

Making Lemonade the Drink of Choice

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Gay and lesbian Americans have been handed multiple bags of lemons in their campaign for equal rights. In November 2004 alone, voters in 13 states approved constitutional amendments to ban same-sex marriage. In partial response to the bags of lemons they have been handed, gays and lesbians are making legal lemonade.

To understand what is happening, look to the parallel of the urban real-estate market. Gays and lesbians move into a neglected area and, with significant investment of time, money, and energy, transform the community into a cosmopolitan hub. The urban gentry, representing the broader population, then moves into the neighborhood, and the community as a whole reaps the benefits of the improvements. Washington, D.C.'s Dupont Circle in the 1990s and Logan Circle today provide examples.

Gays and lesbians are situated in a legal wasteland in which they are not permitted to be married, and, in some instances, are prohibited from making legally enforceable contracts. Gays and lesbian couples are investing time, money, and energy into formalizing their relationships in ways that do not depend on marriage law or the laws of hostile jurisdictions. These couples are using innovative strategies that require counseling, communication, and long-term planning. In many ways, their modern legal arrangements serve them better than would traditional marriage. Members of the broader population like what they see and are eager to buy in.

An effective means of formalizing the legalities of relationships is to analogize the arrangement to a business association. Interpersonal relationships and businesses are both long-term associations in which the goal is to make the parties to the association better off. Relationships and businesses both require significant planning with regard to formation, choice of law and legal forum, contributions to the association, control of assets, dissolution, and property division. Proper planning, investment, commitment, and trust are keys to the success of both.

There should be no misunderstanding. Relationships are full of idiosyncrasies and unforeseen occurrences, and they can never be whittled down to a simple contract or business association. The relationship is organic; the legal arrangement reflects the partners' plans for the future.

The arrangements used by same-sex couples are more frequently being used as models for opposite-sex couples. It makes sense. It was commonly stated in the 1990s that a teenager in the U.S. had more in common with a teenager in Japan than with his or her own parents. The teenagers of the 1990s are now formalizing their personal relationships. Straight or gay, these individuals still have more in common with each other than with the generations preceding them.

Traditional marriage may provide a suitable framework for relationships in which one spouse will build a career, and the other spouse will devote her full efforts to making the home and raising children (who will be conceived without the use of a donor or surrogate). Marriage will grant the stay-at-home spouse an equal or nearly equal interest in the breadwinner's earnings during life and rights to inherit his estate upon his death. Obtaining a divorce will be lengthy, cumbersome, and costly.

Traditional marriage is less appealing to those couples who do not have traditional-style relationships. For example, previously divorced spouses who have children from their prior marriage often wish for their children to inherit their full estates upon their deaths. Yet, default inheritance rules for married couples often provide an elective share of about one-third of the decedent's estate to the surviving spouse. Pre-marital agreements and wills can alleviate these undesirable elements of marriage law, but key benefits of standard-form legal marriage -- efficiency and certainty -- are lost when a couple has to contract around the default rules.

Instead of entering into a standard-form legal marriage contract and then executing additional legal documents to undo the provisions of marriage law, many opposite-sex couples are following the lead of gays and lesbians and opting for alternatives. These couples are neither morally nor socially inferior to traditional couples. Their relationships merely differ from those of traditional couples and require distinct legal arrangements. In the same way that a small, professional firm's needs are different from a large corporation's, different types of relationships need different rules.

The unique legal solutions gay and lesbian Americans are crafting today are the bases of what will one day be standard-form options available under the law. Standard-form options have already expanded. California's new Domestic Partners Registry enables gay and lesbian couples, as well as opposite-sex couples in which one partner is 62 years or older, to register for state rights and benefits. Gays and lesbians' ability to tackle tough issues continues to contribute to the expansion of liberties for all Americans -- young and old, straight and gay.

Indeed, gays and lesbians are not just making legal lemonade of the bags of lemons they have been handed. They are making legal lemonade the drink of choice for many others.

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