Domestic Partnership Initiatives

Vada Berger

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Vada Berger, Domestic Partnership Initiatives, 40 DePaul L. Rev. 417 (1991)
Available at: https://via.library.depaul.edu/law-review/vol40/iss2/5

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.
DOMESTIC PARTNERSHIP INITIATIVES

Vada Berger*

Each kind of passion—man-and-woman passion, man-and-man passion—has all degrees of love . . . . The only difference is—the only damned difference is that for us there's no way of getting social sanction—so we go around the world like a lot of sorry ghosts, being forever ashamed of a thing we've no reason to be ashamed of.

Richard Meeker

INTRODUCTION

Richard Meeker expressed his frustration concerning the treatment of homosexual couples in his 1933 novel Better Angel.® Unfortunately, the lack of social sanction Meeker lamented has not changed much in the almost sixty years since the publication of his novel. In general, society still does not recognize the existence of homosexual couples, and fails to provide them with the benefits of social, and legal sanction.

The legal, and social invisibility of homosexual couples is stark in contrast to the benefits provided to married heterosexual couples.® Indeed, “[m]arriage triggers a universe of rights, privileges, and presumptions.” Some of the privileges available to married couples include favored immigration status,® the

---


The author would like to thank Professor Martha Minow of the Harvard Law School for her encouragement and advice in the writing of this Article. She would also like to thank Mary Bilder for commenting on previous drafts of this Article.

1. R. MEKKER, BETTER ANGEL 206-07 (paperback ed. 1987, original publication 1933).

2. Id.

3. This contrast is particularly ironic given the number of unmarried couples in this country. Census estimates as of 1988 indicated that out of 91 million households in the United States, unmarried heterosexual couples account for 2.6 million households and homosexual couples account for 1.6 million households. Zonana, Census Will Count “Unmarried Partners” for First Time, L.A. Times, Feb. 15, 1990, at A38, col. 1, A39, col. 3. In fact, the Census Bureau is including the category of “unmarried partner” in its 1990 Census. Id. at A38, col. 3. Only 27% of households are composed of traditional families of two parents living with children. GUTIS, WHAT IS A FAMILY? TRADITIONAL LIMITS ARE BEING REDRAWN, N.Y. Times, Aug. 31, 1989, at C1, col. 6, C6, col. 1.


right of hospital, and jail visitation,6 reduced cost club memberships,7 the ability to file joint tax returns,8 exemption from gift taxes,9 estate tax deductions,10 extension of health and dental benefits,11 the right to sue for loss of consortium, and wrongful death,12 the privilege not to testify against one another,13 the ability to own property as tenants in the entirety,14 intestate succession,15 and entitlement to Social Security benefits.16

None of these privileges is available to homosexual couples or any unmarried couples, even though such couples may be deeply committed, and may be each other's only family as a practical matter.17 Marriage is not an option for homosexual couples. No state currently permits same-sex marriage.18 Similarly, no state recognizing common-law marriages allows homosexual relationships to qualify for that status.19

In response to the failure of states to provide protection for homosexual

7. See, e.g., Olson & Popp v. Y.M.C.A. of Metropolitan Madison, Inc., No. 3110 (Madison, Wisc., Equal Opportunities Comm'n, Oct. 10, 1985) (affirming that the denial of a Y.M.C.A. family membership to a lesbian couple did not violate the local Equal Opportunity Ordinance).
12. See, e.g., Comment, Consortium Rights of Unmarried Cohabitants, 9 AM. J. TRIAL ADVOC. 147, 149-50 (1985) (indicating that loss of consortium is a remedy generally available only to married persons).
13. See, e.g., CAL. EVID. CODE § 970 (Deering 1990) (a spouse has the privilege not to be called as a witness to testify against a spouse).
14. See, e.g., CAL. CIV. CODE § 4800.1 (Deering 1986) (stating the presumption that property acquired during marriage is tenancy in the entirety property).
15. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 1990) (providing that at least a portion of decedent's estate goes to the surviving spouse in the event that decedent died intestate).
18. See Note, Marital Status Classifications: Protecting Homosexual and Heterosexual Cohabitators, 14 HASTINGS CONST. L.Q. 11 [hereinafter Note, Marital Status Classifications] (discussing rights that are available to couples absent the right to marry); see also UNIF. MARRIAGE AND DIVORCE ACT § 201, 9A U.L.A. 160 (1987) (defining marriage as "a personal relationship between a man and a woman").
couples, several cities have adopted “domestic partnership initiatives.” A typical domestic partnership initiative allows homosexual couples to register with the city in order to obtain marital-type benefits that are within the city’s ability to provide.

This Article analyzes domestic partnership initiatives, their protections, their effectiveness, and their vulnerabilities. In Part I of this Article, I explain the need for domestic partnership initiatives. In Part II, I describe domestic partnership initiatives and the manner in which couples qualify for domestic partnership benefits. In Part III, I analyze the initiatives. I discuss practical problems involved with implementing domestic partnership initiatives, such as procuring willing insurers. I also discuss the limitations of city-based solutions, due to the supremacy of state and federal law over municipal law. Finally, in Part III, I discuss the extent to which domestic partnership initiatives reflect an alternative vision of the kind of relationships which our society should protect and promote.

This Article addresses the ability of homosexual couples to receive the protections and privileges provided by municipal law through domestic partnership initiatives. The Article focuses on homosexual cohabitators, even though heterosexual cohabitators encounter many of the same problems since neither group’s relationships are protected by marital status.

The failure of the law to protect heterosexual and homosexual cohabiting couples can have tragic consequences for both groups. The issue of protecting

20. Berkeley, California, for example, has adopted a domestic partnership initiative embodied by a Domestic Partnership Information Sheet and Affidavit. See Berkeley, Cal., Domestic Partnership Information Sheet (1987); Berkeley, Cal., Affidavit of Domestic Partnership (1986). For an example of a Domestic Partnership Ordinance, see infra Appendix A. For an example of an Affidavit of Domestic Partnership, see infra Appendix B.


22. As with any article of limited scope, the issues not discussed are as disturbing as the issues that are discussed. I do not, for example, discuss the discrimination faced by individual homosexuals due to their sexual orientation. I also do not analyze the obligation of governmental entities to extend unmarried partners status-related benefits or other entitlements.

23. The refrain that heterosexual cohabitators may simply “choose to marry” to solve their problems ignores the complexity of what marriage represents as an institution. See Blumberg, Cohabitation Without Marriage: A Different Perspective, 28 UCLA L. REV. 1125, 1136 (1981). Many heterosexual couples, for example, may choose not to marry due to the subjugation and hierarchy they associate with marriage. To state that their failure to marry is merely a matter of choice undervalues the role definition supplied by marital bonds. Indeed, Ambrose Bierce defined marriage as “the state or condition of a community consisting of a master, a mistress and two slaves, making in all, two.” H. CURRY & D. CLIFFORD, A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES 3:4 n.2 (5th ed. 1989) (quoted without citation); see also Cronan, Marriage, in FEMINIST FRAMEWORKS: ALTERNATIVE THEORETICAL ACCOUNTS OF RELATIONS BETWEEN WOMEN AND MEN 240 (A. Jaggar & P. Struhl eds., paperback ed. 1978) (comparing marriage to slavery). Moreover, many couples, married or cohabiting, simply do not realize the legal, as opposed to social, ramifications of marriage. See supra Blumberg, at 1169-1170; see also Glendon, Marriage And The State: The Withering Away of Marriage, 62 VA. L. REV. 663, 687 (1976) (indicating that lack of concern for marriage is growing due, in part, to the perception that the law does not provide advantages to married couples).
homosexual couples, however, generates more fear and criticism from the opponents of domestic partnership initiatives in view of the AIDS crisis and heterosexism. Protecting homosexual couples also creates complicated legal problems in view of state obstacles such as antisodomy laws. Thus, while domestic partnership initiatives extend benefits to both heterosexual and homosexual couples, my emphasis will be on homosexual couples.

I. DEVELOPING THE NEED FOR DOMESTIC PARTNERSHIP INITIATIVES

Since marriage is not an option, homosexual couples have been compelled to draft legal documents and rely on litigation to protect their rights. The results of these efforts, however, have largely been unsatisfactory.

For the most part, litigation efforts attempting to procure the benefits associated with marital or familial status for homosexual couples have failed. In In re Guardianship of Kowalski, a Minnesota appeals court affirmed a lower court ruling granting sole custody of an incapacitated woman to her father, over the objections of the woman's female partner of more than four years. The appeals court affirmed the grant of sole guardianship even though the father terminated the visiting rights of the partner following the lower court's decision.

In Hinman v. Department of Personnel, a California appeals court upheld the denial of state dental benefits to a state employee's homosexual partner. The court ruled that the denial of benefits did not violate either the equal protection clause of the California Constitution or a state employment policy prohibiting discrimination on the basis of sexual orientation. Despite recognizing that eligibility for the dental plan was determined by marital status, the court concluded that the discrimination served the legitimate state interest of promoting marriage. Although California law prohibits employment discrimination on the basis of marital status, the court ruled that the bona fide fringe

24. See, e.g., Bodovitz, Domestic Partner Debate May Key on Economics, San Francisco Chron., Oct. 16, 1989, at A4, col 1 (reporting that opponents fear the domestic partnership ordinance will compromise the city's ability to provide health care benefits because the pool of eligible domestic partners will include people with a high risk of contracting AIDS).

25. See Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that the fourteenth amendment does not encompass the right of a male homosexual to engage in consensual sodomy); see infra notes 34-35 and accompanying text (discussing Bowers).


27. Id. at 863. The court found the relationship of the partners "uncertain." The two women had been roommates for four years, had exchanged rings, and had named each other as beneficiaries in their respective life insurance policies. Prior to her accident, however, Sharon Kowalski closed the partners' joint bank account and told her sister that she was considering moving to Colorado or home and that her roommate was becoming very possessive. Id.

28. Id. at 864.


30. Hinman, 167 Cal. App. 3d at 530, 213 Cal. Rptr. at 419.

31. Id.

32. Id. at 527, 213 Cal. Rptr. at 417.
benefit involved was statutorily exempt from the antidiscrimination provision. In Bowers v. Hardwick, the Supreme Court held that the due process clause of the fourteenth amendment does not encompass a homosexual male's right to engage in consensual sodomy. In view of the Supreme Court's decision in Bowers, federal constitutional protection of homosexual relationships is not likely to be forthcoming.

In a few notable state court cases, however, gay men and lesbians have been able to procure benefits as the family members of their partners. In Braschi v. Stahl Associates, for example, New York's highest court ruled that a gay man's partner qualified as a family member under the noneviction provision of New York City's rent control law. A California court, in Donovan v. Workers' Compensation Appeals Board, held that a decedent's homosexual partner could claim death benefits if the facts demonstrated dependency. On remand, the Workers' Compensation Appeals Board awarded Donovan benefits as a dependent of his partner.

While these rulings are victories for gay couples, they are exceptions to the general rule that litigation fails to secure benefits for homosexual partners. Although benefits may be obtained through litigation, these victories come at a prohibitively high price. Litigation is expensive and time consuming. Moreover, the court in Braschi reached its decision that the two men constituted a family only after examining the intimate details of their life together. The facts the court found dispositive included the following: the exclusivity of the relationship; its ten-year duration; the existence of joint bank accounts, safety

33. Id. at 530, 213 Cal. Rptr. at 419. The court concluded that "as a matter of federal and state law, dental benefits under the state plan qualified as fringe benefits exempt from marital status discrimination." Id.
34. 478 U.S. 186 (1986).
35. Id. at 192. In Bowers, Hardwick, an adult male, was charged with violating a Georgia statute criminalizing sodomy after police caught him in his home engaging in sodomy with a consenting male adult. The state did not pursue the charges against Hardwick. Hardwick then challenged the constitutionality of the Georgia statute. The federal district court dismissed the case, holding that Hardwick had failed to state a claim for relief. The Eleventh Circuit reversed, finding that the statute violated Hardwick's fundamental rights.
37. Braschi, 74 N.Y.2d at 213, 543 N.E.2d at 55, 544 N.Y.S.2d at 790.
39. Id. at 328-29, 187 Cal. Rptr. at 873.
deposit boxes and credit cards; that Braschi was his partner's life insurance beneficiary; and that their families knew of their relationship.

A test such as the one used in Braschi is not only intrusive, but few married couples could meet its criteria. As one commentator noted, "There is some unavoidable injustice in this; after all, many blood relatives share little or no emotional commitment and indeed need demonstrate none in order to establish their rights." In short, few gay and lesbian couples are likely to benefit from the Braschi holding, considering its limited scope and its onerous criteria.

Aside from resorting to litigation as a means of obtaining benefits, gay couples can draft legal documents that formalize the obligations of their relationship and inform third parties of their wishes. The ability of gay men and lesbians to draft legally binding documents to protect their rights is also problematic. In theory, gay couples can draft cohabitation contracts which guarantee equitable property division and financial support if their relationship ends. Gay couples can also protect their rights in case of a medical emergency or death by executing living wills, wills, or other documents that name each other as insurance beneficiaries or that provide for durable powers of attorney and funeral arrangements. Some states, however, will not recognize cohabitation agreements between heterosexuals unless the partners put their wishes in writing. Even fewer states are likely to recognize such contracts between homosexuals.

Even if states enforce the written wishes of a homosexual couple, not all couples can afford a lawyer. Thus, such solutions are likely to be accessible only to people in higher income groups. Although self-help manuals are available to assist partners in drafting contracts, some cohabitators are mistrustful of the legal system, or are not aware that legal solutions exist to help them structure their relationship. Further, binding contracts between the two partners that contemplate emergencies or the end of their relationship are not the

42. Id. at 213, 543 N.E.2d at 55, 544 N.Y.S.2d at 790.
44. See generally H. CURRY & D. CLIFFORD, supra note 23, at 3:1-2 (indicating that unmarried partners should always draft contracts identifying partner's property when significant property is involved).
45. See Recent Developments, Protecting the Nontraditional Couple in Times of Medical Crises, 12 Harv. Women's L.J. 220, 229-34 (1989) [hereinafter Recent Developments, Medical Crises] (discussing methods by which nontraditional couples can express their wishes about health-related decisions).
47. Cf. H. CURRY & D. CLIFFORD, supra note 23, at 2:7 (noting that courts may refuse to enforce contracts of homosexuals if they are perceived to be based upon sexual services or are drafted in states with laws prohibiting sodomy).
only benefits gay partners need. They also need the state to recognize their relationship by bringing it “within the purview of the law . . . automatically creat[ing] certain rights and duties in both parties.” Legal documents are not a viable option for many couples, and they are an incomplete alternative in any event.

II. Domestic Partnership Initiatives

At least seven municipalities have adopted ordinances or policies that address inequitable treatment between married people and cohabitators. Cities with such policies include Santa Cruz, West Hollywood, and Berkeley, California; Takoma Park, Maryland; Madison, Wisconsin; Seattle, Washington; and New York, New York. The initiatives explicitly adopt the language of “domestic partners” or “domestic partnerships.”

50. Note, Property Rights of Same-Sex Couples, supra note 43, at 359 (footnote omitted).
51. Minneapolis, Minnesota has also passed an ordinance providing a public registry for domestic partners and employment benefits. See National Center for Lesbian Rights Newsletter, Fall/Winter 1990, at 10. Ithaca, New York provides only a public registry for domestic partners. See id. Washington, D.C.'s new family leave act includes domestic partners as family members. See id.

Numerous private organizations and employers, including the American Psychological Association, the Workers' Trust Insurance Company, and the Village Voice Newspaper, have also extended benefits to domestic partners. See Lesbian Rights Project, Preserving and Protecting the Families of Lesbian and Gay Men 10 n.46 (R. Achtenberg ed. 1986). Additionally, the Board of Trustees of Stanford University recently elected to extend medical and housing benefits to domestic partners of university employees. New Stanford Policy Backs Rights of Gay Unmarried Couple, Chicago Trib., Oct. 2, 1990, §1, at 4, col. 1. While such developments are to be applauded, the focus here is on governmental extension of benefits.

52. Santa Cruz, Cal., Domestic Partnership Information Sheet and Affidavit of Domestic Partnership (1985).
59. See, e.g., Seattle, Wash., Municipal Code 114648 (Aug. 18, 1989) (stating that the ordinance is designed to “facilitate the identification of an individual as the spouse or ‘domestic partner’ of an . . . employee”); Berkeley, Cal., Domestic Partnership Information Sheet (1987) (using the term “domestic partner” in its title). But see Madison, Wis., General Ordinance § 3.36(15)(a)2.g (1988) (extending sick and bereavement leave to Madison city employees when there is an illness or a death of a “family partner”).

Much of the legal scholarship concerning cohabitation also uses the term “domestic partners.” See, e.g., Bonnell, The Domestic Partnership Act: Cohabitants' Property Rights, 2 Harv. Women's L.J. 49 (1979) (proposing The Domestic Partnership Act, which designates “domestic
New York's policy provides a typical definition of, and qualifications for becoming, domestic partners. New York City's Executive Order No. 123, entitled "Bereavement Leave for City Employees Who Are Members of a Domestic Partnership," states:

Domestic partners are two people, both of whom are eighteen years of age or older and neither of whom is married, who have a close and committed personal relationship involving shared responsibilities, who have lived together for a period of one year or more on a continuous basis at the time of registration, and who have registered as domestic partners. 60

Eligibility for domestic partnership in most cities is limited to the partners of city employees. New York City, Santa Cruz, Berkeley, Madison, and Seattle impose this restriction. 61 In Takoma Park, and West Hollywood, some of the benefits are available to all city residents who meet the other criteria for partnership. 62

In most cities, couples seeking recognition as domestic partners file affidavits with the city stating their eligibility for partnership. 63 The cities provide the affidavits. Typically, the affidavits require the partners to assert that they live together, are not married, are not barred from marriage under state consanguinity requirements, and are "each other's sole domestic partner." 64 In order
to qualify, the partners must be eighteen years old, and must be competent to contract. The parties must also assert that they “share the common necessities of life” and are responsible for each other’s welfare. The partners may be either of the opposite sex or of the same sex.

The affidavits not only require the partners to provide particular information, but they also inform the partners of, and bind them to, specific obligations. The partners promise to notify the city within a specified number of days if they terminate the partnership. They promise to file a “Statement of Termination of Domestic Partnership” with the city upon termination of the relationship and to mail a copy of the completed form to the other partner.

After termination of the partnership, the partners agree not to enter into another domestic partnership for up to six months after a Statement of Termination has been filed with the city. Significantly, the partners affirm they “understand that any persons/employer/company who suffer any loss because of a false statement contained in an Affidavit of Domestic Partnership may bring a civil action against [them] to recover their losses including reasonable attorney’s fees.”

The benefits available to domestic partners vary among cities. Berkeley, Santa Cruz, and West Hollywood extend health care benefits to the domestic partners of their employees. West Hollywood’s health care benefits include medical, dental, and vision insurance. Some of these same cities, along with Seattle, Takoma Park, New York, and Madison, provide city employees with bereavement leave.

and falling under the purview of statutes criminalizing incest. 41 AM. JUR. 2D Incest § 7 (1968). For a discussion of domestic partnership consanguinity requirements, see infra text accompanying notes 111-15.

65. See, e.g., Berkeley, Cal., Affidavit of Domestic Partnership (1986) (paragraph 4, requiring applicants to affirm that they are 18 years of age, and paragraph 5, requiring that they are competent to contract).


67. See, e.g., Berkeley, Cal., Domestic Partnership Information Sheet (1987) (stating the purpose of the policy is to equalize benefits of domestic partners of city employees whether unmarried by choice or because they are barred by law from marrying).

68. See, e.g., Santa Cruz, Cal., Affidavit of Domestic Partnership (1990) (paragraph 3 giving an employee 30 days to notify the city of changes in circumstances attested to in the affidavit).

69. See, e.g., Berkeley, Cal., Affidavit of Domestic Partnership (1986) (paragraph 8 providing that “change[s] in circumstances” will be cause for notifying the city, which will terminate the domestic partnership).

70. See, e.g., id.

71. Id.


73. See Speech by Mary Tyson, City Clerk of West Hollywood, California, given at public forum (Apr. 24, 1989).

74. See SEATTLE, WASH., MUNICIPAL CODE 114648 § 4.30.00 (1989); MADISON, WIS., GENERAL ORDINANCE § 3.36 (1988); New York, N.Y., Executive Order 123 (Aug. 7, 1989); Master
partner's immediate family dies, then the employee may leave work without penalty. Berkeley, Madison, Seattle, and Takoma Park also provide sick leave. When the employee's partner or a member of the partner's immediate family is ill, the employee may stay home to provide care without penalty. In Takoma Park, and West Hollywood, domestic partners also receive some protection under their housing ordinances. West Hollywood's ordinance provides the most extensive benefits by providing for health-care facility and city jail visitation.

The methods by which the cities extend benefits to domestic partnerships also vary. In Santa Cruz, West Hollywood, Berkeley, and New York, the cities adopted new employment policies to implement the domestic partnership benefit programs. In Santa Cruz, the city adopted the policy after negotiations with the Service Employees Union and the Management Association. In New York City, the mayor issued an executive order adopting bereavement leave. The cities of Seattle, and Madison extend their benefits pursuant to ordinances. Takoma Park provides partners with benefits under an ordinance, but employees receive benefits pursuant to a collective bargaining agreement between the city and its employees' union. In addition to its employment policy, West Hollywood also has an ordinance extending visitation

Agreement between City of Takoma Park, Md., and the American Federation of State, County, and Municipal Employees, AFL-CIO Council 67 and Local 3399 § 7 (Sept. 1, 1987 to Aug. 31, 1989); see also Letter from Daniel Boggan, City Manager of Berkeley, Cal., to Members of the City Council (Nov. 20, 1984) (indicating that bereavement leave would be available to city employees in the event of the death of a domestic partner).

75. See, e.g., SEATTLE, WASH., MUNICIPAL CODE 114648 § 4.30.00 (1989).

76. See id. § 4.30.10; MADISON, WIS., GENERAL ORDINANCES § 3.36 (1988); Berkeley, Cal., Domestic Partnership Information Sheet (1987); Master Agreement between City of Takoma Park, Md., and the American Federation of State, County and Municipal Employees, AFL-CIO Council 67 and Local 3399 § 7(e) (Sept. 1, 1987 to Aug. 31, 1989).


78. See Speech by Mary Tyson, City Clerk of West Hollywood, California, given at public forum (Apr. 24, 1989) (indicating that domestic partners receive the benefits of the city's rent stabilization ordinance). The Takoma Park Housing Code defines domestic partners, includes the term domestic partner in the definition of family member, and uses the term family member in housing provisions related, for example, to tenant opportunity to purchase and offers for sale provisions. TAKOMA PARK, MD., HOUSING CODE Art. 8 § 6-81 (1986).


80. See, e.g., Berkeley, Cal., Domestic Partnership Information Sheet (1986) (documenting the adoption of a city policy extending certain benefits, such as medical benefits and sick leave benefits, to city employees and their domestic partners).

81. See Santa Cruz, Cal., Domestic Partnership Information Sheet (1990) (introducing domestic partnership initiatives as a policy resulting from an agreement between the City Service Employees Union, and the city).


83. See SEATTLE, WASH., MUNICIPAL CODE 114648 (Aug. 18, 1989); MADISON, WIS., GENERAL ORDINANCE § 3.36 (1988).

84. See supra note 55 (citing a collective bargaining agreement including domestic partnership benefits).
DOMESTIC PARTNERSHIP INITIATIVES

While the particulars of the various domestic partnership initiatives may vary, the initiatives represent a unified concept: an effort to equalize the rights and privileges of cohabiting couples regardless of their sexual preferences. An analysis of some of the issues raised by domestic partnership initiatives follows.

III. DISCUSSION

Domestic partnership initiatives are an effective means for conferring benefits on unmarried partners. As they presently exist, however, domestic partnership initiatives are very limited in scope. Furthermore, municipalities are limited in their ability to extend the scope of the initiatives due to federal and state preemption concerns.

On a theoretical level, advocates of domestic partnership initiatives are divided over the purpose domestic partnership initiatives should serve. Domestic partnership initiatives are typically viewed as either a tacit recognition of homosexual marriage or as a recognition of alternative family relationships. The perceived purpose of domestic partnership initiatives will impact the extent to which they are adopted in the future by municipalities, states, or nationally.

A. Advantages of Domestic Partnership Initiatives

Couples who register as domestic partners receive numerous benefits. The partners are eligible for the specific entitlements listed in the initiatives. They also receive the benefits that society conveys upon a legally recognized relationship.

The tangible benefits domestic partners receive include entitlements such as health benefits or hospital visitation that are readily available to married couples and traditional family members. Under a domestic partnership initiative providing hospital visitation, the Kowalski situation could have been avoided. If Sharon Kowalski and Karen Thompson could have registered as a domestic partnership, then Thompson would have been able to visit Kowalski in the hospital over the objections of Kowalski's father. Although ultimately successful, the extensive litigation in the Braschi case could have been avoided if New York's rent control law had explicitly included homosexual couples within its definition of qualifying families.

While domestic partnership initiatives require couples to register with the city, this requirement is less burdensome than hiring an attorney to draft com-

85. See West Hollywood, Cal., Ordinance 22 §§ 7-8 (1986); see also Takoma Park, Md., Ordinance No. 1986 (1986) (giving domestic partners the same housing rights as "family members").

86. See supra notes 5-16 and accompanying text (listing many rights unique to married couples).


plex legal documents. Moreover, the requirement is no more onerous than requiring heterosexual couples to procure a license and a blood test before marrying.

Although the receipt of entitlements is crucial to many partners, another benefit of domestic partnership initiatives is that they provide social sanction of the partners' relationship. The recognition of domestic partnerships as a family entity that should be protected and fostered is a significant development. Not only might such social recognition curtail discrimination against domestic partners, but it also acknowledges that a relationship exists.

Social sanctioning of domestic partnerships in and of itself is valued by domestic partners, particularly by gay and lesbian couples. That is, partners value the ability of their relationship to be recognized by the state, even without the receipt of benefits. Indeed, the City Clerk of West Hollywood reported that as of December 5, 1989, many of its 240 registrants for domestic partnerships "do not even reside in West Hollywood and several do not even reside in the State of California." The Clerk stated that the "majority of couples have filed [for domestic partnerships] because it gives them an opportunity to make a public commitment to one another and receive a modicum of validity from a public agency."

The public affirmation aspect of domestic partnership initiatives is mitigated, however, by the confidentiality provisions included in some cities' affidavits. The Santa Cruz affidavit, for example, provides that "this information will be held confidential and will be subject to disclosure only upon [the partners'] express written authorization or pursuant to court order." Employee records are often kept confidential, and the sensitivity reflected in these policies is admirable. Nevertheless, it is ironic to provide a device that affirms the existence of a relationship and then keeps the affirmation confidential.

89. Cities provide the affidavit at nominal cost. See, e.g., Speech by Mary Tyson, City Clerk of West Hollywood, California, given at public forum (Apr. 24, 1989) (indicating there is a $15.00 fee for filing a domestic partnership application with affidavit, and a $5.00 fee for filing a notice of termination). But see Berkeley, Cal., Domestic Partnership Information Sheet (1987) (recommending that applicants consult an attorney about the legal ramifications of the domestic partnership affidavit before completing it).

90. E.g., Ettelbrick & Stoddard, supra note 48, at 8, 12 (viewing homosexuals' commitment to the right to marry as equivalent to seeking to be free from discrimination).

91. See Gorney, Making It Official: The Law & Live-Ins: San Francisco Recognizes the Domestic Partner, Wash. Post, Jul. 5, 1989, at C1, col. 1. In fact, a gay couple interviewed felt that the city would recognize them as a "unit" once they registered as domestic partners. Id. at C6, col. 4.

92. Speech by Mary Tyson, City Clerk of West Hollywood, California, given at public forum (Apr. 24, 1989).

93. Id.

94. Santa Cruz, Cal., Affidavit of Domestic Partnership (1990). The initiatives of New York City and Berkeley also contain confidentiality provisions. See, e.g., Berkeley, Cal., Affidavit of Domestic Partnership (1986) (stating in paragraph 11 that the affidavit information is confidential and subject to disclosure only by court order); New York, N.Y., Executive Order 123 (Aug. 7, 1989) (providing that any information concerning a domestic partner's entitlement to bereavement leave "must be kept confidential").
ably if two people are living together and reveal their relationship to the city, they are not predominantly concerned with maintaining the confidentiality of their relationship. In providing for confidentiality, the affidavit contains an implicit recognition of continued discrimination and of the limited ability of the city to solve the problem.

B. Practical Issues

While domestic partnership initiatives are an affirmative step in the direction of equitable treatment for homosexual couples, they have practical limitations. The objections of private parties whose cooperation is needed to implement the initiatives may limit the cities' ability to provide even a small range of entitlements. Additionally, cities have limited power to affect state entitlements. Thus, protections and entitlements provided by most cities may not have much actual substance. Moreover, not only are cities limited in their ability to solve social problems with legislation, but the initiatives may be preempted by state and federal law.

1. Private Cooperation

Cities may enact domestic partnership initiatives, but the cooperation of private parties is necessary to implement them. On the rare occasion that a city is willing to extend benefits to homosexual couples, its citizens may not be. The Board of Supervisors in San Francisco passed domestic partnership legislation on June 22, 1989. The San Francisco domestic partnership initiative prohibited discrimination against domestic partners in the city and county of San Francisco, and extended hospital visitation rights to domestic partners. The San Francisco initiative was opposed by a slim voting majority of city residents who succeeded in getting it repealed in a November 1989 referendum.

Domestic partnership initiatives are likely only to be passed in cities with an active, vocal, organized, and sizable gay community. Indeed, one reason initia-
tives are being adopted at the city level is that some cities have significant gay and lesbian communities. As the San Francisco referendum indicates, however, even an active gay community may not be able to defeat organized resistance to domestic partnership initiatives. Considering that liberal estimates place the homosexual population at ten percent of the total population, their power as a state or national political force is diluted. Heterosexual cohabitators do not appear to have any organized political movement that could contribute significant support to implementing domestic partnership initiatives.

In cities which have managed to enact domestic partnership initiatives, private cooperation is still needed to implement them. The initiatives of West Hollywood, Santa Cruz, and Berkeley, for example, extend health insurance benefits to the domestic partners of city employees. A city's decision to provide insurance to the domestic partners of its employees is meaningful only when private insurers contracting with the city are willing to extend coverage to partners.

The AIDS crisis, heterosexism, and the increased cost of extending coverage to a third party discourages insurers from agreeing to provide coverage to domestic partners. If private insurers do not provide coverage for partners, they cannot be compelled to do so even by state laws prohibiting discrimination on the basis of marital status. While insurers stand to lose the business of a few municipalities if they refuse to insure domestic partners, the reality is that the loss of this relatively small amount of business is not a sufficient incentive to compel insurance companies to provide benefits to domestic partners. Indeed, the City of West Hollywood failed to procure an insurer for its extension of benefits after approaching twelve insurers during a three-year search. The city is therefore providing insurance coverage on its own.

100. See generally Zonana, Gay Agenda Takes Beating—Even In San Francisco, L.A. Times, Nov. 9, 1989, at A1, col. 1 (discussing the passage of only one gay rights measure when such measures were on the ballots in the three California cities of San Francisco, Irvine, and Concord).


102. See Berkeley, Cal., Domestic Partnership Information Sheet (1987); Santa Cruz, Cal., Domestic Partnership Information Sheet (1990); Speech by Mary Tyson, City Clerk of West Hollywood, California, given at public forum (Apr. 24, 1989).

103. The City Manager of Berkeley reported in 1984 that there was no evidence that domestic partners would be more expensive to insure than spouses. Speech by Daniel Boggan Jr., Proposed Policy Establishing "Domestic Partnerships" 12 (Presented to the Mayor and City Council of the City of Berkeley, Cal., July 17, 1984); see H. CURRY & D. CLIFFORD, supra note 23, at 4:13 (summarizing the problem cities with domestic partnership initiatives have procuring medical insurance for employees). Cf. Cox, supra note 6, at 28-31 (explaining how insurers choose insureds).


105. See Russell, West Hollywood Will Insure Partners of Single Employees, L.A. Times, Feb. 22, 1989, § 2, at 3, col. 5; see also H. CURRY & D. CLIFFORD, supra note 23, at 4:13 (reporting that "no health insurance carrier for Berkeley . . . has been willing to extend coverage to 'domestic partners' except in dental insurance"); Berkeley, Cal., Domestic Partnership Information Sheet (1987) ("Currently, dental coverage is the only insured benefit available.").
DOMESTIC PARTNERSHIP INITIATIVES

2. Determining Who Qualifies as a Domestic Partner

Many commentators, including those sympathetic to procuring benefits for homosexual couples, have criticized domestic partnership initiatives based on the indeterminacy of establishing who qualifies as a partner. Opponents claim that mere roommates can register as domestic partners. They emphasize that the failure to require a sexual relationship between the partners means that any two people living together can register as partners.

This criticism is generally unfounded. To the extent that the initiatives do not explicitly require the partners to be in a sexual relationship with one another, then perhaps mere roommates can register as partners. The consanguinity requirement, however, indicates that the cities assume that at least some partners are involved in a sexual relationship. Otherwise, the requirement does not seem to serve any purpose.

The purpose of consanguinity requirements is to prevent incestuous mar-

In discussing the extension of benefits to partners in Seattle, the manager of King County Medical Blue Shield’s underwriting department stated that Blue Shield would decline to offer coverage to domestic partners. He stated, “It’s a can of worms because we can’t quantify the risks.” Live-in Partners Could Get Health Benefits, U.P.I. (May 8, 1989).


The Hinman court also discussed the practical problems involved in determining benefit eligibility for homosexual partners:

The responsible agencies would have to establish standards which would reach the very foundations of the privacy rights of both homosexual partners in order to properly determine whether the relationship meets some arbitrary standard equating with marriage, and still exclude other unmarried non-spouses, such as roommates, acquaintances or companions. Additionally, it would bear down unfairly on those unmarried homosexual[s] . . . who would prefer to keep their sexual orientation a private matter. The great potential for different opinions by the employer, insurers and unions as to who is an eligible homosexual partner could expose all parties to allegations of discriminatory treatment and the making public of any administrative examination of the sexual relationships involved.

Hinman, 167 Cal. App. 3d at 528, 213 Cal. Rptr. at 418 (citation and footnote omitted).


109. See, e.g., Sullivan, supra note 107, at 20 (giving various examples of domestic partnership arrangements where partners have a nonsexual relationship, such as an elderly woman and her live-in nurse, a pair of seminarians, two close students, and so forth).

110. New York’s Bereavement Policy requires domestic partners be in a “close and committed personal relationship,” but does not mention whether the relationship is expected to be sexual. New York, N.Y., Executive Order 123 § 1 (Aug. 8, 1989).

111. The consanguinity requirement in most domestic partnership agreements is probably intended to prevent applicants from violating laws against incest. See supra note 64 and accompanying text (discussing domestic partnership initiative consanguinity requirements). Domestic partners typically must swear that they “are not related by blood closer than would bar marriage.” See, e.g., SEATTLE, WASH., MUNICIPAL CODE 114648 § 4.30.020(A)(2)(d) (1989).
riages and marriages where the proximity of the blood relationship could produce children with genetic deficiencies. Incest, and until relatively recently, the production of children, can only occur if a couple is engaging in sexual relations. Many partners who do not engage in sexual relations will meet the initiatives' consanguinity requirement. On the other hand, cousins and other extended family members who do not engage in sexual relations, but who need the protection of the initiatives will not meet the consanguinity requirement. Thus, the presence of the restriction indicates an assumption that many of the partners will be engaging in sexual relations.

The failure of domestic partnership initiatives to require the parties to be involved in a sexual relationship may be dictated by state law. If domestic partnership affidavits constitute contracts between cohabitants, then requiring partners to be in a sexual relationship will make the contract void under state law prohibiting contracts with meretricious consideration. Cohabitants, therefore, must contract as partners rather than as lovers in order to have a binding agreement. The irony is that married couples supposedly do not have a binding marital contract until they engage in sexual intercourse.

The affidavit the partners must sign before being recognized as domestic partners will decrease the likelihood of mere roommates registering, regardless of whether the partners are engaged in a sexual relationship. Not only does the affidavit contain requirements the partners must meet before they qualify for benefits, but it also requires each of the partners to swear that they plan to remain together as a couple indefinitely, are responsible for each other's welfare and share the common necessities of life.

The concern about mere roommates registering as partners seems to reflect a concern about people fraudulently registering as domestic partners. The affidavit the partners must sign, however, mitigates the potential for fraud. If the partners commit fraud in signing the affidavit, they subject themselves to suit by any party suffering losses due to their fraud. Although not defined in the affidavits, presumably fraud in this context would be found where the parties signing the affidavit registered solely to obtain benefits, rather than because they were in a mutually committed relationship.

113. See, e.g., Marvin v. Marvin, 18 Cal. 3d 660, 670-671, 557 P.2d 106, 113, 134 Cal. Rptr. 815, 822 (1976) (stating that although the existence or contemplation of a sexual relationship will not invalidate any agreements between parties, such agreements will fail to the extent that they rest upon consideration of meretricious sexual services).
114. Cf. H. CURRY & D. CLIFFORD, supra note 23, at 2:7 (warning contracting cohabitants to refer to themselves as partners, not lovers).
115. See 55 C.J.S. Marriage § 13 (1948) ("The theory on which [an unconsummated] marriage is invalidated is not that there was an original incapacity to contract, but that there has been an entire and complete failure of the consideration of the marriage contract." (footnote omitted)).
117. See, e.g., id. (specifying that anyone who suffers loss due to false affidavit statements or unnotified change in circumstances may bring a civil action against the partners to recover the loss).
118. See TAKOMA PARK, MD., HOUSING CODE 1986 § 6-81(a) (1986) ("A person is not a
The fear of fraud by some partnerships should not justify failure to recognize domestic partnerships. Heterosexual couples claiming to be married generally do not have to prove they are married in order to obtain benefits. Rather, the cities or other entities extending them benefits simply assume that they are telling the truth. Similarly, people registering as domestic partners should not be assumed to be dishonest in numbers greater than any other population, particularly after signing an affidavit. Even assuming that some of the parties signing the affidavits will commit fraud, the benefits of city recognition of domestic partnerships outweigh the risks.

3. Increased Cost of Providing Benefits to Domestic Partners

Opponents of the initiatives also claim that extending insurance benefits to domestic partners will be too costly for the municipalities. They argue that there will be an exponential growth in the amount of benefits claimed, particularly due to covering male homosexuals who are at a high risk for contracting AIDS. In turn, opponents claim that such growth in the demand for benefits will increase the cost of the benefits available to those already receiving them.

While concerns about the increased costs of providing benefits are understandable, they seem to be based on troubling assumptions. There is no reason, for example, to assume that domestic partners will be ill more often than spouses or traditional family members. Therefore, benefits for covered partners should cost no more than benefits for traditional family members. The gay male population still has the highest incidence of AIDS, but the growth of new cases is declining. Of course, to the extent that a high-risk group concept still applies to AIDS, a further irony is that lesbians are the least likely seg-

---

119. See Boggan, supra note 103, at 5, 13; see also Seattle, Wash., Municipal Code 114648 § 430.020(A)(1) (1989) (requiring a married employee seeking benefits to swear only that he or she is married).

120. See Letter from Abbe Land, Mayor of West Hollywood, California, to Sandy Sturges, domestic partnership forum audience member (May 10, 1989) (indicating that abuse of the domestic partnership ordinance will not be tolerated because its purpose is to recognize sincere relationships).


123. See Boggan, supra note 103, at 12.

ment of the population to contract the disease. This arguably makes them preferable to sexually active heterosexuals as insureds.

Arguments about the perceived cost of domestic partnership initiatives also seem to assume that extending benefits to spouses and traditional family members is somehow cost free. Not only is this not true as an empirical matter, but such benefits are partially paid through the contributions of unmarried employees whose partners receive no benefits. The objection to extending benefits to partners appears to be based more on the type of relationships a city should protect, rather than on the costs of the benefits provided to partners.

4. Obligations Created by Registering as Domestic Partners

Upon registering as a domestic partnership, the partners create enforceable obligations between the partnership and third parties and potentially between one another. Third parties are granted causes of action against the partners under the provisions of the domestic partnership affidavit. Thus, the partners do have obligations to those parties extending them benefits. The provisions authorizing civil actions for recovery of losses and reasonable attorneys' fees under most of the initiatives, however, do not indicate how the liability should be allocated among the partners. The liability provisions do not call for joint and several liability or contribution.

The provisions also are ambiguous as to the extent that parties bringing private actions to collect the debts of one partner by suing the other can rely on statements made in the affidavit of domestic partnership. The cities evidently do not intend state partnership law to govern the situation. In fact, the West Hollywood ordinance provides that "[t]his Chapter does not make the California Uniform Partnership Act ... applicable to domestic partnerships."

Opponents of extending benefits to domestic partners also argue that the partners are not required to support each other financially like married people. In most cities, the partners must affirm under penalty of perjury that

126. See Boggan, supra note 103, at 1-2.
127. Berkeley's Affidavit of Domestic Partnership contains a paragraph providing that the partners "understand that any persons/employer/company who suffer any loss because of false statements ... may bring a civil action against [the partners]." Berkeley, Cal., Affidavit of Domestic Partnership (1986).
128. See Note, Property Rights of Same-Sex Couples, supra note 43, at 359 n.15.
129. See, e.g., Berkeley, Cal., Affidavit of Domestic Partnership (1986) (indicating that partners, together, may be civilly liable based upon false statements made in the affidavit).
130. Id.
132. See, e.g., Elvin, Letter to the Editor, N.Y. Times, Aug. 14, 1989, at A14, col. 4 (arguing that in addition to the adverse tax consequences marriage presents, married persons are unable to qualify for a variety of subsidized programs on the basis of one spouse's income); D'Souza, From Tolerance to Subsidy, Wash. Times, Jul. 10, 1989, at D1, col. 1 ("If one wishes to inherit the life
they are responsible for each other's welfare and common necessities of life. While this type of language is ambiguous, it does indicate that by signing the affidavit the partners are not only registering with the city, but are also entering into a potentially enforceable agreement with each other.

In contemplation of these complex issues, Berkeley's "Domestic Partnership Information Sheet" warns partners signing an Affidavit of Domestic Partnership "that this declaration may have potential legal implications under California law which has recognized that non-marital cohabiting couples may privately contract with respect to the financial obligations of their relationship." Perhaps ironically, several of the information sheets also advise partners to consult an attorney regarding the potential legal effects of the affidavit. Married individuals certainly are not warned to consult attorneys prior to taking their vows. Indeed, they are discouraged from considering the legal aspects of marriage.

In its proposed domestic partnership ordinance, San Francisco attempted to mitigate the potential problem of domestic partnerships creating enforceable liabilities between the partners. Section 4004(a) of its ordinance stated:

Neither this Article nor the filing of a Statement of Domestic Partnership shall create any legal rights or duties from one of the parties to the other other than the legal rights and duties specifically created by this Chapter or other ordinances or resolutions of the San Francisco Board of Supervisors which specifically refer to Domestic Partnership.

The desire not to create legal obligations between partners is understandable, particularly if they do not understand the implications of signing the affidavit. Nevertheless, such a disclaimer seems troubling. If the idea of domestic partnership initiatives is to recognize the commitment two people have made to one another, then it seems problematic to claim within the same initiative that the partners have no enforceable duties to one another.

C. Federalism: The Limitations of Local Government

Legislative enactments by municipalities are subject to the dictates of state
Any city initiative is vulnerable to a claim of preemption. That is, a city is subject to a claim that state or federal law prohibits the city's ability to legislate on a particular issue. Moreover, even if an initiative is not preempted by state and federal statutes, it may interact with those statutes in ways that may disadvantage domestic partners.

Preemption issues concerning domestic partnership initiatives could arise if third parties affected by the initiatives challenge them. A wide range of potential plaintiffs could attack the initiatives. The West Hollywood ordinance, for example, provides domestic partners with health-care facility visitation rights. If traditional family members object to a partner's visitation, as in the Kowalski case, then they could challenge the validity of the ordinance. The West Hollywood ordinance also protects domestic partners under its Rent Stabilization ordinance. A landlord, hostile to the ordinance's protections, could challenge its validity, as in the Braschi case.

1. State Preemption

Opponents could conceivably make state law challenges to domestic partnership initiatives based on at least three theories. First, an initiative might be challenged as being beyond the city's authority to enact legislation of local concern. Second, an initiative might be attacked as contrary to state law. Third, domestic partnership initiatives are vulnerable to preemption by the state legislature which could overrule them with contrary state legislation.

139. See Note, Conflicts Between State Statutes and Municipal Ordinances, 72 Harv. L. Rev. 737, 737-38 (1959) (hereinafter Note, Statutes and Ordinances) (indicating that municipal legislative powers are wholly controlled by state legislatures); see, e.g., Pacific Gas & Elec. v. State Energy Resources Conservation Comm'n, 460 U.S. 190, 203-04 (1983) (setting forth various ways in which Congress can preempt state authority to make laws).
140. State antisodomy laws, for example, could be construed to prevent cohabiting homosexual couples from receiving domestic partnership benefits. See infra notes 164-75 and accompanying text.
141. West Hollywood, Cal., Ordinance 22 § 7 (Feb. 26, 1985). Under the ordinance, health care facilities include "hospitals, convalescent facilities or other long-term care facilities." Id.
143. See Cox, supra note 6, at 49 (arguing that "[u]nder local legislation, a problem of state preemption may arise in attempting to require hospitals to recognize alternative family members to the same extent that they currently recognize immediate family members for visitation and treatment authorization purposes" (footnote omitted)).
144. The Rent Stabilization ordinance protects domestic partners from rent increases and evictions when a lease provides for single occupancy of a residence. See Speech by Mary Tyson, City Clerk of West Hollywood, California, given at public forum (Apr. 24, 1989); see also West Hollywood, Cal., Rent Stabilization Ordinance § 6413 (1985).
DOMESTIC PARTNERSHIP INITIATIVES

In most states, the power of a municipality to enact legislation or adopt policies is derived from the state. In the states having cities with domestic partnership initiatives discussed here—California, Maryland, New York, Washington, and Wisconsin—the cities derive their powers from “home rule” provisions. A state constitutional grant of home-rule power enables cities “to enact ordinances governing a wide range of local and municipal affairs,” free from interference by the state legislature.

Despite such home-rule provisions, cities are limited in their ability to enact legislation. State courts have construed home-rule provisions as narrow grants of power. Typically, state courts will invalidate city ordinances that legislate on issues deemed to be of general or statewide concern. A state court could, therefore, strike down an initiative as beyond municipal power if it views legal affirmation of the relationship of unmarried cohabitators as an issue of general statewide concern. An initiative could be struck down even in the absence of contrary state legislation.

Domestic partnership initiatives may be subject to implied preemption by state statutes and court interpretations prohibiting same-sex marriages. Since no state allows same-sex marriage, none of the cities having domestic partnership initiatives are located in states that allow same-sex marriages. While

146. CAL. CONST. art. XI, § 7 (“A city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”).
147. The Maryland Constitution provides: “Any such municipal corporation, now existing or hereinafter created, shall have the power and authority, (a) to amend or repeal an existing charter or local laws relating to the incorporation, organization, government, or affairs of said municipal corporation ...” MD. CONST. art. XI-E, § 3.
148. N.Y. CONST. art. IX, § 2(c)(i) (providing that “every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government”).
149. WASH. CONST. art. XI, § 10 (1889, amended 1964, 1989) (providing any city with a population of 10,000 or more with the power to frame a charter for its own government).
150. WIS. CONST. art. XI, § 3 (1848, amended 1874, 1912, 1924, 1932, 1951, 1955, 1960, 1961, 1963, 1966, 1981). This section provides: “Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village.” Id.
151. See Note, Statutes and Ordinances, supra note 139, at 739.
152. See, e.g., Comment, One Century of Constitutional Home Rule: A Progress Report?, 64 WASH. L. REV. 155, 160 (1989) [hereinafter Comment] (reporting that Washington’s courts have limited their municipalities’ broad grant of power).
153. See Feiler, Conflict Between State and Local Enactments—The Doctrine of Implied Preemption, 2 URB. LAW. 398, 408-12 (1970).
154. See Note, Statutes and Ordinances, supra note 139, at 744. In many situations, municipal ordinances which are consistent with state laws are, nevertheless, invalidated on the theory that the state law was intended to be the sole applicable legislation. Id.
the initiatives do not purport to authorize same-sex marriages,166 a state court could find that determination of family status is an area of exclusive state concern. If a state court found that health-care facility visitation is an issue of statewide concern, then it could invalidate a West Hollywood-type initiative that grants hospital visitation rights to partners.167

In states allowing cohabitators to contract with one another, the initiatives might withstand an implied preemption challenge.168 A state’s willingness to respect private contracts, however, is not the same as a willingness to uphold municipal initiatives. The initiatives are more likely to be upheld in states that have extended benefits to gay couples under statutes providing benefits to dependents or family members such as New York.

In a home-rule state, municipal legislation also remains subject to the constitution and laws of the state.169 An ordinance or municipal policy that is viewed as conflicting with state law could be struck down on the ground that state law preempts the ordinance.170 Deciding whether an ordinance conflicts with a state statute is therefore a critical inquiry. In determining whether a conflict exists, the “basic test . . . is whether . . . a municipal ordinance permits [what] a general law prohibits or vice versa.”171 If an ordinance permits behavior restricted under a state law, a court could strike down the ordinance.172 A court can make this ruling even in the absence of an express conflict.173

To the extent that domestic partnership initiatives promote, or at least tolerate, sexual relationships between the partners,174 they arguably conflict with state antisodomy laws by allowing homosexual couples to register as partners.175 In a jurisdiction that prohibits consensual acts of sodomy, such as Ma-

| 156. Boggan, supra note 103, at 13. |
| 157. Cf. Note, Statutes and Ordinances, supra note 139, at 472 (recognizing that even municipal ordinances concerning matters uniquely associated with municipal government have some state-wide effect which could subject the ordinance to preemption). |
| 158. Cf. Note, Property Rights of Same-Sex Couples, supra note 43, at 364-67 (arguing that homosexual cohabitation contracts should be enforced in the same manner as heterosexual cohabitation contracts because no logical distinction exists between the two groups). |
| 159. See, e.g., Wis. Const. art. XI, § 3 (for pertinent text see supra note 150). |
| 160. See, e.g., Note, Statutes and Ordinances, supra note 139, at 741 (noting that even matters that are “exclusively local” in character seldom prevail over conflicting state laws). |
| 161. See Comment, supra note 152, at 169. |
| 162. Id. at 170; see also Note, Statutes and Ordinances, supra note 139, at 744 (arguing that only the portion of the ordinance which conflicts with a state law needs to be stricken). |
| 163. See supra note 154 and accompanying text. |
| 164. The initiatives do not explicitly require the partners to be in a sexual relationship, but a court could easily find that a sexual relationship is assumed. See supra text accompanying notes 110-15. |
| 165. Cohabitation contracts could also be invalidated on this basis. See H. Curry & D. Clifford, supra note 23, at 2:7. The authors recommend that homosexual partners avoid using the |
ryland, a court could decide that domestic partnership initiatives are preempted by a state law. Domestic partnership initiatives may also be struck down for impossibly condoning illegal behavior in such a jurisdiction. In extending benefits to known violators of the law, the city may be viewed as violating its duty to uphold and enforce state laws.

Sodomy statutes that could preempt domestic partnership initiatives have survived federal constitutional challenge. Nevertheless, preemption of the term "lovers" in contracts and instead use the word "partners" to avoid having their contracts declared unenforceable. State statutes prohibiting fornication could also preempt domestic partnership initiatives. Cf. Note, Property Rights of Same-Sex Couples, supra note 43, at 365 (indicating that decriminalization of sodomy, adulterous cohabitation, and oral copulation between consenting adults has promoted the recognition by courts of contract rights between homosexual couples). See, e.g., Marvin v. Marvin, 18 Cal. 3d 660, 684, 557 P.2d 106, 122, 134 Cal. Rptr. 815, 831 (1976).

166. MD. CRIM. LAW CODE ANN. art. 27, §§ 553, 554 (1987). Maryland courts have ruled that consensual sodomy is not exempt from prosecution under the statute. See, e.g., Gooch v. State, 34 Md. App. 331, 367 A.2d 90 (Ct. Spec. App. 1976) (stating that a violation of the statute occurred whether the sodomy act was voluntary or involuntary).

California, Washington, and Wisconsin do not criminalize consensual sodomy by statute. See CAL. PENAL CODE § 286(c) (West Supp. 1990) (criminalizing sodomy with a person 14 years old or under, or sodomy against a person's will); WASH. REV. CODE § 9A.44.010(7) (Supp. 1989) (defining consent to mean actual words or conduct indicating freely given agreement); Wis. Stat. Ann. § 944.01 (West Supp. 1989) (stating that the state does not regulate the private sexual activity of consenting adults).


Contrary to popular myth, or perhaps invisibility, lesbian sexual behavior is also covered by many sodomy laws. See MD. CRIM. LAW CODE ANN. art. 27 § 554 (1987) (criminalizing the acts of a person "taking into his or her mouth the sexual organ of any other person"); see also Brief of Amicus Curiae American Psychological Association and American Public Health Association in Support of Respondent at 5-7, Bowers v. Hardwick, 478 U.S. 186 (1986) (No. 85-140) (discussing cunnilingus as prohibited behavior under the Georgia sodomy statute) [hereinafter Brief of Amicus Curiae APA].

167. Heterosexuals, of course, also engage in sodomy. See Brief of Amicus Curiae APA, supra note 166, at 5-7.


168. Cf. Note, The Concurrent State and Local Regulation of Marijuana: The Validity of the Ann Arbor Marijuana Ordinance, 71 MICH. L. REV. 400, 417 (1972) (stating that "[t]he City of Ann Arbor is without power to pre-empt or suspend the operation of the state law [making marijuana possession a felony] within her city limits").

169. E.g., Bowers v. Hardwick, 478 U.S. 186, 192 (1986) (holding that Georgia's sodomy statute does not violate the fourteenth amendment as applied to consenting male homosexuals).
initiatives on the basis that they condone sodomy would reduce the entirety of the partners’ relationship to their sex acts. While the importance of the partners’ sex life to their relationship cannot be denied, sex is not the only bond in a relationship. Other values such as mutual caring and emotional intimacy are also prominent aspects of a relationship. The purpose of domestic partnership initiatives is to protect relationships, of which sex is one element. To invalidate the initiatives because they “promote” sodomy would constitute a narrow vision of the relationships they protect.

For similar reasons, domestic partners should not be subject to sodomy prosecutions. Sodomy should not be presumed merely because a couple registers as a domestic partnership. Moreover, states should not be allowed access to domestic partnership information from cities for this purpose. Despite its other troubling aspects, the confidentiality provision contained in most of the initiatives solves this problem. If, for some reason, states believe that the initiatives promote sodomy, then the states should challenge the initiatives, or the cities, and not the behavior of the partners. Further, the partners should not be penalized for conduct arguably condoned by what they believe to be a valid piece of city legislation.

A more direct form of preemption would occur if a state enacted general legislation abolishing the ability of municipalities to act on these issues. Generally, as long as the state legislature does not pass legislation directed at a particular city, so-called “special legislation,” it is free to restrict a municipality’s ability to act. The legislature of a state hostile towards domestic partnership initiatives could enact laws stripping cities of the power to extend benefits to persons other than traditional family members. This possibility is more than mere speculation. After the New York Court of Appeals’ decision in Braschi v. Stahl Associates, a state senator proposed an amendment to the New York Constitution limiting the definition of “family” under New York

170. Cf. Rubenfeld, The Right of Privacy, 102 HARY. L. REV. 737, 755 (1989) (In discussing Bowers v. Hardwick, Rubenfeld states that “[t]here is no reason for personhood to assert that every sexual act is fundamental to an individual’s identity. Rather the intimacy of a sexual relationship—the bond between two people—might be what is central.” (emphasis in original)).

171. Many of the initiatives emphasize the long-term commitments of the partners as well as the “emotional and psychological bonds” fostered by recognizing domestic partners. SEATTLE, WASH., MUNICIPAL CODE 114648, preamble (Aug. 18, 1989).

172. See supra text accompanying notes 94-95.

173. See Md. Const. art. XI-E, § 1 (“The General Assembly shall act in relation to the incorporation, organization, government or affairs of any such municipal corporation only by general laws which shall in their terms and in their effect apply alike to all municipal corporations.”); N.Y. Const. art. XI, § 2(b)(2) (“The legislature [s]hall have the power to act in relation to the property, affairs of government of any local government only by general law.”); Wash. Const. art. 11, § 10 (1889, amended 1964) (“All charters . . . adopted by authority of this Constitution shall be subject to and controlled by general laws.”). For California’s constitutional provision, see supra note 146. For Wisconsin’s constitutional provision, see supra note 150.

state law to traditional family members.\textsuperscript{178}

2. \textit{Federal Preemption}

Domestic partnership initiatives may also be partially preempted by federal law. One possible source of preemption is the federal Employee Retirement Income Security Act ("ERISA").\textsuperscript{175} ERISA regulates employee benefit plans. ERISA specifically states that its provisions "shall supersed[e] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described" in the statute, unless exempt from its provisions.\textsuperscript{177} Under this provision, most state regulation of employee benefit plans is preempted by ERISA.\textsuperscript{178} The only exemptions from federal preemption of local laws under ERISA are state laws that regulate "insurance, banking or securities."\textsuperscript{179}

A unanimous Supreme Court, in \textit{Shaw v. Delta Airlines, Inc.},\textsuperscript{180} interpreted the language of ERISA's preemption provision very broadly. In \textit{Shaw}, Delta challenged the application of New York's Human Rights Law,\textsuperscript{181} and Disability Benefits Law\textsuperscript{182} to company benefit plans subject to ERISA.\textsuperscript{183} Delta's benefit plans did not provide benefits to pregnant women.\textsuperscript{184} The two New York
The Court concluded that the two state statutes fell within ERISA’s preemptive reach because they “relate to” employee benefit plans. The Court stated that ERISA preemption did not merely preempt “state laws specifically designed to affect employee benefit plans.” As applied to benefit plans, statutes that prohibit discriminatory practices not specifically prohibited by federal law are preempted by ERISA.

The expansive interpretation of ERISA adopted by the Supreme Court in Shaw has implications for domestic partnership initiatives. A city or state requirement that private employers provide benefits to the domestic partners of their employees “relate[s] to” an employee benefit plan and is arguably preempted by ERISA. This is possible even if the initiative does not mention employee benefit plans on its face.

ERISA has already been interpreted as preempting the application of municipal legislation prohibiting discrimination against cohabitants for benefits subject to ERISA. The Seattle Fair Employment Practices Ordinance prohibits discrimination against cohabitants. In May, 1989, the Seattle Human Rights Department ruled that the ordinance required private employers in the city to provide medical and health benefits to the partners of unmarried employees equivalent to that provided to the spouses of married employees. Due to preemption, Seattle’s City Attorney concluded that the ruling does not

185. Id. at 89. “ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits.” Id. at 91.

186. Shaw v. Delta Airlines, 463 U.S. 85, 96-97 (1983) (citing the language of 29 U.S.C. § 514(a) (1985)). The Court noted that “[a] law ‘relates to’ an employee benefit plan ... if it has a connection with or reference to such a plan.” Id. (footnote omitted).

187. Id. at 98.

188. Id. at 108.

189. Cf. Law & Ensminger, Negotiating Physicians’ Fees: Individual Patients or Society? (A Case Study in Federalism), 61 N.Y.U. L. Rev. 1, 78 (1986) (arguing that ERISA “imposes significant limits on states that seek to develop social responses to major problems in medical insurance cost, coverage, and accessibility”).

190. See Kilberg & Inman, Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514, 62 Tex. L. Rev. 1313, 1334 (1984) (giving examples of decided cases, including Shaw, where ERISA preempted state laws that were ambiguously related to employee benefits).


192. Id.
apply to an employer whose benefit plans are covered by ERISA. Since most Seattle employers' benefits plans are covered by ERISA, the impact of the ordinance and the Department's ruling on private employers' benefit plans is virtually nonexistent.

Due to possible ERISA preemption, a city can only require that private employers provide benefits to the domestic partners of employees if mandated by federal law, or by passing a law regulating insurance. Under the applicable federal law, Title VII of the Civil Rights Act of 1964, employers are not required to provide benefits to the domestic partners of their employees. Until Title VII provisions are changed, it is unlikely that domestic partnership initiatives can be applied to private employers. Additionally, ordinances prohibiting discrimination against domestic partners in employment are not likely to qualify as state regulation of insurance, exempt from ERISA preemption. Thus, ERISA may effectively prohibit cities from requiring private employers to provide benefits for the partners of their employees. Outside the parameters of ERISA, however, the municipalities can continue to prohibit discrimination against domestic partners.

3. Avoiding Preemption

Preemption problems limit the ability of municipalities to force third parties to recognize and treat domestic partnerships equitably. Indeed, the limited scope of domestic partnership initiatives indicates that municipalities have structured their initiatives to avoid preemption problems. Most of the initiatives only cover municipal employees, and therefore avoid ERISA preemption. Further, most initiatives are adopted through private or collective bargaining agreements and not pursuant to an ordinance. By failing to implicate third parties and by enacting domestic partnership agreements through collective bargaining, the initiatives may be insulated from legal challenge. If protection

---

193. See supra note 176 (describing plans covered by ERISA).
194. See supra notes 176-79 and accompanying text.
195. Cf. 42 U.S.C. § 2000e-2(a)(1) (1982). This section provides that it is an unlawful employment practice to “discriminate against any individual . . . because of . . . race, color, religion, sex, or national origin.” Id. Section 2001e-(k) defines “because of sex” to include “because of or on the basis of pregnancy, childbirth, or related medical conditions.” 29 U.S.C. § 2000e-(k). Two provisions indicate that Title VII applies to employees only and not to family members, and that Title VII does not prohibit discrimination on the basis of sexual preference.
196. Cf. Metropolitan Life Ins. v. Massachusetts, 471 U.S. 724 (1985) (holding that a Massachusetts law requiring health insurance policies to include mental health benefits was not preempted by ERISA because the law related to insurance and not to employee benefit plans); Note, Defining the Contours of ERISA Preemption of State Insurance Regulation: Making Employee Benefit Plan Regulation an Exclusively Federal Concern, 42 Vand. L. Rev. 607, 628 (1989) (arguing that the insurance, banking, and securities savings clause found in 29 U.S.C. § 1144(b)(2)(A) has been narrowed to “preserve only state-mandated benefit laws and, presumably, any state statute specifically regulating the terms of an insurance contract” from ERISA preemption (footnote omitted)).
197. See Law & Ensminger, supra note 189, at 76 (noting that “Congress has placed plans outside the realm of legal regulation and social control, except for collective bargaining”).
is limited to what is available through private agreements, however, the benefits partners can receive are commensurately limited. While cities have initially succeeded in providing partners with a limited range of entitlements, preemption challenges might discourage cities from expanding the types of benefits available.

Preemption is not only a litigation concern. The adoption of a domestic partnership initiative by a city is an explicit recognition that the city is powerless to change the fact that homosexual partners are denied certain entitlements such as federal tax benefits or marriage. As Berkeley's City Manager stated: “The State's narrow definition of marriage is beyond the power of the City of Berkeley or its citizens to change. Efforts aimed at the state level are politically useless at this time, either in changing the definition of marriage or the pattern of use in California.”

4. Federal Marital Status Classifications

While not an issue of preemption, receipt of benefits under domestic partnership initiatives may create difficulties for the partners under federal laws that apply marital status classifications. Such laws include the Bankruptcy Code, the Social Security Act, and the Internal Revenue Code.

The extension of health benefits to the domestic partners of employees may be problematic, for example, under the Internal Revenue Code. The cost of medical benefits provided to a domestic partner may be taxable to the employee, even though such benefits are not taxable when provided to a spouse. The Internal Revenue Service “does not recognize unmarried partners in health-insurance plans and may insist that . . . employees pay taxes on health benefits if those benefits were extended to unmarried couples.” The partners may also be disadvantaged if the federal government considers one partner’s income in calculating the other partner’s eligibility for need-based

198. Boggan, supra note 103, at 13; see also Salholz, The Future of Gay America, NEWSWEEK, Mar. 12, 1990, at 20, 25 (concluding that it is unlikely that gay marriage will be recognized in the foreseeable future due to objections by church and state officials).


202. See, e.g., 26 U.S.C. § 105(b) (1988) (exempting from taxation medical benefits received by an employee on behalf of the employee’s spouse or dependents).

203. Id. The tax exemption is available to a taxpayer only when the benefit is paid directly to the taxpayer’s spouse or dependents.

The value of the benefits associated with domestic partnership initiatives probably will outweigh the negative consequences which might accompany them, making the benefits worthwhile to the partners. According to opponents of domestic partnership initiatives, however, being subjected to such disadvantages is what marital obligation is all about.206 The balance struck between receiving benefits under one program and being burdened by another demonstrates the complexity of the entitlement structure that domestic partnership initiatives may affect. Nevertheless, many of the benefits available under the initiatives will not implicate the marital status classifications in federal laws.

D. Should Domestic Partnership Initiatives Use Marriage As A Model?

In addition to practical considerations, domestic partnership initiatives give rise to a theoretical dilemma. As they are currently drafted, domestic partnership initiatives seem to require partners to have a marital-type relationship.207 This requirement reflects an underlying tension as to whether the domestic partnership initiatives are a first step in the direction of allowing gay marriage or whether the initiatives are an attempt to promote an alternative vision of the family. Regardless of the answer, the purposes of domestic partnership initiatives and what they promote should be clarified.

1. How Current Initiatives Imitate Marriage

While domestic partnership initiatives do not purport to allow same-sex marriages, many of their requirements mirror marital requirements. All the domestic partnership initiatives discussed here require the partners to be in a monogamous relationship.208 As is generally the case in marriage, the partners

205. See M. Glendon, The Transformation of Family Law: State, Law, and Family in the United States and Western Europe, 282 (1989); see also Gorney, Making It Official: The Law & Live-Ins; San Francisco Recognizes the Domestic Partner, Wash. Post, July 5, 1989, at C1, col. 1. In the Gorney article, a gay opponent of domestic partnership initiatives expressed his fear that AIDS treatment cost reimbursement for domestic partners might depend upon the total income of the partners rather than on the income of only the afflicted partner. Id. at C9, col. 4. This problem, however, would probably arise only if domestic partners were recognized as having financial obligations toward one another. Regarding the likelihood that domestic partnership initiatives will be interpreted as creating financial obligations between partners, see supra notes 132-33 and accompanying text.

206. See, e.g., Sherman, Gay Couples Seek Recognition; New York Ruling Raises Hopes, Nat'l J., July 31, 1989, at 3 (raising the possibility that the surviving member of a gay couple could be responsible for his or her companion's medical bills).

207. See, e.g., Berkeley, Cal., Affidavit of Domestic Partnership (1986) (requiring that domestic partners swear that (1) they reside together and have done so for 6 months; (2) that they are not married; (3) that they are not related by blood; and (4) that they are each other's sole domestic partner). See infra Appendix B for an example of an Affidavit of Domestic Partnership.

208. See, e.g., West Hollywood, Cal., Ordinance No. 22 § 1(A) (Feb. 26, 1985). The ordinance defines a domestic partnership as "exist[ing] between two persons if . . . (6) [t]he persons declare that they are each other's sole domestic partner; . . . [and] (9) [n]either person has declared that he or she has a different domestic partner." Id.
must be eighteen years of age,\textsuperscript{209} and must also be competent to sign and enforce contracts.\textsuperscript{210} The partners must not be blood relatives,\textsuperscript{211} and cannot already be married.\textsuperscript{212} In most cities, each of the partners must wait six months after terminating a domestic partnership before registering as a member of a different partnership.\textsuperscript{213} This period is analogous to the waiting period between obtaining a final divorce and being eligible to marry again.\textsuperscript{214}

In some respects, the requirements for domestic partnerships are more onerous than those for marriage.\textsuperscript{215} Many cities require domestic partners to have been together as a couple, or to have actually lived together for several months, before registering as partners.\textsuperscript{216} New York City requires partners to live together for a year before qualifying for domestic partnership benefits.\textsuperscript{217} In contrast, married couples are eligible to receive benefits as soon as they are married, without having lived together beforehand.\textsuperscript{218} Domestic partners are required to live together.\textsuperscript{219} Married couples are not subject to this

\begin{enumerate}
\item \textsuperscript{209} Compare \textit{id.} § 1(A)(4)-(5) (requiring domestic partners to be 18 years of age and competent to contract) with \textit{Cal. Civ. Code} § 4101(a) (1990) (requiring that “any unmarried person over the age 18 years and upwards is capable of consenting to and consummating marriage”).
\item \textsuperscript{210} Compare \textit{West Hollywood, Cal., Ordinance} 22 § 1(A)(5) (Feb. 26, 1985) (requiring that partners be competent to contract) with \textit{Cal. Civ. Code} § 4425 (1990) (indicating that lack of capacity of a party entering a marriage is grounds for an annulment).
\item \textsuperscript{211} \textit{West Hollywood, Cal., Ordinance} 22 § 1(A)(1) (Feb. 26, 1985). This is a consanguinity requirement. See supra note 64 and accompanying text (discussing consanguinity requirements).
\item \textsuperscript{212} \textit{West Hollywood, Cal., Ordinance} 22 § 1(A)(2) (Feb. 26, 1985).
\item \textsuperscript{213} See, \textit{e.g.}, Santa Cruz, Cal., Affidavit of Domestic Partnership (1990) (the employee “understand[s] that another Affidavit of Domestic Partnership cannot be filed until six (6) months after a statement of termination of the previous partnership has been filed with [the] Personnel Department”).
\item \textsuperscript{214} See, \textit{e.g.}, \textit{Cal. Civ. Code} § 4514(a) (West. Supp. 1990) (noting with respect to a final divorce judgment, “no judgment entered . . . shall be final until six months have expired from the date of service of a copy of summons and petition or the date of appearance of the respondent, whichever occurs first”); see also Bogdan, \textit{supra} note 103, at 18 (disclosing that the six-month waiting period between domestic partnership filings is equal to the time required to obtain a divorce).
\item \textsuperscript{215} See Sullivan, \textit{supra} note 107, at 22. Domestic partnership agreements usually require “an elaborate statement of intent to qualify.” \textit{Id.}
\item \textsuperscript{216} See, \textit{e.g.}, Berkeley, Cal., Affidavit of Domestic Partnership (1986) (“[W]e affirm . . . that this domestic partnership has been in existence for a period of six (6) consecutive months, at least, prior to the date identified on this affidavit.”). \textit{But see Takoma Park, Md., Housing Code} § 6-81(a) (1986) (allowing partners who have lived together for less than a year to register for benefits if they “can show other indicia of a committed relationship”).
\item \textsuperscript{217} See, \textit{e.g.}, New York, N.Y., Affidavit of Domestic Partnership for Bereavement Leave (1989). By signing the affidavit, the partners swear that they “are currently living together and have been living together for a period of one year or more on a continuous basis.” \textit{Id.}
\item \textsuperscript{218} \textit{E.g., N.Y. Est. Powers & Trusts Law} § 4-1.1 (McKinney 1990) (providing that at least a portion of a decedent’s estate will pass to a spouse if the decedent died without a will, regardless of the length of time married).
\item \textsuperscript{219} See New York, N.Y., Affidavit of Domestic Partnership for Bereavement Leave (1989). West Hollywood’s ordinance provides that “[t]he domestic partnership statement shall include the date on which the persons became each other’s domestic partners and the address or addresses of
DOMESTIC PARTNERSHIP INITIATIVES

requirement. To an extent, some of the stringent requirements that apply to domestic partners reflect understandable governmental goals. Requiring the partners to live together may, in fact, decrease fraudulent claims. The City Manager of Berkeley realizes that the living-together requirement may be "theoretically . . . unfair to same-gender couples," but he thought it was "practically . . . fair and necessary" as an indication of the seriousness of the relationship. Without such a requirement, he feared "abuse of the opportunity" to register as domestic partners. Requiring the partners to be eighteen years of age or able to understand contracts may also relate to acceptable goals. The cities have an interest in making sure that the partners understand the implications of the affidavit and are legally able to sign it.

Other requirements of the domestic partnership initiatives, however, indicate that the initiatives assume that the relationship between domestic partners is virtually identical to the relationship between married couples. A consanguinity requirement, for example, has no purpose without assuming that the partners have a marriage-like relationship. Forcing partners to be in a monogamous relationship also assumes that the partners have a marriage-like relationship. Likewise, a prohibition against a married person becoming a domestic partner assumes the relationship is marital. It is analogous to a prohibition against bigamy.

In many cases, the initiatives are in fact a self-conscious "attempt to try to equalize . . . benefits between married couples and couples who are not married, either through choice or because they are barred from marriage, as in the case of lesbian or gay male couples." In recommending an extension of benefits to domestic partners, the City Manager of Berkeley proclaimed, "Whatever one may think of extending benefits to different kinds of relationships, it has no immediate bearing on the issue of extending benefits to similar relationships." Thus, the initiatives appear to benefit only those partnerships that successfully imitate the traditional marriage model.

---

220. See 41 AM. JUR. 2D, Husband and Wife § 7, at 24 (1968) (stating that the "term 'living together', as applied to husband and wife, does not always mean a common place of living").
221. Boggan, supra note 103, at 17.
222. Id.
223. See text accompanying notes 110-13 (discussing domestic partnership initiative consanguinity requirements).
224. See SEATTLE, WASH., MUNICIPAL CODE 114648 § 4.30.020(A)(2)(b) (1989). The affidavit of domestic partnership must contain a provision affirming that the partners are not married. Id.
226. Boggan, supra note 103, at 11.
2. The Theoretical Debate

Supporters of the initiatives disagree over whether they are a step toward same-sex marriages or whether same sex marriage should even exist. In a published debate with Thomas Stoddard in Out/Look magazine, Paula Ettelbrick of Lambda Legal Defense and Education Fund, posed the question, Since When is Marriage a Path to Liberation?227

While Ettelbrick understands gay men and lesbians' desire to have their status changed from "outsiders" to "insiders" through marriage, she opposes gay marriage on two grounds.228 First, she fears that gay marriage will "force [homosexual] assimilation into the mainstream, and undermine the goals of gay liberation."229 She does not want to give the state the power to regulate her "primary relationship."230 Second, she argues that gay marriage will perpetuate the "narrow, but dramatic, distinctions [our society makes] between those who are married and those who are not married."231 In sanctioning gay marriage, society will therefore fail to "respect[] and encourage[] choice of relationships and diversity."232

Ettelbrick supports domestic partnership initiatives precisely because she views them as protecting alternative families and because they lay the "groundwork for revolutionizing society's views of the family."233 She does not interpret domestic partnership initiatives as requiring the partners to be in a sexual or romantic relationship.234 Thus, for Ettelbrick, domestic partnership initiatives are progressive validations of nonmarital relationships.235

Thomas Stoddard, also of Lambda Legal Defense and Education Fund, debated Ettelbrick. He discussed the issue: Why Gay People Should Seek the Right to Marry.236 Stoddard views domestic partnership initiatives as a step

---

228. Id. at 9, 14.
229. Id. at 14. Almost two decades ago Ralph Hall espoused views similar to Ettelbrick's: Homosexual marriages submitting to the guidelines of so-called conventional rites must be classed as reactionary. The gay lib movement does not need these kinds of tactics. We're involved in rational warfare, not irrational. Now, don't you agree it isn't relevant to gay liberation when we start imitating meaningless, bad habits of our oppressors and begin instituting them? That isn't the freedom we want. That isn't our liberation. That isn't the equality we want. And that ain't revolutionary.


231. Id.
232. Id.
233. Id. at 17.
234. Id.
235. Id.
236. Id. at 9. Stoddard is not alone in his advocacy of homosexual marriage. Legal scholarship abounds with support for homosexual marriage. See, e.g., Friedman, The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family, 3 Berkeley Women's L.J. 134 (1988); Lewis, From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage, 97 Yale L.J. 1783 (1988); Note, Marriage: Homosexual
towards equality, where homosexual couples have the same right as heterosexual couples to marry. While Stoddard recognizes that "marriage has been oppressive, especially . . . for women," he nevertheless believes "that the gay rights movement should aggressively seek full legal recognition for same-sex marriages." Stoddard believes that every solution to confer benefits on gay and lesbian couples other than marriage "will inevitably, under current circumstances, be incomplete" and will maintain homosexual relationships in their "subsidiary status." He also argues that there are "some barriers one simply cannot transcend outside of a formal marriage," such as eligibility for favorable tax or immigration status under federal law.

Stoddard emphasizes that he is not discussing the "desirability of marriage, but rather the desirability of the right to marry." Stoddard claims that allowing homosexual marriage would change the institution of marriage, making it less oppressive and static. Finally, he views allowing gays and lesbians to marry as a litmus test of society's commitment to end discrimination against gays and lesbians.

While Ettelbrick and Stoddard are articulate advocates of their opinions, both seem to dismiss crucial aspects of the realities many couples and alternative families face. In his desire to obtain entitlements, Stoddard discounts the impact of marriage as a social institution. Since marriage is statutorily defined, couples are limited in the ways in which they may structure their relationship. Indeed, the failure of many heterosexual couples to marry when marriage is an option for them indicates the confining structure of marriage. Stoddard also downplays the notion that marriage is "the bedrock of a heterosexually dominated society" and the difficulty gays will face in changing the institution of marriage. Thus, in advocating that homosexual couples adopt roles similar to married couples, Stoddard's solution seems to perpetuate marriage as society's sole method of legalizing intimate relationships.

In her advocacy of liberation from marital bonds, Ettelbrick dismisses the expressed desire of many homosexual couples to marry. Many homosexual


Even some conservatives support homosexual marriage. In The New Republic, Andrew Sullivan argued that the state should allow gay marriage because "[l]ike straight marriage, it would foster social cohesion, emotional security, and economic prudence." Sullivan, supra note 107, at 22.

238. Id. at 10.
239. Id. at 11.
240. Id. at 13.
241. Id. at 12.
242. Id. at 13.
243. See id.
244. See id. at 12.
245. LESBIAN RIGHTS PROJECT, supra note 51, at 12.
couples have litigated to obtain the right to marry. While some advocates may view lobbying for gay marriage merely as an alternative to the current reality, not all gays and lesbians share that sentiment. That is, many homosexual couples want to get married solely for social and psychological, as opposed to legal reasons. Moreover, many homosexual couples' relationships are virtually indistinguishable from those of married couples. To claim that they must be different as a matter of principle seems to ignore the preferences of many homosexual couples.

While Ettelbrick's fear of having the state regulate her "primary relationship" through marriage is understandable, her argument overlooks the fact that the state already regulates such relationships even in the absence of express regulation. The state regulates a gay couple's relationship every time it denies one partner access to the other in the hospital, or fails to let a partner make medical decisions. Traditional family members are entitled to make these decisions without question.

3. The Initiatives as a Compromise

The tension expressed by Ettelbrick and Stoddard's debate is reflected in the domestic partnership initiatives themselves. The initiatives extend benefits to unmarried homosexual and heterosexual couples and therefore recognize nontraditional relationships. Nevertheless, the initiatives seem to provide benefits only to those couples whose relationships successfully imitate that of married couples. In this respect, domestic partnership initiatives seem to be a form of local marriage, rather than a social affirmation of an alternative type of family. Domestic partnership initiatives are a local compromise resting somewhere between Ettelbrick's view that the initiatives recognize alternative families and Stoddard's view they are a step in the direction of sanctioning gay marriages. This compromise is a troubling one. Domestic partnership initiatives


247. Cf. Ettelbrick & Stoddard, supra note 48, at 8; 12-13 (urging gays to seek the right to marry or the abolishment of marriage).

248. The psychological benefit of marriage is evidenced by the occurrence of gay and lesbian marriages which are not recognized by the state as legal marriages. See id. at 8 (reporting "the popularity of 'The Wedding,' ... the event at the 1987 March on Washington for Lesbian and Gay Rights at which thousands of men and women 'married' their partners of the same sex").

249. See Lesbian Rights Project, supra note 51, at 11 (arguing that the elements of successful lesbian and gay relationships are "virtually identical" to the elements of successful comparable heterosexual relationships).

250. For a discussion of the Kowalski case in which a family member, who was given custody of an incapacitated woman, denied the woman's partner visitation rights, see supra text accompanying notes 26-28.

251. Even some proponents of the initiatives recognize their incoherence. In fact, they applaud this confusion, claiming that it will force states to allow homosexual marriage. See Gorney, supra note 91 (reporting that Cynthia Goldstein, a National Gay Rights Advocates staff attorney, stated, "And I hope what [domestic partnership] show[s] is that it's too confusing to have this
should not be a hybrid means of both recognizing gay marriage and protecting cohabiting family members. Rather, they should attempt to promote and protect only one vision or both visions. Otherwise, neither vision will be adequately protected. Moreover, the initiatives serve as models for other cities considering domestic partnerships and may serve as models for state legislatures. Thus, there is a need for cities to articulate their purposes clearly.

If the initiatives are going to burden relationships with heightened marital-type requirements in order for partners to qualify, then the initiatives should provide more protection to the couples. Even at the city level, more protection is available than the cities currently extend. If the cities are willing to provide only limited protection, then the cities should have fewer domestic partnership requirements. Cities could require the affidavits, for example, but could eliminate the six-month waiting period and the monogamy requirement. To the extent that cities fear that elimination of these requirements will increase fraud, perhaps the cities can develop other criteria to prevent fraud.

While there is no reason that the legal system cannot simultaneously protect both cohabitators and married people, domestic partnership initiatives should focus on promoting only a single vision at the present time. Considering that the initiatives currently only seem viable at the city level, cities should strive to protect alternative family arrangements rather than promoting marriage. Marriage is a distinct and separate goal. Merely creating a local marriage does not change the entitlement structure. In fact, as Ettelbrick stated, creating a marital-type relationship means that only people who are exclusive couples are rewarded for being responsible family members.

4. Domestic Partnerships as an Alternative Vision of the Family

Domestic partnership initiatives should promote alternative visions of the family. Protecting alternative family status means that couples who either do not wish to marry, or are unable to marry, will receive similar protections to a new category of relationship, and wouldn't it be more logical just to let gay and lesbian couples get married?"

The logical connection, however, is tenuous. If the initiatives are difficult to administer or are unclear about the purposes they foster, then the more likely result will be their repeal. Additionally, such a cavalier attitude seems to ignore the fact that people need the protections provided by the initiatives, rather than a theoretical debate waged at their expense.

252. See, e.g., Frisco on the Potomac, Wash. Times, July 11, 1989, at F2 (reporting that the District of Columbia was studying the San Francisco Ordinance in contemplation of adopting a domestic partnership initiative). Indeed, the District of Columbia has "recently passed a family leave act which includes lesbians and gay partners in its definition of family members." NATIONAL CENTER FOR LESBIAN RIGHTS NEWSLETTER, Fall/Winter 1990, at 10.

253. See text accompanying note 139.
254. See Boggan, supra note 103, at 19.
255. Alternatives such as personally interviewing domestic partners might be more closely related to preventing fraud.
those afforded married partners. Perhaps more importantly, as domestic partnership initiatives become more widespread, people who love each other and build a strong family without being a “couple” will be rewarded for that behavior. Cities trying to adopt innovative family policies do not need to reinforce society’s fixation on couples. People who never find, or do not search for, the one person with whom to share their lives, or elderly people without traditional family members to surround them, will have their relationships valued by a governmental entity. Certainly, mutual caring, respect, and long-term commitment among two or more people not necessarily related by blood or marriage should be fostered both locally and nationally.

Alternative visions of the family should not be any more difficult to promote at the city level than domestic partnership initiatives currently are. If the political clout exists at the local level for domestic partnership initiatives, then allowing a wider range of relationships to qualify should not be that much harder to achieve.257

IV. CONCLUSION

Domestic partnership initiatives are a positive step towards legally sanctioning the relationships of gay men and lesbians. The vulnerability of city-based initiatives, however, indicates that state level initiatives are needed in order to provide equitable treatment under the law to homosexual couples. Nevertheless, the city initiatives are valuable because they do provide some protection to gay and lesbian couples. Moreover, the initiatives provide a model for solutions that can be enacted at the state level. Legislators can learn from the initiatives and discover the type of solutions that will work and the type that will not work.

In their current form, domestic partnership initiatives appear to be a type of gay marriage at the local level. While recognition of homosexual marriage may be one solution to the inequitable treatment of gay and lesbian couples, it is not a satisfactory solution for all homosexual couples. Marriage is certainly not a satisfactory solution for many heterosexual couples either. Thus, advocates should lobby for both gay marriage and for the protection of nontraditional families.

Even with their limitations, until state legislatures and courts are receptive

257. A city’s provision of benefits to alternative families will not detract from the benefits currently available to married couples and traditional families. See Crutchfield, Nonmarital Relationships and Their Impact on the Institution of Marriage and the Traditional Family Structure, 19 J. Fam. L. 247 (1981) (arguing that recognition of unmarried cohabitators will not erode the institution of marriage). Married couples and traditional families will still receive their state and federal entitlements.

While rethinking whether marriages should receive all of their current privileges is a topic worth pursuing, domestic partnership initiatives at the city level do not really implicate marital entitlements. As domestic partnership legislation is considered at the state and federal level, the questionable primacy of marriage will have to be discussed explicitly, instead of implicitly, by its proponents.
to recognizing a variety of family relationships, domestic partnership initiatives are a necessary and welcome recognition of non-traditional couples.
Appendix A

An Ordinance of the City of West Hollywood Establishing Regulations Governing the Creation, Termination and Effect of Domestic Partnerships

THE CITY COUNCIL OF THE CITY OF WEST HOLLYWOOD DOES ORDAIN AS FOLLOWS:

Section 1. Definition of Domestic Partnership

A. A domestic partnership shall exist between two persons if the following is true:

(1) The persons are not related by blood closer than would bar marriage in the State of California;
(2) Neither person is married or related by marriage;
(3) The persons share the common necessities of life;
(4) The persons are eighteen (18) years old or older;
(5) The persons are competent to enter a contract;
(6) The persons declare that they are each other’s sole domestic partner;
(7) The persons are responsible for each other’s welfare;
(8) The persons agree to notify the City of any change in the status of their domestic partnership;
(9) Neither person has declared that he or she has a different domestic partner;
(10) The persons file a statement of domestic partnership as set forth in Section 2 of this ordinance.

Section 2. Statement of Domestic Partnership

A. Contents

Domestic partners may make an official record of their domestic partnership by completing, signing and submitting to the City Clerk a statement of domestic partnership. Persons submitting a statement of domestic partnership must declare under penalty of perjury:

(1) The persons are not related by blood closer than would bar marriage in the State of California;
(2) Neither person is married or related by marriage;
(3) The persons share the common necessities of life;
(4) The persons are eighteen (18) years old or older;
(5) The persons are competent to enter a contract;
(6) The persons declare that they are each other’s sole domestic partner;
(7) The persons agree to be responsible for each other’s welfare;
(8) The persons agree to notify the City of any change in the status of their domestic partnership;
(9) Neither person has declared that he or she has a different domestic partner.

The domestic partnership statement shall include the date on which the per-
sons became each other’s domestic partners and the address or addresses of both partners.

B. Amendment of Domestic Partnership Statement

Partners may amend the statement at any time in order to change an address by filing a new statement.

C. Termination of Domestic Partnership

Any member of a domestic partnership may terminate the domestic partnership by filing a termination statement with the City Clerk. The person filing the termination statement must declare under penalty of perjury: (1) The domestic partnership is terminated and (2) A copy of the termination statement has been mailed to the other domestic partner.

D. New Statement of Domestic Partnership

No person who has filed an affidavit of domestic partnership may file another statement of domestic partnership until six (6) months after a statement of termination of a previous partnership has been filed with the City Clerk.

Section 3 A. Filing of Statements

Anyone who signs a statement of domestic partnership may file it with the City Clerk. A domestic partnership statement, termination statement or amendment of domestic partnership statement shall not be deemed effective unless filed with the City Clerk and in accordance with the provisions of this Chapter.

B. Form of Statements

All statements relating to domestic partnerships shall be executed as a declaration made under penalty of perjury. The City Clerk shall provide forms as necessary to interested individuals. A statement prepared in substantially the same form as that provided in Section 4227 shall be sufficient for the purpose of this Chapter.

C. Fees for Statements

(1) The City Clerk shall charge a fee for filing a domestic partnership statement, a termination of domestic partnership statement, and for filing an amendment to a domestic partnership statement. The amount of this fee shall be determined by resolution of the City Council.

(2) Payment of the above fee entitles the person filing the statement on behalf of the domestic partnership to have two copies of the statement certified by the City Clerk.

Certification of additional copies at the time of filing shall cost an amount per copy to be determined by resolution of the City Council. Certification of the additional copies at any other time shall cost an amount per copy to be determined by resolution of the City Council.
Section 4 City Clerk's Records

The City Clerk shall maintain adequate records of domestic partnership statements showing which domestic partnerships have been created, terminated or amended.

Section 5 Civil Actions

Any person defrauded by a false statement contained in a statement of domestic partnership, termination statement or amendment statement may bring a civil action for fraud to recover his or her losses.

Section 6 Limited Effect

This Chapter does not make the California Uniform Partnership Act (Corp C 15001 et seq.) applicable to domestic partnerships.

Section 7 Visitation Rights

All health care facilities including but not limited to hospitals, convalescent facilities or other long-term health care facilities shall allow a domestic partner of a patient to visit the patient unless no visitors are allowed.

Section 8 Jail Visitation

All City jails shall allow an inmate's domestic partner to visit the inmate unless:

1. No visitors are allowed, or
2. The authority in charge of the jail decides that the particular visitor is a threat to the security of the facility.

Section 9 Forms

The following forms shall be sufficient proof of the creation or termination of [a] domestic partnership:

A. STATEMENT OF DOMESTIC PARTNERSHIP

We, the undersigned, do declare that:

1. We are not related by blood;
2. Neither of us is married, nor are we related by marriage;
3. We share the common necessities of life;
4. We are each other's domestic partner, and we have been each other's domestic partner since ____________.
5. We are the sole domestic partner of each other and have no other domestic partners.
6. We are both over 18 years of age;
7. We are responsible for each other's welfare;
8. We agree to notify the City of any change in the status of our domestic partnership arrangement;

I declare under penalty of perjury under the laws of the State of California that the statements made above are true and correct.

Executed on ____________, 19__, at __________________, California.
B. STATEMENT TERMINATING DOMESTIC PARTNERSHIP

I, the undersigned, do declare that:

1. (Name of Individual as shown on domestic partnership statement) and I are no longer domestic partners; and,
2. I mailed my former domestic partner a copy of this notice at ________________ on ________________, 19______.

I declare under penalty of perjury under the laws of the state of California that the statements above are true and correct.

Executed on ________________, 19______, at ________________, California.

Signed: ________________
Print: ________________
Address: ________________
Telephone Number: ________________
City of Berkeley Affidavit of Domestic Partnership

I, (Name of Employee), certify that:
1. I, (Name of Employee), and (Name of Domestic Partner) reside together and intend to do so indefinitely at: (Address) and share common necessities of life;
2. We affirm that the effective date of this domestic partnership is (Date) and that this domestic partnership has been in existence for a period of six (6) consecutive months, at least, prior to the date identified on this affidavit. We understand that documentation will be required.
3. We are not married to anyone.
4. We are at least eighteen (18) years of age or older.
5. We are not related by blood closer than would bar marriage in the State of California and are mentally competent to consent to contract.
6. We are each other's sole domestic partner and intend to remain so indefinitely and are responsible for our common welfare.
7. We understand that domestic partners are subject to the same 30-day “window” periods governing all other employees who are covered by or applying for health plan coverage. New children, new employees, adoptions, new marriages and domestic partnerships are all subject to a 30-day limit on the enrollment period beginning on the date of the event.
8. We agree to notify the City if there is any change of circumstances attested to in this Affidavit within thirty (30) days of the change by filing a State of Termination of Domestic Partnership. Such termination statement shall be on a form provided by the City and shall affirm under penalty of perjury that the partnership is terminated and that a copy of the termination statement has been mailed to the other partner.
9. After such termination I, (Name of Employee), understand that another Affidavit of Domestic Partnership cannot be filed until six (6) months after a statement of termination of the previous partnership has been filed with the Risk Management Office.
10. We understand that any persons/employer/company who suffer any loss because of false statement[s] contained in an Affidavit of Domestic Partnership may bring a civil action against us to recover their losses including reasonable attorney's fees.
11. We provide the information in this Affidavit to be used by the City for the sole purpose of determining our eligibility for domestic partnership benefits. We understand that this information will be held confidential and will be subject to disclosure only upon our express written authorization or pursuant to a court order.
12. We affirm under penalty of perjury, that the assertions in this Affidavit are true to the best of our knowledge.