

# Fashioning a Tolerable Domestic Partners Statute in an Environment Hostile to Same-Sex Marriages

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*"Oh! I want to put my arms around you, I ache to hold you close. Your ring is a great comfort. I look at it [and] think she does love me or I wouldn't be wearing it."*

Eleanor Roosevelt (from a letter to her lover, Lorena Hickock)<sup>1</sup>

## I. INTRODUCTION

"Family." The term conjures up many positive connotations—warmth, security, and love, to name just a few. Traditionally, that term evoked the picture of a male breadwinner, a nonworking wife and mother, and a few children. That image no longer reflects the average family,<sup>2</sup> if in fact it ever did.<sup>3</sup>

Changing family composition, while interesting from a sociological perspective, is similarly quite important from a legal perspective. Being a member of a family entitles a person to numerous legal and economic benefits. Thus, when parties are unable to attain the marital status that confers on their relationship the designation of family, they are denied many important economic and legal rights.

A substantial number of persons in this society are prohibited from legalizing their relationships through marriage and are thus unfairly denied the benefits that should arise from their relationships. These individuals comprise the thousands of same-sex couples who live in committed family relationships. Because no state currently allows same-sex couples to marry,<sup>4</sup> these couples are deprived of the benefits of marriage.<sup>5</sup> The thesis of this article is that the best way to secure justice and provide comparable rights for those in same-sex relationships is through the enactment of state domestic partnership

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1. QUENTIN CRISP'S BOOK OF QUOTATIONS: 1000 OBSERVATIONS ON LIFE AND LOVE BY, FOR, AND ABOUT GAY MEN AND WOMEN 181 (Amy Appleby, ed. 1989).

2. See Ken Bryson, *Household and Family Characteristics: March 1995*, in CURRENT POPULATION REPORTS 1 (U.S. Census Bureau P20-488, October 1996).

3. See generally, STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP (1992).

4. The Honorable Kevin S. C. Chang of Hawaii's First Circuit Court ruled on December 3, 1996, that same-sex couples cannot be denied the right to apply for a marriage license solely because the applicants are of the same sex. The enforcement of the judgment has been stayed as the case is awaiting a ruling on appeal to the Hawaii Supreme Court. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). See *infra* Part II and accompanying notes.

5. See *infra* discussion Part III.

statutes, accompanied by minor amendments to the federal Internal Revenue Code, the Social Security Act, and the Family and Medical Leave Act.

Legal evolution is pulled forward by the interactions of ethics and traditions. The traditions surrounding marriage are among our most rigid habits. Whatever else marriage is or is not, many members of contemporary society believe it is a relationship limited to people of opposite biological sexual construction—a belief often rooted in religious teachings.<sup>6</sup> Hence, only the strongest ethical persuasion would ever permit the legal embrace of same-sex marriages.<sup>7</sup> This article is written on the basis of that assumption. The prevailing culture is largely an aleatory context<sup>8</sup> in which all must function, despite the vigor of any resentment as to its prescribed boundaries.<sup>9</sup>

What is the basis for the claim that our culture is so hostile to same-sex marriages that legislative action in that domain is for the foreseeable future largely futile? After outlining the logic of this article, the introduction will document popular antagonism to the extension of rights to homosexuals and derivatively the vigorous opposition to same-sex marriage.

Part II of the article traces the vigorous reaction on a state and federal level to the possibility that Hawaii courts might sanction same-sex marriage. This section is a continuation of the introduction because it contributes to the picture of a cultural environment hostile to same-sex marriage. Part III provides a prelude to our suggested use of a particular form of Domestic Partnership Statutes, for it discusses

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6. See Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1872 (1997).

7. See generally S. Mark Pancer, *Religious Orthodoxy and the Complexity of Thought about Religious and Nonreligious Issues*, 63 J. PERSONALITY 213 (1995) (presenting data suggesting that those with orthodox religious beliefs have a tendency to think less complexly about religious issues).

8. This culture is far from monomorphic. See Linda Hosek, *Special Report: Benefits Poor but Better*, HONOLULU STAR-BULLETIN (visited Nov. 7, 1997) <<http://starbulletin.com/97/01/24/news/story2.html#hawaii>>. Hosek points out that more than 500 public and private employers recognize domestic partners and extend benefits to them as with married couples. Several cities also permit domestic partnership registration for all citizens, although it should be noticed that most are cities like Ann Arbor, Madison, Berkeley, and Ithaca, where universities play a major role in the political climate. See *infra* Part III and accompanying notes.

9. Anything less than support for same-sex marriage will be regarded by some as unfortunately “partial.” See Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, OUT/LOOK, NAT’L GAY AND LESBIAN Q., Fall 1989, at 18, reprinted in SUZANNE SHERMAN, LESBIAN AND GAY MARRIAGE 13-26 (1992). See also WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 62-75 (1996) (noting that homosexuals will not have equal citizenship until they have the right to marry persons of the same sex).

the benefits of marriage that gays are seeking. Part IV describes alternative versions of Domestic Partnership Laws, including San Francisco's exemplary domestic partner law enacted on June 1, 1997, and Hawaii's partnership statute effective July 1, 1997, as additional foundation for our suggested Model Statute in Part V. The Model Statute attempts to provide many of the benefits of same-sex marriage<sup>10</sup> without providing a direct assault on the popular concept of acceptable marriages.

Opposition to same-sex marriage certainly has as its core antagonism to homosexuality,<sup>11</sup> which—to varying degrees—is a cross-cultural phenomenon.<sup>12</sup> Anger towards and fear of homosexuals is an ancient habit reflected in the eminent William Blackstone's contention that homosexuality is a "crime against nature."<sup>13</sup>

The sodomy statutes that exist in twenty states are illustrative of this animosity towards homosexuality,<sup>14</sup> the presence of which has often been a legal basis for "discrimination against lesbians and gays in employment, housing, health care and family issues."<sup>15</sup> In *Dean v.*

10. One benefit our proposal can in no way provide, of course, is the shared sense that gays are as deserving as heterosexuals of the entire panoply of rights and respect.

11. See, e.g., STEPHEN BRANSFORD, *GAY POLITICS VS. COLORADO AND AMERICA: THE INSIDE STORY OF AMENDMENT 2* (1994) (characterizing resistance to homosexual rights as "a true standard of decency").

12. See generally GARY KINSMAN, *THE REGULATION OF DESIRE: SEXUALITY IN CANADA* (1987) (analyzing resistance to homosexual rights in Canadian history). But see David Ben-Asher, *Legal Discrimination Against Homosexuals in America, and a Comparison With More Tolerant Societies*, 7 N.Y.L. SCH. J. HUM. RTS. 157, 171-175 (1990) (discussing the general legal and cultural acceptance of homosexuals in the Netherlands, Denmark, Sweden, and Norway).

13. 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 215 (1811).

14. See ALA. CODE § 13A-6-65(a)(3) (1982); ARIZ. REV. STAT. ANN. § 13-1411 (West 1989); ARK. CODE ANN. § 5-14-122 (Michie 1987); FLA. STAT. ANN. § 800.02 (West 1990); GA. CODE ANN. § 16-6-2 (1982); IDAHO CODE §§ 18-6605-06 (1987); KAN. STAT. ANN. § 21-3505 (1988); LA. REV. STAT. ANN. § 14:89 (West Supp. 1986); MD. ANN. CODE art. 27, § 554 (1957); MICH. COMP. LAWS ANN. § 750.158 (West 1991) (unchallenged lower court decision invalidating sodomy statute); MINN. STAT. ANN. § 609.293 (West Supp. 1984); MISS. CODE ANN. § 97-29-59 (1989); MO. REV. STAT. §§ 566.010(1), .090(1) (Supp. 1990); N.C. GEN. STAT. § 14-177 (1986); OKLA. STAT. ANN. tit. 21 § 886 (West 1983); R.I. GEN. LAWS § 11-10-1 (1989); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1976); TEX. PENAL CODE ANN. §21.06 (West 1990); UTAH CODE ANN. §76-5-403 (Supp. 1989); VA. CODE ANN. § 18.2-361 (Michie 1988). Of the states that continue to have operative sodomy laws, five apply only to same-sex sexual conduct: Kansas, Missouri, Oklahoma, Arkansas and Maryland.

15. Mark F. Johnson, *Montana Supreme Court Strikes Down State's Sodomy Law*, NATIONAL GAY AND LESBIAN TASK FORCE (visited Nov. 7, 1997) <<http://www.nglft.org/press/montsod.html>>. See also *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997), in which Georgia Attorney General Michael Bowers won on appeal the right to withdraw a job offer previously extended to Robin Shahar after he learned that she planned to wed another woman. The court stated Shahar's employment would cause confusion in the office and among those who voted for him due to his long-standing battle to uphold Georgia's sodomy laws.

*District of Columbia*,<sup>16</sup> for example, a same-sex couple was denied the right to marry based in part on the existence of the District's sodomy statute.<sup>17</sup> One basis for the lower court's ruling was that to "consummate" a same-sex marriage within the District of Columbia, a couple would have to commit the crime of sodomy.<sup>18</sup>

While some state courts have overturned sodomy statutes as unconstitutional and certain states have repealed such laws,<sup>19</sup> the Supreme Court upheld the constitutionality of such statutes in *Bowers v. Hardwick*.<sup>20</sup> The Court ruled that the constitutional right of privacy does not extend to private, adult, consensual homosexual sodomy.<sup>21</sup> Justice White, writing for the majority, distinguished the Georgia anti-sodomy statute from other statutes in constitutional privacy cases such as *Griswold v. Connecticut*<sup>22</sup> and *Carey v. Population Servs. Int'l*.<sup>23</sup> White's basis for the distinction was that the privacy right of these earlier cases was linked to family, marriage, and procreation:

[W]e think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated. . . .<sup>24</sup>

## II. OPPOSITION TO SAME-SEX MARRIAGES: THE *BAEHR V. LEWIN* BACKLASH

Many state legislatures have recently passed or are currently considering legislation prohibiting same-sex marriages.<sup>25</sup> This growing trend is a reaction to the possibility that same-sex marriage

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16. No. 90-13892, 1992 WL 685364 (D.C. Super. Ct., June 2, 1992), *aff'd*, 653 A.2d 307 (D.C. 1995).

17. See D.C. CODE ANN. § 22-3502 (1981) (repealed May 23, 1995, prior to the appeals court's ruling).

18. See *Dean*, 1992 WL 685364, at \*8.

19. See *Johnson*, *supra* note 15, at 1 (noting that the District of Columbia and 30 states have repealed sodomy statutes).

20. 478 U.S. 186 (1986).

21. See *id.* at 190-96. While this case does not concern same-sex marriages, it reflects a pervasive attitude toward homosexuals demonstrated by the federal government.

22. 381 U.S. 479 (1965).

23. 431 U.S. 678 (1977).

24. *Bowers*, 478 U.S. at 190-191.

25. See *infra* note 47 and accompanying text. Representative Hottinger introduced H.R. 160, 122d Leg. Reg. Sess. (Ohio 1997) in Ohio, which declares that same-sex marriage is against the policy of the state. Representative Jiminez introduced a similar bill in Puerto Rico's House of Representatives in October 1997. See Doug Zehr, *Bill Would Ban Gay Marriages in Puerto Rico*, WASH. POST, October 12, 1997, at A11.

may become legal in Hawaii<sup>26</sup> based on the 1993 Hawaii Supreme Court's decision in *Baehr v. Lewin*,<sup>27</sup> which held that a ban on same-sex marriages was subject to the highest level of judicial scrutiny—strict scrutiny.<sup>28</sup>

Fearing similar decisions from their state courts in addition to the possibility that states may be required to recognize same-sex marriages contracted in other states,<sup>29</sup> legislators have drafted statutes aimed at ensuring that legally recognized same-sex marriages never come to fruition. To help understand this proliferation of state statutes banning same-sex marriages, we will examine the *Baehr* case.

A. *Baehr v. Miike (formerly Baehr v. Lewin)*

In 1990, after being denied marriage licenses by the Hawaii Department of Health on grounds that the applicants were the same sex, Ninia Baehr and Genora Dancel, along with two other couples, filed suit against the Department of Health seeking declaratory and injunctive relief.<sup>30</sup> The complaint alleged that the section of the Hawaii Marriage Law<sup>31</sup> justifying denial of the licenses was unconstitutional.<sup>32</sup>

In 1991, the Hawaii Circuit Court held that Lewin, as head of the Department of Health, was “entitled to judgment in his favor as a matter of law” and dismissed the suite because the facts alleged in the pleadings did not support the plaintiffs’ allegations of equal protection, privacy, and due process violations.<sup>33</sup> The plaintiffs appealed the ruling.

After reviewing the plaintiffs’ appeal of the circuit court’s decision, the Hawaii Supreme Court held that the granting of the defendant’s motion for judgment on the pleadings was in error.<sup>34</sup>

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26. See H.R. REP., No. 104-664, at 5 (1996).

27. 852 P.2d 44 (Haw. 1993), *remanded sub nom.* *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996) (preventing the state from denying marriage license applications to same-sex partners).

28. See *id.* at 67.

29. See Diane M. Guillerman, *The Defense of marriage Act: The Latest Maneuver in the Continuing Battle to Legalize Same-Sex Marriage*, 34 HOUS. L. REV. 425, 442 (1997) (noting the feared impact of the Full Faith and Credit Clause on recognition of same-sex marriage between states).

30. See *Baehr*, 852 P.2d at 48-49.

31. HAW. REV. STAT. § 572-1 (1985).

32. See *Baehr*, 852 P.2d at 48-49.

33. *Id.* at 52.

34. See *id.* at 68.

Consequently, the court vacated the circuit court's judgment and remanded the case to the circuit court for further proceedings.<sup>35</sup>

In the course of its decision, the Hawaii Supreme Court systematically examined each of the plaintiffs' constitutional arguments. First, the court considered the claim that the plaintiffs' denial of a marriage license to them violated their right to privacy and due process as guaranteed by the Hawaii constitution.<sup>36</sup> After examining the records of the 1978 Hawaii Constitutional Convention, the court concluded that Hawaii's constitution incorporates only the privacy rights the United States Supreme Court has found to be within the penumbra of the U.S. Constitution.<sup>37</sup> The Hawaii Supreme Court then examined several of these U.S. Supreme Court cases, including *Palko v. Connecticut*<sup>38</sup> and *Griswold v. Connecticut*.<sup>39</sup> The court concluded:

Applying the foregoing standards to the present case, we do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed. Accordingly, we hold that the applicant couples do not have a fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise.<sup>40</sup>

Next, the court discussed the plaintiffs' equal protection claim. The court viewed the Hawaii Marriage Law as classifying individuals on the basis of sex, rather than on the basis of homosexuality. The court concluded that *prima facie* and as applied by the circuit court, the Hawaii statute discriminates against same-sex couples because the state denies them marriage licenses solely on the basis of the applicant's sex.<sup>41</sup> The court noted that for purposes of equal

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35. *See id.*

36. *See id.* at 55-57.

37. *See id.*

38. 302 U.S. 319 (1937) (defining fundamental rights as those "implicit in the concept of ordered liberty").

39. 381 U.S. 479 (1965). Justice Goldberg in his concurrence described fundamental rights as those which "lie at the base of all our civil and political institutions." *Id.* at 493 (quoting *Powell v. State of Alabama*, 287 U.S. 45, 67 (1932)).

40. *Baehr*, 852 P.2d at 57.

41. *See id.* at 67. "Rudimentary principles of statutory construction render manifest the fact that, by its plain language, HRS § 572-1 restricts the marital relation to a male and female. . . . Accordingly, on its face and (as Lewin admits) as applied, HRS § 572-1 denies same-sex couples access to the marital status and its concomitant rights and benefits." *Id.* at 60.

protection analysis, sex is a suspect category.<sup>42</sup> Therefore, Hawaii's Marriage Law must pass strict scrutiny, which requires the state to establish a "compelling state interest" for making such a sex-based classification.<sup>43</sup> Consequently, the Hawaii Marriage Law is presumptively unconstitutional absent a showing by the Department of Health on two levels: that the statute's sex-based classification is justified by a compelling state interest and that the statute is narrowly tailored to avoid unnecessary abridgments of the applicant couple's constitutional rights.<sup>44</sup>

Upon remand by the Hawaii Supreme Court, the Honorable Kevin S. C. Chang of Hawaii's First Circuit Court heard the case and ruled that the defendant neither "sustained his burden [of] overcome[ing] the presumption that HRS 572-1 is unconstitutional by demonstrating or proving that the statute furthers a compelling state interest," nor did the defendant "establish that HRS 572-1 is narrowly tailored to avoid unnecessary abridgments of constitutional rights."<sup>45</sup> Judge Chang found in favor of the plaintiffs and held Hawaii's marriage law unconstitutional.<sup>46</sup> The Hawaii Supreme Court summarily affirmed Judge Chang's decision.<sup>47</sup>

### B. *The States' Response*

In response to the potential legality of same-sex marriage in Hawaii, many state legislatures, including Hawaii, have already adopted or are presently considering the adoption of statutes that would bar the recognition of same-sex marriages, even if the marriages were valid in another jurisdiction.<sup>48</sup> A typical anti-same-sex

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42. *See id.* at 67.

43. *See id.* "HRS § 572-1 is subject to the "strict scrutiny test." *Id.*

44. *See id.*

45. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, \*21 (Haw. Cir. Ct. Dec. 3, 1996) (unpublished table decision).

46. *See id.* at \*22.

47. *See Baehr v. Miike*, 950 P.2d 1234 (Haw. 1997) (unpublished table decision).

48. *See* ALASKA STAT. § 25.05.013 (Michie 1996) (banning same-sex marriages performed in Alaska or other jurisdictions, as well as the termination of marriage, specifically stating in part (b) that "a relationship may not be recognized by the state as being entitled to the benefits of marriage"); ARIZ. REV. STAT. ANN. § 25-101(C) (West 1997) (prohibiting marriage between persons of the same sex); ARIZ. REV. STAT. ANN. § 25-112 (West 1996) (banning recognition of same-sex marriage contracted in other states or countries); ARK. CODE ANN. § 9-11-107-109 (Michie 1997) (prohibiting same-sex marriage in Arkansas and prohibiting recognition of same-sex marriages contracted outside the state); FLA. STAT. ANN. § 741.212 (West 1997) (stating same-sex marriages contracted in or out of state are "not recognized for any purpose" and the state may not "give effect to . . . a claim arising from such a marriage or relationship"); GA. CODE ANN. § 19-3-3.1 (1997) (prohibiting and not recognizing marriage between persons of the same sex); IDAHO CODE § 32-202 (1997) (stating only males and females



marriage statute is similar to title 31, article 11, chapter 1(b) of the Indiana Code which states that “[a] marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized.”<sup>49</sup>

Similarly, many states’ statutes define marriage as occurring solely between males and females.<sup>50</sup> While not explicitly banning same-sex marriage, these laws often have the same effect. Of these

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may marry); IDAHO CODE § 32-209 (1997) (stating same-sex marriages violate the public policy of the state and specifying that such marriages will not be recognized if contracted out of state); 750 ILL. COMP. STAT. ANN. 5/212(a)(5) (West 1997) (prohibiting same-sex marriage); ILL. COMP. STAT. ANN. 5/216 (West 1997) (voiding prohibited marriages contracted out of state); IND. CODE ANN. § 31-11-1-1 (Michie 1997) (stating that only males and females may marry and that a marriage between persons of the same gender is void even if lawful in place contracted); KAN. STAT. ANN. § 23-101 (1996) (stating marriage must be contracted between persons of the opposite sex and all others are void and contrary to the public policy of the state); LA. CIV. CODE ANN. art. 89 (West 1997) (stating those of the same sex may not marry), LA. CIV. CODE ANN. art. 94 (West 1997) (stating marriages are void when contracted in violation of an impediment); ME. REV. STAT. ANN. tit. 19-A § 701 (West 1997) (prohibiting same-sex marriage and the recognition of such marriage); MICH. STAT. ANN. § 25.15, .16 (Law Co-op. 1997) (stating marriage not between a man and a woman is invalid in Michigan, regardless of jurisdiction within which it was contracted); MISS. CODE ANN. § 93-1-1 (1997) (stating marriage between persons of the same gender is prohibited, regardless of jurisdiction within which it was contracted); MO. REV. STAT. § 451.022 (1996) (prohibiting same-sex marriages as against public policy); MONT. CODE ANN. § 40-1-401 (1997) (prohibiting marriage between persons of the same sex and declaring such marriages void as against public policy); N.C. GEN. STAT. § 51-1.2 (1996) (stating marriages contracted by individuals of the same gender are void in North Carolina, regardless of jurisdiction where contracted); N.D. CENT. CODE § 14-03-01 (1997) (defining marriage as a civil contract between a man and a woman); OKLA. STAT. tit. 43, § 3 (1996) (stating only persons of the opposite sex may marry); OKLA. STAT. tit. 43, § 3.1 (1996) (stating recognition of marriages between persons of the same sex is prohibited); 23 PA. CONS. STAT. § 1704 (1997) (stating marriages between persons of the same sex void regardless of jurisdiction within which they are contracted); S.C. CODE ANN. § 20-1-15 (Law Co-op. 1996) (stating marriage between persons of the same sex is void and against public policy); TEX. FAM. CODE ANN. § 1.01 (West 1997) (stating “a license may not be issued for the marriage of persons of the same sex”); UTAH CODE ANN. § 30-1-2 (1997) (stating marriages between persons of the same sex are prohibited and void); UTAH CODE ANN. § 30-1-4 (1997) (stating marriages void in Utah are not recognized in Utah, even if contracted in a state in which they were legal); VA. CODE ANN. § 20-45.2 (Michie 1997) (whether contracted in Virginia or out of state, same-sex marriages are void).

49. IND. CODE ANN. § 31-11-1-1 (Michie 1997).

50. See CAL. FAM. CODE § 301 (West 1997) (defining adults capable of marriage as one male and one female); COLO. REV. STAT. § 14-2-104 (1996) (“a marriage between a man and a woman . . . is valid in this state”); MD. LAW CODE ANN., FAM. LAW § 2-201 (1997) (stating “only a marriage between a man and woman is valid in this state”); MINN. STAT. § 517.01 (1996) (stating marriage is “a civil contract between a man and a woman”); NEV. REV. STAT. ANN. § 122.020 (Michie 1995) (stating “a male and a female person” are “capable of marriage”); OR. REV. STAT. § 106.010 (1996) (stating “males . . . and females” may marry); S.D. CODIFIED LAWS § 25-1-1 (Michie 1997) (stating marriage is “between a man and a woman”); TENN. CODE ANN. § 36-3-113 (1997) (stating the only legally recognized marital contract is between one man and one woman); W. VA. CODE § 48-1-1 (1997) (stating only males and females may marry); WIS. STAT. § 765.001 (1995-1996) (stating “marriage is a legal relationship between two equal persons, a husband and wife”); WYO. STAT. ANN. § 20-1-101 (Michie 1997) (stating “marriage is a civil contract between a male and a female person”).

statutes, Tennessee's is one of the most extreme in its language, including its reasoning and the stated public policy, in an attempt, presumably, to avoid constitutional challenges similar to those experienced by the State of Hawaii.<sup>51</sup>

In a similar show of anti-gay sentiment, Hawaii itself has been pursuing legal avenues to avoid recognizing same-sex marriage. After *Baehr v. Lewin* was remanded to the First Circuit Court, the Hawaii legislature passed two significant measures: a bill calling for a constitutional amendment to restrict marriage to opposite-sex couples<sup>52</sup> and a domestic partnership statute that provides some of the benefits of marriage to same-sex couples in an attempt to ensure an amendment or legislation restricting marriage to opposite-sex couples would not be overturned on grounds that it was unconstitutional.<sup>53</sup> This proposed constitutional amendment, which polls show voters overwhelmingly support, states that: "The Legislature shall have the power to reserve marriage to opposite-sex couples."<sup>54</sup> Given the hostility toward same-sex unions, other states are likely to follow Hawaii's lead in proposing such an amendment to their constitutions. Furthermore, many state courts have historically collaborated with state legislators in the creation of an unfavorable environment for

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51. See TENN. CODE ANN. § 36-3-113 (1997). Tennessee's statute states:

(a) Tennessee's marriage licensing laws reinforce, carry forward, and make explicit the long-standing public policy of this state to recognize the family as essential to social and economic order and the common good and as the fundamental building block of our society. To that end, it is further the public policy of this state that the historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state in order to provide the unique and exclusive rights and privileges to marriage.

(b) The legal union in matrimony of only one (1) man and one (1) woman shall be the only recognized marriage in this state.

(c) Any policy, law or judicial interpretation that purports to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman is contrary to the public policy of Tennessee.

(d) If another state or foreign jurisdiction issues a license for persons to marry which marriages are prohibited in this state, any such marriage shall be void and unenforceable in this state.

*Id.*

52. See Associated Press, *Benefits for Hawaii Couples*, NEWSDAY, July 7, 1997, at A16.

53. While the intent was to deny lesbians and gay men the right to marry, the results of the passage of the domestic partnership statute were not entirely deleterious. The measure, which took effect July 1, 1997, does not allow same-sex couples to marry, but rather provides those who register as "reciprocal beneficiaries" about sixty various benefits. See Bettina Boxall, *A New Era Set to Begin in Benefits for Gay Couples*, L.A. TIMES, July 7, 1997, at A3; Susan Essoyan, *Hawaii Approves Benefits Package for Gay Couples*, L.A. TIMES, April 30, 1997, at A3.

54. David Orgon Coolidge, *At Last, Hawaiians Have Their Say on Gay Marriages*, WALL ST. J., April 23, 1997, at A19.

homosexuals, and many courts continue to do so. At least six state courts have summarily rejected same-sex marriages.<sup>55</sup>

### C. *The Federal Response*

The federal government prepared a similar preemptive strike against same-sex marriage. On May 8, 1996, Senator Nickles, an Oklahoma Republican, proposed the Defense of Marriage Act.<sup>56</sup> In what Nickles termed a “simple” measure concerning “the defense of marriage as an institution and as the backbone of the American family,” the Defense of Marriage Act serves two purposes.<sup>57</sup> First, the bill provides for uniform definitions of “marriage” and “spouse.” “Marriage” is defined as “a legal union between one man and one woman as husband and wife;”<sup>58</sup> “spouse” refers only to “a person of the opposite sex who is a husband or a wife.”<sup>59</sup> According to Nickles, these uniform definitions are essential because the federal government provides federal benefits to persons who are married, as defined by the resident’s state.<sup>60</sup> Thus, this bill would “help the Federal Government defend the traditional and common-sense definitions of . . . ‘marriage’ and ‘spouse.’”<sup>61</sup> Otherwise, Nickles asserted, if states created new definitions for the words “marriage” and “spouse,” the “reverberations may be felt throughout the Federal Code.”<sup>62</sup>

The second purpose of the Defense of Marriage Act is to provide that no state shall be required to give effect to any public act of another state that validates a marriage between persons of the same sex.<sup>63</sup> This provision was necessary, Nickles claimed, to ensure that

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55. See *Dean v. District of Columbia*, No. 90-13892, 1992 WL 685364 (D.C. Super. Ct. June 2, 1992), *aff’d*, 653 A.2d 307 (D.C. 1995); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971); *DeSanto v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984); *Singer v. Hara*, 533 P.2d 1187 (Wash. Ct. App. 1994). See also ESKRIDGE, *supra* note 9, at 56.

56. See S. 1740, 104th Cong. (1996). On May 7, 1996, an almost identical bill was introduced in the House of Representatives—H.R. 3396, 104th Cong. (1996). This bill, which received bi-partisan support, was approved by the House Judiciary Committee on June 12, 1996, by a 20-10 vote. The bill was passed by both the Senate and the House of Representatives in the 104th Congress. President Clinton signed the bill on September 21, 1996. See *Defense of Marriage Act*, Pub. L. No. 104-99, 110 Stat. 2419 (codified at 1 U.S.C. § 7, 28 U.S.C. § 1738c (1996)). On the bill, Charles T. Canady, a Florida Republican, stated: “What is at stake in this controversy? Nothing less than our collective moral understanding . . . of the essential nature of the family.” 142 CONG. REC. H7441 (daily ed. July 11, 1996) (statement of Sen. Canady).

57. 142 CONG. REC. S10103-04 (daily ed. Sept. 10, 1996) (statement of Sen. Nickles).

58. *Id.* at S10103.

59. *Id.*

60. See *id.*

61. *Id.*

62. *Id.*

63. See *id.*

some states would not be forced to compromise their own law prohibiting same-sex marriage by recognizing such a union in a state where such marriages are legal.<sup>64</sup>

### III. THE BENEFITS OF LEGALLY RECOGNIZED MARRIAGE

Numerous rights arising out of the marital relationship<sup>65</sup> are not available to unmarried same-sex couples.<sup>66</sup> Some of the more significant ones include: (1) parental rights, including foster care, adoption, joint parenting, and visitation rights; (2) local, state, and federal entitlement benefits, including social security, veterans, unemployment, and worker's compensation benefits;<sup>67</sup> (3) employee benefits such as group insurance, family health care, and the assumption of pension rights if a partner dies;<sup>68</sup> (4) the right to bring a tort action for wrongful death or loss of consortium;<sup>69</sup> (5) housing

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64. See *id.* But cf. Diane M. Guillerman, *The Defense of Marriage Act: The Latest Maneuver in the Continuing Battle to Legalize Same-Sex Marriage*, 34 HOUS. L. REV. 425, 450 (1997) (discussing potential implications of the Defense of Marriage Act and concluding that the statute "is in accordance with the Court's declaration . . . and thus the DOMA can be construed as codifying the existing constitutional rule rather than altering it").

65. For further discussion of the rights that arise after marriage, see Stacey Lynne Boyle, Note, *Marital Status Classifications: Protecting Heterosexual and Homosexual Cohabitants*, 14 HASTINGS CONST. L.Q. 111, 115-16 (1986). See also *The Marriage Project*, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. (visited Sept. 8, 1998) <<http://www.lambdalegal.org>>.

66. After reviewing many of the legislative provisions applicable to cohabitants, Rebecca L. Melton found that same-sex and heterosexual cohabitants still struggle for health insurance, dental insurance, eye care, life insurance, bereavement leave, pensions, sick leave, social security, club memberships, and all the benefits that married couples can receive automatically. See Rebecca L. Melton, Note, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of "Family,"* 29 U. LOUISVILLE J. FAM. L. 497 (1990-91). See also John Dwight Ingram, *A Constitutional Critique of Restrictions on Marriage—Why Can't Fred Marry George—or Mary and Alice at the Same Time?*, 10 J. CONTEMP. L. 33 (1984) (asserting traditional barriers to marriage should be removed); William V. Vetter, *Restrictions on Equal Treatment of Unmarried Domestic Partners*, 5 B.U. PUB. INT. L.J. 1 (1995) (discussing plans to provide equal benefits to married and unmarried couples and their tax implications).

67. See Denise Pino Erwin, *Survivor Benefits Denied to Lesbian Life Partner: Rovira v. AT&T*, 817 F. Supp. 1062 (S.D.N.Y. 1993), 9 BERKELEY WOMEN'S L. J. 209 (1994).

68. For further discussion of these rights and attempts to secure them for domestic partners, see Sue Nussbaum Averill, *Desperately Seeking Status: Same-Sex Couples Battle for Employment-Linked Benefits*, 27 AKRON L. REV. 253 (1993); J. Robert Cowan, *The New Family Plan: Employee Benefits and the Non-traditional Spouse*, 32 U. LOUISVILLE J. FAM. L. 617 (1993-94); Daniel R. White, *Another San Francisco Firm Offers Benefits to Domestic Partners of Gays and Lesbians*, L. FIRM PARTNERSHIP & BEN. REP., January 1996, at 7; Jeff Barge, *More Firms Offer Benefits for Gay Couples: Managers Say Fairness Concerns Prompted Change; Low Cost Was a Surprise*, 81 A.B.A. J., June 1995, at 34; Alice Rickel, *Extending Employee Benefits to Domestic Partners: Avoiding Legal Hurdles While Staying in Tune With the Changing Definition of the Family*, 16 WHITTIER L. REV. 737 (1995).

69. See Anne E. Simerman, *The Right of a Cohabitant to Recover in Tort: Wrongful Death, Negligent Infliction of Emotional Distress and Loss of Consortium*, 32 U. LOUISVILLE J. FAM. L. 531 (1993-94).

rights; (6) local, state, and federal tax benefits, including the ability to file joint income tax returns; (7) the right to receive the partner's property through intestate succession;<sup>70</sup> (8) qualification for immigration status;<sup>71</sup> (9) legal rights to protection in cases of domestic violence; (10) the right to legal divorce or dissolution proceedings; and (11) the privilege of not having to testify against one's partner. Some of these benefits are self-explanatory; others require further explication.

#### A. Parenting Rights

Some of the most prominent and troublesome legal issues facing same-sex couples today include the legal ability of lesbians and gay men to adopt<sup>72</sup> and parent jointly.<sup>73</sup> Traditionally, legally recognized families are defined as "a group of two or more people (one of whom is the householder) living together, who are related by birth, marriage, or adoption."<sup>74</sup> For lesbians and gay men, however, adoption as a means to the creation or legal recognition of family is often implicitly or explicitly denied by state legislatures and courts.<sup>75</sup> For example, two years after Jon Holden and Michael Galluccio brought home a three-month-old foster child, they were denied the right to adopt the child based on their marital status. According to officials from New Jersey's Division of Youth and Family Services (DYFS), Holden and Galluccio could not "adopt the baby together because a state statute

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70. See Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83 (1995) (urging reform of inheritance laws).

71. See Amy R. Brownstein, *Why Same Sex Spouses Should be Granted Preferential Immigration Status: Re-evaluating Adams v. Howerton*, 16 LOY. L.A. INT'L. & COMP. L.J. 763 (1994).

72. While most adoptions are either "second parent adoptions" (in which the same-sex partner wishes to adopt the biological child of the other partner) or traditional adoptions (where the same-sex couple attempts to adopt a foster child or other child to whom the couple is not biologically related), some same-sex couples are attempting to adopt each other in hopes of gaining some of the legal benefits of marriage. Of the various types of adoption, adult adoption is the least likely to be granted by the courts. See Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-Use of Social Science Research*, 2 DUKE J. GENDER L. & POL'Y 207 (1995); Vincent C. Green, Note, *Same-Sex Adoption: An Alternative Approach to Gay Marriage in New York*, 62 BROOK. L. REV. 399 (1996).

73. See generally Ruth Padawer, *Gay Couple Await Ruling on Adoption: Widely Backed in Fighting State Ban*, RECORD (Bergen County, N.J.), Oct. 16, 1997, at L1.

74. Ken Bryson, *Household and Family Characteristics: March 1995*, in CURRENT POPULATION REPORTS 1-4 (Census Bureau P20-488, Oct. 1996).

75. See Elovitz, *supra* note 72 (noting that both New Hampshire (N.H. REV. STAT. ANN. §§ 170-B:4, 170-F:6 (1994)) and Florida (FLA. STAT. ANN. § 63.042(3) (West 1985 & Supp. 1995)) have specific statutes denying gay men and lesbians the right to adopt children. See also Maria Gil de Lamadrid, *Lesbians Choosing Motherhood: Legal Implications of Co-Parenting*, in LESBIANS AND CHILD CUSTODY 195 (1992).

holds that adoption is an option only for married couples or unmarried singles.”<sup>76</sup> Both Holden and Galluccio, together for over ten years yet unable to marry, requested the courts grant them the right to adopt jointly.<sup>77</sup> On October 22, 1997, the New Jersey Superior Court allowed the couple to adopt based on the state law “best interests of the child” standard rather than the DYFS regulations.<sup>78</sup> Holden and Galluccio then filed a class action against the state concerning this discrepancy between state law and DYFS regulations.<sup>79</sup> In a settlement of the suit, the state changed its policy and agreed to use the same adoption standards for unmarried couples as married couples.<sup>80</sup>

Traditionally, the courts have reinforced a nuclear, heterosexual vision of legally recognized families in a formal approach to family law.<sup>81</sup> Consistently, suits for custody and visitation have been lost by lesbian and gay parents for no reason other than their sexual orientation.<sup>82</sup> However, a recent shift to the application of a functional family law theory<sup>83</sup> has provided some benefits to gay and

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76. Padawer, *supra* note 73. DYFS officials stated that either Holden or Galluccio could adopt, but this option was rejected by the couple as discriminatory. They noted the legal costs of second-parent adoption and potential risks if the adoptive parent were to die before the second parent adoption was granted.

77. *See id.*

78. *See* Ruth Padawer, *Victory for Gay Couple: Judge Sidesteps DYFS Rule to Allow Adoption*, THE RECORD (Bergen County, N.J.), Oct. 23, 1997, at A1.

79. *See* Holden v. New Jersey Dep’t of Human Servs., No. C-203-97 (N.J. Super. Ct. Dec. 16, 1997).

80. *See* Julie Brienza, *Joint Adoptions by Gays Are Put on Even Ground with Heterosexual Couples*, TRIAL, March 1998, at 98.

81. *See generally* Brad Sears, *Recent Developments: Winning Arguments/Losing Themselves: The (Dys)functional Approach in Thomas S. v. Robin Y.*, 29 HARV. C.R.-C.L. L. REV. 559 (1994) (documenting various state court cases in which the ruling reinforced traditional notions of family, although statutes were in place that allowed for alternative judgments). *See also* Aurthur S. Leonard, *Law News*, LESBIAN AND GAY NEW YORK (visited Nov. 9, 1997) <[http://www.spacelab.net/~lgny/volume\\_23/features23/law23.html](http://www.spacelab.net/~lgny/volume_23/features23/law23.html)> (noting Michigan Appeals Court ruling which denied custody to a non-biological lesbian mother and instead gave custody to the ex-boyfriend of her recently deceased partner, in spite of the deceased partner’s delegation of parental authority to non-biological mother).

82. *See In re* Adoption of Bruce M., No. A-62-93 (D.C. Super. Ct. Fam. Div. Apr. 20, 1994) (denying gay couple’s co-parent adoption petition); *In re* Angel Lace, 516 N.W. 2d 678 (Wis. 1994) (denying lesbian couple’s co-parent adoption petition), *motion for recons. denied, as noted in* Elovitz, *supra* note 72. *See also* Curiale v. Regan, 222 Cal. App. 3d 1597 (Cal. Ct. App. 1990) (denying custody and visitation to non-biological lesbian mother of child who was conceived during the couple’s relationship on the basis that the non-biological mother had “no colorable claim of right to custody.”)

83. *See* Sears, *supra* note 81. Sears notes that in *Thomas S. v. Robin Y.* 599 N.Y.S.2d 377 (N.Y. Fam. Ct. 1993), the court rejected a formal law approach for a functional approach, denying custody to the biological sperm donor who sued for partial custody, and instead recognized the validity of the child’s non-biological lesbian mother. Sears continued by noting the failure of the functional approach to provide for the needs of non-traditional families as it simply “reifies the

lesbian parenting families.<sup>84</sup> Nonetheless, the existence of statutes and precedents which deny gay and lesbian parents and their children the right to a legally recognized family abound.<sup>85</sup>

*B. Local, State, and Federal Entitlement Benefits*

Social Security, Veterans Benefits, Workers Compensation, and Unemployment Compensation programs all rely on conceptions of family limited to opposite-sex couples in determining benefits.<sup>86</sup> For example, when a working spouse is transferred, the other spouse must quit a job to accompany the transferred spouse to a new residence. Under some unemployment compensation statutes, the transfer of a spouse constitutes “good cause” for voluntary termination of employment and thus allows collection of unemployment compensation.<sup>87</sup> However, most courts will not extend this right to a non-married partner.<sup>88</sup> While it has been suggested that the standard for determining benefits is whether the claimant is a “good faith” member of the household,<sup>89</sup> this standard has not yet been used for same-sex partners.

*C. The Right to Employee Benefits*

Many employee benefits programs ensure that families are not financially devastated by accident, death, or major illness of one of the family members. Such benefits include medical and dental insurance, as well as sickness and death benefits. The provision of death benefits to a spouse ensures that when a wage-earner dies, the decedent’s spouse has the financial means to survive without seeking public assistance. The working person with a same-sex partner does

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law’s current presumptions and conceptions about [the nuclear] family” and instead suggests “a queer approach” to family law. *Id.*

84. See Elovitz, *supra* note 72, at 208 (noting that both the Massachusetts and Vermont Supreme Courts allowed lesbians and gays to legally adopt as the second parent). See also OR. REV. STAT. § 109.119(5) (1993) (while not relating to homosexuals explicitly, this statute allows for visitation by those persons who have “maintained an ongoing personal relationship with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality”); Debbie Howlett, *Supreme Court Reaffirms Gay Parents’ Rights*, USA TODAY, Nov. 14, 1995 (noting “the Supreme Court let stand a Wisconsin Supreme Court decision that allows a lesbian mother’s ex-lover, whom her 6-year-old son considers a parent, to prove she is entitled to visitation rights,” also citing Washington, D.C., New York, and Illinois court decisions recognizing gay and lesbian family constructions).

85. See Elovitz, *supra* note 72, at 208-10.

86. See *Norman v. Unemployment Insurance Appeals Board*, 663 P.2d 904 (Cal. 1994).

87. See *id.*

88. See *id.*

89. See *Department of Indus. Relations v. Workers Compensation Appeals Bd.*, 94 Cal. App. 3d 72 (Cal. Ct. App. 1979).

not receive the same protections for his or her partner, to the financial detriment of both the surviving partner and—if a household is forced to apply for public assistance—the community.<sup>90</sup>

*D. The Right to Sue for Loss of Consortium*

One of the more significant rights that arises out of the marital relationship is the right to bring a tort action for the loss of consortium or wrongful death.<sup>91</sup> An action for loss of consortium reflects a recognition of the importance of the relational interest that arises when there is a significant, stable relationship involving economic cooperation and exclusivity of a sexual relationship.<sup>92</sup> At least one court has stated that if marriage is a *sine qua non* to recovery, then a gay or lesbian plaintiff has no claim.<sup>93</sup>

However, the justifications for limiting this action to only spouses are not strong. For example, the California Court of Appeal held that injury to an unmarried cohabitant was foreseeable and that it was reasonable to anticipate that an adult involved in a serious relationship will be harmed by injury to the victim.<sup>94</sup> However, the California Supreme Court has disagreed with this view, and has held that unmarried cohabitants are not entitled to loss of consortium because of the state's interest in promoting marriage and the difficulty of assessing injury to an unmarried cohabitant.<sup>95</sup> The California Supreme Court set forth its reasoning in *Rodriguez v. Bethlehem Steel Corporation*, explaining that “[o]ne who negligently causes a severely disabling injury to an adult may reasonably expect that the injured person is married and that his or her spouse will be adversely affected by that injury.”<sup>96</sup> The same rationale likewise applies to cases

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90. See, e.g., *Rovira v. AT&T*, 817 F. Supp. 1062 (S.D.N.Y. 1993) (upholding denial of death benefits to lesbian partner under management pension plan governed by ERISA). Several cases illustrate the considerable foothold same-sex couples could gain if afforded legal status as a couple. See *Hinman v. Department of Personnel Admin.*, 167 Cal. App. 3d 516 (Cal. Ct. App. 1985) (holding that state employee's same-sex partner is not entitled to dependent coverage under the State Employees' Dental Care Act); *Phillips v. Wisconsin Personnel Comm'n*, 482 N.W.2d 121 (Wis. Ct. App. 1992) (ruling that an employer's limit on dependent health insurance coverage does not violate marital status, sexual orientation, or other gender based provisions of Wisconsin's Fair Employment Act, and that marriage, not sexual orientation was the basis for the denial).

91. See *id.*

92. See *Butcher v. Superior Court*, 139 Cal. App. 3d 58 (Cal. Ct. App. 1983).

93. See *Rodriguez v. Bethlehem Steel Corp.*, 525 P.2d 669 (Cal. 1974).

94. See *Butcher*, 139 Cal. App. 3d at 68.

95. See *Eldon v. Sheldon*, 758 P.2d 582 (Cal. 1988).

96. *Rodriguez*, 525 P.2d at 680.



involving same-sex adult partners. One would expect them to have mates who depend on them; the sex of the mate is irrelevant.

In rejecting the wrongful death claim of a cohabitant, the California Court of Appeals stated in *Harrod v. Pacific Southwest Airlines, Inc.*<sup>97</sup> that an unformalized marriage “lacks the necessary permanence to allow the survivor to recover damages . . . which look to the future and are intended to compensate for future loss.”<sup>98</sup> The state could further argue that rejecting these claims furthered the public policy of encouraging marriage.<sup>99</sup> These arguments are irrelevant, however, to the issue of whether same-sex couples should be able to sue for loss of consortium because these couples do not presently have the option of marriage.

Another commonly made argument against extending this right is that liability must be limited at some point.<sup>100</sup> This is a standard “floodgates” argument that is often made when no other substantive reason is given to deny recovery. It is a much better argument when those denied have an alternative means of recourse available to them. In the case of same-sex couples, no such alternative exists.

It would not be difficult for the courts to look at the same-sex couple’s relationship to determine whether it is stable enough to justify awarding loss of consortium damages. However, given the courts’ reluctance to extend this right to cohabiting heterosexual couples, its extension to homosexual couples is highly unlikely.

### E. Housing

It is in the area of housing where much of the discrimination against same-sex couples occurs. The case of *Village of Belle Terre v. Boraas*<sup>101</sup> exemplifies the problem. In that case, the United States Supreme Court upheld the constitutionality of a village ordinance that restricted land use to “one-family” dwellings. The ordinance defined a “family” as one or more persons related by blood, adoption, or marriage.<sup>102</sup> The ordinance specifically excluded more than two unmarried and unrelated parties living together. Thus, in thousands of communities across the country where single family dwelling

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97. 118 Cal. App. 3d 155 (Cal. Ct. App. 1981).

98. *Id.* at 158.

99. *See id.* at 70.

100. This argument is made in numerous cases. *See Justice v. Atchison*, 565 P.2d 122 (Cal. 1977); *Borer v. American Airlines*, 563 P.2d 858 (Cal. 1977); *Tong v. Jocson*, 87 Cal. App. 3d 603 (Cal. Ct. App. 1977); *Nieto v. City of Los Angeles*, 138 Cal. App. 3d 464 (Cal. Ct. App. 1982).

101. 416 U.S. 1 (1974).

102. *See id.* at 1.

ordinances are in force, same-sex couples cannot live together with any degree of constitutional protection.

Until the New York City case of *Braschi v. Stahl Associates*,<sup>103</sup> another housing problem for same-sex couples often arose under rent control laws. If a same-sex couple was living in a rent-controlled apartment and the person in whose name the lease was held died, the surviving partner would have no claim to the residence. The surviving partner could either be evicted or forced to sign a new lease at a higher rent. After several same-sex partners suffered eviction after the loss of their partners, the New York court finally recognized these parties' rights to be treated like family units in limited circumstances.<sup>104</sup> In its decision, the court laid down a number of factors that should be considered in determining the existence of a family: exclusivity and longevity of the relationship; the level of emotional and financial commitment; how a couple has conducted themselves and held themselves out to society; and the reliance placed upon one another for daily family services.<sup>105</sup> While this court's ruling may have improved the situation with respect to housing for gay couples in New York City, there is no evidence to indicate that this ruling is likely to be extended to other states.

Along with the rights accorded by marriage come responsibilities as well. Foremost among these is a spouse's legal responsibility to provide "necessaries" for the other, relative to income.<sup>106</sup> To date, the responsibilities, like the benefits of marriage, have not been extended legally to same-sex partners.

#### IV. THE DOMESTIC PARTNERS ORDINANCE ALTERNATIVE

In all of the above situations, the judiciary has been the governmental entity that has given or withheld rights from same-sex partners. Change through judicial decisions can be a time consuming and often unpredictable process. As a result, gay and lesbian rights advocates have also been making coordinated efforts to improve their status through the legislative process across the country. Eleven

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103. 543 N.E.2d 49 (N.Y. 1989).

104. *But see* Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991) (limiting the circumstances under which the court would find a nontraditional family in the course of denying visitation rights to the lesbian partner of a child's biological mother after the couple separated).

105. *See Braschi*, 543 N.E.2d at 788-91.

106. *See* Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1167-1168 (1992).

states<sup>107</sup> and over 123 counties and cities have passed specific ordinances prohibiting discrimination based on sexual orientation.<sup>108</sup> These laws have been especially helpful in the areas of housing and employment. As a result of collective bargaining, some counties have also extended various domestic partnership benefits to county employees.<sup>109</sup> However, in order to secure the economic and legal benefits of being a “family” to gay and lesbian couples, comprehensive domestic partners legislation may be the most helpful reform.

Growing numbers of cities are legally recognizing domestic partnerships, primarily through the creation of domestic partnership ordinances.<sup>110</sup> Some of the cities that have passed these ordinances are Berkeley, Laguna Beach,<sup>111</sup> Los Angeles,<sup>112</sup> San Francisco,<sup>113</sup> and West Hollywood,<sup>114</sup> California; Takoma Park, Maryland,<sup>115</sup>

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107. See 989 MASS. ADV. LEGIS. SERV. ch. 516 (Law Co-op.); 1981 WIS. LAWS ch. 112 (primary employment provisions codified at WIS. STAT. ANN. §§ 16.765, 111.31 - .32, .70, .85, 230.01 (2)) (West 1988). See also *Legislative Update*, NATIONAL GAY AND LESBIAN TASK FORCE PRESS RELEASE (June 29, 1997) (observing that California, Connecticut, Hawaii, Massachusetts, Maine, Minnesota, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin all have statutes barring discrimination based on sexual orientation).

108. See PR Newswire Assoc., Inc., *Philadelphia Lesbian & Gay Task Force Proudly Announces . . . Twin Civil Rights Legislation*, Oct. 8, 1997; Mike Causey, *The Federal Diary*, THE WASHINGTON POST, October 31, 1997, at C02.

109. See Public Sectr. Bargaining, 17 Pens. Rep. (BNA) 607 (1990) (San Mateo County); Public Sector, 16 Pens. Rep. (BNA) 1736 (1989)(Alameda County); Santa Cruz Employees Add Domestic Partner to Health Plan, 17 Pens. Rep. (BNA) 190 (1990)(Santa Cruz).

110. These cities include Santa Cruz, Berkeley, Los Angeles, West Hollywood, Laguna Beach, California, as well as Seattle, Washington.

111. The Laguna Beach Ordinance, passed in April, 1992, requires that health care facilities and jails allow visitation by domestic partners. See Laguna Beach, Calif. Municipal Code, § 1.12.070 (1992). A city issued certificate may also be used to file a durable power of attorney in the areas of health care and the disposition of personal effects at the time of death. See *id.* at § 1.12.040.

112. The Los Angeles ordinance extends sick leave and bereavement pay to city employees with domestic partners. See L.A., Cal. Admin. Code § 4.123 (1996); Scott Harris, *Council O.K. 3 Leave for Unwed Partners*, L.A. TIMES, Oct. 6, 1988, at S2.

113. The San Francisco ordinance provides for the registration of domestic partners at city hall, as well as the extension of health benefits to registered domestic partners of city employees. See SAN FRANCISCO, CAL. ADMIN. CODE SS62.1-62.8 (1991); *SF Supervisors OK Domestic Partners' Law*, L.A. TIMES, May 23, 1989, at S1. The law faced stiff opposition, but a ballot to repeal the law was unsuccessful. For an overview of the ordinance's history, see *Law on Unmarried Couples Suspended by San Francisco*, N.Y. TIMES, July 7, 1989, at SB; *Voters Force Runoff in San Francisco*, CHRISTIAN SCIENCE MONITOR, November 7, 1991, at 6. San Francisco also recently enacted an ordinance prohibiting the city from entering into contracts with entities that discriminate in provision of benefits between employees with spouses and those with domestic partners. See S.F. Admin. Code § 12B.

114. See Ordinance No. 22, An Ordinance of West Hollywood (1985); R. Russle, *West Hollywood Will Insure Partners of Single Employees*, L.A. TIMES, Feb. 22, 1989, at S2A.

115. The term “domestic partner” is included in the definition of “immediate family” in the Personnel Procedures section of the Takoma Park, Maryland Code. See TAKOMA PARK, MD.

Cambridge, Massachusetts;<sup>116</sup> Ann Arbor, Michigan;<sup>117</sup> Minneapolis, Minnesota;<sup>118</sup> Madison, Wisconsin;<sup>119</sup> and Washington, D.C.<sup>120</sup>

This section will examine some of these legislative alternatives. The structure of each ordinance or statute varies somewhat, as do the benefits each provides. The main thrust of each law, however, is to recognize the existence of alternative familial relationships and give the partners in such relationships some of the benefits that would arise from being a member of a traditional family. In crafting the “ideal” domestic partnership law, we can look to the models provided by some of these domestic partnership enactments.

#### A. *Berkeley, California*

The oldest domestic partnership ordinance was adopted in Berkeley, California in December, 1994.<sup>121</sup> While this policy is significant in that it was the first such ordinance, it is limited in that it only provides benefits to municipal employees. Under Berkeley’s Domestic Partnership Policy, unmarried domestic partners file an Affidavit of Domestic Partnership (ADP), in which they attest that they have lived together at least six months and “share the common necessities of life.”<sup>122</sup> Both parties must be over eighteen years of age and must declare that they are each the other’s sole domestic partner

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CODE, PERSONNEL PROCEDURES, art. 2 S8B-108 (6) (Supp. Nov. 11, 1986). Landlord-Tenant law also includes domestic partners as family members. TAKOMA PARK, MD. CODE, HOUSING, art. 8 SS 6-81(a), 6-81(c), 6-83.

116. See CAMBRIDGE, MASS. CODE § 2.119. Cambridge’s domestic partnership ordinance provides equal health benefits to employees with domestic partners and employees with spouses. See *id.*

117. See ANN ARBOR, MICH. CODE, tit. IX, ch. 11 (1991). The Ann Arbor ordinance, passed November 4, 1991, allows domestic partners to register at city hall, but conveys no legal benefits on them. See *id.*

118. See MINNEAPOLIS, MN. CODE §§ 142.30, 142.70 (1991). The Minneapolis ordinance provides for registration of domestic partnerships and grants them visitation rights in health care facilities. See *id.* Sick and bereavement leave benefits are also available to the domestic partners of city employees. See *id.* See also *Minneapolis Domestic Partner Plan Expands Sick, Bereavement Benefits*, 29 Gov’t Empl. Rel. Rep. 131 (BNA) (1991).

119. See MADISON, WIS. GEN. ORDINANCES § 3.23 (1990). Madison requires organizations operating public accommodations to provide the same benefits to domestic partners as are provided to other families. See *id.* Domestic partnerships are also protected from housing and zoning discrimination. See *id.*

120. The Washington, D.C. ordinance provides health benefits to domestic partners of D.C. government employees, and offers tax breaks to private employers who offer similar benefits. The law mandates that health care facilities allow domestic partners the same visitation right as spouses. Rene Sanchez, *D.C. Council Approves Partners Bill; Ministers’ Opposition Fails to Kill Measure*, WASH. POST, April 8, 1992, at B1.

121. City of Berkeley Affidavit of Domestic Partnership (visited Aug. 31, 1998) <[www.inberkeley2.ci.berkeley.ca.us/clerk/domestic.html](http://www.inberkeley2.ci.berkeley.ca.us/clerk/domestic.html)>.

122. *Id.*

and are responsible for their common welfare.<sup>123</sup> Should the partnership dissolve, the partners must file a statement of termination, and the employee would not be able to register another domestic partnership during the next six months.<sup>124</sup>

Once a couple files an ADP, they are then eligible for the same health care and dental insurance policies as married couples. Under Berkeley's plan, premiums for both the city employee and his or her domestic partner are paid for by the city. Perhaps surprisingly, four years after the ordinance was passed, the city found that the costs of their premiums had increased only minimally.<sup>125</sup> Another somewhat surprising aspect of this law was that five years after it had passed, 85 percent of the 108 registered domestic partnerships were heterosexual couples.<sup>126</sup>

#### B. *West Hollywood, California*

The West Hollywood, California ordinance provides an example of how an ordinance can be adopted as a starting point from which additional benefits can subsequently be added. The West Hollywood ordinance, adopted in 1985, initially granted unmarried couples the right to register their relationships.<sup>127</sup> At first, the ordinance was largely symbolic; the only substantive rights parties received were jail and hospital visitation rights similar to those of married spouses.<sup>128</sup> In February of 1989, however, the city began providing registered city employees' partners with basic medical coverage for premiums comparable to those they provided for spouses or other legal dependents.<sup>129</sup> West Hollywood did, however, have difficulty finding a private insurance company willing to provide them with a health care plan, and they ultimately adopted a self-insurance policy.<sup>130</sup>

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123. *See id.*

124. *See id.*

125. *See S.F. Supervisors OK 'Domestic Partners' Law*, L.A. TIMES, May 23, 1989, at 28.

126. *See id.*

127. *See R.W. Russle, Hollywood Will Insure Partners of Single Employees*, L.A. TIMES, February 22, 1989, at 2A.

128. *See id.*

129. *See id.*

130. *See Risinbg Freudenheim, Worry on 'Partner' Benefits*, N.Y. TIMES, Aug. 16, 1989 at D1.

C. *San Francisco, California*

On June 1, 1997, San Francisco's Domestic Partners Law went into effect.<sup>131</sup> It requires that everyone doing business with the city, both private firms and nonprofit organizations, providing benefits to their employees' spouses must also provide the benefits to their employees' domestic partners.<sup>132</sup> To be deemed a "domestic partner," both members of the couple must be over eighteen years of age, must live together, must be financially interdependent, and must register at one of the twenty-eight domestic-partner registries run by local governments around the United States or at company internal domestic-partner registries.<sup>133</sup> If companies attempt to provide domestic-partner benefits, but for some reason are unable to do so, they may offer the cash equivalent of the benefits to their eligible employees instead.<sup>134</sup> Companies failing to provide such benefits risk fines of \$50 per day, in addition to possibly losing their city contracts.<sup>135</sup>

Anti-domestic partnership statute advocates are not passively standing by while such statutes as San Francisco's are enacted. For example, San Francisco's domestic partnership statute is already being challenged in two separate suits. In May of 1997, the Air Transport Association, an airline trade group, filed suit in United States District Court in San Francisco.<sup>136</sup> Similarly, on June 17, 1997, the American Center for Law and Justice, a law firm founded by conservative Christian Reverend Pat Robertson, also filed suit challenging the statute.<sup>137</sup> Both suits allege that the ordinance violates the state and federal constitutions by requiring city contractors to offer employment benefits to their workers' domestic partners.<sup>138</sup> The results of these law suits will no doubt dictate the continued viability of statutes such as San Francisco's.

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131. See I. DeBar, *Big Help for Small Firms*, S.F. CHRON., May 28, 1997, at B1. While the law officially takes effect on June 1, 1997, companies do not have to comply with it until they renew, amend or bid on a city contract. See *id.* Companies can delay the start of providing partner benefits until the first open-enrollment period after their contract beings. See *id.* Consequently, some firms will not have to provide domestic-partner benefits for several months or years. See *id.*

132. See *id.*

133. See *id.*

134. See *id.*

135. See *id.*

136. See *Air Transport Ass'n v. City San Francisco*, 992 F. Supp 1149 (N.D. Cal. 1998).

137. See Rachel Gordon, *United Faces Showdown with City: Airline May Have to File Own Suit to Get Partners Exemption*, S.F. EXAMINER, July 9, 1998, at A1.

138. See *id.*

#### D. *Hawaii*

With the governor's approval on July 8, 1997, Hawaii's House Bill No. 118 became the first state statute to extend benefits to same-sex partners. The legislation provides that those who are at least eighteen years old, are not currently married or in another reciprocal beneficiary relationship, and are legally prohibited from marrying under Chapter 572 of the Hawaii Revised Code may register as reciprocal beneficiaries.<sup>139</sup>

The benefits provided by the bill include extension of health insurance benefits to the partner and the partner's children under the age of nineteen,<sup>140</sup> the extension of authority regarding hospital visitation rights and related medical decisions to reciprocal beneficiaries,<sup>141</sup> the extension of insurance rights to the partner and any children,<sup>142</sup> the extension of intestate succession rights to a deceased partner's estate as with married couples,<sup>143</sup> and bereavement benefits.<sup>144</sup> Additionally, the legislation provides for extending university housing, dining, and athletic benefits to "reciprocal beneficiaries" and their family members.<sup>145</sup> Tort rights for same-sex partners are included in the legislation,<sup>146</sup> along with a revision of the statute defining and prohibiting domestic violence to include same-sex partners.<sup>147</sup> In all, over sixty individual benefits are provided in Hawaii's statute. The legislation allows for termination of the reciprocal beneficiary relationship upon payment of an eight dollar fee to the director of health or upon issuance of a marriage license to either member of the reciprocal beneficiary relationship.<sup>148</sup>

### V. A MODEL STATE DOMESTIC PARTNERSHIP STATUTE

#### A. *Theoretical Basis for a Model Domestic Partnership Statute*

The preceding sections illustrate the diversity of the protections given to married couples and domestic partners. In a just society, attaining the basic benefits of a family should not be dependent on whether or not one meets the traditional requirements for marriage,

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139. See Haw. Rev. Stat. § 572-4 (1997).

140. See *id.* at § 87-25.5.

141. See *id.* at § 323-323-2.

142. See *id.* at § 431:10A-601.

143. See *id.* at § 560:2-202.

144. See *id.* at § 79-13.

145. See *id.* at § 306-1.

146. See *id.* at § 88-85.

147. See *id.* at § 709-906.

148. See *id.* at § 572C-7.

especially in a world where increasing numbers of individuals are opting for nontraditional family relationships.<sup>149</sup> Paula Ettelbrick framed the fundamental issue of equality regarding marital status by analyzing the issue of domestic partner benefits in a feminist light:

“[The pursuit of domestic partnership benefits] establishes a civil rights remedy to the pervasive practice of disproportionately providing married employees with health insurance, paid bereavement, family sick leave and other ‘family’ based benefits that are denied to unmarried employees and their families. Its main premise is that unmarried workers who perform the same jobs, at the same salaries as married workers, should be entitled to ‘equal pay for equal work.’”<sup>150</sup>

Moreover, the pursuit of domestic partnership statutes which recognize alternative family compositions is, if not more just than the pursuit of the right to marry for same-sex couples, then certainly more viable. As noted in the introduction, marriage, for many, is a religious sacrament, and as such people are often unyielding in their beliefs regarding this institution.<sup>151</sup> Conversely, issues relating to fairness and the extension of certain basic legal protections are often not thought of in quite the same light.<sup>152</sup> Public opinion polls indicate that while the majority of Americans oppose same-sex marriage, most believe gays and lesbians should be entitled to certain protections and benefits enjoyed by heterosexuals.<sup>153</sup>

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149. Paula L. Ettelbrick, *Youth, Family and the Law: Defining Rights and Establishing Recognition* 5 J.L. & POL’Y 107, 135, 140 (Ettelbrick posed the following question: “If the strongest of public policy goals is to support families . . . is there any justification for allowing only those families joined by marriage, or only those families biologically joined, to partake in economic and social support?”). *Id.*

150. *Id.* at 144. Compare Barbara J. Cox, Symposium: *Towards A Radical and Plural Democracy*, 33 CAL. W.L. REV. 155, 156 (proposing same-sex marriage as a radical notion to redefine the family) (focusing on the right to marry, rather than domestic partnership statutes, as a means to provide the gay community with family benefits); See generally Eskridge, *supra* note 9, at 62-191 (providing arguments for same-sex marriage for both the mainstream and homosexual communities).

151. Cf. Pancer, *supra* note 7 (concluding that “orthodoxly religious” individuals do not think in more “rigid” ways in regard to most issues, but they may “think less complexly about religious issues.”).

152. See *id.*

153. See Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage*, 85 GEO. L.J. 1871, at note 21 (stating that “[a] recent poll conducted by the Human Rights Campaign found the following level of support for the following issues relating to the rights of gay and lesbian couples: (1) Issue Support Among Respondents Social Security benefits for gay couples—46%; (2) Health Benefits for gay domestic partners—51%; (3) Protecting gay and lesbian parents from losing their kids—54%; (4) Inheritance rights for gay couples—62%; (5) Hospital-visitation rights for gay partners—84%”). See also *Congress Defines Marriage: 1 Man, 1 Woman*, U.S. NEWS & WORLD REPORT, September 23, 1996, at 19 (documenting poll results indicating that slightly less than 85% opposed gay marriage, but more than 80% believe gays should be protected from discrimination in the workplace); H.R. REP. No. 104-664, at 6



These opinions are shared by corporate America as well.<sup>154</sup> Their support may be most obvious in the sheer number of companies that provide domestic partnership benefits in the absence of any statutory requirement.<sup>155</sup> Ettlbrick notes these corporate provisions are a “necessary response to the reality of their employees’ lives,” and the lack of such benefits would “undermine[ ] their own commitment to equal treatment in the workplace.”<sup>156</sup>

In response to the threat of increased costs resulting from extending benefits to opposite-sex partners<sup>157</sup> or to arguments that such statutes are unnecessary since opposite-sex couples have the option to marry,<sup>158</sup> it may be tempting to pursue domestic partner benefits for same-sex couples only. However, such a position would invariably decrease popular support, which will be necessary to encourage state legislators to pass such statutes. Pursuing a statute that could potentially benefit a substantial number of opposite-sex unmarried partners would no doubt assist in expressing the political support for such statutes to the legislatures.<sup>159</sup> Furthermore, if a domestic partners benefits statute excluded opposite sex couples, these couples “could maintain an action for marital status or sexual-orientation discrimination under applicable state and local ordinances.”<sup>160</sup>

### B. *Legal Provisions of the Model Domestic Partnership Statute*

State legislation is essential for the successful and equitable provision of domestic partner benefits. Family law has traditionally

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(1996) (notes that 71% of the Hawaii public believe that marriage licenses should be issued only to opposite-sex couples, while 18% believe the state should extend the licenses to same-sex couples). While these figures show substantial support for lesbian and gay legal rights and benefits, they also indicate that significantly more support exists for extending domestic partnership benefits to gays and lesbians than for same-sex marriage rights.

154. See Rachel Gordon, *High Compliance Rate on S.F. Partners Law: More Than 2,400 Firms Approved, but Backlog Still Exists*, SAN FRANCISCO EXAM’R, October 31, 1997, at A-1.

155. See Ettlbrick, *supra* note 149.

156. *Id.* at 144-145.

157. *But cf.* Partners Task Force for Gay & Lesbian Couples, *Factoids on Domestic Partnership Benefits 2* (visited Oct. 12, 1997) <<http://www.buddybuddy.com/d-p-fac.html>> (stating that “A 1993 Brown University study [cited in the June 1995 ABA Journal] found that only 0.36 to 0.77 percent of employees sign up for domestic partner benefits. Firms found that their \$100,000 allocations for planned costs finally only came to about \$10,000, due to low sign up.”); See also *infra* Section V (C) and accompanying notes.

158. See generally Ettlbrick, *supra* note 149.

159. See Cowles Business Media, *One-Third of Unmarried Partners Are Gay*, May 1996, THE NUMBER NEWS (visited Nov. 11, 1997) <[http://www.demographics.com/Publications/FC/96\\_NN/9605\\_NN/9605NN01.html](http://www.demographics.com/Publications/FC/96_NN/9605_NN/9605NN01.html)> (noting the number of opposite-sex couples increased 28% between 1990 and 1994).

160. *Sexual Orientation Discrimination*, 2 N.J. OF SEXUAL ORIENTATION L. 33, 50.

been governed by state law, and such statutes would fit naturally into each state's revised code, ostensibly alongside the statute that defines marriage. Additionally, proposing domestic partner ordinances city by city—the current alternative—may be too cumbersome a process and could lead to innumerable conflicts when a person lives in one city but is employed just outside the city limits. Such an approach may also encourage employers to move outside a city to avoid the law.<sup>161</sup> Of course, in order for these state statutes to provide the optimal situation for same-sex partners, some accompanying changes in federal law will be necessary. These changes will be detailed at the end of this section.

By examining the experiences of communities that have had domestic partnership ordinances in place for a number of years, we can construct a model state domestic partnership statute that, if adopted, could begin to improve the status of same-sex couples across the country. Our initial consideration in drafting the statute is defining eligibility requirements. Berkeley's ordinance provides a good approach. Couples wishing to attain domestic partnership status would file an ADP in the state recorder's office in the county in which they reside.<sup>162</sup> In this document, they must attest that each is committed to being the other's domestic partner, that they have lived together for six months or longer, and that they each have agreed to be legally responsible for providing the common necessities for the other. Each party also must be at least eighteen years of age, be mentally competent to consent to a contract, and be related neither by blood relations nor marriage.<sup>163</sup> If the partnership ends, the couple will be required to file a termination of partnership with the state recorder's office.

In order to avoid fraudulent registration, and potentially more significant, to quell the fears of those who envision multitudes of roommates registering for domestic partnership status, certain safeguards should be written into the statute. Any falsification on the application, or failure to file a statement of termination if necessary

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161. This problem is also raised with respect to state legislation as opposed to federal legislation, but the problem would be more severe when dealing with the small geographical areas of cities. Moreover, the benefits covered by these laws have traditionally been matters of state law.

162. While the information will be a matter of public record, domestic partnership requirements will not include a stipulation to publish registration information in a public newspaper, as it may unnecessarily put same-sex couples at risk to the more radical intolerant members of the community who may act violently on their homophobia.

163. See Craig A. Bowman & Blake M. Cornish, Note: *A More Perfect Union*, 92 COLUM. L. REV. 1164, 1192.

would constitute a misdemeanor. Also, if any person who relied to his or her detriment on the statements contained in the ADP or who extended benefits to the partners based on their domestic partnership status and that status was later proven to be fraudulent, the victimized party would have a right to bring an action for fraud and recover treble damages. While some may argue that these penalties are too severe, they are necessary to gain the political support required for passage of laws that some fear will open possibilities for massive fraud.

The six month cohabitation requirement is simply another way to ensure that the individuals are indeed committed to the relationship. Perhaps in time this requirement might be shortened, as applying many states have shortened the waiting period between for a marriage license and the wedding, but at least initially, while these legal relationships are new, this requirement will ensure the statutes are duly considered.

The clause most likely to dissuade anyone from falsifying domestic partnership data would be that requiring financial responsibility for necessities. Also, in cases of intestate succession, when one partner fails to make a will, the domestic partner should be treated as a spouse. The primary reason for intestate succession is to ensure that someone does not end up in the "poor house" or need to be publicly supported when their mate dies. The same rationale should apply to domestic partnerships. The couple's finances and property are commingled and each relies on the other's property for support; a partner should not lose this property due to the death of his or her partner.

Looking to the West Hollywood ordinance for further examples, it is clear that domestic partners should be entitled to the same legal and medical powers of attorney and hospital and jail visitation rights as are extended to marital partners. Likewise, the privilege not to testify against one's spouse should be extended to include the privilege to not testify against one's partner. These provisions are vital in pursuing the state's interest in making domestic partnerships just as strong and stable as marriages. The potential financial hazards of fraudulently entering into a relationship and intimately sharing such economic and legal obligations with another will easily outweigh any ill-gotten gains.

Most significant of the legal provisions will be the parenting rights accorded by this statute. Foster-parenting, second-parent and traditional adoption requests, and co-parenting rights will be extended to domestic partners, and any previously enacted statutes forbidding

lesbian or gay parents from entering into these family relationships based solely on the sexual orientation of the parent will be null and void. Similarly, any prior legislation purporting to deny same-sex partnerships the benefits and legal rights of marriage must be repealed.<sup>164</sup>

### C. *Economic Benefits Under the Statute*

The primary benefits that should be available to same-sex couples should be those that are most essential to their welfare. At the top of the list should be access to the same health, dental, and life insurance benefits to which married couples and their children are entitled. If an employer provides insurance benefits to an employee and his or her spouse and family, then the law should mandate that the same benefit package be available to the employee, his or her registered domestic partner, and the children of either partner.<sup>165</sup>

While employers may initially be concerned about the increased cost of providing these benefits, as noted above, many municipalities have been surprised at how minimal the additional costs have been. The increased cost, for example, of providing health insurance to the domestic partners of city employees in Seattle, Washington, amounted to only 1.1 percent of the city's total costs for medical and dental coverage over the period of May through December, 1990.<sup>166</sup> In Berkeley, the extension of dental benefits to domestic partners caused the city's insurance carrier to raise its premium by only 2 percent.<sup>167</sup>

The extension of medical and death benefits is especially important in light of the fact that lesbians and gay men still face

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164. This provision is necessary to void specific sections of Alaska, Florida, and Montana's statutes which ban same-sex marriage. *See supra* note 14. Only these three states included wording which specifically prohibits the extension of the rights and benefits normally accorded to couples who marry from same-sex couples entering into any type of contractual agreement. *See id.*

165. One commentator has suggested that the failure to provide the same benefits policy to same-sex partnerships is a form of employment discrimination. *See* Robert L. Elbin, *Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)*, 51 OHIO ST. L.J. 1067 (1990). For the typical white collar employee, benefits provide 25% of the employee's total compensation package. *See id.* Medical benefits alone account for 6% of the total. *See id.* When the married employee can include his or her spouse and children, whereas the homosexual partner cannot include his or her partner, the homosexual is in effect being paid less for no reason related to his or her productivity or value to the firm. *See* Barbara Cox, *Alternative Family: Obtaining Traditional Family Benefits Through Litigation, Legislation, and Collective Bargaining*, 2 WIS. WOMEN'S L.J. 1, 27 (1986).

166. *See* City of Seattle Fact Sheet: Domestic Partner Benefits (January 1991).

167. *See Recognizing Non-Traditional Families, Work & Family Rep.* (BNA) SPECIAL REPORT NO. 38, at 10-11 (Feb. 1991).

substantial amounts of discrimination in the workplace.<sup>168</sup> Title VII does not include homosexuality as a protected class. It is estimated that only half of all U.S. residents are legally protected from sexual orientation discrimination in employment<sup>169</sup> and it is thus more likely that gay men or lesbians will experience discrimination in the workplace, potentially resulting in unemployment. The discrimination gay men and lesbians may face affects not only their ability to obtain employment but also their wages. Using econometric techniques to analyze data from the General Social Survey (of years 1989-91), M.V. Lee Badgett found that gay and bisexual male workers earned from 11—27.1 percent less than heterosexual male workers with the same experience, education, occupation, marital status, and region of residence.<sup>170</sup> These lower wage levels may mean that some gay couples have less income to meet their needs, and therefore less money available to purchase insurance independently.<sup>171</sup>

#### D. Complementary Changes in Federal Legislation

##### 1. Social Security

To conform with the model domestic partner statute, two amendments would be necessary to the Social Security Act.<sup>172</sup> First, subsection (y) would be added to Section 402, which describes the requirements for survivors' insurance benefit payments. This new subsection would be titled "(y) Domestic Partners Insurance Benefits." It would provide that one who qualifies as a domestic partner under his/her state's domestic partner statute is entitled to the same social security benefits as a marital spouse. Also, under Section 416, Subsection (m) would be added to define a domestic partner as "one who qualifies under his/her state's domestic partnership statute."

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168. Anecdotal evidence of the discriminatory workplace environment for gays and lesbians abound. For example, the Dallas Police Department had a policy prohibiting the employment of homosexuals. Despite challenges to the policy, it was retained by the Dallas City Council. David A. Landau, *Employment Discrimination Against Lesbians and Gays: The Incomplete Legal Responses of the United States and the European Union*, 4 DUKE J. OF COMP. AND INT'L L. 335 (1994), at 388.

169. See Arthur S. Leonard, *Sexual Orientation and the Workplace: A Rapidly Developing Field*, 414 LAB. L.J. 574, 576 (1993).

170. See M.V. Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48(4) Indus. & Lab. Rel. Rev. 726-739 (1995).

171. See *id.*

172. 42 U.S.C. §§ 301-305 (1994).

## 2. Family and Medical Leave Act

The Family and Medical Leave Act,<sup>173</sup> which entitles employees to take reasonable leave to care for a spouse, child, or parent who has a serious health condition, also requires an amendment to conform with this attempt to extend reciprocal benefits to same-sex partners. The law currently provides that:

[A]n employee shall be entitled to a total of [twelve] administrative workweeks of unpaid leave during any [twelve] month period for one or more of the following reasons: (1) the birth of a son or daughter of the employee and the care of such son or daughter; (2) the placement of a son or daughter with the employee for adoption or foster care; (3) the care of a spouse, son, daughter, or parent of the employee, if such spouse, son, daughter, or parent has a serious health condition, or (4) a serious health condition of the employee that makes the employee unable to perform any one or more of the essential functions of his or her position.<sup>174</sup>

Subsections one, two, and three would be amended to include non-biological children of same-sex partners, and section three must be amended to include same-sex partners.

## 3. IRS Tax Laws

Currently, the Internal Revenue Service does not allow same-sex partnerships to be defined as family or involving dependents. As a result, same-sex partners cannot file income tax statements jointly. In some respects, this is not necessarily detrimental to same-sex couples, especially those without children, due to the so-called “marriage penalty,” in which “[t]wo income earning individuals pay less income tax if they are unmarried than they would pay if they are married.”<sup>175</sup> However, the IRS’s failure to recognize families becomes detrimental to both employees and employers with regard to health insurance benefits. The benefits provided by employers to an employee’s same-sex partner and her or his dependents is considered taxable income for the employee, thus increasing the taxes paid by both the employer and employee.<sup>176</sup> Modifying Internal Revenue Code Section 152(b)(5) to recognize domestic partners as “dependents” would solve this dilemma.<sup>177</sup>

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173. 29 U.S.C. §§ 2601-2654 (1994).

174. 5 CFR 630.1203 (Michie 1997).

175. William V. Vetter, *Restrictions on Equal Treatment of Unmarried Domestic Partners*, 5 B.U. PUB. INT. L.J. 1, 5.

176. *See id.*

177. *See id.*

## VI. CONCLUSION

Gaining passage of such legislation will not be easy;<sup>178</sup> however, such passage is necessary if we are to live in a society that recognizes difference, and does not discriminate against individuals on the basis of sexual orientation. This struggle is substantively advanced by urging an inclusive understanding of what it means to be a family. That designation provides those fortunate enough to be parties to the relationship an array of rights and responsibilities. Gay men and lesbians are eager to gain those rights and fulfill those responsibilities. Efforts to forestall those opportunities are motivated by vitriolic rigidity. Perverse images and carefully selected negative anecdotes about flawed homosexual relationships have persuasive value only for those already committed to treating homosexuals as a special class of unfortunates.

Given political realities, those wishing to extend rights to homosexual partners must make some accommodation to their numerous, aggressive opponents. The concerted political activity stimulated by the prospect that Hawaii would sanction same-sex marriages speaks loudly of the entranced anger and fear activated by an extension of family rights to homosexuals. The Model Domestic Partners Statute proposed in this paper permits the angry and fearful to preserve their definition of "family," while guaranteeing the rights that lesbians and gay men seek when they urge inclusion under the family umbrella.

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178. Amendments to federal statutes will be challenging as well. In particular, the Family and Medical Leave Act alterations will need particularly careful strategic planning, as it was expressly noted in the creation of the statute that domestic partners were to be excluded from the act.