

LIVING IN SIN AND THE LAW: BENEFITS FOR UNMARRIED COUPLES DEPENDENT UPON SEXUAL ORIENTATION?

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INTRODUCTION

The family, perhaps the most basic and central unit of civilized society, has traditionally been formed by the union of one man and one woman through marriage. As early as 1888, the United States Supreme Court held that marriage is “the most important relation in life” and that there would be neither civilization nor progress without the foundation of the family.¹ Marriage confers substantial rights. Couples who are part of a marital unit enjoy a plethora of benefits that are denied to unmarried individuals.²

However, the dramatic increase over the last several years in the number of unmarried couples, both heterosexual and homosexual, living together outside of marriage has led to an increasingly blurred definition of family.³ One study,

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1. *Maynard v. Hill*, 125 U.S. 190, 205 (1888); *see also Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (stating that “the right to marry is of fundamental importance.”); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (stating that “marriage involves interests of basic importance in our society.”); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (establishing that the right to marry is part of the fundamental “right of privacy” implicit in the Fourteenth Amendment’s Due Process Clause); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (describing marriage as “fundamental to the very existence and survival of the race”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (stating that the right “to marry, establish a home and bring up children” is a central part of the liberty protected by the Due Process Clause).

2. These benefits include:

Inheritance and community property rights, recovery for loss of consortium and intentional infliction of emotional distress, sick and bereavement leave, coverage under a spouse’s health and pension plans, tax breaks, veterans’ and social security benefits, the right to live in a single family residential zone, spousal testimonial privileges, financial support upon separation, next-of-kin status to make medical decisions or burial arrangements, visitation privileges at hospitals and prisons, and entitlement to family rates at clubs and organizations.

David G. Richardson, *Family Rights for Unmarried Couples*, 2 KAN. J.L. & PUB. POL’Y 117, 117 (1993); *see also Legal Effects of Marriage*, (visited Oct. 12, 1998) <<http://www.nolo.com/ChunkSP/SP13.HTML>>. Marriage is the vehicle through which couples gain social acceptance, and the legal and economic benefits that marriage confers evidence the value that society places upon marriage and family. *See Jennifer L. Heeb, Homosexual Marriage, the Changing American Family, and the Heterosexual Right to Privacy*, 24 SETON HALL L. REV. 347, 352 (1993).

3. The number of unmarried couples living together has increased from 1.6 million in 1980 to 4.1 million in 1997. *See U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1998*, Table 66 (118th ed. 1998); *see also In re Ray Cummings*, 640 P.2d 1101, 1103 (Cal.

conducted by the Massachusetts Mutual Life Insurance Company, found that most Americans today define family in emotional terms such as "a group who love and care for each other" rather than in legal or structural terms.⁴ This breakdown in the traditional concept of marriage has led to an increased legal recognition that unmarried couples can also constitute a family that is deserving of rights and benefits.⁵

This Note explores the legal treatment of heterosexual and homosexual cohabiting couples. Part I is a brief historical survey of society's treatment of cohabiting heterosexual couples. Part II compares society's treatment of cohabiting homosexual couples with its treatment of cohabiting heterosexual couples. Part III discusses the Reciprocal Beneficiaries Act, a first-of-its-kind statute enacted in Hawaii that confers substantial benefits to homosexual couples, but not to unmarried heterosexual couples. Part IV explores the legal and policy implications of affording disparate treatment to cohabiting heterosexual and homosexual couples. Finally, the Note concludes that as a policy matter, unmarried heterosexual couples should be included in any plan whose goal is to confer marriage-related benefits to unmarried couples.

I. THE LAW AND COHABITING HETEROSEXUAL COUPLES

A. *A Brief Historical Overview*

Due to the "fundamental importance" that American society has associated with marriage as the basis for family, couples who choose to cohabit without the benefit of marriage have historically been subjected to social and economic discrimination.⁶ For example, unwed couples have been denied housing because of their "sinful" and "evil" relationship.⁷ Mothers have had custody of their children taken away due to their nonmarital cohabitation and the alleged ill effect that such "utter disregard for moral guidance and social standards" has on a

1982) (Bird, C.J., concurring) ("The definition of a 'family' in our society has undergone some change in recent years. It has come to mean something far broader than only those individuals who are united by formal marriage.").

4. Shoshana Bricklin, *Legislative Approaches to Support Family Diversity*, 7 TEMP. POL. & CIV. RTS. L. REV. 379, 379 (1998).

5. See Thomas S. Hixson, *Public and Private Recognition of the Families of Lesbians and Gay Men*, 5 AM. U. J. GENDER & L. 501, 502 (1997); see also *Braschi v. Stahl Assoc. Co.*, 543 N.E.2d 49 (N.Y. 1989) (expanding the definition of "family" for the purpose of defining rights under rent stabilization laws to include a homosexual couple that had lived together for ten years); GRAHAM DOUTHWAITE, *UNMARRIED COUPLES AND THE LAW* 1 (1979) ("The courts are moving away from the often harsh traditional refusal to accord to unmarried couples and their offspring the status and rights which are accorded to lawfully married spouses and their children.").

6. See DOUTHWAITE, *supra* note 5, at 6.

7. See, e.g., *Cooper v. French*, 460 N.W.2d 2 (Minn. 1990); *City of Ladue v. Horn*, 720 S.W.2d 745 (Mo. Ct. App. 1986). But see, e.g., *Swanner v. Anchorage Equal Rights Comm.*, 874 P.2d 274 (Alaska 1994).

child.⁸ These couples have also been denied the numerous advantages associated with marital status such as intestate inheritance,⁹ tax benefits, and community property rights.

Additionally, courts have traditionally viewed non-marital relationships with disfavor.¹⁰ To illustrate, a concurring opinion of a 1957 Supreme Court of Washington case announced that “[o]bviously, . . . a [meretricious] relationship is not generally approved by the mores of our society. It is not a relationship which is encouraged by the courts.”¹¹ Therefore, when disputes regarding property have arisen between parties to a non-marital cohabiting relationship, the courts have had to balance their duty to arbitrate disputes and to prevent unjust enrichment against their perceived responsibility to preserve the public morality by refusing to sanction the offensive relationship.¹² This balancing has sometimes led courts to pronounce that the parties to such a relationship should be left in the position in which they placed themselves, and that the court would not intervene in the dispute due to the inseparable connection between the immorality of the illicit relationship and the subject of the dispute.¹³

8. *Brown v. Brown*, 237 S.E.2d 89, 91 (Va. 1977) (holding that mother was unfit to retain custody because she was openly cohabiting in the presence of her children).

9. *But see* N.H. REV. STAT. ANN. § 457:39 (1992) (providing that the surviving partner of a committed opposite sex relationship will be treated as a legal spouse for inheritance purposes if the couple had cohabited for a period of three years); OR. REV. STAT. § 112.0117 (Supp. 1998), *repealed by* 1999 Or. H.B. 2292 (effective Jan. 1, 2000) (providing that the surviving partner of a committed opposite sex relationship will be treated as a legal spouse for inheritance purposes if the couple had cohabited for a period of ten years).

10. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (“Marriage . . . is an association that promotes a way of life . . .”).

11. *West v. Knowles*, 311 P.2d 689, 692 (Wash. 1957) (Finley, J., concurring). A meretricious relationship is one in the nature of an “unlawful sexual connection.” BLACK’S LAW DICTIONARY 988 (6th ed. 1990).

12. *See* IRVING J. SLOAN, *LIVING TOGETHER: UNMARRIEDS AND THE LAW*, at vi (1980); *see also* *Smith v. Smith*, 108 So.2d 761, 763 (Fla. 1959) (announcing that although the court was inclined to dismiss an action to establish an interest in property acquired during a nine-year non-marital relationship due to the immorality of the situation, the court would reluctantly allow the plaintiff the opportunity to submit evidence that a constructive trust was created).

13. *See, e.g., Houlton v. Prosser*, 194 P.2d 911 (Colo. 1948) (en banc); *Baxter v. Wilburn*, 190 A. 773 (Md. 1937); *Smith v. Smith*, 38 N.W.2d 12 (Wis. 1949). However, courts have always upheld express contracts so long as the contract was not made in contemplation of the illicit relationship. *See* *Emmerson v. Botkin*, 109 P. 531, 534 (Okla. 1910) (“[A]n express contract . . . is valid and enforceable, although the parties entering into it live together in a state of concubinage during the time the services are rendered, unless the contract was made in contemplation of such illicit relationship.”); *Stewart v. Waterman*, 123 A. 524, 526 (Vt. 1924) (“Immoral or criminal as their conduct may be, there is no legal inhibition against their contracting with each other; and if their contract is not infected by the illegality of the relation, it is held to be enforceable.”). Additionally, the parties will be protected if they can establish that they have a common law marriage. However, the majority of states do not recognize common law marriages. *See generally*

The harshness of this approach led the courts to develop equitable theories to provide recovery and to prevent unjust enrichment in property disputes involving meretricious relationships.¹⁴ Accordingly, courts have applied theories of resulting trust,¹⁵ constructive trust,¹⁶ and equitable lien¹⁷ to allow a party to an unmarried cohabiting relationship to obtain an interest in property even though the legal title was in the other party's name. Courts have also likened the non-marital cohabiting relationship to a business partnership or joint venture in order to give the complaining party an interest in the property acquired during the relationship.¹⁸ However, the unpredictable application of these equitable doctrines places the unmarried cohabitant in an uncertain and precarious position when difficulty in the relationship develops.

B. *The Modern Trend*

Over time, society has witnessed a dramatic increase in the number of couples choosing to live together outside of marriage and a corresponding relaxation in attitude towards these couples by the judiciary. This trend is best demonstrated by the 1976 landmark decision in *Marvin v. Marvin*.¹⁹ The importance of the *Marvin* decision lies not necessarily in its holding, but in its

Common Law Marriage (visited Oct. 12, 1998) <<http://www.nolo.com/ChunkSP/SP8.HTML>>.

14. Recovery that is allowed under a theory of unjust enrichment is not based upon an express or implied agreement between the parties; it is rooted in the principle that "one who has received a benefit has a duty to make restitution where retaining such a benefit would be unjust." *Watts v. Watts*, 405 N.W.2d 303, 313 (Wis. 1987).

15. A resulting trust is an equitable theory designed to "effectuate the intent of the parties in certain situations where one party pays for property, or part of it, [and] for different reasons [it] is titled in the name of another." *Collins v. Davis*, 315 S.E.2d 759, 761 (N.C. Ct. App. 1984); see also *Williams v. Bullington*, 32 So. 2d 273 (Fla. 1947); *Walberg v. Mattson*, 232 P.2d 827 (Wash. 1951).

16. A constructive trust transforms the legal owner into a trustee and gives the complaining party equitable ownership of the property. See SLOAN, *supra* note 12, at 10; see also *In re Estate of Eriksen*, 337 N.W.2d 671 (Minn. 1983); *Kuhlman v. Cargile*, 262 N.W.2d 454 (Neb. 1978); *Matos v. Gadman*, 570 N.Y.S.2d 68 (N.Y. App. Div. 1991).

17. In an equitable lien, the party with legal title retains the title and ownership of the property, and the lien acts to provide security for the outstanding debt. See SLOAN, *supra* note 12, at 10; see also *Marum v. Marum*, 194 N.Y.S.2d 327 (N.Y. Sup. Ct. 1959).

18. See, e.g., *Ferraro v. Ferraro*, 304 P.2d 168 (Cal. Ct. App. 1956); *Poole v. Schrichte*, 236 P.2d 1044 (Wash. 1951).

19. 557 P.2d 106 (Cal. 1976). In *Marvin*, Michelle Marvin alleged that she and Lee Marvin had entered into an oral agreement that they would share all property acquired during their seven-year non-marital relationship. See *id.* at 110. The California Supreme Court not only held that the agreement was enforceable, but went on to hold that courts could inquire into the conduct of the parties to determine the existence of any implied contract or implied agreement between the parties. See *id.* at 122.

forthright sanctioning of unmarried relationships.²⁰ The court in *Marvin* took cognizance of the obvious fact that more and more couples engage in nonmarital cohabitation and stated:

[T]he prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as time when our court should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship [T]he nonenforceability of agreements expressly providing for meretricious conduct rested upon the fact that such conduct, as the word suggests, pertained to and encompassed prostitution. To equate the nonmarital relationship of today to such a subject matter is to do violence to an accepted and wholly different practice.

. . . .

The mores of society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many.²¹

Since the *Marvin* decision, society has continued its ever-increasing acceptance, or at least tolerance, of cohabitation as an alternative family life style. More and more courts today are willing to find implied agreements to share in the property acquired during the nonmarital cohabitation and to equitably divide such property rather than refusing cohabiting couples a remedy in the event that the relationship dissolves.²² This change in attitude is further demonstrated by the willingness of some jurisdictions to extend the protection of their criminal laws specifically to unmarried cohabitants in domestic violence situations²³ and the fact that some courts have allowed a party to a cohabiting

20. See DOUTHWAITE, *supra* note 5, at 180 (noting that “no court previous to *Marvin* ha[d] been so forthright in its sanctioning of unmarried relationships.”).

21. *Marvin*, 557 P.2d at 122. However, in an effort to provide assurances that the court was not advocating this alternative lifestyle, the court also stated: “[T]he structure of society itself largely depends upon the institution of marriage, and nothing we have said in this opinion should be taken to derogate from that institution.” *Id.*

22. See, e.g., *Levar v. Elkins*, 604 P.2d 602 (Alaska 1980); *Pinto v. Smalz*, 955 P.2d 770 (Or. Ct. App. 1998); *Wilbur v. DeLapp* 850 P.2d 1151 (Or. Ct. App. 1993); *Sutton v. Widner*, 933 P.2d 1069 (Wash. Ct. App. 1997). *But see* *Rehak v. Mathis*, 238 S.E.2d 81, 83 (Ga. 1977) (holding that cohabitation constituted immoral consideration and was incapable of supporting a contract); *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1211 (Ill. 1979) (holding that it was in violation of public policy to recognize mutual property rights between unmarried cohabitants).

23. See, e.g., CAL. PENAL CODE § 273.5 (West 1988 & Supp. 1999); KAN. STAT. ANN. § 21-3412(c)(4)(B) (Supp. 1997); N.H. REV. STAT. ANN. § 173-B:1 (1994); OHIO REV. CODE ANN. § 2317.02 (Anderson 1996 & Supp. 1997); R.I. GEN. LAWS § 12-29-1 (1994); S.C. CODE ANN. § 16-25-10 to -30 (Law. Co-op 1985); WASH. REV. CODE ANN. §§ 10.99.101, .020 (West 1990 & Supp.

relationship standing to bring a claim for negligent infliction of emotional distress upon witnessing injury to his or her partner.²⁴ Moreover, some municipalities allow unmarried couples to register their relationship as domestic partners, which may or may not carry with it any benefits,²⁵ and some employers extend benefits to the committed partners of their unmarried employees.²⁶

This increasing acceptance is not uniform among jurisdictions nor have cohabiting couples achieved status that is comparable to their married counterparts.²⁷ The reality is that although the situation of unmarried cohabitants is much improved from years past, they nevertheless continue to be relegated to an inferior legal and social status, and they are generally treated as less deserving of rights and benefits than couples who choose to have the state sanction their relationship through marriage.²⁸

1999).

24. See *Dunphy v. Gregor*, 642 A.2d 372, 380 (N.J. 1994) (allowing a cohabitant bystander recovery, and holding that the "familial relationship" with the injured person necessary to permit a bystander to recover for his or her emotional distress upon witnessing injury is not limited to relationships of marriage or blood). *But see Elden v. Sheldon*, 758 P.2d 582, 586 (Cal. 1988) (en banc) (holding that unmarried cohabitant is not entitled to bystander recovery because such recovery would discourage marriage and encourage fraudulent claims).

25. See discussion *infra* Part III.B. Domestic partnerships are "business or political recognition of two adults seeking to share benefits normally conferred upon married couples." Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163, 163 (1995). It is "one step more than cohabitation, but one step less than marriage." *Id.* at 165. While domestic partnership ordinances vary, most require that the partners meet some version of the traditional definition of family by attesting that they are involved in a committed relationship of mutual caring and support and that they are unmarried. See Ron-Christopher Stamps, *Domestic Partnership Legislation: Recognizing Non-Traditional Families*, 19 S.U. L. REV. 441, 451 (1992). The first domestic partnership ordinance was passed in 1984 by Berkeley, California. See Richardson, *supra* note 2, at 121-22.

26. See Nancy J. Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less Than Perfect Institutional Choice*, 7 TEMP. POL. & CIV. RTS. L. REV. 337, 337 (1998); see also *Employers with Domestic Partnership Policies* (visited Oct. 12, 1998) <<http://www.hrc.org/issues/workplac/dp/dplist.html>> (providing a list of employers who provide benefits to the domestic partners of their employees).

27. Some states continue to have laws that criminalize unmarried cohabitation. See, e.g., ARIZ. REV. STAT. ANN. § 13-1409 (West 1989); FLA. STAT. ANN. § 798.02 (West 1992); N.M. STAT. ANN. § 30-10-2 (Michie 1997 Repl.); N.C. GEN. STAT. § 14-184 (1993); N.D. CENT. CODE § 12.1-1-20-10 (1997).

28. Although the relationship of couples who cohabit may be similar in many ways to couples who are married, society has favored the institution of marriage over cohabitation for many reasons including (1) a desire to preserve the traditional view of family life, (2) to legitimize the children born of the union, and (3) religion sanctions and encourages marriage while declaring cohabitation sinful. See Jennifer L. King, Comment, *First Comes Love, Then Comes Marriage? Applying Washington's Community Property Statutes to Cohabitational Relationships*, 20 SEATTLE U. L. REV. 543, 554-55 (1997). Because unmarried cohabitation does not involve the highly

II. THE LAW AND COHABITING HOMOSEXUAL COUPLES

A. *The Condemnation of Homosexuality*

Although heterosexual couples who choose to live together outside of marriage have historically been looked down upon by society and subjected to social and economic discrimination, that discrimination has been mild compared to the discrimination that homosexual couples have faced. Virtually all cultures have condemned, or at least frowned upon, homosexuality.²⁹ The Bible, relied upon by the Judeo-Christian tradition, sets forth an absolute prohibition against homosexual activity: "Thou shalt not lie with mankind, as with womankind: it is abomination."³⁰ Therefore, it is not surprising that the "[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization."³¹ This "state intervention" typically has taken the form of laws that make sodomy a criminal act.³² The United States Supreme Court has declared such laws constitutional as recently as 1986 in *Bowers v. Hardwick*.³³

defined set of rights and obligations that marriage does, it is advisable for these couples to protect their interests by entering into a cohabitation agreement and constructing a proper estate plan. See Jared Laskin, *What You Should Know Before You Move in Together* (visited Oct. 7, 1998) <<http://www.plaimony.com/1.html>>.

29. See Jeffrey Hart, *Adam and Eve, Not Adam and Henry*, in SAME-SEX MARRIAGE 30, 31 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997); see also *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) ("Proscriptions against that conduct has ancient roots."); Jeff Jordan, *Is It Wrong to Discriminate on the Basis of Homosexuality?*, in SAME-SEX MARRIAGE, *supra*, at 72, 77 ("The theistic tradition, Judaism and Christianity and Islam, has a clear and deeply entrenched position on homosexual acts: they are prohibited.").

30. *Leviticus* 18:22 (King James).

31. *Bowers*, 478 U.S. at 196 (Burger, C.J., concurring).

32. *Id.* at 192-93 ("Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights . . . In fact, until 1961, all 50 States outlawed sodomy. . . ."); see also Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 523 (1986) (discussing the historical basis of discrimination against homosexuals and noting that "[a]t common law, and at one time by statute in every state of the United States, sodomy was a criminal act.").

33. See *Bowers*, 478 U.S. at 194-96. The Court framed the issue as whether there was a fundamental right to engage in homosexual sodomy. See *id.* at 190. However, the statute in question did not differentiate between heterosexual and homosexual sodomy. See *id.* at 200 (Blackmun, J., dissenting). Several states continue to criminalize the act of sodomy. See, e.g., ALA. CODE §§ 13A-6-60(2), 13A-6-65(a)(3) (1994); ARIZ. REV. STAT. ANN. §§ 13-1411, -1412 (West 1989); ARK. CODE ANN. § 5-14-122 (Michie 1997); FLA. STAT. ANN. § 800.02 (West 1992 & Supp. 1998); GA. CODE ANN. § 16-6-2 (1996 & Supp. 1998); IDAHO CODE § 18-6605 (1977); KAN. STAT. ANN. § 21-3505 (1995); LA. REV. STAT. ANN. § 14:89 (West 1996); MD. CODE ANN. art. 27, §§ 553-

In addition to having their private sexual conduct regulated by the State through criminal sanctions, homosexuals have been subject to wide spread discrimination in all contexts. In employment, homosexuals have been fired or refused employment merely because of their sexual orientation.³⁴ Homosexuals have also been denied custody of their children because of their alternative lifestyle.³⁵ Additionally, homosexuals are more often the victims of hate crimes than any other group.³⁶

B. *The Plight of the Homosexual Couple*

Homosexual couples who cohabit encounter many of the same legal obstacles that their unmarried heterosexual counterparts face. As all unmarried couples, homosexual couples are denied the rights and benefits that are attached to marriage such as property distribution, survivorship rights, health-related benefits and legal standing.³⁷ Moreover, the absence of any legal relationship

554 (1996); MASS. GEN. LAWS ANN. ch. 272, §§ 34-35 (West 1990); MICH. COMP. LAWS ANN. §§ 750.158, 750.338(a),(b) (West 1991 & Supp. 1998); MINN. STAT. ANN. § 609.293 (West 1987); MISS. CODE ANN. § 97-29-59 (1994); MO. REV. STAT. ANN. §§ 566.010, 566.090 (West 1979 & Supp. 1999); MONT. CODE ANN. §§ 45-2-101(20), -5-505 (1997); N.C. GEN. STAT. § 14-177 (1993); OKLA. STAT. ANN. tit. 21, § 886 (West 1983 & Supp. 1999); R.I. GEN. LAWS § 11-10-1 (1994 & Supp. 1998); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); TEX. PENAL CODE ANN. § 21.06 (West 1994); UTAH CODE ANN. § 76-5-403 (1995); VA. CODE ANN. § 18.2-361 (Michie 1996).

34. See *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997). In *Shahar*, the Attorney General of Georgia revoked an offer of employment to Robin Shahar to be a Staff Attorney upon learning of her lesbian "marriage." *Id.* at 1100-01. Reasons cited for the revocation included the appearance of conflicting interpretations of Georgia law that would affect the Department's credibility with the public, an interference with the Department's ability to enforce Georgia's sodomy law, and that the employment of Shahar would endanger the working relationships of the office lawyers. See *id.* All jurisdictions addressing this issue have held that Title VII does not protect employees from sexual orientation discrimination. See, e.g., *Dillon v. Frank*, No. 90-2290, 1992 WL 5436 (6th Cir. Jan. 15, 1992); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979); *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979).

35. See, e.g., *Newsome v. Newsome*, 256 S.E.2d 849, 855 (N.C. 1979) (transferring custody to father when court discovered that mother cohabitated with a woman); *M.J.P. v. J.G.P.*, 640 P.2d 966, 969 (Okla. 1982) (shifting custody to father when court discovered mother's open lesbian relationship); *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985) (shifting custody to mother when court learned that father was living with his homosexual lover). But see *S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985) (reversing lower court's order to change custody to father because mother was a lesbian); *Schuster v. Schuster*, 585 P.2d 130, 133 (Wash. 1978) (en banc) (refusing to change custody to father because of mother's homosexuality).

36. See *Rudy Serra, Sexual Orientation and Michigan Law*, 76 MICH. B.J. 948, 949 (1997); see also *Jantz v. Muci*, 759 F. Supp 1543, 1549 (D. Kan. 1991) (noting the widespread violence against homosexuals), *overruled by* 976 F.2d 623 (10th Cir. Kan. 1992).

37. See *Kristin Bullock, Applying Marvin v. Marvin to Same-Sex Couples: A Proposal for*

between the parties places cohabiting homosexual couples in the same legal position as unmarried heterosexual couples; they must rely on contractual and equitable principles to protect their rights.³⁸

The *Marvin* court's refusal to follow a standard that would render cohabitation contracts invalid if they involved unmarried sexual relationships was important not only for cohabiting heterosexual couples, but for homosexual couples as well. Although the *Marvin* decision concerned an agreement between a heterosexual couple, the court's language was neutral and did not limit its holding to heterosexual couples.³⁹ Therefore, courts subsequent to *Marvin* have increasingly, though certainly not uniformly, been willing to apply *Marvin* principles to homosexual cohabitation in the event that the relationship terminates.⁴⁰

Although the degree of acceptance of homosexual cohabitation is not on par with that of cohabiting heterosexuals, society has increasingly tolerated homosexual cohabitation in the years since *Marvin*. For instance, some jurisdictions have allowed a former homosexual partner standing to seek

a Sex-Preference Neutral Cohabitation Contract Statute, 25 U.C. DAVIS L. REV. 1029, 1035 (1992).

38. See MARVIN MITCHELSON, *LIVING TOGETHER* 115 (1980) ("In the eyes of the law, gay relationships fall into the same category as the meretricious spouse. They are beyond the boundaries of domestic relations and must take their cases into the civil court . . . as contract matters."); see also Jared Laskin, *Gay and Lesbian Issues* (visited Oct. 7, 1998) <<http://www.palimony.com/6.html>> ("There is no legal difference between unmarried cohabitation by straight couples and unmarried cohabitation by gay or lesbian couples.").

39. See *Marvin v. Marvin*, 557 P.2d 106, 116 (Cal. 1976) ("[W]e base our opinion on the principle that adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights."); see also Bullock, *supra* note 37, at 1044.

40. See *Bramlett v. Selman*, 597 S.W.2d 80, 85 (Ark. 1980) (holding that equity should not deny claimant from recovering property he purchased in his same-sex cohabitant's name); *Whorton v. Dillingham*, 248 Cal. Rptr. 405, 409-10 (Cal. Ct. App. 1988) (enforcing cohabitation agreement between homosexual couple); *Posik v. Layton*, 695 So.2d 759, 762 (Fla. Dist. Ct. App. 1997) (holding that an agreement for support between same-sex couples is valid if it is in writing and not inseparably based upon illicit consideration of sexual services); *Ireland v. Flanagan*, 627 P.2d 496, 500 (Or. Ct. App. 1981) (finding that an agreement between cohabiting lesbians to pool their earning indicated intent to be joint owners); *Small v. Harper*, 638 S.W.2d 24, 28 (Tex. Ct. App. 1982) (holding that public policy considerations would not prevent a claimant from recovering on the basis of a partnership agreement with her same-sex cohabitant). *But see Jones v. Daly*, 176 Cal. Rptr. 130, 133 (Cal. Ct. App. 1981) (refusing to enforce cohabitation agreement between same-sex couple because sexual services were not a separable part of the agreement). See also Bullock, *supra* note 37, at 1045 (arguing that courts in California have been inconsistent in applying *Marvin* principles to homosexual couples due to homophobia); Laskin, *supra* note 38 (stating that the practical difference between unmarried heterosexual and homosexual couples is that it may be more difficult for a homosexual partner to enforce an oral or implied agreement due to bias against homosexuals).

visitation or custody.⁴¹ Some jurisdictions have also allowed homosexual couples to adopt children.⁴² Additionally, several cities have allowed homosexual couples to register their relationships as domestic partners.⁴³ Moreover, many employers that have extended benefits to the committed partners of their unmarried employees have expressly limited those benefits to homosexual partners.⁴⁴

Although there are many similarities between unmarried heterosexual and homosexual cohabiting couples, there is one fact that makes the two relationships fundamentally different: heterosexuals always have the option of getting married while homosexual couples do not. Attempts by homosexuals to assert a constitutional right to marry have met with little success.⁴⁵ However, in 1993, Hawaii appeared as though it would be the first state to recognize same-sex marriages when it held in *Baehr v. Lewin*⁴⁶ that a law which restricts marriage to opposite-sex couples is a classification based on sex in violation of the Equal Protection Clause of the Hawaii Constitution.⁴⁷ In response to the perceived

41. See *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1321 (Pa. Super. Ct. 1996) (holding that former same-sex partner had standing to seek partial custody; partner stood in loco parentis to child as they were members of a nontraditional family). *But see* *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 219 (Cal. Ct. App. 1991) (refusing to grant partial custody of children to former lesbian partner); *Lynda A.H. v. Diane T.O.*, 673 N.Y.S.2d 989, 991 (N.Y. App. Div. 1998) (holding that temporary visitation rights to former lesbian partner impermissibly impaired the biological mother's right to custody of her child conceived by artificial insemination when the women were a couple).

42. See *In re M.M.D. & B.H.M.*, 662 A.2d 837, 862 (D.C. 1995) (allowing homosexual to adopt his biological partner's child); *In re Adoption of Tammy*, 619 N.E.2d 315, 321 (Mass. 1993) (allowing lesbian to adopt her partner's biological child); *In re Jacob*, 660 N.E.2d 397, 405-06 (N.Y. 1995) (allowing lesbian to adopt her partner's biological child); *Adoptions of B.L.V.B. and E.L.V.B.*, 628 A.2d 1271, 1275-76 (Vt. 1993) (allowing lesbian to adopt her partner's biological child). *But see* FLA. STAT. ANN. § 63.042 (West 1997); N.H. REV. STAT. ANN. §§ 170-B:4, 170-F:6 (1994 & Supp. 1998) (prohibiting the adoption of minor children by homosexuals); *In re Adoption of T.K.J.*, 931 P.2d 488, 491 (Colo. Ct. App. 1996) (holding that homosexual couples are unable to adopt each other's children).

43. See O'Brien, *supra* note 25, at 181-82.

44. See *id.* at 178; see also *Employers with Domestic Partner Health Care Benefits for Same Gender Couples* (visited Oct. 12, 1998) <<http://www.nyu.edu/pages/sls/gaywork/codponly.html>> (providing a list of employers who provide health care benefits to same-sex partners).

45. See, e.g., *Adams v. Howerton*, 486 F. Supp. 1119 (C.D. Cal. 1980), *aff'd on other grounds*, 673 F.2d 1036 (9th Cir. 1982); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Storrs v. Holcomb*, 645 N.Y.S.2d 286 (N.Y. Sup. Ct. 1996); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

46. 852 P.2d 44 (Haw. 1993).

47. See *id.* at 67. The court held that the government could deny same-sex couples the right to marry only if the law was justified by a compelling state interest and was narrowly tailored to avoid abridging constitutional rights (i.e., the law was subject to strict scrutiny). See *id.* Accordingly, the court remanded the case for a determination of whether compelling state interests

assault against traditional heterosexual marriage, Congress passed the In Defense of Marriage Act (DOMA) in 1996.⁴⁸ DOMA denies federal recognition to same-sex marriages by defining marriage as being between a man and a woman and provides for states to refuse to extend recognition to same-sex marriages performed in other states.⁴⁹

III. HAWAII AND THE RECIPROCAL BENEFICIARIES ACT

The citizens of Hawaii, like the rest of the nation, reacted strongly to the *Baehr* decision. One poll found that approximately seventy percent of Hawaii's registered voters opposed same sex marriage.⁵⁰ In an effort to prevent recognition of same-sex marriages, the Hawaiian legislature passed the Reciprocal Beneficiaries Act ("RBA") which became effective on July 1, 1997.⁵¹ The passage of the RBA was a political compromise; it was attached to another bill which called for a constitutional amendment that would authorize the state legislature to restrict marriage to opposite-sex couples.⁵²

existed so as to justify the prohibition of marriage between couples of the same sex. *See id.* at 68. On remand, the circuit court ruled that the State had failed to provide sufficient evidence of a compelling state interest to justify the marriage law, and therefore, the law was unconstitutional. *See Baehr v. Miike*, No. 91-1394, 1996 WL 694235 at 21-22 (Haw. Cir. Ct. Dec. 3, 1996). However, implementation of the decision was suspended in order for the case to be reviewed by the Hawaii Supreme Court. *See id.*

48. Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 1 U.S.C. § 7 (Supp. IV 1998); 28 U.S.C. § 1738(C)).

49. *See* § 1738(C). The panic in the aftermath of the *Baehr* decision prompted at least twenty-five states to pass laws that specifically restrict marriage to opposite sex couples. *See* Knauer, *supra* note 26, at 335. For discussions regarding the constitutionality of this Act, see Jon-Peter Kelly, *Act of Infidelity: Why the Defense of Marriage Act Is Unfaithful to the Constitution*, 7 CORNELL J.L. & PUB. POL'Y 203 (1997); James M. Patten, *The Defense of Marriage Act: How Congress Said "No" to Full Faith and Credit and the Constitution*, 38 SANTA CLARA L. REV. 939 (1998); Barbara A. Robb, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 NEW ENG. L. REV. 263 (1997); Melissa Rothstein, Essay, *The Defense of Marriage Act and Federalism: A States' Rights Argument in Defense of Same-Sex Marriages*, 31 FAM. L.Q. 571 (1997).

50. *See* Linda Hosek, *Reciprocal Benefits Reaction Lukewarm*, HONOLULU STAR-BULLETIN, July 17, 1997, available at <<http://starbulletin.com/97/07/17/news/index.html>>.

51. *See* Act Relating to Unmarried Couples (Reciprocal Beneficiaries), ch. 383, 1997 Haw. Sess. Laws 2C (codified at HAW. REV. STAT. ANN. §§ 572C-1 to -7 (Michie Supp. 1998)).

52. *See* Linda Hosek, *A Peek Inside Hawaii's 'Pandora's Box'*, HONOLULU STAR-BULLETIN, July 3, 1997; Hosek, *supra* note 50; *see also* Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 6-7 (1998). On November 3, 1998, 69% of Hawaiian voters approved the passage of the constitutional amendment. *See* Don Feder, *Nuptials for Gays Put to Test in Vt.*, BOSTON HERALD, Nov. 25, 1998, at O23, available in 1998 WL 7361941; Maggie Gallagher, *Hope in the Land of Aloha*, N.Y. POST, at 17, Nov. 14, 1998, available in 1998 WL 25290304.

A. *The RBA and Its Benefits*

The RBA permits same-sex couples to become "reciprocal beneficiaries" by filing a notarized declaration of their relationship with the Director of Health and paying an eight dollar fee.⁵³ Those couples who become reciprocal beneficiaries are entitled to substantial benefits that were previously available only through marriage.⁵⁴ Some of the benefits include:

Survivorship rights including inheritance, workers compensation survivorship benefits, state employees retirement beneficiary benefits;

Health related benefits including hospital visitation, private and public employee prepaid medical insurance benefits, auto insurance coverage, mental health commitment approvals and notifications, family and funeral leave;

Benefits and obligations relating to jointly held property: tenancy in the entirety, disaster relief loans, and public land leases;

Legal standing relating to wrongful death, victims rights, and domestic violence family status; and

Miscellaneous benefits such as University of Hawaii facilities use, anatomical gifts, and government vehicle emergency use.⁵⁵

However, many of the most fundamental rights and obligations associated with marriage, such as provisions for financial support, distribution of property, and determination of child custody upon termination of the relationship, were denied to reciprocal beneficiaries.⁵⁶ Obligations for spousal debts, as well as civil and criminal testimonial privileges, were also denied.⁵⁷

Additionally, no federal marriage-related benefits could be bestowed upon reciprocal beneficiaries due to federal preemption and the enactment of DOMA with its restrictive language limiting marriage to a union between a man and a woman. To illustrate, the RBA, as written, required public, as well as private, employers to provide a variety of benefits, such as health insurance, to reciprocal

53. HAW. REV. STAT. ANN. §§ 572C-3 to -5 (Michie 1999).

54. *See id.* §§ 572C-1, -2, -6.

55. CONF. COMM. REP. NO. 2, H.B. NO. 118, at 2 (Haw. 1997).

56. *See* Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage,"* 66 *FORDHAM L. REV.* 1699, 1742 (1998); *see also* *Frequently Asked Questions* (visited Oct. 9, 1998) <<http://www.hawaii.gov/health/rbrfaq.htm>>; Hosek, *supra* note 52 (noting that the RBA extends only about 45 of some 400 benefits offered through marriage).

57. *See* Christensen, *supra* note 56, at 1742 n.270.

beneficiaries.⁵⁸ In an unreported decision, a federal district court held that the federal Employee Retirement Income Security Act ("ERISA") preempted application of state law to private sector benefit plans covered by ERISA.⁵⁹ Therefore, private employers are not required to offer benefits to reciprocal beneficiaries. Additionally, reciprocal beneficiaries do not qualify as spouses for tax purposes.⁶⁰ As a result, public sector employees who are able to receive benefits for their reciprocal beneficiary have to include the fair market value of the benefits provided for their reciprocal beneficiary in their gross income.⁶¹ As a result, the RBA's omission of many of the major benefits and burdens of marriage has the effect of creating a type of second-class marriage.

Though a far cry from the benefits associated with marriage, the importance of this groundbreaking legislation should not be overlooked: the RBA is the first state law that confers status as well as considerable rights and benefits to unmarried couples.⁶²

B. The RBA and Municipal Domestic Partnership Registries: A Comparison

In the mid-1980s, many municipalities began establishing domestic partner registries that enable unmarried couples to declare themselves partners in a committed relationship with marriage-like characteristics and thereby obtain some form of legal recognition.⁶³ Domestic partnership ordinances vary considerably from city to city.⁶⁴ The benefits extended are fairly limited and can range from little more than recognition of the relationship to hospital visitation privileges to the extension of health benefits to city employees.⁶⁵ Generally, the status of domestic partner is attained through the filing of a declaration by a couple stating that they are unmarried and are each other's sole domestic partner, that they are responsible for each other's welfare, and that they live together in

58. See *id.* at 1740; see also Catherine L. Fisk, *ERISA Preemption of State and Local Laws on Domestic Partnership and Sexual Orientation Discrimination in Employment*, 8 *UCLA WOMEN'S L.J.* 267, 271 (1998).

59. See Fisk, *supra* note 58, at 271 n.13; see also Linda Hosek, *Reciprocal Benefits Limited*, *HONOLULU STAR-BULLETIN*, Sept. 26, 1997.

60. See Priv. Ltr. Rul. 96-03-011 (Jan. 19, 1996).

61. See *id.*; see also Knauer, *supra* note 26, at 342-43 nn.29-30.

62. See HAW. REV. STAT. ANN. §§ 572C-1, -2, -4, -6 (Michie 1999); see also Christensen, *supra* note 56, at 1739; Hosek, *supra* note 52.

63. See Stamps, *supra* note 25, at 451. Domestic partnership laws have been enacted in cities such as Ann Arbor, Michigan; Atlanta, Georgia; Cambridge, Massachusetts; Chicago, Illinois; Los Angeles, California; Madison, Wisconsin; Minneapolis, Minnesota; New York, New York; San Francisco, California; Seattle, Washington; and Takoma Park, Maryland just to name a few. See Christensen, *supra* note 56, at 1734-35; Richardson, *supra* note 2, at 121-22.

64. See Richardson, *supra* note 2, at 122.

65. See *id.*; O'Brien, *supra* note 25, at 166. The scope of benefits extended by municipal domestic partnership registries are necessarily restricted due to state and federal preemption. See Christensen, *supra* note 56, at 1738-39; Richardson, *supra* note 2, at 122.

a cohabitation arrangement.⁶⁶ Additionally, the partners must not be related by blood so that the relationship can be distinguished from other types of familial relationships.⁶⁷

At first blush, the RBA appears to be merely a statewide version of the municipal domestic partnership registries with a corresponding conferral of a greater number of benefits. However, the status of reciprocal beneficiary and domestic partner are really quite different. To be eligible to enter into a reciprocal relationship, the parties must be at least eighteen years old, unmarried, not in another reciprocal relationship, and not under the influence of force, duress, or fraud.⁶⁸

What distinguishes reciprocal beneficiaries from domestic partners is that the RBA requires that the parties be *legally prohibited from marrying one another* in order to be eligible to enter into a reciprocal relationship.⁶⁹ The import of this requirement is that not only are same-sex couples eligible to register as reciprocal beneficiaries, but so are people related by consanguinity.⁷⁰ Moreover, heterosexual couples are excluded from the list of potential beneficiaries since they are not legally prohibited from marrying.⁷¹ Such a provision is unique and clearly delineates reciprocal beneficiaries from domestic partners, the latter of who may never be related by blood and are most often open to both homosexual or heterosexual couples.⁷² Additionally, in contrast to domestic partner registries, the RBA does not require that the couple be involved in an emotional or intimate relationship.⁷³

66. See Stamps, *supra* note 25, at 452.

67. See *id.*

68. See HAW. REV. STAT. ANN. § 572C-4 (Michie 1999).

69. See § 572C-4(3). The legislature paid lip service to the ability of homosexuals to engage in meaningful relationships:

[T]he legislature concurrently acknowledges that there are many individuals who have significant personal, emotional, and economic relationships with another individual yet are prohibited by such legal restrictions from marrying. For example, two individuals who are related to one another, such as a widowed mother and her unmarried son, or two individuals who are of the same gender. Therefore, the legislature believes that certain rights and benefits presently available only to married couples should be made available to couples comprised of two individuals who are legally prohibited from marrying one another.

HAW. REV. STAT. ANN. § 572C-2.

70. "The inclusion of couples who are related to each other biologically or through adoption undermines the recognition of same-sex committed relationships as uniquely intimate, emotional attachments and therefore supports . . . subordination based on sexual orientation." Fellows et al., *supra* note 52, at 30; see also 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, 489-91 (1996) (advocating the extension of marital benefits to relationships of consanguinity).

71. See HAW. REV. STAT. ANN. §§ 572C-1, -2, -4.

72. See Richardson, *supra* note 2, at 122; Stamps, *supra* note 25, at 452.

73. See generally HAW. REV. STAT. ANN. §§ 572C-1 through -6. The RBA also does not

IV. HETEROSEXUALS: SHOULD THEY BE INCLUDED?

The ever-increasing number of municipalities that are willing to extend benefits, albeit limited, to unmarried couples indicates a legal recognition of the validity of alternative relationships, i.e., those that are not established through a marital tie.⁷⁴ This recognition is also visible at the state level, although no state other than Hawaii has enacted legislation that confers significant benefits to unmarried couples.⁷⁵ However, as the number of "traditional" households decline, and as homosexuals continue to demand recognition and equality, more states may be inclined to bestow rights and benefits to alternative families.⁷⁶ What model should these states follow? Should they follow Hawaii's approach and exclude heterosexuals from the list of potential beneficiaries? Or, should they fashion their legislation in keeping with the majority of municipal domestic partnership registries and make the benefits available to all unmarried couples, whether homosexual *or* heterosexual?

A. *The Debate About Heterosexuals in Other Contexts*

In drafting and implementing legislation to grant rights and benefits to unmarried couples, states may find it helpful to consider similar debates surrounding the inclusion or exclusion of heterosexual couples that have taken place in the context of domestic partnership registries and employer-provided benefits to domestic partners.⁷⁷

1. *Actions at the Federal Level.*—Employers who provide benefits to the unmarried partners of their employees must initially decide whether to limit the benefits to homosexual couples or whether to offer them to all unmarried couples. Generally speaking, public employers tend to grant benefits to *all* unmarried couples while private employers are more likely to grant benefits only to the same-sex partners of their employees.⁷⁸

Those employers who have limited benefits to same-sex couples have not faced any significant legal challenges to their decisions until recently.⁷⁹ In May 1998, Paul Foray filed a lawsuit in a New York federal court alleging that Bell Atlantic's policy of extending benefits to domestic partners of the same-sex, but

require that the couple be residents of Hawaii or that they maintain a common residence. See Jacob Kamhis, *Reciprocal Benefits Open Pandora's Box*, PAC. BUS. NEWS, June 2, 1997, available at <<http://www.bizjournals.com/pacific/stories/1997/06/02/story3.html>>.

74. See discussion *supra* Part III.B; see also *supra* note 63 and accompanying text.

75. See *supra* note 62.

76. See *supra* note 3 and accompanying text.

77. See generally Bricklin, *supra* note 4; Jonathan Rauch, *What's Wrong with "Marriage Lite,"* WALL ST. J., June 2, 1998, at A22; David E. Rovella, *Same Benefits for Hetero, Gay Couples?*, NAT'L L.J., June 1, 1998, at B1.

78. See Hixson, *supra* note 5, at 502-03.

79. See Bruce J. Kasten et al., *Domestic-Partner Benefits Plans Raise Legal Issues*, NAT'L L.J., June 8, 1998, at B7.

not of the opposite sex, is discrimination based on sex in violation of Title VII of the Civil Rights Act.⁸⁰ The complaint is problematic, however, because the company focused on the partnership, not the gender, of the employees in denying benefits.⁸¹ Because Title VII does not protect against sexual orientation or marital status discrimination, Mr. Foray's suit is unlikely to succeed.⁸²

Similarly, any challenges to a statewide RBA-type legislation on the grounds that excluding heterosexual couples is discriminatory under Title VII will not succeed. Moreover, a challenge alleging a denial of equal protection of the laws also will not meet with much success.⁸³ A court, when hearing such a claim, would inquire whether there exists a rational basis for the discrimination.⁸⁴ In such a situation, the court would defer to the wisdom of the state legislature in enacting the statute, and the legislation would most likely be upheld.⁸⁵

Arguably, a heterosexual couple challenging such legislation could succeed on a claim alleging a denial of due process.⁸⁶ Because marriage has been held to be a fundamental right, the freedom of choice to marry, or not to marry, is constitutionally protected.⁸⁷ Therefore, forcing heterosexual couples to get married in order to attain benefits that are available to other unmarried couples could possibly be found to be unconstitutional.

2. Actions at the State Level.—Although federal law does not protect against discrimination based on sexual orientation or marital status, some states have enacted laws that forbid these kinds of discrimination. State and local prohibitions against marital status⁸⁸ and sexual orientation⁸⁹ discrimination are

80. See *id.*; Rovella, *supra* note 77. The complaint states that “[g]iven the fact that his domestic partner is female, . . . Foray was denied benefits because he is male.” Rauch, *supra* note 77. See generally Civil Rights Act of 1964, § 701 as amended, 42 U.S.C. § 1985 (1994).

81. See Rovella, *supra* note 77.

82. All jurisdictions addressing this issue have held that Title VII does not protect employees from sexual orientation discrimination. See, e.g., *Dillon v. Frank*, No. 90-2290, 1992 WL 5436 (6th Cir. Jan. 15, 1992); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979); *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979). “What the company is doing may be something people don’t approve of as a social matter, but it isn’t violative of any federal discrimination laws.” Daniel Hays, *Domestic Partner Benefits Spark Sex Suit*, NAT’L UNDERWRITER LIFE & HEALTH-FIN. SERVICES EDITION, June 8, 1998, at 37.

83. See U.S. CONST. amend. XIV, § 1. “[T]he Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination.” *Loving v. Virginia*, 388 U.S. 1, 10 (1967).

84. See *Loving*, 388 U.S. at 9.

85. See *id.*

86. See U.S. CONST. amend. XIV, § 1. A statutory classification that significantly interferes with the exercise of a fundamental right will be found invalid unless it is supported by a compelling state interest and the classification is necessary to further that state interest. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

87. See *Bricklin*, *supra* note 4, at 392.

88. See, e.g., ALASKA STAT. §§ 18.80.200, 210 (Michie 1998); CAL. GOV’T CODE §§ 12940,

designed primarily to ensure that an individual's status as a married, single, heterosexual, or homosexual person is not the basis for providing employee benefits or making other employment decisions.

Lawsuits filed by homosexual couples asserting that the failure to offer them employee benefits that are available to heterosexual married couples is unlawful discrimination based on sexual orientation have not met with much success.⁹⁰ However, the rationale for such decisions is based, to a large extent, on the fact that unmarried heterosexuals are also excluded from the benefit plans. To illustrate, the court in *Ross v. Denver Department of Health and Hospitals* held that the denial of sick leave benefits to a municipal employee to care for her same-sex domestic partner did not violate a rule prohibiting discrimination on the basis of sexual orientation.⁹¹ In so holding, the court stated "[a]n unmarried heterosexual employee also would not be permitted to take family sick leave benefits to care for his or her unmarried opposite-sex partner. Thus, the rule does not treat homosexual employees and similarly situated heterosexual employees differently."⁹²

Therefore, legislation comparable to the RBA, which excludes heterosexuals from reaping the benefits bestowed upon other unmarried couples, could possibly be found unlawful in those states that have laws prohibiting sexual orientation discrimination since an unmarried opposite-sex couple is not treated the same as an unmarried same-sex couple.⁹³

19702, 12920, 12921 (West 1992 & Supp. 1999); CONN. GEN. STAT. ANN. § 46a-60 (West 1995 & Supp. 1999); DEL. CODE ANN. tit. 19, § 711 (1995 & Supp. 1998); D.C. CODE ANN. §§ 1-2501, -2512 (1999); FLA. STAT. ANN. § 760.10 (West 1997 & Supp. 2000); HAW. REV. STAT. ANN. § 378-2 (Michie 1999); 775 ILL. COMP. STAT. ANN. 5/1-102 (West 1993 & Supp. 1999); MD. ANN. CODE art. 49B, §§ 14, 16 (1998 & Supp. 1999); MICH. COMP. LAWS ANN. §§ 37.2102, 37.2202(1) (West 1985 & Supp. 1999); MINN. STAT. ANN. § 363.03, .12 (West 1991 & Supp. 2000); MONT. CODE ANN. § 49-2-303 (1999); NEB. REV. STAT. § 81-1355 (1994); N.H. REV. STAT. ANN. §§ 354-A: 1, :6-8 (1995 & Supp. 1999); N.J. STAT. ANN. §§ 10:5-4, -12 (West 1993 & Supp. 1999); OR. REV. STAT. § 659.020 (1989 & Supp. 1998); VA. CODE ANN. § 2.1-715 (Michie 1995 & Supp. 1999); WASH. REV. CODE ANN. § 49.60.010 (West 1990 & Supp. 2000); WIS. STAT. ANN. §§ 111.31, .321 (West 1997 & Supp. 1999).

89. See, e.g., CAL. LAB. CODE § 1102.1 (West Supp. 1999), *repealed by* 1999 Cal. Stat. 592; CAL. GOV'T CODE §§ 12921, 12940 (West 1999); CONN. GEN. STAT. ANN. § 46a-81c (West 1995); D.C. CODE ANN. §§ 1-2501, -2512 (1999); HAW. REV. STAT. § 378-2 (Michie 1999); MASS. GEN. LAWS ANN. ch. 151B § 4 (West 1996 & Supp. 1999); MINN. STAT. §§ 363.01, .12 (Supp. 1998); N.J. STAT. ANN. §§ 10:5-4, 10:5-12 (West 1993 & Supp. 1999); R.I. GEN. LAWS §§ 28-5-3, -7 (1995 & Supp. 1998); VT. STAT. ANN. tit. 21, § 495(a) (Supp. 1999); WIS. STAT. ANN. §§ 111.31, .36 (West 1997 & Supp. 1999).

90. See, e.g., *Ross v. Denver Dep't of Health & Hosp.*, 883 P.2d 516 (Colo. Ct. App. 1994); *Rutgers Council of AAUP Chapters v. Rutgers, the State Univ.*, 689 A.2d 828 (N.J. Super. Ct. App. Div. 1997); *Philips v. Wisconsin Personnel Comm'n*, 482 N.W.2d 121 (Wis. Ct. App. 1992).

91. See *Ross*, 883 P.2d at 520.

92. *Id.*

93. See *Fisk*, *supra* note 58, at 276 (stating that limiting domestic partner benefits to

Similar lawsuits, alleging discrimination based on marital status, have also failed.⁹⁴ That is until the Alaska Supreme Court held in *University of Alaska v. Tumeo* that the university's denial of health insurance benefits for the same-sex committed partners of their employees, while offering those same benefits to employees who were legally married, was marital status discrimination in violation of the Alaska Human Rights Act.⁹⁵ Interestingly, the plaintiffs argued that the university's policy of extending partner benefits only to employees with a legal spouse was discriminatory towards all unmarried couples, not just the homosexual ones.⁹⁶ Nonetheless, the court limited its decision to same-sex couples because none of the plaintiffs were unmarried opposite-sex couples.⁹⁷

Arguably, RBA-type legislation that excludes heterosexual couples is discrimination based on marital status in those jurisdictions that have laws proscribing such conduct. Marriage is a state-conferred legal status which gives rise to rights and benefits which are reserved exclusively for that relationship.⁹⁸ Reciprocal beneficiaries, or whatever name a state legislature chooses to assign to the relationship, is also a state-conferred legal status and requiring heterosexuals to marry in order to receive any type of benefits could possibly be construed to be a form of marital status discrimination.

B. Arguments in Favor of Excluding Heterosexuals

Whether excluding heterosexual couples from the list of potential beneficiaries of a plan to grant benefits to unmarried couples is legal or not, is such exclusion in keeping with policies that society should promote? No social change is brought about without controversy, and many have strong sentiments about this issue. The following are rationales given in support of the notion that unmarried, opposite-sex couples should never be given benefits that mirror those that traditionally could only be attained through marriage.

1. *Heterosexuals Can Always Get Married.*—The most pervasive and obvious rationale for excluding opposite-sex couples from any type of program

homosexual couples could possibly constitute illegal discrimination in those states that forbid discrimination based on sexual orientation, but argued that the more compelling view is that there is no unlawful discrimination because heterosexual and homosexual couples are not similarly situated because heterosexual couples can obtain benefits by getting married). The RBA does not necessarily discriminate based on sexual orientation because it allows anyone who is legally prohibited from marrying, which may include heterosexuals related by consanguinity, to register as reciprocal beneficiaries. See HAW. REV. STAT. ANN. § 572C-4(3). However, the focus of this note is on the implications of state-wide legislation that excludes heterosexual couples and not on the RBA specifically.

94. See, e.g., *Funderburke v. Uniondale Union Free Sch. Dist. No. 15*, 660 N.Y.S.2d 659 (N.Y. Sup. Ct. 1997), *aff'd*, 676 N.Y.S.2d 199 (N.Y. App. Div. 1998).

95. 933 P.2d 1147 (Alaska 1997).

96. See *id.* at 1149 n.2.

97. See *id.*

98. See *Baehr v. Lewin*, 852 P.2d 44, 58 (Haw. 1993).

that grants benefits to unmarried couples is that heterosexuals have the option of getting married, unlike their homosexual counterparts.⁹⁹ The two are not similarly situated, and accordingly, it is unnecessary, from a fairness perspective, to include unmarried heterosexual couples.¹⁰⁰ If opposite-sex couples desire the benefits that marriage provides, so the argument goes, then they should simply get married.¹⁰¹

In response to claims that there are legitimate reasons for couples not to wed and denying benefits in the face of these valid reasons is unfair and discriminatory, supporters of this theory contend that any financial reason that may exist to discourage a couple from getting married can be worked out legally through contract.¹⁰² Moreover, cohabiting couples are far less likely to remain together over the long run than married couples, and studies have shown that as a group, unmarried couples are less happy, healthy, and wealthy than their married counterparts.¹⁰³ Therefore, "it is very hard to make an argument for including heterosexuals All they have to do is get married."¹⁰⁴

2. *Including Heterosexuals Would Discourage Marriage.*—The traditional concept of family has historically been based upon marriage.¹⁰⁵ Marriage is the basic building block of Western Civilization and is said to be the foundation of

99. See O'Brien, *supra* note 25, at 178; Knauer, *supra* note 26, at 346.

100. Chicago, for instance, opted not to include opposite-sex partners in a plan to extend health benefits to the same-sex partners of the city's employees. The decision was based on "equity" because "[g]ays and lesbians are prohibited from marrying by state law . . . [h]eterosexuals aren't." *Updates: Chicago OK's Partner Benefits*, BUS. INS., Mar. 24, 1997, at 26.

101. Although the Human Rights Campaign, the nation's largest gay-rights group, has not formally taken a position on benefits for unmarried heterosexuals, Kim Mills, the education director of the group, stated that a law tailored to providing only same-sex benefits is defensible "[b]ecause gay couples can't legally marry . . . they have no other way to secure benefits for their partners—unlike heterosexual couples, who can walk to the altar if they want benefits." Shawn Zeller, *All in the So-Called Family*, NAT'L J., Sept. 19, 1998, available in 1998 WL 2089599; see also *Rutgers Council of AAUP Chapters v. Rutgers, the State Univ.*, 689 A.2d 828, 834 (N.J. Super. Ct. App. Div. 1997) (stating that an "elementary response" for heterosexual domestic partners is that marriage solves the problem).

102. See Zeller, *supra* note 101.

103. See *id.*

104. *Id.*

105. See *Maynard v. Hill*, 125 U.S. 190, 205 (1888); see also *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (stating that "the right to marry is of fundamental importance."); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (stating that "marriage involves interests of basic importance in our society."); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (establishing that the right to marry is part of the fundamental "right of privacy" implicit in the Fourteenth Amendment's Due Process Clause); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (describing marriage as "fundamental to the very existence and survival of the race"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (stating that the right "to marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause).

a strong, stable, and healthy society.¹⁰⁶ Thus, public policy mandates that laws promote, not discourage marriage.

Conservative, pro-family critics urge that bestowing benefits upon unmarried heterosexual couples would weaken and slowly destroy the institution of marriage.¹⁰⁷ According to this theory, when a benefit is detached from marriage and given to all unmarried couples, the significance of marriage is weakened for everyone and the institution gradually takes on a symbolic status as opposed to being a truly meaningful institution.¹⁰⁸ Moreover, the rising number of heterosexual couples who choose to cohabit without the benefit of marriage demonstrates an eroding respect for marriage, and giving marriage-like benefits to these couples would further diminish incentives to get married.¹⁰⁹

C. Arguments in Favor of Including Heterosexuals

On the other side of the debate are those who believe that any benefits that are to be bestowed upon unmarried couples should be given without regard to the sexual orientation of the couple. Listed below are justifications that are advanced in support of this position.

1. *All Non-Traditional Families, Whether Homosexual or Heterosexual, Deserve the Same Recognition and Support.*—A traditional family consists of a husband and wife with their children. Today, however, fewer and fewer American households contain traditional families. A 1997 survey revealed that only twenty-five percent of this nation's households fit the traditional definition of family and that the number of unmarried couples living together has increased by 2.5 million since 1980.¹¹⁰ These changing social patterns are incompatible with the notion that the term "family" should be restricted to the traditional definition.

106. See Richardson, *supra* note 2, at 118.

107. See Zeller, *supra* note 101. This reasoning was embraced by Massachusetts Governor A. Paul Cellucci when he vetoed domestic partner legislation that extended benefits to unmarried couples, regardless of sexual orientation. Governor Cellucci stated that "[e]xtending health care benefits to unmarried [heterosexual] couples undermines strong marriages and leads to our children growing up without fathers. . . . [w]e must do everything we can to support marriages and discourage out-of-wedlock births." Kelly M. Fitzsimmons, *Domestic Partners Legislation Vetoed*, MASS. L. WKLY., Aug. 17, 1998, at 27.3 A study conducted by the Urban Institute indicates that 57% of unwed fathers visit their child at least weekly during the first two years of life. That number drops to only 25% by the time the child is seven-and-a-half-years old. See Zeller, *supra* note 101.

108. See Hixson, *supra* note 5, at 521.

109. See Zeller, *supra* note 101. In support of the contention that cohabitation should be discouraged, advocates point to research which "suggests that cohabiting women are more than twice as likely as married women to be victims of domestic violence, and more than three times as likely to suffer depression; cohabiting partners tend to be less sexually faithful 'Partnership' is less durable than marriage. . . ." Rauch, *supra* note 77.

110. See U.S. DEP'T OF COMMERCE, *supra* note 3, at Tables 77, 83; see also *supra* text accompanying note 3.

These alternative families may consist of an unmarried couple, either heterosexual or homosexual, with or without minor children.¹¹¹ Such relationships entail extensive sharing of responsibilities and embody many of the values and functions of a traditional family such as stability, commitment, support, care, and affection. Arguably, these cohabiting relationships meet many of the acknowledged values promoted by marriage at least as well as the marital relationship itself given the lack of commitment to traditional family values indicated by this country's high divorce rate.¹¹²

This diversity in family relationships, whether welcome or not, is a reality in today's society. Accordingly, cohabiting heterosexual couples should be granted benefits under statutory "pseudo-marriage" schemes to the same extent that homosexual couples are, in order to recognize and support family units, whatever their makeup.¹¹³ Such an approach recognizes that changes in American society have created diverse family relationships and that support for these families is important to continued well-being of society and its members, both adult and child. Moreover, its focus is not to offer a gay marriage equivalent, but to truly support many diverse family types.

2. *All Couples Have a Fundamental Right Not to Get Married.*—In response to the argument that cohabiting opposite-sex couples can obtain the benefits they desire simply by getting married, supporters of including heterosexuals in any plan to confer benefits to unmarried couples contend that all people have the freedom to choose whether they want to marry or not, and the grant of benefits should not hinge upon this decision.¹¹⁴ Advocates of this theory stress that "[f]reedom of choice is not a one-way street where the only decision deserving protection is one that is socially preferred by those in power."¹¹⁵

Cohabitation, overall, has become firmly established as a feasible and workable alternative to traditional marriage.¹¹⁶ Although many view opposite-sex

111. See, e.g., David C. Wiegel, *Proposal for Domestic Partnership in the City of Detroit: Challenges Under Law*, 74 U. DET. MERCY L. REV. 825, 825 (1997). The effect these alternative families have on children should not be underestimated. Three out of ten cohabiting households couples contain children. See Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829, 1865-66 (1987).

112. See Mary Patricia Treuhart, *Adopting a More Realistic Definition of "Family,"* 26 GONZ. L. REV. 91, 98 (1991). Some commentators have questioned whether it is appropriate to utilize marriage and family as the criteria for conferring benefits and achieving social acceptability. See *id.* at 120-22.

113. Thomas F. Coleman, *Domestic Partners Plan: 1 Step Forward, 2 Back*, CHI. DAILY L. BULL., March 17, 1997, at 5.

114. See Bricklin, *supra* note 4, at 392.

115. Coleman, *supra* note 113.

116. See, e.g., Kris Franklin, "A Family Like Any Other Family": *Alternative Methods of Defining Family Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 1027, 1045 (1990-91); see also Zeller, *supra* note 101 ("Cohabitation is becoming a lifetime decision for lots of people, and more and more are choosing to co-habit before getting married." (quoting Dorian Solot, co-founder of the Alternatives to Marriage Project which is based in Massachusetts)).

couples who live together, choosing to cohabit rather than marry, as casual and less committed in their relationships and thus undeserving of any of the rights and benefits that are associated with marriage, legitimate reasons do exist for not marrying. Some people object to the religious implications that are invariably linked to marriage or believe that traditional marriage promotes oppressive gender roles that are not egalitarian.¹¹⁷ Elderly people may risk losing Social Security benefits and survivors' pensions.¹¹⁸ Moreover, the added costs of marriage and the money, time, and emotional upheaval attendant to divorce proceedings are enough to dissuade many from saying, "I do."¹¹⁹ Whatever the reason for not desiring marriage, supporters of this theory propound, a heterosexual couple that chooses not to wed should not be penalized for this decision: a "get married or get lost" attitude is intolerable.¹²⁰

3. *Gay Rights Perspective: The Exclusion of Heterosexual Couples Results in Homosexuals Being Forever Relegated to the Inferior Status Provided by a "Pseudo-Marriage" Scheme.*—As previously mentioned, public employers, when they decide to implement domestic partnership benefit plans, are more likely to make benefits available to all unmarried couples, both heterosexual and homosexual.¹²¹ This phenomenon is the product of a long tradition of homosexual couples attaining legal recognition and support only through membership in the larger class of unmarried couples generally.¹²² Underlying this practice is a politically motivated fear of the ramifications that endorsing gay marriage would entail.¹²³ By allowing homosexual couples only the same entitlements that are granted to unmarried heterosexual couples, same-sex relationships are not really legitimized.¹²⁴

Supporters of this theory contend that the only way for homosexuals to achieve true equality is to be granted the right to marry; only then will they have

117. See Stamps, *supra* note 25, at 459; Treuthart, *supra* note 112, at 122. Until relatively recently, the husband controlled all of the marital assets and made all decisions, leaving the woman with no voice. This subordination of women is not obsolete; social and institutional structures within our society reinforce this subordination. For example, women are generally poorer after a divorce than are men. See Chambers, *supra* note 70, at 453-54.

118. See Zeller, *supra* note 101.

119. See Stamps, *supra* note 25, at 459; Rovella *supra* note 77. The so-called "marriage penalty" is another reason that couples may choose not to marry: by living together without marriage, each can file a separate income tax return and maximize their incomes. Chambers, *supra* note 70, at 473.

120. See, e.g., Coleman, *supra* note 113.

121. See *supra* note 78 and accompanying text.

122. See Hixson, *supra* note 5, at 521 (analyzing the public and private approaches to recognizing homosexual families and stating that "[a] lawsuit seeking legal recognition of a same-sex couple as family . . . has a good chance of success only if an unmarried heterosexual couple could file an exactly identical suit."); see also discussion *supra* Part II.B.

123. See Hixson, *supra* note 5, at 519.

124. See *id.*

the same rights heterosexual couples do.¹²⁵ While the RBA, along with any other plan designed to grant benefits to unmarried couples, may grant numerous benefits to reciprocal beneficiaries, a great number of the most fundamental and significant benefits attached to marriage are withheld.¹²⁶ The net effect of this is a creation of a type of second-class marriage, it is not marriage or a comparable equivalent. Consequently, same-sex couples will forever be relegated to an inferior status, perpetually denied the legal recognition that married opposite-sex couples enjoy.¹²⁷

CONCLUSION

The notion of allowing couples who are "living in sin" to reap the benefits traditionally associated with marriage, and thereby putting the state's stamp of approval on the relationship, is an idea that would have been considered radical just a few decades ago. Giving same-sex couples these benefits, in light of the long history of persecution of homosexuals, would have been considered more than radical; it would have been tantamount to heresy. However, today large numbers of people are making the choice every day to live together as a family without obtaining the blessing of society through a marriage certificate. More and more homosexuals are making themselves visible and demanding respect and the equal treatment under the laws to which all American citizens are entitled.

The response to the quickly changing attitudes of society by some courts, legislatures, and employers has been to allow unmarried couples to enjoy at least some of the entitlements and protections that have previously been available only through marriage. With an ever-growing segment of the population increasingly demanding rights, it seems quite likely that more states will follow Hawaii's lead and implement legislation bestowing benefits similar to the RBA on unmarried couples. Whether such legislation should be directed solely at same-sex couples or should also include opposite-sex couples is largely a product of the perceived function and impact of the legislation.

The fear that allowing unmarried heterosexual couples access to these benefits will discourage marriage, while having a legitimate basis, is exaggerated. Despite the large number of couples who choose not to marry, the symbolic significance of marriage remains strong. Moreover, marriage still remains the optional choice given that the most significant marriage-related benefits, such as distribution of property, determination of child custody upon termination of the relationship, and the exemption of partner benefits from gross income, are withheld.

To those who say that there is no need to allow unmarried heterosexual couples access to these benefits because they could always attain these benefits by getting married, the most obvious response is that heterosexual relationships *are* fundamentally different from homosexual relationships because the latter is

125. *See id.*

126. *See discussion supra* Part III.A.

127. *See Hixson, supra* note 5, at 521-22.

prohibited by law from marrying. However, this truism does not necessarily answer the question. If the goal, when drafting such a policy, is to create a second-tier station where homosexuals, presumably happy to be given rights and benefits at all, are to be placed indefinitely, then heterosexual couples should indeed be left out of the equation. However, if the goal is to recognize and support the wide diversity in the composition of families today, then the only real solution is to include heterosexual couples in the mix.

The bottom line is that the RBA, or any comparable legislation that may be passed in the future, is not marriage. It is a less advantageous alternative, in terms of rights and obligations, to marriage that unmarried heterosexual couples should have available to them if they should choose not to marry, whatever their reason may be.