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NON-TRADITIONAL FAMILY VALUES: PROVIDING QUASI-MARITAL RIGHTS TO SAME-SEX COUPLES

I. INTRODUCTION

In the course of the extended debate over family values that took place during the 1992 campaign season, there were subtle suggestions that there was some large “anti-family” coalition out there attacking our nation’s shared values.¹ The truth, of course, is that one would be hard-pressed to find someone who is “anti-family.” The perceived attack on the family is in fact a battle for inclusion within the definition of family. People who do not live in a traditional family believe that alternative living arrangements can foster and protect the same values that traditional family arrangements encourage. The very people who do not fit within a traditional definition of family—single parents, same-sex couples, and so forth—are perhaps the most vocal in arguing for a broader, more inclusive definition of family. The goal is not to break down the concept of family, but rather, in a changing society, to insure the survival of the values that a family provides.

This nation has always valued and encouraged the family because of the security it provides family members, and the stability it provides to society at large. By excluding the growing number of same-sex couples, single-parent households, and other non-traditional arrangements from legal and cultural recognition as families, we, as a nation, are discouraging the very stability that has historically been the backbone of society in the United States.

In the United States today, less than 25% of the population live in traditional families—that is, families consisting of legally married parents and their children.² The other 75% live in various types of

¹ Susan Baer, *GOP Puts Emphasis on Morals; Message Intended for White America*, HOUSTON CHRONICLE, Aug. 30, 1992, at A13 (quoting Secretary of Education, William Bennett, as stating at Republican National Convention that “[f]amily values represent a great dividing line between the parties.”); William Schneider, *Anti-Gay Rhetoric: Handle With Care*, THE NAT’L J., Sept. 12, 1992, at 2098 (discussing Republican Convention’s implication that gays and lesbians, at least, are not compatible with family values).

² The Committee for Family Protection, Family Protection Act Summary, 1 (1991) (on file with author) (this summary of impact of municipal domestic partnership ordinances was prepared by proponents of domestic partnership ordinance proposed in Boston, Massachusetts in Spring 1991).

“non-traditional” families.³ Of these, the Bureau of the Census estimates that approximately 2.6 million households are composed of unmarried heterosexual couples living together, and that another 1.6 million are composed of same-sex couples living together.⁴

The same-sex couple is perhaps perceived as the most threatening non-traditional family arrangement. Experts have written entire books on the subject of why some people perceive homosexuality to be a threat to society in general and to the family in particular. Suffice it to say that there are significant religious and cultural bases behind the fear and misunderstanding that surround the subject, and it is beyond the scope of this Note to address those cultural and religious arguments. This Note proceeds from the premise that homosexuality in humankind is as much a fact of life as heterosexuality, and moves on to address the issue of same-sex couples’ rights from an equality of treatment perspective.

While there have been various attempts over the last twenty years or so to obtain certain quasi-marital rights for same-sex couples, the recently developed domestic partnership initiatives have been the most successful option for obtaining these rights. As such, this Note will focus on domestic partnership initiatives in light of other less successful attempts to gain quasi-marital rights for same-sex couples. Part II will discuss the need for the approach embodied in domestic partnership initiatives, and examine the weaknesses of other options that same-sex couples have for achieving equal treatment. Part II then explains why domestic partnership initiatives are the currently favored option among same-sex couples for achieving equal treatment under the law, and for increasing societal recognition and understanding of same-sex relationships. Part III will discuss existing domestic partnership initiatives, both at the municipal and corporate level. This section will compare the basic requirements of these initiatives, assess their impact, and discern any particular strengths and weaknesses. Finally, Part IV extracts the most effective aspects of the domestic partnership initiatives currently in place, and presents them as a guide for other cities and companies that may decide to implement domestic partnership initiatives in the future.

³ See Vada Berger, *Domestic Partnership Initiatives*, 40 DEPAUL L. REV. 417, 417 n.3 (1991).

⁴ Victor F. Zonana, *Census Will Count “Unmarried Partners” for First Time*, L.A. TIMES, Feb. 15, 1990, at A38.

II. THE RATIONALE BEHIND DOMESTIC PARTNERSHIP INITIATIVES

A. *Domestic Partnership Initiatives*

Primarily in response to the needs and requests of same-sex couples, several cities and private corporations have adopted some form of domestic partnership initiative.⁵ Generally, these initiatives seek to accomplish two things. First, domestic partnership initiatives provide an entry point for official state and societal recognition of long-term, stable, same-sex relationships—a goal which has also become the basis for much of the opposition to domestic partnership initiatives.⁶

This is particularly relevant in the municipal context where domestic partnership initiatives provide gays and lesbians with a feeling of inclusion into mainstream society.⁷ In cities such as West Hollywood, California, for example, which allow residents and non-residents alike to register their domestic partnership with the city, most of the registrants have been same-sex couples seeking to proclaim the significance of their relationship and their devotion to each other in a government-recognized manner.⁸

Second, they attempt to equalize the employee benefits package that an employee with a same-sex partner receives with the package available to a married employee.⁹ This disparity in employee benefits packages is the primary motivating factor for domestic partnership proponents simply because of the easily quantifiable inequality between same-sex and married couples. A typical white collar employee's benefits package represents approximately 25% of his or her total compensation, with health insurance benefits alone accounting for 6% of total compensation.¹⁰ Under the guidelines of a traditional employee benefits package, when an employee

⁵ See, e.g., Lotus Development Corp. Policy (Sept. 6, 1991); San Francisco, Cal., City Ordinance (Feb. 14, 1991); Seattle, Wash., Municipal Code 114648 (Aug. 18, 1989); West Hollywood, Cal., Ordinance 22 (Feb. 26, 1985).

⁶ Telephone Interview with Rick Ruvolo, Legislative Assistant to San Francisco City Supervisor, Harry Britt (Oct. 24, 1991); see also Berger, *supra* note 3, at 417.

⁷ Berger, *supra* note 3, at 419.

⁸ *Id.* at 428 (quoting West Hollywood City Clerk as saying 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.").

⁹ *Id.* at 419.

¹⁰ Robert L. Elbin, *Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)*, 51 OHIO ST. L.J. 1067, 1070 (1990).

marries, the employer provides health insurance coverage for the employee's spouse, thereby enlarging that employee's benefits package. A married employee whose partner is covered under an employer's health insurance plan essentially is paid more than a similarly situated gay or lesbian employee whose partner is not covered by the same employer's health insurance plan on grounds that he or she is not legally that employee's spouse.¹¹

Despite this apparent compensation disparity in employee benefits packages, employers are reluctant to enact domestic partnership initiatives.¹² Domestic partnership proponents are fighting against the trend among most employers and insurers to reduce employee benefits across the board.¹³ Even among employers that are sensitive to the changing structure of families in the United States, the perceived cost of covering employees' non-traditional families under their benefits plans weighs heavily in their consideration of adopting a domestic partnership policy. As the cost of providing health insurance continues to increase dramatically, many employers and insurers are in fact attempting to decrease the amount of benefits coverage they provide to employees and their families.¹⁴

Beyond this cost barrier, most employers are reluctant to extend health insurance benefits to the partners of gay and lesbian employees because this would amount to a recognition of the valid-

¹¹ See *id.* The compensation disparity argument is highlighted in a typical situation that Barbara Cox discusses in her article, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation, and Collective Bargaining*, 2 WIS. WOMEN'S L.J. 1, 27 (1986). Assuming two employees work for the same corporation, one the head of a traditional family with a spouse and two children, and the other a member of a non-traditional family composed of the employee, his or her companion, and two children, Cox estimates that the employee in the non-traditional family would have to pay a local HMO close to \$200 a month for health insurance covering all of his or her family members. The married employee would pay nothing in a corporation that extends a married employee's health insurance benefits to his or her spouse and dependents. In addition to this \$2400 expense that the second employee would incur every year, he or she may also lose a major employment benefit. In many large enterprises it is the employer who would pay the \$200 per month in insurance premiums in the above situation, resulting in a net \$2400 per year in benefits to the employee in the traditional family over and above that of the employee in the non-traditional family. The employee loses \$2400 that he or she must pay out of his or her salary for equivalent family insurance coverage, plus another \$2400 that he or she is not paid by the employer in the form of the standard family insurance benefit. Thus the employee heading a non-traditional family faces a net cost of \$4800 per year.

¹² *Id.* at 27.

¹³ *Recognizing Non-Traditional Families*, Work & Family Rep. (BNA) Special Report No. 38, at 10-11 (February 1991) [hereinafter BNA Special Report].

¹⁴ See *id.* at 11.

ity of same-sex relationships.¹⁵ In other words, even employers who may agree with domestic partnership policies for reasons of fairness resist supporting them because of the perception that they will be construed as sanctioning same-sex couples and, more importantly, homosexuality. Many employers believe that any official recognition of same-sex relationships through domestic partnership initiatives would be perceived as an "onslaught on the family."¹⁶ Domestic partnership proponents respond that these initiatives do not attack the family at all and that, on the contrary, they bolster the concept of "family" by broadening the definition of what a family is to more accurately reflect contemporary social realities.¹⁷

B. *Quasi-Marital Benefits*

In addition to the disparity in compensation between homosexual and heterosexual employees that results from the health insurance benefits often available to an employee's legal spouse, there are a host of other privileges that are automatically available by law to married couples that are denied to similarly-situated same-sex couples. These privileges include: a legal spouse's favored immigration status; the right of hospital and jail visitation; the ability to file joint tax returns; an exemption from gift taxes; an estate tax deduction; the right to sue for loss of consortium and wrongful death; the privilege not to testify against one another; the ability to own property as tenants by the entirety; the right to inherit through intestate succession; and entitlement to social security benefits.¹⁸ While many of these disparities could not be remedied by the adoption of domestic partnership initiatives alone, these initiatives do act as a starting point.

Because marriage and many of its attendant privileges and obligations are matters traditionally governed by state law, domestic partnership initiatives are not a substitute for marriage.¹⁹ Domestic partnership initiatives may only operate in areas that are not preempted by state law.²⁰ Despite this very real limitation on their scope, domestic partnership initiatives would secure at least some important rights formerly available only to married couples, such

¹⁵ *Id.* at 5.

¹⁶ *Id.*

¹⁷ Cox, *supra* note 11, at 3-4.

¹⁸ Berger, *supra* note 3, at 418.

¹⁹ *Id.* at 436-39.

²⁰ *See id.*

as "spousal" health insurance coverage, and would act as an inroad toward securing other rights.²¹

Domestic partnership initiatives have proven to be the most successful option thus far in giving same-sex couples the opportunity to attain some quasi-marital rights.²² Other attempts, such as adoption and same-sex marriage, have proven even more limited in what they may accomplish. Same-sex marriages are presently illegal in all states.²³ Although these laws continue to be challenged in court, it is unlikely that marriage will become a legal option for same-sex couples any time in the near future.²⁴ This is a result of courts' unwillingness to legislate a change in the term "marriage" as it has traditionally been defined. Most judges believe this to be the legislature's job, and in a nation where half of the states still have sodomy laws, state legislatures are not likely to change their marriage laws to become more inclusive.²⁵

In January 1992, in *Craig Dean and Patrick Gill v. District of Columbia*, the Superior Court for the District of Columbia became the most recent court to refuse to allow same-sex marriages in its jurisdiction.²⁶ Citing from the Book of Genesis and various legal and standard dictionaries, Judge Shellie F. Bowers concluded in his opinion that persons of the same sex could not, by definition, enter into a "marriage."²⁷ The court stated that implicit in the state and federal constitutions is the belief that the state may and should encourage family values. One of the primary arguments made in

²¹ See Elbin, *supra* note 10, at 1086-87.

²² Berger, *supra* note 3, at 452-53.

²³ Elbin, *supra* note 10, at 1069; see also *Hicks v. Miranda*, 422 U.S. 322 (1975); *Baker v. Nelson*, 409 U.S. 810 (1972).

²⁴ *Dean v. District of Columbia*, No. 90-CA-13892 (D.C. Super. Ct. filed Nov. 26, 1990), cited in BNA Special Report, *supra* note 13, at 29-30. Plaintiffs alleged two-fold discrimination based upon the denial of a marriage license by the District of Columbia. *Id.* First, they alleged that the denial was a violation of D.C.'s gender-neutral marriage law, which does not state that a marriage must consist of a man and a woman, or that a married couple may not be of the same sex. *Id.* The plaintiffs also alleged that the District violated its own Human Rights Act, which states that "every individual shall have an equal opportunity to participate in the economic, cultural and intellectual life of the District and to have an equal opportunity to participate in all aspects of life." *Id.*

²⁵ See *id.*

²⁶ *Id.*

²⁷ *Id.* Judge Shellie Bowers wrote that "[i]t is simply inaccurate to say that plaintiffs were denied a marriage license due to their sexual orientation. . . . Two heterosexuals of the same sex, who, for whatever reason, had sought such a license, would have been similarly treated. Rather, plaintiffs were denied a marriage license because of the nature of marriage itself," which according to Judge Bowers' dictionary-bound definition requires two persons of the opposite sex. *Id.*

these suits is that the two individuals want to be legally recognized as a family.²⁸ Thus, although courts are attempting to strengthen the same things the government wants to encourage, until courts and legislatures define family in functional terms rather than historical terms, courts will continue to deny marriage as a legal option for committed same-sex couples.

C. Other Court Challenges

Other attempts to obtain certain quasi-marital rights for same-sex couples have also met with mixed success. *Hinman v. Department of Personnel Administration*²⁹ is one of a group of cases in which a gay employee sues his employer to obtain spousal benefits for his partner, basing the suit on a claim of sexual orientation discrimination.³⁰ In *Hinman*, the plaintiff, a gay employee of the State of California, was prohibited from registering his domestic partner for dental insurance coverage under a state health benefits plan that provided for spousal benefits.³¹ *Hinman* claimed that the state's benefit plan was illegal, based on Executive Order B-54-79, which prohibits the state from "discriminat[ing] in state employment against any individual solely upon that individual's sexual preference."³² *Hinman* argued that because the health benefits plan restricted coverage to "spouses" as defined by marriage, the plan unreasonably discriminated against him as a gay employee. The California Court of Appeal, Third District, disagreed. Because the health plan provided benefits to *unmarried* homosexual and heterosexual state employees on equal terms, the court held that the state health benefits plan did not discriminate on the basis of sexual orientation.³³ The court also found that the plan did not unreasonably discriminate on the basis of marital status, because the practice of extending fewer benefits to unmarried workers was a rational means of furthering the state's interest in promoting marriage.³⁴

²⁸ *Id.*; see generally *Baker v. Nelson*, 409 U.S. 810 (1972).

²⁹ 213 Cal. Rptr. 410 (Cal. Ct. App. 1985).

³⁰ See generally *Rovira v. AT&T*, 760 F. Supp. 376 (S.D.N.Y. 1991).

³¹ *Hinman*, 213 Cal. Rptr. at 412.

³² *Id.* at 419 (citing Exec. Order B-54-79).

³³ *Id.*

³⁴ See *id.* The court concluded by stating that, in its view, the only recourse for similarly situated plaintiffs would be to persuade the state legislature to amend Cal. Civil Code § 4100 so that marriage would not be limited by definition to a civil contract "between a man and a woman." *Id.* at 419-20.

Not all courts have felt as constrained by traditional and biblical definitions of "family" as was Judge Bowers in *Dean*, or the California Court of Appeals in *Hinman*. Some have gone beyond the dictionary and asked what it is the state seeks to encourage in providing benefits to married people that it denies to single people.³⁵ In 1989, the New York Court of Appeals ruled in *Braschi v. Stahl Associates*, that a gay couple was entitled to the same benefits under New York City's rent control law as a heterosexual couple.³⁶

In *Braschi*, the plaintiff's domestic partner had died of complications associated with AIDS.³⁷ Because his partner's name was the only one on the lease of the rent-controlled apartment, the defendant landlord attempted to evict Braschi.³⁸ Braschi claimed that under a New York City rent control law allowing family members of deceased lessees to remain tenants under the terms of the original lease, gay and lesbian domestic partners should be included as members of the lessee's family.³⁹ The court agreed with Braschi, stating that "the intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life."⁴⁰ In determining that the gay couple met a contemporary definition of "family" for purposes of New York's rent control laws, the New York court took into account "the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily services."⁴¹

Some commentators believe that the *Braschi* decision might herald the beginning of a trend in which courts move away from defining "family" only in the traditional nuclear sense.⁴² These commentators believe that a more "functionalist" approach to defining

³⁵ See, e.g., *Braschi v. Stahl Associates*, 74 N.Y.2d 201, 213, 543 N.E.2d 49, 544 N.Y.S.2d 784 (N.Y. 1989) (expanding definition of "family" under New York City Rent Control laws to include long-term, same-sex couples); *Lepar Realty Corp. v. Griffin*, 581 N.Y.S.2d 521 (N.Y. App. Div. 1991) (including long-term, opposite-sex couples under definition of family in New York City Rent Control laws).

³⁶ *Braschi*, 74 N.Y.2d at 213.

³⁷ *Id.*

³⁸ *Id.* at 206.

³⁹ See *id.* at 211.

⁴⁰ *Id.* at 212.

⁴¹ *Id.*

⁴² See Note, *Looking For a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1641 (1991).

“family” is desirable because it more accurately reflects contemporary relationships and because it encourages the stability and structure that are at the heart of states’ interests in promoting the family.⁴³

D. *Corporate and Contractual Domestic Partnership Initiatives*

At the corporate level, gay and lesbian employees of more progressive companies are attempting to obtain certain spousal benefits by invoking their employer’s own non-discrimination policy. Based upon such policies, gay and lesbian employees claim that the employer is violating its own policy of non-discrimination by, in essence, providing married heterosexual employees with superior compensation to similarly situated gay and lesbian employees in committed relationships.⁴⁴ Employers put forth two arguments against this type of claim. First, companies claim that until legislatures change state marriage laws to allow same-sex marriages, the private benefits that accompany marriage must be bound by the same legal determination of status.⁴⁵ Second, taking a page from the California court’s reasoning in *Hinman*, companies claim that their internal non-discrimination policies are not violated in cases of this type because unmarried gay or lesbian employees and unmarried heterosexual employees are treated identically in the distribution of benefits.⁴⁶ In other words, the response is that the distinction the companies are making is between married and unmarried employees, not between gay and straight employees, and that therefore the company is not discriminating on the basis of sexual orientation.

One such case in which the plaintiff is basing her claim on a corporation’s own internal non-discrimination policy is currently pending before a federal court in New York.⁴⁷ In *Rovira v. AT&T*, Sandra Rovira claims that her partner’s employer, AT&T, violated its own internal non-discrimination policy when it failed to pay Rovira death benefits routinely paid to surviving family members of its employees.⁴⁸ Rovira’s domestic partner, Marjorie Forlini, had been a sales and marketing manager for AT&T for many years

⁴³ *See id.*

⁴⁴ *Rovira*, 760 F. Supp. at 378–79.

⁴⁵ *See id.*

⁴⁶ *See id.* at 381.

⁴⁷ *Id.*

⁴⁸ *Id.* at 377.

until she died in 1988.⁴⁹ Rovira claims that AT&T not only violated its own non-discrimination policy, but that it also contravened New York State and New York City human rights laws, because the company breached its contract with Forlini by failing to provide death benefits to her family (plaintiff and her children).⁵⁰

AT&T argued that Rovira's claims arose from the administration and denial of employee benefits and that as such they are preempted by ERISA (Employment Retirement Income Security Act), which provides that benefits such as those claimed here are available only to the legal "spouse" of the employee.⁵¹ The Federal District Court for the Southern District of New York denied AT&T's motion to dismiss. The court held that ERISA might not preempt Rovira's first claim if Rovira proves that she was treated impermissibly before she had any established beneficiary relationship with AT&T.⁵²

Domestic partnership proponents eagerly await the final outcome of this case because of its potential impact on private employers who, like AT&T, have internal policies prohibiting discrimination based on sexual orientation. Many of the nation's largest companies have non-discrimination policies in place that prohibit unequal treatment of gay and lesbian employees.⁵³ Should Rovira prevail in this case, those companies might be encouraged to enact domestic partnership initiatives in order to adhere to their own non-discrimination policies, if for no other reason than to avoid lawsuits.

Gay and lesbian couples also have attempted, with limited success, to secure certain quasi-marital rights by contract—that is, by drafting legal documents that state what each partner's legal obligations are to each other and that inform third parties about the couple's intentions.⁵⁴ Relationship issues that are often reduced to contract include rights of a partner in cases of medical emergency, execution of wills, funeral arrangements, as well as the division of property and financial support should the relationship end.⁵⁵ There

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 378.

⁵² *Id.* at 379 (Rovira claimed AT&T discriminated against Forlini and herself from the moment Rovira, acting in her capacity as executor of Forlini's estate, made application for benefits on behalf of beneficiaries).

⁵³ Thomas Maier, *Gay Couples Pressing Employers to Extend Them the Same Benefits Provided to Heterosexual Spouses*, *NEWSDAY*, May 13, 1991, at 29.

⁵⁴ Berger, *supra* note 3, at 422.

⁵⁵ *Id.*

are some severe limitations in attempting to cover these issues by contract, however. In jurisdictions where homosexuality itself is technically illegal due to laws prohibiting sodomy, many courts are unlikely to enforce such contracts between same-sex partners.⁵⁶ These courts are not likely to give effect to contract provisions between two parties of the same sex when those provisions are based, at least in part, on the sexual relationship between the two.⁵⁷

Another inherent weakness to this contract approach is that these contracts do not take into account the full range of benefits and obligations that gay and lesbian couples need because they only contemplate emergencies or the end of the relationship.⁵⁸ As such these contracts are incomplete alternatives at best. Although current domestic partnership initiatives also do not address all of the legal rights accompanying marriage, they provide a legal framework upon which to build. Because of the limitations and inadequacies of other legal and contractual approximations of the marital relationship, domestic partnership initiatives are currently at the forefront of the gay rights agenda.⁵⁹

III. THE REQUIREMENTS AND THE IMPACT OF DOMESTIC PARTNERSHIP INITIATIVES CURRENTLY IN PLACE

Several municipalities nationwide have passed domestic partnership ordinances that, while varying in the benefits and rights that they confer upon same-sex couples, provide the initial framework with which proponents may work.⁶⁰ Additionally, several private employers recently have enacted their own internal domestic partnership policies that attempt to treat gay and lesbian employees, and heterosexual employees equally.⁶¹

⁵⁶ *Id.* at 422 n.47, citing H. CURRY & D. CLIFFORD, A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES 27 (5th ed. 1989).

⁵⁷ *Id.*

⁵⁸ *Id.* at 422-23.

⁵⁹ See Elbin, *supra* note 10, at 1067.

⁶⁰ See, e.g., San Francisco, Cal., City Ordinance (Feb. 14, 1991); Seattle, Wash., Municipal Code 114648 (Aug. 18, 1989). Other cities that have enacted some type of domestic partnership ordinances include: Ithaca, N.Y.; Takoma Park, Md.; Madison, Wis.; Cambridge, Mass.; and West Hollywood, Sacramento, Santa Cruz, and Laguna Beach, Cal. LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., DOMESTIC PARTNERSHIP: ISSUES AND LEGISLATION, 2-6 (1990)[hereinafter DOMESTIC PARTNERSHIP ISSUES]; *Cambridge Adopts "Domestic Partner" Law*, WASH. TIMES, Sept. 16, 1992, at A6.

⁶¹ See, e.g., James Barron, *Bronx Hospital Gay Couples Spouse Benefits*, N.Y. TIMES, Mar. 27, 1991, at A1 (discussing Montefiore Medical Center's new domestic partnership policy); Mike Dorning, *Software Giant Extends Benefits to Gay Couples*, CHI. TRIB., Sept. 7, 1991, at C1

A. *Municipal Domestic Partnership Initiatives*

With regard to the initiatives in place at the municipal level, commonalities exist among the requirements and provisions of the various ordinances regarding who may register a domestic partnership, the benefits and obligations incurred through registration, the requirements to qualify, and how termination is handled. Currently, all of the cities that have domestic partnership legislation in place allow both same-sex and opposite-sex unmarried couples to register as domestic partners.⁶² Most have registration systems whereby the two partners, at least one of which usually must be a municipal employee, sign sworn affidavits.⁶³ Domestic partnership affidavits generally state that the two persons have lived together for a certain period of time—usually six months to a year—and that they intend to be each other's sole companion.⁶⁴ In these affidavits, the parties are also usually required to swear that they are not related by blood, that they are not currently married to anyone, that they are both over 18 years of age, and that they "accept responsibility for each other's welfare."⁶⁵

"Accepting responsibility for each other's welfare" is an important component because it means that the partners do have certain legal obligations.⁶⁶ For example, under San Francisco's domestic partnership ordinance, the partners' obligations are limited to "basic living expenses," which is defined as the cost of basic food and shelter.⁶⁷ The ordinance states that this also may include "the expenses which are paid at least in part by a program or benefit for which the partner qualified because of the domestic partnership."⁶⁸

(discussing Lotus Development Corporation's domestic partnership policy). Other companies that have recently adopted their own domestic partnership policies include: Levi Strauss, MCA (Music Corporation of America), and Orrick, Harrington & Sutcliffe. Marc Sandalow & David Tuller, *Next Step for Partners' Benefits*, SAN FRANCISCO CHRON., May 14, 1991, at A1; David J. Fox, *Gay and Lesbian Fundraiser to Tap Hollywood Power Players*, L.A. TIMES, Aug. 21, 1992, at F2; Rorie Sherman, *Gay Law No Longer Closeted*, NAT'L L.J., Oct. 26, 1992, at 34.

⁶² See, e.g., Seattle, Wash., Municipal Code, 114648 (Aug. 18, 1989); West Hollywood, Cal. Ordinance 22 (Feb. 26, 1985).

⁶³ West Hollywood, Cal. Ordinance 22 (Feb. 26, 1985).

⁶⁴ Berger, *supra* note 3, at 424–25.

⁶⁵ *Id.* at 456–57 (containing copy of West Hollywood's affidavit). *But see id.* at 423 n.55 (stating that Takoma Park, Maryland has no domestic partnership ordinance per se, but rather an agreement between city and Municipal Employees' Union containing in their contract the same benefits for domestic partners as for spouses of married employees. As such there is no formal registration process with city of Takoma Park).

⁶⁶ *Id.* at 434.

⁶⁷ San Francisco, Cal. Ordinance (Feb. 14, 1991).

⁶⁸ *Id.*

In other words, if one partner convinces his company to cover his domestic partner under its health insurance plan, he may incur the liability to pay for any medical expenses that the insurance does not pay, such as deductibles.⁶⁹ Registration of domestic partnership does not mean, however, that other creditors of one partner may use the domestic partnership registration to force the other partner to pay debts.⁷⁰

Domestic partnership affidavits also usually contain provisions that require the parties to notify the city through a "Statement of Termination" should the domestic partnership dissolve,⁷¹ and which prohibit the city employee from registering another partner for a certain period of time, usually from six months to a year.⁷²

In addition to certain similarities, there are also important differences among the various city ordinances. The most important aspect in which the municipal ordinances vary is the amount of benefits actually provided to the employee and his or her domestic partner.⁷³ Some ordinances, such as that of Ithaca, New York, merely provide the opportunity for unmarried couples to register their relationship with the city.⁷⁴ The only real benefit provided by this type of ordinance is that of allowing gay and lesbian couples to attain a modicum of state recognition of the validity of their relationships. Other cities, such as New York and Los Angeles, provide limited benefits in the form of sick leave and bereavement leave for employees who must take time to care for domestic partners during illness, or who need time off after their partner has died.⁷⁵

There are several cities that extend significantly greater benefits to domestic partners. Seattle, Berkeley, and West Hollywood, for example, all allow an unmarried employee to register his or her partner under the municipality's family health insurance plan, just as they allow a married employee to register his or her spouse.⁷⁶

⁶⁹ ACLU OF NORTHERN CALIFORNIA, DOMESTIC PARTNERSHIP INFORMATION SHEET 3 (1991). Domestic partnership initiatives are not intended to make domestic partners responsible for extraordinary food, housing, or medical costs. This, however, has not been tested in court by, for example, a hospital demanding that a partner pay for extraordinary medical cost over and above insurance coverage. *Id.*

⁷⁰ Berger, *supra* note 3, at 434 (citing language from West Hollywood ordinance stating that a domestic partnership is not subject to general laws of California's Uniform Partnership Act).

⁷¹ *Id.* at 425 (citing Berkeley's legislation as example).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ DOMESTIC PARTNERSHIP ISSUES, *supra* note 60, at 7.

⁷⁵ *Id.* at 5, 8.

⁷⁶ *Id.* at 2-4.

Under West Hollywood's ordinance, domestic partners are also granted jail and hospital visitation rights, as well as guarantees that they will not be discriminated against in obtaining public accommodations.⁷⁷

B. *Impact of Domestic Partnership Initiatives on Municipalities*

Perhaps the best way to evaluate the impact of domestic partnership legislation on the municipal level is to look specifically at the experiences of the first cities that passed domestic partnership legislation. This discussion may be broken down by examining the general participation rate of municipal employees, the sexual orientation of the couples who register, and the costs to the city in extending benefits to domestic partners.

In early 1985, the California cities of Berkeley and West Hollywood became the first cities in the nation to enact domestic partnership legislation. In its original form, Berkeley's ordinance extended dental benefits to domestic partners of city employees, gave employees sick leave to care for ailing partners, and allowed for extended bereavement leave for an employee whose partner had died.⁷⁸ As of May 1990, 110 of the city's 1550 employees had enrolled for these domestic partner benefits.⁷⁹ Of these 110 employees, the city estimates that approximately 15% were one-half of a same-sex couple.⁸⁰ As the cost of extending sick/bereavement leave benefits to domestic partners is negligible,⁸¹ these cities were most concerned with the price of the added health insurance benefits. In Berkeley's experience, the extension of *dental* benefits to domestic partners prompted the city's insurance company to raise its premiums by 2%.⁸² This minor increase in cost was perhaps the primary factor in the city's decision to provide health insurance coverage to unmarried employees' domestic partners. The city's insurance car-

⁷⁷ West Hollywood, Cal., Ordinance 22 (Feb. 26, 1985).

⁷⁸ DOMESTIC PARTNERSHIP ISSUES, *supra* note 60, at 3.

⁷⁹ *Id.*

⁸⁰ Elbin, *supra* note 10, at 1072.

⁸¹ See DOMESTIC PARTNERSHIP ISSUES, *supra* note 60, at 3. This explains why cities such as Los Angeles, New York, Madison, Ithaca, and Minneapolis have thus far limited the coverage of their domestic partnership ordinances to providing for sick/bereavement leave. It should be noted, however, that all of the aforementioned cities are considering enhancing their domestic partnership legislation by extending other benefits, such as health insurance, to domestic partners. *Id.* at 5-8.

⁸² BNA Special Report, *supra* note 13, at 21.

rier again insisted on a 1.5% surcharge on all insured employees' premiums to cover the cost of anticipated increases in claims.⁸³

Cities considering the adoption of domestic partnership initiatives that would extend the health benefits of municipal employees have often found it difficult to project accurately the costs that will be incurred as a result of AIDS-related hospital and treatment claims. Since Berkeley's insurance carrier enacted the 1.5% surcharge, there has been no evidence of AIDS-related claims unduly burdening the city's health plan.⁸⁴ In fact, the city of Berkeley has found that insuring domestic partners costs about the same as equivalent coverage for spouses and dependents of employees in traditional families.⁸⁵

West Hollywood's experience has generally mirrored Berkeley's. In February 1985, the West Hollywood city council approved a domestic partnership ordinance that initially allotted parenting, sick, and bereavement leave to city employees who needed time off to care for their partners.⁸⁶ In addition, the ordinance provided that domestic partners registering with the city of West Hollywood would automatically receive hospital visitation rights and jail visitation rights as immediate family members.⁸⁷ The city's plan to provide health insurance benefits to domestic partners of city employees was hampered by its inability to find a commercial insurance carrier that would provide medical benefits to an employee's domestic partner.⁸⁸ Due to a lack of actuarial data on claims of this type—data which an insurance company would ordinarily use to determine an employee's health insurance premiums—insurance companies refused to assume the unknown risk associated with covering domestic partners of West Hollywood city employees.⁸⁹ Responding to this problem, in December of 1988, West Hollywood decided to create its own insurance company to cover the domestic partners of city employees.⁹⁰

⁸³ DOMESTIC PARTNERSHIP ISSUES, *supra* note 60, at 3. In fact, the only semi-catastrophic claim came from a non-gay unmarried couple, the female partner of which had a troublesome pregnancy that ended up costing approximately \$300,000. *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 2.

⁸⁷ West Hollywood, Cal., Ordinance 22 §§ 7, 8 (Feb. 26, 1985).

⁸⁸ DOMESTIC PARTNERSHIP ISSUES, *supra* note 60, at 2.

⁸⁹ *Id.*

⁹⁰ *Id.*

As of 1991, however, only six of West Hollywood's 150 employees even requested coverage for their domestic partners.⁹¹ The city's personnel department assumes that many employees' domestic partners are already covered by their own respective employers' health benefits plans, and that the low enrollment rate of municipal employees under the new initiative is attributable to this low demand for household coverage.⁹² In terms of cost, the domestic partner claims are lower than the group average, and the city health plan has in fact received a benefit through the additional premium payment.⁹³

In a city like West Hollywood, where gays and lesbians make up an estimated 40% of the population, the main benefit of the domestic partnership provisions has been an increase in worker morale.⁹⁴ Similarly, because West Hollywood allows any couple to register its domestic partnership with the city whether the partners are municipal employees or not,⁹⁵ the city has created a psychological benefit for gays and lesbians who seek recognition of their relationships.⁹⁶

San Francisco's domestic partnership ordinance went into effect on February 14, 1991.⁹⁷ The current version allows anyone who lives *or works* in the city of San Francisco to register his or her domestic partnership with the city clerk.⁹⁸ The procedures are much the same as in other cities: the couple signs affidavits, pays a registration fee, and receives a certificate of registration as domestic partners.⁹⁹ The plan provides an additional benefit to city employees, who may pay to have their registered domestic partners covered under the city's health insurance plan.¹⁰⁰

⁹¹ Telephone Interview with Kevin Fridlington, Personnel Department, West Hollywood, Cal. (Oct. 11, 1991).

⁹² *Id.*

⁹³ DOMESTIC PARTNERSHIP ISSUES, *supra* note 60, at 2.

⁹⁴ Telephone Interview with Kevin Fridlington, *supra* note 91.

⁹⁵ Berger, *supra* note 3, at 428. Non-city employees, however, may only register their domestic partnership with the city. This registration in no way means that their private employers must meet the requirements of the city's domestic partnership policy.

⁹⁶ Dorning, *supra* note 61, at C1 (quoting one woman as stating, "It's so very rare that someone outside of our community recognizes our relationships. . . . When relationships are recognized, it's a psychologically and emotionally uplifting experience").

⁹⁷ See Telephone Interview with Rick Ruvolo, *supra* note 6.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

As of October 1991, an estimated 100 city employees and 1800 city residents had registered their domestic partners with the San Francisco City Clerk.¹⁰¹ Gay and lesbian couples have formed an overwhelming majority of these registrants, though no exact figures are available.¹⁰² Because the ordinance has been in operation for such a short period of time, its impact in terms of claims made to the city's health insurance carrier has not yet been assessed.¹⁰³

One may best examine the results of domestic partnership legislation in Seattle, Washington.¹⁰⁴ In 1989, the city of Seattle began extending sick and bereavement leave benefits to gay and lesbian employees who needed to care for their partners, but postponed extending health insurance benefits until it received notification from the IRS about the tax consequences of such an extension.¹⁰⁵ City officials thought that extending health insurance benefits to domestic partners would violate Section 89 of the Federal Tax Code, and possibly endanger the tax-exempt status of the city's health insurance plan.¹⁰⁶ In November of 1989, Section 89 was repealed. The following March, the IRS ruled that an employee

¹⁰¹ *Id.* Mr. Ruvolo stated that couples that do not wish to have their domestic partnership become part of the public record at the city clerk's office may register through a third party notary public. He said it is not known how many couples have taken this route to registering their relationship. Because the primary benefit to non-city employees is societal and government recognition of their committed relationship, Ruvolo does not think that many couples have registered privately through a notary. *Id.*

¹⁰² *Id.* In November of 1990, opponents of the San Francisco legislation succeeded in placing on the ballot an initiative that would repeal the domestic partnership provisions. Unlike the outcome of a year earlier, however, San Francisco voters this time defeated the measure by a margin of 59% to 41%. *State-by-State Voting Results and a Look at What's Ahead for '92: Winners and Losers*, USA TODAY, Nov. 7, 1991, at A6.

¹⁰³ Although one might initially believe that the costs would be higher in San Francisco because of its large gay population, and its high percentage of HIV positive men, other factors may lead to the opposite result. For example, it has been pointed out that lesbians are in the lowest risk group for HIV infection, and also that persons registering as domestic partners are generally younger and more healthy than married couples. BNA Special Report, *supra* note 13, at 12.

¹⁰⁴ DOMESTIC PARTNERSHIP ISSUES, *supra* note 60, at 4. The push for domestic partnership began in Seattle in March of 1988, when the mayor's lesbian and gay task force submitted a briefing paper to the mayor and city council explaining the need for domestic partnership legislation. This briefing paper was partially the result of a complaint filed with the Seattle Human Rights Council by a city employee charging that the city's refusal to allow her to register her domestic partner under the city's health plan violated a city ordinance prohibiting discrimination based on a person's marital status or sexual orientation. Upon receiving the complaint, the Human Rights Council ruled that city employees with domestic partners must be provided the same paid leave and health benefits as married employees. *Id.*

¹⁰⁵ Elbin, *supra* note 10, at 1074.

¹⁰⁶ BNA Special Report, *supra* note 13, at 23.

electing to add his or her domestic partner to the city health plan's family coverage must pay federal taxes on the value of the benefit conferred.¹⁰⁷

In May 1990, Seattle extended medical and dental benefits, as well as accidental death and dismemberment insurance, to city employees' domestic partners and their children in the same manner that they are made available to spouses and children of city employees.¹⁰⁸ Some Seattle officials and insurance representatives favored including a "preexisting condition" exclusion to the new insurance coverage, which would exclude from coverage any illness that a person had prior to registering the domestic partnership.¹⁰⁹

As of October 1990, 400 Seattle city employees had enrolled their domestic partners in order to be eligible for sick and bereavement leave, and slightly fewer than 200 had enrolled their domestic partners in the city's group health insurance plan.¹¹⁰ It is estimated that same-sex couples constitute 30% of both of the above groups.¹¹¹ From May to December of 1990, the additional cost of providing health insurance coverage to domestic partners of Seattle employees amounted to approximately \$225,000, or 1.1% of the city's total costs for medical and dental coverage over the same period.¹¹² This figure represents 50% of what the city had estimated the coverage would cost, which administrators attribute to the younger age of domestic partners as compared to married partners, as well as this group's fewer pregnancy-related claims—characteristically the most costly medical expense associated with medical insurance coverage.¹¹³

As the experiences of these cities attest, the actual impact of domestic partnership initiatives has been rather modest regarding both the number of registrants, and the increased costs of extending coverage to domestic partners.¹¹⁴ The relatively low number of

¹⁰⁷ *Id.* at 31, citing I.R.S. Ltr. Rul. 9109060 (March 4, 1990). The IRS stated that "the excess of the fair market value of the group medical coverage provided to the PDP ("principal domestic partner") . . . over the amount paid by the employee for the coverage is includable in the gross income of the employee who elects to cover a PDP . . . under the plan." *Id.*

¹⁰⁸ City of Seattle Fact Sheet: Domestic Partner Benefits 1 (January 1991).

¹⁰⁹ See Elbin, *supra* note 10, at 1083. Pre-existing condition clauses are used by insurance companies to protect themselves against paying the medical costs of a person who was already ill when he or she enrolled in the insurance plan. *Id.*

¹¹⁰ *Id.* at 1074.

¹¹¹ *Id.*

¹¹² City of Seattle Fact Sheet: Domestic Partner Benefits 1 (January 1991).

¹¹³ The Committee for Family Protection, Family Protection Act Summary 5 (1991) (copy on file with the *Boston College Third World Law Journal*).

¹¹⁴ DOMESTIC PARTNERSHIP ISSUES, *supra* note 60, at 7.

registrants may be attributed to two possible factors. First, many employees' partners are already covered under their own employers' health plans. In cities where the primary employment benefit under a domestic partnership initiative is the inclusion of an employee's domestic partner in his or her health insurance coverage, these couples feel less economic need to register as domestic partners.¹¹⁵ Second, because most cities' domestic partnership ordinances require the parties to register their relationship with the city clerk, same-sex couples in particular may be likely to feel some apprehension about their relationship becoming a matter of public record.¹¹⁶ In many same-sex couples, one or both partners remain "closeted," and may prefer not to acknowledge publicly their sexual orientation.¹¹⁷

The relatively slight monetary impact of extending benefits to domestic partners has been surprising to most. From the beginning, opponents to domestic partnership have raised the specter of massive insurance burdens. They predict such burdens to be the inevitable result of extending health insurance coverage to domestic partners.¹¹⁸ This argument has been one of the most successful in campaigns to oppose domestic partnership legislation. Ironically, a study done in Madison, Wisconsin, in 1986, at the inception of the domestic partnership debate, predicted the relatively low increase in insurance cost to an employer (corporate or municipal) offering health insurance coverage to its employees' domestic partners.¹¹⁹ The study, conducted by the Madison Equal Opportunities Commission, concluded that if the city of Madison were to offer health insurance benefits to the domestic partners of its municipal employees, the increase in cost to the city's annual budget for health insurance coverage would fall somewhere between .85% and 3.8%.¹²⁰ The increase in cost of providing domestic partners with spousal equivalent benefits obviously would vary from city to city depending on the composition of the employer's work force and

¹¹⁵ *Id.*

¹¹⁶ Telephone Interview with Rick Ruvolo, *supra* note 6.

¹¹⁷ See generally DOMESTIC PARTNERSHIP ISSUES, *supra* note 60, at 7.

¹¹⁸ See generally BNA Special Report, *supra* note 13, at 12.

¹¹⁹ Cox, *supra* note 11, at 28 n.120.

¹²⁰ *Id.* at 28. The conclusions were based on an annual increased employer cost of \$1,338.36 for conversion of single insurance coverage to family coverage. The Commission reached this conclusion when it discovered that 10% of city employees answering its survey stated that they were part of an "alternative family," and that of those 10%, 66% said they would apply for family group health insurance benefits if their availability were extended to encompass domestic partners and alternative families. *Id.*

the number of employees wishing to enroll their partners.¹²¹ This study, however, and the experiences of Seattle, Berkeley, and West Hollywood, attest to the falsity of claims that the costs of domestic partnership initiatives are overly burdensome.

B. Corporate Domestic Partnership Policies

Few private employers have adopted or even considered adopting their own domestic partnership initiatives.¹²² Even when there is little opposition to providing benefits for domestic partners, many company executives believe that such extensions constitute "an onslaught on the family," and will therefore refuse to even consider domestic partnership initiatives.¹²³ A 1990 survey of benefits specialists conducted by the International Society of Certified Employee Benefits Specialists, however, found that 30% of respondents predict that the number of employers that offer health insurance coverage of employees' domestic partners will increase in the near future.¹²⁴

Corporate adoption of internal domestic partnership policies is an even more recent development than the enactment of municipal domestic partnership ordinances.¹²⁵ Recently, several major private employers have adopted internal domestic partnership policies, including Lotus Development Corporation,¹²⁶ the Cambridge, Massachusetts-based computer software company, Levi-Strauss,¹²⁷ MCA,¹²⁸ and Montefiore Medical Center, a large private hospital in

¹²¹ *Id.* Presumably Cox would caution against using the Madison, Wisconsin study's results as a completely accurate guide or predictor of what would occur should New York City or Los Angeles extend domestic partnership benefits to their municipal employees, since in the larger urban areas of the nation there are more same-sex and opposite-sex couples that would be eligible to register under standard domestic partnership provisions. In fact, however, even in cities such as West Hollywood, which, because of its high percentage of gay and lesbian citizens, has a greater percentage of eligible persons than Madison, Wisconsin, the actual result has been a similarly low number of registrants, as well as a low increase in costs to the city of extending domestic partnership benefits. See DOMESTIC PARTNERSHIP ISSUES, *supra* note 60, at 2, 5.

¹²² See BNA Special Report, *supra* note 13, at 5 (quoting Raymond Kann, a consultant with Hewitt Associates in San Francisco, as saying that "no movement of significance" has occurred among private employers toward adopting any form of domestic partnership initiative).

¹²³ *Id.*

¹²⁴ *Id.* Fifty percent of respondents do not anticipate an increase in the next few years. *Id.*

¹²⁵ Sandalow & Tuller, *supra* note 61, at A1.

¹²⁶ Dorning, *supra* note 61, at C1.

¹²⁷ Sandalow & Tuller, *supra* note 61, at A1.

¹²⁸ Fox, *supra* note 61, at F2.

New York City.¹²⁹ Interestingly, these companies' policies limit the extension of benefits to domestic partners of gay and lesbian employees, stating that their policies are based in part on the inability of gays and lesbians to share in the legal benefits of marriage.¹³⁰

Lotus Development's policy provides health and dental insurance coverage to a gay or lesbian employee's "spousal equivalent" on the same terms as heterosexual spouses.¹³¹ After personnel administrators were approached by a lesbian employee regarding domestic partner benefits, the company concluded that adopting a domestic partnership policy was the "fair and equitable" thing to do.¹³² The company reasoned that many of its gay and lesbian employees were unfairly being denied certain company benefits merely because they could not legalize their significant, long-term relationships through marriage.¹³³

Montefiore Medical Center, a private hospital employing over 9,000 people, was similarly motivated to take action by an employee, in this case a lesbian staff oncologist who voiced concerns that her domestic partner was not covered by her health insurance plan at the hospital.¹³⁴ In March of 1991, the hospital established a policy providing the same health benefits to gay and lesbian employees and their domestic partners as to married employees and their spouses.¹³⁵ To establish eligibility, the hospital requires an employee to prove that his or her living arrangement with his or her domestic partner is substantially similar to that of a married couple.¹³⁶ Examples of evidence the hospital may require include the driver's licenses of the partners establishing their joint address, joint checking accounts establishing proof of financial interdependence, and a sworn statement from the two partners attesting to the fact that they are each other's sole domestic partner.¹³⁷ Like Lotus, the hospital has stated that its primary reason for adopting a domestic partnership policy was the absence of marriage as a legal option for

¹²⁹ Barron, *supra* note 61, at A1.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Dorning, *supra* note 61, at C1.

¹³³ *Id.*

¹³⁴ Barron, *supra* note 61, at A1. The employee actually contacted the director of the ACLU's Lesbian and Gay Rights Project, who helped her negotiate with the hospital to achieve this result. *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

its gay and lesbian employees, and its desire to treat these employees who were in committed same-sex relationships equitably.¹³⁸

Although these larger companies are the most recent private employers to adopt internal domestic partnership policies, a number of smaller employers have had such policies in place for years.¹³⁹ For example, the *Village Voice* newspaper adopted a domestic partnership policy in 1981.¹⁴⁰ The policy provides paid sick-care and bereavement leave, as well as health insurance coverage for domestic partners of employees, whether heterosexual or homosexual.¹⁴¹

The *Village Voice* had the advantage of being self-insured for its health coverage. Thus, the often formidable task of finding an insurance carrier that will cover employees' domestic partners did not arise in this case.¹⁴² To qualify for domestic partnership benefits, the newspaper's policy requires employees to sign an affidavit naming their domestic partner.¹⁴³ It then requires a one-year waiting period ostensibly to verify the seriousness of the commitment between the partners.¹⁴⁴ Finally, the policy requires the couple to again sign the same affidavit in front of a notary public before the employee obtains full domestic partnership benefits.¹⁴⁵ Currently, fifteen of the newspaper's 250 employees—about half of whom are in same-sex relationships—have registered their domestic partnership with the company.¹⁴⁶

Another smaller private company, Vermont-based Ben and Jerry's Homemade Ice Cream Company, adopted a domestic partnership policy in 1989 that provides sick-care and bereavement leave, as well as company-paid health, dental, and life insurance benefits to employees and their domestic partners.¹⁴⁷ Unlike the *Village Voice* and Montefiore Medical Center, Ben and Jerry's does not require a signed affidavit or a waiting period before it will extend these benefits to an employee and his or her domestic part-

¹³⁸ *Id.*

¹³⁹ See Elbin, *supra* note 10, at 1078 (noting that "where domestic partnerships have been recognized, it usually has been by private employers with no more than a few hundred employees").

¹⁴⁰ BNA Special Report, *supra* note 13, at 16.

¹⁴¹ *Id.*

¹⁴² See *id.* at 16–17.

¹⁴³ *Id.* at 17.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 116.

¹⁴⁷ *Id.* at 117.

ner.¹⁴⁸ Fifteen of the company's 300 employees have registered their domestic partners under the policy.¹⁴⁹

One of the main reasons that private employers cite for not adopting domestic partnership policies is the perceived potential for fraud. This fear, in turn, raises concerns of radically increased insurance costs for all policy holders.¹⁵⁰ Employers fear that employees will take advantage of domestic partnership provisions by registering ill friends who need health insurance coverage but cannot afford to obtain it because of their condition.¹⁵¹ Due to this fear, many of those companies that have developed domestic partnership policies, such as the *Village Voice* and Montefiore Medical Center, have required waiting periods, and have often included "pre-existing condition" exclusions whereby the insurance does not cover any illnesses present before the domestic partnership was registered.

In response to this anxiety concerning fraudulent registration and the fear of ensuing increases in health insurance costs, proponents of domestic partnership point out that there has been no evidence of fraudulent registration in any of the private companies or municipalities that already have domestic partnership provisions in place.¹⁵² The *Village Voice*, for example, has covered employees' domestic partners for over ten years, and it has not encountered any fraudulent registration problems.¹⁵³ Additionally, most employers, whether private or public, have requirements in place that make fraudulent registration unlikely, often providing for civil liability should the employee be found to have misrepresented his or her status.¹⁵⁴ Finally, proponents also point out that employers rarely require a heterosexual employee to prove that he or she is indeed *married* to the person he or she seeks to enroll in the employer's

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See Elbin, *supra* note 10, at 1082.

¹⁵¹ *Id.* at 1082-83. Because it is usually gay and lesbian employees who push for domestic partnership initiatives, employers are particularly fearful of employees registering persons with AIDS as their domestic partners because of the high cost of treating this disease. *Id.*

¹⁵² See generally Berger, *supra* note 3, at 432-33.

¹⁵³ BNA Special Report, *supra* note 13, at 16.

¹⁵⁴ See *id.* at 1083. For example, the San Francisco domestic partnership ordinance specifically states that either partner to a fraudulent registration may be liable to third parties, such as insurance companies, who may be injured by their fraud. San Francisco, Cal. Ordinance (Feb. 14, 1991). See also West Hollywood, Cal. Ordinance 22, § 5 (Feb. 1985) ("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 for his or her losses").

health insurance plan for spousal coverage. It would therefore be unfair for employers to adopt an unwarranted presumption that partners to a same-sex couple are more likely to lie about the nature of their relationship than are heterosexual couples.¹⁵⁵

IV. THE USEFULNESS OF DOMESTIC PARTNERSHIP INITIATIVES IN THE FUTURE

Domestic partnership initiatives have succeeded in providing certain rights and privileges to same-sex couples who are prohibited by law from enjoying the multitude of rights and benefits that accompany marriage.¹⁵⁶ Were marriage a legal option for same-sex couples, the need for domestic partnership initiatives would be less urgent. One of the aims of these initiatives is to carve out a kind of quasi-marital status that confers some of the benefits of marriage without offending state laws controlling marriage itself.¹⁵⁷ Of course, even if marriage were a legal option for same-sex couples, domestic partnership initiatives would still be useful in providing certain basic rights to couples, who, for whatever reasons, choose to remain unmarried.

Because marriage is not a legal option for same-sex couples, domestic partnership initiatives provide these couples with a way to fit their relationship into the framework of "family," and as such, to obtain some of the benefits our society reserves for families. At the municipal level, domestic partnership initiatives provide recognition and validation of the significance of same-sex relationships.¹⁵⁸ Domestic partnership initiatives currently provide the best option for providing unmarried couples, whether same-sex or opposite sex, with some of the benefits that flow from marriage. In many progressive urban areas and in progressive companies, domestic partnership will continue to serve as a method for alleviating some of the legal and social inequities that exist between gay and lesbian employees and heterosexual employees.¹⁵⁹

Municipalities and companies that decide to adopt domestic partnership initiatives will look to the successes and failures of earlier initiatives to devise the best legislation or policy that they are capable of developing. For municipalities, the first decision is

¹⁵⁵ Telephone Interview with Kevin Fridlington, *supra* note 91.

¹⁵⁶ Berger, *supra* note 3, at 418–19.

¹⁵⁷ See generally *id.*

¹⁵⁸ *Id.* at 426.

¹⁵⁹ See *id.* at 452.

whether to include all city residents within a domestic partnership initiative's registration process, or to restrict its application to municipal employees. This means that a city council must first decide if it is acting in its role as employer of city employees or in its role as protector of the rights of all its citizens. Allowing all of a city's residents to register, as the West Hollywood and San Francisco ordinances do, provides a larger class of people with the benefit of government recognition, and to some extent, societal recognition. The only tangible benefits to non-employee registrants under this type of approach are guaranteed hospital and prison visitation rights. This option does not cost a city any more than an ordinance that only affects city employees.

For better or for worse, cities and companies that initiate domestic partnership policies will probably continue to have registrants or employees meet certain required criteria before the same-sex couple may qualify as a domestic partnership under the policy. The purpose of these requirements is to protect against fraudulent registration by employees who would attempt to take advantage of an employer's domestic partnership policy. Although the purpose is entirely valid, the requirements used to prevent fraud need not be overly intrusive. The experiences of municipal employers such as Berkeley and West Hollywood have shown that requirements inquiring into the commitment of the partners to each other, their joint residence, and their intention to look after each other's well being, are sufficient.¹⁶⁰

In order to convince insurance companies that they will not be defrauded, the affidavit also should include a statement specifying the liability of the parties to any third party that is harmed by any false statement made by the couple in the registration process. The employers that have included this type of statement in their affidavits have not had problems with fraudulent registration.¹⁶¹

Initiatives need not demand as much evidence of a marriage-like relationship as Montefiore Medical Center does, such as re-

¹⁶⁰ San Francisco Declaration of Domestic Partnership (sample copy on file with the *Boston College Third World Law Journal*). For example, of San Francisco's eight requirements, six are mostly procedural: the couple must live together; each must be over 18 years of age; they must not be married to anyone; they must not be directly related to each other; neither party may have another domestic partner currently, or within the last six months. The other two requirements, that the two people have an "intimate, committed relationship of mutual caring," and that they agree to be responsible for each other's basic living expenses, are not overly intrusive in the parties' relationship. *Id.*

¹⁶¹ See generally, Elbin, *supra* note 10, at 1082-83.

quiring joint checking accounts to establish proof of financial interdependence. In fairness to same-sex couples, drafters of domestic partnership initiatives should remember that many traditional marriages no longer exemplify the type of financial interdependence that Montefiore seeks to find before it will allow domestic partners to register. A policy or ordinance may instead follow the majority of the current initiatives and merely require that the couple has shared the same residence for a minimum period of time ranging from six months to a year. If a company or municipality reaches the point of adopting a domestic partnership policy, one of its primary motivations is presumably a desire to treat all of its employees (and/or residents, in the case of municipalities) equally. Therefore, requirements that heterosexual married employees would find intrusive and burdensome should not be imposed on gay and lesbian employees.

Future domestic partnership initiatives should specify further the extent to which the parties are liable to each other, and to third parties, under the terms of the partnership. Because these initiatives provide very limited benefits, however, it follows that the liability of the parties should be expressly limited. For example, the parties should be liable for providing for each other's welfare, as they are under the San Francisco ordinance, unless one party decides to terminate the relationship. In that case, there should be a brief period after the termination statement is filed with the appropriate office during which those partners are still liable for each other's well-being. After that brief period, any liability should be extinguished. The provisions of the domestic partnership initiative also should specify that neither partner is liable for the debts of the other partner. Again, because domestic partnership provisions are severely limited by law as to how much they may extend quasi-marital rights to unmarried couples, it would simply be unfair to bind partners in a way that does in fact mirror marriage.

An effective domestic partnership initiative should also require that a couple inform the city or company by means of a termination statement if their relationship comes to an end. This requirement merely allows the employer to treat domestic partners and married couples similarly. If a married couple divorces, the company's insurance coverage provided to the employee's spouse ends.

An employer, whether a municipality or a private company, must also decide whether to limit the scope of its initiative to same-sex couples or to also allow unmarried heterosexual couples to register their domestic partnership. Two large private employers,

Lotus and Montefiore Medical Center, have limited their domestic partnership policy's application to same-sex couples, based on the fact that unmarried heterosexual couples may qualify for the same benefits by marrying each other, while marriage is not an option for same-sex couples. These companies believe that their domestic partnership policies are trying to remedy an inequitable situation caused by state marriage laws.¹⁶² For private employers worried about the cost of expanding health care coverage, this limitation to gay and lesbian employees also accomplishes the goal of confining such extensions in benefits to a smaller eligible class of persons.

Presumably this consideration is just as valid for municipalities in their role as employer. However, because municipal domestic partner registration is a governmental function, there might be a discrimination problem in an ordinance limiting coverage to same-sex couples. Heterosexual couples could presumably argue that they are just as entitled to domestic partnership rights should they decide not to marry, and that a city ordinance benefiting only gays and lesbians to the exclusion of heterosexuals is discriminatory. Additionally, from a larger policy perspective of broadening the concept of what a "family" is, refusing to recognize heterosexual unmarried couples under domestic partnership initiatives ignores the reality of the 2.6 million heterosexuals cohabiting as a "family."¹⁶³

V. CONCLUSION

Domestic partnership initiatives are likely to become more common in cities and companies in the coming years. As the best solution to the unequal treatment that same-sex couples face in this country, the use of domestic partnership initiatives will likely gather momentum as gays and lesbians in cities and companies press for their enactment. Judging from recent court decisions, state marriage laws are unlikely to allow same-sex couples to marry any time

¹⁶² Dorning, *supra* note 61, at C1.

¹⁶³ Berger, *supra* note 3, at 417 n.3. A related question that cities interested in drafting domestic partnership ordinances are already facing is whether to limit the ordinance's scope to "partners," in the sense of unmarried couples. Some cities have attempted to draft statutes with provisions allowing "extended family members" to register as part of the same household for purposes of gaining the same benefits that the domestic partnership ordinances provide to couples. Because these proposals have garnered much less support, and, more importantly, because of the higher costs of these more expansive proposals, domestic partnership initiatives should probably be limited in coverage to unmarried couples. The very relevant concerns of proponents of a more broadly applicable ordinance are probably better handled by channeling efforts into the call for universal health care.

in the near future. Therefore domestic partnership initiatives on the municipal and corporate levels are particularly important to same-sex couples. Based on the rapid developments that have taken place in the area of domestic partnership during the past few years, the issue will become more important to more communities and companies during the 1990s.

Domestic partnership initiatives are the best approach for same-sex couples to achieve certain quasi-marital benefits denied to them under current state marriage laws. Other attempts at gaining quasi-marital benefits, such as attempting to specify them through contract, or attain them through one partner's adoption of the other, have been only marginally successful, and then only in a limited number of states. Non-discrimination clauses, while an important first step ten years ago, so far have proven inadequate in bringing gays and lesbians the equality those policies seemed to promise. Court challenges to states' marriage laws have also been largely unsuccessful, and as the recent D.C. Superior Court decision attests, legislative amendment of these laws would undoubtedly face serious opposition due to our society's desire to "protect the sanctity of the marriage."

Domestic partnership initiatives also provide the beginnings of state and societal recognition of the validity of same-sex relationships. This recognition is often cited as one of the primary objectives of domestic partnership initiatives. Societal recognition of the permanence and relative equality of same-sex relationships also benefits the larger gay rights movement, in that at least in certain cities and inside some corporations people agree that pro-active measures must be taken to achieve equal treatment for the gay and lesbian minority.

For these reasons, domestic partnership initiatives, while clearly limited in the extent to which they provide equal treatment, are further steps in the right direction. When carefully drafted, such initiatives may succeed in carving out important rights and privileges for same-sex couples. Until marriage is available to same-sex couples, domestic partnership is indeed a viable and necessary alternative.

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