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**AMERICAN BAR ASSOCIATION**

**SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES  
NEW YORK STATE BAR ASSOCIATION  
GENERAL PRACTICE, SOLO AND SMALL FIRM DIVISION  
SECTION OF TORT TRIAL AND INSURANCE PRACTICE  
COMMISSION ON MENTAL AND PHYSICAL DISABILITY LAW  
COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY  
COMMISSION ON WOMEN IN THE PROFESSION  
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK  
BAR ASSOCIATION OF SAN FRANCISCO  
MASSACHUSETTS BAR ASSOCIATION  
VERMONT BAR ASSOCIATION  
WASHINGTON STATE BAR ASSOCIATION  
NATIONAL LGBT BAR ASSOCIATION  
BEVERLY HILLS BAR ASSOCIATION**

**RECOMMENDATION**

- 1 RESOLVED, That the American Bar Association urges state, territorial, and tribal governments
- 2 to eliminate all of their legal barriers to civil marriage between two persons of the same sex who
- 3 are otherwise eligible to marry.

## REPORT

### I. Introduction

Many gay and lesbian people seek a committed, lifelong partnership with another adult, and to raise children. ABA policy has kept pace with our society's evolving understanding that gay and lesbian people are healthy, functioning contributors to our society who face discrimination – both as individuals and as families. For almost three decades, the ABA has taken a leading role in urging the elimination of discrimination against lesbian and gay people and their families.<sup>1</sup> This recommendation – urging the elimination of legal barriers to civil marriage between same-sex couples -- builds upon this prior policy.<sup>2</sup>

State courts and legislatures have grappled for more than twenty years with the question of extending legal rights and protections to committed same-sex couples in a way consistent with our country's principles of equality and liberty, as well as the states' interests in protecting and supporting families. See generally "An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions and Domestic Partnerships: A White Paper," American Bar Association, Section on Family Law, Working Group on Same-Sex Marriages and Non-marital Unions (2005). A growing number of states – Connecticut, Iowa, Massachusetts, New Hampshire, Vermont, and Washington D.C.<sup>3</sup> – and at least one Native American tribe<sup>4</sup> have concluded that ending the bans that prohibit gay and lesbian couples from marrying under state laws is the simplest and fairest way to extend those protections to same-sex couples and their families. Current estimates are that at least 33,000 same-sex couples have married in U.S. states.<sup>5</sup> In addition, New York and

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<sup>1</sup> In 1989, the ABA urged the adoption of statutes prohibiting discrimination on the basis of sexual orientation. More recently, as described *infra*, the ABA opposed efforts to amend the federal constitution to bar marriage between two people of the same sex, and ABA urged the repeal of Section 3 of federal Defense of Marriage Act, which mandates the denial of hundreds of federal rights and responsibilities to married same-sex spouses.

<sup>2</sup> A government's decision to permit same-sex couples to marry has no effect or impact on any faith's requirements for its religious rites.

<sup>3</sup> Eric Moskowitz & Martin Finucane, "N.H. Becomes Sixth State Where Gays Can Marry," 6/3/09 Boston Globe, available at [http://www.boston.com/news/local/breaking\\_news/2009/06/nh\\_legislature.html](http://www.boston.com/news/local/breaking_news/2009/06/nh_legislature.html). Ian Urbina, "Gay Marriage Is Legal in U.S. Capital," 3/4/2010 NYTimes, available at <http://www.nytimes.com/2010/03/04/us/04marriage.html>.

<sup>4</sup> See, e.g., Associated Press, "Native American tribe to allow same-sex marriages," 8/22/2008 USA Today, available at [http://www.usatoday.com/news/nation/2008-08-22-native-americans-gaymarriage\\_N.htm](http://www.usatoday.com/news/nation/2008-08-22-native-americans-gaymarriage_N.htm).

<sup>5</sup> Approximately 18,000 same-sex couples married in California between June 2008 and November 4, 2008. Howard Mintz, "Fight Goes Back to Supreme Court; Justices have 90 Days to Rule on Prop. 8," 3/4/09 San Jose Mercury News at 1B. Although an amendment to the California Constitution limits marriage to the union of one man and one woman, the state's high court has held that the marriages entered into in California by same-sex couples prior to the adoption of Proposition 8 "remain valid in all respects." Strauss v. Horton, 46 Cal. Rptr. 3d 363

Maryland recognize marriages between same-sex couples licensed elsewhere, while Rhode Island's Attorney General has opined that a state administrative agency may recognize marriages between same-sex couples.<sup>6</sup>

Other states – including California, New Jersey, Nevada, Oregon and Washington – provide a comprehensive, state-wide relationship recognition system, such as civil unions or domestic partnerships that provide substantially all of the state-conferred tangible rights and responsibilities of marriage.<sup>7</sup>

The states that have decided to allow same-sex couples to marry have done so because of their recognition that the denial of marriage violates the constitutional rights of gay and lesbian citizens and their understanding that families and children are vulnerable without the protections of marriage. This proposed recommendation will signal the ABA's support for the extension of equal marriage rights to same-sex couples under state, territorial, and tribal law, as consistent with our country's constitutional principles of equal protection and due process, as well as states' strong interest in protecting and fostering the family unit.

Excluding same-sex couples from the right to marry has the practical impact of denying them and their children a host of rights and responsibilities that exist under both state and federal law. State protections automatically extended to married spouses include the ability to make health care decisions for one's spouse, the right to direct the remains of a deceased spouse and inherit from his or her estate absent a will, the security of being able to provide health insurance for one's spouse, and the peace of mind knowing that both adults' relationships with children born to the couple will be protected. In a comprehensive report adopted in 2005, the New York State Bar Association documented numerous areas in which New York law, for example, provides specific rights and benefits reserved to married couples.<sup>8</sup> On the federal level, there are

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at 474 (Cal. 2009) Over 15,214 same-sex couples married in Massachusetts in the four years after Massachusetts began permitting such marriages. See Massachusetts v. U.S. Dep't of Health and Human Res., No. 09-cv-11156, Affidavit of Stanley E. Nyberg, ¶ 6 (D. Mass. Feb. 18, 2010).

<sup>6</sup> See State of New York Executive Chamber, Governor David Paterson, Executive Order, Martinez decision on same-sex marriages (May 14, 2008), available at: [http://data.lambdalegal.org/in-court/downloads/exec\\_ny\\_o\\_20080514\\_governor-directive-same-sex-marriage.pdf](http://data.lambdalegal.org/in-court/downloads/exec_ny_o_20080514_governor-directive-same-sex-marriage.pdf); Godfrey v. Spano, 2009 WL 3849008, \*6 (N.Y. 2009); 95 Op. Maryland Att'y Gen. 3 (2010) available at <http://www.oag.state.md.us/Opinions/2010/95oag3.pdf>; Opinion of R.I. Attorney General Patrick Lynch to R.I. Board of Governors for Higher Education, Feb. 20, 2007, available at <http://www.glad.org/uploads/docs/cases/ri-ag-statement.pdf>.

<sup>7</sup> See, e.g., Human Rights Campaign, Marriage Equality and Other Relationship Recognition Laws, available at: [http://www.hrc.org/documents/Relationship\\_Recognition\\_Laws\\_Map.pdf](http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf).

<sup>8</sup> New York State Bar Ass'n., Report and Recommendations of Special Committee to Study Issues Affecting Same-Sex Couples (October 2004), available at <http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=13520>.

at least 1138 federal statutory provisions in which marital status is a factor in determining whether an individual is eligible for federal rights or benefits, including family medical leave, health insurance benefits, and Social Security survivor benefits.<sup>9</sup> In addition, the denial of these important protections harms the hundreds of thousands of children being raised by same-sex couples.<sup>10</sup> Treating same-sex couples differently not only tangibly harms those individuals, couples, and their families, but also stigmatizes them and their children by deeming them unworthy to enjoy fundamental and equal citizenship rights. See Lawrence v. Texas, 539 U.S. 558, 576, 578 (2003) (finding that past precedent upholding constitutionality of anti-sodomy criminal statute demeaned and stigmatized gay and lesbian individuals). The experiences of those states that have created legal relationships such as domestic partnerships that are intended to mirror the attributes of marriage make plain that these separate and inferior systems perpetuate, rather than cure the inequality that results from denying marital recognition to same-sex couples.

The proposed recommendation is consistent with and builds upon existing ABA policy. In 2009, the House of Delegates approved a recommendation urging the repeal of Section 3 of the federal Defense of Marriage Act (DOMA), which denies federal marital benefits and protections to lawfully married same-sex spouses.<sup>11</sup> In 2004, the House of Delegates approved a recommendation opposing efforts “to enact a federal constitution amendment or other legislation that would prevent states from establishing, by court decision or legislation, a definition of marriage that would include marriages between two persons of the same sex.”<sup>12</sup>

In addition, as noted above, over the past 30 years, the ABA has adopted a series of policies urging state legislatures and state courts to extend legal protections to same-sex couples and their families. For example, in August 1995, the ABA adopted a policy supporting the

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<sup>9</sup> U.S. General Accounting Office, *Defense of Marriage Act: Update to Prior Report*, GAO-04-353R (Washington, D.C., January 23, 2004) (determining that there are at least 1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges).

<sup>10</sup> According to the *Gay and Lesbian Atlas*, approximately 250,000 children were being raised by same-sex couples in 1999.

<sup>11</sup> 1 U.S.C. § 7 (“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”).

The other substantive provision of DOMA -- Section 2 -- provides that states to not have to recognize marriages between two people of the same sex entered into in other states, territories, or tribes. 28 U.S.C. § 1738C (“No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.”).

<sup>12</sup> See ABA Recommendation 103D, Report 1 (Feb. 2004).

enactment of legislation and implementation of public policies that would ensure that child custody or visitation is not denied or restricted on the basis of a parent's sexual orientation. An August 2002 ABA policy favors the availability of victim compensation and victim assistance funds for the surviving partners of victims of terrorism or other crime to the same extent as they are available to spouses. In February 1999, the ABA adopted a policy supporting "the enactment of laws and implementation of public policy [providing] that sexual orientation shall not be a bar to adoption when the adoption is determined to be in the best interest of the child." In 2003, the ABA adopted a policy supporting state laws and court decisions permitting second parent adoptions by nonmarital partners, including same-sex partners.

## **II. The denial of marriage to same-sex couples and their families and children hurts those families.**

Marriage is first and foremost about love, commitment, and personal responsibility, but it is also society's most prominent institution for legally recognizing and protecting families. Marriage conveys a unique legal status recognized by governments and private entities around the world and is the gateway to tangible state, federal and private protections and responsibilities.

Denying civil legal marriage to same-sex couples significantly harms those families and their children. Not only does the denial stigmatize gay and lesbian families and mark them as inferior, but it deprives them of numerous and crucial legal protections, rights and responsibilities conferred by states to support the well-being and integrity of the family unit. These inequalities exist in, among others, the following areas:

- Health and wellbeing: States understand that family members provide support for each other in sickness and in health. Accordingly, many states allow employees to use accrued sick and vacation time, as well as take unpaid time off from work, to care for a spouse, parent or child. Many employers restrict these benefits as well as health care benefits to care for only a spouse, but not to an unmarried partner of an employee. A spouse is automatically entitled to direct his incapacitated spouse's health care. In addition, confidential medical information can be disclosed to a person's spouse so that the spouse can participate in decisions relating to the care of his or her spouse.
- Death: Because tragic events can devastate families emotionally and financially, the states have provided legal protections to assist families during these crises. Most importantly, spouses automatically receive the right to determine how to dispose of their deceased spouses' remains in all states. In addition, in all states, a spouse may still automatically inherit a significant portion of an intestate decedent's estate. Wrongful death actions in many states may only be filed on behalf of a surviving spouse (or children if there is no spouse). For work-related deaths, often only spouses can receive worker's compensation death benefits or file an action against a negligent employer. Finally, many state retirement systems pay accidental death benefits solely to an employee's surviving spouse and/or dependent children.

- Public Safety Officers: Most states appreciate that some individuals take on special risks because their spouses serve the public as police officers, firefighters, or other public safety officers. Many states provide a death benefit to the surviving spouse (and children, if any) when a law enforcement officer dies in the line of duty. The surviving spouse and children are often entitled to a tuition waiver for college education at state schools.
- Economic security: State laws typically regard married couples as a single economic unit. For example, most states require spouses to support one another. They allow only married couples to file joint tax returns and pool any deductions they may have. They allow only married couples to transfer real property between each other during the marriage (and at divorce) without paying a real estate transfer tax.
- Retirement security: Valuable federal Social Security retirement and disability benefits are available only to married couples (although at this time, because of Section 3 of DOMA,<sup>13</sup> only to opposite-sex spouses). When a worker covered by Social Security retires, becomes disabled or dies, only a spouse can claim benefits based on the worker's employment credits. Only a spouse of a disabled worker is eligible for additional benefits when he or she is 62 or older or when a child under age 16 is in the home. The spousal benefit serves as a safety net for those spouses with little or no tenure in the workforce, and who have thus not earned substantial Social Security benefits from their own wage deductions.
- Child protections: In almost all states, when a married couple has a child, the child is presumed to be the child of the married pair, and the child's relationship with his or her parents is legally protected. If the married couple separates while the child is a minor, the law provides an ordered and reliable system for allocating parental rights and responsibilities and child support. Also, in many states, only married couples can jointly adopt a child.
- Relationship dissolution: When a relationship has failed, states provide an orderly and predictable mechanism for ending it and equitably dividing property, and in some cases, providing for ongoing support of a former spouse. State and federal tax laws also exempt certain financial transfers as a result of a divorce in order to alleviate the financial strains of divorce, such as through qualified domestic relations orders.
- Privacy and conflicts of interest: State law generally presumes that spouses are each other's closest confidants and often protects spousal confidences from disclosure. Most states' Rules of Evidence provide that neither spouse may, without consent of the other, be required to share with others any private marital communication, including in lawsuits. Because of this presumed confidence, these states also require

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<sup>13</sup> As noted above, Section 3 of DOMA denies federal marital benefits and protections to lawfully married same-sex spouses.

spouses to disclose their relationships and attempts to prevent conflicts of interests in public positions.

In each and every one of these categories, gay and lesbian families suffer deep and irreparable harm by their exclusion from these protections enjoyed by married couples. The denial of these protections makes it more difficult for same-sex couples to provide for each other and their children, as well as plan their future and protect themselves from future risks.

The following are some of the many examples of how the denial of these protections affects individual families. The experience of the Langbehn-Pond family makes painfully clear the damage that can be inflicted families who are not provided with automatic legal protections around end-of-life care. Janice Langbehn and Lisa Pond had been in a committed relationship for 18 years when Lisa suffered a stroke and was rushed to the hospital. Janice and the couple's children were kept apart from Lisa by hospital staff for eight hours as Lisa slipped into a coma and later died without seeing her family.<sup>14</sup> As illustrated by this account, the harms are experienced not only by the same-sex couples, but also by their children.

Another tragic story is that of John Langan. After many years in a committed relationship, John Langan's partner, Neal Conrad Spicehandler, was struck by a car and suffered a serious leg injury. Neal later died from complications of his leg surgery. John later filed a wrongful death action. A New York appellate court ruled that he lacked standing to sue for wrongful death because he was not Neal's married spouse.<sup>15</sup> John was also denied the right to seek workers' compensation benefits for the death of his former partner, again because he was not Neal's married spouse.<sup>16</sup>

Even when same-sex couples spend time and money putting extensive legal documents in place, their relationships are often ignored. A recent example is the story of a long-term elderly couple – Clay Greene and Harold Scull. In the spring of 2008, Harold was taken to the hospital following a fall at the couple's home. While Harold was in the hospital, public officials petitioned for conservatorship of Harold's estate, ignoring Clay and treating Harold as if he had no family. After seeking temporary authority to revoke the Harold's powers of attorney (previously granting these powers to Clay), the County liquidated all of the couple's assets. "Adding further insult to grave injury, the county removed [Clay] from their home and confined

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<sup>14</sup> President Obama cited the experience of the Langbehn-Pond family when he issued the April 15, 2010 memorandum instructing Health and Human Services Secretary Kathleen Sebelius to draft rules requiring hospitals that receive Medicare and Medicaid payments to "respect the rights of patients to designate visitors..." However, even after the rules are drafted, gay couples who are not married or in some other comprehensive legal relationship will still need to present legal documentation in order to be entitled to hospital visitation.

<sup>15</sup> Langan v. St. Vincent's Hosp. of N.Y., 802 N.Y.S.2d 476 (N.Y. App. Div. 2005), appeal dismissed, 6 N.Y.3d 890 (2006).

<sup>16</sup> Langan v. State Farm, 849 N.Y.S.2d 105 (N.Y. App. Div. 3<sup>rd</sup> Dep't 2007)

him to a nursing home against his will—a different placement from his partner. . . . Three months after [Harold] was hospitalized, he died, without being able to see [Clay] again.”<sup>17</sup>

### **III. The denial of marriage to same-sex couples and their families and children offends our constitutional commitments to liberty and equality.**

The U.S. Supreme Court has repeatedly recognized that the freedom to marry is a constitutionally protected fundamental right – “one of the vital personal rights essential to the orderly pursuit of happiness by free men.” Loving v. Virginia, 388 U.S. 1, 12 (1967). See also Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (“the right to marry is of fundamental importance for all individuals”); Turner v. Safley, 482 U.S. 78, 95-96 (1987) (ruling that the right to marry applies to prisoners). The “freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause.” Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639 (1974).

The nature of the institution of marriage as a legal relationship has changed over time to comport with evolving standards of fairness and equality. Moreover, in furtherance of those values, courts and legislatures often mandate changes in the institution in the face of strong public support for the status quo. For example, laws stripping married women of their legal personhood under the doctrine of coverture have gradually fallen by the wayside as our country developed more robust constitutional protections for women’s equality.<sup>18</sup> The ability to remarry after divorce is also a relatively recent phenomenon.<sup>19</sup>

Prior definitions limiting marriage strictly to persons of the same race enjoyed legal and religious support tracing back to the colonial days and remained common into the late 1960’s. See, e.g., State v. Gibson, 36 Ind. 389 (1871). Despite this long history, in 1948 that the California Supreme Court became the first court in the country to strike down anti-miscegenation laws as unconstitutional under the California Constitution. Perez, 198 P.2d 17, 29 (Cal. 1948). And in 1967, the U.S. Supreme Court finally struck down all remaining state bans on interracial marriage as a violation of due process and equal protection. Loving v. Virginia, 388 U.S. 1, 12 (1967).

What emerges from this history is a recognition that the institution of marriage has always been dynamic and that elements that were once considered essential or natural to a marriage (e.g., that women be subservient to men, that it be lifelong, that it be between people of the same race) have fallen away due to our growing respect for equality and individual freedom.

Limiting a right so fundamental as the right to marry to a certain class of citizens raises both due process and equal protection concerns. “When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld [pursuant to the Due

<sup>17</sup> National Center for Lesbian Rights Press Release, available at [http://www.nclrights.org/site/PageServer?pagename=press\\_Greene\\_v\\_SonomaCounty041910](http://www.nclrights.org/site/PageServer?pagename=press_Greene_v_SonomaCounty041910).

<sup>18</sup> Nancy Cott, *Public Vows* 52-55 (Harvard University Press 2000).

<sup>19</sup> *Id.* at 49; George Elliot Howard, A History of Marriage (1904),

Process Clause] unless it is supported by sufficiently important state interests and is tailored to effectuate only those interests.” Zablocki, 434 U.S. at 388. In addition, our government cannot burden only one class of people without a constitutionally sufficient justification under the Equal Protection Clause. See Plyler v. Doe, 457 U.S. 202, 216 (1982). Particularly with regard to issues affecting the family, these two constitutional strands are intimately connected. See Goodridge v. Department of Public Health, 440 Mass. 309, 320 (2003) (“In matters implicating marriage, family life, and the upbringing of children, the two constitutional concepts [of equal protection and due process] frequently overlap”) (citing, among others, M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996) (noting convergence of due process and equal protection principles in cases concerning parent-child relationships); Perez v. Sharp, 32 Cal.2d 711, 728 (1948)). As the Supreme Court explained, “[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects.” Lawrence, at 575.

The U.S. Supreme Court has made clear that our federal and state constitutional guarantees of liberty and equality extend to all citizens,<sup>20</sup> including gay and lesbian citizens. In Romer v. Evans, 517 U.S. 620 (1996), the U.S. Supreme Court held that gay and lesbian individuals are not excluded from the Fourteenth Amendment’s guarantee of equal protection of the law. In Romer, the Court struck down Colorado’s constitutional amendment prohibiting all legislative, executive or judicial action designed to protect gay and lesbian individuals from discrimination. In doing so, the Court cited Justice Harlan’s venerable dissent affirming that the Constitution “neither knows nor tolerates classes among citizens,” id. at 623, making clear that the principles of the Fourteenth Amendment apply equally to gay and lesbian individuals.

Seven years later, the Supreme Court’s decision in Lawrence v. Texas, 539 U.S. 558 (2003), held that due process and liberty protections of the Fourteenth Amendment apply to gay and lesbian citizens, despite a past history of exclusion. In striking down Texas’ statute criminalizing same-sex sexual conduct, the Supreme Court held that all adults, including lesbian and gay citizens, enjoy a “right to liberty under the Due Process Clause” that “gives them the full right to engage” in “private sexual conduct . . . without intervention of the government.” 539 U.S. at 578. The Court reasoned that “our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education,” id. at 574, and concluded that “[p]ersons in a homosexual relationship may seek autonomy for those purposes, just as heterosexuals do.” Id. at 574. While the issue of marriage was not before the Court, the import of Lawrence is that it is impermissible to simply exclude gay and lesbian citizens from exercising the same liberties as others absent an adequate justification.

While the U.S. Supreme Court has not considered the question, a growing number of states – through both the judicial and legislative branches – have concluded that there are no

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<sup>20</sup> State constitutions have similar, if not more protective, guarantees of liberty and equal protection. See Jennifer Friesen, 1 State Constitutional Law: Litigating Individual Rights, Claims and Defenses §§ 2.02, 3.01 (4<sup>th</sup> Ed. 2006),

rational reasons to restrict marriage based upon sexual orientation.<sup>21</sup> Even in states that do not allow same-sex couples to marry, legislation protecting the ability of gay and lesbian couples to form, protect and provide for their families directly contradicted the supposed legitimate interests for marriage restrictions.<sup>22</sup>

The ABA should follow the growing trend of courts and state legislatures in recognizing the inclusion of same-sex couples in the legal relationship of marriage as mandated by fundamental constitutional principles of equality.

#### **IV. Parallel but inferior systems of relationship recognition, such as civil unions or domestic partnerships, do not afford equality.**

Without a doubt, civil unions and domestic partnerships provide some recognition and access to legal protections and frameworks of responsibility, and have helped alleviate the harsh legal void in which many same-sex couples live. But civil unions and domestic partnerships also perpetuate a legal and status distinction among citizens, and most profoundly, still deny committed same-sex couples the ability to join in marriage. Quite simply, creating a separate and ultimately inferior system to which gay and lesbian couples are relegated, when our government and society have already established marriage as the primary and preferred system through which to legally recognize relationships and families maintains rather than rectifies inequality.

Even where marriage and a civil union framework embody the same legal rights under state law, courts have rightly found that “they are by no means equal. . . . [T]he former is an institution of transcendent historical, cultural and social significance, whereas the latter most surely is not.” Kerrigan, 957 A.2d at 418 (internal quotation marks omitted). “Marriage, therefore, is not merely shorthand for a discrete set of legal rights and responsibilities but is one of the most fundamental of human relationships. . . .” Kerrigan, 957 A.2d at 417 (internal quotation mark omitted). For that reason, the unique social meaning of marriage over the centuries carries profound personal meaning for couples that civil unions can never provide. No other relationship has been characterized by the U.S. Supreme Court as a “way of life,” a “bilateral loyalty,” and a relationship “intimate to the degree of being sacred.” Griswold, 381 U.S. at 486 (1965). No other state-recognized relationship can have the same “spiritual significance” for many couples. See Turner, 482 U.S. at 95-96.

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<sup>21</sup> Act to Protect Religious Freedom and Promote Equality in Civil Marriage, S. 115, 2009 Leg. (N.H. 2009) (“The purpose of this act is to promote legal equality in the civil marriage laws...”); Act Relative to Civil Marriage and Civil Unions, H.B. 436, 2009 Leg. (Vt. 2009).

<sup>22</sup> C.R.S.A. § 15-22-101 et seq. (Colorado’s “Designated Beneficiary Agreement”); HRS § 572C-1 et seq. (Hawaii’s “Reciprocal Beneficiaries”); 22 M.R.S.A § 2710 (Maine’s “Domestic partner registry”); W.S.A. 770.001 et seq. (Wisconsin’s domestic partnerships); C.R.S.A. § 19-5-203 (Colorado’s second-parent adoption statute); Cal. Fam. Code § 9000(f) (2004) (California’s statute permitting registered domestic partners to complete stepparent adoptions).

In addition, the prestige and longevity of marriage as a social institution have created a common ritual that ties people together into the larger fabric of families, generations and communities. Without “the right to marry – one is excluded from the full range of human experience.” Goodridge, 798 N.E.2d at 956-57. Marriage also ties into a common understanding that immediately conveys to the community that two people love each other and are a family. Civil unions do not and cannot provide this same broad protection.

Moreover, the state’s creation of a marriage substitute marks lesbian and gay families as inferior and less worthy. Rather than being merely “semantic” or “innocuous,” the term “is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.” Opinion of the Justices, 802 N.E. 2d at 570. Language has “power” because “[l]abels set people apart as surely as physical separation on a bus or in school facilities.” Lewis v. Harris, 908 A.2d 196, 226 (N.J. 2006) (Poortz, C.J., dissenting).

Furthermore, without marriage, same-sex couples are precluded from access to federal rights and protections granted to married couples (e.g. ability to share in a spouse’s Social Security). While those protections are presently withheld from married same-sex couples due to Section 3 of DOMA, 1 U.S.C. § 7, this federal discrimination may not always be the state of the law. If DOMA were to be repealed or judicially invalidated, only those same-sex couples who are married, and not those in civil unions or domestic partnerships, would enjoy federal marriage rights and protections.

Finally, experience has demonstrated that even when the tangible state-conferred rights are equal as a theoretical matter, couples in these alternative statuses continue to be denied equal treatment in practice. For example, individuals testified to a New Jersey commission that they repeatedly needed to explain their civil union status to employers, doctors, nurses, insurers, teachers and emergency room personnel.<sup>23</sup> One New Jersey resident, who was serving jury duty, testified that the presiding judge asked each potential juror if they were married or single. The witness testified, “I’m thinking, how do I answer that, because I am not. I’m not single, I’m not married. ... What I am is not represented in any way.”<sup>24</sup> Another New Jersey man testified that when he was opening a line of credit account, the bank employee told him that the computer system did not contemplate civil unions.<sup>25</sup> There was no place for him.

To affirm and acquiesce in a legal mechanism of official separation dishonors the gay people who seek to join in marriage, as well as our venerable principles of equality and due process. Asserting that separate systems for classes of citizens can satisfy constitutional equality guarantees as long as identical legal rights are conferred invokes the long-repudiated reasoning in Plessy v. Ferguson. In that case, the Court upheld separate railway cars for African-Americans because “[w]hen the government... has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the

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<sup>23</sup> NJ Final Report at 3, 11-12, 16-17, 20, 26, 40, 68 and 72.

<sup>24</sup> NJ Interim Report at 14-15.

<sup>25</sup> NJ Final Report at 14.

end for which it was organized.” Plessy, 163 U.S. at 551. However, as our constitutional tradition and history has made clear, only full marriage equality comports with our constitutional standards that separate is not equal. See Brown v. Board of Ed., 347 U.S. 483 (1954).

### **Conclusion**

With this resolution, the House of Delegates has the opportunity to offer affirmative support to this legal movement towards greater recognition of all Americans’ constitutional rights and protections, regardless of their sexual orientation, and stronger protections for all families.

Respectfully Submitted,

Richard J. Podell, Chair  
Section of Individual Rights and Responsibilities

August 2010

**GENERAL INFORMATION FORM**

Submitting Entity: Section of Individual Rights and Responsibilities

Submitted By: Richard J. Podell  
Chair, Section of Individual Rights and Responsibilities

1. Summary of Recommendation(s).

The recommendation urges state, territorial, and tribal governments to eliminate all of their legal barriers to civil marriage between two persons of the same sex.

2. Approval by Submitting Entities.

The Council of the Section of Individual Rights and Responsibilities approved the filing of this Report with Recommendation on April 16, 2010, during its spring meeting in New Orleans, LA.

The New York State Bar Association approved co-sponsorship of the Report with Recommendation on May 4, 2010.

The Board of Governors of the Bar Association of San Francisco approved co-sponsorship of the Report with Recommendation on April 21, 2010.

The Association of the Bar of the City of New York approved co-sponsorship of the Report with Recommendation on April 23, 2010.

The Board of Governors of the Washington State Bar Association approved co-sponsorship of the Report with Recommendation on April 24, 2010.

The Commission on Sexual Orientation and Gender Identity approved co-sponsorship of the Report with Recommendation on April 28, 2010.

The Massachusetts Bar Association approved co-sponsorship of the Report with Recommendation on April 28, 2010.

The Vermont Bar Association approved co-sponsorship of the Report with Recommendation on May 3, 2010.

The Board of Directors of the National LGBT Bar Association approved co-sponsorship of the Report with Recommendation on May 3, 2010.

The Commission on Women in the Profession approved co-sponsorship of the Report with Recommendation on May 6, 2010.

The Council of the General Practice, Solo and Small Firm Division approved co-sponsorship on May 14, 2010.

The Tort Trial and Insurance Practice Section approved co-sponsorship of the Report with Recommendation on May 14, 2010.

The Commission on Mental and Physical Disability Law approved co-sponsorship of the Report with Recommendation on May 15, 2010.

The Beverly Hills Bar Association approved co-sponsorship of the Report with Recommendation on May 18, 2010.

3. Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?

Yes. For almost three decades, the ABA has taken a leading role in urging the elimination of discrimination against lesbian and gay people and their families. In 1989, the ABA urged the adoption of statutes prohibiting discrimination on the basis of sexual orientation. More recently, the ABA opposed efforts to amend the federal constitution to bar marriage between two people of the same sex, and ABA urged the repeal of Section 3 of federal Defense of Marriage Act, which mandates the denial of hundreds of federal rights and responsibilities to married same-sex spouses (Report #09A112).

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

Over the past 30 years, the ABA has adopted a series of policies urging state legislatures and state courts to extend legal protections to same-sex couples and their families. The proposed recommendation is consistent with and builds upon existing ABA policy. In particular, in 2009, the House of Delegates approved a recommendation urging the repeal of Section 3 of the federal Defense of Marriage Act, which denies federal marital benefits and protections to lawfully married same-sex spouses (Report #09A112). In 2004, the House of Delegates approved a recommendation opposing efforts “to enact a federal constitution amendment or other legislation that would prevent states from establishing, by court decision or legislation, a definition of marriage that would include marriages between two persons of the same sex.” (Report #04M103D) The ABA has also adopted policy supporting adoption by same-sex couples (Report #99M109B), and opposing discrimination on the basis of sexual orientation in the areas of child custody (Aug. 1995) and foster care (Report #06M102).

5. What urgency exists which requires action at this meeting of the House?

A growing number of states – Connecticut, Iowa, Massachusetts, New Hampshire, Vermont, and Washington D.C. – have concluded that ending the bans that prohibit gay and lesbian couples from marrying under state laws is the simplest and fairest way to

extend those protections to same-sex couples and their families. Current estimates are that at least 33,000 same-sex couples have married in U.S. states. In addition, New York and Maryland recognize marriages between same-sex couples licensed elsewhere, while Rhode Island's Attorney General has opined that a state administrative agency may recognize marriages between same-sex couples.

Other states – including California, New Jersey, Nevada, Oregon and Washington – provide a comprehensive, state-wide relationship recognition system, such as civil unions or domestic partnerships, that provide substantially all of the state-conferred tangible rights and responsibilities of marriage.

This proposed recommendation will signal the ABA's support for the extension of equal marriage rights to same-sex couples under state, territorial, and tribal law, as consistent with our country's constitutional principles of equal protection and due process, as well as states' strong interest in protecting and fostering the family unit.

6. Status of Legislation. (If applicable.)

Legislation is pending in a number of states that would permit same-sex couples to marry.

7. Cost to the Association. (Both direct and indirect costs.)

Adoption of this Recommendation would result only in minor indirect costs associated with staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities, and the costs of updating documents which list the Association's goals.

8. Disclosure of Interest. (If applicable.)

There are no known conflicts of interest.

9. Referrals.

By copy of this form, the Report with Recommendation will be referred to the following entities:

Section of Administrative Law and Regulatory Practice  
 Criminal Justice Section  
 General Practice, Solo and Small Firm Section  
 Section of Family Law  
 Section of Real Property, Trust, and Estate Law  
 Section of International Law  
 Section of Labor and Employment Law  
 Section of Litigation  
 Section of State and Local Government Law

Section of Taxation  
 Judicial Division  
 Law Student Division  
 Senior Lawyers Division  
 Young Lawyers Division  
 Center for Racial and Ethnic Diversity  
 Commission on Mental and Physical Disability Law  
 Commission on Racial and Ethnic Diversity in the Profession  
 Council on Racial and Ethnic Justice  
 Commission on Women in the Profession  
 Hispanic National Bar Association  
 National Asian Pacific American Bar Association  
 National Association of Women Judges  
 National Association of Women Lawyers  
 National Bar Association Inc.  
 National Conference of Women's Bar Associations  
 National Lesbian and Gay Law Association (National LGBT Bar Association)  
 A Number of State and Local Bar Associations

10. Contact Person. (Prior to the meeting. Please include name, address, telephone number and email address.)

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11. Contact Person. (Who will present the report to the House. Please include email address and cell phone number.)

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## EXECUTIVE SUMMARY

### 1. Summary of the Recommendation

The recommendation urges state, territorial, and tribal governments to eliminate all of their legal barriers to civil marriage between two persons of the same sex.

### 2. Summary of the Issue that the Resolution Addresses

Excluding same-sex couples from the right to marry has the practical impact of denying them and their children a host of rights and responsibilities that exist under both state and federal law. State protections automatically extended to married spouses include the ability to make health care decisions for one's spouse, the right to direct the remains of a deceased spouse and inherit from his or her estate absent a will, the security of being able to provide health insurance for one's spouse, and the peace of mind knowing that both adults' relationships with children born to the couple will be protected. In a comprehensive report adopted in 2005, the New York State Bar Association documented numerous areas in which New York law, for example, provides specific rights and benefits reserved to married couples. On the federal level, there are at least 1138 federal statutory provisions in which marital status is a factor in determining whether an individual is eligible for federal rights or benefits, including family medical leave, health insurance benefits, and Social Security survivor benefits. In addition, the denial of these important protections harms the hundreds of thousands of children being raised by same-sex couples. The experiences of those states that have created legal relationships such as domestic partnerships that are intended to mirror the attributes of marriage, make plain that these separate and inferior systems perpetuate rather than cure the inequality that results from denying marital recognition to same-sex couples.

### 3. Please Explain How the Proposed Policy Position will Address the Issue

For over 30 years, ABA policy has kept pace with our society's evolving understanding that gay and lesbian people are healthy, functioning contributors to our society who face discrimination – both as individuals and as families. Over that time, the ABA has taken a leading role in urging the elimination of discrimination against lesbian and gay people and their families. This recommendation – urging the elimination of legal barriers to civil marriage between same-sex couples -- builds upon this prior policy.

### 4. Summary of Minority Views

No minority views or opposition have been identified.