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Emerging Models for Alternatives to Marriage

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I. Introduction

Formal and informal marriages have existed side-by-side since the founding of our country. While a formal, ceremonial marriage based on state statutory requirements is the conventional model, it is not the exclusive one. Another, recognized in some jurisdictions at various times during our history, is common law or informal marriage, a union of a man and a woman whose relationship meets the same statutory requirements as a formal marriage, save a license and ceremony. By definition, the status of common law marriage was not created by state legislatures but evolved. Perhaps that is why common law marriage is often misunderstood and carries with it a certain amount of negative connotations such as its being immoral, temporary, and a lower social class phenomenon.

Where individuals have not intended their relationships to be considered marital, and where courts have not superimposed that status on them either through substantive laws by finding a common law marriage, or procedural devices like presuming a marriage, these individuals have not been able to secure legal recognition of their relationships except in a business context. In other words, courts have not given legal recognition to friendships.

This essay is based in part on my contribution to the 1997 *International Survey of Family Law*. *See* Sanford N. Katz, *Domestic Partnership Laws, in* THE INTERNATIONAL SURVEY OF FAMILY LAW (Andrew Bainham ed. 1997). It has been substantially rewritten and updated.

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Perhaps one of the most important changes in family law in the past thirty years has been the inclusion of certain kinds of committed relationships from which rights and responsibilities can flow. It is difficult to explain why this has occurred. One reason might well be that courts are responding to social realities.

Domestic partnership laws, a phenomenon of the 1990s, may be seen as a natural development from the judicial recognition of contract cohabitation and the legislative and judicial response to same-sex couples who, unable to meet statutory requirements for marriage, have sought official recognition of their relationships. The most interesting aspect of certain kinds of domestic partnership laws is their formal requirements and the extent to which they represent a greater regulation of a relationship than is found in marriage laws.

II. Contract Cohabitation

When the California Supreme Court decided *Marvin v. Marvin*[1] in 1976, it openly sanctioned the legality of two adult persons living together in a nonmarital relationship by allowing one of the parties to sue the other for compensation upon the termination of the relationship. That is not to say that before that time in cases with similar fact patterns lawyers had not used legal theories such as implied partnership, joint venture, constructive or resulting trust, or express or implied (in law and in fact) contract to support their clients' claims for recovery.[2] The importance of the *Marvin* cases[3] is that the California courts were the first American courts not to mask their decisions by invoking a legal fiction or engaging in a distortion of the facts so as to fit some legal doctrine. They recognized what was already a reality not only in the United States but in Europe: adult men and women were living in a committed relationship (without having taken marriage vows in a ceremony) with legal consequences attached to that relationship.

In *Marvin,* the California Supreme Court held that in a state that did not recognize common law marriage, an adult woman who had lived with a man in a relationship that factually resembled a formal marriage

1. *See* 557 P.2d 106 (Cal. 1976).

2. *See, e.g.,* Omer v. Omer, 523 P.2d 957 (Wash. Ct. App. 1974); *In re* Estate of Thornton, 499 P.2d 864 (Wash. 1972); Poole v. Schrichte, 236 P.2d 1044 (Wash. 1951); Leong v. Leong, 27 F.2d 582 (9th Cir. 1928). For a discussion of the legal effects of nonmarital cohabitation, *see* WALTER O. WEYRAUCH, SANFORD N. KATZ & FRANCES OLSEN, CASES AND MATERIALS ON FAMILY LAW—LEGAL CONCEPTS AND CHANGING HUMAN RELATIONSHIPS 180–81, 213–74 (1994).

3. *See* Marvin v. Marvin, 557 P.2d 106 (Cal. 1976); Marvin v. Marvin, 176 Cal. Rptr. 555 (Cal. Ct. App. 1981); Marvin v. Marvin, 5 Fam. L. Rep. (BNA) 3077 (1979).

could sue her companion for compensation following the break-up of that relationship. The holding in *Marvin* was not immediately or universally adopted by courts or legislatures. In fact, in 1979 the Illinois Supreme Court specifically rejected the idea of allowing a remedy for breach of a contract of cohabitation.[4] The following year New York's highest court limited recovery to cases in which an express contract of cohabitation could be proven.[5] The legislatures of Minnesota and Texas required cohabitation contracts to be in writing.[6] Courts have made a point of stating that if an agreement is based in any way on sexual activity, the agreement will not be enforced.

Twenty-two years after the *Marvin* decision, the Supreme Judicial Court of Massachusetts held that an unmarried couple's written cohabitation agreement that defined the rights of the parties and property acquired during the relationship was valid.[7] During the course of the opinion, Justice Greany wrote:

> Social mores regarding cohabitation between unmarried parties have changed dramatically in recent years and living arrangements that were once criticized are now relatively common and accepted. With the prevalence of nonmarital relationships today, a considerable number of persons live together without benefit of the rules of law that govern property, financial, and other matters in a marital relationship. . . . Thus, we do well to recognize the benefits to be gained by encouraging unmarried cohabitants to enter into written agreements respecting these matters, as the consequences for each partner may be considerable on termination of the relationship or, in particular in the event of the death of one of the partners. . . . This may be especially important in a jurisdiction like Massachusetts where we do not recognize common law marriage, do not extend to unmarried couples the rights possessed by married couples who divorce, and reject equitable remedies that might have the effect of dividing property between unmarried parties.[8]

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4. *See* Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979).

5. *See* Morone v. Morone, 413 N.E.2d 1154 (N.Y. 1980).

6. MINN. STAT. §§ 513.075-.076 (1989); TEX. BUS. & COM. CODE ANN. § 26.01(b)(3) (West 1987).

7. *See* Wilcox v. Trautz, 693 N.E.2d 141 (Mass. 1998).

8. *Id.* at 144–45. It is interesting to note the change in social mores and opinion in the past twenty-five years. A 1983 study that received a great deal of public attention described all aspects of couple relationships—married, living together, same-sex, urban, rural, rich, middle class, poor, with and without children, of short and long duration, and between partners of all ages. In it the researchers wrote:

> The whole idea behind lifetime cohabitation is that people who love each other can create a bond that does not need the state's participation and can be durable and satisfying. But relationships are both public and private. It is difficult to create an institution without support from society and this society still recognizes only marriage as an institution.
>
> Furthermore, to be an institution, cohabitation would have to have a predictable shape, and at present cohabitation takes too many forms. The fact that two partners

That unmarried cohabiting couples is commonplace in the United States is borne out by statistics. The U.S. Census Bureau reported that by 1990 there were 2,856,000 unmarried heterosexual couples living together.[9]

Yet even though a cohabiting couple's relationship may be recognized for purposes of fashioning legal and equitable remedies for compensation upon termination of that relationship, that relationship is quite different from the legal status of marriage. For example, a cohabiting couple's relationship is not considered confidential and there-

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often have very different concepts of what cohabitation means is evidence that it is not yet institutionalized. It is not recognized as a stable *form* by law or society; it is seen as a *situation* which may change at any moment. Its lack of predictability and the absence of clear understandings about what the relationship means to the participants themselves make establishing the institution of cohabitation very difficult.

Before cohabitation can become an institution, its properties must be clear to any schoolchild. It must be seen as legitimate. Both partners must have the same level of commitment (or lack thereof) to the future. At the present time, we think that because there are so many possible permutations of cohabitation, partners may have trouble being sure they both want the same things out of the relationship. There is often no basis for trust, no mutual cooperation, and no ability to plan.

Currently, cohabitation as a way of life is unstable. Cohabitors may be dismayed by this because they feel their love is enough and that all it takes to create a way of life is two people who see eye to eye. But they do not take into account the importance of society's reactions and how poorly society is equipped to accommodate them. For example, parents may not want to acknowledge a cohabitor's partner as a family member. Even if they want to be welcoming, they may be unsure of what to expect of such a person; they may not know how to act toward him or her. One symptom of this confused state of affairs is that cohabitation has been widely discussed and openly practiced for the past fifteen years, and yet we still do not have a term the two people can use for one another. Couples who want to create an institution should be aware of what an awesome task they have taken on. It is very hard to anticipate the results when one tries to create a new tradition and it is very hard to maintain one's resolve in the face of an unsupportive society. After all, it has taken a long time for Western marriage to evolve the features that it has. Institutions are not made or redesigned overnight.

Moreover, we think it will be hard for cohabitation to become an institution while the traditional model of marriage still exists. As long as marriage retains its image as the highest form of commitment, it acts as a lure to cohabiting couples who want to prove their love for each other. So they are likely either to get married or to break up once their commitment falters. If cohabitation is to be a unique institution, it must be perceived as different from marriage, and marriage cannot be allowed to be seen as a better or next step in the relationship. But, the establishment of cohabitation as a lifetime alternative to marriage is an implied criticism of the latter, and hence is likely to be resisted by government and society in an attempt to defend the concept of matrimony. Society accepts cohabitation now only because it is thought of as a phase in person's life. It is not understood as challenging the legitimacy of marriage.

PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES 321–22 (1983).

9. *See* Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1165 (n. 5) (1992) (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, Series P-20, No. 450 MARITAL STATUS AND LIVING ARRANGEMENTS, MARCH 1990, at 14 (1990)).

fore the marital evidentiary privilege does not attach. Unlike a married couple, a cohabiting couple does not qualify for tax benefits. Nor can a cohabitant recover for loss of consortium, wrongful death, workman's compensation (except in limited circumstances), or receive social security benefits. A cohabitant is not defined as a spouse or heir in decedents' estates so that he or she cannot take a forced statutory or intestate share of an estate. As a general statement, it can be said that where status (e.g., spouse), not dependency, is a criterion for obtaining benefits a cohabitant does not qualify.[10]

There are, however, signs that the contributions each person has made to a premarital cohabitation partnership will be considered in the assignment of property upon the couple's divorce.[11] In addition, cohabiting couples may be recognized as qualifying as parents so as to form family units. It is seemingly paradoxical that if a cohabiting couple has a child together, that child is considered illegitimate (because the child's parents are not married to each other). Although the biological mother is the natural guardian of the child without any legal action on her part, the male cohabitant normally must have his paternity determined by a court in order to protect his custodial rights. However, if a cohabiting couple wishes to adopt a child, the fact that the couple is not nor could be married does not seem to be a limiting factor.[12]

III. Same-Sex Marriage

Baehr v. Lewin[13] and *Baehr v. Miike*[14] are the two Hawaiian same-sex marriage cases that have given rise to legislative activity both on the state and federal levels. In the former case, the Supreme Court of Hawaii held that to deny a same-sex couple the legal status of marriage infringed on their rights to equal protection of the laws in Hawaii, rights guaranteed under the Hawaiian State Constitution. Because according to Hawaiian constitutional law sex is a suspect category for purposes

10. *See* Sanford N. Katz, *Marriage as Partnership,* 73 NOTRE DAME L. REV. 1251, 1263–68 (1998).

11. *See* Moriarty v. Stone, 668 N.E.2d (Mass. App. Ct. 1996). In *Moriarty,* the couple had lived together for ten years before they married. The court took into account the parties' premarital contributions to the assets brought into the marriage, which had lasted eight years. Even though most of the assets were held in the husband's name, they were subject to distribution according to the Massachusetts equitable distribution statute.

12. *See In re* Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); Adoptions of B.L.V.B. & E.L.V.B., 628 A.2d 1271 (Vt. 1993). In both of these cases, the courts approved the adoption of children by lesbian couples.

13. *See* 852 P.2d 44 (Haw. 1993).

14. *See* 23 Fam. L. Rep. (BNA) 2001 (Dec. 10, 1996).

of equal protection analysis, any infringement on equal protection rights was subject to the strict scrutiny test. The Supreme Court of Hawaii placed the burden on the state to overcome the presumption that its marriage law is unconstitutional "by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgment of constitutional rights."[15] By the time *Baehr v. Lewin* was litigated again in the lower Hawaiian court, the defendant, Mr. John Lewin, was no longer the Director of the Hawaiian Department of Health, having been replaced by Mr. Lawrence Miike (thus the change in the case name). *Baehr v. Miike* held that the State of Hawaii did not meet its burden of proof. After the decision was handed down, the Hawaii Attorney General requested and received a stay of the trial court's decision pending its appeal to the Hawaii Supreme Court. Although the Hawaii Supreme Court affirmed the lower courts ruling,[16] the issue of same-sex marriage was put before the voters in Hawaii. On November 4, 1998, the voters voiced their overwhelmingly large opposition to legalizing gay and lesbian marriages by approving a constitutional amendment banning same-sex marriages. On the same day, voters in Alaska did the same thing.

No state court has legally sanctioned same-sex marriages although a case is presently before the Vermont Supreme Court.[17] Two state legislatures and the U.S. Congress, however, have responded to the issue.[18]

If same-sex marriages are not legally recognized in the same way that heterosexual relationships are,[19] what alternative is there for same-sex couples who live together in a committed relationship and wish to

15. *See* 852 P.2d 44, 68 (Haw. 1993).

16. *See* Kutsch v. County of Maui, 950 P.2d 1234 (Hawaii 1998).

17. The case, *Baker v. State of Vermont*, was argued on November 19, 1998. As of November 19, 1999, no decision has been rendered.

18. In 1996 the U.S. Congress enacted the Defense of Marriage Act which defines marriage under federal law as "a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." In addition, the Act states that no American jurisdiction must recognize a same-sex marriage entered into in another American jurisdiction. *See* 28 U.S.C.A. § 1738 C (West Supp. 1997). Legislation that provides same-sex couples with certain rights was passed in the State of Hawaii in 1997 and in California in 1999. *See infra* notes 38–39, and accompanying text.

19. The popular and legal literature on the social acceptance and, legality of, same-sex marriage is vast. Andrew Sullivan's writings are particularly thoughtful. *See generally* ANDREW SULLIVAN, AN ARGUMENT ABOUT HOMOSEXUALITY (1995). For a full discussion of and argument for same-sex marriages, *see* WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME SEX MARRIAGE 1996; *see also* David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples,* 95 MICH. L. REV. 447 (1996). For a discussion of the case against same-sex marriage, *see* Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage,* 1996 B.Y.U.L. REV. 1.

have that relationship formally recognized by the state? The answer may be the use of domestic partnership laws.

IV. Domestic Partnership Acts

Domestic Partnership Acts or Ordinances have as their antecedent the judicial and statutory recognition of nonmarried cohabitants on one hand, and the nonrecognition of same-sex marriages on the other hand. In addition, they represent an anomaly in American law in that they are perhaps the first successful attempt by municipalities or cities to regulate marriage-like relationships, a power normally reserved to the states.[20] Under the Tenth Amendment to the U.S. Constitution certain legislative powers, including the power to regulate domestic relations, have been reserved by the individual states. Technically speaking, because local governments are the creation of the states and derive all of their authority from the states, the areas in which a city can act free from state intervention are very limited. Thus, municipalities attempting to enact domestic partnership ordinances have technically exercised a legislative power they do not possess. Throughout the latter half of this century, however, many states have recognized the need for local governments to have more autonomy. Many of these states have, therefore, amended their constitutions with home rule provisions that allow local governments, "to enact ordinances governing a wide range of local and municipal affairs, free from interference."[21] While the amount of autonomous power given to local governments varies widely, generally a city is given either specifically enumerated powers or broad police powers.[22] Challenges to local domestic partnership ordinances have focused on whether the local government has the authority to act based on the powers that have been granted by their specific home rule ordinance. In fact, most of the domestic partnership ordinances that have been ruled unconstitutional by state supreme courts have been ordinances that exceeded the powers granted to the city under their home rule charter or that ran contrary to a general state policy.[23]

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20. *See infra* note 22.

21. *See* Vada Berger, *Domestic Partnership Initiatives,* 40 DEPAUL L. REV. 417, 437 (1991) (quoting Note, *Conflicts Between State Statutes and Municipal Ordinances,* 72 HARV. L. REV. 737, 739 (1959)).

22. For an extensive analysis of the tensions between state authority and autonomous local authority, *see* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law,* 90 COLUM. L. REV. 1 (1990); Note, *Conflict Between State Statutes and Municipal Ordinances,* 72 HARV. L. REV. 737, 739 (1959); Gerald E. Frug, *The City as a Legal Concept,* 93 HARV. L. REV. 1059 (1980).

23. For a discussion of these challenges, *see* Berger, *supra* note 21 at 437 Note, *Proposal for Domestic Partnership in the City of Detroit: Challenges Under the Law,*

The domestic partnership ordinances that have been enacted and challenged fall into two categories: those that provide a legal method for registering a partnership and those that extend employee-related benefits to partners of city employees. Illustrative of the first category is the San Francisco Recognition of Domestic Partners Law.[24] That ordinance provides that two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring, who live together and who have agreed to be jointly responsible for basic living expenses may register as domestic partners. The law states that these relationships should be recognized in order to acknowledge the intimate and committed relationships of homosexual couples, who are otherwise denied the right to marry.

Couples meeting the criteria for domestic partnership, namely the residence and joint financial responsibility requirements, may register their relationship with the San Francisco County Clerk. Registration provides domestic partners the same visitation rights as a spouse in city hospitals and correctional facilities. It also provides a modicum of public recognition for their relationship. In order to end a domestic partnership, one partner must send an official written notice of termination to the other partner (either notarized or filed with the clerk). Once an individual has ended a domestic partnership, he is precluded from registering a new relationship for six months. Except for the statement regarding the recognition of "intimate committed relationships, including those of lesbians and gay men," the similarities of a domestic partnership to the marriage relationship are striking. Domestic partnerships are required to be adults who are not related to each other "in a way which would bar marriage." In addition, they must share in each other's lives and live together in an intimate and committed relationship of mutual caring. Further they must agree to be jointly responsible for

74 DET. MERCY L. REV. 825, 835–44 (1997) (citing City of Atlanta v, McKinney, 454 S.E.2d 517 (Ga. 1995), and Lilly v. City of Minneapolis, 527 N.W.2d 107 (Minn. Ct. App. 1995)).

24. *See* SAN FRANCISCO, CAL., ADMIN. CODE §§ 62.1–62.8 (1991). Other cities that have registration acts include: Berkeley, Laguna Beach, Long Beach, Los Angeles, Oakland, Palo Alto, Sacramento, Santa Barbara, West Hollywood, California; Boulder, Colorado; Hartford, Connecticut; Atlanta, Georgia; Oak Park, California; Iowa City, Iowa; New Orleans, Louisiana; Boston, Brookline, Cambridge, Provincetown, Massachusetts; Ann Arbor, East Lansing, Michigan; St. Louis, Missouri; Albany, Ithaca, New York City, Rochester, New York; Carrboro, Chapel Hill, North Carolina; Philadelphia, Pennsylvania; Austin, Texas, Seattle, Washington; Madison, Wisconsin. This information was obtained from the Lambda Legal Defense and Education Fund (120 Wall Street, Suite 1500, New York, NY 10005–3904). That organization's Domestic Partnership Listings (August 31, 1998) states that 103 state and municipalities offer benefits to its employees as do 123 colleges and universities, 476 private employers, and 37 labor unions.

basic living expenses incurred during the partnership. These requirements are broader than those required for marriage. In fact, they represent what some might consider ideals which may have become lost in contemporary marriage.

Thus, it is interesting to note that while the institution of marriage is being treated more and more like a contract in which the parties have a certain amount of freedom to set their own terms, registered domestic partnerships give parties less freedom to define their relationships.[25] Whether domestic partners will be able to legally contract out of certain duties enumerated in domestic partnership laws, an option available to married people through antenuptial agreements, is an open question.

The second type of Domestic Partnership Act is illustrated by that found in the City of Cambridge, Massachusetts.[26] In addition to recognizing the domestic partnership, the Cambridge model provides partners who work for the city or school department with "the same health and other employment fringe benefits to employees with spouses." These benefits include medical insurance coverage, sick and bereavement leave, as well as parental leave to take care of a child of the domestic partner. To be eligible for these benefits, the Cambridge ordinance states that domestic partners must be individuals who are competent to contract (i.e., eighteen years old), who reside together, and consider themselves to be a family. The ordinance limits those couples eligible for domestic partnership benefits to those who are not married nor related by blood any closer than would bar marriage in the Commonwealth of Massachusetts. The law also stipulates that the couple must also be in a relationship of "mutual support, caring and commitment, and intend to remain in such a relationship."

If a couple meets these criteria they may register with the city clerk. Once the filings with the clerk are complete, the couple is issued a certificate of domestic partnership. This certificate states the names of the domestic partners as well as any dependents of the partnership[27] and is used as evidence of the relationship in order to obtain the aforementioned employee benefits.

Domestic Partnership Acts have met with two kinds of opposition. One is that by legally recognizing a committed relationship of two adults, whether of the same-sex or of different sexes, the community

25. For a discussion of the contractual aspects of marriage and antenuptial agreements, *see* Katz, *supra* note 10, at 1257.

26. *See* CITY OF CAMBRIDGE MUN. CODE §2.119.

27. The Cambridge ordinance is unique in that it accords domestic partners the right to have access to their partner's child's school records once the school is notified of the registered domestic partnership.

is sanctioning immoral conduct. The second is economic. In voicing his opposition to efforts to enact domestic partnership legislation in New York City, John Cardinal O'Connor, the Roman Catholic archbishop of New York, is quoted as saying," [M]arriage matters supremely to every person and every institution in our society. It is imperative, in my judgment, that no law be passed contrary to natural moral law and Western tradition by virtually legislating that marriage does not matter."[28] But "legislating that marriage does not matter" is not what is occurring when domestic partnership laws are enacted. As stated earlier, in a certain sense these laws have more rigid requirements of commitment and mutual dependency than marriage laws. In addition, where a domestic partnership law limits a person for a period of six months from registering a new relationship, it is more restrictive than divorce laws. Indeed, if a state divorce law prohibited either party from remarriage within a certain period after the final divorce decree was issued, such a law would probably be unenforceable if challenged today.[29]

In vetoing a Boston ordinance that would have extended health benefits to city employees, Acting Governor, now Governor, A. Paul Cellucci said that although he supported an ordinance that extended health benefits to gay employees, he did not support an ordinance that would extend such benefits to unmarried heterosexual partners.[30] He is quoted as saying, "I just spent a year meeting with my commission on father absence, and the conclusion we reached is that we have strong, stable marriages, and strong, stable families, and I'm not going to do anything that is going to encourage more of this not getting married and having children. The consequence of father absence in our society is staggering."[31] The acting governor also is quoted as saying, "Extending health

28. Mike Allen, *Cardinal Sees Marriage Harm in Partners Bill,* N.Y. TIMES, May 25, 1998, at A1.

29. *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 549 (2d ed. 1988). *See also* Zablocki v. Redhail, 434 U.S. 374 (1978).

30. The Boston City Council passed a Domestic Partnership Ordinance in 1993. Mayor Thomas Menino sent the provision to the Massachusetts Legislature as a home rule petition. After a series of debates, the Massachusetts House of Representatives Speaker amended the ordinance in order to extend benefits to blood relatives of municipal employees beyond homosexual and heterosexual nonmarried couples. This amended version of the ordinance was then vetoed by Acting Governor A. Paul Cellucci.

31. Adrian Walker & Tina Cassidy, *Cellucci Rejects City's Partners Bill,* BOSTON GLOBE, July 31, 1998 at A1. On September 11, 1994, Governor Pete Wilson of California vetoed California's version of a domestic partnership law. In so doing, Governor Wilson is quoted as saying, "Government policy ought not to discount marriage by offering a substitute relationship that demands much less, and provides much less than

care benefits to unmarried couples undermines strong marriages and leads to our children growing up without fathers. If you grow up without a father in the home, you're five times as likely to live a life of poverty . . . two or three times, if you're a boy, to end up in jail."[32] Because of the then acting governor's veto, Boston's mayor issued an executive order to extend health coverage to the registered domestic partners of all city employees regardless of sexual orientation.[33]

The economic arguments against domestic partnership acts that extend city employee work benefits focus on the potential they have on raising city budgets to take into account the high cost of insurance premiums. An additional economic argument is that allowing employees paid leave to care for a sick partner will have a negative impact on their productivity.[34]

The future of domestic partnership legislation is uncertain. Until there is a resolution of the legality of same-sex marriages[35] and their recognition by sister states, and as long as the United States does not have a national health care program, there will be demands on units of government to find legal ways of recognizing ongoing heterosexual and homosexual marriage-like relationships and extending health care benefits to the couples.[36]

If state governments wish to regulate the partnership on the state level, instead of empowering cities to do so, they can enact state domestic partnership laws defining partners' rights and duties. That is the action Hawaii took when it enacted its Reciprocal Beneficiaries Act.[37]

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is needed both by the children of such relationships, and ultimately much less than is needed by society." *See Domestic Partner Bill Vetoed in California,* N.Y. TIMES, September 13, 1994, at A14. In the same article, Assemblyman Richard Katz, the sponsor of the bill, is quoted as saying, "This bill has nothing to do with the institution of marriage. As a matter of fact, if anything, it strengthens family values. There are people throughout California, senior citizens in particular, who don't have the ability to get married because they might lose social security or pension benefits." The article went on to state that, "of the 10.4 million households in California, nearly 500,000 consist of unmarried couples, according to the 1990 census. More than 90 percent of them are opposite-sex couples."

32. Hilary Sargent, *Mayor Sets Order on Partner Benefits,* BOSTON GLOBE, August 5, 1998, at B7.

33. *Id.*

34. For a discussion of these economic arguments, *see* Note, *Domestic Partnerships Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others),* 51 OHIO STATE L. J. 1067 (1990).

35. As of 1999, 29 states have enacted legislation banning same-sex marriage.

36. In response to the uncertainty of local home rule provisions at least three states (Massachusetts, New York, and Vermont) have extended employee benefits to domestic partners of state employees by either gubernatorial executive order or through contract employee negotiations with employee unions. *See* Domestic Partnership Listings (August 31, 1998), *supra* note 26.

37. *See* HAW. REV. STAT. ANN. § 572C (Supp. 1998).

In that law, the Hawaii Legislature expressly stated that the state preserved the tradition of marriage, but made available certain rights and benefits to couples who were legally prohibited from marrying one another. Various provisions under the Hawaii statutes were amended so as to provide reciprocal beneficiaries a number of rights including the following: state income tax advantages; the right to hold property jointly as tenancy by the entirety; the right to elect a statutory share of a deceased spouse's estate; the benefit of confidential marital communications; post-divorce rights such as maintenance, child support, and equitable division of property; and the right to sue for wrongful death.[38]

In 1999 California enacted its Domestic Partnership Law which provided a vehicle for homosexual partners and unmarried couples over the age of sixty-two to register their relationship with the state. The law provided these partners with certain benefits such as hospital visitation privileges and health coverage.[39]

By enacting a domestic partnership law that would define and recognize marriage-like relationships and provide partners with economic benefits very similar to those for married couples, state legislatures would be responding to an important goal sought by same-sex couples as well as eliminating the major argument of discrimination they present in their drive for marital status.[40] In so doing, a state legislature would be reflecting a major shift in family law policy at a time when a state may not wish to expand its definition of marriage with all of its religious and social significance. Such legislative action may in fact be a political compromise. It would retain the traditional model and definition of marriage as a union of a man and a woman. But it would recognize and institutionalize an alternative model—domestic partnership or some other characterization—for those people who can not marry because of legal prohibitions or choose not to marry for individual reasons but wish to be connected to one another and live

38. *See id.*

39. *See California Moves to Extend Gay Rights with New Laws,* N.Y. TIMES, October 4, 1999, at A20.

40. If a state were to follow Hawaii's lead and enact a domestic partnership law endowing partners with the same rights and duties as a spouse, all state statutes that include the word "spouse" would have to be reviewed and ultimately altered. In its intestate succession law, for example, the Hawaii Legislature added "reciprocal beneficiary" to those sections that deal with the rights of a surviving spouse. *See* HAW. REV. STAT. ANN. § 560 (1998).

in a committed relationship based on mutual dependency, trust, and love.[41]

In the past thirty years, major changes in American family law have begun in the west and slowly moved eastward. If that history is to continue, the future for the enactment of domestic partnership laws on a state level looks encouraging.

41. Contrary to Blumstein and Schwartz, history shows that alternative models can exist side-by-side. Domestic Partnership laws provide the institutional elements that they propose for social acceptance. *See* BLUMSTEIN & SCHWARTZ, *supra* note 8, at 321–22.