

Recognizing Civil Domestic Partnerships Without Sex or Religion

By Kenneth G. Petruilis

A nondiscriminatory form of civil domestic partnership is the answer to family partners' needs, not same-sex marriage. The California domestic partnership law and same-sex marriage, in their commonly understood form, require or assume a sexual relationship between the partners. In this respect they discriminate against partners who don't want or are forbidden by law from having a sexual relationship.

A new form of domestic partnership would address the needs of all family partners, not just same-sex sexual partners. Other, equally deserving family partnerships are denied their rights if we restrict the right to have a nontraditional marriage to only sexual relationships.

The debate over nontraditional marriage should not bog down over whether the partners have sex. It is irrelevant for the following reasons:

1. If two adults want the advantages of marriage, we should not artificially graft the requirement that they have a sexual relationship to gain the civil and tax benefits of marriage. In this sense, same-sex marriage is by definition discriminatory.

2. The substantive issue is whether to give a tax benefits package to partners living in non-traditional family units; and

3. The dispute over the word "marriage" is a religious argument in which the government should not be involved.

The national debate has been framed by two polar extremes that define same-sex marriage to promote their political agenda; there is no middle ground. We should not limit ourselves to the political solutions being put on the table by partisans.

Discriminatory Same-Sex Marriage

The argument from the right is that tradition and morals dictate that only men and women be married. The argument from the left rests on a constitutional right to marriage. Underlying the constitutional issue framed by both sides is that marriage is a fundamental human right. Unfortunately, there is no agreed upon definition of marriage. The constitutional rights, if they exist, must be otherwise defined.

In the most general context, marriages are a subcategory of domestic partnerships (other states use the term "civil union"). Recent news stories have featured older women or sisters who choose to live together in domestic partnerships with no thought of a sexual relationship. The California domestic partnership law prohib-

its the sisters from being partners and suggests that two friends must have an "intimate" relationship. The law discriminates against these domestic partnerships in which a sexual relationship might be illegal, but in which the non-sexual relationship is actually a constructive domestic partnership.

California's domestic partnership law prohibits same-sex couples from being domestic partners if they would not be able to marry based upon kinship rules or, in the case of heterosexual couples, if they could be married and are younger than 62. Neither one of these restrictions has any conceivable constitutional basis. If domestic partnerships or marriage are no longer to be associated with the traditional heterosexual/parental model, then why is it constitutional to link domestic partnerships or marriage to a sexual relationship? Why prohibit people from being domestic partners if they don't want to have sex or can't have sex legally?

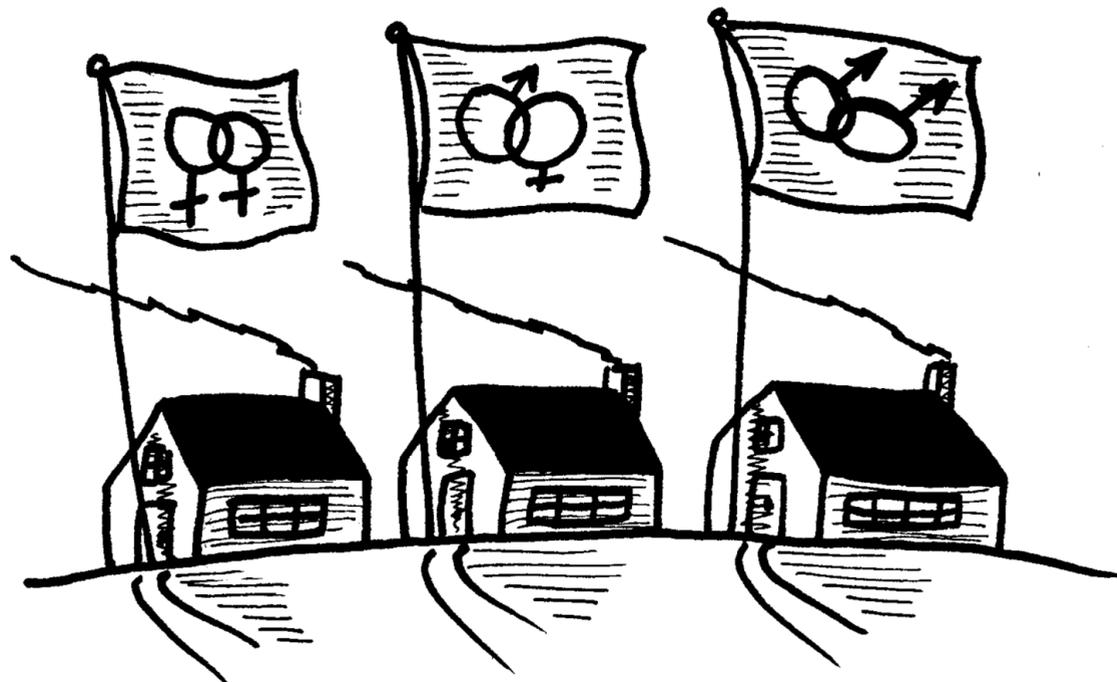
If any two adults could become domestic partners, the laws regulating who can and cannot have sex or procreate would still apply. If the partners cannot legally have sex, the domestic partnership law doesn't change that. They still cannot have sex — but there is no reason to prohibit them from being domestic partners.

Sexual conduct should not be a prerequisite. Sexual restrictions on who may be domestic partners not only discriminate, they also improperly focus the debate on sexuality. Taking the implication of sex out of the domestic partnership law would eliminate the sex appeal or revulsion that many seem to feel regarding same-sex marriage. Domestic partnerships would instantly become less offensive to the religious right because they would have no sexual component.

The existence of language in the domestic partnership law requiring or suggesting a sexual relationship exist between the partners serves no apparent purpose other than to evoke the ire and moral condemnation of the right. If any two consenting adults could form a domestic partnership, it would be no one's business whether those two consenting adults were having sex or not. They would merely be promising to form a domestic partnership whether, that relationship was platonic, familial or sexual.

Political Goal; Tax Benefits

Many of the tax benefits given to married persons have to do with the traditional paradigm of marriage as a child-bearing and child-rearing institution. The benefits are designed to benefit children. Because of an antiquated tax code, the benefits often devolve upon



unintended beneficiaries such as a 30-year-old actress marrying a 90-year-old billionaire. Our tax dollars should be spent more intelligently. We should not expand bad tax policy and we should not support a new tax benefits package without considering to the policies behind the benefits.

Behind the debate on same-sex marriage is the goal of the tax benefits package that comes with

Other, equally deserving family partnerships are denied their rights if we restrict the right to have a nontraditional marriage to only sexual relationships.

marriage. When the domestic partnership law went into effect on Jan. 1, 2005, in California, it gave same-sex couples and certain heterosexual couples over 55 years of age the functional equivalent of marriage. The chief aspect missing from this functional equivalent were federal tax benefits.

Same-sex marriage activists see it as more efficient to avoid dealing with policy issues on each individual tax benefit. Instead they prefer to reach for the tax benefit package that comes associated with the word marriage. This is a political issue, not a constitutional issue. Literature promoting same-sex marriage notes that because of the use of the word "marriage"

throughout the federal code, there are thousands of benefits available to married persons that are not available to domestic partners.

Religious Issue

In addition to the discrimination issues and the tax benefits involved, marriage involves a religious overlay. Modern marriage has its origins in religious rites

and sacraments that by common acceptance created a bond between a man and a woman. In the United States, all marriages now need to be sanctioned by the government. This is not universally true, however. (It was also not always true. At times, common law marriages were sanctioned, sometimes even over official and pre-existing marriages.)

Other countries separate civil unions from marriage. England, for example, has civil unions that are sanctioned by the government and religious marriages that are sanctioned by the church. Thus, in England the religious ritual of marriage can be anything the church wants it to be. In the United

States, one gay community church chooses to solemnize homosexual marriages and refuses to perform heterosexual marriages. The gay church takes the position that it will not perform a civil marriage ceremony, wishing to separate church and state in this way.

From a religious point of view, there are conflicts when marriages are required to be government sanctioned. Even if a church does not recognize divorce, its members are still forced to go through a "legal" marriage ceremony that will carry with it the legal right to a divorce. Additionally, the religious see a perceived insult to their rite of marriage in the California domestic partnership law. Even though it is not called marriage, it still offends those who recognize marriage as a religious ceremony or sacrament not to be tampered with by government.

It would be better for the orthodoxy of conservative churches and their members to have a clear separation between their sacrament of marriage and the state-required legal relationship. By taking the state out of the marriage business, and, instead, creating a domestic partnership, focusing on legal rights and benefits, everyone's interest is served.

We should not discriminate. We

should extend the benefits and duties of domestic partnerships equally to heterosexual, homosexual and nonsexual relationships and, at the same time, respect religious beliefs and traditional institutions.

Starting from the point of granting equal civil rights to every individual we should:

1. Allow religions each to define marriage according to their own beliefs and traditions;
2. Allow domestic partnerships between any two adults;
3. Not implicitly or explicitly require a sexual relationship between domestic partners;
4. Re-evaluate and target tax benefits to families bearing and raising children; and
5. Enforce rights and responsibilities for domestic partners including not only benefits but also obligations that will promote their monogamous relationship.

Kenneth G. Petruilis is a partner at Goodson Wachtel and Petruilis in Los Angeles and a former president of the Beverly Hills Bar Association. He was a member of its select committee on domestic partnerships and same-sex marriage. The opinions expressed in this article are his own.

Oh, the Drama: Congress' Ethics Debate Veers From Script

By Daryl Lease

C-Span isn't likely to overtake "American Idol" or any of the 249 variations of "Law and Order" and "CSI" in TV's Nielsen ratings next year. But the folks in the new, Democratic-controlled Congress are shaping up to be a fine value for our entertainment dollar — and they're still weeks away from their season premiere.

Steny Hoyer, a Maryland Democrat who is set to take over as House Majority Leader in January, gave us a glimpse of the fun to come when he disclosed recently that his colleagues can pretty much expect to work five days a week next year.

You would have thought he had told them that all future lobbyist-paid golf excursions would be limited to Putt Putt courses.

The reaction to Hoyer's announcement was mostly dismay and outrage, judging from a report last week in *The Washington Post*.

"Keeping us up here eats away at families," fumed Rep. Jack Kingston, R-Ga. "Marriages suffer. The Democrats could care less about families — that's what this says."

Rep. Debbie Wasserman Schultz, D-Fla., was more subdued, noting that the new schedule would mean she won't be able to make it to her daughter's Brownie meetings on Mondays anymore.

While most of us can probably sympathize with the difficulties lawmakers face in juggling work and home life, it should be noted that most members of the current Congress were clumsy jugglers. They kept dropping the ball marked "work."

This year, Congress was in session a little more than 100 days — fewer than the infamous "Do-Nothing Congress" of 1948, according to *The Post*.

There are, of course, two ways to view those numbers.

It's often said that no one's life, liberty or property is safe while Congress is in session. So 260 or



so days off isn't necessarily a bad thing.

But, as it's also often said, idle hands are the devil's workshop.

Unless they're kept fully occupied, or close to it, lawmakers can

and legislating. It's risky, yes, but it can be entertaining.

For instance, I'm looking forward to the upcoming debate about ethics reform.

House Speaker-elect Nancy

Some folks are recoiling from the notion of setting up an independent office to enforce ethics standards. Dianne Feinstein is skeptical that such an office is needed.

easily land themselves in some real foolishness — like, say, going off on antique shopping sprees with sleazy defense contractors, or re-arranging the frozen veggies in their home freezer to make room for \$90,000 worth of bribes.

Personally, I'd rather have Congress standing in front of the C-Span cameras, speechifying

Pelosi, D-Calif., has promised to "drain the swamp" of the slimy behavior that helped lead to the Republican downfall last month.

Americans, it appears, are counting on her to fulfill her pledge. According to a USA Today/Gallup poll in October, 86 percent of the respondents said corruption would be an "extremely" or "very impor-

tant" factor in how they would vote on Election Day.

As, some of the enthusiasm for swamp-siphoning appears to be waning among the winning candidates.

Rep. Jack Murtha, D-Pa., mocked Pelosi's proposed ethics reform package as "total crap" during a post-election meeting.

And some folks are recoiling from the notion of setting up an independent office to enforce ethics standards.

Sen. Dianne Feinstein, D-Calif., is skeptical that such an office is needed. "If the law is clear and precise," she said, "members will follow it."

Uh, yeah. Clarity and precision. Sure, sure. But let's follow that with a swift kick in the rear, shall we? Hmmm?

USA Today reports that there's even some doubt among lawmakers about the necessity of a proposal to bar them from slipping any earmarks into spending bills that would directly benefit them, their family members or businesses that employ their family members.

Gee, what a radical concept.

It's just a hunch, but Hoyer might want to consider going to a six-day-a-week schedule — at least until he and his esteemed colleagues work through this tricky ethics stuff.

Again, the long hours aren't likely to boost C-Span's ratings.

But it might just spare the Democratic majority — and the remaining Republicans on Capitol Hill — from getting cancelled by voters two years from now.

This article originally appeared in the *Herald-Tribune* in Sarasota, Fla.

Submissions

The Daily Journal welcomes your opinions. Send articles of no more than 1,500 words to eric_berkowitz@dailyjournal.com.

Daily Journal

Charles T. Munger
Chairman of the Board
J. P. Guerin
Vice Chairman of the Board

Gerald L. Salzman
Publisher / Editor-in-Chief
Robert E. Work
Publisher (1950-1986)

Martin Berg
Editor

David Houston
Los Angeles Editor

Peter Blumberg
San Francisco Editor

Keith Bowers
San Francisco City Editor

Carri Karuhn
Los Angeles City Editor

Jennifer Hamm
Business Editor

Pat Alston
Profiles Editor

Jim Adamek
Regional Editor

Eric Berkowitz
Legal Editor

Michael Cervantes, Aris Davoudian, Meagan Yellott,
Production Editors

Cynthia Goldstein, Hannah Naughton,
Copy Editors

Los Angeles Staff Writers

Rebecca Beyer, Drew Combs, Emma Dewald, Max Follmer,

Gabe Friedman, Andrew Harmon, Sandra Hernandez, Robert Iafolla,

Rick Kennedy, Susan McRae, Bobbi Murray,

San Francisco Staff Writers

Craig Anderson, Donna Domino, Laura Ernde, Amelia Hansen,

Tim Hay, William-Arthur Haynes, Anna Oberthur, Dennis Opatry,

Dennis Pfaff, John Roemer, Itr Yakar, Amy Yarbrough

Robert Levins, S. Todd Rogers, Xiang Xing Zhou,
Photographers

Alexa Hyland,
Editorial Assistant

Bureau Staff Writers

Craig Anderson, San Jose, Lawrence Hurley, Brent Kendall, Washington D.C.,

Linda Rapattoni, Sacramento, Don J. DeBenedictis, Santa Ana,

Jason W. Armstrong, Riverside, Claude Walbert, San Diego

Rulings Service

Cynthia Prado,
Rulings Editor

Sherrri Murata, Polin Mardrossian, Lesley Sacayanan,
Legal Writers

David Mendenhall,
Verdicts and Settlements

Advertising

Audrey L. Miller,
Corporate Display Advertising Director

Monica Smith, Maria Ramirez, Sheila Sadaghiani
Los Angeles Account Managers

Leonard Auletto, Erin Egleston, Michelle Kenyon,
San Francisco Account Managers

Stephen Maitland-Lewis,
Director of Marketing

Jesse Rios, Jayme White,
Display Advertising Coordinators

Megan Kinney,
San Francisco Administrative Coordinator

Art Department

Kathy Cullen
Art Director

Mel M. Reyes
Graphic Artist