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The More, the Not Marry-Er: In Search of a Policy Behind Eligibility for California Domestic Partnerships

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The More, the Not Marry-Er: In Search of a Policy Behind Eligibility for California Domestic Partnerships*

TABLE OF CONTENTS

I.	INTRODUCTION	427
II.	WHAT DOMESTIC PARTNERSHIP OFFERS AND TO WHOM	429
	A. <i>Whose Rights? Those Eligible to Register as Domestic Partners</i>	429
	B. <i>Rights Gained</i>	432
III.	BACKGROUND IN CALIFORNIA AND COMPARATIVE MODELS	436
	A. <i>Municipalities and Employers</i>	436
	B. <i>Hawaii's Reciprocal Beneficiaries</i>	439
	C. <i>Vermont's Civil Unions</i>	442
IV.	LEGISLATIVE HISTORY	444
V.	ANALYSIS OF THE POLICY BEHIND THE EXPANSION OF ELIGIBILITY	450
	A. <i>Offering an Alternative to Marriage and Cohabitation</i>	451
	B. <i>Preventing Criticism Through Inclusion</i>	452
	C. <i>Offering a Remedy: Is "Practically Prevented" from Marrying the Same as "Prohibited" from Marrying?</i>	455
VI.	RECOMMENDATIONS AND CONCLUSION	458

I. INTRODUCTION

On October 14, 2001, California Governor Gray Davis signed Assembly bill 25 into law, granting certain civic rights to state-registered domestic partners.¹ The Governor praised the bill as “one of the

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1. Letter from Gray Davis, Governor of the State of California, to the Members of the California Legislature (Oct. 14, 2001), *reprinted in* 2001–02 CAL. LEG. ASSEMB. J.

strongest domestic partner laws in the nation.”² The legislation has been lauded by many in popular debate as a triumph for lesbian and gay rights and senior citizen rights.³ Assembly bill 25 (AB 25) includes an unusual grouping of couples within its scope of eligibility: not only same-sex couples who cannot legally marry, but also certain opposite-sex couples who could marry under California law.⁴ The bill excludes from eligibility any opposite-sex couples in which both partners are younger than age sixty-two.⁵

Is there some explanation for including these groups within one statutory alternative to marriage? Does AB 25 seek to promote state recognition of same-sex couples or to codify new representations of family or to preserve senior citizens rights or all of the above? Can these potential motivations for a statutory alternative to marriage coexist within one scheme, and if so, should that scheme exclude younger, opposite-sex couples? This Comment seeks to parse the statute, provide some background to the development of the current scheme, and, finally, examine whether any coherent policy supports the statute’s expansion to include greater numbers of opposite-sex couples.

At the outset, Part II examines in detail the substantive benefits that California domestic partnerships provide and to whom those benefits are offered.⁶ Part III of this Comment examines the background of the current domestic partnership scheme in California by way of comparison to the methods used by other states (at either the state or municipal level) to address the needs of nontraditional couples and families.⁷ Most notably, the current statute expands eligibility of domestic partnerships to include opposite-sex couples in which *only one* partner is elderly,⁸

4095, 4175 (2001) [hereinafter Letter from Gray Davis].

2. *Id.*

3. *See, e.g.*, Press Release, California Western School of Law, Domestic Partnership Scholar Lauds Judiciary Committee’s Approval of Assembly Bill 25 (Mar. 15, 2001), http://www.cwsl.edu/main/default.asp?nav=news.asp&body=news/2001_03_15.asp (last visited Feb. 6, 2003) [hereinafter Press Release, California Western School of Law]. *See generally* Robert Salladay & Christopher Heredia, *Domestic Partners’ Benefits Boosted: State Adds Health Care and Adoption Rights*, S.F. CHRON., Oct. 15, 2001, at A1.

4. Assemb. B. 25, 2000–01 Leg., Reg. Sess. (Cal. 2001); *see also* CAL. FAM. CODE § 297(b)(6) (West Supp. 2003).

5. *See* Assemb. B. 25.

6. *See* discussion *infra* Part II.A–B.

7. *See* discussion *infra* Part III.

8. For the purposes of this Comment, unless otherwise noted, the terms “elderly,” “senior citizen” and “retirement age” refer to individuals over age sixty-two because an individual at that age becomes eligible to be a partner in a California opposite-sex domestic partnership. CAL. FAM. CODE § 297(b)(6). The Author notes that the use of these terms to refer to sixty-two year olds is likely outdated with respect to general trends of retirement and lifespan.

whereas the earlier version had required that *both* members of an opposite-sex couple be over age sixty-two.⁹

Part IV examines the legislative history of AB 25 in search of a policy behind expansion.¹⁰ In light of the absence of a stated policy to support expansion, and in light of a lack of printed discussions at hearings on the topic, Part V analyzes three possible purposes behind expanding eligibility for domestic partnerships.¹¹

This Comment concludes that a single concrete policy behind expansion cannot be identified, but offers suggestions to Californians and the California Legislature regarding the likely purpose behind expansion. Furthermore, the likely policies that support expansion of eligibility to a still limited class of opposite-sex couples are problematic. To carve out a remedy for a class of persons who are legally ineligible to marry may be a legitimate policy and goal. To then incrementally add the eligibility of persons who can marry, however, indicates a different purpose altogether and raises concerns about the legitimacy of the proffered policy.

Additionally, the Author hopes that the following discussion may provide some guidance to states that consider following California's domestic partnership model by recommending that a clear policy behind eligibility be adopted and defended.

II. WHAT DOMESTIC PARTNERSHIP OFFERS AND TO WHOM

Authored by Assemblywoman Carole Migden and given effect on January 1, 2002,¹² AB 25 offers expressly delineated civic rights to domestic partners who qualify under the terms of the statute and who register with the California Secretary of State.¹³ This Part discusses the details of the bill, the substantive rights offered, and the couples who are eligible to register as domestic partners.

A. *Whose Rights? Those Eligible to Register as Domestic Partners*

Domestic partners are defined as “two adults who have chosen to share one another’s lives in an intimate and committed relationship of

9. See discussion *infra* Part II.A.

10. See discussion *infra* Part IV.

11. See discussion *infra* Part V.

12. Assemb. B. 25, 2000–01 Leg., Reg. Sess. (Cal. 2001).

13. See Assemb. B. 25; see also CAL. FAM. CODE § 297(b)(9).

mutual caring.”¹⁴ This definition immediately presents problems with factual determination. Precisely, what is a “committed relationship of mutual caring”?¹⁵ An answer to that question, to the extent one exists, may be provided by the structure and language of the other statutory requirements. A domestic partnership is deemed to satisfy this initially vague definition when the couple qualifies to be registered as a domestic partnership by satisfying all of nine requirements that follow in the next subsection of the statute.¹⁶

Potential domestic partners must share a common residence¹⁷ and agree to be jointly responsible¹⁸ for each other’s basic living expenses¹⁹ during the partnership.²⁰ Neither person may be married nor a member of another domestic partnership, and the two may not be related by blood to a degree that would prevent them from marrying in California.²¹ Both persons must be at least eighteen years of age, must be capable of consenting to the partnership, and neither may have previously filed a Declaration of Domestic Partnership that has not been officially terminated.²² An application for Declaration of Domestic Partnership must be filed with the Secretary of State.²³

The application requires that the partners (1) declare they meet the

14. Assemb. B. 25 § 3 (codified as amended at CAL. FAM. CODE § 297(a)).

15. *Id.*

16. CAL. FAM. CODE § 297(b). The “intimate and committed relationship of mutual caring” definition appears first, in subsection (a) of section 297 of the California Family Code. *Id.* § 297(a). Then, subsection (b) states that “a domestic partnership shall be established” when all nine of the requirements are satisfied. *Id.* § 297(b). The ninth requirement is the filing of registration. *Id.* § 297 (b)(9). Presumably, that final act of registration will create a presumption that the other requirements were met, should a challenge ever ensue.

17. “Common residence” does not require that “the legal right to possess the common residence be in both of [the domestic partners’] names.” *Id.* § 297(c). “Two people have a common residence even if one or both have additional residences. Domestic partners do not cease to have a common residence if one leaves the common residence but intends to return.” *Id.*

18. “Joint responsibility,” as defined in the California Family Code, does not immediately implicate mutual responsibility to third-party creditors. Instead, third parties may be able to rely on this relationship for payments due if, “in extending the credit or providing goods or services, they relied on the existence of the domestic partnership and the agreement of both partners to be jointly responsible for those specific expenses.” *Id.* § 297(e).

19. These expenses include: “shelter, utilities, and all other costs directly related to the maintenance of the common household . . . [or] any other cost, such as medical care, if some or all of the cost is paid as a benefit because a person is another person’s domestic partner.” *Id.* § 297(d).

20. *Id.* § 297(b)(1), (2).

21. *Id.* § 297(b)(3), (4).

22. *Id.* § 297(b)(5), (7), (8).

23. *Id.* § 298.5. For a copy of the Declaration of Domestic Partnership form, see State of California, *Declaration of Domestic Partnership*, <http://www.ss.ca.gov/business/sf/forms/sf-dp1.pdf> (last visited Feb. 6, 2003) [hereinafter *Declaration of DP*].

nine requirements of domestic partnership provided in section 297 of the Family Code; (2) provide a mailing address;²⁴ (3) sign the form with a declaration that “representations herein are true, correct, and contain no material omissions of fact to our best knowledge and belief;”²⁵ and (4) notarize both signatures.²⁶ The registration also requires payment of a fee.²⁷ As of February 2003, the required filing fee is ten dollars.²⁸

Finally, the couple must qualify as one of two classes: either (1) both individuals must be of the same sex or (2) one or both of the individuals must meet the eligibility criteria under Title II²⁹ or Title XVI³⁰ of the Social Security Act and one or both individuals must be over the age of sixty-two.³¹ In short, in an opposite-sex couple, at least one member must be over age sixty-two.

The structure and effect of the bill suggest that, at its essence, the domestic partnership intends to provide civic rights to those who cannot marry. Oddly, though, the domestic partnership model expanded in 2001 to include more couples for whom marriage is currently a lawful option: opposite-sex couples in which only *one* partner is above age sixty-two.³²

The original California domestic partnership legislation, Assembly bill 26,³³ offered partnership status to all same-sex couples and to those opposite-sex couples who were eligible for marriage, only if *both* individuals were (1) over the age of sixty-two and (2) eligible for either old age insurance benefits under Title II of the Social Security Act as defined in 42 U.S.C. § 402(a), or qualified as aged individuals under Title XVI of the Social Security Act as defined in 42 U.S.C. § 1381.³⁴

24. The primary residential address provided on this application form will be publicly available through the secretary of state. 84 Op. Cal. Att’y Gen. 55–56 (2001) (discussing the policies supporting public disclosure, despite some potential for harassment or “social stigma”).

25. *Declaration of DP*, *supra* note 23.

26. CAL. FAM. CODE § 298(c)(4); *see also Declaration of DP*, *supra* note 23.

27. CAL. FAM. CODE § 298(b)(2); *see also Declaration of DP*, *supra* note 23.

28. CAL. CODE REGS. tit. 2, § 21922 (2002); *see also Declaration of DP*, *supra* note 23.

29. 42 U.S.C. § 402(a) (2000).

30. *Id.* § 1381.

31. CAL. FAM. CODE § 297(b)(6).

32. Assemb. B. 25 § 3, 2000–01 Leg., Reg. Sess. (Cal. 2001).

33. Assemb. B. 26, 1999 Leg., Reg. Sess. (Cal. 1999), 1999 Cal. Stat. 588.

34. *Id.*

B. Rights Gained

California AB 25 opens with the statement that domestic partners shall be entitled to “recover for damages for negligent infliction of emotional distress” to the same extent that spouses are so entitled under state law.³⁵ Immediately thereafter, section 2 gives standing to surviving domestic partners in actions of wrongful death or neglect.³⁶ Interestingly, these policy changes are announced before the parameters of a domestic partnership are statutorily defined. This overall statutory structure indicates, in part, the bill’s purpose.

Many Californians, and especially members of same-sex couples, were outraged by the compelling story of Ms. Dianne Whipple and Ms. Sherry Smith. Ms. Whipple, who was killed by two large dogs in the hall outside her San Francisco apartment,³⁷ had been in a long term, committed lesbian relationship with Ms. Smith. Despite the nature of their relationship, Ms. Smith lacked standing to sue for wrongful death.³⁸ If marriage had been a viable option and had they been married, Ms. Smith would have had standing to sue for her partner’s wrongful death. Eventually, Ms. Smith was granted standing by Judge A. James Robertson II, based upon the finding that to deny Ms. Smith’s claim was to deny her equal protection in violation of the California Constitution.³⁹ AB 25 responded to the social realities and legal needs of domestic partners in positions like Dianne Whipple and Sherry Smith.

Within both the San Francisco community and the gay and lesbian community of California, the spark was ignited by this story before the court granted standing.⁴⁰ The substantive rights offered by the 2001 legislation, especially standing for wrongful death and intentional

35. Assemb. B. 25 § 1, 2000–01 Leg., Reg. Sess. (Cal. 2001); *see also* CAL. CIV. CODE § 1714.01 (West Supp. 2003).

36. Assemb. B. 25 § 2; *see also* CAL. CIV. PROC. CODE § 377.60 (West Supp. 2003).

37. *See* Michael Pena et al., *Powerful Dogs Maul Woman, Kill Her, SF Neighbors’ Pets Lunged Down Hallway*, S.F. CHRON., Jan. 27, 2001, at A1.

38. *See* Louise Rafkin, *Marriage: A Privilege or a Right? The Death of a Partner Changed One Woman’s Opinion on the Validity of Gay Marriage*, S.F. CHRON. MAG., Jan. 20, 2002, at 16. The article discusses AB 25 as a response to Ms. Smith’s struggle to gain standing for her wrongful death claim, despite the fact that the initial draft of AB 25, on December 4, 2000, preceded Ms. Whipple’s death by approximately one month. *Compare id.*, with Assemb. B. 25.

39. Order Overruling Defendant’s Demurrer and Denying Defendant’s Motion to Strike at 2, *Smith v. Knoller*, No. 319532 (Cal. Super. Ct., order filed Aug. 9, 2001) (“Plaintiff also asserts that reading the wrongful death statute to exclude her claim denies her equal protection based upon her sexual orientation in violation of Cal. Const., art. I, sec. 7. The court agrees.”), http://www.nclrights.org/publications/pubs/smith_order.pdf (last visited Feb. 6, 2003); *see also* Rafkin, *supra* note 38.

40. *See* Christopher Heredia, *Mauled S.F. Woman’s Partner Files Wrongful Death Lawsuit*, S.F. CHRON., Mar. 13, 2001, at A21.

infliction of emotional distress claims, would subsequently have more passionate and widespread support than ever before.

After the introduction regarding standing for wrongful death suits, the language of AB 25 proceeds to define the domestic partnership and eligible members.⁴¹ Once the scope is defined, the bill then describes other substantive rights and obligations. The California Family Code is amended to allow a domestic partner to file for adoption of a partner's child.⁴² The California Government Code now provides that a domestic partner, a child of a domestic partner, and a surviving domestic partner will each be considered a family member for certain purposes of the Code.⁴³ Additionally, the Government Code is amended to extend certain spousal benefits to domestic partners who have been registered with the state for at least a year prior to a partner's retirement or death prior to retirement.⁴⁴ All of these changes reflect a general desire to address the needs of the changing face of the California family.

As of January 1, 2002, the California Insurance Code and the Health and Safety Code both provide that domestic partners are eligible for coverage under an employee's healthcare service plan offering medical, hospital, surgical, or expense benefits.⁴⁵ That coverage may be terminated, however, if the partnership is terminated.⁴⁶ Employees are also now authorized to take sick leave to attend to the illness of a domestic partner or the child of a domestic partner.⁴⁷ The employee-related benefits are extensions of the initial domestic partnership model, first developed by employers and municipalities.⁴⁸

Changes to the California Probate Code are substantial.⁴⁹ Property rights, however, are not affected by AB 25, and rights to inherit by intestacy, while initially included as part of AB 25, were eventually removed.⁵⁰ California's intestacy scheme extends to domestic partnerships

41. See discussion *supra* Part II.A.

42. Assemb. B. 25 § 5, 2000–01 Leg., Reg. Sess. (Cal. 2001) (codified as amended at CAL. FAM. CODE § 9000 (West Supp. 2003)).

43. *Id.* § 9 (codified as amended at CAL. GOV'T CODE § 22871.2 (West Supp. 2003)).

44. *Id.* § 9.5 (codified as amended at CAL. GOV'T CODE § 31780.2).

45. *Id.* §§ 10–11 (codified as amended at CAL. HEALTH & SAFETY CODE § 1374.58 (West Supp. 2003); CAL. INS. CODE § 10121.7 (West Supp. 2003)).

46. *Id.*

47. *Id.* § 12 (codified as amended at CAL. LAB. CODE § 233(a) (West Supp. 2003)).

48. See *infra* notes 69–88 and accompanying text.

49. See generally Assemb. B. 25 §§ 13–55.

50. Compare *id.* § 4 (codified as amended at CAL. FAM. CODE § 299.5 (West Supp.

by virtue of Assembly bill 2216, approved on September 10, 2002.⁵¹ Effective July 1, 2003, a surviving domestic partner gains the same intestate share as a surviving spouse.⁵²

Much as the compelling story of Ms. Whipple and Ms. Smith spurred legal recognition of same-sex partners, the tragedy of September eleventh encouraged this addition to the domestic partnership scheme. One of the flight attendants on American Airlines flight eleven, Mr. Jeff Collman, lost his life when the plane crashed into the World Trade Center.⁵³ Mr. Collman was survived by his life partner of eleven years, Mr. Keith Bradkowski. The couple believed, at the time of its creation, that their domestic partnership status included intestacy rights.⁵⁴ In the wake of publication surrounding their story, AB 2216 was enacted, adding to the rights earlier guaranteed by AB 25.⁵⁵

Changes to the probate scheme offered by AB 25 include that domestic partners are now entitled to notice of petition for conservatorship.⁵⁶ Domestic partners may also nominate conservators.⁵⁷ Domestic partners will be preferred as proposed conservators and administrators, equating treatment to that of spouses.⁵⁸ Petitions to terminate a conservatorship, for transfer, for appointment of successor conservator, or for court order, may be filed by a domestic partner.⁵⁹ Domestic partners may authorize and receive payments from the surplus income of the estate upon petition or to cover basic living expenses of the domestic partner.⁶⁰ Finally, the revised Probate Code reflects that an incapacitated patient's domestic partner will have the same authority to make healthcare decisions as would a spouse.⁶¹

Additional amendments allow domestic partners a California state tax deduction for certain medical and healthcare expenses.⁶² Under the

2003)), *with* Assem. B. 25 § 2 (as introduced).

51. Assemb. B. 2216, 2001–02 Leg., Reg. Sess. (Cal. 2002) (codified as amended at CAL. PROB. CODE §§ 6401–6402 (West Supp. 2003) (effective July 1, 2003)).

52. *Id.*

53. *Gay Partner of 9/11 Victim and Lambda Legal Lawyer to Attend Signing of Bill Providing Inheritance Rights to Domestic Partners* (Sept. 10, 2002), at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1139> (last visited Feb. 6, 2003).

54. *Id.*

55. *Id.*

56. Assemb. B. 25 § 14, 2000–01 Leg., Reg. Sess. (Cal. 2001) (codified as amended at CAL. PROB. CODE § 1460 (West 2002)).

57. *Id.* § 15 (codified as amended at CAL. PROB. CODE § 1811).

58. *Id.* § 16 (codified as amended at CAL. PROB. CODE § 1812).

59. *Id.* § 16.5 (codified as amended at CAL. PROB. CODE § 1813.1).

60. *Id.* § 34 (codified as amended at CAL. PROB. CODE § 2423).

61. *Id.* § 49 (codified as amended at CAL. PROB. CODE § 4716 (West Supp. 2003)).

62. *Id.* § 56 (codified as amended at CAL. REV. & TAX. CODE § 17021.7 (West Supp. 2003)).

California Unemployment Code, good cause is established if an employee leaves work voluntarily to accompany a domestic partner to a new location from which it is impractical to commute.⁶³ Individuals eligible for disability benefits may have a claim filed on their behalf by a domestic partner if the individual is mentally incapable of making the claim.⁶⁴

All of the above changes to California law make AB 25 one of the more aggressive legislative efforts to add rights to domestic partnerships of various types.⁶⁵ Although there are certainly couples for whom such rights will be a welcome improvement, the statutory creations are not without challenges and potential problems.

Some members of the California Assembly have argued that such legislation is simply wrong or ill-advised because it begins to undermine the legal rights of marriage.⁶⁶ Others have asserted that the bill has not gone far enough: either in recognizing same-sex couples who are committed to one another for life and justifiably expect state recognition of their relationship, or in providing state-sanctioned rights and

[Domestic partners] shall be treated as the spouse of the taxpayer for the purposes of applying only Sections 105(b) [amounts received under accident and health plans], 106(a) [contributions by employer to accident and health plans], 162(l) [health insurance costs of self-employed individuals], 162(n) [trade or business expenses for certain group health plans], and 213(a) [deductions for medical and dental expenses] of the Internal Revenue Code and for purposes of determining whether an individual is the taxpayer's "dependant" or "member of their family" as these terms are used in those sections.

Id.

63. *Id.* § 58 (codified as amended at CAL. UNEMP. INS. CODE § 1032(c) (West Supp. 2003)).

64. *Id.* § 60 (codified as amended at CAL. UNEMP. INS. CODE § 2705.1).

65. Letter from Gray Davis, *supra* note 1. Compare Assemb. B. 25, with 1997 Haw. Sess. Laws 383. The California scheme may be described as an aggressive legislative effort, in the sense that only three states currently offer statewide recognition of domestic partnerships, including Vermont, which offers the civil union. See discussion *supra* Part III.C.

66. See Press Release, California State Assembly Republican Caucus, Domestic Partners Bill Moves to Governor: "Marriage Rights Are Only for a Man and a Woman," Says Hollingsworth (Sept. 12, 2001), <http://republican.assembly.ca.gov/members/66/PressRelease3750.html> (last visited Nov. 20, 2002) (on file with author); Press Release, California State Assembly Republican Caucus, Wyman Opposes Legislation Undermining Marriage: Wyman Calls Upon Governor Davis to Protect Marriage Between a Man and a Woman (Sept. 12, 2001), available at <http://republican.assembly.ca.gov/members/34/PressRelease3778.html> (last visited Nov. 20, 2002) (on file with author); see also Jenifer Warren, *Bill Expanding Domestic Partners' Rights Signed*, L.A. TIMES, Oct. 15, 2001, at B6.

responsibilities.⁶⁷ Most likely, Californians will similarly respond by dividing into these two camps. Although either perspective might be defended, it remains unclear why the legislature has made the changes that it has. Significant changes to substantive law have not clarified the motivating force for a statutory exception to marriage that includes same-sex couples and only those opposite-sex couples in which one individual is over age sixty-two.

III. BACKGROUND IN CALIFORNIA AND COMPARATIVE MODELS

In order to understand the origin, purpose, and effect of domestic partnership laws, some comparison to the various other domestic partnership models is required. Although this Comment does not attempt exhaustive survey of legislation or case law in other jurisdictions, a thorough critique of California's legislative model and its challenges must include an exposition of the statute's development and a basic comparison to the models in other states and jurisdictions.⁶⁸

A. Municipalities and Employers

The California domestic partnership emerged initially from municipal ordinances, rather than from statewide action.⁶⁹ Many state constitutions provide latitude for municipalities to offer substantive rights to same-sex couples, even though statewide legislation declines to guarantee those same protections.⁷⁰ Throughout California, cities recognized domestic

67. On January 28, 2003, Assembly bill 205 was read for the first time and proposed to enact the California Domestic Partner Rights and Responsibilities Act of 2003. Assemb. B. 205, 2003-04 Leg., Reg. Sess. (Cal. 2003). If enacted, it would extend to domestic partners the rights and responsibilities of marriage as of January 1, 2005. *Id.* More importantly, this bill reinforces that the driving policy behind domestic partnerships has little or nothing to do with senior citizens, rather much or everything to do with same-sex couples. *Id.* § 1(8)(J)(11)-(12) (discussing equal protection and sex discrimination as reasons to expand rights and responsibilities to domestic partners, even though the current scheme excludes only certain opposite-sex couples). For an example of popular reaction to AB 25's progress as insufficient, see Press Release, People For the American Way, California Takes Two Steps Forward (Oct. 19, 2001), <http://www.pfaw.org/pfaw/general/default.aspx?oid=1887> (last visited Feb. 6, 2003).

68. For a discussion of Canada's current treatment of same-sex partners and emerging family relationships, see generally Nicole LaViolette, *Waiting in a New Line at City Hall: Registered Partnerships as an Option for Relationship Recognition Reform in Canada*, 19 CAN. J. FAM. L. 115 (2002).

69. See Sanford N. Katz, *Emerging Models for Alternatives to Marriage*, 33 FAM. L.Q. 663, 668-75 (1999); see also Heidi Eischen, *For Better or Worse: An Analysis of Recent Challenges to Domestic Partner Benefits Legislation*, 31 TOL. L. REV. 527, 530-31 (2000).

70. See Katz, *supra* note 69, at 669 (citing Vada Berger, *Domestic Partnership Initiatives*, 40 DEPAUL L. REV. 417, 437 (1991)); see, e.g., MASS. GEN. LAWS ch. 43B, § 13 (2000 & Supp. 2002).

partnerships in an effort to provide substantive rights to the nontraditional families of workers.⁷¹

Cities in other states also offer municipal domestic partnerships.⁷² For example, in 1989, the city of New York recognized domestic partnerships by executive order of then-Mayor Edward Koch.⁷³ In 1998, then-Mayor Giuliani expanded the initial Domestic Partnership Registry.⁷⁴

The New York City domestic partnership model requires only that (1) both partners be residents of the city of New York or that one be an employee of the city; (2) both are over age eighteen; (3) neither partner is married; (4) neither is, or has recently been, party to another domestic partnership; (5) the partners are not related to one another in a manner that would bar marriage in the state of New York; and (6) the “persons have a close and committed personal relationship, live together and have been living together on a continuous basis.”⁷⁵

The New York model differs from California’s, most significantly, in that gender is not mentioned at all in the New York City model.⁷⁶ Therefore, there is no limitation on opposite-sex couples’ eligibility, provided the partners are not closely related.⁷⁷ Although California’s model also contains a limitation on blood relation, the California

71. Cities in California that offered a local ordinance recognizing domestic partnerships and offering registration include: San Francisco, Berkeley, Laguna Beach, Long Beach, Los Angeles, Oakland, Palo Alto, Sacramento, Santa Barbara, and West Hollywood. Katz, *supra* note 69, at 669–70. The first city to pass a domestic partnership ordinance was Berkeley, California in 1984. Debbie Zielinski, *Domestic Partnerships Benefits: Why Not Offer Them to Same-Sex Partners and Unmarried Opposite Sex Partners?*, 13 J.L. & HEALTH 281, 290 (1998–99).

72. See, e.g., N.Y. CITY ADMIN. CODE § 3-241 (2001); BOSTON, MASS. PUB. HEALTH & WELFARE ORDINANCE ch. 12-9A.1 (1993).

73. René M. Scire & Christopher A. Raimondi, *Employment Benefits: Will Your Significant Other Be Covered?*, 17 HOFSTRA LAB. & EMP. L.J. 357, 362 (2000).

74. N.Y. CITY ADMIN. CODE § 3-241. Press Release, Rudolph W. Giuliani, Mayor Giuliani Signs Landmark Domestic Partnership Legislation (July 7, 1998), <http://www.ci.nyc.ny.us/html/om/html/98b/pr319-98.html> (last visited Feb. 6, 2003) [hereinafter Press Release, Rudolph W. Giuliani]. The city’s recognition of domestic partnerships was affirmed after a taxpayer challenge in *Slattery v. City of New York*, 697 N.Y.S.2d 603 (N.Y. App. Div. 1999).

75. N.Y. CITY ADMIN. CODE § 3-241.

76. *Id.* In support of the New York City domestic partnership legislation, Mayor Giuliani praised the importance of the registration, in part, because of its wide applicability. “As of April 1998, there were approximately 8,700 couples registered as domestic partners in New York City. More than 55 percent . . . were heterosexual couples, and less than 45 percent were same sex couples.” Press Release, Rudolph W. Giuliani, *supra* note 74.

77. See N.Y. CITY ADMIN. CODE § 3-241.

eligibility requirements focus on the gender of the partners.⁷⁸

The city of Cambridge led the way in Massachusetts, offering a domestic partnership registration in 1992.⁷⁹ Boston followed a year later.⁸⁰ In 1998, although an expanded domestic partnership bill passed in the Massachusetts House and Senate, the Governor vetoed the bill.⁸¹ Portions of Massachusetts municipal ordinances were successfully challenged in *Connors v. City of Boston*, which limited the use of public funds to pay benefits.⁸² However, the crusade for Massachusetts's domestic partnerships had begun.

The 2001 Massachusetts Legislature considered a bill that would have given statewide effect to the domestic partnership legislation that emerged from Cambridge and Boston.⁸³ The Massachusetts approach largely approximated the New York City model, in that it requires for eligibility that partners (1) share a residence and financial expenses; (2) be over age eighteen and competent; (3) are not related by blood to a degree closer than would bar marriage in Massachusetts; (4) are not married to another; (5) reside together as exclusive partners; and (6) are in a relationship of "mutual support, caring and commitment."⁸⁴

In addition to the efforts of cities to protect citizens and families, employers recognized and offered benefits to couples who had made a long-term commitment.⁸⁵ The crucial role that employment benefits play in the American family has led many employers to offer nonspousal benefits to domestic couples of any gender.⁸⁶ After cities and employers led the way for the recognition of nontraditional couples, the states followed in an attempt to provide statutory recognition and relief to modern families.

78. CAL. FAM. CODE § 297(b)(6)(A) (West Supp. 2003).

79. CAMBRIDGE, MASS., MUNICIPAL CODE ch. 2.119 (1992).

80. BOSTON, MASS., PUBLIC HEALTH & WELFARE ORDINANCE ch. 12-9A (1993).

81. See Tatsha Robertson, *Edict Expected on Partner Benefits; Mayor's Order Would Bypass Critics, Expand Coverage for Gay Families*, BOSTON GLOBE, Aug. 4, 1998, at B1.

82. *Connors v. City of Boston*, 714 N.E.2d 335 (Mass. 1999). The court found that the mayoral executive order was inconsistent with state insurance law. *Id.* at 339.

83. S.B. 2123, 2001 Leg., Reg. Sess. (Mass. 2001). The Massachusetts House Ways and Means Committee is currently reviewing the text of S.B. 2123. This proposed version of the bill, if passed, would resemble the current Boston and New York City models in terms of eligibility requirements. *Id.*

84. *Id.* § 2(d 1/2).

85. M.R. Carrillo-Heian, *Domestic Partnership in California: Is It a Step Toward Marriage?*, 31 MCGEORGE L. REV. 475, 481-82 (1999). For a discussion of how California municipalities and employers responded to the demand for equal benefits in the emerging definition of family by recognizing domestic partnerships, see Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1280-81 (2001).

86. See Blumberg, *supra* note 85, at 1282-92.

California's original domestic partnership status emerged in 2000.⁸⁷ The substantive rights offered to registered couples through this model differ from the models of other states. For the purposes of this Comment, the crucial comparison is less the rights available after registration and more the eligibility requirements preceding it. Therefore, a brief comparison of California's current domestic partnership to other states' recognition of same-sex and nontraditional couples follows.⁸⁸

B. Hawaii's Reciprocal Beneficiaries

Hawaii preceded California in state recognition of same-sex couples and nontraditional families. The Reciprocal Beneficiary Statute was enacted in 1997, allowing same-sex and certain other couples to register as state recognized partnerships.⁸⁹

Like California, the Hawaii model did not begin with reference specifically to same-sex couples. Rather, the Hawaii Intermediate Court of Appeals began in the early 1980s to address the changing face of the family in several crucial divorce decisions amidst the move to no-fault divorce.⁹⁰ The partnership model suggested that marriage was similar to a business partnership, in which both parties have rights and obligations and work towards joint contributions.⁹¹

In the 1990s, three same-sex couples filed suit in Hawaii state court alleging that denial of their marriage request violated their privacy and equal protection rights as guaranteed by the Hawaii Constitution.⁹² The

87. See generally Assemb. B. 26, 1999 Leg., Reg. Sess. (Cal. 1999).

88. Arizona is currently considering the enactment of a domestic partnership statute, although it did not previously offer that status through city ordinances. H.B. 2301, 45th Leg., 2d Reg. Sess. (Ariz. 2002), available at <http://www.azleg.state.az.us/legtext/45leg/2r/bills/hb2301p.htm> (last visited Feb. 15, 2003); H.B. 2309, 45th Leg., 2d Reg. Sess. (Ariz. 2002), available at <http://www.azleg.state.az.us/legtext/45leg/2r/bills/hb2309p.htm> (last visited Feb. 15, 2003). Discussion of these bills is omitted from the comparison, due to their recent sponsorship and support. Should they pass in their proposed form, the Arizona scheme would depart from California's in that there is no mention of the genders of the respective partners, but would approximate the California scheme in its exclusion of close blood relatives and requirements for a committed relationship intended to "last forever." *Id.*

89. HAW. REV. STAT. § 572C-5 (2001).

90. Calvin G.C. Pang, *Slow-Baked, Flash-Fried, Not to Be Devoured: Development of the Partnership Model of Property Division in Hawai'i and Beyond*, 20 U. HAW. L. REV. 1, 4-5 (1998).

91. *Id.* at 2-3 (citing Amy Kastely, *An Essay in Family Law: Property Division, Alimony, Child Support, and Child Custody*, 6 U. HAW. L. REV. 381, 390-91 (1984)).

92. Baehr v. Lewin, 852 P.2d 44, 49-50 (Haw. 1993).

Hawaii Supreme Court in *Baehr v. Lewin*, found that the couples' inability to obtain a marriage license was discrimination on the basis of sex, and the court remanded for hearings on whether the marriage license law furthered a compelling interest and was narrowly tailored.⁹³ Although the state could not meet its burden of proving a state interest in the refusal to recognize same-sex couples, any recognition of same-sex marriages was halted by an ballot initiative restricting marriages to opposite-sex couples.⁹⁴

Language from the partnership models of the 1980s was revisited and allowed a wider lens through which family relationships would be viewed in Hawaii.⁹⁵ The initial 1997 legislation to create reciprocal beneficiaries emerged from this developing understanding of marriage and family: "[T]he legislature concurrently acknowledges that there are many individuals who have significant personal, emotional, and economic relationships with another individual yet are prohibited by such legal restrictions from marrying."⁹⁶ Specifically named as intended beneficiaries, then, are "a widowed mother and her unmarried son" or a same-sex couple.⁹⁷

Like the California domestic partnership statute, Hawaii limits the rights and benefits extended to same-sex couples within the statutory construction. "[T]he rights and benefits extended by this Act shall be narrowly interpreted and nothing in this Act shall be construed nor implied to create or extend rights or benefits not specifically provided herein."⁹⁸

Substantively, Hawaii's reciprocal beneficiary status offers similar benefits to the California scheme. Like California, Hawaii offers

93. *Id.* at 67.

94. Jeffery Hubins, *Proposition 22: Veiled Discrimination or Sound Constitutional Law?*, 23 WHITTIER L. REV. 239, 248 (2001).

95. Following *Baehr* and its effects, a similar effort began in Alaska. *See generally* Brause v. Bureau of Vital Statistics, 21 P.3d 357, 357–58 (Alaska 2001) (holding that the controversy was not ripe for adjudication when a same-sex couple challenged ineligibility for marriage on federal and state constitutional grounds). Unlike Hawaii, however, Alaska did not respond to that litigation with an attempt to allow a statutory alternative to marriage for same-sex couples. Instead, a constitutional amendment was proposed and later passed limiting marriage as only between a man and a woman. *See* Kevin G. Clarkson et al., *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 ALASKA L. REV. 213, 217–19 (1999). For a discussion of that amendment, *see id.* at 246–68. In comparison, California voters passed proposition 22, a state defense of marriage act, that limited the definition of marriage between a man and a woman. CAL. FAM. CODE § 308.5 (West Supp. 2003). However, the California Legislature evidently remained open to alternative, statutory methods of recognizing and providing benefits to same-sex couples. *See generally* Assemb. B. 25, 2000–01 Leg., Reg. Sess. (Cal. 2001); Assemb. B. 26, 1999–2000 Leg., Reg. Sess. (Cal. 1999).

96. HAW. REV. STAT. § 572C-2 (Supp. 2001).

97. *Id.*

98. *Id.* § 572C-1, editor's note (quoting 1997 Haw. Sess. Laws 383, § 74).

benefits in employment,⁹⁹ insurance,¹⁰⁰ taxation,¹⁰¹ hospital visitation and health care protection,¹⁰² probate,¹⁰³ and standing for tort claims.¹⁰⁴ In addition to these common benefits, Hawaii offers additional rights to same-sex couples beyond California's model, including social services, limited property rights, and eligibility for loans.¹⁰⁵ The Supreme Court of Hawaii recently expanded tort claims for reciprocal beneficiaries to include a cause of action for negligent handling of a corpse or preparation for crematory services.¹⁰⁶

Hawaii and California share similarities in their statutory approaches to the recognition of same-sex couples, especially with respect to the substantive rights conferred upon formation of either the reciprocal beneficiary or the domestic partnership. The greatest distinction between the two models lies in the definition and scope of eligibility.

Hawaii's reciprocal beneficiary status openly states its purpose: to provide a statutory remedy to those couples who cannot marry.¹⁰⁷ Necessarily, the statutory alternative to marriage includes opposite-sex couples, provided they are "legally prohibited from marrying under state law."¹⁰⁸ The purpose of the reciprocal beneficiary, then, differs quite markedly from California's domestic partnership. While Hawaii seeks to provide statutory relief to families¹⁰⁹ by including a grandmother and grandson living together within the scope of eligibility, California, on

99. HAW. REV. STAT. §§ 83-8, 87-23.5, 386-34, 388-4 (Supp. 2001); HAW. REV. STAT. ch. 88 (Supp. 2001).

100. *Id.* §§ 431-432. For further discussion of the insurance rights affected by the reciprocal beneficiary status, see Op. Haw. Att'y Gen. 97-05 (Aug. 14, 1997), http://www.state.hi.us/ag/opinions_formal_letters/9705.htm (last visited Feb. 6, 2003); Op. Haw. Att'y Gen. 97-10 (Dec. 2, 1997), http://www.state.hi.us/ag/opinions_formal_letters/9710.htm (last visited Feb. 6, 2003).

101. HAW. REV. STAT. § 247-3 (Supp. 2001).

102. *Id.* §§ 323-2, 324-22, 327-3, 334-6, 334-59, 334-60.4, 334.60.5 (Supp. 2001).

103. *Id.* at ch. 560.

104. *Id.* § 663-1.

105. See 1997 Haw. Sess. Laws 383.

106. Guth v. Freeland, 28 P.3d 982, 990 (Haw. 2001).

107. HAW. REV. STAT. § 572C-1 ("The purpose of this chapter is to extend certain rights and benefits which are presently available only to married couples to couples composed of two individuals who are legally prohibited from marrying under state law.").

108. *Id.*

109. For a discussion of how health insurance coverage is affected by reciprocal beneficiary's use of "family" (as opposed to "couple"), see Op. Haw. Att'y Gen. 97-10, (Dec. 2, 1997), http://www.state.hi.us/ag/opinions_formal_letters/9710.htm (last visited Feb. 6, 2003).

the other hand, offers domestic partnership to romantic rather than blood-related couples.¹¹⁰

The reciprocal beneficiary model examines eligibility primarily upon family structure.¹¹¹ The California domestic partnership, as currently defined, focuses upon the quality of a couple's relationship.¹¹² Hawaii has made clear its policy on advancing the state recognition and support of nontraditional families, which include blood-related, nonromantic arrangements, through the Reciprocal Beneficiary Statute and earlier legislation.¹¹³ The policy, if one exists, that drives California's domestic partnership remains murky.

C. Vermont's Civil Unions¹¹⁴

Vermont officially recognized a civil union for same-sex couples in April of 2000.¹¹⁵ Same-sex couples who enter a civil union are entitled to the same benefits and responsibilities that exist for married couples under Vermont law.¹¹⁶ The enactment of the civil union laws reflected an understanding that discrimination against same-sex couples would not reflect the purposes of the state's family law.¹¹⁷

Unlike the California domestic partnership scheme, Vermont law offers registered same-sex partners essentially the same state recognition as is offered to traditional marriages, due to the civil union's grounding in the Vermont Constitution. Relying upon the doctrine that states are free to offer greater protection to residents than is offered by the federal Constitution, the Vermont state court found that the Vermont Common Benefits Clause prevented same-sex couples from being "deprived of the statutory benefits and protections afforded persons of the opposite sex

110. CAL. FAM. CODE § 297(a) (West Supp. 2003).

111. HAW. REV. STAT. § 572C-1.

112. Compare *id.*, with HAW. REV. STAT. §§ 572C-1, 572C-4 (Supp. 2000). California's unique approach to defining and identifying a family or couple by the quality of the relationship is problematic at best. Although beyond the scope of this Comment, the statute begs the question: should all couples and families be evaluated for their "mutual caring" or the degree of their commitment? If so, the Author respectfully suggests that many married couples might fall short of the standard.

113. See *supra* notes 95–97, 107–10 and accompanying text.

114. An exhaustive study of the civil union or marriage alternative as recognized in Vermont is beyond the scope of this Comment.

115. 2000 Vt. Acts & Resolves H. 847, § 3 (codified as amended at VT. STAT. ANN. tit. 15, § 1201 (2002)).

116. *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999) (relying upon the Common Benefits Clause of the Vermont Constitution).

117. William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions: The 2000 Edward C. Sobota Lecture*, 64 ALB. L. REV. 853, 859 (2001).

who choose to marry.”¹¹⁸ Thus, state constitutional principles, in addition to legislative intent, provide the groundwork and support for statutory provisions for the Vermont civil union, adopted in 1999.¹¹⁹ The recently adopted California domestic partnership scheme, however, relies entirely upon legislative efforts.¹²⁰ California domestic partners cannot rely, at this time, upon California state constitutional recognition or protection.

Some critics of the Vermont approach have debated the theoretical differences between traditional marriage and civil unions in Vermont. Opponents of the civil unions generally fall into two main groups. One group opposes same-sex unions on traditional moral grounds with concerns of state-sanctioned homosexuality. The other group objects that the law has created a “separate but equal” status for same-sex partnerships that further separates them from “full legal equality.”¹²¹ Both reactions in Vermont have relevance for the California domestic partnership.

Opponents of the legal recognition of same-sex couples have tended to raise sufficient rancor that California legislation may have innocuously included opposite-sex couples within the scope of domestic partnership to avert criticism.¹²² On the other end of the spectrum are those who would object to any recognition of same-sex couples that falls short of marriage. To this group, the California domestic partnership is a failed remedy, if not an insult.¹²³

Regardless of popular response, the Vermont law does offer the most expansive and complete rights to same-sex couples currently offered by any state. In that sense, Vermont offers a model to emerging California law of one possible route for the development of same-sex couples’ rights.

Like Hawaii, Vermont has faced no onslaught of case law in the wake of enacting the civil union recognition. In fact, the Vermont Supreme

118. *Baker*, 744 A.2d at 867.

119. *See id.*; *see also* VT. STAT. ANN. tit. 15, §§ 1201–1207 (2002).

120. No California constitutional litigation preceded the legislature’s initiation of domestic partnerships or the adoption of section 297 of the California Family Code.

121. Eskridge, *supra* note 117, at 853.

122. *See infra* notes 174–86 and accompanying text.

123. *See* Andrew Sullivan, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, in BEYOND QUEER: CHALLENGING GAY LEFT ORTHODOXY 252, 254–55 (Bruce Bawer ed., 1996).

Court has offered few opinions on the subject,¹²⁴ indicating that problems with statutory interpretation have not yet been encountered, if they will be at all.

California will likely face further comparison to Vermont's civil union structure. In 2001, Assemblyman Paul Koretz introduced Assembly bill 1338 in California that would authorize civil unions, like those existing in Vermont.¹²⁵ Efforts to equate the rights and responsibilities of married couples to same-sex couples continue today. Assembly bill 205, introduced in January of 2003, would grant rights to same-sex partners equivalent to those of married couples.¹²⁶

IV. LEGISLATIVE HISTORY

Despite substantive differences in the various states' approaches to recognizing domestic partnerships, certainly the most glaring difference in California's scheme is the inclusion of, and restriction on, opposite-sex couples. What policy lies behind California's initial inclusion of opposite-sex couples and then expansion of the statute's application to more opposite-sex couples?

While the debate over how and when to recognize same-sex couples rages on, California complicates the relevant policy with an additional factor. Does the California approach avoid the potential equal protection argument against a statute that only recognizes one type of couple? Or, instead, does it dilute the progress and efforts of same-sex couples to gain social and political rights and recognition? The historical development of the statutory scheme sheds light on these questions.

The domestic partnership began with the first reading of AB 26 in December of 1998.¹²⁷ As introduced, the bill defined domestic partnerships with the same broad language that later versions continued to use.¹²⁸ Requirements followed that initial definition, but nowhere in either the

124. *Brady v. Dean*, 790 A.2d 428, 433–35 (Vt. 2001) (finding that the plaintiff town clerks failed to show that the civil union law substantially burdened their religious beliefs and upholding dismissal of their state constitutional challenge); *Baker*, 744 A.2d at 864.

125. Assemblyman Koretz sponsored the bill to introduce civil unions in California, then pulled the bill in mid-2001. Assemb. B. 1338, 2001 Leg., 2001–02 Sess. (Cal. 2001). The civil union effort died immediately on February 7, 2002, pursuant to article IV, section 10(c) of the California Constitution. *Id.*; CAL. CONST. art. IV § 10(c).

126. Assemb. B. 205, 2003–04 Leg., Reg. Sess. (Cal. 2003).

127. Assemb. B. 26, 1999 Leg., 1999–2000 Sess. (Cal. 1999) (as introduced Dec. 7, 1998) (proposing to offer only two substantive rights: (1) allowing health facility visitation and (2) providing eligibility for employer-provided health care and disability insurance).

128. Assemb. B. 26 § 1 (“Domestic partners are two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.”).

broad definition or the required elements was there any mention of gender.¹²⁹ Thus, any two people, of any major age or any gender, would have been eligible to register as domestic partners under the initial drafting.¹³⁰

The Assembly Committee on Health commented that the purpose of defining the domestic partnership as the bill's author had done was twofold. First, the problems of health insurance and visitation were "particularly acute for same sex couples whose relationships are not currently recognized under existing law."¹³¹ Second, those problems were shared by "elderly couples who form committed and exclusive relationships."¹³²

The Committee's comment gives no further explanation. The lurking question remains: Why do the problems of healthcare insurance and health facility visitation affect elderly opposite-sex couples more than nonelderly opposite-sex couples? Granted, the use of healthcare may increase with age. But age is not necessarily relevant to how much patients value visitation and coverage rights. Other factors, such as prognosis, length of hospitalization, socioeconomic status, and social support are far more salient. More importantly, the Health Committee's comment discusses the limited group of elderly couples, while the applicable draft of the bill makes no such limitation.¹³³ This disconnect indicates the trouble that California will have both in delineating domestic partnership eligibility and also in providing support for that choice.

The bill's legislative history catalogued amendments and recommendations to the proffered substantive rights. Alongside substantive fine-tuning, the debate over eligibility continued. A July 1999 comment by the

129. All requirements, other than the gender of the couples, remain substantially the same in all versions of the domestic partnership status. Occasionally, there has been some change in the definition of a term, such as "have a common residence." *Compare* Assemb. B. 26 (as introduced), *with* Assemb. B. 26 (as chaptered) *and* Assemb. B. 25 (as chaptered).

130. At no time in any draft did the eligibility requirements permit blood relatives who were forbidden by law to marry to enter a domestic partnership.

131. *Domestic Partnerships; Health Insurance: Hearing on AB 26 Before the Assembly Comm. on Health*, 1999–2000 Leg., Reg. Sess. (Cal. 1999) (bill analysis commenting on purpose of legislation), http://www.leginfo.ca.gov/pub/9900/bill/asm/ab_0001-0050/ab_26_cfa_19990412_144347_asm_comm.html (last visited Feb. 6, 2003) [hereinafter *Hearing on AB 26*].

132. *Id.*

133. *Compare id.*, *with* Assemb. B. 25, 2000–01 Leg., Reg. Sess. (Cal. 2001).

Senate Judiciary Committee jumped the gun and assumed that problems with domestic partnership had been remedied as of that draft.¹³⁴ In reference to previous legislation that was vetoed by Governor Wilson,¹³⁵ the Committee noted that prior problems included lack of definition.¹³⁶ While true that by the summer of 1999, clear requirements existed for eligibility to the domestic partnership, the legislature was still struggling with the most basic questions: to whom would these rights be available, and why would certain couples be included or excluded?

The Senate Judiciary Committee further commented that multiple bills introduced during the 1999–2000 session had attempted to address the changing face of the California family.¹³⁷ The problem, it seems in retrospect, may be that the legislature is not clear on what it or Californians are willing to recognize as a family. While the elected representatives might have led Californians to a new understanding of state-sanctioned families, they have instead struggled to understand the emerging social systems. That struggle is reflected in the jagged progress of their family legislation.

Between that Senate Judiciary comment, made in July, and the August 16 issuance of an amended AB 26, the sponsor had adopted a drastic change in definition. *All* opposite-sex couples were now excluded from domestic partnership eligibility under this third draft.¹³⁸ The multiple personalities of early domestic partnership legislation suggest the central difficulty. If the legislature had merely been debating who could visit a dying loved one in the hospital, it seems absurd to exclude any member of a romantic, committed couple. In fact, exclusion from that benefit

134. *Domestic Partnerships: Hearing on AB 26 Before the Senate Judiciary Comm.*, 1999–2000 Leg., Reg. Sess. (Cal. 1999), http://www.leginfo.ca.gov/pub/9900/bill/asm/ab_0001-0050/ab_26_cfa_19990708_092134_sen_comm.html (last visited Feb. 6, 2003). In the “background” section, the committee discussed that AB 26 (as amended Apr. 8, 1999) had remedied the problems of Assemb. B. 1059, 1997 Leg., 1997–98 Sess. (Cal. 1997). *Id.* at 1–2.

135. Assemb. B. 1059, 1997 Leg., 1997–98 Sess. (Cal. 1997).

136. The Committee cited to the veto message of Governor Wilson: “The lack of definition for ‘domestic partner’ lends itself to instability, fraud and adverse selection?” The committee responded to the prior challenge, “The problem of defining ‘domestic partner’ has been taken care of by AB 26.” *Hearing on AB 26, supra* note 131, at 13–14.

137. *Id.* Senate bill 75 was a similar bill concurrently being drafted in the Senate that was ultimately dropped. S.B. 75, 1999–2000 Leg., Reg. Sess. (Cal. 1999). The Committee stated that:

AB 26 would acknowledge that domestic partners, whether they be of the same sex or not, should have some rights and privileges even though the sanctions of a legal, traditional marriage are not available. . . . These are major steps in filling in the gaps in family law and other areas, where existing law is insufficient or non-existent.

Hearing on AB 26, supra note 131, at 14, § 10.

138. Assemb. B. 26 § 1, 1999 Leg., 1999–2000 Sess. (Cal. 1999) (as amended Aug. 16, 1999) (“Both persons are members of the same sex.”).

sounds draconian as applied against any individual wishing to spend time with an ill loved one, regardless of relationship type or title.

The real debate was not about hospital visitation, nor about which health benefits might be extended to an employee's significant other. The real debate struggled with defining who would be eligible for these rights, and more importantly, who would be eligible for the additional rights that surely would follow.¹³⁹

As of September 7, 1999, less than one month later, the pendulum had swung again.¹⁴⁰ The Senate Rules Committee's comments suggested an amendment to "expand coverage of the bill to opposite sex partners who are senior citizens 62 years or older and who are eligible for either Social Security or SSI, thus making them eligible for benefits provided by the bill."¹⁴¹ In that same report, one argument in support of the version offered provided that AB 26 would remedy an equal protection problem by providing certain benefits to same-sex couples. Although mentioning elderly couples and opposite-sex couples briefly, the arguments in support fail to match up with the eligibility requirements of that draft.¹⁴²

No one caught the inherent problem of including "unmarried couples" as beneficiaries while simultaneously limiting the legislation's proffered protection to only same-sex couples or elderly couples.¹⁴³ Attached to these policy statements suggesting that the domestic partnership should be available to any nonmarried couple, the draft provided: "Notwithstanding

139. See, e.g., Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1178-80 (1980).

140. AB 26: *Third Reading: Senate Rules Comm.*, 1999-2000 Leg., Reg. Sess. 2-3 (Cal. Sept. 7, 1999), http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_0001-0050/ab_26_cfa_19990908_174058_sen_floor.html (last visited Feb. 6, 2003).

141. *Id.* at 2. This was the first time that the language of social security eligibility was presented: "Both persons [must] meet the eligibility criteria under Title II of the Social Security Act as defined in 42 U.S.C. Section 402(a) for old-age insurance benefits or Title XVI of the Social Security Act as defined in 42 U.S.C. Section 1381 for aged individuals." *Id.* Requiring eligibility under Social Security, the Senate suggested that it was more comfortable granting statutory benefits to a defined group that already received other benefits due to their status.

142. *Id.* at 13.

The problem [referring to health care] is the same for heterosexual couples, same-sex couples, and elderly couples who form committed and exclusive relationships, proponents say. AB 26 would ensure that 'unmarried couples will not be denied access to health benefits for their partner solely because of their sexual orientation or marital status.'

Id. (quoting Assemblywoman Migden).

143. *Id.*

any other provision of this section [referring to section 297 of the California Family Code], persons of opposite sexes may not constitute a domestic partnership unless both persons are over the age of 62.”¹⁴⁴ This was the language included in the chaptered version of the bill, finally signed by the governor.¹⁴⁵

Only four months after Governor Davis’s approval of AB 26, an attempt at expansion of the domestic partnership eligibility began anew. Again authored by Assemblywoman Migden, AB 2421 began as legislation to provide greater substantive rights to then existing domestic partnerships.¹⁴⁶

In its first amendment, all substantive changes were dropped and AB 2421 became purely a proposed change to domestic partnership eligibility.¹⁴⁷ Its only effect, had it passed, would have been to expand domestic partnership eligibility to opposite-sex couples, as long as one member was over the age of sixty-two.¹⁴⁸

Once again, the only commentary offered in support of this expansion is a reference to the 1990 census.¹⁴⁹ In fact, throughout the lives of both AB 26 and AB 2421, the census statistics are the only support provided for either expansion *or* for restriction to exclude younger opposite-sex couples.¹⁵⁰

Governor Davis’s veto gave no further explanation as to the policy behind these changes. Instead, he merely offered, “I am not willing to make any changes to this Act at this time.”¹⁵¹

144. Assemb. B. 26, 1999 Leg., 1999–2000 Sess. (Cal. 1999) (as amended Sept. 7, 1999).

145. *Id.* (chaptered and approved by the governor on Oct. 2, 1999).

146. Assemb. B. 2421, 2000 Leg., 1999–2000 Sess. (Cal. 2000). The initial version of the bill authorized anatomical gifts between domestic partners, sick leave, and certain unemployment insurance benefits related to absence from work to care for a domestic partner. *Id.* (as introduced Feb. 24, 2000).

147. *Id.* (as amended Apr. 6, 2000).

148. *Id.*; *see also id.* (as enrolled).

149. *Domestic Partnerships: Hearing on AB 2421 Before the Senate Judiciary Comm.*, 1999–2000 Leg., Reg. Sess. (Cal. 2000), http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_2401-450/ab_2421_cfa_20000621_132355_sen_comm.html (last visited Feb. 6, 2003). The census report provided that, “there are approximately 500,000 unmarried couples in California, 93% of which are heterosexual couples and 7% of which are same sex couples. Of the 500,000 unmarried couples, 35,000 are senior citizen couples who are not married because of social security or other pension restrictions.” *Id.*

150. *Compare id.* (allowing opposite-sex couples with one elderly partner to register), with Assemb. B. 26 § 1 (as amended Aug. 8, 1999) (forbidding any opposite-sex couple from inclusion in the domestic partnership scheme).

151. *Veto Message from Cal. Gov. Gray Davis, Assemb. B. 2421* (Sept. 24, 2000), http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_2401-2450/ab_2421_vt_20000924.html (last visited Feb. 6, 2003). The preceding paragraph indicates that one reason for the veto might have been the recent passage of AB 26. “I signed legislation last year to establish the procedures for the registration of domestic partnership in California.” *Id.*

The legislative history of AB 25 itself provides no greater explanation of the policies underlying domestic partnership eligibility. The legislation does offer some indication as to why the substantive rights are included; however, there is virtually no mention of who might be entitled to those rights or why the legislature made choices of inclusion and exclusion.

As of its introduction, the 2000 version of domestic partnership legislation offered to expand the class of eligible couples to include those in which only one partner is over age sixty-two.¹⁵² Once again, however, the comments following the bill's readings highlight that there is no clear purpose or explanation for individual eligibility. The bill's author, the assembly, the senate, and the governor each seem to have a different approach. There is no guiding principle, at least not an apparent one. Comments from the March 13, 2001 hearing on the proposed bill posed the following as one of two key issues: "Should the group of individuals who may register as domestic partners be expanded to include opposite sex couples where only one individual, rather than both, is over the age of 62?"¹⁵³

In response to that question, the Assembly Committee on Judiciary merely referred to Assemblywoman Migden's statement, a statement that makes no reference whatsoever to opposite-sex couples, nor gives any purpose for their exclusion or inclusion.¹⁵⁴ It is an odd silence to follow a specific question posed by the legislature.

This legislative history, although not completely explicative, suggests at least three potential explanations for the expansion of eligibility in California's domestic partnership scheme. Three possibilities are explored in the following Part, informed by legislative history, the development of the California model, and the differences between the models of California and other jurisdictions.

152. Assemb. B. 25, 2000–01 Leg., Reg. Sess. (Cal. 2001) (as introduced). No other changes were suggested in the eligibility or definition portion of the legislation. *Id.*

153. *Domestic Partners: Hearing on AB 25 Before the Cal. Assembly Comm. on the Judiciary*, 2000–01 Leg., Reg. Sess. (Cal. 2001), http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0001-0050/ab_25_cfa_20010309_170135_asm_comm.html (last visited Feb. 6, 2003).

154. *Id.*
This bill seeks to expand the group of individuals who can register as, and confer a number of new legal rights on, domestic partners, to the same extent such rights are guaranteed to married couples. In commenting on the need for this measure, the author states, "[U]ntil the enactment of AB 26 in 1999, *same sex couples* and their families received no recognition under California law. *Id.* (emphasis added). The author mentioned only the substantive rights that the bill would offer to registered domestic partners.

V. ANALYSIS OF THE POLICY BEHIND THE EXPANSION OF ELIGIBILITY

On its face, there is no expressed policy in AB 25 regarding the expansion of eligibility, from opposite-sex couples in which both partners are over age sixty-two, to opposite-sex couples in which at least one partner is over age sixty-two. Nor is a concrete policy in support of expansion expressed in the legislative history of the bill.¹⁵⁵ As the author, Assemblywoman Migden, claimed in Internet promotion of the legislation, certain benefits are presented to the people of California and to the elderly in general. However, these benefits are not expressed as the reason behind the expansion.¹⁵⁶

There are three potential policies supporting the expansion to include more couples within the reach of the domestic partnership statutes, specifically those couples in which only one partner is over age sixty-two and eligible for social security benefits. Each of these three will be discussed in turn, and, finally, suggestions are offered to clarify the intent behind the continued expansion of eligible couples. Initially, however, this Part will briefly describe some of the elemental concepts of social security and social benefits that influence the policy of expansion.¹⁵⁷

By requiring that at least one member of an opposite-sex couple be over age sixty-two and eligible for social security benefits,¹⁵⁸ the domestic partnership statute calls into issue the policies behind eligibility for those benefits. The Old-Age and Survivors Insurance program (OASI)¹⁵⁹ “provides monthly cash benefits to retired workers and their dependents and to survivors of covered workers.”¹⁶⁰ OASI is the largest of the social benefit programs and is the program commonly referred to as Social Security.¹⁶¹ OASI was primarily established to protect workers over retirement age, age sixty-two at the earliest, who have worked in covered employment for over ten years; additionally,

155. See discussion *supra* Part IV.

156. See Assemblywoman Carole Migden, *AB 25 Fact Sheet*, at <http://democrats.assembly.ca.gov/members/a13/issues/ab25FACT.htm> (last visited Nov. 2, 2002) (on file with author).

157. It is beyond the scope of this Comment to offer an in depth discussion of old age security benefits, disability benefits, or Medicare and Medicaid. Each of these topics has been studied in great detail in other law review articles.

158. AB 25 requires that person to be over age sixty-two and to “meet eligibility criteria under Title II of Social Security Act as defined in 42 U.S.C. Section 402(a) for old-age insurance benefits or Title XVI of Social Security Act as defined in 42 U.S.C. Section 1381 for aged individuals.” Assemb. B. 25, § 3, 2000–01 Leg., Reg. Sess. (Cal. 2001); see also CAL. FAM. CODE § 297(b)(6)(B) (West Supp. 2003).

159. 42 U.S.C. § 401–434 (2000).

160. Jonathan Barry Forman, *Making Social Security Work for Women and Men*, 16 N.Y.L. SCH. J. HUM. RTS. 359, 362 (1999).

161. *Id.*

dependents and survivors of the worker may receive additional monthly income under the program, based upon the worker's primary insurance amount.¹⁶² For married couples, then, social security functions as a joint and two-thirds survivor annuity.¹⁶³

The other social benefit program referenced in domestic partnership legislation is the Supplemental Security Income (SSI).¹⁶⁴ SSI provides monthly cash benefits to low income elderly Americans, as well as to the blind and disabled.¹⁶⁵ The purpose of SSI is explicitly stated as providing security income to these persons;¹⁶⁶ however, the statute's interpretive notes suggest that security is intended only "to cover basic necessities, but not medical expenses."¹⁶⁷ SSI does not immediately raise concerns of marital status, although eligibility for SSI guarantees eligibility for Medicaid coverage.¹⁶⁸ In turn, Medicaid eligibility is potentially affected by marital status.¹⁶⁹

A. Offering an Alternative to Marriage and Cohabitation

At the most basic level, an expansion of domestic partnership eligibility appears, simply, to broaden its application to as many people as possible. Scholars have suggested that the modern American family is changing its face at a rapid pace and in many different directions.¹⁷⁰

162. *Id.* at 363–64; *see also* Jonathan Barry Forman, *Whose Pension Is It Anyway? Protecting Spousal Rights in a Privatized Social Security System*, 76 N.C. L. REV. 1653, 1654–57 (1998).

163. Forman, *supra* note 160, at 365; *see also* Forman, *supra* note 162, at 1678–80 (discussing how the joint and two-thirds annuity would be affected by an amendment to social security to allow for individual retirement savings account (IRSA) and how IRSAs would remove a marriage penalty).

164. 42 U.S.C. § 1381–1383f (2000).

165. 42 U.S.C. § 1381 (2000).

166. *Id.* ("For the purpose of establishing a national program to provide supplemental security income to individuals who have attained age 65 or are blind or disabled, there are authorized to be appropriated sums sufficient to carry out this title . . .").

167. *See id.* at Interpretive Notes and Decisions, 1 (citing *Atkins v. Rivera*, 477 U.S. 154 (1986)).

168. *See id.* at Interpretive Notes and Decisions, 3 (citing *Hayes v. Stanton*, 512 F.2d 133 (1975)).

169. *See* Medically Needy Income Standard, 42 C.F.R. § 435.811 (2001) (requiring that Medicaid eligibility be determined on the basis of a single income standard).

170. *See generally* Blumberg, *supra* note 85 (tracing the development of American nonmarital cohabitation in terms of the American welfare state); Martha M. Ertman, *Commentary: The ALI Principles' Approach to Domestic Partnership*, 8 DUKE J. GENDER L. & POL'Y 107 (2001) (offering helpful descriptions of nontraditional but likely

More often, couples cohabit, rather than marry, as the divorce rate climbs ever higher.¹⁷¹ Thus, expanding the statutory option for family recognition to more couples might be practical.

This first proffered policy behind expansion can be eliminated fairly quickly. If the policy were indeed to offer a middle ground between cohabitation and marriage, the statute entirely fails to address the issue. It provides no such alternative to opposite-sex couples with partners between the ages of eighteen and sixty-two.¹⁷²

It is possible, of course, that the expansion reflects a gradual trend toward the inclusion of any couple that meets the other non-age, nongender requirements.¹⁷³ However, this seems unlikely. If the eventual goal were to provide all couples with the option of domestic partnership registration, there seems no reason to initially exclude such a well-numbered and well-represented group: middle aged, opposite-sex couples.

B. Preventing Criticism Through Inclusion

A second possible policy driving the expansion of eligible opposite-sex couples is the desire to divert attention from the true or initial policy of the domestic partnership: to benefit gay and lesbian couples. Despite criticism that the domestic partnership does not go far enough in its recognition of same-sex couples,¹⁷⁴ many still urgently oppose any efforts, especially legal ones, to support gay, lesbian, or same-sex couples.¹⁷⁵ Some proponents of the advancement of same-sex couple

households), WL 8 DUKEJGLP 107; Katz, *supra* note 69; Nancy K. Ota, *Symposium, "Family" and the Political Landscape for Lesbian, Gay, Bisexual and Transgender People (LGBT): Opening Remarks*, 64 ALB. L. REV. 889 (2001).

171. See Blumberg, *supra* note 85, at 1271–75.

172. See CAL. FAM. CODE § 297 (West Supp. 2003).

173. 84 Op. Cal. Att’y Gen. 55, 57 (2001). This approach is tangentially suggested in an opinion by California Attorney General Lockyer. He discusses the purpose of the registration as the distribution of government benefits and uses this policy as partial justification for making residential addresses of domestic partners publicly available through the secretary of state. *Id.* at 58.

174. Several authors comment that the only truly equal protection for gay and lesbian couples is marriage, and some suggest that any solution short of marriage is a failure. See Press Release, California Western School of Law, *supra* note 3 (quoting Professor Barbara Cox: “I would prefer to see the legislature focus on a comprehensive marriage law to end the discrimination against same-sex couples . . .”); see also Press Release, People For the American Way, *supra* note 67 (quoting Ralph G. Neas, President of People For the American Way: “Even strong domestic partnership laws are no substitute for full and equal marriage rights.”).

175. See 28 U.S.C. § 1738C (2000); CAL. FAM. CODE § 308.5 (West Supp. 2002); Lynn D. Wardle, *Essay: "Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL’Y 771 (2001); Press Release, Campaign for California Families, Statement on Governor Davis’

recognition may be willing to pad the early legislative efforts in order to gain immediate benefits. Some supporters of gay and lesbian rights might be willing to use opposite-sex inclusion in the statute as a fig leaf cover, to shield the young legislation from traditional criticism.

In fact, the most compelling support for this explanation of the policy behind expanded opposite-sex couple eligibility comes from its own author. Assemblywoman Migden's press release on the date of the governor's signature offered a description of the added substantive rights, and then she added: "This bill marks a stellar advance for lesbians and gays in California."¹⁷⁶

Given an opportunity to discuss who will benefit from the new law, she mentioned only same-sex couples. The comment continued, "[The bill] recognizes important everyday rights under the law that affect all individuals and their families. This new law sends a message across the nation that California celebrates the dignity and diversity of all people, including same sex couples."¹⁷⁷ Surely opposite-sex couples in which one partner is elderly are included within the reference to "dignity and diversity of all people," but her silence on the expansion seems pregnant in light of publication of the legislation's developments in other areas of the prior version.

Additionally, Migden said that AB 25 provides "basic protections" to gay, lesbian, and senior citizen families.¹⁷⁸ Her comments continue, however, to suggest that the true value of the bill is in the additional rights that it affords to same-sex couples.¹⁷⁹ Finally, a telephone discussion with one of Migden's aides revealed that the expansion came as a direct response to the criticism lodged at efforts to create a statutory recognition of gay and lesbian couples.¹⁸⁰

Signing of AB 25 (Oct. 14, 2001), <http://www.savecalifornia.com/press/newsreleases/release.cfm?nrid=PR011014A> (last visited Feb. 6, 2003).

176. Press Release, Assemblywoman Carole Migden, 13th Assembly District, Governor Davis Signs Migden Bill Expanding Domestic Partner Rights (Oct. 22, 2001), <http://democrats.assembly.ca.gov/members/a13/press2001/p132001019.html> (last visited Nov. 2, 2002) (on file with author). *But see infra* notes 177–78 and accompanying text.

177. *Id.*

178. *See* Assemblywoman Carole Migden, *Assemblywoman Carole Migden's Legislation, San Francisco*, at <http://democrats.assembly.ca.gov/members/a13/a13leg2001.htm> (last visited Nov. 2, 2002) (on file with author).

179. *Id.* ("AB 25 provides important employment, health care, and estate planning rights currently denied same-sex couples, including the ability to seek compensation for the loss of economic or emotional support, make medical decisions in the hospital, and act as a Conservator to tend to a partner's medical and financial needs.")

180. Telephone Interview with Kirsten Boyd, Assistant to California

The expansion appears to be a shield to prevent criticism of a liberal platform or to improve the acceptance of the legislation, if one considers that the minimum age requirement of sixty-two seems arbitrary with respect to the age at which opposite-sex senior citizens might wish for an alternative to marriage. If the purpose behind expansion were truly to protect the income of those couples who would lose survivor benefits by remarriage,¹⁸¹ then the statute fails to accomplish that policy for couples aged sixty. This inconsistency tends to indicate that the inclusion of elderly opposite-sex couples serves a purpose unrelated to protecting their benefits.

If this policy were in fact the impetus behind expansion, problems arise. First, the inclusion of opposite-sex couples constitutes a sham of sorts.¹⁸² If the real purpose for expansion and inclusion of more opposite-sex couples is to avoid criticism from voters who would oppose domestic partnerships were they only available to same-sex couples, as reflected in public opinion polls, then Californians are misled by the current legislation. It appears, on the face of AB 25, that a crisis may exist for retirement-aged opposite-sex couples. If that is the case, then social security reform should take place nationwide, to address these couples in need, regardless of state residency. If such a crisis does not exist, then the current domestic partnership scheme needlessly includes senior citizen couples and needlessly excludes all other opposite-sex couples.

Therein lies the second problem. The expansion represents an overt disservice to opposite-sex couples who do not qualify under the age and social security requirements but would wish for a state-sanctioned alternative to marriage. If the only purpose for inclusion of elderly is to dilute the statute's application (and in so doing to avoid criticism from voters who would oppose domestic partnerships if only available to same-sex couples), then there is no reason to exclude opposite-sex couples of younger years.

Assemblywoman Migden, 13th Dist. (Apr. 4, 2002).

181. See discussion *infra* Part V.C.

182. This suggestion is supported, in part, by the first draft of the California Domestic Partner Rights and Responsibilities Act of 2003. Assemb. B. 205, 2003-04 Leg., Reg. Sess. (Cal. 2003), available at http://www.leginfo.ca.gov/pub/bill/asm/ab_0201-0250/ab_205_bill_20030128_introduced.pdf (last visited Feb. 15, 2003). No effort is made in this bill introduced in January 2003 to remove opposite-sex couples with one senior member from eligibility; however, the text repeatedly refers to the needs of same-sex couples, but does not mention the special needs of senior couples or opposite-sex couples with only one senior member. *Id.* § 1(b)(3), (6), (8). The full text of the proposed legislation indicates that the purpose of the entire domestic partnership scheme is incremental progression towards marriage rights for same-sex couples and that opposite-sex senior couples, while they may face a legitimate problem with access to marriage, may have only been statutorily included along the way to bolster popular support. See *id.*

Limiting domestic partnerships to same-sex couples without some stated purpose presents the problem of discrimination and equal protection challenges.¹⁸³ Such a challenge requires raising the gender discrimination of both the complainant and her domestic partner by a policy that recognizes only same-sex couples.¹⁸⁴ Therefore, the challenge is a gender based, couple challenge, rather than an individual one. At least in the employment setting, under Title VII law, there is indication that domestic partnerships may not be limited to same-sex couples alone.¹⁸⁵

In conclusion, inclusion by default is rarely the preferred method of advancing legal theory or civil rights. In failing to defend a substantive policy throughout the development of the domestic partnership scheme and by repeated reference to polls throughout the legislative history,¹⁸⁶ the California Legislature and Governor Davis have convinced the Author: the inclusion of opposite-sex couples, in any regard, seems politically motivated, in the most superficial sense of the phrase.

C. Offering a Remedy: Is “Practically Prevented” from Marrying the Same as “Prohibited” from Marrying?

The most valid of policies behind the current scheme would explain both the inclusion of opposite-sex couples to a limited degree, as well as the expansion to allow couples in which only one partner is over sixty-two and OASI or SSI eligible. The California Legislature might have determined that same-sex couples required a statutorily created alternative to marriage in order to gain important civic benefits because marriage is not available; similarly then, the statutory option should be available to opposite-sex couples in which at least one partner would lose eligibility to OASI survivor benefits by remarrying or who would lose SSI benefits by marrying a person with an additional source of income.

Is marriage sufficiently unavailable as an option to opposite-sex couples in which one partner is elderly to justify merging the treatment of those couples with same-sex couples who are statutorily forbidden

183. See generally Paul R. Lynd, *Domestic Partnership Benefits Limited to Same-Sex Couples: Sex Discrimination Under Title VII*, 6 WM. & MARY J. WOMEN & L. 561 (2000).

184. *Id.* at 603.

185. See *id.*

186. See *supra* notes 149–50 and accompanying text.

from marrying?¹⁸⁷ Do those two groups require similar treatment, and such to the exclusion of other opposite-sex couples who might face other marriage “penalties”?¹⁸⁸

In California in the year 2000, during AB 25’s amendments, 428,280 widows and widowers received survivor benefits through OASI.¹⁸⁹ OASI paid out, on average, \$821 per month to survivors.¹⁹⁰ SSI paid benefits to 475,594 California elderly in need of supplemental income, and the national average payment for elderly recipients was \$439 per month.¹⁹¹ As California’s overall population in 2000 was 33,872,000 and the number of Californians over the age of sixty-five was 3,596,000, the domestic partnership eligibility provision could, at its widest reach, affect approximately ten percent of Californians.¹⁹²

Of course, not each of those individuals eligible for OASI or SSI draws on those benefits; of those who do collect benefits, not all would avoid marriage in order to retain them. Therefore, the inclusion of these couples within the domestic partnership schema really applies to a smaller portion of Californians.

The need, however, is also a reality, and law has never required a majority in need in order to provide a protection. The need amounts to some portion of elderly Californians who would either (1) lose their benefits as surviving spouses under OASI by remarrying (but cannot afford to) or (2) lose their eligibility for SSI benefits by marrying an individual whose income was too high for the couple to remain eligible and too low to support both persons without the supplemental income.

A distinction is easily made, however, between those who practically cannot afford to marry and those who are prohibited from marriage. Marriage is an alternative for elderly opposite-sex couples, even when financially disastrous. Whereas, under any circumstance, a domestic partnership is the only means for same-sex couples to obtain state recognition.¹⁹³ In principle, inclusion of a group that does not require

187. CAL. FAM. CODE § 308.5 (West Supp. 2003).

188. The income tax marriage penalty is beyond the scope of this Comment; however, it should be noted that younger opposite-sex couples may chose to not marry in order to avoid financial penalties, just as elderly opposite-sex couples chose to not marry in order to maintain social benefits. See David L. Chambers, *For the Best of Friends and for Lovers of All Sorts, A Status Other than Marriage*, 76 NOTRE DAME L. REV. 1347, 1355 (2001).

189. SOCIAL SECURITY ADMINISTRATION, OFFICE OF POLICY, OFFICE OF RESEARCH, EVALUATION, AND STATISTICS, CALIFORNIA STATE STATISTICS (2000), available at http://www.ssa.gov/statistics/state_fact_sheets/ca.html (last visited Feb. 6, 2003).

190. *Id.*

191. *Id.*

192. U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2001, at 21, 23 (2001).

193. James M. Donovan, *Essay: An Ethical Argument to Restrict Domestic*

the remedy dilutes the remedy's effect for groups truly in need of a solution.¹⁹⁴

In hearings regarding the initial domestic partnership legislation, the Senate Judiciary Committee cited a need for the status on behalf of senior citizens.¹⁹⁵ However, the Committee made a distinction between those who would not, and those who could not, marry; and in so doing, the *need* is clearly undermined.¹⁹⁶ The use of proposed benefits to senior citizens is unconvincing as a need for an alternative to marriage. If the purpose had truly been to provide a statutory remedy to those elderly couples who could not marry, then additional compelling data might have been provided in support.

One problem with this rationale as proper support for expanded eligibility is a near void of popular discussion of the matter as a perceived problem. Although discussion of social security abounds in popular media of all types on various topics,¹⁹⁷ no one is raising a flag on behalf of seniors who would marry but cannot due to the reduction in their social benefits that would result.

In a February 2002 hearing on improving social security for women, seniors, and working Americans, not one of eight panelists discussed any concern in this area.¹⁹⁸ During the session, panelists vehemently opposed any reduction in social security benefits and urged strongly for the protection of benefits to women, especially widows and divorcees.¹⁹⁹ However, there was little mention and no debate of the benefits scheme currently deterring marriage or second marriages.²⁰⁰

Partnerships to Same-Sex Couples, 8 LAW & SEX. 649, 665–68 (1998).

194. *Id.*

195. *Domestic Partnerships: Hearing on AB 26 Before the Senate Judiciary Comm.*, 1999–2000 Leg., Reg. Sess. 4 (Cal. 1999), http://www.leginfo.ca.gov/pub/9900/bill/asm/ab_0001.

Especially to senior citizens, cohabitation with a trusted friend, male or female, could give them companionship, security and independence they so need at this time of their lives. Yet, many would not, or could not marry due to restrictions on social security or other pension benefits that would affect their incomes.

Id.

196. *Id.*

197. See, e.g., Robert Pear, *Report on Social Security Adds 3 Years to Fund's Life: Improved Outlook Due to More Productivity*, N.Y. TIMES, Mar. 27, 2002, at A16.

198. See *Social Security Improvements for Women, Seniors and Working Americans: Hearing Before the Subcomm. on Social Security of the House Ways and Means Comm.*, 107th Cong. 11–78 (2002).

199. *Id.* at 12–13.

200. See generally *id.* (focusing on strengthening the social security system's ability

Of course, problems may exist without newsprint or television attention and without discussion in the Ways and Means Committee. Indeed, a lack of evidence fails to demonstrate much of anything. It seems a bit odd, however, that such discussion is absent if the California Legislature has determined the problem sufficient to be addressed with a statutory alternative to marriage, hardly a minimalist approach. Although the domestic partnership's application to couples with only one elderly partner is a development, rather than a creation of law,²⁰¹ the expansion must have some purpose. When a purpose appears to be lacking on the face of the statute, in its legislative history, and in the popular press, Californians ought to wonder and begin asking questions.

It seems more likely, and less palatable, that California's elected officials desire bipartisan and more widespread support for the domestic partnership legislation, especially in a gubernatorial election year.

VI. RECOMMENDATIONS AND CONCLUSION

The domestic partnership has arrived. California and Hawaii offer a statewide statutory alternative to marriage. Cities in the states of New York and Massachusetts offer similar options, and other states, like Massachusetts and Arizona, are at various stages in developing state domestic partnership legislation. The successful challenge of Vermont's constitution and the resulting civil union legislation indicate that other challenges to further same-sex couples' recognition will follow. But each of these approaches differs markedly, not only in explicit statutory language, but also in the expressed and implied policies that underlie the emerging models of family.

How will other states proceed? How will the nation uniformly recognize a new family status, especially when its face changes so markedly by crossing state lines? The policies that drive the definition of California's domestic partnership and its resulting benefits are crucial.

Initially, there will be challenges. The issues of same-sex marriage or union and nontraditional families will continue to be hotly debated. Although much remains uncertain, legislatures can count on challenges to new understandings of the American family. Once these challenges arise, the success or failure of the domestic partnership may turn, in part, upon its purpose.

California has failed to make its purpose clear. Comparison,

to support seniors and women). *But see id.* at 41 ("Another key problem facing divorcees, is if . . . the divorced woman remarries, she may lose all claim to benefits based on her previous marriage.").

201. *See discussion supra* Part III.

legislative history and analysis, and Governor Davis's message upon enactment indicate, however, that the California domestic partnership may include opposite-sex couples for less than compelling reasons.

Without clarification, the current domestic partnership model remains open to an equal protection attack from nonretirement aged opposite-sex couples. It remains open to criticism from same-sex couple advocates because the domestic partnership fails to provide an adequate remedy to same-sex couples, or because the remedy is diluted by offering opposite-sex couples an unnecessary alternative to marriage. Finally, the current model suggests that the California Legislature and the governor have tried to gain the approval of Californians on a lukewarm solution to real problems with emerging understandings of family.

In order to salvage the domestic partnership, the legislature needs to clarify its intent. Either the domestic partnership is available to everyone as an alternative to marriage and cohabitation, or it exists temporarily as a remedy to same-sex couples who are truly prevented from marrying. In either case, the substance of the model requires fine-tuning.

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