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## “The Little Project:” From Alternative Families to Domestic Partnerships to Same-Sex Marriage

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# “THE LITTLE PROJECT”: FROM ALTERNATIVE FAMILIES TO DOMESTIC PARTNERSHIPS TO SAME-SEX MARRIAGE

Barbara J. Cox\*

## I. INTRODUCTION

When I first heard from members of the Editorial Board of the *Wisconsin Women's Law Journal* about its 15<sup>th</sup> Anniversary issue and their desire to republish my article from their second issue, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining*,<sup>1</sup> I was surprised that it had been fifteen years since the *Journal's* inception. As a graduate of the University of Wisconsin Law School in 1982, and supervisor of its legal writing program from 1983-1987, I was on campus when the students decided to launch the *Journal*. Both it and I have changed and grown over the past fifteen years and I would like to take this opportunity to reflect on that change and growth.

The *Journal* first started publishing when there were very few other law journals dedicated to issues of gender. The *Journal's Statement of Purpose* asserts, “Women’s issues compel continuing attention. We establish this journal to sustain and enlarge the forum. We publish so that the best of what is thought and said about women and the law is no longer relegated to the ‘special issue’ or orphaned by the accepted canon.”<sup>2</sup> The *Journal's* articles have included many groundbreaking articles, often first in their fields to focus on issues of gender, equality, and sex discrimination.

*Alternative Families*, although one of the first articles on domestic partner rights, was not ground-breaking, except perhaps in its acknowledgment of a growing movement involving activists who wanted to ensure that families of all types were protected by law and shielded from discrimination. The story I told in *Alternative Families* was really

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1. Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining*, 2 WIS. WOMEN'S L.J. 1 (1986) [hereinafter Cox, *Alternative Families*].

2. *Statement of Purpose*, 2 WIS. WOMEN'S L.J., at III (1986).

about a group of activists creating a new concept and making it up as we went along.<sup>3</sup>

## II. THE MOVEMENT GETS STARTED

My involvement in the domestic partner movement began when Barbara Lightner, a long-time Madison, Wisconsin activist in the gay, lesbian, and women's communities, called me in late 1982 and asked me to help her with a "little project." Due to my position as a member of the Madison Equal Opportunity Commission (MEOC), she thought I might be able to help introduce an ordinance that would recognize alternative families and provide them with some of the benefits received by people in marital relationships. More than five years later, after countless hours of weekly meetings, hearings, and organizing campaigns, the Madison Common Council finally adopted an extremely limited ordinance.<sup>4</sup>

From the beginning, Madison's ordinance was focused on "alternative family rights," starting with a definition adopted by the MEOC's Alternative Family Rights Task Force,<sup>5</sup> which defined a family as: "Two or more adults, not related by blood, marriage or adoption, who are involved in a mutually supportive, committed relationship and who

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3. See also Barbara J. Cox, *Choosing One's Family: Can the Legal System Address the Breadth of Women's Choices of Intimate Relationships*, 8 ST. LOUIS U. PUB. L. REV. 299 (1989) [hereinafter Cox, *Choosing One's Family*] (further discussing the efforts in Madison, Wisconsin to pass an alternative family ordinance).

4. In 1988,

The [Madison] Common Council amended § 28.03(1) of the Madison General Ordinances to define "family" for zoning purposes to include "two unrelated adults and the minor children of each," . . . [and] § 3.36(15) (a) (2) (g) of the Madison General Ordinances to expand the definition of "immediate family" to include "[a] person designated in writing by the employee as a family partner or that partner's children, stepchildren, or grandchildren."

Cox, *Choosing One's Family*, *supra* note 3, at 320. As a result, city employees could receive bereavement and sick pay due to absences for the death or illness of a member of their family. See *id.* at 320. For a more detailed description of the process behind the Madison ordinance, see *id.* at 308-22. In October 1999, the City of Madison extended health insurance benefits to the domestic partners of its employees. See Lambda Legal Defense and Education Fund, *States and Municipalities Offering Domestic Partnership Benefits and Registries* (visited Jan. 31, 2000) <<http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=403>> [hereinafter Lambda Legal Defense, *States and Municipalities*]. The Lambda Legal Defense and Education Fund provides leadership on lesbian, gay and HIV-related legal issues, publishes educational materials for lawyers and the general public, and serves as a clearinghouse on civil rights information.

5. The MEOC "established the Alternative Family Rights Task Force . . . to study the desirability and feasibility of enacting [local legislation] that would grant traditional family benefits to alternative families in the areas of employment-related benefits, single-family housing, family memberships in organizations, authorization of emergency medical treatment and hospital visitation." Cox, *Choosing One's Family*, *supra* note 3, at 304.

are voluntarily registered publicly . . . together with their dependent children.”<sup>6</sup>

But that definition did not even survive the discussion at the Commission level. Before forwarding its proposal to the City Attorney’s office for the drafting of an alternative families ordinance, the MEOC “altered the definition of an alternative family to include only ‘two adults . . . plus dependents’ thus making its alternative family equivalent to the traditional nuclear family.”<sup>7</sup>

Madison’s ordinance became part of a growing number of such ordinances. What amazes me now, as I consider how many countries, states, counties, cities, employers, organizations, and groups now provide some type of domestic partner recognition and benefits, is the fact that we were inventing and developing the very concept of domestic partnership along the way.<sup>8</sup> This concept grew from a simple reality: nontraditional families, whether gay/lesbian, heterosexual unmarried couples, or any other variation on the traditional nuclear family of two married adults and their children, are not recognized by society or law as families deserving of recognition and protection. Rather than accepting that narrow definition, we set out to change both society and the law. From a vantage point more than fifteen years later, we have made strides that I feel confident in saying none of us imagined would have occurred. But we continue to struggle for the ultimate recognition that society could provide: providing all benefits to these families and recognizing them across-the-board as equal to traditional families.

### III. THE STATE OF AFFAIRS AT THE TIME OF *ALTERNATIVE FAMILIES*

At the time *Alternative Families* was published,<sup>9</sup> no nation or state provided benefits to or recognition of these nontraditional families.

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6. Cox, *Alternative Families*, *supra* note 1, at 3 n.8.

7. *Id.*

8. Others involved with this movement have not embraced the “alternative family” label and have instead adopted the term “domestic partner.” “Domestic partner” is now the common term for these types of recognition and benefit-provision schemes and the one I will use throughout the rest of this introduction. As explained in my *Alternative Families* article, other ordinances then in effect or being studied at that time used the term “domestic partner” and defined “domestic partners” as lesbian or gay couples. *See id.* The rationale was that heterosexual, unmarried couples who wanted to receive recognition, protections, and benefits could easily marry. *See id.* As the movement has grown, this restriction has engendered much discussion and questioning, particularly from family rights activists and others who believe that limiting heterosexual couples to marriage, instead of domestic partnership, is as restrictive to their rights as denying marital status or domestic partnership benefits is to lesbian and gay couples. *See generally*, Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL’Y 107, 119-22 (1996); M.V. Lee Badgett, *Equal Pay for Equal Families*, ACADEME: BULL. AM. ASS’N. U. PROFESSORS, May-June 1994, at 26, 28.

9. The article is dated Spring 1986, but the copyright indicates 1987, which is when the volume was actually published. I clarify the timing because much of the

The cities of Berkeley and West Hollywood, California were the only cities with domestic partner ordinances, although Santa Cruz, California; Oakland, California; East Lansing, Michigan; and Minneapolis, Minnesota, in addition to Madison, Wisconsin were considering some type of ordinance at the same time.<sup>10</sup> As far as we could determine at that time, only Liberty Mutual Insurance Company was providing domestic partner insurance to members of the American Psychological Association,<sup>11</sup> although a few employers or unions offered this insurance on a self-insured basis to its members.<sup>12</sup> The Berkeley School Board provided benefits to domestic partners in August 1984,<sup>13</sup> and the City of Berkeley followed suit in December 1984, becoming the first municipality to do so.<sup>14</sup>

As the title of my article indicates, other methods of obtaining domestic partner rights include litigation and collective bargaining. The article discussed a range of cases that challenged restrictions in local zoning ordinances which limited housing to members of a family related by blood, marriage or adoption. The most well-known case is the United States Supreme Court's decision in *Village of Belle Terre v. Boraas*,<sup>15</sup> which prevented homeowners from leasing their house to six college students in violation of the definition of "family" in the Village's zoning ordinance.<sup>16</sup> Numerous lower courts, however, have decided in favor of domestic partners living in single-family zones by finding such zoning ordinances unconstitutional under their respective state constitutions.<sup>17</sup> Besides zoning, other litigation focused on

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information included in the article was obtained during 1986, and not 1987, when it was published.

10. See Cox, *Alternative Families*, *supra* note 1, at 37-38.

11. See *id.* at 33 n.139. As that footnote indicates, the Workers Trust Company offered domestic partner insurance until October, 1986, when its underwriter changed from Consumers United Insurance Company to Lincoln National Insurance Company and its coverage was eliminated. See *id.*

12. See *id.* Those organizations included District 65 of the United Auto Workers for employees of the *Village Voice* newspaper in New York City, and the National Organization for Women. See *id.*

13. See *id.* at 34 n.140.

14. See *id.* at 34. The Lambda Legal Education and Defense Fund lists Berkeley as having adopted the benefits in April 1982. See Lambda Legal Defense, *States and Municipalities*, *supra* note 4. However, newspapers cite the date as December 1984. See *Berkeley Offers Benefits to City Workers' 'Live-Ins,'* SEATTLE TIMES, Dec. 6, 1984, at B9; *Berkeley Sweetens Deal for Live-In Lovers*, SAN DIEGO UNION-TRIB., Dec. 6, 1984, at A32.

15. 416 U.S. 1 (1974).

16. See Cox, *Alternative Families*, *supra* note 1, at 13-18 (discussing the Supreme Court's decision and using prior and subsequent Supreme Court precedent to conclude that the Court may not have reached the same decision if those challenging the ordinance had been domestic partners and their children, rather than an unrelated group of college students).

17. See *id.* at 21-26. Among those cases are *Charter Township of Delta v. Dinolfo*, 351 N.W.2d 831 (Mich. 1984); *McMinn v. Town of Oyster Bay*, 488 N.E.2d 1240 (N.Y. 1985); and *City of Santa Barbara v. Adamson*, 610 P.2d 436 (Cal. 1980). By using provisions of their state constitutions to hold the ordinances unconstitutional, the courts avoided

obtaining recognition of domestic partners in the areas of employment-based benefits, such as dental insurance, funeral leave, and reduced airfare benefits.<sup>18</sup> Still other litigation focused on recognizing domestic partners as eligible for loss of consortium damages, unemployment and workers' compensation benefits, hospital visitation and treatment authorization, and eligibility for family benefits from organizations.<sup>19</sup> Additionally, many employees adopted collective bargaining as a way to obtain recognition and benefits for their families, and some initial successes did occur, particularly in the area of bereavement and sick leave.<sup>20</sup>

#### IV. SUCCESSES ACHIEVED TODAY

Viewed against the backdrop of where we started in the early eighties, our successes are nothing short of amazing. Clearly, recognition and protection of nontraditional families was a concept ready for development and adoption. With a distance of more than fifteen years, this "little project" can now be seen as one of the initial efforts worldwide that spawned a movement that would change the face of the cultural road map of the world. Today, Denmark (1989), Norway (1993), Greenland (1994), Sweden (1995), Iceland (1996), the Netherlands (1998), and France (1999) recognize same-sex unions through "registered partnerships."<sup>21</sup> Additionally, Australia treats the long-term partners of gay men and lesbians the same as spouses for immigration purposes, and Canada, Israel, Namibia, South Africa, the Czech Republic, Spain, and Hungary recognize such relationships for a variety of purposes.<sup>22</sup>

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the precedent set by the U.S. Supreme Court in *Belle Terre* under the U.S. Constitution. See Cox, *Alternative Families*, *supra* note 1, at 21.

18. See Cox, *Alternative Families*, *supra* note 1, at 35-37.

19. See *id.* at 40-51.

20. See *id.* at 39 n.170.

21. Lambda Legal Defense and Education Fund, *International Recognition of Same-Sex Relationships* (visited Feb. 14, 2000) <<http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=432>>; see also Michael S. Wald et al., *Same-Sex Couples: Marriage, Families, and Children: An Analysis of Proposition 22, The Knight Initiative* (Stanford Institute for Research on Women and Gender & Stanford Center on Adolescence, Stanford, Cal.), Dec. 1999, at vii (copy on file with the author).

22. See Wald, *supra* note 21, at 14. The surviving partner in a gay or lesbian relationship in the Czech Republic can inherit the deceased partner's property if they have lived together as a couple for at least three years. See James D. Willets, *International Human Rights Law and Sexual Orientation*, 18 HASTINGS INT'L & COMP. L. REV. 1, 96 (1994). Additionally, in Spain, a man who hid his partner after he escaped from prison escaped criminal liability under an exception provided to spouses and family members. See *id.* at 97. Hungary's Constitutional Court mandated the recognition of the common-law marriages of same-sex couples, although those couples may not adopt children. See Barbara A. Robb, Note, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 NEW ENG. L. REV. 263, 267 n.12 (1997) (citing Rex Wockner, *Dutch Gays Will Have Two Ways to Get Hitched* (Apr. 2, 1997) <<http://www.qrd.org.qrd/world/wockner/assorted/gay.marriage.in.holland>>).

As of October 1, 1999, over 3500 organizations in the United States have domestic partner benefits, and additional organizations are being added to this group at a rate of two or three per week.<sup>23</sup> Currently, twenty-three percent of organizations with over 5000 employees provide health benefits to domestic partners.<sup>24</sup> Additionally, thirteen percent of employers with 1000 to 4999 employees and twelve percent of employers with 200 to 999 employees provide domestic partner health benefits.<sup>25</sup> According to the list maintained by Lambda Legal Defense and Education Fund, over eighty government employers (including five states plus the District of Columbia) provide some type of domestic partner benefits to their employees.<sup>26</sup> In what Lambda recognizes as an incomplete listing, but one that helps quantify the range of organizations involved, domestic partner benefits are provided by thirty-seven other governmental employers, including some agencies of the federal government, 125 colleges or universities, thirty-one medical/pharmaceutical companies, 105 corporations, thirty-six non-profit organizations or foundations, sixteen religious organizations, 117 law firms, eighty-seven media/entertainment companies, thirty-five financial firms, eighty-six technological companies, and forty-one labor unions.<sup>27</sup> The vast majority of these institutions include health insurance for the domestic partners of their employees, which is usually the most difficult of benefit to obtain.<sup>28</sup> At least thirty-four health and life and four homeowner insurance companies offer domestic partner policies to unmarried partners.<sup>29</sup>

When we first started talking with employers and insurance companies in the mid-1980s as part of Madison's Alternative Families Task

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23. See Common Ground, *Domestic Partner Benefits* (visited Jan. 31, 2000) <<http://www.common-grnd.com/dpbenefits.htm>> [hereinafter Common Ground, *Domestic Partner Benefits*]. Common Ground is a consulting company which has been retained by numerous organizations in the United States and Canada to provide consulting services on domestic partner benefits. See *id.* It maintains for sale the most comprehensive list available of US/Canadian organizations with domestic partner benefits. See *id.*

24. See Lambda Legal Defense and Education Fund, *Details About Domestic Partner Benefits* (visited Jan. 31, 2000) <<http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=18>> [hereinafter Lambda Legal Defense, *Details About Domestic Partner Benefits*].

25. See Dominick Vetri, *Almost Everything You Always Wanted to Know About Lesbians and Gay Men, Their Families, and the Law*, 26 S.U. L. REV. 1, 65 (1998).

26. See Lambda Legal Defense and Education Fund, *Domestic Partnership Listings* (visited Jan. 31, 2000) <<http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=21>> [hereinafter Lambda Legal Defense, *Domestic Partnership Listings*]. The five states are: Hawaii, Massachusetts, New York, Oregon, and Vermont. See *id.*

27. See *id.* A comprehensive list can be obtained from Common Ground by contacting them through their website. See Common Ground, *Domestic Partner Benefits*, *supra* note 23.

28. See Lambda Legal Defense, *Domestic Partnership Listings*, *supra* note 26. According to Lambda's list, only 28 of the listed employers provide only non-health benefits. See *id.*

29. See *id.*

Force, we encountered significant fears that the costs of providing these benefits would be significant. Raising fears that up to ten percent of an employer's employees may seek such benefits and including concerns that the need for AIDS treatment and "other 'lifestyle' factors" might drive up claims costs, the State of Wisconsin Commissioner of Insurance's office expressed a belief that insurance companies may resist providing coverage.<sup>30</sup> Based on a survey of City of Madison employees conducted in May 1986, however, the taskforce estimated that increased costs would "range between 1 and 4 percent of the employer's overall cost of benefits."<sup>31</sup> Our estimate turned out to be quite accurate: about two to three percent of employers' total number of employees have signed up for domestic partner benefits when available.<sup>32</sup>

These results show that many segments of society are willing to protect nontraditional families. In addition to domestic partner benefits provided by employers, many states have provided other family rights to domestic partners under state law. While this introduction cannot begin to fully describe these rights, cases range from *Braschi v. Stahl Associates, Inc.*, where the New York Court of Appeals interpreted the term "family" in a rent control ordinance to include "two adult lifetime partners whose relationship is long-term and characterized by an emotional and financial commitment and interdependence,"<sup>33</sup> to *Baker v. State*, where the Vermont Supreme Court stated:

We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel 'domestic partnership' system or some equivalent statutory alternative, rests with the Legislature. Whatever system is chosen, however, must conform to the constitutional imperative to afford all Vermonters the common benefit, protection, and security of the law.<sup>34</sup>

## V. CURRENT WORK WITH DOMESTIC PARTNER BENEFITS

In the years since I finished my work on the Madison alternative families ordinance, I have moved to San Diego, where I am currently Associate Dean for Academic Affairs and Professor of Law at California Western School of Law (CWSL). Upon my arrival here, I worked

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30. Cox, *Alternative Families*, *supra* note 1, at 28 nn.120-21.

31. *Id.* at 28.

32. See Lambda Legal Defense and Education Fund, *Details About Domestic Partner Benefits*, *supra* note 24.

33. 543 N.E.2d 49, 53-54 (N.Y. 1989). The question for the court was whether the surviving domestic partner of a gay man was entitled to prevent eviction and continue in a rent-controlled apartment even though only his deceased partner was named in the lease. *See id.*

34. 744 A.2d 864, 867 (Vt. 1999).



with a few colleagues to add domestic partner benefits to those provided by CWSL. Our approach, when talking to the administration, was to emphasize the equality argument: CWSL provided additional pay to its employees by helping to subsidize health insurance to their married spouses and children; employees with same-sex partners are prevented from marrying and gaining benefits that way; hence, CWSL should provide similar benefits to employees in long-term same-sex relationships. The administration agreed and, contrary to most other employers, also recognized that equality required CWSL to minimize the adverse tax consequences that resulted from the federal government's treatment of these benefits. Under § 106 of the Internal Revenue Code, the cost of employer-provided health insurance benefits is excluded from an employee's gross income if the coverage is for the employee, his or her spouse, and their dependents.<sup>35</sup> The IRS has issued several private letter rulings that conclude that the value of these benefits when provided to an employee's domestic partner is not excluded from the employee's income, and thus treated as income to be taxed under § 61 of the Code.<sup>36</sup> CWSL recognizes this inequality and provides employees receiving domestic partner benefits with additional income in an amount equal to the tax that is owed for these benefits. This approach is not widespread, but is one way to address some of the negative tax treatment by the federal government.<sup>37</sup>

Since the early nineties, my scholarship focus has shifted from domestic partnership to marriage by same-sex couples. In the years since the Hawaii Supreme Court's decision in *Baehr v. Lewin*,<sup>38</sup> I have written numerous articles on the interstate recognition of marriages by same-sex couples once a state permits such marriages.<sup>39</sup> Perhaps it

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35. See Steven N. Hargrove, *Domestic Partnerships Benefits: Redefining Family in the Work Place*, 6 LOY. CONSUMER L. REP. 49, 55 (1994).

36. See *id.* at 55-56.

37. CWSL is not able to avoid all the negative employee benefits-related tax consequences. For example, employees with domestic partners are unable to use pre-tax contributions in our Flexible Spending Plan under Internal Revenue Code § 125 to cover medical, dental and vision expenses not covered under our health insurance plan or certain child care expenses of our domestic partners. See Summary Plan Description California Western School of Law Flexible Spending Plan (Mar. 2000) (on file with author). Interestingly, the title of § 125(c) is "discrimination as to eligibility to participate." I.R.C. § 125(c) (West Supp. 1999). It attempts to prevent discrimination in favor of "highly compensated" or "key" employees, while not concerning itself with discrimination between married and unmarried partners. See § 125(c).

38. 852 P.2d 44 (Haw. 1993).

39. These articles include Barbara J. Cox, *Practical Battles From Being Visible as a Lesbian*, 5 REV. L. & WOMEN'S STUD. 89 (1995); Barbara J. Cox, *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033 [hereinafter Cox, *Same-Sex Marriage*]; Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?*, 16 QUINNIPIAC L. REV. 61 (1996) [hereinafter Cox, *Public Policy Exception*]; Barbara J. Cox, *The Lesbian Wife: Same-Sex Marriage as an Expression of Radical and Plural Democracy*, 33 CAL. W. L. REV. 155 (1997); Barbara J. Cox, *A (Personal) Essay on Same-Sex Marriage*, 1(3) NAT'L J.

was naive on my part that led me to focus my research on the interstate recognition of these marriages, rather than whether marriages by same-sex couples would be permitted in any state. Having read the Hawaii Supreme Court's original decision, I moved directly to whether other states would recognize such marriages. My research led me to conclude that most states should legally recognize the out-of-state marriages by their residents, assuming their courts treat marriages by same-sex couples similarly to their treatment of other out-of-state marriages entered into by residents who are prevented from marrying their intended spouse in state.<sup>40</sup> But, I did not count on the extent to which some segments of the public would go to prevent marriage by same-sex couples. Voters in both Hawaii and Alaska have amended their state constitutions to void decisions by their state courts permitting these marriages, and Congress and thirty-six states have adopted laws or executive orders purporting to refuse recognition of marriages by same-sex couples.<sup>41</sup> Even the Vermont Supreme Court, while stating that the "exclusion of same-sex couples from the legal protections incident to marriage . . . treats persons who are similarly situated for purposes of the law, differently,"<sup>42</sup> concluded its opinion by saying that remedying this unconstitutional treatment of same-sex couples could take "the form of inclusion within the marriage laws themselves or a parallel 'domestic partnership' system or some equivalent statutory alternative."<sup>43</sup>

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SEXUAL ORIENTATION L. 3 (1995) <<http://metalab.unc.edu/gaylaw/issue1/index.html>>; Barbara J. COX, *Are Same-Sex Marriage Statutes the New Anti-Gay Initiatives?*, 2(3) NAT'L J. SEXUAL ORIENTATION L. 3 (1996) <<http://metalab.unc.edu/gaylaw/issue4/index.html>>.

40. For a detailed descriptions of the choice of law rules and cases which lead to this conclusion, see Cox, *Same-Sex Marriage*, *supra* note 39; Cox, *Public Policy Exception*, *supra* note 39.

41. See Vetri, *supra* note 25, at 55-57. The Hawaii referendum amended its constitution to ensure that restricting marriage to opposite-sex couples would no longer violate its constitution, following the Hawaii Supreme Court's decision in *Baehr*. See *id.* at 54. The referendum passed on November 2, 1998 by a 69% to 29% margin. See *id.* at 55. The Alaska constitution was also amended to declare that marriage is limited to opposite-sex couples, in reaction to the decision in *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Super. Ct. Alaska 1998). See *id.* at 56 n.182. An appendix listing the more than 30 state statutes purporting to restrict marriage to opposite-sex couples and limit recognition of out-of-state marriages by same-sex couples can be found in Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105, 134-51 (1996). According to Lambda Legal Defense and Education Fund, 36 states have passed statutes and two governors have signed executive orders purporting to refuse recognition to the out-of-state marriages by same-sex couples. See Lambda Legal Defense and Education Fund, *2000 Anti-Marriage Bills Status Report* (viewed Mar. 1, 2000) <<http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=578>>; see generally *infra* note 71 (discussing the Defense of Marriage Act).

42. *State v. Baker*, 744 A.2d 864, 882 (Vt. 1999).

43. *Id.* at 867.

## VI. CAN DOMESTIC PARTNERSHIP INSTEAD OF MARRIAGE PROVIDE AN ANSWER?

The foremost question, therefore, is whether some type of domestic partnership, in a vastly more mature form than we envisioned in the early 1980s, can provide such a "parallel" or "equivalent" alternative to marriage. The Vermont Supreme Court referred to several different acts that extend most of the same rights and obligations provided by the law to married partners, even though it did not endorse any of those acts "particularly in view of the significant benefits omitted from several of the laws."<sup>44</sup>

Among those acts are the Danish Registered Partnership Act, enacted on May 26, 1989, which permits gay men and lesbians to register their partnerships with "nearly" the same legal effect as marriage.<sup>45</sup> But "nearly" is somewhat questionable since the Act did not permit "adoption of non-related children nor of each other's children, . . . common custody of children, . . . 'official' church marriage, and . . . partnership unless one of the partners is Danish."<sup>46</sup> "Symbolically, the unions are not recognizable, as is marriage, under the terms of international treaties . . . ."<sup>47</sup>

Norway's Act on Registered Partnership for Homosexual Couples went into effect on August 1, 1993.<sup>48</sup> This act represents a rapid change in the legal treatment of gay and lesbian Norwegians; sexual relations between men were criminalized until 1972, and discrimination was not prohibited until 1981.<sup>49</sup> The registered partnership law more closely approximates marriage than the original Danish Act, since most of the laws and regulations that apply to married couples also apply to registered partners.<sup>50</sup> One of the most significant similarities to marriage occurs at dissolution, when the partners must follow the general divorce rules and permit a court to divide their property accordingly.<sup>51</sup> Substantial differences, however, still remain.

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44. *Id.* at 887.

45. See Andrew H. Friedman, *Same-Sex Marriage and the Right to Privacy: Abandoning Scriptural, Canonical, and Natural Law Based Definitions of Marriage*, 35 *How. L.J.* 173, 217 n.237 (1992). Sweden was the first country to provide national registration for same-sex couples in 1987 when it passed a law providing for equal distribution of property upon dissolution of the relationship (similar to the results that flow following divorce in a community property state). See Craig A. Christensen, *If Not Marriage?: On Securing Gay and Lesbian Values by a "Simulacrum of Marriage"*, 66 *FORDHAM L. REV.* 1699, 1744 (1998). Sweden amended its law following Denmark's expanded Act within five years. See *id.*

46. Friedman, *supra* note 45, at 217 n.237.

47. Christensen, *supra* note 45, at 1745.

48. See Marianne Roth, *The Norwegian Act on Registered Partnership for Homosexual Couples*, 35 *U. LOUISVILLE J. FAM. L.* 467, 467 (1996-97).

49. See *id.*

50. See *id.* at 468.

51. See *id.* at 469. This difference can be seen by comparing it to the San Francisco Administrative Code which also permits the registration of domestic partnerships but, like most other U.S. ordinances or regulations, specifically indicates that

Registered partnerships may not adopt children as a couple because "children should not be educated in homosexual relationships."<sup>52</sup> Additionally, registered partners may not have joint custody of a child; custody remains solely with the biological parent or in joint custody with his or her former spouse.<sup>53</sup> Additionally, at least one of the partners must be a citizen of Norway, domiciled in the country, and no other European countries as of 1996, except Denmark and Sweden, recognize these partnerships.<sup>54</sup> Iceland is the only country that authorizes registered partners to share legal custody of each other's children.<sup>55</sup>

Given the limitations on marital rights imposed by other countries' domestic partnership acts, the question facing Vermont's legislature is whether it can, in fact, create a "parallel" or "equivalent" system for recognizing same-sex couples.<sup>56</sup> According to the list created by

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"[i]f a domestic partnership ends, the partners incur no further obligations to each other." SAN FRANCISCO, CA., ADMINISTRATIVE CODE § 62.6(b) (1990).

52. Roth, *supra* note 48, at 470.

53. *See id.*

54. *See id.* at 469-70.

55. *See* Christensen, *supra* note 45, at 1745 n.285. However, gay and lesbian couples in Iceland do not have the rights to a church wedding, to adopt children, or to attempt to have them through artificial insemination. *See Homosexual Marriage Legalized*, Facts on File World News Digest, July 18, 1996, available in LEXIS, News, News Group File.

56. Following the Vermont Supreme Court's decision in *Baker v. State*, the Vermont Assembly passed House Bill 847 entitled "An Act Relating to Civil Unions," on March 16, 2000. H. 847, 1999-2000 Leg. Sess. (Vt. 2000); *see also* Ross Sneyd, *Vermont Plan Won't Benefit Nonresident Gays: Other States Likely to Ignore 'Civil Unions'*, SAN DIEGO UNION-TRIB., Mar. 18, 2000, at A11. The purpose of the bill is "to provide eligible same-sex couples the opportunity to receive the legal benefits and protections and be subject to the legal responsibilities that flow from civil marriage." H. 847 § 2(a). The bill would also permit eligible blood-relatives to establish a "reciprocal beneficiaries relationship" to receive certain benefits and protections and be subject to certain responsibilities that are granted to spouses. H. 847 § 2(b). Among the rights that would be granted to those who enter civil unions are (1) "all the same benefits, protections, and responsibilities under law . . . as are granted to spouses in a marriage;" (2) "[responsibility] for the support of one another to the same degree and . . . manner as . . . for married persons;" (3) "[t]he law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance;" (4) "laws relating to title, . . . intestate succession, . . . [and] survivorship;" (5) "causes of action related to or dependent upon spousal status, including . . . wrongful death, emotional distress, loss of consortium, . . . or other torts;" (6) "probate law and procedure;" (7) "adoption law and procedure;" (8) "group insurance for state employees;" (9) "spouse abuse programs;" (10) "prohibitions against discrimination based on marital status;" (11) "victim's compensation rights;" (12) "workers' compensation benefits;" (13) "laws relating to . . . medical care and treatment, hospital visitation and notification;" (14) "terminal care documents . . . and durable power of attorney for health care;" (15) "family leave benefits;" (16) "public assistance benefits;" (17) state and local taxes; (18) "immunity from compelled testimony and the marital communication privilege;" (19) "homestead rights of the surviving spouse;" (20) veteran loans; (21) family farmer status; (22) assignment of wages; and (23) "family landowner rights to hunt and fish." H. 847 § 3. For the language of the bill,

the Vermont Legislative Council, at least 870 rights and responsibilities in state law are affected by one's marital status.<sup>57</sup> Of course, amending the marriage laws of the state would be the easiest and most comprehensive system; this would simply involve changing the definition of "spouse" for all purposes to include same-sex couples who had fulfilled the state's requirements for marriage. But the Vermont Supreme Court's refusal to order such an obvious solution indicates a hesitancy that can be seen wherever domestic partnerships, registered partnerships, reciprocal beneficiaries,<sup>58</sup> or some other "simulacrum of marriage" is proposed.<sup>59</sup>

As a legal matter, it may be that marriage, and only marriage, can truly be equivalent. Craig W. Christensen explains both succinctly and eloquently that if marriages by same-sex couples were permitted, then:

In one step, society would confer, perforce, the symbolic legitimation of intimacy that is always implicit in the celebration of a marriage. It would be a civic recognition of shared humanity like no other that gay people have ever experienced. But it could only come with marriage. There is no simulacrum that would do the same.<sup>60</sup>

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see *Bills As Passed by the House: H.847* (visited Apr. 18, 2000) <<http://www.leg.state.vt.us/docs/2000/bills/house/H-847.htm>>. On April 19, 2000, the Vermont Senate passed H. 847 with amendments. See *Vermont Senate Approves 'Civil Unions' for Gays and Lesbians: Marriage Still Reserved for Male-Female Pairs*, CHI. TRIB., Apr. 20, 2000, at 10. The bill now goes back to the House for approval of the Senate amendments. See *id.* Governor Dean of Vermont has stated that he will sign the bill. See *id.* For more information on H. 847 and other bills related to *Baker v. State*, see *The Vermont Legislative Bill Tracking System: Baker v. State*, (visited Apr. 20, 2000) <<http://www.leg.state.vt.us/baker/baker.cfm>>.

57. See Partners Task Force for Gay & Lesbian Couples, *What Rights Come with Legal Marriage? Vermont* (visited Mar. 2, 2000) <<http://www.buddybuddy.com/toc.html>> (listing Vermont state laws that are affected by marital status).

58. During the debate on marriages by same-sex couples in Hawaii, the legislature passed a "reciprocal beneficiaries" law in 1997 which provides (1) hospital visitation and medical decisions, (2) the ability to sue for wrongful death, (3) intestate inheritance rights, and (4) the ability to hold property in tenancy by the entirety. See Vetri, *supra* note 25, at 55-56. This law comes closest to following the reasoning of the Madison Alternative Families Task Force in recognizing "reciprocal beneficiaries" to be any two persons, 18 or older, not married or in another reciprocal beneficiaries' relationship, legally prohibited from getting married, who have declared themselves to be in such a relationship. See HAW. REV. STAT. § 572C-4 (1997). Due to the breadth of the definition of "reciprocal beneficiaries," challenges have been made to portions of the law and its viability is somewhat questionable. See Vetri, *supra* note 25, at 76.

59. The term "simulacrum of marriage" was used in RICHARD A. POSNER, *SEX AND REASON* 313 (1992). Posner uses the term to provide an "intermediate solution" because, according to Posner, "the public hostility to homosexuals in this country is too widespread to make homosexual marriage a feasible proposal even if it is on balance cost-justified . . ." *Id.* But see generally Christensen, *supra* note 45 (discussing whether such a simulacrum can be created and concluding it cannot). My use of the term is based on the concepts explored in the Christensen article.

60. Christensen, *supra* note 45, at 1783-84.

In order to achieve equivalence to marriage, Christensen refers to David Chambers' article, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*,<sup>61</sup> for three categories of legal consequences which must be provided: "(1) those recognizing 'affective or emotional bonds,'<sup>62</sup> (2) those involving marriage as an environment for the raising of children,<sup>63</sup> and (3) those relating to economic arrangements between partners."<sup>64</sup> None of the equivalencies currently in effect includes all three categories.

Additionally, even if the Vermont legislature creates a marriage alternative that extends all state laws to members of same-sex couples, two significant exclusions will remain. First, the Defense of Marriage Act (DOMA)<sup>65</sup> now limits the federal definition of "marriage" and "spouse" for "any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies in the United States . . . ." <sup>66</sup> For federal purposes, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife."<sup>67</sup> During the debate on

61. See David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447 (1996).

62. Christensen, *supra* note 45, at 1733. Chambers refers to these as "facilitators of the affective aspects of couples' relationships." *Id.* at 1733 n.209 (citing Chambers, *supra* note 61, at 454). Christensen summarizes these as "laws granting decisionmaking powers when a spouse becomes incompetent to act, intestate succession laws, immigration preferences, family medical leave rights, testimonial privileges in civil and criminal proceedings, and compensation for loss of consortium." *Id.* (citing Chambers, *supra* note 61, at 454-59).

63. *Id.* at 1733-34. Christensen sets forth the following:  
 gay and lesbian couples who are or want to be parents are not accorded the same 'specially favored' treatment that the law extends to similarly-situated married couples: (1) the acquisition of 'stepparent rights' (including adoption, visitation, and custody) by the spouse of a legal parent . . . ; (2) parental rights for both spouses with respect to children conceived by artificial insemination or, in some cases, born to surrogate mothers . . . ; and (3) the opportunity to become nonbiological parents by adoption or foster care placement . . . .

*Id.* at 1734 n.210 (citing Chambers, *supra* note 61, at 463-70).

64. *Id.* at 1734. Christensen explains that the most common means of differentiating married persons is by legal rules treating 'the married couple as an economic unit,' . . . including: (1) laws regulating the couple's relationship with the state (taxation of income, gifts, and estates; social security; health care; and welfare benefits) . . . ; (2) laws regulating the spouses' relationship with each other (distribution of marital property at divorce, alimony, spousal forced shares, and intestate succession) . . . ; and (3) laws regulating the couple's relationship with third persons (employee benefits, wrongful death actions, obligations for 'necessaries' and spousal debts) . . . .

*Id.* at 1734 n.211 (citing Chambers, *supra* note 61, at 472-85).

65. Pub. L. No. 104-199 § 1, 110 Stat. 2419 (1996).

66. 1 U.S.C.A. § 7 (West 1997).

67. *Id.*

DOMA, the United States General Accounting Office concluded that 1,049 federal laws include marital status as a factor, and the benefits provided to married couples include some favorable tax treatments, Social Security benefits, child support enforcement, Medicare and Medicaid, housing benefits, veteran's benefits, and federal employment benefits.<sup>68</sup> Thus, if the DOMA is constitutional (something that many commentators believe is highly unlikely),<sup>69</sup> same-sex couples will be denied rights that would have flowed to them by the federal government's use of Vermont's definition of "spouse" for federal purposes.

Second, as my previous articles detail, one's status as part of a married couple would be expected to follow gay and lesbian Vermonters who move to other states after their marriage or out-of-state couples who traveled to Vermont to marry and then return home. In fact, the general choice-of-law principle controlling recognition of out-of-state marriages is that "if a marriage is valid where celebrated, then it is entitled to recognition in the celebrants' home state."<sup>70</sup> While that result has been somewhat complicated for marriages by same-sex couples because of the DOMA<sup>71</sup> and similar statutes or executive orders adopted by thirty-six states,<sup>72</sup> it is unlikely that a same-sex couple's status under any "parallel" or "equivalent" system developed by the Vermont legislature would survive a trip or move outside the state.<sup>73</sup> The policies behind the marriage validation rule

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68. See Barbara A. Robb, *supra* note 22, at 285 n.133; 301-03 (citing *Report to the Honorable Henry J. Hyde, Chairman, Committee on the Judiciary House of Representatives, UNITED STATES GENERAL ACCOUNTING OFFICE*, Jan. 31, 1997, at 2 (Fed. Doc. Clearing House 1996)). For a comprehensive listing of federal benefits attached to marriage, see *id.* at 301 nn.235-46.

69. See MARK STRASSER, *THE CHALLENGE OF SAME-SEX MARRIAGE: FEDERALIST PRINCIPLES AND CONSTITUTIONAL PROTECTIONS* 187-213 (1999).

70. Cox, *Same-Sex Marriage*, *supra* note 39, at 1041; see also Cox, *Public Policy Exception*, *supra* note 39 (discussing the limitations on the general policy).

71. See Defense of Marriage Act § 2, 28 U.S.C.A. § 1738C (West Supp. 1999). The Defense of Marriage Act states:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record or judicial proceeding of any other State, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession or tribe, or a right or claim arising from such relationship.

28 U.S.C.A. § 1738C.

72. I believe the issue of recognizing out-of-state marriages by same-sex couples is only complicated, not prohibited, by these acts because it is likely that they are unconstitutional. For scholarship questioning the constitutionality of these statutes, see STRASSER, *supra* note 69; Robb, *supra* note 68.

73. Legislation could be adopted which would recognize domestic partnerships from other states. For an example of such proposed legislation, see A.B. 2211, § 3, 1999-2000 Reg. Sess. (Ca. 2000), which would amend California Family Code section 299.5 to read: "(g) Any domestic partnership entered into outside of this state, that would be valid by the laws of the jurisdiction under which the partnership was cre-

(and ones that are equally important for same-sex couples in domestic partnerships) are that the rule confirms the parties' expectations, it provides stability in an area where stability is very important, and "it avoids the potentially hideous problems that would arise if the legality of a marriage [or a domestic or registered partnership] varied from state to state."<sup>74</sup> Without the ability to maintain their marital status as they move around the country or the world, the same-sex couple has achieved a "simulacrum of marriage" only to the extent that, as Professor Christensen pointed out, it meets the third definition of Webster's New World Dictionary of American English: "a mere pretense; sham."<sup>75</sup>

## VII. CONCLUSION

To the extent it is a "mere pretense" or "sham," such a domestic partnership, even if established in good faith by governmental entities and entered into by same-sex couples seeking recognition and protection of our relationships and families, smacks of the "separate but equal" track in racial relations created by the Supreme Court in *Plessy v. Ferguson*<sup>76</sup> and invalidated by *Brown v. Board of Education*.<sup>77</sup> My experience in Madison and the years since then have led me to believe that we will not achieve the goals that we set back in 1982 until we win the freedom for gay men and lesbians to marry their same-sex partners. Some in our community believe that, in seeking the freedom to marry, we are turning away from the reasons we sought domestic partnership benefits in the first place.<sup>78</sup>

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ated, shall be valid in this state." California Assembly Member Sheila Kuehl proposed this bill on February 24, 2000. See California Alliance for Pride and Equality, *California Legislature 1999-2000 Session: Partial List of Bills That Affect Lesbian, Gay, Bisexual and Transgendered (LGBT) Californians*, (last modified on Mar. 10, 2000) <<http://www.calcape.org/ListofBills/CurrentListofBillsAffectingLGBTCalifornians.htm>>. It would pose an interesting question whether a domestic partnership as robust as one likely to be permitted in Vermont would be recognized to the same extent in California.

74. Cox, *Same-Sex Marriage*, *supra* note 39, at 1065 (citing WILLIAM M. RICHMAN ET AL., UNDERSTANDING CONFLICT OF LAWS § 116, at 362 (2d ed. 1993)).

75. Christensen, *supra* note 45, at 1699 n.† (citing Webster's New World Dictionary of American English 1251 (3d college ed. 1988)).

76. 163 U.S. 537 (1896). In his dissent, Justice Harlan used the term "separate but equal." *Id.* at 552 (Harlan, J., dissenting).

77. 347 U.S. 483 (1954).

78. Among the best articles opposing marriage as the best way to obtain recognition of gay and lesbian couples and our families are Paula Ettelbrick's *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, *supra* note 8, and Nancy D. Polikoff's *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage*, 79 VA. L. REV. 1535 (1993). Although I believe that marriage is the option that will achieve the broadest and most positive results for gay men and lesbians and will do the most to open up traditional marital rights and benefits to all alternative families, my respect for both these activists/scholars and those who agree with them makes clear to me that we all seek ways in which our relationships and families can be protected from a society that often scorns us.



Whatever conclusion one reaches, it cannot be disputed that the "little project" I and countless others have worked on since the early 1980s has changed the way society looks in 2000. Publication of my original "alternative families" article in 1986 by the *Wisconsin Women's Law Journal* helped provide information and analysis to others working in this movement. The *Journal's* leadership then and now has fulfilled its purpose to provide a "perspective that expands and challenges our understanding of the law."<sup>79</sup>

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79. *Statement of Purpose, supra* note 2.