that the average household

income for the homosexual population in Hawai'i was \$56,218. The *Journal* article also noted that 49 percent of homosexuals held professional and managerial positions, as compared to 15.9 percent of the national population.

If we assume that the gay and lesbian population of Hawai'i will grow, several other questions come to mind. Will professional and skilled jobs become harder to find if gays and lesbians are statistically more likely to be professionals? Will well-heeled homosexuals drive up housing prices? Will increased gay tourism or a reputation as the "San Francisco of the Mid-Pacific" discourage tourism by individuals who dislike being around gays and lesbians? We simply don't know the answers to these questions.

"Allowing gay marriage encourages homosexuality and the spread of HIV." It is a widely held perception that homosexual men are more likely to contract HIV than heterosexuals. However, homosexual men who currently have AIDS are dying of the disease at a higher rate than heterosexuals because of high-risk behavior that occurred many years ago. In fact, HIV infection today cuts across all lines: sexual orientation, sex, social status, religion, and ethnicity. The World Health Organization estimates that five out of eleven new infections occur in women and that, by the year 2000, 75 percent of those with HIV infection or full-blown AIDS will be heterosexual.

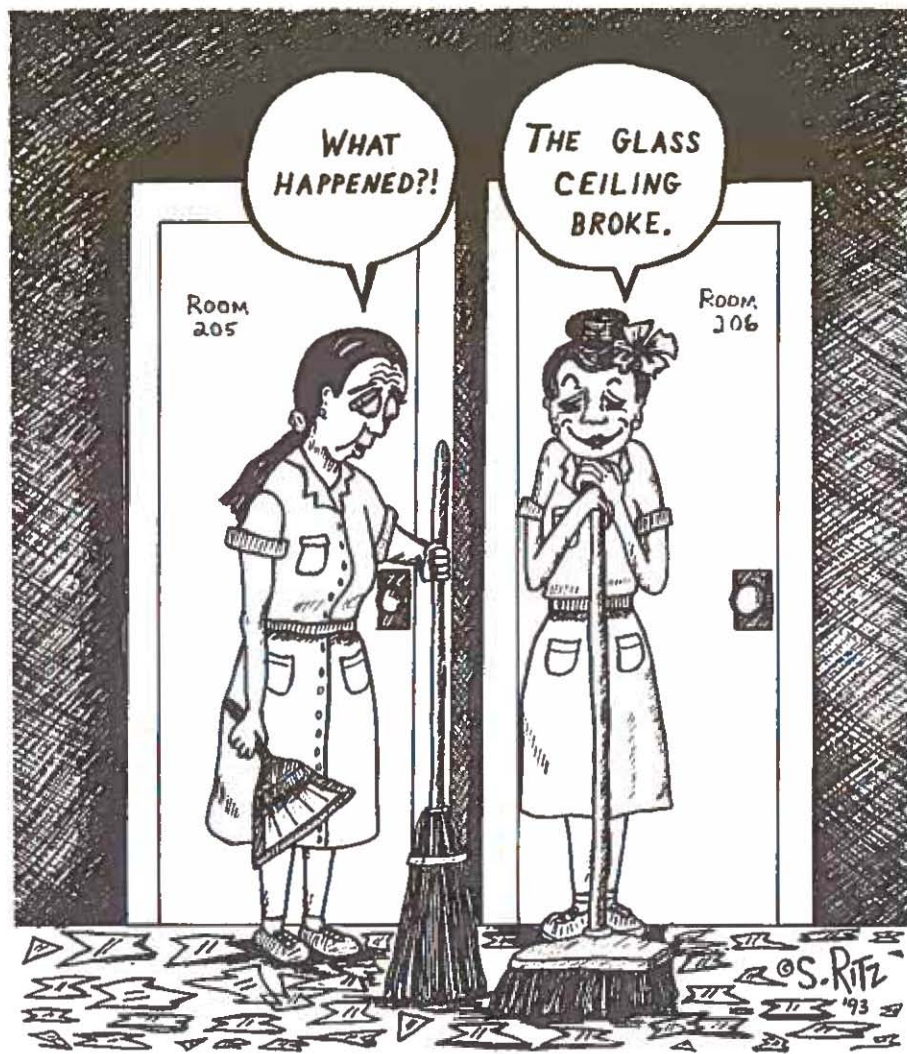
Whether public perception of AIDS is correct or incorrect, homosexual men are not going to change their sexual activities or become heterosexual if denied the opportunity to marry. Some people argue that community encouragement of long-term monogamous relationships among the homosexual population (i.e., allowing them to marry) would serve to reduce the spread of HIV.

But migratory uncertainties are a particular concern in this context. What happens if a large number of homosexual men are attracted to Hawai'i and a certain percentage of them are already HIV infected? That could place a tremendous financial burden on the state.

"Homosexuals are antisocial troublemakers." The perception that there is a disproportionate incidence of antisocial behavior among gays and lesbians is fueled by the outrageous antics of groups such as Act Up

and Queer Nation, whose “in your face” activities are expressly designed to shock and dismay the average “straight” person. Perhaps their radical behavior can be likened to the extreme actions of Black Panthers or other highly visible extremist groups from an era when equality for them was just a dream. As civil rights legislation became more and more a reality, most radical groups disbanded.

Gender equality. In case you’ve been thinking the Baehr case doesn’t directly impact heterosexuals, think again. By deciding this case the way it did, the Hawai’i Supreme Court has made it much easier



for victims of sex discrimination—who usually, but not always, are women—to sue and win! Before the Baehr decision, sex discrimination was permissible as long as the government had an important objective in mind and the discrimination was substantially related to achievement of that objective. Now, a “compelling” reason to discriminate must be shown—and that’s much harder to do. So, while the headlines may speak only of same-sex marriage, future generations (especially of women) might look back on this case as a landmark decision for them.



"OH, DON'T PAY ATTENTION TO HIM - HE JUST DOESN'T WANT ME TO JOIN..."



"\$860,652 EACH!!! \$860,652!??..."