

## Domestic Partnership Laws in the United States: A Review and Critique\*

*William C. Duncan*\*\*

### I. INTRODUCTION

Arrangements providing for employment and other social benefits based on “domestic partnership” status are becoming increasingly common in both the private and the public sectors. For example, the Human Rights Campaign reports that 3,572 private companies, colleges, universities, and governments offer domestic partnership benefits to their employees.<sup>1</sup> Recently, the state legislature of California began to offer domestic partnership benefits to partners of legislative employees.<sup>2</sup> In 2000, an arbitrator in Connecticut ruled that the state had to offer health benefits for same-sex partners of state employees.<sup>3</sup> A number of countries and foreign jurisdictions have also created a special status for same-sex couples. These countries include Brazil,<sup>4</sup> Canada,<sup>5</sup> Denmark,<sup>6</sup> France,<sup>7</sup> Ice

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\*\* Assistant Director, Marriage Law Project, Columbus School of Law, The Catholic University of America. I am particularly grateful to Margaret Robertson and James Peters of the BYU Law Review staff for their superb editorial comments on the article.

1. DARYL HERRSCHAFT & KIM I. MILLS, *THE STATE OF THE WORKPLACE FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDERED AMERICANS* 2000 8 (2000).

2. *Capitol Workers Win New Benefit; Health Coverage Quietly Extended to Unmarried Partners*, PRESS-ENTERPRISE (Riverside, CA), May 12, 1999, at A3.

3. Matthew Daly, *Ruling Favors Same-Sex Couples*, HARTFORD COURANT, Feb. 2, 2000, at A3.

4. Larry Rohter, *Brazil Grants Rights to Same-Sex Pairs*, ARIZ. REPUBLIC, June 11, 2000, at A26.

5. Modernization of Benefits and Obligations Act, Bill C-23, § 125 (2000).

6. The Danish Registered Partnership Act, Act No. 372 (1989).

7. Adam Sage, *Teachers Fake Gay Love to Move Jobs*, TIMES (London), May 25, 2000, at 18.

land,<sup>8</sup> Norway,<sup>9</sup> Sweden,<sup>10</sup> Switzerland,<sup>11</sup> New South Wales (Australia),<sup>12</sup> and Aragon (Spain).<sup>13</sup> Now, Germany and Hungary are also considering creating a status for same-sex domestic partners.<sup>14</sup>

These laws are of increasing concern not only because of their frequency, but also because of their attractiveness as a substitute for recognition of same-sex "marriage." Politicians may offer domestic partnership benefits, or something similar, as a concession. This happened in Hawaii in 1997 when the state marriage amendment was being considered in the legislature.<sup>15</sup> Similarly, the Iowa marriage recognition statute (providing that an out-of-state same-sex "marriage" would not be valid in Iowa) included a provision creating a task force to report on the issue of domestic partners.<sup>16</sup> Most conspicuously, the Vermont Legislature created the status of "civil unions" for same-sex couples<sup>17</sup> after a Vermont Supreme Court decision mandated the provision of marriage benefits to same-sex couples by the legislature and threatened to force recognition of same-sex "marriage" if the legislature did not comply.<sup>18</sup>

Now the American Law Institute ("ALI") has joined the fray by endorsing a domestic partnership status.<sup>19</sup>

This paper will survey the domestic partnership laws of various U.S. jurisdictions and will compare the ALI proposal with these laws. It will also discuss the litigation surrounding these provisions and

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8. Icelandic Confirmed Partnership Act, No. 87 (1996).

9. Norwegian Registered Partnerships Act, Act No. 40 (1993).

10. Swedish Registered Partnership Act, Act No. 1994:1117 (1994).

11. *Partnerships Broadened in Switzerland*, WASH. BLADE, Mar. 31, 2000.

12. New South Wales Property (Relationships) Legislation Amendment Act (1999).

13. *Domestic Partnerships Granted by Law in Aragon*, at <http://www.redestb.es/triangulo/leyarin.htm> (last visited Mar. 10, 2001).

14. *German Lawmakers Move Toward Giving Legal Status to Gay Couples*, CHI. TRIB., Nov. 11, 2000, at 8; Jana Pinterovc & Michele Legge, *Gay Marriage Bill Likely to Win Approval*, PRAGUE POST, March 17, 1999.

15. See David Orgon Coolidge, *The Hawaii Marriage Amendment: Its Origins, Meaning and Constitutionality*, 22 U. HAW. L. REV. 19, 27-30 (2000).

16. 1998 Ia. H.F. 382, § 4 (Apr. 15, 1998); see also David Orgon Coolidge & William C. Duncan, *Definition or Discrimination? State Marriage Recognition Statutes in the "Same-Sex Marriage" Debate*, 32 CREIGHTON L. REV. 1, 13 (1998).

17. VT. STAT. ANN. tit. 15, §1201 (2000).

18. *Baker v. Vermont*, 744 A.2d 864 (1999).

19. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (Tentative Draft No. 4, Apr. 10, 2000) [hereinafter PRINCIPLES (Tentative Draft No. 4)].

briefly comment on legal and policy implications of domestic partnership statutes.

## II. STATE DOMESTIC PARTNERSHIP PROVISIONS

Only three states—Hawaii, California, and Vermont—have domestic partnership statutes. The Hawaii law was adopted in 1997 as a tradeoff for the passage of the Marriage Amendment, which would have prevented the legalization of same-sex “marriage.”<sup>20</sup> The Hawaii law provides a number of benefits to state employees and citizens, although its effect on private employers is limited. Its provisions include funeral leave for state employees, hospital visitation rights, health insurance coverage for partners of state employees, and the ability to claim an elective share of a partner’s estate.<sup>21</sup> Hawaii’s term for domestic partners is “reciprocal beneficiaries.” Reciprocal beneficiaries must be eighteen years old, ineligible to marry, and unmarried. They must sign a declaration of intent,<sup>22</sup> which is filed with the director of the state health department.<sup>23</sup> Reciprocal beneficiary status can be ended by filing a declaration with the state health department or by marriage.<sup>24</sup> Notably, the Hawaii statute explicitly includes relationships not involving sex or the same residence. While the law was originally intended to cover private as well as public employers, private employers filed suit. The litigation settled with an agreement that the law would only apply to a small number of private employers.<sup>25</sup>

The California law, enacted in 1999, creates a registry whereby same-sex couples and couples over age sixty-two can register for the right to hospital visitation and to appoint their partner a beneficiary on their insurance.<sup>26</sup>

Vermont’s act creates “civil union” status.<sup>27</sup> The law provides that town and county clerks will begin to issue “certificates of civil union” to same-sex couples who are not married or party to another civil union and who are not related to each other within the degrees

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20. See Coolidge, *supra* note 15.

21. 1997 Haw. Sess. Laws 383.

22. *Id.* §§ 1–4.

23. HAW. REV. STAT. § 572C-5 (2000).

24. *Id.* § 572C-7.

25. See Coolidge, *supra* note 15, at 274–75 n.246.

26. 1999 Cal. Legis. Serv. Ch. 588 (West).

27. VT. STAT. ANN. tit. 15, § 1201 (2000).

prohibited by the marriage laws.<sup>28</sup> It also gives jurisdiction to the family court over all cases based on the civil union law.<sup>29</sup> The law provides that parties to a civil union will “have all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage.”<sup>30</sup> It also provides that the terms “spouse,” “family,” and similar terms in the law will be construed to include couples in a civil union, and outlines a list of twenty-four nonexclusive kinds of law that will now be applied to same-sex couples on the same terms as married spouses.<sup>31</sup> The law also contains a requirement that

insurers shall provide dependent coverage to parties to a civil union that is equivalent to that provided to married insureds. An individual or group health insurance policy which provides coverage for a spouse or family member of the insured shall also provide the equivalent coverage for a party to a civil union.<sup>32</sup>

The bill also creates a new status of “reciprocal beneficiaries,” defined as two people related by blood or adoption who want to enjoy some benefits of marriage.<sup>33</sup> Reciprocal beneficiaries are given rights related to: (1) hospital visitation and medical decision-making;<sup>34</sup> (2) decision-making relating to anatomical gifts;<sup>35</sup> (3) decision-making relating to disposition of remains;<sup>36</sup> (4) “[d]urable power of attorney for health care”;<sup>37</sup> (5) “[p]atient’s bill of rights”;<sup>38</sup> (6) nursing home patient’s bill of rights;<sup>39</sup> and (7) abuse prevention.<sup>40</sup>

The National Gay and Lesbian Task Force indicates that Connecticut, Delaware, Massachusetts, New York, Oregon, and Washington also provide for non-statutory benefits for domestic partners

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28. *Id.* § 1203.

29. *Id.* § 1206.

30. *Id.* § 1204(a).

31. *Id.* § 1204(e).

32. VT. STAT. ANN. tit. 8, § 4063(a) (2000).

33. *Id.* tit. 15, § 1303 (2000).

34. *Id.* tit. 18, § 1853 (2000).

35. *Id.* tit. 18, § 5240(a)(2).

36. *Id.* tit. 18, § 5220.

37. *Id.* tit. 14, § 3456 (2000).

38. VT. STAT. ANN. tit. 18, § 1852 (2000).

39. *Id.* tit. 33, § 7301.

40. *Id.* tit. 15, § 1101 (2000).

of public employees.<sup>41</sup>

### III. MUNICIPAL DOMESTIC PARTNERSHIP ORDINANCES

Some form of domestic partnership benefits is reportedly offered to employees or residents of as many as seventy-four cities and counties.<sup>42</sup> The first city to have offered such benefits was Berkeley, California, which did so in 1984.<sup>43</sup> The ordinances creating municipal benefits can vary widely but include a number of common elements. This paper examines the ordinances or policies of thirty-five municipalities.<sup>44</sup>

#### *A. Statement of Purpose*

A number of municipalities include findings or a statement of purpose in their domestic partnership laws.<sup>45</sup> Several themes emerge in these statements. First is a reference to domestic partnerships as a different form of “family.” Ann Arbor’s statement of purpose says: “Many persons today share a life as *families* in enduring and committed relationships apart from marriages. . . . The city of Ann Arbor has an interest in strengthening and supporting all caring, committed and responsible *family* forms.”<sup>46</sup> Cambridge’s ordinance says: “The City Council acknowledges that the people’s lives have evolved from when laws governing family relationships were enacted. Perpetuation of the traditional definitions of ‘family’ excludes a significant seg-

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41. National Gay and Lesbian Task Force, *Domestic Partner Benefits for State Employees*, at <http://www.nglwf.org/pi/dpbstatebr.htm> (last visited Mar. 9, 2001).

42. See HERRSCHAF & MILLS, *supra* note 1, at 9.

43. See Partners Task Force for Gay and Lesbian Couples, *Governments Offering Benefits*, at <http://www.buddybuddy.com/d-p-gov.html> (last visited Jan. 12, 2001).

44. These were the statutes available online. Some of the cities reported to have domestic partnership ordinances do not, in fact, have such laws.

45. ANN ARBOR, MICH., CODE ch. 110, § 9:86 (2001); BROWARD COUNTY, FLA., CODE OF ORDINANCES § 16½-151 (1999); CAMBRIDGE, MASS., ORDINANCE § 2.119.010 (1992); IOWA CITY, IOWA, CODE ch. 6, § 2-6-1 (1994); ITHACA, N.Y., CODE § 215-20 (2000); LOS ANGELES COUNTY, CAL., CODE § 2.210.010 (1999); MARIN COUNTY, CAL., CODE § 6.88.010 (1993); MINNEAPOLIS, MINN., CODE OF ORDINANCES § 142.10 (1991); MONTGOMERY COUNTY, MD., CODE OF ORDINANCES § 33-22 (1999); MULTNOMAH COUNTY, OR., ADOPTED DOCUMENTS, Ord. No. 948 (2000); PROVINCETOWN, MASS., GENERAL BY-LAWS § 7-1 (1998); SAN FRANCISCO, CAL., MUN. CODE § 62.1 (1990); SANTA BARBARA COUNTY, CAL., CODE § 42-1 (2001); SANTA MONICA, CAL., MUN. CODE § 4.60.010 (1995).

46. ANN ARBOR CODE ch. 110, § 9:86 (2000) (emphasis added).

ment of the Cambridge population.”<sup>47</sup> The notion of an expanding understanding of family also appears in the Iowa City law: “The city recognizes that nationwide debate has advanced an expanded concept of familial relationships beyond traditional marital and blood relationships. This expanded concept recognizes the relationship of two (2) non-married but committed adult partners.”<sup>48</sup> Ithaca’s ordinance expresses an interest in “strengthening and supporting all caring, committed and responsible *family* forms” and describes domestic partnership as “a relationship and *family unit* that is deserving of official recognition.”<sup>49</sup> Broward County’s findings include the contention that domestic partners “often live in a committed *family relationship*.”<sup>50</sup> Santa Monica’s law says that “domestic partners live in an intimate and committed *family relationship*.”<sup>51</sup>

Another common theme is diversity. The Ann Arbor language indicates the city’s interest in “cultural diversity.”<sup>52</sup> Diversity is also invoked in the ordinances of Cambridge, Montgomery County, and Provincetown.<sup>53</sup>

A few statements describe their purpose as involving concepts of fairness or equal treatment with regard to marriage benefits. Iowa City’s domestic partnership ordinance is typical: “It is appropriate and fair that certain of the societal privileges and benefits now accorded to members of a marriage be extended to those who meet the qualifications of a domestic partnership.”<sup>54</sup> The Broward County language is interesting:

Domestic partners are often denied public and private sector benefits because there is no established system for such relationships to be registered and/or recognized. In addition, because of the status of their relationship, domestic partners in many cases are not ex-

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47. CAMBRIDGE ORDINANCE § 2.119.010 (emphasis added). The Provincetown language is identical except for jurisdiction-specific references. PROVINCETOWN GENERAL BY-LAWS § 7-1.

48. IOWA CITY CODE ch. 6 § 2-6-1 (emphasis added). The same language is contained in the Minneapolis ordinance. MINNEAPOLIS CODE OF ORDINANCES § 142.10.

49. ITHACA CODE § 215-20(a) (emphasis added).

50. BROWARD COUNTY CODE OF ORDINANCES § 16 ½-151(a) (emphasis added).

51. SANTA MONICA, CAL., MUN. CODE § 4.60.010 (1995) (emphasis added).

52. ANN ARBOR, MICH., CODE ch. 110, § 9:86 (2000).

53. CAMBRIDGE, MASS., ORDINANCE § 2.119.010 (1992); MONTGOMERY COUNTY, MD., CODE OF ORDINANCES § 33-22 (1999); PROVINCETOWN, MASS., GENERAL BY-LAWS § 7-1 (1998).

54. IOWA CITY, IOWA, CODE ch. 6, § 2-6-1 (1994).

tended certain employment benefits that are otherwise made available to other employees.<sup>55</sup>

Montgomery County's language reads thus: "The County believes it is unfair to treat employees differently based solely on whether the employee's partner is legally recognized as a spouse."<sup>56</sup> Like Broward County, Santa Monica's law emphasizes that unmarried couples "are often denied public and private sector benefits because no mechanism has been established for registering their relationship."<sup>57</sup>

Interestingly, many statutes focus on the purpose of providing recognition or validation for unmarried couples. The Los Angeles County ordinance includes this statement: "As domestic partnerships have become more prevalent among individuals who reside or are employed within the county, a corresponding need has arisen on the part of persons in such relationships and on society's part generally for a means for such persons to give *public notice* of their relationships."<sup>58</sup> Similarly, the San Francisco ordinance states: "The purpose of this ordinance is to create a way to recognize intimate committed relationships, including those of lesbians and gay men who otherwise are denied *the right to identify the partners with whom they share their lives*."<sup>59</sup> Similar language is contained in the Marin County and Santa Barbara ordinances.<sup>60</sup> The Multnomah County statement of purpose describes its domestic partnership registry as a "means by which unmarried, committed couples who share a life and home together may document their relationship."<sup>61</sup> Some of the ordinances focus not merely on recognition but on providing approbation to the relationship. For instance, the Ann Arbor ordinance indicates that its domestic partnership system provides "a mechanism for the public expression, sanction and documentation of the commitment reflected by the domestic partnership."<sup>62</sup> Failing to give legal status, according to

55. BROWARD COUNTY, FLA., CODE OF ORDINANCES § 16½-151 (1999).

56. MONTGOMERY COUNTY CODE OF ORDINANCES § 33-22.

57. SANTA MONICA, CAL., MUN. CODE § 4.60.010 (1995).

58. LOS ANGELES COUNTY, CAL., CODE § 2.210.010 (1999) (emphasis added).

59. SAN FRANCISCO, CAL., MUN. CODE § 62.1 (1990) (emphasis added).

60. MARIN COUNTY, CAL., CODE § 6.88.010 (1993); *see also* SANTA BARBARA COUNTY, CAL., CODE § 42-1 (2001) (using the exact same language as Los Angeles County).

61. MULTNOMAH COUNTY, OR., ADOPTED DOCUMENTS, Ord. No. 948, § 27.351 (2000).

62. ANN ARBOR, MICH., CODE ch. 110, § 9:86 (2001).

the Cambridge statement of purpose, “deprives [unmarried couples] of recognition and validation.”<sup>63</sup>

Finally, a few of the laws describe benefits to the city or county that will come from domestic partnership recognition. Broward County’s ordinance says that “the provision of domestic partner benefits promotes employee recruitment, employee retention, and employee loyalty.”<sup>64</sup> Montgomery County’s provision says: “Providing domestic partner benefits will significantly enhance the County’s ability to recruit and retain highly qualified employees and will promote employee loyalty and workplace diversity.”<sup>65</sup>

### B. Registration

All but one of the policies or ordinances require some form of registration.<sup>66</sup> Most merely require a statement, affidavit, or form to be filed with the city or county clerk.<sup>67</sup> A few require enrollment

63. CAMBRIDGE, MASS., ORDINANCE § 2.119.010 (1992).

64. BROWARD COUNTY, FLA., CODE OF ORDINANCES § 16½-151 (1999).

65. MONTGOMERY COUNTY, MD., CODE OF ORDINANCES § 33-22 (1999).

66. Montgomery County allows for registration but also provides that a domestic partnership can be established by filling the legal requirements of the ordinance. *See id.*

67. ALAMEDA COUNTY, CAL., ADMIN. CODE § 3.20.170 (2000); ALBUQUERQUE, N.M., Domestic Partners Policies & Procedures (on file with author); ANN ARBOR, MICH., CODE ch. 110, § 9:88 (2001); ATLANTA, GA., CODE OF ORDINANCES § 94-131 (2000); Berkeley, Cal., City Clerk, *Domestic Partnership Information*, at <http://www.ci.berkeley.ca.us/clerk/forms/domesticaffidavitform.pdf> (last visited Sept. 19, 2001); BROWARD COUNTY, FLA., CODE OF ORDINANCES § 16½-153 (1999); CAMBRIDGE, MASS., ORDINANCE § 2.119.030 (1992); Town of Eastchester, N.Y., Town Board Minutes (Sept. 9, 2000) (on file with author); IOWA CITY, IOWA, CODE ch. 6, § 2-6-3 (1994); ITHACA, N.Y., CODE § 215-22 (2000); KEY WEST, FLA., CODE OF ORDINANCES § 72.32 (1998); KING COUNTY, WASH., CODE § 3.12.010 (1998); LAGUNA BEACH, CAL., MUN. CODE § 1.12.010 (1992); LOS ANGELES COUNTY, CAL., CODE § 2.210.020 (1999); MADISON, WIS., MUN. CODE § 3.23(10)(d) (1998); MARIN COUNTY, CAL., CODE § 6.88.030 (1993); MINNEAPOLIS, MINN., CODE OF ORDINANCES § 142.30 (1991); MULTNOMAH COUNTY, MD., ADOPTED DOCUMENTS, Ord. No. 948 § 27.352 (2000); NEW YORK CITY, N.Y., CODE § 3-241 (2000); OAKLAND, CA., CODE § 4.20.050 (2000); Petaluma, Cal., City Council, *Minutes of Regular Meeting*, at <http://www.ci.petaluma.ca.us> (last visited Jan. 4, 1999); PROVINCETOWN, MASS., GENERAL BY-LAWS § 7-3-1 (1998); ROCHESTER, N.Y., CODE § 47B-1 (2000); SACRAMENTO, CAL., MUN. CODE § 2.120.020 (2000); SAN FRANCISCO, CAL., MUN. CODE § 62.3 (1990); SANTA BARBARA, CAL., COUNTY CODE § 42-2 (2001); SANTA MONICA, CAL., MUN. CODE § 4.60.030 (1995); SEATTLE, WASH., MUN. CODE § 4.30.020 (1989); Tempe, Ariz., Human Resources, *Domestic Partner Affidavit*, at <http://www.tempe.gov> (last visited Mar. 9, 2001); City of Tumwater, Wash., *Facts About Domestic Partnership Registration*, at <http://www.oly-wa.net/tumwater> (last visited Mar. 10, 2001); WEST HOLLYWOOD, CAL., MUN. CODE § 2.84.030 (1996).

with the municipality's human resource department.<sup>68</sup> In Philadelphia, partners file an affidavit with the Commission on Human Relations.<sup>69</sup> Two jurisdictions require that the parties sign their form in the presence of the clerk.<sup>70</sup> Three jurisdictions also issue certificates to the parties after filing.<sup>71</sup>

### *C. Definition*

The ways in which different jurisdictions define "domestic partners" are substantially uniform. The definitions generally include the following:

- a requirement that the parties be at least 18 years old.<sup>72</sup>
- a specification that a domestic partnership involve only two persons.<sup>73</sup>

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68. City of Los Angeles, Cal., *Domestic Partner Information*, at <http://www.lacity.org/PEN/dppenfaq.htm> (last visited Mar. 9, 2001); MONTGOMERY COUNTY CODE OF ORDINANCES § 33-22 (again, Montgomery County allows for registration but does not require it); City of Northampton, Mass., Human Resources Department, *Domestic Partners—Family Health Insurance Benefit*, at <http://www.city.northampton.ma.us> (last visited Oct. 26, 2001); PIMA COUNTY, ARIZ., MERIT POLICIES § 7-106 (2000).

69. PHILADELPHIA, PA., CODE § 9-1106 (2000).

70. KEY WEST CODE OF ORDINANCES § 72.32; MARIN COUNTY CODE § 6.88.030.

71. MARIN COUNTY CODE § 6.88.030; CAMBRIDGE ORDINANCE § 2.119.050; NEW YORK CITY CODE § 3-244.

72. All but one of the ordinances contain this requirement. ALAMEDA COUNTY ADMIN. CODE § 3.20.170; Albuquerque Domestic Partners Policies & Procedures; ANN ARBOR CODE ch. 110, § 9:87; ATLANTA CODE OF ORDINANCES § 2-858; Berkeley, City Clerk, *Domestic Partnership Information*, at <http://www.ci.berkeley.ca.us/clerk/forms/domesticaffidavitform.pdf>; BROWARD COUNTY CODE OF ORDINANCES § 16½-153; CAMBRIDGE ORDINANCE § 2.119.020; IOWA CITY CODE ch. 6 § 2-6-2; ITHACA CODE § 215-21; KEY WEST CODE OF ORDINANCES § 72.31; KING COUNTY CODE § 3.12.010; LAGUNA BEACH MUN. CODE § 1.12.010; City of Los Angeles, *Domestic Partner Information*, at <http://www.lacity.org/PEN/dppenfaq.htm>; LOS ANGELES COUNTY CODE § 2.210.020; MADISON MUN. CODE § 3.23(2); MARIN COUNTY CODE § 6.88.020; MINNEAPOLIS CODE OF ORDINANCES § 142.20; MONTGOMERY COUNTY CODE OF ORDINANCES § 33-22 (1999); MULTNOMAH COUNTY ADOPTED DOCUMENTS, Ord. No. 948 § 27.352; NEW YORK CITY CODE § 3-241; City of Northampton, Mass., Human Resources Department, *Domestic Partners—Family Health Insurance Benefit*, at <http://www.city.northampton.ma.us> (last visited Oct. 26, 2001); OAKLAND CODE § 4.20.050; PHILADELPHIA CODE § 9-1106; ROCHESTER CODE § 47B-1; SACRAMENTO MUN. CODE § 2.120.010; SAN FRANCISCO MUN. CODE § 62.2; SANTA BARBARA COUNTY CODE § 42-2; SANTA MONICA MUN. CODE § 4.60.020; SEATTLE MUN. CODE § 4.30.020; Tempe, Human Resources, *Domestic Partner Affidavit*, at <http://www.tempe.gov>; City of Tumwater, *Facts About Domestic Partnership Registration*, at <http://www.olywa.net/tumwater>; WEST HOLLYWOOD MUN. CODE § 2.84.010.

73. All but two of the ordinances contain this requirement. ALAMEDA COUNTY, CAL., ADMIN. CODE § 3.20.170 (2000); Albuquerque Domestic Partners Policies & Procedures; ANN ARBOR CODE ch. 110, § 9:87; ATLANTA CODE OF ORDINANCES § 2-858; Berkeley, City

- a specification that neither party can be married.<sup>74</sup>
- a requirement that the parties share joint responsibility for expenses (sometimes phrased as sharing the “common necessities of life”).<sup>75</sup>

Clerk, *Domestic Partnership Information*, at <http://www.ci.berkeley.ca.us/clerk/forms/domesticaffidavitform.pdf>; BROWARD COUNTY CODE OF ORDINANCES § 16½-153; CAMBRIDGE ORDINANCE § 2.119.020; IOWA CITY CODE ch. 6 § 2-6-2; ITHACA CODE § 215-21; KEY WEST CODE OF ORDINANCES § 72.31; KING COUNTY CODE § 3.12.010; LAGUNA BEACH MUN. CODE § 1.12.010; City of Los Angeles, *Domestic Partner Information*, at <http://www.lacity.org/PEN/dppenfaq.htm>; LOS ANGELES COUNTY CODE § 2.210.020; MADISON MUN. CODE § 3.23(2); MINNEAPOLIS CODE OF ORDINANCES § 142.20; MONTGOMERY COUNTY CODE OF ORDINANCES § 33-22; MULTNOMAH COUNTY ADOPTED DOCUMENTS, Ord. No. 948 § 27.352; NEW YORK CITY CODE § 3-241; City of Northampton, Human Resources Department, *Domestic Partners—Family Health Insurance Benefit*, at <http://www.city.northampton.ma.us>; OAKLAND CODE § 4.20.050; PHILADELPHIA CODE § 9-1106; PROVINCETOWN, MASS., GENERAL BY-LAWS § 7-2-1 (1998); ROCHESTER CODE § 47B-1; SACRAMENTO MUN. CODE § 2.120.010; SAN FRANCISCO MUN. CODE § 62.2; SANTA BARBARA COUNTY CODE § 42-2; SANTA MONICA MUN. CODE § 4.60.020; SEATTLE MUN. CODE § 4.30.020; City of Tumwater, *Facts About Domestic Partnership Registration*, at <http://www.olywa.net/tumwater>; WEST HOLLYWOOD MUN. CODE § 2.84.010.

74. All but three of the ordinances contain this requirement. ALAMEDA COUNTY ADMIN. CODE § 3.20.170; Albuquerque, Domestic Partners Policies & Procedures; ANN ARBOR CODE ch. 110, § 9:87; ATLANTA CODE OF ORDINANCES §2-858; Berkeley, City Clerk, *Domestic Partnership Information*, at <http://www.ci.berkeley.ca.us/clerk/forms/domesticaffidavitform.pdf>; BROWARD COUNTY CODE OF ORDINANCES § 16 ½-153; CAMBRIDGE ORDINANCE § 2.119.020; IOWA CITY CODE ch. 6 § 2-6-2; ITHACA CODE § 215-21; KEY WEST CODE OF ORDINANCES § 72.31; KING COUNTY CODE § 3.12.010; City of Los Angeles, *Domestic Partner Information*, at <http://www.lacity.org/PEN/dppenfaq.htm>; MADISON MUN. CODE § 3.23(2); MARIN COUNTY CODE § 6.88.020; MINNEAPOLIS CODE OF ORDINANCES § 142.20; MONTGOMERY COUNTY CODE OF ORDINANCES § 33-22; MULTNOMAH COUNTY ADOPTED DOCUMENTS, Ord. No. 948 § 27.352(2); NEW YORK CITY CODE § 3-241; City of Northampton, Human Resources Department, *Domestic Partners—Family Health Insurance Benefit*, at <http://www.city.north-ampton.ma.us>; OAKLAND CODE § 4.20.050; PHILADELPHIA CODE § 9-1106; PROVINCETOWN GENERAL BY-LAWS § 7-2-1; ROCHESTER CODE § 47B-1; SACRAMENTO MUN. CODE § 2.120.010; SAN FRANCISCO MUN. CODE § 62.2; SANTA MONICA MUN. CODE § 4.60.020; SEATTLE MUN. CODE §4.30.020; Tempe, Human Resources, *Domestic Partner Affidavit*, at <http://www.tempe.gov>; City of Tumwater, *Facts About Domestic Partnership Registration*, at <http://www.olywa.net/tumwater>; WEST HOLLYWOOD MUN. CODE § 2.84.010. In Madison, the parties can be married to each other. MADISON MUN. CODE § 3.23(2).

75. All but six of the ordinances contain this requirement. ALAMEDA COUNTY ADMIN. CODE § 3.20.170; Albuquerque, Domestic Partners Policies & Procedures; ANN ARBOR CODE ch. 110, § 9:87; ATLANTA CODE OF ORDINANCES § 2-858; Berkeley, City Clerk, *Domestic Partnership Information*, at <http://www.ci.berkeley.ca.us/clerk/forms/domesticaffidavitform.pdf>; BROWARD COUNTY CODE OF ORDINANCES § 16½-153; IOWA CITY CODE ch. 6 § 2-6-2; ITHACA CODE § 215-21; KEY WEST CODE OF ORDINANCES § 72.31; KING COUNTY CODE § 3.12.010; LAGUNA BEACH MUN. CODE § 1.12.010; City of Los Angeles, *Domestic Partner Information*, at <http://www.lacity.org/PEN/dppenfaq.htm>; MARIN COUNTY CODE § 6.88.020; MINNEAPOLIS CODE OF ORDINANCES §

- a provision that the parties not be related in a way that would prevent them from being married in the state.<sup>76</sup>

Somewhat less common provisions include:

- a requirement that the parties live together.<sup>77</sup>
- a requirement that the parties be competent to consent

142.20; MONTGOMERY COUNTY CODE OF ORDINANCES § 33-22; MULTNOMAH COUNTY ADOPTED DOCUMENTS, Ord. No. 948 § 27.352(1); City of Northampton, Human Resources Department, *Domestic Partners—Family Health Insurance Benefit*, at <http://www.city.northampton.ma.us>; OAKLAND CODE § 4.20.050; PHILADELPHIA CODE § 9-1106; PROVINCETOWN GENERAL BY-LAWS § 7-2-1; ROCHESTER CODE § 47B-1; SACRAMENTO MUN. CODE § 2.120.010; SAN FRANCISCO MUN. CODE § 62.2; SANTA MONICA MUN. CODE § 4.60.020; SEATTLE MUN. CODE § 4.30.020; Tempe, Human Resources, *Domestic Partner Affidavit*, at <http://www.tempe.gov>; WEST HOLLYWOOD MUN. CODE § 2.84.010.

76. All but five of the ordinances contain this requirement. ALAMEDA COUNTY ADMIN. CODE § 3.20.170; Albuquerque, Domestic Partners Policies & Procedures; ANN ARBOR CODE ch. 110, § 9:87; ATLANTA CODE OF ORDINANCES § 2-858; Berkeley, City Clerk, *Domestic Partnership Information*, at <http://www.ci.berkeley.ca.us/clerk/forms/domesticaffidavitform.pdf>; BROWARD COUNTY CODE OF ORDINANCES § 16½-153; CAMBRIDGE ORDINANCE § 2.119.020; IOWA CITY CODE ch. 6 § 2-6-2; ITHACA CODE § 215-21; KEY WEST CODE OF ORDINANCES § 72.31; KING COUNTY CODE § 3.12.010; LAGUNA BEACH MUN. CODE § 1.12.010; LOS ANGELES COUNTY CODE § 2.210.020; MARIN COUNTY CODE § 6.88.020; MINNEAPOLIS CODE OF ORDINANCES § 142.20; MONTGOMERY COUNTY CODE OF ORDINANCES § 33-22; MULTNOMAH COUNTY ADOPTED DOCUMENTS, Ord. No. 948 § 27.352(4); NEW YORK CITY CODE § 3-241; City of Northampton, Human Resources Department, *Domestic Partners—Family Health Insurance Benefit*, at <http://www.city.northampton.ma.us>; OAKLAND CODE § 4.20.050; PHILADELPHIA CODE § 9-1106; PROVINCETOWN GENERAL BY-LAWS § 7-2-1; SACRAMENTO MUN. CODE § 2.120.010; SAN FRANCISCO MUN. CODE § 62.2; SANTA MONICA MUN. CODE § 4.60.020; SEATTLE MUN. CODE § 4.30.020; Tempe, Human Resources, *Domestic Partner Affidavit*, at <http://www.tempe.gov>; City of Tumwater, *Facts About Domestic Partnership Registration*, at <http://www.olywa.net/tumwater>; WEST HOLLYWOOD MUN. CODE § 2.84.010. In two municipalities, the requirement is that the parties cannot be related “by blood.” BROWARD COUNTY CODE OF ORDINANCES § 16½-153; City of Los Angeles, *Domestic Partner Information*, at <http://www.lacity.org/PEN/dppenfaq.htm>.

77. All but ten of the ordinances contain this requirement. ALAMEDA COUNTY ADMIN. CODE § 3.20.170; Albuquerque, Domestic Partners Policies & Procedures; ATLANTA CODE OF ORDINANCES § 2-858; Berkeley, City Clerk, *Domestic Partnership Information*, at <http://www.ci.berkeley.ca.us/clerk/forms/domesticaffidavitform.pdf>; CAM-BRIDGE ORDINANCE § 2.119.020; ITHACA CODE § 215-21; KING COUNTY CODE § 3.12.010; City of Los Angeles, *Domestic Partner Information*, at <http://www.lacity.org/PEN/dppenfaq.htm>; MADISON MUN. CODE § 3.23(2); MARIN COUNTY CODE § 6.88.020; MONTGOMERY COUNTY CODE OF ORDINANCES § 33-22; MULTNOMAH COUNTY ADOPTED DOCUMENTS, Ord. No. 948 § 27.352(1); NEW YORK CITY CODE § 3-241; City of Northampton, Human Resources Department, *Domestic Partners—Family Health Insurance Benefit*, at <http://www.city.northampton.ma.us>; OAKLAND CODE § 4.20.050; PHILADELPHIA CODE § 9-1106; ROCHESTER CODE § 47B-1; SACRAMENTO MUN. CODE § 2.120.010; SAN FRANCISCO MUN. CODE § 62.2; SANTA MONICA MUN. CODE § 4.60.020; SEATTLE MUN. CODE § 4.30.020; Tempe, Human Resources, *Domestic Partner Affidavit*, at <http://www.tempe.gov>.

to the arrangement.<sup>78</sup>

Nearly every municipality with a domestic partnership law allows—either explicitly or implicitly by not specifying gender requirements of partners—both same-sex and opposite-sex couples to register as domestic partners.<sup>79</sup> Montgomery County and Philadelphia allow only same-sex couples to register.<sup>80</sup>

Three of the jurisdictions specify that there must be free consent of the parties involved.<sup>81</sup>

Over half of the jurisdictions include some sort of requirement

78. All but eleven of the ordinances contain this requirement. ALAMEDA COUNTY ADMIN. CODE § 3.20.170; ANN ARBOR CODE ch. 110, § 9:87; ATLANTA CODE OF ORDINANCES § 2-858; Berkeley, City Clerk, *Domestic Partnership Information*, at <http://www.ci.berkeley.ca.us/clerk/forms/domesticaffidavitform.pdf>; BROWARD COUNTY CODE OF ORDINANCES § 16½-153; CAMBRIDGE ORDINANCE § 2.119.020; IOWA CITY CODE ch. 6 § 2-6-2; ITHACA CODE § 215-21; KEY WEST CODE OF ORDINANCES § 72.31; KING COUNTY CODE § 3.12.010; LAGUNA BEACH MUN. CODE § 1.12.010; MADISON MUN. CODE § 3.23(2); MINNEAPOLIS CODE OF ORDINANCES § 142.20; MONTGOMERY COUNTY CODE OF ORDINANCES § 33-22; City of Northampton, Mass., Human Resources Department, *Domestic Partners—Family Health Insurance Benefit*, at <http://www.city.northampton.ma.us> (last visited Oct. 26, 2001); OAKLAND CODE § 4.20.050; PHILADELPHIA CODE § 9-1106; PROVINCETOWN GENERAL BY-LAWS § 7-2-1; ROCHESTER CODE § 47B-1; SACRAMENTO MUN. CODE § 2.120.010; SEATTLE MUN. CODE § 4.30.020; WEST HOLLYWOOD MUN. CODE § 2.84.010.

79. ALAMEDA COUNTY ADMIN. CODE § 3.20.170; Albuquerque Domestic Partners Policies & Procedures; ANN ARBOR CODE ch. 110, § 9:87; ATLANTA CODE OF ORDINANCES § 2-858; Berkeley, City Clerk, *Domestic Partnership Information*, at <http://www.ci.berkeley.ca.us/clerk/forms/domesticaffidavitform.pdf>; BROWARD COUNTY CODE OF ORDINANCES § 16½-153; CAMBRIDGE ORDINANCE § 2.119.020; IOWA CITY CODE ch. 6 § 2-6-2; ITHACA CODE § 215-21; KEY WEST CODE OF ORDINANCES § 72.31; KING COUNTY CODE § 3.12.010; LAGUNA BEACH MUN. CODE § 1.12.010; City of Los Angeles, *Domestic Partner Information*, at <http://www.lacity.org/PEN/dppenfaq.htm>; LOS ANGELES COUNTY, CAL., CODE § 2.210.020 (1999); MADISON MUN. CODE § 3.23(2); MARIN COUNTY CODE § 6.88.020; MINNEAPOLIS CODE OF ORDINANCES § 142.20; MULTNOMAH COUNTY ADOPTED DOCUMENTS, Ord. No. 948; NEW YORK CITY CODE § 3-241; City of Northampton, Human Resources Department, *Domestic Partners—Family Health Insurance Benefit*, at <http://www.city.northampton.ma.us>; OAKLAND CODE § 4.20.050; PROVINCETOWN GENERAL BY-LAWS § 7-2-1; ROCHESTER CODE § 47B-1; SACRAMENTO MUN. CODE § 2.120.010; SAN FRANCISCO MUN. CODE § 62.2; SANTA BARBARA, CAL., COUNTY CODE § 42-2 (2001); SANTA MONICA, CAL., MUN. CODE § 4.60.020 (1995); SEATTLE MUN. CODE § 4.30.020; Tempe, Human Resources, *Domestic Partner Affidavit*, at <http://www.tempe.gov>; City of Tumwater, *Facts About Domestic Partnership Registration*, at <http://www.oly-wa.net/tumwater>; WEST HOLLYWOOD MUN. CODE § 2.84.010.

80. MONTGOMERY COUNTY CODE OF ORDINANCES § 33-22; PHILADELPHIA CODE § 9-1106.

81. City of Los Angeles, *Domestic Partner Information*, at <http://www.lacity.org/PEN/dppenfaq.htm>; MONTGOMERY COUNTY CODE OF ORDINANCES § 33-22; SACRAMENTO MUN. CODE § 2.120.010.

that the parties be engaged in an intimate relationship. This is generally designated as a relationship of “mutual support, caring and commitment.”<sup>82</sup> Another common description is a “close and committed personal relationship” or some variation of that theme.<sup>83</sup> It is not clear whether this “intimacy” requirement means a sexual relationship, although that seems to be the implication. Some describe the relationship by reference to marriage. For instance, Albuquerque requires a “mutual commitment similar to marriage.”<sup>84</sup> The requirement in Minneapolis is that the parties be “committed to one another to the same extent as married persons are to each other, except for the traditional marital status and solemnities.”<sup>85</sup> Northampton requires an “exclusive mutual commitment similar to that of marriage.”<sup>86</sup> Los Angeles County’s law describes an “intimate and committed relationship of mutual caring,”<sup>87</sup> and Santa Monica’s law is substantially the same.<sup>88</sup> San Francisco’s law states that the parties will have “chosen to share one another’s lives in an intimate and committed relationship of mutual caring . . . .”<sup>89</sup> Two cities reference “family”: Cambridge requires that the parties “consider themselves to be a family”;<sup>90</sup> Key West is similar in requiring that the partners “consider themselves to be members of each other’s immediate family” and that they have “chosen to share one another’s lives in a family relationship.”<sup>91</sup> Madison’s description employs both positive (“relationship is of a permanent and distinct domestic character”) and negative (“not in a relationship that is merely

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82. Albuquerque Domestic Partners Policies & Procedures; ANN ARBOR CODE ch. 110, § 9:87; CAMBRIDGE ORDINANCE § 2.119.020; IOWA CITY CODE ch. 6 § 2-6-2; ITHACA CODE § 215-21; MADISON MUN. CODE § 3.23(2); PROVINCETOWN GENERAL BY-LAWS § 7-2-1; City of Tumwater, *Facts About Domestic Partnership Registration*, at <http://www.olywa.net/tumwater>.

83. ATLANTA CODE OF ORDINANCES § 2-858; KING COUNTY CODE § 3.12.010; MONTGOMERY COUNTY CODE OF ORDINANCES § 33-22; NEW YORK CITY CODE § 3-241; SEATTLE MUN. CODE § 4.30.020.

84. Albuquerque Domestic Partners Policies & Procedures.

85. MINNEAPOLIS, MINN., CODE OF ORDINANCES § 142.20 (1991).

86. City of Northampton, Mass., Human Resources Department, *Domestic Partners—Family Health Insurance Benefit*, at <http://www.city.northampton.ma.us> (last visited Oct. 26, 2001).

87. City of Los Angeles, Cal., *Domestic Partner Information*, at <http://www.lacity.org/PEN/dppenfaq.htm> (last visited Mar. 9, 2001).

88. SANTA MONICA, CAL., MUN. CODE § 4.60.020 (1995).

89. SAN FRANCISCO, CAL., MUN. CODE § 62.2 (1990).

90. CAMBRIDGE, MASS., ORDINANCE § 2.119.020 (1992).

91. KEY WEST, FLA., CODE OF ORDINANCES § 72.31 (1998).

negative (“not in a relationship that is merely temporary, social, political, commercial or economic in nature”) elements.<sup>92</sup> Rochester wants the partners to be “committed to the physical, emotional and financial care and support of each other.”<sup>93</sup>

#### *D. Benefits*

A wide variety of benefits are available to domestic partners in the various jurisdictions. Some provisions, however, are merely symbolic and do not provide the basis for any specific benefits. Five municipalities offer to domestic partners all of the benefits extended to married spouses of public employees.<sup>94</sup> Eleven provide health insurance coverage for partners of public employees.<sup>95</sup> Eight allow partners to have hospital visitation,<sup>96</sup> and five provide for visitation in jails.<sup>97</sup> Eight municipalities allow public employees to have sick or bereavement leave on the illness or death of a partner or partner's family member.<sup>98</sup> Provincetown and Cambridge allow for access to

92. MADISON, WIS., MUN. CODE § 3.23(2) (1998).

93. ROCHESTER, N.Y., CODE § 47B-1 (2000).

94. Berkeley, Cal., City Clerk, *Domestic Partnership Information*, at <http://www.ci.berkeley.ca.us/clerk/forms/domesticaffidavitform.pdf> (last visited Sept. 19, 2001); CAMBRIDGE ORDINANCE § 2.119.070; ITHACA, N.Y., CODE § 215-27 (2000); KEY WEST CODE OF ORDINANCES § 72.35; MONTGOMERY COUNTY, MD., CODE OF ORDINANCES § 33-22 (1999).

95. ALAMEDA COUNTY, CAL., ADMIN. CODE § 3.64.030 (2000); Albuquerque, N.M., Domestic Partners Policies & Procedures (on file with author); ATLANTA, GA., CODE OF ORDINANCES § 2-858 (2000); BROWARD COUNTY, FLA., CODE OF ORDINANCES § 16½-156 (1999); Town of Eastchester, N.Y., Town Board Minutes (Sept. 9, 2000) (on file with author); ITHACA CODE § 215-27; KING COUNTY, WASH., CODE § 3.12.040 (1998); City of Los Angeles, Cal., *Domestic Partner Information*, at <http://www.lacity.org/PEN/dppenfaq.htm> (last visited Mar. 9, 2001); City of Northampton, Mass., Human Resources Department, *Domestic Partners—Family Health Insurance Benefit*, at <http://www.city.northampton.ma.us> (last visited Oct. 26, 2001); PHILADELPHIA, PA., CITY CODE § 9-1106 (2000); PIMA COUNTY, ARIZ., MERIT POLICIES § 7-106 (2000); Tempe, Ariz., Human Resources, *Domestic Partner Affidavit*, at <http://www.tempe.gov> (last visited Mar. 9, 2001).

96. CAMBRIDGE, MASS., ORDINANCE § 2.119.060 (1992); LAGUNA BEACH, CAL., MUN. CODE § 1.12.070 (1992); MARIN COUNTY, CAL., CODE § 6.88.070 (1993); MINNEAPOLIS, MINN., CODE OF ORDINANCES § 142.70 (1991); NEW YORK CITY, N.Y., CODE § 3-244 (2000); PROVINCETOWN, MASS., GENERAL BY-LAWS § 7-6-1 (1998); SACRAMENTO, CAL., MUN. CODE § 2.120.080 (2000); WEST HOLLYWOOD, CAL., MUN. CODE § 2.84.070 (1998).

97. ATLANTA CODE OF ORDINANCES § 94-135; CAMBRIDGE ORDINANCE § 2.119.060; LAGUNA BEACH MUN. CODE § 1.12.080; PROVINCETOWN GENERAL BY-LAWS § 7-6-2; WEST HOLLYWOOD MUN. CODE § 2.84.080.

98. ALAMEDA COUNTY ADMIN. CODE § 3.20.120; Albuquerque Domestic Partners Policies & Procedures; CAMBRIDGE ORDINANCE § 2.119.070; LOS ANGELES COUNTY, CAL.,

the school records of a partner's child if the guardian partner has written a letter to the school allowing such access.<sup>99</sup> Oakland and Philadelphia provide an exemption from taxes on property transfers between the parties.<sup>100</sup> New York allows partners to have a right of succession in public housing.<sup>101</sup> The City of Los Angeles provides survivor pensions for surviving partners of deceased employees.<sup>102</sup> In Sacramento, domestic partners are given authority to establish contractual duties between the parties in writing.<sup>103</sup> The term "family" in real estate documents in Sacramento is also defined to include domestic partners.<sup>104</sup>

### *E. Termination*

The most common provision in domestic partnership statutes provides for termination upon the death of one of the parties or by a statement or affidavit filed with the clerk.<sup>105</sup> Tempe requires a state-

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CODE § 2.210.080 (1999); NEW YORK CITY CODE § 3-244; PIMA COUNTY MERIT POLICIES § 7-106; SACRAMENTO MUN. CODE § 2.120.070; SEATTLE, WASH., MUN. CODE § 4.30.010 (1989).

99. CAMBRIDGE ORDINANCE § 2.119.060; PROVINCETOWN GENERAL BY-LAWS § 7-6-3.

100. OAKLAND, CAL., CODE § 4.20.050 (2000); PHILADELPHIA, PA., CODE § 19-1405 (2000).

101. NEW YORK CITY CODE § 3-244.

102. City of Los Angeles, Cal., *Domestic Partner Information*, at <http://www.lacity.org/PEN/dppenfaq.htm> (last visited Mar. 9, 2001).

103. SACRAMENTO MUN. CODE § 2.120.030.

104. *Id.* § 2.120.060.

105. ALAMEDA COUNTY, CAL., ADMIN. CODE § 3.20.170 (2000); Albuquerque, N.M., Domestic Partners Policies & Procedures (on file with author); ANN ARBOR, MICH., CODE ch. 110, § 9:89 (2001); ATLANTA, GA., CODE OF ORDINANCES § 94-136 (2000); Berkeley, Cal., City Clerk, *Domestic Partnership Information*, at <http://www.ci.berkeley.ca.us/clerk/forms/domesticaffidavitform.pdf> (last visited Sept., 2001); BROWARD COUNTY, FLA., CODE OF ORDINANCES § 16½-154 (1999); CAMBRIDGE, MASS., ORDINANCE § 2.119.030 (1992); Town of Eastchester, N.Y., Town Board Minutes (Sept. 9, 2000) (on file with author); IOWA CITY, IOWA, CODE ch. 6 § 2-6-4 (1994); ITHACA, N.Y., CODE § 215-22 (2000); KEY WEST, FLA., CODE OF ORDINANCES § 72.33 (1998); KING COUNTY, WASH., CODE § 3.12.044 (1998); LAGUNA BEACH, CAL., MUN. CODE § 1.12.010 (1992); City of Los Angeles, *Domestic Partner Information*, at <http://www.cityoflaw.org>; LOS ANGELES COUNTY, CAL., CODE § 2.210.030 (1999); MADISON, Wis., MUN. CODE § 3.23(10)(d) (1998); MARIN COUNTY, CAL., CODE § 6.88.040 (1993); MINNEAPOLIS, MINN., CODE OF ORDINANCES § 142.60 (1991); MONTGOMERY COUNTY, MD., CODE OF ORDINANCES § 33-22 (1999); MULTNOMAH COUNTY, OR., ADOPTED DOCUMENTS, Ord. No. 948 (2000); NEW YORK CITY CODE § 3-242; OAKLAND CODE § 4.20.050; Petaluma, Cal., City Council, *Minutes of Regular Meeting*, at <http://www.ci.petaluma.ca.us> (last visited Mar. 10, 2001); PROVINCETOWN, MASS.,

ment to its Human Resources Department.<sup>106</sup> Philadelphia requires a statement to the Commission on Human Relations.<sup>107</sup> Some municipalities presumably require a statement to the person with whom the partnership was registered.<sup>108</sup> Six of the municipalities provide for termination if one of the parties marries.<sup>109</sup> If the parties end their cohabitation, the partnership terminates in four jurisdictions.<sup>110</sup> A partnership can be terminated if one party gives notice to the other partner in six jurisdictions.<sup>111</sup> In another five municipalities, a change in the circumstances that initially justified the partnership suffices to terminate it.<sup>112</sup>

#### *F. Policies Toward Private Employers*

Only San Francisco requires that all private employers who contract with the jurisdiction offer domestic partnership benefits to their employees.<sup>113</sup> Sacramento's law requires private employers to allow family leave for domestic partners if they allow such leave for married

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GENERAL BY-LAWS § 7-3-3 (1998); ROCHESTER, N.Y., CODE § 47B-2 (2000); SACRAMENTO MUN. CODE § 2.120.040; SAN FRANCISCO, CAL., MUN. CODE § 62.4 (1990); SANTA BARBARA, CAL., COUNTY CODE § 42-3 (2001); SEATTLE, WASH., MUN. CODE § 4.30.030 (1989); Tempe, Ariz., Human Resources, *Domestic Partner Affidavit*, at <http://www.tempe.gov> (last visited Mar. 9, 2001); City of Tumwater, Wash., *Facts About Domestic Partnership Registration*, at <http://www.oly-wa.net/tumwater> (last visited Mar. 10, 2001); WEST HOLLYWOOD, CAL., MUN. CODE § 2.84.020 (1998).

106. Tempe, Human Resources, *Domestic Partner Affidavit*, at <http://www.tempe.gov>.

107. PHILADELPHIA CODE § 9-1106.

108. These are the ordinances of Eastchester, Northampton, Santa Monica, and Pima County.

109. ANN ARBOR CODE ch. 110, § 9:89; BROWARD COUNTY CODE OF ORDINANCES § 16½-154; City of Los Angeles, *Domestic Partner Information*, at <http://www.lacity.org/PEN/dppenfaq.htm>; MARIN COUNTY CODE § 6.88.040; NEW YORK CITY CODE § 3-242; SAN FRANCISCO MUN. CODE § 62.4.

110. City of Los Angeles, *Domestic Partner Information*, at <http://www.lacity.org/PEN/dppenfaq.htm>; MARIN COUNTY CODE § 6.88.040; SACRAMENTO MUN. CODE § 2.120.040; SAN FRANCISCO MUN. CODE § 62.4.

111. ATLANTA, GA., CODE OF ORDINANCES § 94-136 (2000); ITHACA, N.Y., CODE § 215-22 (2000); City of Los Angeles, *Domestic Partner Information*, at <http://www.lacity.org/PEN/dppenfaq.htm>; LOS ANGELES COUNTY, CAL., CODE § 2.210.030 (1999); MARIN COUNTY CODE § 6.88.040; SACRAMENTO MUN. CODE § 2.120.040; SAN FRANCISCO MUN. CODE § 62.4.

112. Albuquerque, N.M., *Domestic Partners Policies & Procedures* (on file with author); ATLANTA CODE OF ORDINANCES § 94-136; IOWA CITY, IOWA, CODE ch. 6 § 2-6-4 (1994); MINNEAPOLIS, MINN., CODE OF ORDINANCES § 142.60 (1991); MONTGOMERY COUNTY, MD., CODE OF ORDINANCES § 33-19 (1999).

113. SAN FRANCISCO MUN. CODE § 12B-1.

spouses.<sup>114</sup>

### *G. Recognition of "Foreign" Domestic Partners*

Four jurisdictions provide that domestic partnerships registered in another place will be recognized in those jurisdictions.<sup>115</sup> By contrast, ten municipalities require that at least one partner be a resident or employee of the jurisdiction.<sup>116</sup> The recognition or nonrecognition of partnerships registered in other jurisdictions is important because parties to a domestic partnership may want to assert rights based on their status as partners when they move from the jurisdiction in which their partnership was registered. Where there is provision for "foreign" recognition, partners may be able to do so. Where there is not such provision, individuals cannot assert rights based on their status as partners, but it is not unlikely that the refusal of one jurisdiction to recognize a domestic partnership from another would lead to litigation.

### *H. Other Provisions*

A number of municipalities require that once a domestic partnership has been terminated, the partners must wait six months (or sometimes a shorter period) before entering another partnership (although exception is sometimes made where the termination occurs due to the death of one of the partners).<sup>117</sup> Provincetown and Sacramento have provisions that forbid discrimination on the basis of domestic partnerships, but the Sacramento law specifies that it is to

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114. SACRAMENTO MUN. CODE § 2.120.070.

115. CAMBRIDGE, MASS., ORDINANCE § 2.119.090 (1992); KEY WEST, FLA., CODE OF ORDINANCES § 72.36 (1998); OAKLAND, CAL., CITY CODE § 4.20.050 (2000) (requiring the partnership to have been in effect for a year before recognition is sought); WEST HOLLYWOOD, CAL., MUN. CODE § 2.84.100 (1998).

116. BROWARD COUNTY, FLA., CODE OF ORDINANCES § 16½-153 (1999); IOWA CITY CODE ch. 6 § 2-6-3; KING COUNTY, WASH., CODE § 3.12.010 (1998); MARIN COUNTY CODE § 6.88.030; MINNEAPOLIS CODE OF ORDINANCES § 142.40; NEW YORK CITY, N.Y., CODE § 3-241 (2000); SACRAMENTO MUN. CODE § 2.120.020; SAN FRANCISCO MUN. CODE § 62.3; SANTA BARBARA, CAL., COUNTY CODE § 42-2 (2001); City of Tumwater, Wash., *Facts About Domestic Partnership Registration*, at <http://www.olywa.net/tum-water> (last visited Mar. 10, 2001).

117. IOWA CITY CODE ch. 6 § 2-6-4; ITHACA, N.Y., CODE § 215-22 (2000); KEY WEST, FLA., CODE OF ORDINANCES § 72.33 (1998); City of Los Angeles, Cal., *Domestic Partner Information*, at <http://www.lacity.org/PEN/dppenfaq.htm> (last visited Mar. 9, 2001); MARIN COUNTY CODE § 6.88.030; MULTNOMAH COUNTY, OR., ADOPTED DOCUMENTS, Ord. No. 948 (2000); SACRAMENTO MUN. CODE § 2.120.020; SAN FRANCISCO MUN. CODE § 62.3.

be enforced by private action.<sup>118</sup> In San Francisco, a domestic partnership ceremony can be performed.<sup>119</sup> Santa Barbara County provides that a domestic partnership cannot be the basis for a cause of action.<sup>120</sup> Seattle does not allow domestic partners to claim a right to the retirement benefits of their partners.<sup>121</sup> In Tempe, the domestic partnership only lasts twelve months before it must be registered again.<sup>122</sup>

#### IV. AMERICAN LAW INSTITUTE PROPOSAL

Chapter 6 of the American Law Institute's *Principles of the Law of Family Dissolution* ("Principles") recommends that certain rights be made available to unmarried couples upon the dissolution of their relationship. This chapter defines "domestic partners" as "two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple."<sup>123</sup> The *Principles* would give credence to registration under a municipal or state domestic partnership law in determining whether to invoke its provisions on dissolution of the relationship.<sup>124</sup> Perhaps most startling in this proposal is the fact that a couple can establish a domestic partnership even if one of the parties is married to someone else or if the relationship would have been incestuous had it been a marriage!<sup>125</sup> The *Principles* would provide to domestic partners many of the rights associated with divorce, including concepts analogous to marital property, property division, and alimony.<sup>126</sup>

In some ways, the ALI proposal does not resemble the domestic

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118. PROVINCETOWN, MASS., GENERAL BY-LAWS § 7-7 (1998); SACRAMENTO MUN. CODE § 2.120.100.

119. SAN FRANCISCO MUN. CODE § 62.9. The ceremony can be performed by the County Clerk or any person who can perform a marriage under California law. *Id.*

120. SANTA BARBARA COUNTY CODE § 42-7.

121. SEATTLE, WASH., MUN. CODE § 4.36.185 (1999).

122. Tempe, Ariz., Human Resources, *Domestic Partner Affidavit*, at <http://www.tempe.gov> (last visited Mar. 9, 2001).

123. PRINCIPLES (Tentative Draft No. 4), *supra* note 19, § 6.01(1); *see also id.* § 6.03(1).

124. *Id.* § 6.03(7)(j).

125. *Id.* § 6.01(5); *id.* cmts. c, d; *id.* § 6.03(7)(k); *id.* cmt d. The *Principles* do contain a caveat that the claims of a domestic partnership should not compromise the marital claims of the spouse of the married partner, which alleviates some potential economic harm to the spouse but sends a novel message about the law's view of adultery.

126. *Id.* §§ 6.04-.06.

partnership ordinances now in existence. This is true largely because of the different context of the ALI proposal and the existing domestic partnership ordinances. The *Principles* deal with the dissolution of a relationship and impose on that relationship a status that the parties may or may not have intended. The ordinances, on the other hand, provide an opportunity for couples to opt into a status. The *Principles* do not create a way to formalize a relationship and do not offer benefits to the couple during the existence of the relationship. Thus, while the existing ordinances do not create any ramifications for termination, that is the sole purpose of the ALI proposal.

Despite the differences between the ALI proposal and the existing domestic partnership ordinances, there are some significant similarities, particularly in the definitions of a domestic partnership. Both the *Principles* and the municipal ordinances limit a partnership to two persons. As with the majority of ordinances, the ALI proposal allows for both same-sex and opposite-sex couples to be recognized as domestic partners. Lastly, like the majority of municipal laws, the *Principles* require the partners to live together.<sup>127</sup>

## V. CRITIQUE

There are significant concerns raised by the domestic partnership laws discussed above. This section will briefly address two categories of potential problems with the various laws and the ALI proposal: legal problems and public policy problems.

### A. Legal Issues

Domestic partnership laws have been the subject of significant litigation, involving three kinds of scenarios: (1) businesses seeking clarification of ordinances, which raises *preemption* concerns, (2) taxpayers challenging the laws, which raises *authority* concerns, and (3) attempts to have benefits mandated, which raises concerns about *constitutional interpretation*. There are also some other significant legal issues that have not yet been litigated but which will be addressed below.

#### 1. Preemption and regulation concerns

The questions raised in the litigation by businesses have involved

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127. *Id.* § 6.03(2).

a state's or municipality's authority to regulate the behavior of private employers. For instance, in July 1997, five employers challenged the Hawaii reciprocal beneficiaries legislation, claiming that if the law were interpreted broadly, it would conflict with the federal Employee Retirement Income Security Act ("ERISA").<sup>128</sup> U.S. District Judge David Ezra ruled that the law did not cover health maintenance organizations or mutual benefit societies, the subjects of the lawsuit, and left open the question of the law's application to companies that contract with insurance companies.<sup>129</sup>

Similar issues were raised in litigation involving the San Francisco domestic partnership ordinance, which prohibited the city from contracting with companies that do not provide domestic partnership benefits to their employees' partners equivalent to those offered to their employees' spouses. Two airline trade organizations and Federal Express, all of which do business with the city through the San Francisco airport, filed suit, challenging the requirement that they offer domestic partnership benefits to their employees.<sup>130</sup> Among plaintiffs' arguments were a number of issues related to the regulation of private employers, asserting that: (1) the ordinance violated the U.S. Constitution by regulating out-of-state conduct, (2) the ordinance was preempted by ERISA, (3) the ordinance was preempted by the Airline Deregulation Act ("ADA"), and (4) the ordinance was preempted by the Railway Labor Act ("RLA").<sup>131</sup> In that case, the court held that the ordinance unconstitutionally restricted interstate commerce to the extent that it applied to out-of-state conduct, thus significantly limiting the ordinance's effect on the business of the airlines. The court did not, however, strike down the ordinance altogether.<sup>132</sup> Like the Hawaii case, the court held that the ordinance was preempted by ERISA, except as to benefits not covered by ERISA (i.e., moving expenses and travel benefits), so the ordinance could not govern family medical and bereavement leave and health and pension benefits.<sup>133</sup> The court held that the ordinance could not withstand the ADA challenge inasmuch as it "is applied in a manner that creates coercive economic incentives for air carriers to

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128. See Coolidge, *supra* note 15, at 274-75 n.246.

129. *Id.*

130. Air Transp. Ass'n v. City of San Francisco, 992 F. Supp. 1149 (N.D. Cal. 1998).

131. *Id.* at 1155.

132. *Id.* at 1162-64.

133. *Id.* at 1180.

alter their routes,<sup>134</sup> but to the degree the ordinance did not do so, it was valid.<sup>135</sup> On the RLA claim, the court held that because the ordinance acts as a bar on employer conduct regardless of union status of its employees, it does not affect collective bargaining agreements.<sup>136</sup> Thus, the ordinance was severely limited, though not killed outright.<sup>137</sup>

## 2. *Authority concerns*

Since localities are legally creatures of the state, a locality needs state authority to pass an ordinance.<sup>138</sup> Usually this authority is broad, but some state governments do not freely share power with their municipalities. In a number of states, taxpayers have filed suit, arguing that a locality did not have the authority to pass a domestic partnership ordinance. These suits have led to mixed results.

In Minneapolis, taxpayers challenged the city's adoption of an ordinance offering domestic partnership benefits to city employees.<sup>139</sup> The court of appeals held that the state benefits statute *limits* the class of persons to whom municipalities may offer benefits. It further concluded that domestic partners were outside the statutory limitation, that the extension of benefits was an issue of statewide concern, as was the matter of discrimination, and that because the city's power was purely local, the ordinance was invalid.<sup>140</sup> In a similar challenge to a policy of Arlington County, Virginia, the Virginia Supreme Court held that the Dillon Rule, which allows municipalities to exercise only the powers expressly granted by the State Legislature, was properly interpreted by the Virginia Attorney General in 1997 to prohibit the extension of benefits to "domestic partners." Central to the court's holding was the finding that "domestic partners" are not "dependents" as that term is used in the Virginia statute defining municipalities' power regarding the extension of insur-

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134. *Id.* at 1188.

135. *Id.*

136. *Id.* at 1190.

137. In May 1999, the court revisited this case, but the ordinance survived unchanged from the previous ruling. *Air Transp. Ass'n v. City of San Francisco*, No. 97-01763 CW (May 27, 1999); *see also* *S.D. Myers, Inc. v. City of San Francisco*, No. 97-04463 CW (May 27, 1999) (reiterating some of the holdings of these cases).

138. *See* *Arlington County v. White*, 528 S.E.2d 706 (Va. 2000).

139. *Lilly v. City of Minneapolis*, 527 N.W.2d 107 (Minn. Ct. App. 1995).

140. *Id.* at 111-13.

ance benefits to employees.<sup>141</sup> The majority concluded that the General Assembly contemplated that some financial dependence must be established to allow benefits to be extended, but that the Arlington County policy did not rely exclusively on financial dependence and, thus, went beyond the power the County could legitimately exercise.<sup>142</sup>

In an Illinois case, however, the court rejected plaintiffs' challenge to a Chicago domestic partnership claim, holding that a domestic partnership statute was not a marital statute, but rather an insurance law that could be validly enacted by the city as long as it was not *expressly* preempted by state law.<sup>143</sup> A number of other legal challenges have similarly resulted in ordinances being upheld.<sup>144</sup>

### 3. State constitutional concerns

The lawsuits attempting to mandate domestic partnership benefits through the courts have raised significant issues of state constitutional interpretation. These cases raise the question of whether limiting employment benefits to married couples violates state equal protection guarantees by discriminating based on the sex or "sexual orientation" of unmarried persons.

In California, an employee challenged the denial of dental benefits to his partner by the State Department of Personnel Administration, arguing that the term "spouse," which was used to determine

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141. *Arlington County*, 528 S.E.2d at 708–09.

142. *Id.* at 709. Three concurring and dissenting justices agreed that the County had violated the Dillon Rule but argued that the majority had missed the "fundamental issue"—whether the County could confer recognition on common law marriages or "same-sex unions." They characterized the fundamental flaw in the County's policy as follows: "The County's expanded definition of eligible dependents is nothing more than a disguised effort to confer health benefits upon persons who are involved in either common law marriages or 'same-sex unions,' which are not recognized in this Commonwealth and are violative of the public policy of this Commonwealth." *Id.* at 713 (Hassell, J., concurring and dissenting).

143. *Crawford v. Chicago*, 710 N.E.2d 91 (Ill. App. Ct. 1999).

144. *Schaefer v. Denver*, 973 P.2d 717, 718–19 (Colo. Ct. App. 1998), *cert. denied*, (Colo. 1999); *Slattery v. New York*, 686 N.Y.S.2d 683 (Sup. Ct. 1999); *Atlanta v. Morgan*, 492 S.E.2d 193, 194 (Ga. 1997); *Lowe v. Broward County*, 766 So. 2d 1199 (Fla. Dist. Ct. App. 2000); Arthur H. Rotstein, *Judge OKs Benefits for Partners*, ARIZ. REPUBLIC, March 15, 1998, at B3; Anne Blythe, *Court Upholds Towns' Domestic-Partners Laws*, NEWS & OBSERVER (Raleigh, NC), May 9, 2000, at B5; *Jacks v. Santa Barbara*, available at <http://www.lambdalegal.org/cgi-bin/pages/cases/record?-record=83>; Jo Becker, *Domestic Partner Policy Expanded in Montgomery*, WASH. POST, June 27, 2001, at B1; *Judge Upholds City's Domestic-Partner Benefits*, ST. PETERSBURG TIMES, Nov. 16, 2000, at 6B.

to whom benefits were available, was a classification based on sexual orientation and should therefore be viewed as suspect under California's equal protection clause.<sup>145</sup> Explaining that the department policy distinguished solely between married and unmarried employees rather than between heterosexual and homosexual employees, the court failed to identify "any classification at all which is the subject of discrimination."<sup>146</sup> The court also noted that it was "unable to establish the nature of a homosexual 'family' on the basis of any natural, intrinsic or legal foundation."<sup>147</sup> Since the class of unmarried persons was not suspect, statutory distinctions based upon marital status needed only to be rationally related to a legitimate state purpose. Citing the state's "legitimate interest in promoting marriage," the court rejected the discrimination claim, stating that "[t]he state's public policy favoring marriage is promoted by conferring statutory rights upon married persons which are not afforded unmarried partners."<sup>148</sup>

In Wisconsin, the State Personnel Commission dismissed an employee's discrimination complaint based on an administrative denial of her request for family health insurance coverage for her partner.<sup>149</sup> Her claim, based on a state discrimination statute and the Wisconsin constitution, was also denied by the trial court, which affirmed the Commission's decision.<sup>150</sup> The Court of Appeals affirmed, holding that the decision not to extend benefits did not rely on a classification based on gender or sexual orientation, but rather on marital status, so there was no constitutional claim.<sup>151</sup>

In Colorado, an employee challenged a decision by the state Career Services Board to deny her sick leave to take care of her domestic partner. The decision was based on an administrative rule that allowed for sick leave only to care for a member of the employee's "immediate family."<sup>152</sup> The plaintiff claimed that because the rule's definition of "immediate family" did not include a same-sex partner,

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145. *Hinman v. Dep't of Pers. Admin.*, 167 Cal. App. 3d 516, 524 (Ct. App. 1985).

146. *Id.* at 526.

147. *Id.*

148. *Id.* at 527.

149. *Phillips v. Wis. Pers. Comm'n*, 482 N.W.2d 121, 123 (Wis. Ct. App. 1992).

150. *Id.*

151. *Id.* at 129.

152. *Ross v. Denver Dep't of Health and Hosp.*, 883 P.2d 516, 518 (Colo. Ct. App. 1994).

the law created a classification of persons who are denied sick leave benefits on the basis of sexual orientation, thus violating the Colorado Constitution.<sup>153</sup> The court held that the rule in question did not differentiate between heterosexual and homosexual employees but rather between married and unmarried employees:

Ross was not denied family sick leave benefits to care for her same-sex partner because she is homosexual. An 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.<sup>154</sup>

Therefore, there was no violation of the State constitution.<sup>155</sup>

Recently, the Oregon Court of Appeals affirmed a trial court ruling that public employers who offer spousal benefits to employees must provide domestic partnership benefits to homosexual persons meeting certain requirements. In order to qualify, the employees must not be related by blood or be closer in degree of relationship than first cousins. They must not have been legally married and must have continuously lived together in an exclusive and loving relationship that they intend to maintain for the rest of their lives. They must share financial responsibilities and demonstrate that they would be married to each other if Oregon law permitted it. They must not have other domestic partners, and, finally, must be eighteen years of age or older.<sup>156</sup>

In the section of the opinion regarding Oregon constitutional law, the court applied a two-step analysis to determine, first, whether the plaintiffs were part of a "true class" and, second, whether they were part of a "suspect class." Same-sex couples are clearly "defined in terms of *ad hominem*, personal and social characteristics," so to the court, they are a "true class."<sup>157</sup> In other words, their identity as

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153. *Id.* at 518.

154. *Id.* at 520.

155. *Id.* at 521. The court also noted that the underlying claim was that the marriage law was unfair but noted that the decision to change that law must be left to the legislature. *Id.* at 520.

156. *Tanner v. Or. Health Sci. Univ.*, 971 P.2d 435, 439 (Or. Ct. App. 1998). For more on this case, see David Orgon Coolidge & William C. Duncan, *Marriage and Democracy in Oregon: The Meaning and Implications of Tanner v. Oregon Health Sciences University*, 36 WILLAMETTE L. REV. 503 (2000).

157. *Tanner*, 971 P.2d at 447.

a class is not an artificial legal construct, but is something that exists outside the structure of legal classifications.<sup>158</sup>

The court then analyzed whether or not the class was a *suspect* class. The court held that there was no requirement of an immutable trait (or traits) to establish a suspect class, adopting instead the standard that the class must have characteristics that have been “historically regarded as defining distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice.”<sup>159</sup> The court then held that homosexuals are subject to stereotyping and prejudice, so they are a *suspect class*.<sup>160</sup> The court could find no valid justification for the denial of domestic partnership benefits, and, since same-sex couples cannot marry, the court found that the policy was discriminatory.<sup>161</sup>

#### 4. Other issues

Three legal issues related to domestic partnership laws have not yet been litigated: the effect of such laws on marriage law, the effect of the laws on religious freedom, and the effect of the laws on democratic self-government.

*a. Marriage.* The most significant legal concern regarding domestic partner benefits is the effect of the extension of these benefits on marriage law. If a court (such as in *Tanner*<sup>162</sup>) finds these benefits constitutionally required, it would not seem to be a large inferential leap to say that marriage status is also constitutionally required for same-sex couples.<sup>163</sup> The essential claim would be: If same-sex couples have all the benefits of marriage, why not the title? In a less direct way, recognizing same-sex relationships sets a precedent for ei-

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158. *Id.* at 445.

159. *Id.* at 446.

160. *Id.* at 447.

161. *Id.* at 448. The practical effect of this remarkable ruling is not yet clear. The State of Oregon chose not to appeal to the Oregon Supreme Court. In an unusual (but not unprecedented) procedural move, an Oregon state legislator sought a writ of mandamus to compel the state to appeal the ruling in order to defend the current state of the law. *State ex rel. Sunseri v. Court of Appeals*, No. 46055, 1999 Ore. LEXIS 116 (Or. Mar. 2, 1999). The petition for the writ, however, was denied by the Oregon Supreme Court.

162. *See supra* note 156 and accompanying text.

163. In the *Tanner* case, the Oregon Court of Appeals specifically declined to address the constitutionality of the Oregon marriage statute, but it is not hard to imagine that if same-sex couples are a suspect class, then denying them marriage rights would likely come under exacting scrutiny. *Tanner*, 971 P.2d at 443 n.3.

ther (1) recognition of “sexual orientation” as a constitutionally recognized class, or (2) recognition of same-sex relationships as equivalent to marriage. In other words, even if domestic partnerships are not constitutionally mandated, they may lead to a rethinking of constitutional requirements in these two areas.

*b. Religious liberty.* When domestic partnership laws include provisions for forcing non-government employers to offer benefits, religious freedom concerns are also implicated. This possibility would arise where a religious organization or religious individual is an employer and objects on moral grounds to offering domestic partnership benefits. Some religious *organizations* would decline to hire someone with a domestic partner or would decline to provide that employee the equivalent of spousal benefits if they subsequently learned that he or she had a domestic partner. In addition, while a religiously motivated *person* who is a private “secular” employer may feel that the personal choices of his or her employee are not an employment issue, that employer may still be hesitant to support these choices by offering benefits. If forbidden to make this judgment, individuals (or organizations) may be denied the opportunity to act on their beliefs regarding the immorality of nonmarital sexual relationships.<sup>164</sup>

*c. Democracy.* The cases seeking to compel recognition of domestic partnerships through novel constitutional interpretations also raise serious issues for constitutional self-government. In the *Tanner* case, for instance, the court of appeals (1) held that Oregon’s sex-discrimination law prohibited discrimination on the basis of sexual orientation, (2) created and defined a status of domestic partners to whom public employers were ordered to offer benefits, and (3) held that distinctions between married couples and unmarried same-sex

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164. An analogous situation has arisen in a number of states where private individuals have been unwilling to rent to unmarried couples based on their religious conviction that doing so would violate their religious beliefs related to sexual morality. *See* *Smith v. Fair Employment & Hous. Comm’n*, 913 P.2d 909 (Cal. 1996) (requiring landlord to rent to unmarried couple despite religious objections to nonmarital sexual relationships does not violate state constitution’s free exercise clause); *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274 (Alaska 1994) (same result); *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (holding that requirement that landlord rent to unmarried couple in violation of conscience substantially burdens free exercise under state constitution); *State v. French*, 460 N.W.2d 2 (Minn. 1990) (concluding that the Minnesota Constitution’s freedom of conscience provision outweighed state interest in preventing marital status discrimination in housing).

couples are constitutionally forbidden.<sup>165</sup> In the case of the first and third issues, the Oregon Legislature had grappled with the issues but had not been able to resolve them. Regarding the second issue, although creating and defining the status of domestic partners was clearly a legislative function, the trial court created such a status without any outside legal support.<sup>166</sup> This attempt to circumvent the normal legislative process is dangerous because it threatens to undermine the structure of state governments when one branch imposes on the province of another. It also threatens to undermine the legitimacy of the court as citizens sense that the court has overstepped its constitutional authority.

*B. Public Policy Concerns*<sup>167</sup>

Serious policy considerations of domestic partnership laws derive from the underlying nature of domestic partnerships.

The crucial element of domestic partnerships is not the fact that they allow unmarried couples to gain some of the benefits of marriage. Marriage is not about benefits. In fact, marriage law has always begun with a recognition of its uniqueness as a status—a union between a man and a woman. This uniqueness makes marriage particularly well suited to advance certain goals. These include procreation (since a sexual relationship between a man and a woman is the only context in which procreation can take place naturally) and child-rearing (because the commitment between parents in a marriage makes it more likely that children will be raised in a stable environment where they are guaranteed both a mother and father). Marriage between a man and a woman also provides protection to women and children from men who would take advantage of women sexually without being willing to make a commitment to either the woman or any children that result from their relationship.<sup>168</sup> Recognizing the

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165. *Tanner*, 971 P.2d at 442–44.

166. Even in Vermont, where the supreme court held that the state constitution required the extension of marital benefits to same-sex couples, the court held that creating the mechanism to extend the benefits was a legislative function. *See Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

167. For the most part, these criticisms apply most directly to the municipal ordinances I have discussed and only by extension to the *Principles*. For a more thorough critique of the *Principles*, see Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 BYU L. REV. 1189.

168. Parenthetically, it should be noted that marriage is different from both same-sex relationships in which any sexual relationship cannot result in procreation and different from

value of marriage to society, the state provides a package of benefits to those who marry.<sup>169</sup>

The concept of domestic partnership seems to work the other way, recognizing that some people do not receive marital benefits, and trying to create a status that can then be used for identifying where the benefits ought to go.<sup>170</sup> It is really a functional redefinition of marriage—one in which the status of marriage is separated from the benefits afforded it. Those benefits are meted out to other relationships which seem to fulfill some of the same functions as marriage (such as economic interdependency, commitment, etc.).<sup>171</sup> It is interesting to note that the definitional parameters of the domestic partnership laws are very similar to marriage (sometimes even making reference to marriage) but are still significantly broader in their scope by employing nebulous requirements such as “caring and commitment.”<sup>172</sup>

In upending the normal understanding of family law, which accorded marriage a privileged status because of its unique contribution, these ordinances shift the burden from individuals to show that they deserve benefits because they have entered a status beneficial to society and to the state. Instead, the state is now required to justify its decision not to give benefits to any two people who feel committed to each other for an indeterminate amount of time.

Still, the focus of the laws is not benefits. If it were, why would relatives be excluded? Certainly there are adult children of elderly parents who would benefit from being able to designate their parents as dependents. The answer is obvious—the intention is not to give out benefits; there are other ways to do that. The point is to create a status that serves as a parallel to marriage but which is inclusive of

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opposite-sex cohabiting relationships in which the parties may have children as a result of a sexual relationship but do not have the inherent stability that marriage provides. In addition, the vulnerability experienced by a woman in a relationship with a man. In a homosexual relationship, even though they may raise children together, their sexual relations cannot result in procreation; in such a relationship, it requires a willful decision to introduce children into the relationship.

169. See Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983).

170. See, e.g., BROWARD COUNTY, FLA., CODE § 16½-151 (1999); SANTA MONICA, CAL., CODE § 4.60.010 (1995).

171. See William C. Duncan, “Don’t Ever Take a Fence Down”: *The “Functional” Definition of Family—Displacing Marriage in Family Law*, 3 J. L. & FAM. STUD. 57 (2001).

172. See *supra* notes 82–93 and accompanying text.

those who are not married. The implications of the creation of domestic partnership status are serious and troubling. Even in the ALI proposal, where relatives can be domestic partners, the language used is “share . . . life together as a couple.”<sup>173</sup> It seems very unlikely that a parent and child would recognize their relationship as “li[ving] together as a couple.” In addition, the ALI’s placement of its recognition of domestic partnerships in the *Principles* indicates its understanding of domestic partnerships as a type of “functional family” relationship.

Given the ability of unmarried couples to approximate the status of marriage through private agreements or by use of other laws,<sup>174</sup> one of the few benefits historically tied to marriage that still seems to be exclusive to marriage is the making licit of a sexual relationship—that is, sending a message that society considers the marriage relationship to be the only appropriate context for sexual relations. Domestic partnerships send the opposite message; particularly where there is a requirement of “intimacy,” domestic partnership laws provide legal and societal sanction to nonmarital sexual relationships.<sup>175</sup> They send a message that participating in nonmarital relationships is as valid a choice as the choice to be married. As one advocate of domestic partner benefits put it, “The recognition of domestic partnerships also can have a broad societal and legal impact by establishing the legitimacy and acceptability of same-sex relationships.”<sup>176</sup> In fact, this is the stated goal of many of the ordinances examined above.<sup>177</sup> In the case of the ALI proposal, the message will even include a statement that adulterous sexual relationships are appropriate.<sup>178</sup>

In the desire to accommodate the choices people are making, the ALI ignores another reality—the fact that family law is replete with a system of incentives and disincentives and that it may choose to provide social disincentives to behavior it finds objectionable. The failure of most state legislatures to provide domestic partnership recog-

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173. PRINCIPLES (Tentative Draft No. 4), *supra* note 19, § 6.03(1).

174. See HAYDEN CURRY ET AL., A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES (1996).

175. See *supra* notes 82–93 and accompanying text.

176. Lewis Becker, *Recognition of Domestic Partnerships by Governmental Entities and Private Employers*, 1 NAT’L J. SEXUAL ORIENTATION L. 90, 101, at <http://www.ibiblio.org/gaylaw/issue1/becker.html> (last visited Sept. 21, 2001).

177. See *supra* notes 58–63 and accompanying text.

178. See *supra* note 125 and accompanying text.

dition may not be, as the ALI seems to assume, a mere oversight of existing trends, but a statement that the state wants to discourage extramarital sexual relationships—or at least not to privilege them. This is surely the case where the ALI allows a married person to have a domestic partnership with another person to whom he or she is not married.

Another obvious policy implication of domestic partnership laws is the effect on the preferred status of marriage in society. Society has traditionally conferred special benefits only to marriage because of its unique contribution not only to each participant but to the larger community.<sup>179</sup> These laws create a situation where marriage is considered just one way of organizing society in order to confer benefits. If marriage is just a convenient way to dispense benefits, domestic partnerships may be just as appropriate because they arguably provide as convenient a way to decide which relationships are entitled to economic and societal benefits. When the benefits traditionally reserved for married couples are extended to other couples based on a nonmarital status, the obvious implication is that the law no longer considers marriage to be the uniquely valuable institution that it has been. Again, some of the domestic partnership ordinances admit as much with their invocation of the “changing nature of the family” and their references to multiple, equally valid family forms.<sup>180</sup> As Professor William Eskridge has noted, if marriage becomes only one more option, like a flavor of ice cream, its social position will eventually be undermined. According to Eskridge, “experimental laws like Vermont’s will undermine the institution of marriage [and] . . . , [i]n the long run, they threaten to make marriage obsolete.”<sup>181</sup> In the past, couples who wanted to ensure the legitimacy of offspring, the licitness of sexuality, etc., had to marry. With the growing acceptance of alternative statuses, couples are able to choose the type of legal recognition they want for their relationship. Coupled with the parceling out of marital benefits to these other statuses, the draw of marriage could be severely weakened as couples are enticed to enter into other, less demanding legal obligations.

Another challenge raised by domestic partnership laws is the ap-

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179. See Hafen, *supra* note 169.

180. See *supra* notes 46–51 and accompanying text.

181. William Eskridge, Jr., *The Emerging Menu of Quasi-Marriage Options*, at [http://writ.findlaw.com/commentary/20000707\\_eskridge.html](http://writ.findlaw.com/commentary/20000707_eskridge.html) (last visited Mar. 10, 2001).

appropriate limitations on the relationships recognized by the law. Currently, most of the ordinances apply only to single individuals, but the ALI proposal allows for a domestic partnership to exist even if a party is married to another person.<sup>182</sup> If “commitment” or “caring” are the relevant determinants for establishing a domestic partnership,<sup>183</sup> why should the incest prohibitions be included? Why, for that matter, should there be a limitation on the numbers of individuals involved? It has been argued that such limitations should not exist.<sup>184</sup>

Finally, a domestic partner relationship has the potential of binding individuals in a relationship that can never be a marriage and that can never contribute what a marriage could to the happiness of the partners or to the good of society.<sup>185</sup> One such benefit is stability. Domestic partnership ordinances almost always allow for a quick dissolution of the relationship.<sup>186</sup> Thus, while the partnership creates an impression that a marriage-like relationship is involved, this impression is really an illusion because the relationship, along with its benefits and obligations, can usually be ended with extremely little effort. Research indicates that “the break-up rate of cohabitators is far higher than for married partners.”<sup>187</sup> In addition, in a very realistic way, the legal sanction of cohabitation may tie partners in a destructive relationship. A recent report from The National Marriage Project at Rutgers University noted that “[l]iving together outside of marriage increases the risk of domestic violence for women, and the

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182. *See supra* note 125 and accompanying text.

183. *See supra* notes 82–93 and accompanying text.

184. *Cf.* 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, 490–91 (1996) (arguing that because a limit on the number of partners is rather arbitrary, “the law ought to be . . . the same for units of more than two”).

185. “[M]arried persons, both men and women, are on average considerably better off than all categories of unmarried persons (never-married, divorced, separated, and widowed) in terms of happiness, satisfaction, physical health, longevity, and most aspects of emotional health.” INSTITUTE FOR AMERICAN VALUES, CLOSED HEARTS, CLOSED MINDS: THE TEXTBOOK STORY OF MARRIAGE 10 (1997). This report also indicates that the benefits of marriage are not likely to accrue in cohabitation arrangements. *Id.* at 11. *See also, generally*, MAGGIE GALLAGHER & LINDA WAITE, *THE CASE FOR MARRIAGE* (2000).

186. *See supra* notes 105–12 and accompanying text.

187. DAVID POPENOE & BARBARA DAFOE WHITEHEAD, *SHOULD WE LIVE TOGETHER? WHAT YOUNG ADULTS NEED TO KNOW ABOUT COHABITATION BEFORE MARRIAGE: A COMPREHENSIVE REVIEW OF RECENT RESEARCH* 6 (1999).

risk of physical and sexual abuse for children.”<sup>188</sup> Finally, children raised by cohabitating adults are at greater risk of harm from parental break-up, abuse, and poverty.<sup>189</sup>

There are certainly other problems with these types of laws and proposals that others will have noted. So far, there has been no significant pro and con discussion of the legal or policy implications of domestic partnerships. Surely that should be a prerequisite to the creation of such a novel legal status or of its being proposed as part of a uniform family law system.

## VI. CONCLUSION

The law related to domestic partnerships seems to be a growth industry, although the number of jurisdictions which have adopted laws providing for such a status is still relatively small. With the promulgation of the ALI *Principles*, the matter may soon move to the forefront of family law issues and so must be examined with care. This article has attempted to provide some of that examination by surveying the current state of the law regarding domestic partnerships. It has also attempted to address a few of the serious and weighty issues raised by the adoption of such laws. The legal, philosophical, and public policy problems inherent in the legal recognition of a new status for domestic partners caution against adoption of such laws; at the very least, the problems should give a state or local legislative body pause before endorsing such a scheme. At a time when marriage is under threat on many fronts, it behooves policy makers to ask themselves whether the decisions they make will strengthen or further erode this institution, which has always been recognized as the basic unit of society and the foundation for the family. Then policies which threaten marriage, such as the legal recognition of domestic partnership status, should be rejected.

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188. *Id.* at 1.

189. *Id.* at 8.