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Domestic Partnership: Recognition and Responsibility

RAYMOND C. O'BRIEN*

A domestic partnership is a business or political recognition of two adults seeking to share benefits normally conferred upon married couples. To date, partnerships have conferred benefits only; the most logical progression is for partnerships to include responsibilities of support, commitment and obligation within the economic partnership construct of emerging family law. When this occurs, heterosexual couples may lack incentive, but homosexual couples will achieve surer due process recognition regardless of same-sex marriage litigation.

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I. An Introduction to the Issues

First and foremost, domestic partnership is an index of belonging. It is a response to what Erich Fromm identifies as the deepest human need, "the need to overcome... separateness, to leave the prison of... aloneness." Examined within this context, isolated from the hyperbole of family values, morality, and economic costs, domestic partnership is little more than a modicum of public recognition given to a private contract between two consenting adults. It is a civil partnership supported by private or public policy, or both.

Yet, standing at that index of belonging, domestic partnership ripples through "[s]hared beliefs, social and cultural metanarratives shaped in accordance with dominant ideology." It is because of what it conjures, not because of what it does, that feverish opposition is raised: "The perceived increase in nontraditional intimate entities has generated both celebration and concern." But this concern is not without benefit to all sides affected by domestic partnerships. Those parties who sense in domestic partnership an attack upon traditional notions of family,

2. See, e.g., Jonathan P. Hicks, A Legal Threshold Is Crossed by Gay Couples in New York, N.Y. Times, Mar. 2, 1993, at A1. Some came as if headed to a formal event, dressed in tuxedos or party dresses. Many had to go to work and wore business suits or casual slacks. All of them—the first 109 couples to register as "domestic partners" in the City of New York—left with something long withheld, an official acknowledgement of their untraditional lives.

Id.
religion, and community values⁵ should recognize an opportunity for strengthening through dialogue over the core notion of family. Those who celebrate the availability of domestic partnership should recognize, in the struggle for acceptance, the core values which contribute to the functioning, belonging intimate entity. It is the premise of this Article that the advent of domestic partnership is not a win/lose situation for either side of the debate, but rather a win/win situation in which both sides benefit through dialogue.⁶

A. Defining Domestic Partnership

What then is domestic partnership? In its simplicity, domestic partnership is one step more than cohabitation, but one step less than marriage. Its essential ingredient is a business or government recognition of benefits conferred on a non-marital adult couple of the same or opposite sex because of conformity with a procedure established by the business or government.⁷ Increasingly, both businesses and govern-

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⁶. Professor Carl Schneider writes that law has become a means by which people avoid moral discourse; this does not contribute to the common good. Instead, he advocates moral discourse as a necessary and effective means to address waning religiosity. See Carl E. Schneider, Moral Discourse and the Transformation of American Family Law, 83 MICH. L. REV. 1803 (1985); see also Elizabeth S. Scott, Rational Decisionmaking About Marriage and Divorce, 76 VA. L. REV. 9 (1990).

⁷. The judiciary could interpret a state statute so as to confer benefits upon a non-marital couple as well. See, e.g., Braschi v. Stahl Assocs. Co., 543 N.E.2d 49 (N.Y. Ct. App. 1989) (interpreting New York City Rent and Eviction Regulations to allow for the survivor of two men who had shared an apartment for more than 10 years, to benefit from rent control as the surviving member of a “family”). For a recent extension of this familial development, see Dunphy v. Gregory, 642 A.2d 372 (N.J. 1994), which held that unmarried cohabitants who exhibit intimate familial relationship that is stable, enduring, substantial, and mutually supportive, and who witness wrongful death or serious physical injury to the other cohabitant, may recover for negligent infliction of emotional distress.
ments have provided the mechanism through which, by contract, a period of time together, or registration, specified benefits may be conferred upon a partner even though sexual contact is an element—although not a material one—of the arrangement. At present, benefits could include health care, hospital visitation, housing, or other specific benefits able to be conferred by the business or government.

These newly established domestic partnerships are, particularly for the homosexual couple, a means by which one partner may be able to remain at home and still receive benefits because of the employment of the other partner. They have become a means by which equality of benefits extends to couples regardless of sexual orientation. An examination of the definition and scope of domestic partnership will be the focus of Part II of this Article.

Because domestic partnerships involve persons living together in relationships that most often involve sexual activity, they should be examined within the context of judicial, legal, and public acceptance of arrangements involving sexual activity. Contrary to public opinion, the seminal privacy decision of *Griswold v. Connecticut* in 1965 did not eliminate the judicial restriction upon what was then called meretricious relationships. The right to privacy in *Griswold* was confined to married cohabitants and thus only persons of the opposite sex acting as a unit were sanctioned by the state. By 1972 however, "*Griswold*’s right of

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8. For a recent survey of business and government requirements to establish a domestic partnership, see M.V. Lee Badgett, *Equal Pay for Equal Families*, ACADEME, May-June 1994, at 26, 29. They include: (1) minimum time requirements either before a partner is eligible or before a partnership is dissolved; (2) evidence of financial interdependence; (3) sharing a joint residence; (4) boundaries for the relationship, including exclusivity, no close blood relationship, and no current legal partner; (5) naming the partner as a beneficiary of life insurance or pension plan. Id.

9. See, e.g., *Not Enough for Domestic Partners*, N.Y. TIMES, Feb. 6, 1993, at A20 (editorial). Former New York City Mayor David Dinkins’ executive order providing for domestic partnership in New York City allowed for homosexual and heterosexual adults to register as partners and qualify for city apartments in the same manner as married couples, have the same visiting rights at city jails and hospitals, and those who work for the city may take unpaid leave to care for newborn children.

10. A staff oncologist at Montefiore Medical Center sued the hospital because she was receiving only half of the benefits of her heterosexual peer. That is, because the heterosexual employee was married, her or his spouse would be entitled to benefits from his or her employer. Nonetheless, because the homosexual employee was unable to marry because of laws prohibiting him or her, the same benefits were unavailable to his or her partner even though both heterosexual and homosexual persons worked the same number of hours. See James Barron, *Bronx Hospital Gives Gay Couples Spouse Benefits*, N.Y. TIMES, Mar. 27, 1991, at A1; see also Badgett, supra note 8, at 26.

privacy, ostensibly based upon the nobility of marriage as a social institution, was converted by *Eisenstadt v. Baird*12 into the right of the individual, married or unmarried, to be free of unwarranted governmental intrusion into his [or her] sexual conduct.13 This privacy right of the adult individual to be free from governmental regulation in sexual matters shortly resulted in the California case of *Marvin v. Marvin*.14

When the woman plaintiff in *Marvin* brought suit against her cohabitant, she alleged that she had given up her career as an entertainer to devote full time to being a "companion, homemaker, housekeeper and cook" for the defendant, and for this he promised to provide her with support for the remainder of her life.15 There was no written record of the contract, and the male defendant denied all the material elements and alleged that any such arrangement was contrary to public policy since sexual activity was implied in the arrangement. His argument being that the state should not enforce a contract when immoral—and perhaps illegal—sexual activity was a part of the arrangement.16

The California Supreme Court recognized that many more persons were living together in non-marital cohabitation and thus any claim based upon such an arrangement should not be barred by public policy as long as the contract did not explicitly provide for sexual services.17 It is significant that the California court took notice of the changing definition of relationships in its jurisdiction to arrive at its decision.18 Thus, after *Marvin*, non-married persons were able to contract between

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14. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). The plaintiff eventually lost her appeal, but not without establishing the rights of non-marital parties to contract together even though sexual relations were a part of the bargain. See Marvin v. Marvin, 122 Cal. App. 3d 871, 176 Cal. Rptr. 555 (1981).
15. *Marvin*, 18 Cal. 3d at 666, 557 P.2d at 110, 134 Cal. Rptr. at 819.
16. *Id.* at 668, 557 P.2d at 112, 134 Cal. Rptr. at 821.
17. *Id.* at 665, 557 P.2d at 110, 134 Cal. Rptr. at 819.
18. In 1993, the Supreme Court of Hawaii allowed an equal protection challenge to its opposite sex requirement for statutory marriage, in part, because of its recognition that conditions had changed in society. Baehr v. Lewin, 852 P.2d 44, 48 (Haw. 1993) (explaining that "customs change with an evolving social order"). *But see* Herbert W. Titus, *Defining Marriage and the Family*, 3 WM. & MARY BILL OF RTS. J. 327 (1994) (arguing that the focus should not be on social change, but upon a moral order imposed by God or nature).
themselves in a like manner to antenuptial agreements between married persons, even though these non-marital contracts did not have to be in writing, and they were effective immediately, not upon marriage. The contractual element in the Marvin situations, and antenuptial agreements for prospectively married persons, is important because it signals a shift in focus from the status of the arrangement to the partnership of the parties.

Because of Griswold, Eisenstadt, and Marvin, the next stage was possible: domestic partnerships. Domestic partnerships provided benefits that previously had been reserved to marriage. The partnership was expanded beyond consideration of what the parties could do for each other, to what the business or state would do for each of the parties expressly because of the partnership. Furthermore, it allowed for these marriage-like benefits to be conferred on opposite-sex partners, as well as same-sex partners; this ratified the private nature of the partnership and the choice of the participants. This uniquely private element would not be permitted within marriage, a status arrangement where the state is the historical third-party participant. This is a significant development and must be viewed within the progression through Griswold, Eisenstadt, and Marvin; it affirms the expanding nature of partnership in relationships.

19. The Uniform Premarital Agreement Act is law in several states and provides that all premarital agreements must be in writing. See, e.g., CAL. FAM. CODE § 1611 (West 1994).

20. It is important to note that neither legislators nor courts initiated the changes that brought the focus from status to partnership. The following assessment is illustrative: "Law cannot lead where other constitutive discourses and philosophies will not follow. Other disciplines such as economics, psychology, sociology, public policy, anthropology, biology, and history, all have their own narratives about the family with certain values and assumptions embedded in them." Fineman, supra note 3, at 398. Or to put it more simply: "Since the courts read the newspapers and have always been sensitive to political movements, their decisions reflect the same conflicts and ambivalence concerning marriage which are prevalent in our society. This is particularly true of the United States Supreme Court." CLARK, JR., supra note 13, § 2.1, at 27.

21. Some would argue that because of these cases and others, the courts allowed for the deterioration of marriage. See, e.g., Mary Ann Glendon, Marriage and the State: The Withering Away of Marriage, 62 VA. L. REV. 663 (1976); John T. Noonan, Jr., The Family and The Supreme Court, 23 CATH. U. L. REV. 255 (1973).

22. See, e.g., Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). The Hawaii Supreme Court remanded the case to determine state's prohibition of same-sex marriage. The court stated: "Marriage is a state-conferrd legal partnership status, the existence of which gives rise to a multiplicity of rights and benefits reserved exclusively to that particular relation." Id. at 58. For a recitation of those benefits, see id. at 59.
B. Marriage and Domestic Partnership

The true significance of domestic partnership lies in its similarity to marriage. Because it is similar, it offers an alternative. What would occur if adults in the United States decided to abandon the state-involved status of marriage for a partnership containing all of the ingredients of marriage, including obligations, benefits, and termination?23

To answer, it is necessary to examine the status concept of marriage in its historical sense. Based on the acknowledged expertise of Professor Homer H. Clark, Jr., the essential ingredients of marriage are:

1. A ceremony, with a
2. minister or delegate of the state,
3. consummation by the parties who are
4. capable of consenting without fraud or duress,
5. to a permanent, monogamous relationship between a
6. man and a woman who inhabit a joint domicile, and the
7. incidents of the relationship are the province of the law and not within the control of the parties.24

While informal marriage, common law unions, are still allowed, the method by which the status of marriage has been conferred has remained similar in the Western world for hundreds of years. The purpose of the method was to ensure an economic producing unit of society with responsibilities for child rearing; today that purpose includes opportunities for mutual affection, companionship, and sexual satisfaction.25 Even though domestic partnership and other alternatives to traditional marriage have gained attention and have flourished,26 all alternatives

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23. Inequality between contracting parties would both jeopardize the partnership and invite state participation in a renewed status arrangement. Throughout the Middle Ages, the emerging Christian Church regularized marriage into the status arrangement that exists today in an attempt to protect a party to the marriage, spouse or child, who was unable to participate equally in the partnership. See generally David Herlihy, Medieval Households (1985).


25. Id. at 25. For a discussion of the initial changes and challenges to the definition of marriage, see Lenore J. Weitzman, Legal Regulation of Marriage: Tradition and Change, 62 CAL. L. REV. 1169 (1974); Mary Ann Glendon, Power and Authority in the Family: New Legal Patterns as Reflections of Changing Ideologies, 23 AM. J. COMP. L. 1 (1975).

26. A number of other case developments "may be regarded as diminishing the significance of marriage as a social institution." Clark, Jr., supra note 13, § 2.1, at 29.
acknowledge marriage as the “core affiliation.” 27 “Legal recognition of these alternatives is justified by reference to their similarity to heterosexual marriage in regard to the emotional and economic functions assumed in the creation of a sexual tie.” 28 Thus, marriage as a status has not been rejected, nor is it in danger of being abolished, but in that it is challenged by an alternative, its authority as well as its centrality is being debated. This debate is good.

For some adults, however, the marriage status cannot be abandoned because it was never an option. Thus, persons related by consanguinity or affinity would be prohibited from marriage because of prohibitions against incest. Gay and lesbian persons would not find marriage an available option because the status of marriage does not presently provide for their sexual orientation. 29 Perhaps because of the efforts of this latter group—homosexuals—the alternative to marriage as found in domestic partnership has developed more rapidly than expected. But even if this is true, some gay and lesbian persons would even reject the status of marriage as “an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism.” 30

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See, e.g., United States Dep’t of Agric. v. Moreno, 413 U.S. 528 (1973); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (both cases holding that marriage has no effect on entitlement to state benefits).

27. Fineman, supra note 3, at 394; see also David K. Flaks, Gay and Lesbian Families: Judicial Assumptions, Scientific Realities, 3 WM. & MARY BILL OF RTS. J. 345 (1994).


30. Nancy D. Polikoff, We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage”, 79 VA. L. REV. 1535, 1536 (1993). For analysis of the opinion that same-
But obtaining the right to marry can be viewed as a liberating victory. Gay and lesbian organizations such as Lambda Legal Defense and Education Fund advocate and support test case litigation and education about “virtually every area of concern to lesbians and gay men, including discrimination in employment, housing, and the military; AIDS and HIV-related policy and healthcare; parenting and relationship issues; domestic partner benefits; immigration; and constitutional rights.” Denied the option of marriage, the homosexual community has made domestic partnership a civil rights issue, accelerating its adoption by both business and government entities. Indeed, if responsibility, in addition to the current benefits, becomes an ingredient of domestic partnership, the due process recognition of gay and lesbian relationships will be significantly advanced. This Article will explore the due process and equal protection impacts domestic partnership will have upon the gay and lesbian community, homosexual marriage, and the future development of domestic partnerships.

C. Morality, Religion, and Domestic Partnership

At a minimum, domestic partnership has brought attention to the changes in family law. “Family law has moved from a patriarchal structure to a model of formal gender equality with an emphasis on rights of individuals within the family.” This new definition differs in significant degree from the constitutional decisions affecting equality, privacy, and the nature of individual rights. Objections to this definition assert that it represents nothing more than “a celebration of ‘self’ as the

sex marriage is harmful to the gay and lesbian community, see Eskridge, Jr., supra note 28, at 1486-93.

31. Lambda Legal Defense and Education Fund Statement of Purpose, 10 LAMBDA UPDATE 1, 2 (1993).

ultimate concern, the final arbiter, the trump to all moral claim."\textsuperscript{33} Pointing to such studies as \textit{Beyond Rhetoric},\textsuperscript{34} a detailed study of the plight of children in America who have been abused, neglected, and abandoned by parents, critics of the new definition of family place the blame upon parents' celebration of self.

Another criticism of the new definition of family is that there is an absence of moral discourse.\textsuperscript{35} What is missing in the new definition of family is a moral discourse about such issues as non-marital cohabitation, adultery, homosexuality, sexual relations, and reproduction.\textsuperscript{36} Instead, the law has provided for a "psychologic man"\textsuperscript{37} whose search for self-fulfillment comes before everything else, and who instead of seeking what is good, seeks only what works.\textsuperscript{38}

It is difficult to accurately identify what is moral; the task is easier if there is an explicit reference to an objective religion. Of course another criticism of the new family is that it does not accommodate religious values.\textsuperscript{39} Perhaps the most famous exponent of the view that religion in America should be taken more seriously is Stephen L. Carter. He writes in \textit{The Culture of Disbelief} that: "The legal culture that guards the public square still seems most comfortable thinking of religion as a hobby, something done in privacy, something that mature, public-spirited

\textsuperscript{34} NATIONAL COMM’N ON CHILDREN, \textit{BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES} (1991).
\textsuperscript{35} See, e.g., Schneider, supra note 6. Professor Schneider has been characterized by one author as "defender of the [o]rder." Lacey, supra note 32, at 29. "Schneider's overall theme that moral dialogue has disappeared from family law implicitly suggests that those who advocate changes in the area are immoral or at best amoral." Id.
\textsuperscript{37} Schneider, supra note 6, at 1845.
adults do not use as the basis for politics." In his call for religious respect, he implies religious accommodation and gives as successful examples of accommodation the civil rights struggle, capital punishment, abortion and euthanasia, and teaching values. Note that he is not advocating an end to discourse, nor to any more certitude than those advocating elimination of religious considerations. Yet what he does advocate is that:

[R]eligious, for all their arrogance and sinfulness, can often provide approaches to the consideration of ultimate questions that a world yet steeped in materialistic ideologies desperately requires. . . . It is vital that the religions struggle to maintain the tension between the meanings and understanding propounded by the state and the very different set of meanings and understandings that the contemplation of the ultimate frequently suggests.

There is a tension between morality and religion versus domestic partnership. This tension is due in part to the belief on both sides that domestic partnership is an element that will tip the balance of power from one side to the other. One side views it as at least the secular sanctification of meretricious sexual activity and, at most, surely the next step before the legalization of homosexual marriages. The other side views it as economic and political recognition of either choice, or the due process recognition of sexual orientation that will precipitate additional gains in individual liberty. Again, it is the premise of this Article that domestic partnership is, most simply, an issue about belonging; it is not a win/lose battle. Rather, through dialogue, it is a win/win issue. Advocates of natural law or religious conviction have something to contribute; advocates of change have the same.

Professor Carter, in his argument for accommodating religion, provides a helpful comment to those advocating moral and religious positions. He writes:

41. Id. at 227-29.
42. Id. at 258-62.
43. Id. at 232-58.
44. Id. at 200-06.
45. Id. at 273.
If, as most Americans believe, there is a God external to the human mind, and if that God has tried to communicate with us, whether through revelation or some other path, then the human task is surely to discover the contents of that communication, not to surrender that possibility in return for the freedom to call one's own politics God's will.  

Even if some believe that God's will is quite clear on any point, surely the value of revelation from God's will could benefit from explanation and dialogue. We can all take solace in the acknowledgement by the Supreme Court of Hawaii that: "[W]e do not believe that trial judges are the ultimate authorities on the subject of Divine Will." 

For those that advocate that there are many forms of morality that do not derive from religion, dialogue provides ascertainment of those many forms. Surely, among those many forms of morality must be a sensitivity for those persons and institutions still unable to comprehend the "major changes in family law, and law and religion, brought about by the dominance of liberal thought." This sensitivity is of even greater value if it can be extended to those who never extended it before. If the persistent objection of those seeking the freedom to explore alternatives not encompassed within a traditional Judeo-Christian model is the fundamental right to choose, then this right to choose should extend to those maintaining religious values as well. Both sides must concentrate on a win/win milieu.

47. CARTER, supra note 40, at 73.
50. See generally Lacey, supra note 32, at 29 (describing the many perspectives within family law jurisprudence, those derived from religion and those derived from secularity).
51. Id. at 2.
D. Where Lies The Future?

The future of domestic partnerships is expansive. In both business and political enterprises, partnership is nurtured by the ideology of individual freedom, sustained by the economic necessity of recruiting and retaining good employees and citizens, and warranted by legal doctrines of equal protection, privacy, due process, freedom of speech, and freedom from discrimination based on sexual orientation. In addition, the partnership initiatives are sparked by local initiatives, something the current federal judiciary favors over judicial activism. They are


54. See generally Hohengarten, supra note 28 (arguing for a holistic approach to the law governing marriage, thereby imposing a duty on the state to justify its exclusion of gay and lesbian persons from a specific relationship); Marc A. Fajer, Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men, 46 U. MIAIi L. REV. 511 (1992) (arguing that same-sex couples will never achieve true equality until they are free to discuss their private relationships in the same manner as heterosexual couples); David Link, Comment, The Tie That Binds: Recognizing Privacy and the Family Commitments of Same-Sex Couples, 23 LOY. L.A. L. REV. 1055 (1990).

55. Generally, due process constitutional claims are best utilized by majority populations and practices, and equal protection by minorities. Nonetheless, at least one author advocates that litigation involving homosexuals should "combine substantive due process claims that focus on conduct with equal protection claims that focus on status." Patricia A. Cain, Litigating for Lesbian and Gay Rights: A Legal History, 79 VA. L. REV. 1551, 1619 (1993) (due process would emphasize the right to engage in loving conduct, including sexual conduct); see also Cass R. Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U. CHI. L. REV. 1161 (1988).

56. At least three cases involving the military and discharge of homosexuals resulted from speech, that is, acknowledgement that the military person was homosexual. See Meinhold v. United States Dep't of Defense, 808 F. Supp. 1455 (C.D. Cal. 1993); Steffan v. Cheney, 920 F.2d 74 (D.C. Cir. 1990); BenShalom v. Marsh, 703 F. Supp. 1372 (E.D. Wis.) (1989), rev'd, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990). See generally Nan D. Hunter, Identity, Speech, and Equality, 79 VA. L. REV. 1695 (1993) (arguing that the First Amendment provides the most reliable path to success of any of the doctrinal claims made by lesbian and gay rights lawyers).


58. See, e.g., Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (state has the ability to enact regulations to protect its citizens); Webster v. Reproductive Health Serv.,
domestic matters, traditionally an area from which the federal judiciary will abstain from exercising jurisdiction unless confronted with egregious harm. It is safe to assume that domestic partnership will continue to expand.

This Article shall examine three possibilities for expansion in domestic partnerships: First, because it offers a sense of public belonging to the lesbian and gay community, the unique opportunity of partnership shall be examined. In particular, to this point, the partnership arrangement has centered on benefits—health, visitation, and real estate. But what of responsibilities? For a partnership to offer a viable sense of family, it will need to expand to either a statutory or an implied theory of responsibility, and thus it will envision support obligations as well. Second, once obligations become involved, domestic partnership becomes even more similar to marriage. Will the ability to marry follow? This issue has particular consequences for the lesbian and gay community, especially in light of the precarious legal future of marriage litigation. Finally, even without the possibility of marriage, what are the likely areas into which domestic partnership may expand benefits? One is testamentary transfer, especially since the National Conference of Commissioners on Uniform State Law revised the Uniform Probate Code in 1990 to include multiple references to the changing American family. The ability of a domestic partner to inherit from an intestate partner, elect against a partner’s last will and testament, and benefit from exempt property and allowances, may be statutory changes of the future.

This Article shall discuss the various issues, indentified in Part I, that surround the domestic partnership device. Part II shall define the current structure of domestic partnership benefits, including both business and government models. Part III shall examine current cases affecting the

492 U.S. 490, 521 (1989) ("But the goal of constitutional adjudication is surely not to remove inexorably "politically divisive" issues from the ambit of the legislative process, whereby the people through their elected representatives deal with matters of concern to them.").


61. See infra notes 273-87 and accompanying text.
establishment of domestic partnerships, as well as the public policy arguments used against them. Part IV shall discuss the specific role that domestic partnerships have had in the gay and lesbian community. Part V discusses the next stage beyond benefits: responsibilities, and gives specific examples of how domestic partners could acquire benefits and responsibilities through expansion of contractual and statutory elements.

II. DEFINING DOMESTIC PARTNERSHIPS

A. The Business Community

Business was first. In the introduction to his book, The 100 Best Companies for Gay Men and Lesbians, Ed Mickens writes that: "Employers who do well addressing gay and lesbian issues are the organizations that will excel in the years to come." The assessment is based on economics. This is not just because of the economic power of the homosexual community or the ability of organizations to attract and retain employees, but because "organizations that address gay and lesbian issues demonstrate a willingness to listen and respond to the concerns of all their employees." The economics of domestic partnership is crucial, be the employees heterosexual or homosexual, and the simplicity of that approach tempts the observer to convert to the legal world of law and economics. Thus, despite the concerns of morality, discrimination, similarity to marriage, and imprecision of


63. MICKENS, supra note 62, at 2. But see Barbara P. Noble, Attitudes Clash on Jobs and AIDS, N.Y. TIMES, Nov. 7, 1993, § 3, at 25. (Reporting that the National Gay and Lesbian Task Force Policy Institute got only 98 completed surveys from the Fortune 1,000 companies including a study; there were 145 outright refusals, and of the companies responding, only five offered domestic partnership benefits.)

definition, business "just went and did it" because employees convinced themselves, their peers, and management that it was good for business.65

Initially, it is important to note that when providing domestic partnership benefits, some businesses and localities do not provide them for both heterosexual and homosexual partners; some exclude heterosexual partners. The rationale for exclusion of heterosexuals being that they have the option of marriage. Because marriage and domestic partnership are different in both obligations and benefits, the possibility exists for an equal protection challenge. One author has noted that “[f]rom the liberation perspective, requiring marriage for benefit eligibility discriminates against all unmarried couples, whether homosexual or heterosexual”66 and has concluded that “[u]ntil unmarried heterosexual partners are routinely included, the recognition of domestic partners will not constitute a radical redefinition of family.”67

And so it was that in 1991 Montefiore Medical Center in Bronx, New York, became the “largest private employer in the nation to provide the same health benefits for homosexual workers and their partners as for heterosexual employees and their husbands or wives.”68 The hospital required that gay and lesbian couples prove that their living arrangements were similar to those of married couples: cohabitation, joint accounts, proof of financial interdependence, and a sworn statement from the two people that they were “each other’s sole domestic partner.”69 The partnership arrangement was limited to those who are unable to marry because of laws prohibiting marriage of persons of the same sex.70

Some companies were forced to extend domestic partnership benefits. For instance, Woodward & Lothrop, a large department store in the Washington, D.C. area, offered discount benefits to employees’ unmarried partners if the employee would sign a statement of financial interdependence.71 This would be available to both heterosexual and homosexual partners. Likewise, a Virginia Marriott health club and the

65. A publication offering strategies for negotiating with employers is titled NEGOTIATING FOR EQUAL BENEFITS. See supra note 62.
66. Badgett, supra note 8, at 28.
67. Id.
69. Id.
70. Id. Three foreign governments have provided for marriage by persons of the same sex: Norway, Sweden, and Denmark. A Swede Deal for Couples, ADVOCATE, July 12, 1994, at 16.
American Automobile Association in Potomac, Maryland, provided partnership benefits upon being sued for discriminatory treatment involving marriage and partnership.\textsuperscript{72} These companies, like others, settled the case by offering the benefits requested before the suit could be brought to court.

Smaller companies, perhaps more cost conscious of health and leave benefits, have nonetheless provided domestic partnership benefits. For instance, in 1991, Lotus Development Corporation allowed homosexual employees who have “long-term” partners to sign contracts to qualify them for the same benefits offered to employees’ married spouses.\textsuperscript{73} Ben and Jerry’s ice cream is another small business providing domestic partnership benefits.\textsuperscript{74} Cost concerns for these smaller companies are associated with fear of catastrophic medical expenses. This fear is AIDS generated. Negotiation with Lotus was illustrative: “The company required ‘some educating,’ for example, on costs. The discussions ‘danced,’... around certain topics, like catastrophic illness: ‘We kept saying, Is it AIDS? Nobody would say the word AIDS.’”\textsuperscript{75} But fear of a cost burden has not materialized.\textsuperscript{76} Indeed, at least two health insurance companies have extended domestic partnership benefits to their employees: Blue Cross and Blue Shield of Massachusetts and Kaiser Permanente of Northern California.\textsuperscript{77}

Employers also fear that employees will falsely claim someone as a domestic partner.\textsuperscript{78} In addition, there are added administrative costs due to Internal Revenue Code regulations. Because the employer’s contribution to the health benefit policy of the domestic partner is treated as ordinary income to the employee, there is a taxable event that must

\textsuperscript{75} Barbara P. Noble, \textit{Benefits for Domestic Partners}, \textit{N.Y. TIMES}, June 28, 1992, § 3, at 23.
\textsuperscript{76} When Berkeley, California extended medical benefits to live-in partners of employees, many predicted that insurance costs for the municipality would rise dramatically. This has not occurred. Smoking and exercise are better predictors of who will file insurance claims. Claudia H. Deutsch, \textit{Insurance for Domestic Partners}, \textit{N.Y. TIMES}, July 28, 1991, § 3, at 23.
\textsuperscript{77} Badgett, \textit{supra} note 8, at 30.
\textsuperscript{78} \textit{Id.} at 28-29.
be addressed. This is unique to domestic partners and not to married couples because the Internal Revenue Code specifically exempts married couples from the ordinary income aspect. 79

Homophobia is another fear. Businesses and political entities are subject to the same social pressures as individuals. As domestic partnerships are, by implication or specific directive, associated with homosexuals, any business or political base is subject to bias against gay and lesbian persons. 80 Fear of public reaction may have prompted some of the larger companies to delay implementation of domestic partnerships. Yet, it is interesting to note, most of these companies have limited the partnerships to persons of the same sex.

Schools and universities are particularly sensitive to homophobic pressures because of the necessity of soliciting contributions from donors and operating budgets from state legislatures. 81 Nonetheless, “by the end of [1994], every Ivy League university will provide domestic partner benefits for same-sex partners.” 82 State universities are more vulnerable to political pressures, but domestic partnerships exist at the Universities of Minnesota, Iowa, Vermont, the City University of New York, and Rutgers, 83 and a number of others are discussing the issue. 84 Stanford University, for example, provides benefits for both heterosexual and homosexual couples, and student benefits are different

79. One company, HBO, includes the value of the benefits to an employee’s taxable wages in his or her annual W-2 form. In 1993, this cost was estimated to be about $1,300 in taxes and health-plan contributions for an employee making $50,000. Barbara P. Noble, HBO Grants Benefits to Staff’s Same-Sex Partners, N.Y. TIMES, July 2, 1993, at D3. “Signing up a domestic partner for health and dental coverage adds as much as $3,880 to a Harvard employee’s taxable income, for instance, increasing income tax payments and possibly even FICA payments.” Badgett, supra note 8, at 29.
80. For instance, for twelve years the mayors of Burlington, Vermont, were at least liberal, if not actually socialist. Yet Burlington elected its first Republican mayor in three decades in 1993 because of the Democrat’s “advocacy of a plan to extend health-care coverage to the unmarried partners of city employees.” Health Plan Blamed in Vermont Mayor’s Loss, N.Y. TIMES, Mar. 7, 1993, § 1, at 29 [hereinafter Health]. But see Ian Fisher, Cuomo Decides to Extend Domestic-Partner Benefits, N.Y. TIMES, June 29, 1994, at B4. Reporting that two weeks earlier Vermont became the first state to extend health and dental insurance to unmarried homosexual and heterosexual partners.
81. For example, at Ohio State University, a proposal for same-sex couples to live in married student housing was met with so much opposition the state legislators are considering legislation that would prohibit this. Maria Newman, Rutgers Sued for Ban on Health Benefits to Gay Partners, N.Y. TIMES, Jan. 28, 1994, at B4.
82. Badgett, supra note 8, at 26-27. The author estimates that “[t]wenty-four colleges and universities offer health care benefits to lesbian and gay employees’ domestic partners—at least five also recognize opposite-sex partners.” Id. at 26.
83. Rutgers provided benefits to same-sex partners after five gay and lesbian students sued the university and the State of New Jersey. See Newman, supra note 81, at B4.
84. Badgett, supra note 8, at 27.
from those extended to employees. At Stanford, "[t]o share a university apartment with a partner and use the library or the gym, students must have 'an established long-term domestic partnership with a mutual commitment similar to that of marriage' and 'share the necessities of life and responsibility for their common welfare." 85 Smith and Dartmouth colleges require same-sex couples to pledge they would marry if legally allowed to do so. 86

Without the statutory or common law formalities of marriage, businesses and universities have established their own guidelines as to what constitutes the status of domestic partnership. Typical elements of domestic partnership include:

1. Minimum time requirements, either before a partner is eligible for benefits or between partnerships if one is dissolved. Time requirements range from no requirement . . . to twelve months.
2. Evidence of financial interdependence, particularly shared assets and debts;
3. Sharing a joint residence, whether rented or owned;
4. Boundaries for the relationship, including exclusivity, no close blood relationship, and no current legal marriage;
5. Naming the partner as a beneficiary of life insurance or pension plans. 87

Because none of these is a product of government regulation or oversight, businesses and universities are able to change them at will. It is safe to assume that the requirements shall continue to modify as the practice becomes more common. Also, litigation concerning discrimination, privacy, freedom of association, and equal protection will have a significant impact upon eventual uniformity.

B. The Political Community

During the mid-1980s, Berkeley, California, became the first American municipality to offer medical benefits to a live-in partner of either a

86. Badgett, supra note 8, at 29.
87. Id. Also, compare these elements with those required for status of marriage; see supra note 24 and accompanying text.
homosexual or heterosexual employee. Since then additional municipalities have also done so: Madison, Wisconsin; Seattle, Washington; and Cambridge, Massachusetts to name a few. These steps demonstrate that domestic partnership benefits have national applicability. These American cities reflect a trend evidenced in the 1990 census that reported 4.9 million unmarried-partner households in the United States. These couples, whether homosexual or heterosexual, are seeking legal and economic benefits without the obligations of marriage. They have found that living wills, durable powers of attorney, and valid last wills and testaments do not provide the security necessary at illness or death, and that while living and well, there are insufficient benefits to ratify what the partners believe is a functioning family.

Larger cities have now adopted similar domestic partnership benefits. For instance, one is New York City, the city around which the historic Braschi case was centered. In that case, Miguel Braschi, 32, a hair salon manager, filed suit in 1987 against Stahl Associates, a real estate firm that sought to evict him after his lover, Leslie Blanchard, died of AIDS. They had shared the apartment for ten years. In a four to two ruling, the New York Court of Appeals recognized a new definition of family: "[A] family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence." This allowed for the surviving partner to inherit the rent-controlled apartment. In the year of the decision, 1989, Mayor Edward Koch ordered "paid bereavement leave

88. Deutsch, supra note 76, § 3, at 23.
89. In Seattle, for instance, 476 of the city's 10,000 employees were registered as domestic partners and an estimated 70% of them were heterosexual. Kevin Sack, Albany to Let Insurance Law Cover Partners, N.Y. TIMES, Sept. 30, 1993, at B1, B10.
90. See also In 2 Cities, Unmarried Get Marriage Rights, N.Y. TIMES, Nov. 17, 1992, at B9 (Cambridge, Mass. and Sacramento, Calif.); Susan Scherreik, The Practical Part of Living Together, N.Y. TIMES, Mar. 6, 1993, § 1, at 33 (Denver, Colo.); Health, supra note 80, § 1, at 29. But see Lilly v. City of Minneapolis, Nos. C6-94-1583, C8-94-1584, CX94-1585, 1995 Minn. App. LEXIS 120 (Minn. Ct. App. Jan. 31, 1995) (holding that a grant of health care benefits to persons related to or living with a municipal employee is a matter of statewide concern and Minneapolis' resolution granting insurance benefits to same-sex domestic partners and an expansive list of relatives not defined as dependents independently is ultra vires and without legal force).
92. Braschi v. Stahl Assoc's, Co., 543 N.E.2d 49, 54 (N.Y. Ct. App. 1989); see also In re Guardianship of Kowalski, 478 N.W.2d 790 (Minn. Ct. App. 1991) (awarding guardianship of Kowalski to her lesbian partner of four years rather than her relatives, as this is what the severely injured Kowalski would have wanted). Both cases incorporate an expanded definition of family. But see Ross v. Denver Dep't of Health & Hosp., 883 P.2d 516 (Colo. Ct. App. 1994) (recognizing the distinctive status of marriage as providing benefits under a state's definition of immediate family).
be granted to New York City employees who live as unmarried couples, homosexual or heterosexual, when their partners or partners' close family members die." The New York City Council did not expand the benefits even though legislation was introduced.

In 1993, Mayor David Dinkins, signed an executive order creating a city registry in which city residents or nonresident municipal workers who live together could register as unmarried domestic partners. This was a significant development for the city. Registration costs $20 and the parties must complete a notarized affidavit; the affidavit can be terminated for $15. The benefits vary:

Some couples have used their new status to obtain discount prices for health club memberships and car rentals. One woman, armed with the domestic partner certificate, confronted a funeral parlor that had refused to accept her as a close relative. She was then allowed to make future funeral arrangements for her ill partner. Many other couples have used their new status to make symbolic, political points about their sexuality.

The change in New York City came about in part because of the change in New York State. "Reversing a 54-year-old policy, the Cuomo administration . . . lifted New York State's prohibition against providing family health insurance that covers the domestic partners of homosexuals and unmarried heterosexuals." Referring to the 1989 Braschi decision, state administrators accepted domestic partners as a family and provided for a standard of interdependence to determine the existence of

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the partnership. In June 1994, Governor Cuomo announced that he would extend insurance benefits to domestic partners of gay and lesbian employees. 98 At present, the benefits are contemplated only for homosexual couples, since "opposite-sex partners have other options." 99 New York City extended health benefits to both homosexual and heterosexual domestic partners at the end of 1993. 100

Other efforts to establish domestic partnerships within the political community have not met with the equanimity of New York. For instance, allowing for heterosexual and homosexual domestic partners to register in San Francisco, California in 1989, resulted in a city referendum. 101 In addition, for the third consecutive year, the U.S. House of Representatives has prohibited the government of the District of Columbia from using any money to implement its domestic partnership law. 102 Furthermore, by an overwhelming margin, the voters of Austin, Texas, repealed a municipal domestic partnership ordinance on May 7, 1994. 103

Recent political advances by the gay and lesbian community, as well as media attention given to President Clinton's efforts to end the ban on gays and lesbians in the military, have resulted in a number of anti-gay initiatives throughout the country. 104 These initiatives take the form

98. Fisher, supra note 80, at B4. "There are about 162,000 employees in the executive branch and in the state university system." Id.

99. Id.

100. See Navarro, supra note 95, at B1; see Not Enough for Domestic Partners, N.Y. TIMES, Feb. 6, 1993, §1, at 20 (suggesting that health care benefits be extended to city workers).


of measures placed on ballots asking the voters to rescind state laws or allow for a state constitutional amendment repealing any existing laws prohibiting discrimination on the basis of sexual orientation. The state constitutional amendment in Colorado provides:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim and minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing. 105

Similar efforts have been introduced in other American political communities: Oregon, Idaho, Washington, Missouri, Maine, Florida, Nevada, and Michigan. Some of these efforts were at the state level and some were directed towards municipalities; many were organized by the U.S. Citizens Alliance or the Traditional Values Coalition. They contribute in part to a growing political controversy involving, in general, individual versus community standards, and in particular, private partnerships between two adults which may include sexual conduct.

III. THE LEGAL CONTROVERSY

A. In Opposition

There were very few objections to the California Supreme Court's Marvin decision in 1976 which allowed recovery under a theory of contract for persons living in a meretricious relationship. 106 And, other than objections concerning the practical application, there were very few objections to the New York Court of Appeals' Braschi decision in 1989 which allowed a homosexual lover to inherit the deceased lover's rent control as a surviving family member. 107 Perhaps it was because in both cases, the relationship was over and there was no further opportunity for sex. Not true for domestic partnership. There has been significant

105. COLO. CONST. art. II, § 30b.
106. See Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976); see also supra notes 14-19 and accompanying text.
opposition to both heterosexual and homosexual partnership, and particular vehemence over all gay-rights measures.\textsuperscript{108}

The basis for the opposition can result from bigotry, fear of AIDS, discrimination, or ignorance. Many people believe that a gay or lesbian person chooses his or her lifestyle, a lifestyle that is often distorted by media coverage of such events as Gay Pride parades, and since that lifestyle is different from assumed national values, efforts to prohibit it result. An example is found in the comments of New York State Senator John R. Kuhl, Jr., concerning a future vote on a pending gay-rights bill in New York:

I don’t condone their lifestyle. I think it’s their choice and they have to live with it. I look at it different than an Italian person or blacks or Chinese, people who have genetic traits that they can’t do anything about. Sexual orientation is their choice and I don’t think it’s our place to force people that might have a moral opposition to it to have to put up with it and condone it.\textsuperscript{109}

But then there are motives for supporting anti-gay initiatives that arise because of rational religious interpretation, a perceived value of cultural uniformity, or an ardent belief that such liberties as domestic partnership in particular, or gay-rights in general, are bad for America\textsuperscript{110}. Thus, in Idaho in 1993, the Idaho Citizens Alliance proposed an initiative for the voters providing:

Section 67-8002: SPECIAL RIGHTS FOR PERSONS WHO ENGAGE IN HOMOSEXUAL BEHAVIOR PROHIBITED. No agency, department, or political subdivision of the State of Idaho shall enact or adopt any law, rule, policy, or agreement which has the purpose or effect of granting minority status to persons who engage in homosexual behavior, solely on the basis of such behavior; therefore, affirmative action, quota preferences, and special classifications such as ‘sexual orientation’ or similar designations shall not be established on the basis of homosexuality . . . .

Section 67-8003: EXTENSION OF LEGAL INSTITUTION OF MARRIAGE TO DOMESTIC PARTNERSHIPS BASED-ON HOMOSEXUAL BEHAVIOR PROHIBITED. Same-sex marriages and domestic partnerships are hereby declared to be against public policy and shall not be legally recognized in any manner by an agency, department, or political subdivision of the State of Idaho.\textsuperscript{111}


\textsuperscript{109} Sack, \textit{supra} note 97, § 1, at 23; \textit{see also} Titus, \textit{supra} note 18, at 339-40 (arguing the mistaken belief that all people are free to have sex with whomever they please).

\textsuperscript{110} The rationality of arguments concerning, for example, gay and lesbian parents, sexual molestation, and psychosexual orientation are recent and continue to develop. \textit{See, e.g.}, Flaks, \textit{supra} note 27.

\textsuperscript{111} ACLU v. Echolhawk, 857 P.2d 626, 627-28 (Idaho 1993).
Also in 1993, in Oregon, Lon T. Mabon, of the Oregon Citizens Alliance, submitted an initiative for the ballot which would amend the state constitution to provide:

Section 41: MINORITY STATUS BASED ON HOMOSEXUALITY PROHIBITED.
(1) In the State of Oregon, including all political subdivisions and government units, minority status shall not apply to homosexuality; therefore, affirmative action, quotas, special class status or special classifications such as "sexual orientation," "domestic partnerships" or similar designations shall not be established on the basis of homosexuality.

[(2)(a) The State of Oregon, political subdivisions and all units of state and local government shall not grant marital status or spousal benefits on the basis of homosexuality.112]

In California the Riverside Citizens for Responsible Behavior sought to place the following initiative on the ballot in 1991:

(3) City shall not enact any policy or law which "defines homosexuality, bisexuality, sexual orientation, affectional preference, or gay or lesbian conduct as a fundamental human right;" . . . or "promotes, encourages, endorses, legitimizes or justifies homosexuality."

(5) "No City monies may be used directly or indirectly to fund any individual, activity or organization which promotes, encourages, endorses, legitimizes or justifies homosexual conduct."

These state initiatives often had parallel activity at the more local level. In Marietta, Georgia, the Cobb County Board of Commissioners passed a resolution condemning homosexuality and eliminating $110,000 in arts funding in its 1994 budget.114 The Board's action was precipitated by a resident writing to a commissioner to complain about references to homosexuality in a play at Theater in the Square. The Board decided that "the life styles advocated by the gay community" were incompatible with Cobb County standards.115 Likewise, Commissioners of Williamson County, Texas, refused to give a real estate tax

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113. Citizens for Responsible Behavior v. Superior Court, 1 Cal. App. 4th 1013, 1019-20, 2 Cal. Rptr. 2d 648, 651 (1991) (holding that the initiative was constitutionally defective and refusing to place the initiative on the ballot).
115. Id.
abatement to Apple Computer, Inc. which planned to build an $80 million office complex on a patch of land just above Austin. The Commissioners cited Apple's policy of domestic partnership which grants health benefits to partners of gay and lesbian employees as the reason for refusing the tax abatement.\textsuperscript{116}

The vehemence of the opponents to domestic partnership in general, and gay and lesbian rights in particular, presage future initiatives, litigation, and animosity. Yet, the visibility and the concommitant discussion—even though expensive and litigious—contribute to a sense of identity for the gay and lesbian community and to a greater understanding of the homosexual person by the heterosexual community. This is a significant contribution to the development of any due process rights in the future.\textsuperscript{117}

\textbf{B. In Defense}

Organizations such as the Americans for Civil Liberties Union and the Lambda Legal Defense and Education Fund have been persistent, and most recently successful, in the defense of liberties on behalf of gays and lesbians. Included among these liberties is domestic partnership.

Defenses advocated by litigators are as practical as organizing at the local political level for legislative relief; defenses include the gamut of federal and state constitutional guarantees which assist minority communities such as gays and lesbians. Following the 1986 landmark sodomy case of \textit{Bowers v. Hardwick},\textsuperscript{118} academics, commentators, and litigators devoted increased attention towards these and other constitutional guarantees in an effort to expand the rights of gay and lesbian persons.\textsuperscript{119} Today, litigation defenses would include rights to privacy,\textsuperscript{120} Equal Rights Amendments (ERA),\textsuperscript{121} state statutes prohibiting

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\item[116.] Apple Denied a Tax Break, N.Y. TIMES, Dec. 1, 1993, at D7; Sam H. Verhovek, County in Texas Snubs Apple Over Unwed-Partner Policies, N.Y. TIMES, Dec. 2, 1993, at A1. Later, the county commissioners would have another vote and change their minds.
\item[117.] For a discussion of the necessity of a due process argument for the gay and lesbian community, see infra notes 152-210 and accompanying text.
\item[118.] 478 U.S. 186 (1986) (holding that the due process clause of the United States Constitution did not confer on homosexuals a fundamental right to engage in sodomy).
\item[119.] See generally Cain, supra note 55.
\item[120.] See, e.g., Hohengarten, supra note 28 (arguing that state has an affirmative duty to remove obstacles to same-sex marriage so that gay and lesbian persons may enjoy the privacy of this fundamental relationship); see also Commonwealth v. Wasson, 842 S.W.2d 487, 488 (Ky. 1992) (deciding that the state’s sodomy statute violated the state’s guarantee of privacy).
\item[121.] See, e.g., Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (using the Hawaii Equal Rights Amendment to raise the level of judicial scrutiny to strict under equal protection
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discrimination, the First Amendment, and, the two which follow, equal protection and due process of law.

1. Equal Protection

One commentator has explained the equal protection defense: "If homosexuals, as a class, are treated differently from other classes of persons, then the state must justify the differential treatment in the same way the state must justify classifications based on race and sex." In spite of initial setbacks, there have been recent successes.

For instance, in *Cammermeyer v. Aspin*, an Army colonel who had served admirably as a nurse and then in the National Guard from 1961 until 1992 was discharged because she admitted being a lesbian, but she did not admit to any sexual conduct with women. In Spring, 1994, the federal district court in Washington held that the army regulation banning persons who merely acknowledge homosexual orientation was not rationally related to the government’s legitimate interest in maintaining readiness and combat effectiveness of military forces, and therefore violated the equal protection guarantee of the Fifth Amendment. This case forms another element in the saga of lifting the ban against gays and lesbians in the military. Its effect, however, has yet to be
tested on appeal. 128

Professor Patricia Cain writes that, "the greatest hope for equal protection in furthering gay and lesbian rights is that a court, in applying rational basis review, will require the state to offer proof that the discriminatory rule is indeed rational." 129 This is an aggressive policy of rationality; the military must submit actual evidence of the rationality of its policies. 130 For instance, in Cammermeyer, the court ruled that the lesbian colonel who was discharged because of her admission of homosexual orientation met her burden of proof to negate the military’s proffered justification for its ban on gay and lesbian soldiers. 131 Thus, the court held that she had "met her burden of negating the proffered justifications for the government’s policy . . . [and] [t]he Government [had] failed to offer any evidence . . . that its justifications [were] based on anything but prejudice . . . . The government [had] discriminated against [her] . . . and . . . [had] failed to demonstrate a rational basis for doing so." 132

The equal protection argument involves a careful analysis. That is, when subjecting laws to analysis under equal protection, what level of proof must the court apply? There are three possibilities: a rational basis, a quasi-suspect class, often associated with gender discrimination, 133 and a strict approach, most often associated with racial classifi-

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129. Cain, supra note 55, at 1620. This is an active rational review process, thereby forcing the military to justify the exclusion through evidence. See Buttino v. FBI, 801 F. Supp. 298, 308 (N.D. Cal. 1992).

130. Recent cases evidence success with this policy of active rational basis review. See, e.g., Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 113 S. Ct. 655 (1992) (court held that military policies that simply give effect to society’s prejudices do not suffice under a rational basis test); Meinhold v. United States Dept of Defense, 808 F. Supp. 1455 (C.D. Cal. 1993) (citing the equal protection claim of the plaintiff, the court held that a policy of exclusion cannot simply defer to the military judgment as sufficient, but must consider the factual basis as rational).

131. Cammermeyer, 850 F. Supp. at 924. To meet this burden the court accepted evidence of President Clinton’s statements, the presence of homosexuals serving in the military, and a RAND Report stating that homosexuals will not affect military cohesion and that public disapproval of homosexuals in the military is not a valid concern.

132. Id. at 924, 926. The case had been stayed pending President Clinton’s attempt to change the policy on the ban.

133. District Judge Thelton Henderson ruled that lesbian and gay litigants constituted a quasi-suspect class for equal protection purposes, but his decision was overruled on appeal. High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1361 (N.D. Cal. 1987), rev’d, 895 F.2d 563 (9th Cir. 1990). For arguments that gays and lesbians deserve strict scrutiny, see Zamansky, supra note 53, at 251-54;
cations, which requires the state to prove a compelling state interest.\(^{134}\) One author argues that since the due process clause has been primarily used to protect "traditional" substantive rights from the short term intrusion of elected majorities,\(^{135}\) and homosexuals do not engage in traditional conduct, equal protection requires a "heightened justification" for state discrimination against those engaged in such conduct.\(^{136}\) Others have continued to develop sexual arguments for heightened scrutiny,\(^{137}\) but the possibilities are not good.\(^{138}\) Instead, the argument used is likely to be that of Cammermeyer:

Initially, the court must determine whether the challenged classification serves a legitimate governmental purpose. If the court answers this question in the affirmative, the court must then determine whether the discriminatory classification is rationally related to the achievement of that legitimate purpose. A discriminatory classification that is based on prejudice or bias is not rational as a matter of law.\(^{139}\)

It is important to note that Cammermeyer concerned the status of the lesbian colonel as a person who had simply announced her sexual orientation as homosexual. Conduct was not at issue.\(^{140}\) However, because of the adverse ruling in Bowers v. Hardwick,\(^{141}\) homosexual

\(^{134}\) But see Frontiero v. Richardson, 411 U.S. 677 (1973) (Justices Brennan, Douglas, White, and Marshall held that sex is a suspect classification requiring strict scrutiny).

\(^{135}\) See Sunstein, supra note 55, at 1174.

\(^{136}\) Id.

\(^{137}\) See, e.g., Niblock, supra note 124; Trosino, supra note 28 (making an argument of similarity to racial classifications). But see Singer v. Hara, 522 P.2d 1187 (Wash. 1979) (explaining that the court would have applied strict judicial scrutiny if it had found sexual discrimination); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (requiring state to provide a compelling state interest to justify its gender classification prohibiting same-sex marriage).

\(^{138}\) But see Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (remanding to the lower court for a determination to assess the compelling state interest associated with prohibition of same-sex marriages).

\(^{139}\) Cammermeyer, 850 F. Supp. at 915.

\(^{140}\) Id. at 918. Conduct has been defined as "any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires or any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in homosexual acts." Memorandum from Les Aspin, Secretary of Defense, to the Joint Chiefs of Staff, Policy on Homosexual Conduct in the Armed Forces, July 19, 1993, at 2.

\(^{141}\) 478 U.S. 186 (1986). The Supreme Court ruled in a five to four opinion that homosexuals did not have a fundamental due process right to engage in sodomy. Id. at
conduct—sodomy—is without protection even though it could be argued that heterosexual sodomy would be protected under a right to privacy.\textsuperscript{142} The adverse consequences of conduct and the legacy of \textit{Bowers v. Hardwick} prompted judges to respond "to the equal protection claims of gay and lesbian litigants by saying that until \textit{Hardwick} is reversed, no such claim can be recognized."\textsuperscript{143} In confronting this difficulty, "litigators have, whenever possible, distanced themselves from \textit{Hardwick} by claiming that their clients have been victims of discrimination based on 'status' and by arguing that 'conduct' should not be presumed from status."\textsuperscript{144} This argument prevailed in \textit{Cammermeyer}: "[T]o the extent the Government’s policy is based on the unfounded presumption that servicemembers with a homosexual orientation will engage in proscribed homosexual conduct, the policy is not rationally based."\textsuperscript{145} It is therefore unconstitutional.

It could be argued that when the Supreme Court of Hawaii remanded to the circuit court to determine if prohibition of same-sex couples from marrying violated equal protection of the law,\textsuperscript{146} the court was rejecting unfounded presumptions. That is, the court wanted the circuit court to justify its reasons as to why persons of the same sex could not marry. This confrontation—aggressive rationality—over the exact nature of the reason for the denial of equal protection is an argument advocated by proponents of gay and lesbian rights.\textsuperscript{147} Also implicit in the Hawaii decision is sexual conduct, not simply acknowledgement, even though the court specifically states the decision is not about homosexual rights, but rather about the rights of same-sex couples to marry.\textsuperscript{148}

Eventually, \textit{Bowers v. Hardwick} may well be overturned.\textsuperscript{149} Indeed, state legislatures are revoking sodomy statutes,\textsuperscript{150} and in Kentucky, the state's highest court ruled that a state homosexual sodomy law violates

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143. Cain, \textit{supra} note 55, at 1618.

144. \textit{Id.} at 1621-22. The author suggests that "rational basis analysis ought to require more than mere conjecture." \textit{Id.} at 1630.


147. See \textit{supra} text accompanying note 129.

148. See \textit{infra} text accompanying note 155.


150. See \textit{NEV. REV. STAT. ANN.} \textsection 201.190 (Michie 1993). Nevada is the exception in that after repealing its statute, it was reinstated in 1993.
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the equal protection clause of that state's constitution. The equal protection clause of that state's constitution. Some gay and lesbian advocates argue for litigation strategies that would emphasize the inherent rights of gay and lesbian persons to engage in sexual conduct as a due process right, while simultaneously challenging class-based discrimination based on equal protection. This strategy would place more emphasis upon the lifestyle of the gay or lesbian person, greater emphasis upon the immutable characteristic of the gay or lesbian sexual orientation, and greater acknowledgement of the values inherent in the person, even though he or she is homosexual. Of course, these forays are affected by developments concerning domestic partnership. Surely if domestic partnership incorporates responsibilities as well as benefits, due process between gay and lesbian partners will be advanced.

2. Due Process

If equal protection argues that gay and lesbian persons cannot be prosecuted or denied benefits of a law that exempts heterosexuals or provides services to heterosexuals without at least a rational basis, then due process argues for even more. That is, "[s]ubstantive due process arguments . . . [involve] the fundamental importance of love, affection, intimacy, commitment, expressions of concern, and all other forms of conduct that lesbians and gay men embrace as part of their lesbian and gay lifestyle." Conduct is definitely involved, not simply status, and the central focus is on personhood.

This ascension of personhood and thus due process protection for homosexuals is in part due to the abolition of the sodomy laws; if Bowers v. Hardwick were specifically overruled it would make a significant difference. Under Bowers v. Hardwick, simply by determining a gay or lesbian status, a person is an assumed sodomite and thus, a criminal, "morally weak and thus unfit for employment in responsible

152. Cain, supra note 55, at 1628.
153. Id. at 1635-36.
154. For an excellent explanation of personhood, see Rubenfeld, supra note 11.
positions."\textsuperscript{155} "So long as gay men and lesbians were presumed to engage in acts of criminal sodomy, employers could argue that they should not be forced to hire criminals and landlords could argue that they should not be forced to rent to criminals."\textsuperscript{156}

With abolition of the sodomy statutes through legislative or judicial action, it is possible to address the due process rights of gays and lesbians. In other words, once the automatic criminal nexus is lifted from gays and lesbians—and recall that heterosexuals engage in sodomy too—the person of the gay and lesbian becomes the center of attention and this personhood can be recognized within due process.\textsuperscript{157} "If litigants continue to argue that the interests at stake are important, even if they are not 'fundamental,' then perhaps substantive due process claims would begin to enjoy a form of 'active' rational basis review similar to that available for equal protection claims."\textsuperscript{158} In part, this is why litigation over marriage is so important, it presages family,\textsuperscript{159} although it is more logical to think that once the idea of same-sex family takes hold, same-sex marriage may come next.\textsuperscript{160} But the important thing is that persons begin to recognize that gays and lesbians are capable of forming families and thus are deserving of protection under due process.

In \textit{Baker v. Nelson},\textsuperscript{161} Richard Baker and James McConnell went to the courthouse to apply for a marriage license and their application was

\textsuperscript{155} Cain, \textit{supra} note 55, at 1587. For a recent story concerning a homosexual who lost his employment because of his sexual orientation, see James B. Stewart, \textit{Annals of Law: Gentleman's Agreement}, NEW YORKER, June 13, 1994, at 74.


\textsuperscript{157} Biblical prohibitions cannot be as easily eradicated by many. \textit{See}, e.g., Titus, \textit{supra} note 18, at 342-43.


\textsuperscript{160} \textit{See} Eskridge, Jr., \textit{supra} note 28, at 1432 (recommending starting with domestic partnership ordinances and working up to same-sex marriages over time).

\textsuperscript{161} 191 N.W.2d 185 (Minn. 1971), \textit{appeal dismissed}, 409 U.S. 810 (1972).
denied by the clerk because they were of the same sex. The couple appealed the clerk’s decision on due process grounds, but the court denied them their appeal, relying on the legal definition of marriage as that between persons of the opposite sex. Furthermore, the court pointed out, “[t]he due process clause of the Fourteenth Amendment is not a charter for restructuring [marriage] by judicial legislation.” This was in the early seventies.

In the early nineties, two District of Columbia men were denied a marriage license and challenged the denial based on the District of Columbia marriage statute, the District of Columbia anti-discrimination ordinance, and due process of law. The court stated that the “true due process inquiry involves not the fundamental nature of an abstract ‘right to marry,’ but rather, whether the constitution confers a fundamental right upon persons of the same sex to marry one another.” In rejecting their appeal, the District of Columbia Superior Court followed the definitional aspect of marriage as a societal recognition that it takes a man and a woman to form a marital relationship. Litigation continues on that case, but another case has caught the attention of legal scholars. This case occurs in Hawaii.


163. Baker, 191 N.W.2d at 186.


167. Id. The District of Columbia Superior Court, like other courts, linked its definitional authority to biblical references. References to Divine Providence also were included in the rationale for denying interracial marriages in Loving v. Virginia, 388 U.S. 1, 3 (1966), where the court quoted the trial judge. See also Adams v. Howerton, 486 F. Supp. 1119 (C.D. Cal. 1980), aff’d on other grounds, 673 F.2d 1036 (9th Cir. 1982), cert. denied, 458 U.S. 1111 (1992); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972); Craig R. Dean, Legalize Gay Marriage, N.Y. TIMES, Sept. 28, 1991, § 1, at 19.
Baehr v. Lewin involved two women, Genora Dancel and Ninia Baehr, who challenged Hawaii's imposition of an "opposite-sex restriction" on their right to marry. They met all of the state requirements for marriage, but were denied a license because they were "both of the same sex and for this reason [were] not capable of forming a valid marriage contract within the meaning of [the law]." The plaintiffs then brought suit, claiming the following: (1) that the state's denial to a same-sex couple of access to marriage is a violation of the couple's right to privacy as guaranteed by the Hawaii Constitution, and (2) that the denial also is a violation of the right to equal protection of the law and due process of law as guaranteed by the Hawaii Constitution.

In addition, the plaintiffs asserted their homosexuality and claimed a fundamental constitutional right to sexual orientation.

The circuit court dismissed plaintiff's complaint, finding that: "(1) [denial of the license to the plaintiffs] 'does not infringe upon a person's individuality or lifestyle decisions'; (2) [denial] 'does not . . . burden . . . the . . . right to engage in a homosexual lifestyle.'" In addition, the circuit court found that:

168. 852 P.2d 44 (Haw. 1993). The lesbian couple was joined by a gay male couple and another lesbian couple in bringing the suit. Id.
169. Id. at 50. See generally John E. Durkin, Comment, Reproductive Technology and the New Family: Recognizing the Other Mother, 10 J. CONTEMP. HEALTH L. & POL'Y 327 (1994).
170. Baehr, 852 P.2d at 50. Article I, § 6 of the Hawaii Constitution provides: "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right." HAW. CONST. art I, § 6.
171. Baehr, 852 P.2d at 50. Article I, § 5 of the Hawaii Constitution provides: "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." HAW. CONST. art I, § 5.
172. Baehr, 852 P.2d at 52.
173. Id. at 53 (quoting circuit court's order). The Hawaii Supreme Court held that "it is irrelevant, for purposes of the constitutional analysis germane to this case, whether homosexuals constitute a 'suspect class' because it is immaterial whether the plaintiffs, or any of them, are homosexual." Id. at 58.
174. Id. at 53-54 (footnote omitted) (quoting circuit court's order).
On appeal, the Supreme Court of Hawaii was asked to resolve the issues presented by the plaintiffs based upon the Hawaii Constitution. It is important to note that this case was brought in state court based on the interpretation of the state constitution. As in *Kentucky v. Wasson*,175 where the state supreme court ruled that the state sodomy statute violated the state guarantee of equal protection, this is another instance where, "constitutional challenges in state courts may be more productive than federal challenges."176

Although basing its opinion on Hawaii law, the court relied heavily on federal constitutional cases, especially those involved with the issue of whether or not there is a fundamental right to marry. For instance, the right to privacy is specifically enumerated in the state constitution and the court complemented this with a panorama of federal fundamental right to marry decisions.177 The court concluded, "it would make little sense to recognize a right of privacy with respect to other matters of family life [procreation, childbirth, child rearing, and family relationships] and not with respect to the decision to enter the relationship that is the foundation of the family in our society."178 Thus, do "same-sex couples possess a fundamental right" to marry?179 The court, in spite of its emphasis upon federal cases, decided that for purposes of privacy or otherwise:

"[W]e 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."

175. 842 S.W.2d 487 (Ky. 1992); see *supra* text accompanying note 145. Like *Baehr, Wasson* also applied heightened scrutiny to sexual orientation classifications. *Wasson*, 842 S.W.2d at__.


179. *Id.* at 57.

180. *Id.*
The court then addressed the equal protection argument. Since the authority to grant licenses to solemnize marriage, "on its face, discriminates based on sex against the applicant couples in the exercise of the civil right of marriage," the equal protection clause of the Hawaii Constitution is implicated. This equal protection clause is more extensive than that of the United States Constitution. The Hawaii Constitution provides that: "no person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person’s civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry." Thus, unlike the United States Constitution, "the Hawaii Constitution prohibits state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex." But first the court had to address whether same-sex marriage was prohibited by the definition of marriage achieved through history. This is the definitional argument.

The court did not find the definitional argument of previous cases dispositive. Instead, the court implied that the equal protection analysis—federal or state—was not addressed, specifically in analogy to the Virginia miscegenation case of Loving v. Virginia. In that 1966 case, a Black woman and a Caucasian man were married in the District of Columbia and then returned to their home state of Virginia to establish their domicile. The couple was indicted for, and subsequently convicted of, violating Virginia’s miscegenation statute, which banned interracial marriages. The Supreme Court of Virginia upheld their conviction and the couple appealed to the United States Supreme Court. For the Supreme Court, Loving was essentially an equal protection case, even though due process is mentioned briefly. This equal protection argument in Loving also resulted from the definitional

181. Id. at 59.
182. Id. at 60 (quoting HAW. CONST. art. I, § 5).
183. Id. ("It is the state’s regulation of access to the status of married persons, on the basis of the applicants’ sex, that gives rise to the question whether the applicant couples have been denied the equal protection of the laws . . . .”).
185. 388 U.S. 1 (1967) (holding that anti-miscegenation laws violate the United State Constitution’s Fourteenth Amendment Due Process and Equal Protection Clauses); see also Trosino, supra note 28; Eskridge, Jr., supra note 28, at 1504 (Loving is a favorable analogy for those questioning state law prohibiting same-sex marriage).
186. Loving, 388 U.S. at 3-4.
187. Id. at 12.
impossibility of marriage between a Caucasian and anyone other than a Caucasian: "[I]nterracial marriage simply could not exist because the Deity had deemed such a union intrinsically unnatural," and the customs of the state had never included it. Yet, applying strict scrutiny to the racial classification engendered into the miscegenation laws, the Court found no compelling reasons to maintain the past custom. Indeed, the Court found that customs had changed—former vestiges of slavery were disappearing during the sixties—and thus past custom should no longer dictate the definitional aspect of marriage. As to the will of the Deity, the Hawaiian court ratified what the Loving Court found as well: "[W]e do not believe that trial judges are the ultimate authorities on the subject of Divine Will . . . ."

The significance of Baehr therefore, is that it couples the racial prohibitions of Loving with the same-sex prohibitions of the Hawaii statute, and then finds that since customs changed for the former, why cannot customs change for the latter. If time allowed mixed-race couples to marry, time could allow same-sex couples to marry. This eliminates the argument of decisions that held that it was not a denial of equal protection, since marriage had never included within its definition, a same-sex union. This is the unique first step of Baehr, the elimination of the definitional argument; the second step will then be a consideration of whether or not it is in fact a denial of equal protection to refuse to allow marriages between persons of the same sex. But in order to do this, it is necessary to establish the standard by which to evaluate the state's claim. Must the state, under strict scrutiny, show a compelling state interest to justify the classification, or must the state simply show that the statute rationally furthers a legitimate state interest?

Some sex classifications have demanded strict scrutiny; subsequent cases have adopted an intermediate test: "Classifications by

189. Loving, 388 U.S. at 7-12. The state offered "no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification." Id. at 11.
191. See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973). The majority opinion in Baehr relies upon this decision to apply strict scrutiny for sex based classifications. See Baehr, 852 P.2d at 66.
gender must serve important governmental objectives and must be substantially related to achievement of those objectives. 192 Thus, the Hawaii Supreme Court had as possibilities the application of "some form of 'heightened' scrutiny, be it 'strict' or 'intermediate,' rather than mere 'rational basis' analysis." 193 The court adopted the former, the strictest test of judicial scrutiny. The reasoning of the court centered on the presence in the Hawaii Constitution of the Equal Rights Amendment. 194 This amendment raises the level of scrutiny to strict when examining sex-based classification under equal protection.

It therefore follows, . . . that [the statute upon which the plaintiffs base their claims] is presumed to be unconstitutional . . . unless . . . the State of Hawaii, can show that (a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgements of the applicant couples' constitutional rights. 195

The equal protection argument of Baehr also has due process implications. First, it suggests that "the due process right to marry [for gay and lesbian persons] continues to be an uphill battle." 196 The justices deciding the case ignore the reality of plaintiff's homosexuality: "[I]t is immaterial whether the plaintiffs, or any of them, are homosexuals." 197 They thus deny the inherent quality of personhood, the lifestyle—including conduct—of the gay or lesbian person. Furthermore, "[a]ll of the justices voting in Baehr rejected the plaintiffs' due process challenge, although four of the five . . . were open to some kind of equal protection challenge." 198 The Hawaii decision, therefore, even though it is significant for its rejection of the definitional obstacle to same-sex marriages, did not address the substantive due process rights of the litigants to marry because they were gay or lesbian.

For purposes of gay and lesbian rights, a due process argument is preferable to equal protection because it would signal the end of the

192. Baehr, 852 P.2d at 64 (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).
193. Id. at 65.
194. Id. at 67. The court relied heavily on the concurring opinion of Justice Powell, joined by the Chief Justice and Justice Blackmun, in Frontiero. They provided substance to the theory that: "[H]ad the Equal Rights Amendment been incorporated into the United States Constitution, at least seven members (and probably eight) of the Frontiero Court would have subjected statutory sex-based classifications to 'strict' judicial scrutiny." Id.
195. Id. It would be logical to think that the compelling state interest would result from the significant public anger over the court's allowance of a consideration of inclusion of same-sex partners within the definition of marriage.
196. Eskridge, Jr., supra note 28, at 1509.
197. Baehr, 852 P.2d at 58 n.17. Or, "[p]arties to a same-sex marriage could theoretically be either homosexuals or heterosexuals." Id. at 51 n.11.
198. Eskridge, Jr., supra note 28, at 1509.
Bowers v. Hardwick era where conduct is equated with criminality and immorality. Due process recognition would ratify personhood; \(^{199}\) it would recognize "the fundamental importance of lesbian and gay conduct." \(^{200}\) But none of this is present in Baehr. \(^{201}\) In that Baehr ignores the actuality of gay and lesbian conduct, it allows for Bowers v. Hardwick, perpetuates the status/conduct distinction, and worst of all, implies that two same-sex persons would seek to marry one another because one or both were heterosexual—without any reference at all to the possibility that both may be responsible homosexuals.

The subtle and pervasive attitude of Bowers v. Hardwick is the central issue within the need for substantive due process attention. One commentator explains: "The phobic figural representations by which the Supreme Court produces a hierarchical differentiation or ‘scaling’ of homosexual and heterosexual acts and agency in the Hardwick decision provide an indispensable map of the ideological situation with which contemporary gay and lesbian politics must now contend." \(^{202}\) Oddly enough, it is like the scorn of the “apolitical, economically privileged students toward members of religions identified as ‘hicky.’” \(^{203}\) Both groups, gay and lesbian persons and religious fundamentalists, share the distinction of being minority and different. Even though there is mutual distrust and even abhorrence, the two groups are quite similarly situated. Each suffers because the conduct of either is considered abnormal by the majority. Each suffers because each is the victim of “respectable

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\(^{200}\) Cain, supra note 55, at 1633.

\(^{201}\) An example of the type of substantive due process recognition which would have been advantageous in Baehr would be that found in High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1361 (N.D. Cal. 1987), rev’d, 895 F.2d 563 (9th Cir. 1990), where District Judge Thelton Henderson wrote: “The Supreme Court in Hardwick simply did not address the issue of all homosexual activity . . . that two gay people have no right to touch each other in a way that expresses their affection and love for each other.” Id. at 1370.


\(^{203}\) Lacey, supra note 32, at 16 (describing students in her classes at the University of Tulsa who directed scorn at the 10% of religious fundamentalists on the campus).
Each group needs to address this prejudice if it is to have a voice in decisionmaking. This is at the heart of the due process struggle for gay and lesbian persons.

Despite its limitations, Baehr and the judicial system of Hawaii have provided another step in the due process analysis directed towards gay and lesbian persons. By remanding the case with directions to define the compelling state interest for rejecting same-sex marriages, the Hawaiian courts have taken another step towards gay and lesbian identity. Whether intentional or not, the debate regarding same-sex marriage will in fact focus on homosexuality even though this is not what the Hawaii Supreme Court acknowledged. This debate will discuss identity and differences, status and conduct, roles and realities. It will contribute to the structure of a substantive due process argument acknowledged by Justice Blackmun in his dissent to Bowers v. Hardwick. For him, the case did not involve homosexual sodomy, it involved "the fundamental interest all individuals have in controlling the nature of their intimate associations with others." Thus, Baehr is another step in describing the associations that lead to identity.

So too, when the Hawaii Supreme Court analogizes the same-sex couple in Baehr to the black female and Caucasian male in Loving, it contributes to the substantive due process argument for gay and lesbian persons. The similarity provides the mechanism for accepting the fact that just as societal changes brought about the inclusion of interracial marriage within the definition of marriage, so too can societal change bring about the inclusion of gay and lesbian intimate associations, conduct, and status within the definition of marriage. The point of Baehr's reasoning is the premise of change; that amidst Stonewall, Cammermeyer, Wasson, and Presidential support, there is an attitudinal change. The change is not without objection. The legislature

204. Strongly held religious beliefs can often be victimized by prejudice that if directed towards women or persons of color would not be tolerated. So too, "Peter J. Gomes, an American Baptist minister and professor of Christian morals at Harvard University, has described homophobia as 'the last respectable prejudice of the century.'" BRUCE BAWER, A PLACE AT THE TABLE: THE GAY INDIVIDUAL IN AMERICAN SOCIETY 81 (1993).

205. See generally Ortiz, supra note 29.


202
of Hawaii was quick to ban same-sex marriages.\textsuperscript{209} It is predictable that the citizens of Hawaii may initiate changes in their constitution to deflect the \textit{Baehr} ruling, thereby forcing the issue upon federal courts not as willing to enter the domestic relations fray.\textsuperscript{210} If the federal courts refuse to consider the question under an equal protection aegis, each state would adjudicate same-sex marriage individually, with recognition by other states based on public policy.\textsuperscript{211} The resulting debate will certainly affect the substantive rights of gay and lesbian persons. Such a debate will be essential, productive, and identifying.

IV. THE GAY AND LESBIAN COMMUNITY

When the Lambda Legal Defense and Education Fund announced the decision in \textit{Baehr v. Lewin}, it was described as "one of our movement's most significant legal victories to date."\textsuperscript{212} By the winter of 1994, Lambda had announced sixteen judicial, legislative, and political victories in four months.\textsuperscript{213} And 1994 was also the twenty-fifth anniversary of Stonewall, where:

\begin{quote}
\textit{at} a little after one a.m. on the morning of June 28, 1969, the police carried out a routine raid on [a gay bar in New York's Greenwich Village]. But it turned out not to be routine at all. Instead of cowering—the usual reaction to a police raid—the patrons inside Stonewall and the crowd that gathered outside the bar fought back against the police. The five days of rioting that followed changed forever the face of lesbian and gay life. In the years since 1969, the
\end{quote}


\\[\text{\textsuperscript{210}}. \textit{See generally Clark, Jr., supra note 13, § 12-2, at 414-20.}\]

\\[\text{\textsuperscript{211}}. The fact that one state might recognize same-sex marriages does not mean that another state would be forced to accept that recognition under \textit{Full Faith and Credit}. Since recognition by one state would not constitute an adjudicated final judgment, the United States Constitution would not require recognition. Instead, public policy of other states would be the standard of recognition. \textit{See id. § 2.3, at 34-44.}\]

\\[\text{\textsuperscript{212}}. \textit{Evan Wolfson, Hawaii Supreme Court Paves Way for Same-Sex Marriage}, 10 \textit{LAMBDA UPDATE} 1 (1993).}\]

\\[\text{\textsuperscript{213}}. \textit{See Beatrice Dohm, Victory!}, 11 \textit{LAMBDA UPDATE} 1 (1994) (victories included domestic partnership coverage in New York City, an anti-gay initiative blocked in Cincinnati, adoption and custody cases, the American with Disabilities Act which prohibits AIDS insurance caps, and access to dental health care in New York City for HIV infected persons).}\]
Stonewall riots have become the central symbolic event of the modern gay movement.\textsuperscript{214}

The victories and celebration are reflected in the angry cry of a young man at the start of the gay rights movement: “We don’t want acceptance, goddamn it! We want respect!”\textsuperscript{215}

Respect is at the center of the substantive due process arguments; the issues involve an end to the military ban on gays and lesbians, same-sex marriage, and domestic partnership, to name a few. The object of the respect is the recognition of a lifestyle that is just as quixotic and developing as that within the heterosexual community. It is important to note that domestic partnership is attractive to the heterosexual community; there is a mutuality between the two on this issue, something that must be regarded as one of the most significant changes in America. Heterosexuals may well be shocked to experience this similarity. After all, homosexuals have always been acutely aware of heterosexuals, but the difference today is that heterosexuals are increasingly aware of homosexuals. Frank Browning captures this unique change in his book, \textit{The Culture of Desire}:

Rich, raucous, passionate, sometimes self-absorbed, often petulant, the builders of the new gay social terrain in this country have, at the very least, challenged the way Americans think about desire in ordinary life. From the deepest hollows of Appalachia to the flattest prairies of Nebraska, there is not a high school football captain or cheerleader alive who does not know that there are other human plots than the ones taught in Sunday school or sold on the paperback racks at Rexall. . . . By and by, all of us, homo and hetero, male and female, queer and conventional, are brought along onto journeys of rage and irony and sadness and revelation that neither the queer insurgents nor their pinched and prudish antagonists could have foreseen even a few years ago.\textsuperscript{216}

But respect demands responsibility. Within the gay and lesbian culture there are many voices. Among them is that of Frank Browning, who, when speaking of the debate and the conflict within the lesbian and gay community acknowledges: “In the culture of desire, there are no safe spaces.”\textsuperscript{217} There is also Bruce Bawer, who writes: “Homosexuality itself doesn’t circumscribe, it contributes; it doesn’t commit all gay individuals to a single path in life, it merely exerts an influence on the distinctive course traveled by each individual.”\textsuperscript{218} Bawer criticizes a particular faction which he calls the gay subculture,\textsuperscript{219} because he

\begin{itemize}
  \item \textsuperscript{214} \textit{DOBERMAN}, \textit{supra} note 207, at inside cover.
  \item \textsuperscript{215} \textit{Id.} at 211.
  \item \textsuperscript{216} \textit{BROWNING}, \textit{supra} note 198, at 25; \textit{see O’Brien, supra} note 198.
  \item \textsuperscript{217} \textit{Browning, supra} note 198, at 229.
  \item \textsuperscript{218} \textit{BAWER, supra} note 203, at 38.
  \item \textsuperscript{219} \textit{Id.} at 153-223.
\end{itemize}
believes "[i]t disdains the notion of individual identity and takes a reductive, narrowly deterministic view of homosexuality." 220 He argues instead, in a thought borrowed from Mary Renault's *The Charioteer*: "[D]on't use your homosexuality or their contempt for it as an excuse to lower your moral standards. The important thing is to behave in such a way as to keep your own respect and that of people whose respect means something." 221 It seems this is part of his conclusion that homosexuality "is neither good nor evil. It simply is. And it will not go away." 222 He rejects the comment made by a former professor of his: "[I]t's OK to be gay so long as you're ashamed of it." 223

Bawer makes an intriguing point about why visibility of a gay and lesbian culture is valuable as a contribution to gay identity and the formation of a substantive due process argument. He suggests looking at a rerun of an old *Andy Griffith* show. "If you're white, try to imagine what it's like being a black person watching the same show. Think of it: a North Carolina town with no blacks whatsoever. None. Where are they? . . . Well, that's what it's like being a gay man and watching virtually every TV drama and comedy." 224 As America comes to recognize—through television and film and music, mostly—the presence of a culture of gay and lesbian persons, it will not find that they are all the same. Darrell Yates Rist traveled across America looking for "the real gay America beyond the stereotypes of the popular media." 225 His conclusion is that:

Most of the men I met held more in common with their neighbors than with all the other homosexual men I had ever known. And although I found intimate communities of homosexual men throughout the West, whose shared lives made them brothers, I found no trait that surely united all homosexual men in a single gay community. 226

220. Id. at 38.
221. Id. at 201.
222. Id. at 49.
223. Id. at 115.
224. Id. at 92.
225. See DARRELL Y. RIST, HEARTLANDS: A GAY MAN'S ODYSSEY ACROSS AMERICA at inside cover (1992); see also ROBERT C. REINHART, A HISTORY OF SHADOWS (1986) (stories from gay men who lived during the Depression, the war years, and the fifties).
226. RIST, supra note 224, at 225.
Amidst this diversity is the emergence of the need for an identity, something other than desire.

One of the distinct deductions of *The Culture of Desire* is the absolute necessity of gay and lesbian persons to arrive at a fulcrum upon which they can balance their own perceived individual identity as persons imbued with distinctive sexual conduct that is viewed by the media, and often by themselves, as aberrant, and at the same time something that defines themselves as an orientation, a formative group, a culture, a family.227

What can bring this about? What can contribute to the notion that gay and lesbian persons are family? Surely through the history and the litigation, the political agendas and the media inclusion of homosexual identity, and the acceptance and living of life, gays and lesbians are facilitating family:

Having spent years standing on sidewalks in movie lines watching straight couples nuzzling and embracing, same-sex couples now refuse to deny themselves demonstrative intimacy. Bombarded with straight adolescent romance films in their own youth, they have begun to film their own romance stories. With breadth and irony, they are creating and communicating their own queer plots.228

If this is so, what comes next? “If friendship is to generate the genuine power of family, what must it do?”229 The answer “will surely have to confront these abiding American problems of individualism and commitment. Along the way, it will have to move the family of friends beyond a celebration of private happiness to an affirmation of civic participation.”230 There is little doubt that this is done in both the homosexual and heterosexual community. The essential difference is that it is much more obvious now, particularly in perspective of the AIDS pandemic, within the gay and lesbian community. But there is another aspect of civic participation that would be an avenue to greater commitment, another ingredient in a definitional family. This is domestic partnership.

The gay and lesbian community has in domestic partnership a unique vehicle for the formation of family, for civic participation, and for increased protection under substantive due process. The argument could be made that domestic partnership flows from the community commit-

229. *Id.* at 157.
ment over AIDS; the commitment continues between two persons. Likewise, to date, the domestic partnership arrangements have centered on the availability of benefits. The next stage is to incorporate shared responsibilities in the manner of support and obligation. It would be to the advantage of the gay and lesbian community to bring this about. True, for many persons, this responsibility is implied; but responsibility should now become a material provision for entitlement to benefits. Responsibility, quite simply, is the next stage.

V. THE NEXT STAGE: RESPONSIBILITY

At present, domestic partnerships provide benefits to the partners under the political or business programs discussed earlier. These benefits can include (1) access to company events and facilities, (2) bereavement/sickness leave, (3) employee assistance program/counseling, (4) relocation assistance, (5) health coverage, and (6) dental plan. But what would happen if one of the partners became ill; would the other have the responsibility for payment of medical expenses above those provided by the employer? Would there be a responsibility for legal assistance, for food, for housing, for what has come to be known as necessities? Under the common law, one spouse was required to provide support suitable to the other’s rank and station in life, or commensurate with their circumstances or standard of living. Does a domestic partner have this duty of support?

The issue arose in Seattle, Washington with this inquiry: “The City Council that passed the [domestic partnership ordinance] last September

231. See supra text accompanying notes 8-10.
232. MICKENS, supra note 62, at 187 (describing those benefits at Lotus Development Corp.).
233. Between a husband and wife there is a duty of support during marriage according to their respective means and ability to perform the duty. Many states have statutes making nonsupport between spouses a crime. See, e.g., MODEL PENAL CODE § 230.5 (1980) (“A person commits a misdemeanor if he persistently fails to provide support which he can provide and which he knows he is legally obliged to provide to a spouse, child or other dependent.”). Civil contempt enforcement is available as well. See generally Sybil M. Jones, The Problem of Family Support: Criminal Sanctions for the Enforcement of Support, 38 N.C. L. REV. 1 (1959).
234. See CLARK, JR., supra note 13, § 6.1, at 252-58.
has not explained whether local merchants can now sue one domestic partner if the other [partner] omits to pay his bills.\textsuperscript{235}

The answer is somewhat vague. As was stated in \textit{Marvin v. Marvin},\textsuperscript{236} a partnership can be the basis of a duty of support either expressly or by implication. Thus, a responsibility of support exists outside of marriage, based on a partnership theory, and it would seem that this should apply to a domestic partnership as well.\textsuperscript{237} The advances made in the theory of partnership between two adults as the vehicle of support during and after marriage, between prenuptial and postnuptial agreements, provides substance to a new understanding of support responsibility. But with this responsibility comes the necessity of providing the court with a basis for its order. Thus, there are two rationales upon which greater responsibility could be established between the two partners: implied partnership and express partnership. The former rests upon equity and the latter upon either an agreement between the two parties or the adoption of a statute applicable to domestic partnerships. Again, the point is to take domestic partnership from benefits to responsibility.

\textbf{A. Implied Theory of Responsibility}

The essential element in \textit{Marvin} was that the contract between two adults, must be supported "by some recognized underlying obligation in law or equity."\textsuperscript{238} Without this obligation, no benefits accrue.\textsuperscript{239} Because responsibility through implication will come about on a case-by-

\begin{itemize}
\item \textsuperscript{235} Daniel Seligman, \textit{Seeking Fame in Congress, Where Liberals Are Rich, Cohabiting For Fun and Profit, and Other Matters}, \textit{FORTUNE}, Dec. 4, 1989, at 188.
\item \textsuperscript{237} But see Davis v. Misiano, 366 N.E.2d 752 (Mass. 1977) (refusing to provide for a duty of support between non-marital persons).
\item \textsuperscript{238} Marvin v. Marvin, 122 Cal. App. 3d 871, 871, 176 Cal. Rptr. 555, 556 (1981); see also In re Black, 160 Cal. App. 3d 582, 206 Cal. Rptr. 663 (1984) (claim by unmarried cohabitant to 50% of all property held by the decedent at the time of his death).
\item \textsuperscript{239} See, e.g., Murphy v. Bowen, 756 S.W.2d 149 (Ky. Ct. App. 1988) (holding that even though both parties had lived together for 11 years without statutory or common law marriage, there was no evidence of either an express or implied agreement of joint venture or partnership, so no obligations of support arose).
\end{itemize}
case basis, will be less precise than express responsibility, and will vary among the different jurisdictions, the New Jersey approach offers insight.

New Jersey has been a leader in imposing equitable obligations. For instance, in *M.H.B v. H.T.B.*, the Supreme Court of New Jersey held that the doctrine of equitable estoppel was applicable to preclude a former husband, Henry, from denying a duty to provide child support on behalf of a child fathered by another, not himself. The facts are very important. A man and a woman were validly married and during the first five years of their marriage they conceived two children. Shortly after the five years the wife had a brief extra-marital affair and, while still married to her husband, gave birth to a daughter which the husband learned was not his own. With this knowledge, the husband moved out of the house, but for the next three years did not divorce his wife and did in fact support all three children with money, phone calls, letters, gifts, and visits. There followed a six-month period of reconciliation during which time the couple lived together with the children, but the reconciliation failed and the mother was awarded custody while the father agreed to pay family support.

When a final decree of divorce was obtained, both parties “stipulated that all three children were born of the marriage.” No alimony was awarded, but the husband continued to pay child support, and “[a]ll three minor children remained objects of Henry’s affection, attention, and solicitude throughout the post-divorce period. In particular, Henry expressed interest in and concern for [his putative daughter]. . . . [She] knows no other father, [even though her natural father lives nearby] and is ignorant of the facts surrounding her paternity.” Based on all of the evidence, the trial judge concluded that Henry had become the child’s “psychological, if not biological parent.”

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241. *M.H.B.*, 498 A.2d at 781. Note that this case is not about the statutory duty of a stepparent for the support of a stepchild while the stepparent is married to the natural parent. For this, see *Washington Statewide Org. of Stepparents v. Smith*, 536 P.2d 1202 (Wash. 1975).


243. *Id.*

244. *Id.*

245. *Id.* at 777.
Shortly thereafter, Henry remarried and then began to withhold support payments. Specifically, by a pre-trial motion, Henry claimed that he should be under no duty to support his putative daughter, as a blood test confirmed that he was not the father of the child.\textsuperscript{246} The trial judge concluded that the doctrine of equitable estoppel was applicable to preclude Henry from denying the duty to provide child support.\textsuperscript{247} The framework for the analysis was provided by a previous New Jersey decision, \textit{Miller v. Miller}.\textsuperscript{248} The \textit{M.H.B.} court acknowledged the \textit{Miller} court’s rationale that, “[b]ecause we were dealing with responsibilities that may flow from familial relationships that are inherently complicated and subtle, we acknowledged that the application of equitable principles called for great sensitivity, caution, and flexibility.”\textsuperscript{249}

One of the elements of equitable estoppel applied by the New Jersey court was “irreparable harm.”\textsuperscript{250} Again, quoting \textit{Miller}, the court found that “there is an innate immorality in the conduct of an adult who for over a decade accepts and proclaims a child as his own, but then, in order to be relieved of the child’s support, announces, and relies upon his bastardy.”\textsuperscript{251} Such could be said of the domestic partnership between two adults, with or without political registration, where one provides financial support and then leaves, or refuses to pay for at least the necessities of life. Thus, in the case of \textit{Braschi v. Stahl Assocs., Co.},\textsuperscript{252} where the two men had been together and shared significant incidents of life for over ten years before one of them died, would there be irreparable harm to deny support to one upon which he relied, and the other freely gave for so long a period of time? And if Sharon Kowalski’s parents had sued the now comatose daughter’s life partner

\textsuperscript{246.} \textit{Id.}
\textsuperscript{247.} \textit{Id.}
\textsuperscript{248.} 478 A.2d 351 (N.J. 1984). This case involved two girls whose mother remarried after divorcing their father. During the mother’s second marriage, the defendant, her second husband, assumed sole responsibility for the girl’s financial support, as well as other parental privileges and obligations. He discouraged his wife and stepchildren from having contact with the former husband and natural father, but nonetheless, after the divorce that ended seven years of marriage he refused to continue child support for the stepchildren. The court held that he was equitably estopped to deny his duty to continue to support the stepchildren. \textit{Id.} at 353.
\textsuperscript{249.} \textit{M.H.B.}, 498 A.2d at 777 (paraphrasing from \textit{Miller}). For an example of a court stating that it needed a sufficiently definite and predictable test to allow for consistent application from case to case, see Elden v. Sheldon, 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988).
\textsuperscript{250.} \textit{M.H.B.}, 498 A.2d at 779.
\textsuperscript{251.} \textit{Id.} at 780.
\textsuperscript{252.} 543 N.E.2d 49 (N.Y. Ct. App. 1989) (allowing non-marital partners to become family for purposes of rent control law in New York City).
for four years, seeking to obtain support for long-term care for their daughter from the person who had shared significant incidents of life—court referred to them as a family of affinity—would there have been irreparable harm to deny them relief? These are cases in which the partners have not signed an agreement, nor registered with a business or city.

Establishing an implied theory of responsibility between a parent and a putative child may seem justified from the perspective of the vulnerability of the child; the irreparable harm to the child and the concomitant inability of the child to foresee the harm, justify a remedy. But the New Jersey Supreme Court is content to address both the adult’s and the minor’s expectations because of the establishment of an “intimate familial relationship.” Increasingly, the court is drawn to the fact that when a bond is established in which expectations are raised—such as in most domestic partnerships—an implied theory of responsibility attaches. Specific cases are likely to follow.

In June, 1994, the New Jersey Supreme Court, in Dunphy v. Gregor, issued an opinion which further erodes the distinction between married and unmarried cohabitants, and adopted instead, a standard based on the significance and stability of the plaintiff’s relationship. Dunphy was engaged to marry Burwell and had been living with him for two years when she witnessed him being struck by a car while changing a flat tire. Burwell’s body was tossed or dragged 240 feet as a result of the collision and all Dunphy could do when she reached him was to clear pebbles and blood from his mouth, attempt to subdue his hands and feet as he thrashed about, and comfort him. Burwell died some hours later in the hospital. As a result of her experience, Dunphy was undergoing psychiatric treatment. She sought to recover from the driver of the car damages for the “mental anguish, pain and suffering” experienced as a result of witnessing the events that led to the death of her fiance.

New Jersey had heretofore applied the test adopted in California

253. See In re Guardianship of Kowalski, 478 N.W.2d 790 (Minn. Ct. App. 1991) (awarding guardianship over disabled partner to her life partner of four years).
255. Id. at 374.
256. Id. at 373.
requiring a marital or intimate, familial relationship between plaintiff and
the injured person before recovery could be had for negligent infliction
of emotional distress, but was divided as to whether marriage was a
condition of recovery. In a departure from other states, the New Jersey
Supreme Court found marriage was not a prerequisite. Instead, the court
allowed recovery based on the significance and stability of the plaintiff’s
relationship with the injured party. The jury may determine the
significance and stability based on:

the duration of the relationship, the degree of mutual dependence, the extent of
commong contributions to a life together, the extent and quality of shared
experience, ... "whether the plaintiff and the injured person were members of
the same household, their emotional reliance on each other, the particulars of
their day to day relationship, and the manner in which they related to each other
in attending to life's mundane requirements."258

The significance of this decision is that it allows for recovery outside
of the status of marriage based on an implied theory of responsibility.
While recovery for negligent infliction of emotional distress is a benefit
to the plaintiff, such a theory has equal applicability of responsibility to
the plaintiff. It is logical to suggest that a relationship that is significant
and stable may imply not only benefits, but also responsibilities.

B. Express Theory of Responsibility

Express responsibility could take the form of an agreement between
the two parties, a statute mandating responsibility or characterizing the
status of the relationship, or a combination of the two. Based on the
ascendancy of the partnership approach to marriage and the inherent
nature of domestic partnership itself, it would seem that agreements
between two adult contracting' parties will be the likely source of
litigation in the future. What did the parties contract? The agreement
should therefore be the subject of increased scrutiny by both heterosexu­
al and homosexual communities. Later, as domestic partnerships achieve
greater use and are accorded greater status, statutory efforts may follow
as a means by which uniformity and fairness can be achieved.

1. Private Agreements

As with prenuptial agreements and non-marital contracts, the
disclosure, equity, and capacity of the two parties to an express
agreement would be essential. The two parties, regardless of sexual orientation, would have the ability, under a theory of partnership, to establish the terms of their arrangement in the same manner as parties to any other non-marital contract. Nonetheless, because of the presence of domestic partnership, either business or government benefits would be included. Excluded would be exclusive control over children or public policy restraints that do not suffer because of privacy, equal protection, or due process arguments. The parties can benefit from the forms, literature, and comments made about non-marital contracts to date. In some instances, the non-marital couple, even though seeking a domestic partnership, may wish to limit the benefits and obligations of the relationship. In such instances, forms such as an anti-palimony agreement could be utilized to eliminate implied obligations.

An anti-palimony agreement, executed between two cohabiting non-marital partners, requires full disclosure and a writing. Its purpose is to:

- define the financial arrangements, rights, and responsibilities between the parties while they are living together unmarried and at such time as they may cease to live together, and to provide that their living together unmarried will not create any financial rights in either party against the income or the property of the other party.

The elements of the agreement include the following:

1. Advice of Counsel: It is necessary to have independent counsel who consults with each party and who assists with full disclosure, fairness, and full and mature consideration.
2. No Common Law Marriage: The intention not to enter into any form of marriage is made clear.


260. See, e.g., David Westfall, Documents and Statutes in Family Law 156 (2d ed. 1994).

261. Id.
(3) Complete Waiver of Financial Rights: “This waiver and release shall apply while the parties live together, after they cease to live together for any reason (if such event ever occurs) while both are living, and after the death of either or both parties.” \(^{262}\)

(4) Limitations of Waiver Rights: The agreement is void if the parties marry in a statutory manner, and if, “while both parties are living, they cease to live together, the net fair market value of any joint property shall be divided equally between them.” \(^{263}\)

(5) Household and Other Expenses: There exists a mutuality of support, but “no legally enforceable obligation to support the other party shall have been created.” \(^{264}\)

(6) Voluntary Transfers: Inter vivos and testamentary transfers will not be affected by the agreement, each party retaining the right to transfer or receive transfers from others.

(7) Debts: “[E]ach party shall be responsible for his or her own debts incurred before and after the date of this Agreement, and each party specifically agrees to indemnify and to hold the other party harmless from any liability, loss, damage, or expense arising therefrom.” \(^{265}\)

(8) Separate Property: This section characterizes property of each party.

(9) Disclaimer: Each of the parties desires and intends that this Agreement supersede any statutory or other legal or equitable rights he or she might have or otherwise acquire in the other’s property or to obtain support or maintenance from the other as a result of their living together unmarried or in a common-law marriage. \(^{266}\)

(10) Effect of Nondisclosure: Property discovered after this agreement belonging to the other party does not waive the agreement.

(11) Governing Law: Parties may choose the applicable law.

(12) Modification of the Agreement: “This Agreement may be modified, altered, or revoked only by a writing executed by the parties with the same formality as this Agreement.” \(^{267}\)

(13) Arbitration: “Any controversy or claim arising out of or relating to this Agreement or the termination or breach thereof shall be resolved by arbitration. A board of three arbitrators shall be used, each party choosing one arbitrator and the two arbitrators choosing a third. The

\(^{262}\) Id. at 158.
\(^{263}\) Id.
\(^{264}\) Id. at 159.
\(^{265}\) Id.
\(^{266}\) Id. at 160.
\(^{267}\) Id. at 161.
decision of the majority of the board shall be controlling. A majority of
the board may specify the arbitration procedures. 268

(14) Miscellaneous: This section provides for expenses of litigation,
partial invalidity or revocation, and states that the Agreement contains
the entire understanding of the parties.

There is similarity between this anti-palimony agreement and the
Uniform Premarital Agreement Act. 269 The differences being in the
popular acceptance of premarital agreements and the fact that they
become effective upon marriage, whereas anti-palimony agreements are
not popular and cease to be effective upon marriage. They both
emphasize the ability of the couple to enter into a private binding
contractual partnership. The implications of this should not be omitted
in developing greater responsibility within domestic partnerships.

2. Statutory Agreements

Of this we can be certain, as domestic partnerships become more
prevalent among American couples, cities, states, and the federal
government will seek greater involvement. 270 Litigation will incite
some legislation. Further legislation will come about through develop­
ment of the issue and through the lobbying efforts of groups with
cohabiting partners, both heterosexual and homosexual. It is likely that
statutory efforts would include some of the following:

- Mutual obligations. States may wish to exceed the implied limits of
  responsibility enumerated in cases described earlier, 271 and require as

268. Id.
269. Id. at 164-72.
270. For instance, Internal Revenue Code provisions affecting alimony and separate
  maintenance, transfers of property between spouses or incident to divorce, and certain
  property settlements, could be equally applicable to domestic partnership status
  established by the states. See I.R.C. §§ 71, 1041, 2516 (1992). Likewise, surviving
  spouse designations for joint and survivor annuity pre-retirement survivor annuities
271. See supra notes 237-38. For a statutory example of support in reference to
  marital couples, see CAL. FAM. CODE § 4320 (West 1994).

In ordering . . . support . . . the court shall consider all of the following
circumstances:

(a) The extent to which the earning capacity of each party is sufficient to
  maintain the standard of living established during the [partnership], taking into
  account all of the following:
a matter of public policy that partners be "subject to the general rules
governing fiduciary relationships which control the actions of persons
occupying confidential relations with each other." General rules for
liability would protect the rights of creditors of domestic partner­
ships. Of course, since partnership agreements between adults
cannot deprive the state of its role in the protection of minors, any
children born to cohabiting non-marital couples would be protected
under existing statutory provisions.

In one area of the law, estates and trusts, the reality of domestic
partnerships and the changes in American society it represents, has
become a factor in recent statutory changes. In adopting the 1990
Uniform Probate Code, the Joint Editorial Board of the Uniform Probate
Code adopted an approach which accepted the decline of formalism in
the American definition of family, and this recognition affects the
transfer of property at death. The issue is whether states, the

(1) The marketable skills of the supported party; the job market for those
skills; the time and expenses required for the supported party to acquire the
appropriate education or training to develop those skills; and the possible
need for retraining or education to acquire other, more marketable skills or
employment.
(2) The extent to which the supported party’s present or future earning
capacity is impaired by periods of unemployment that were incurred during the
[partnership] to permit the supported party to devote time to domestic duties.

(b) The extent to which the supported party contributed to the attainment of
an education, training, a career position, or a license by the supporting party.
(c) The ability to pay of the supporting party, taking into account the
supporting party’s earning capacity, earned and unearned income, assets, and
standard of living.
(d) The needs of each party based on the standard of living established during the
[partnership].
(e) The obligations and assets, including the separate property, of each party.
(f) The duration of the [partnership].
(g) The ability of the supported party to engage in gainful employment without
unduly interfering with the interests of dependent children in the custody of the
party.
(h) The age and health of the parties.
(i) The immediate and specific tax consequences to each party.
(j) Any other factors the court determines are just and equitable.

Id. 272. See CAL. FAM. CODE § 721(b) (West 1994).
273. See, e.g., id. § 910 (referring to liability for debts in the marital context); see
also id. §§ 2620-28.
274. See U.P.C., art. 2, Prefatory Note (1990); see also James Lindgren, The Fall
of Formalism, 55 ALB. L. REV. 1009 (1992); Margaret V. Turano, UPC Section 2-201:
Equal Treatment of Spouses?, 55 ALB. L. REV. 983 (1992); Gregory S. Alexander,
Ademption and the Domain of Formality in Wills Law, 55 ALB. L. REV. 1067 (1992);
Mary P. Treuthart, Adopting a More Realistic Definition of “Family”, 26 GONZ. L.
REV. 91 (1991); Lawrence W. Waggoner, The Multiple-Marriage Society and Spousal
traditional purveyor of wealth at death through statutes guarantying intestate or testate distribution, will make the connection between the joint efforts of married couples and the joint efforts of non-marital cohabitants. If the essential ingredient is the partnership between the two, and because of that partnership economic benefits were acquired, the status of marriage should not be the deciding factor in the distribution of that wealth upon the death of either party.

The Uniform Probate Code, because of its purpose "to make uniform the law among the various jurisdictions," is a good vehicle from which to discuss provisions in the law of intestate and testate succession that could change in providing for domestic partners. The Uniform Probate Code was certainly not intended as a source for the possible inclusion of domestic partners, but one should consider the following:

Share of the Spouse. The most recent revision of the Code increased the share of the surviving spouse, thus recognizing a trend evidenced in empirical studies. The availability of domestic partnerships could support the inclusion of the partner as an intestate heir with the same portion as that which would have gone to the spouse. Particular remedies to restrict inequities, such as elective share, augmented estate, entitlement under a premarital will, homestead allowance, exempt property, and family allowance, may all in-


275. The intestate estate is defined as "[a]ny part of a decedent's estate not effectively disposed of by will." U.P.C. § 2-101(a) (1990).

276. Other state statutes and uniform acts would be subject to the same inquiry. See, e.g., JOHN H. LANGBEIN & LAWRENCE W. WAGGONER, SELECTED STATUTES ON TRUSTS AND ESTATES 585, 652 (1994) (relating to the Revised Uniform Principal and Income Act and Uniform Marital Property Act).
clude domestic partners in addition to marital spouses. And again, some
would apply to both intestate and testate distribution.

Additional inclusion could be made as to the effect of divorce,
annulment or separation, the meaning of relative, the priorities
of who may be a guardian or a conservator, or any other special
status enjoyed by a spouse. It is not that marriage is unimportant, it is
simply that, since domestic partnership presumes the absence of a spouse
but nonetheless the presence of wealth that accumulates in a partnership
fashion, the person who contributed to that function should participate
in the economic distribution without contest from a formal family.

These statutory changes are not likely to come about in the near
future. Private agreements between domestic partners will need to
develop and bring about a change in attitude, acceptance, and reliance
before legislative recognition will follow. Nonetheless, the debate has
started and since the change in marriage from status to partnership has
begun already, it is likely that, with the implementation of more
domestic partnerships, statutory rights to the transfer of wealth at death
will occur.

VI. CONCLUSION

The Supreme Court of Hawaii recognized—and caused great public
scrutiny of—a significant change in the way family is defined when it
held, in *Baehr v. Lewin*, that it was now necessary for the state to
provide compelling reasons to deny persons of the same-sex the right to
marry. Changes had been taking place as a result of *Griswold*'s privacy,
*Eisenstadt*'s individuality, *Marvin*'s non-marital contracts, and the host
of other judicial, social, and moral changes in America. The Hawaiian
decision, no matter what the outcome, has had far less impact than the
changes brought about through judicial and legislative recognition of
partnership as the functional basis of adult relationships. Because
partnership has demanded expressional forms in addition to marriage,
non-marital contracts and domestic partnerships developed. While
neither of these approaches the history, significance, or status of
marriage, each is unique and now firmly established as a business
incentive and a political boon. Like them or not, domestic partnerships

285. *Id.* §§ 2-802, 2-804.
286. *See id.* § 2-603.
287. *See id.* § 5-305(c)(1) ("[T]he spouse of the incapacitated person or a person
nominated by will of a deceased spouse or by other writing signed by the spouse and
attested by at least 2 witnesses [is entitled to consideration for appointment].").
288. *See id.* § 5-409(a)(3) ("[T]he spouse of the protected person [is entitled to
consideration for appointment].").

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offer an alternative to marriage for both the heterosexual and homosexual couple seeking a bit more permanence, and perhaps a bit more benefit.

For the gay or lesbian person, domestic partnership is an opportunity for public recognition. This implies the struggle of equal protection and the years since Stonewall in 1969, the lifting of the military ban and the abolition of sodomy statutes in southern courts, plus the recognition that two men could share all the necessities of life in a rent-controlled apartment in New York City and be more than strangers. It implies that a lower court in Hawaii must now provide compelling reasons why two adults who are of the same sexual orientation should be prevented from marrying in a state sanctioned ceremony.

Most of all, domestic partnership implies for the gay and lesbian community an argument for due process of law. This is the theory that homosexuality is not a choice, it is an orientation and entitled to the same life, liberty, and pursuit of happiness as those persons within a heterosexual orientation. It is an element of personhood to want and achieve partnership; it is a recognition of family.

To date, domestic partnership has provided benefits. The benefits are increasing at both the business and political levels. Nonetheless, the next stage for domestic partners must be the inclusion of responsibility. For gay and lesbian persons responsibility would assist in bringing about the substantive due process arguments so sought by litigators. That is, by accepting the obligations of life, the status of family and commitment and production would lend credence to sexual orientation claims of both equality and substance.

The detractors—and they would include persons who rationally believe that the traditional family is the family of form—need to be brought into dialogue and made aware of the advantages of domestic partnership. America is a nation based on a Judeo-Christian sense of morality, and this religious heritage is not something to be abandoned by domestic partners, nor by those who see in domestic partnership another step in an expanding agenda of social change. Instead, the heirs of this religious heritage must confront the issue of immutability of sexual orientation. Also to be confronted is the fact that domestic partnership, benefits and responsibilities, does not have as its primary object sexual
activity. To dwell upon this fallacy is to fall victim to the heritage of Bowers v. Hardwick, rather than the "great mystery" of family.²⁸⁹

The advantage to society from the incorporation of domestic partnership is far more evident if responsibility results. But nonetheless, the issue that all must confront is whether the state can recognize a different form of family already in existence. Can the state—without tradition and without the religious underpinnings that form that tradition—establish a new objective standard of what constitutes family? The answer to this will appear in the way in which we utilize judicial decisions recognizing implied responsibility towards children and between persons not married but sufficiently considered to be family to allow recovery under traditional tort theories. Children make a difference, too, and domestic partnership must account for them as well.

Finally, the future of domestic partnership will develop through private consensual agreements. The future alone can determine what will happen with legislative enactments. Nonetheless, both heterosexual and homosexual persons and groups should analyze the possibilities of statutory inclusion of domestic partnerships. These must particularly include changes in the tax code to allow greater equality between marital partners and domestic partners. But changes are warranted in the manners in which we transfer wealth upon death. If marriage is increasingly a partnership in scope, it is not only equitable but predictable that the domestic partner should be provided with the same testate and intestate benefits as the marital partner. But when all is said and done, no matter what society implies or exacts, domestic partnership is still—simply—an index of belonging.