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Competing Approaches to Same-Sex Versus Opposite-Sex, Unmarried Couples in Domestic Partnership Laws and Ordinances*

Terry S. Kogan**

I. INTRODUCTION

Efforts to enact domestic partnership schemes like that embodied in chapter 6 of the ALI *Principles of the Law of Family Dissolution* are faced with a fundamental question as to the proper scope of coverage. Motivated in part by a desire to provide marital-like benefits to same-sex couples who lack full marriage rights, drafters of these schemes must decide whether to include opposite-sex couples within the schemes' ambit. The purpose of this article is to explore the competing ways in which various approaches to domestic partnership laws treat opposite-sex, unmarried couples in comparison to same-sex couples. An important social and ethical question underlies this inquiry: Are there relevant differences that would justify treating opposite-sex, unmarried couples differently from same-sex couples?

I identify three different approaches to this issue. The first approach, which I term the Leveling Position, treats same-sex couples more favorably than it treats opposite-sex, unmarried couples by offering domestic partnership benefits only to the former.¹

The second approach, which I term the Equality Position, treats same-sex couples and opposite-sex, unmarried couples identically in granting domestic partnership benefits. This is the position taken by the ALI *Principles of the Law of Family Dissolution*, under consideration at this conference.²

* This article was presented at the Symposium on the ALI Principles of the Law of Family Dissolution, held at Brigham Young University's J. Reuben Clark Law School on February 1, 2001.

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1. See generally James M. Donovan, *An Ethical Argument to Restrict Domestic Partnerships to Same-Sex Couples*, 8 LAW & SEXUALITY 649 (1998).

2. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS (Tentative Draft No. 4, Apr. 10, 2000) §§ 6.01-6.06 [hereinafter

Finally, the third approach, which I term the Moralistic Position, condemns domestic partnership schemes in general and, in doing so, treats opposite-sex, unmarried couples more favorably than same-sex couples.³ Specifically, the Moralistic Position insists that the only relationship between opposite-sex couples worthy of state recognition is the marital relationship. At the same time, because it condemns homosexuality, the Moralistic Position opposes any state recognition of same-sex relationships whatsoever. Not only does it oppose extending marriage rights to same-sex couples; the Moralistic Position also opposes the state's recognizing same-sex relationships through any other statutory or regulatory program, including domestic partnership schemes. Accordingly, while opposite-sex couples are encouraged to marry, same-sex couples are effectively encouraged to disappear from the state's visage. In discussing the Moralistic Position, I will of necessity have to step away from domestic partnership schemes and discuss the issue of marriage rights for same-sex couples more directly.

I will examine these approaches from several perspectives. First, I will ask whether the justification offered by each makes sense in light of a fundamental goal of family law: Does the approach tend to foster stable, long-term, mutually supportive, committed relationships between two people that are conducive to rearing children in a financially sound environment?⁴ Second, I will ask how each approach fares in terms of principles of fairness and equality, principles critical to our constitutional democracy. Finally, I will examine each position

PRINCIPLES (Tentative Draft No. 4)]. See also Dee Ann Habegger, *Living in Sin and the Law: Benefits for Unmarried Couples Dependent upon Sexual Orientation?*, 33 IND. L. REV. 991 (2000).

3. I associate this position most closely with the writings of Lynn Wardle of Brigham Young University's J. Reuben Clark Law School. See, e.g., Lynn D. Wardle, *A Critique of the ALI's Effort to Redefine "Family" by Increasing the Relationships Given Marital and Parental Status*, 2001 BYU L. REV. (2001); see also Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735 (1998) [hereinafter Wardle, *Redefining Marriage*].

4. Carl Schneider has described this function of family law more generally as the channelling function. See, e.g., CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW: PROCESS, PROBLEMS AND POSSIBILITIES 200 (2d ed. 2000) ("[F]amily law may . . . be said to try to discourage harmful behavior within families, to encourage happiness in intimate relationships, and to promote social stability by establishing, promoting and channelling people into social institutions that seem to conduce to those goals and by channelling people away from social institutions that seem to disserve them."); see also Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992).

from the viewpoint of a gay rights advocate and ask whether the approach is a wise strategic position in furthering the civil rights of gay and lesbian people in our society.

This leads me to a final introductory point. I want to make my underlying position clear from the outset. Though this paper focuses on domestic partnership issues, because of the centrality of chapter 6 of the ALI *Principles of the Law of Family Dissolution* to this conference, it is my strong belief that nothing less than full marriage rights should be extended to same-sex couples. Accordingly, all domestic partnership schemes, including that embodied in chapter 6 of the ALI *Principles*, must be seen as second-best solutions, as but a way station on the road to full marriage rights for gay and lesbian people. This is not to condemn domestic partnership schemes outright. In our second-best world, loving gay couples may have to make do, at least for the present, with the lesser rights given them by such schemes. But we should not lose sight of the ultimate fair goal—full, equal marriage rights.

With this background, let us first consider domestic partnership schemes in general and then examine each of the three positions identified above.

II. DOMESTIC PARTNERSHIP SCHEMES

Modern domestic partnership schemes have been adopted by public entities and by private businesses. They have been motivated by two developments. First, the extent of cohabitation between unmarried adults has been on a steady rise for decades.⁵ Second, gay and lesbian couples have in the recent past been more willing to be open about their relationships as our society has gained a greater tolerance for the civil rights of minority groups in general. The greater presence of nontraditional couples in our society has led public and private entities to consider extending a range of benefits, normally reserved to married couples, to unmarried couples.⁶

5. "Unmarried couples comprise nearly 3 million of the United State's [sic] 93 million households. This represents an increase greater than 400% over the past thirty years." Jonathan Andrew Hein, *Caring for the Evolving American Family: Cohabiting Partners and Employer Sponsored Health Care*, 30 N.M. L. REV. 19, 20 n.12 (2000). 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 COM., STATISTICAL ABSTRACT OF THE UNITED STATES, 1998, Table 66 (118th ed. 1998).

6. The recent passage of a range of domestic partnership schemes in the United States

All domestic partnership schemes provide fewer rights than those currently provided by marriage. To begin with, state and municipally sponsored domestic partnership programs cannot grant the full range of federal rights now granted to married couples,⁷ and federal passage of the Defense of Marriage Act (DOMA)⁸ strongly suggests that Congress is unlikely to extend such federal rights to same-sex couples anytime soon, irrespective of what may happen at the state level. The most extensive rights granted by a domestic partnership scheme are those embodied in Vermont's Civil Union Act,⁹ which extends to same-sex couples who enter into formal civil unions and remain in Vermont "all the same benefits, protections and responsibilities under law, . . . as are granted to spouses in a marriage."¹⁰ Hawaii's Reciprocal Beneficiaries Act¹¹ provides more limited benefits to same-sex couples (unmarried, opposite-sex couples are ineligible), including 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. At the other end of the spectrum are domestic partnership schemes that allow only for registration of a domestic partnership with a municipal agency—largely a symbolic act.¹²

parallels similar moves in other countries extending a range of rights to same-sex couples. As noted by Barbara Cox:

Today, Denmark (1989), Norway (1993), Greenland (1994), Sweden (1995), Iceland (1996), the Netherlands (1998), and France (1999) recognize same-sex unions through "registered partnerships." Additionally, Australia treats the long-term partners of gay men and lesbians the same as spouses for immigration purposes, and Canada, Israel, Namibia, South Africa, the Czech Republic, Spain, and Hungary recognize such relationships for a variety of purposes.

Barbara J. Cox, "The Little Project": *From Alternative Families to Domestic Partnerships to Same-Sex Marriage*, 15 WIS. WOMEN'S L.J. 77, 81 (2000) (citations omitted).

7. 28 U.S.C. § 1738C (Supp. 2000). The United States General Accounting Office has concluded that 1,049 federal laws providing for benefits depend on marital status—benefits including favorable tax treatment, Social Security benefits, child support enforcement, Medicare and Medicaid, housing benefits, veteran's benefits, and federal employment benefits. *United States General Accounting Office, Report to the Honorable Henry J. Hyde, Chairman, Committee on the Judiciary House of Representatives*, Jan. 31, 1997, at 2 (Fed. Doc. Clearing House 1996), cited in Cox, *supra* note 6, at 77 n.68.

8. 28 U.S.C. § 1738C (Supp. 2000).

9. VT. STAT. ANN. tit. 15, §§ 1201–07 (Supp. 2000).

10. *Id.* § 1202(a).

11. HAW. REV. STAT. § 572C (2000).

12. Domestic partnership registry schemes have been adopted in, among other municipalities, New York, Atlanta, San Francisco, Denver, Milwaukee, and Seattle. One commentator noted:

This paper is concerned with domestic partnership schemes created by public entities (irrespective of the extent of benefits offered). This concern is motivated by the fact that a public entity's decision to adopt such benefits carries with it significant symbolic meaning. In effect, the adoption of a domestic partnership scheme places the state's stamp of approval on the form of relationship covered by the benefits program.¹³ In particular, public recognition of same-sex relationships not only sends a message to the broader society, but also provides a symbol for the couple themselves that their relationship is worthy enough to deserve state recognition and benefits. Moreover, the extension of domestic partnership benefits by a public entity to nontraditional couples embodies a commitment by that society to values of fairness, tolerance, and diversity. Though the decision of a private entity to extend domestic partnership benefits can send a similar message, most private entities justify their extending such benefits as largely profit driven, as one way of attracting the best employees in a highly competitive market.¹⁴ This type of justification has little relevance in the public setting.

Most of the domestic partner registries adopted so far are fairly similar. These ordinances provide for a structure or registration, as well as dissolution of the partnerships. Although many of the ordinances provide no benefit beyond the ability to declare themselves domestic partners openly and publicly, some do provide access to city services (like prison/hospital visitation) and benefits correspondent to those offered to the spouses of city employees.

Heidi Eischen, *For Better or Worse: An Analysis of Recent Challenges to Domestic Partner Benefits Legislation*, 31 U. TOL. L. REV. 527, 530 (2000).

13. See, e.g., *id.*, at 532 ("On a public level, domestic partner statutes and ordinances may send an important message—that the municipality or state that one lives in supports its community of same-sex couples."). Carl Schneider has described the use of family law to convey symbolic messages as its expressive function. See SCHNEIDER & BRINIG, *supra* note 4, at 202. See also Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991 (1989); Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 BOSTON C. L. REV. 265, 272 (2000) (addressing the "expressive function" of family law).

14. As noted by Barbara Cox:

As of October 1, 1999, over 3500 organizations in the United States have domestic partner benefits, and additional organizations are being added to this group at a rate of two or three per week. Currently, twenty-three percent of organizations with over 5000 employees provide health benefits to domestic partners. Additionally, thirteen percent of employers with 1000 to 4999 employees and twelve percent of employers with 200 to 999 employees provide domestic partner health benefits.

Cox, *supra* note 6, at 82 (citations omitted). With respect to domestic partnership benefits adopted by private entities, see generally, 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 (1998).

III. THREE APPROACHES TO DOMESTIC PARTNERSHIP SCHEMES

A. *The Leveling Position*

Let us begin by examining the Leveling Position, which treats same-sex couples more favorably than opposite-sex couples in domestic partnership schemes by granting such benefits only to the former. The major justification relied upon by “Levelers” for this disparate treatment is that opposite-sex, unmarried couples have the legal right to marry, while same-sex couples do not. Offering same-sex couples domestic partnership benefits enables them to approximate those benefits they would have were they given the right to marry—a “leveling of the playing field” approach.¹⁵

But some Levelers look beyond this difference in marriage rights offered to these two groups by also examining the motivations of opposite-sex, unmarried couples in making their decision not to marry. For example, James Donovan condemns the decision of such opposite-sex couples not to marry:

Unmarried heterosexual couples claiming status as domestic partners seek the economic benefits of marriage without the social responsibilities. Achieving this end would require that marriage obligations become independent of marriage rewards, whereas presently marriage implies that duties entail rewards. . . .

. . . [I]t is a lowering of that institution [marriage] in status and prestige. As such, heterosexual domestic partnerships transgress the higher principle of preserving marriage in its present status, and on this basis their encouragement should be judged antisocial. Those who desire the benefits of marriage, and are able to marry, should get married.¹⁶

For Levelers, opposite-sex, unmarried couples employ domestic partnership schemes to gain the benefits of marriage while avoiding its obligations, and, in doing so, they denigrate the institution of marriage. In contrast, for same-sex couples, domestic partnership schemes are but a temporary remedy for the failure of the larger soci-

15. See, e.g., Donovan, *supra* note 1, at 657 (“Same-sex-only domestic partnerships are an effort to balance the scales in the arena of domestic relations. To include heterosexuals would preserve their significant advantage by giving them two options where [gays] would have only the one.”).

16. *Id.* at 657.

ety to extend full marriage rights to them.

Let us examine the Leveling Position along the parameters suggested above: goals of family law, fairness and equality, and gay rights. What proves interesting about this position is that its advocates (who strongly support gay rights) are, at best, lukewarm supporters of domestic partnerships schemes. Marriage is the desired relationship; domestic partnerships are a temporary remedy and one that should be open only to those who are unfairly excluded from the opportunity to marry. As Donovan explains, “[H]eterosexual domestic partnerships threaten to undermine the status of marriage”¹⁷ He continues, “[w]hen marriage becomes an option for same-sex couples, then domestic partner benefits for same-sex couples should immediately terminate.”¹⁸

Thus, in terms of the family law goal of fostering long-term, stable relationships, Levelers believe that the domestic partnership alternative is clearly inferior to marriage. Their arguments for supporting domestic partnership schemes at all evolve from a commitment to values of fairness and equality.

Despite this seeming commitment to fairness and equality, however, the Leveling Position has inherent within it a form of discrimination based on sexual orientation—albeit a discrimination that favors gay and lesbian people. This aspect of the Leveling Position has not gone unnoticed. In *Foray v. Bell Atlantic*,¹⁹ the plaintiff alleged that an employee benefits plan adopted by NYNEX that extended a range of benefits to same-sex domestic partners, but not to opposite-sex partners, violated his rights under Title VII of the Civil Rights Act of 1964.²⁰ He asserted that, but for the fact that he is male and his domestic partner is female, he met all of the criteria for receiving benefits under the NYNEX plan. He asserted, “[A]ll things being equal, if Foray’s gender were female, he would be entitled to claim his domestic partner as an eligible dependent under the benefits plan.”²¹ The court in effect adopted the Leveling Position’s rationale in rejecting Foray’s arguments:

17. *Id.* at 665.

18. *Id.* at 667.

19. 56 F. Supp. 2d 327 (S.D.N.Y. 1999).

20. *See id.* at 328–29.

21. *Id.*

Plaintiff's claim that he was treated different from similarly situated persons of the opposite sex depends on the assumption that a similarly situated woman is one who has a female domestic partner. However, a woman with a female domestic partner is differently situated from plaintiff in material respects because under current law, she, unlike plaintiff, is unable to marry her partner. A woman and her same-sex domestic partner, unlike plaintiff and Ms. Muntzner, will never be eligible for a host of benefits available to opposite-sex couples who are able to marry.²²

A similar claim was raised in *Cleaves v. City of Chicago*.²³ In that case, an employee was fired for, among other reasons, calling in sick on the death of his fiancé's father, claiming that his "father-in-law" had died. He alleged illegal sex discrimination under Title VII because had he been "an unmarried woman, rather than an unmarried man, the City would have granted him paid leave due to the death of the father of his female domestic partner" under the City's Domestic Partner Benefits Eligibility Ordinance.²⁴ In rejecting this argument, the court concluded that the only discrimination involved was based on marital status, which was not protected by Title VII:

[T]he Ordinance does not involve treating men less favorably than women on the basis of marital status, but only treating unmarried same-sex couples differently from unmarried opposite-sex couples. It treats men and women exactly the same: if Mr. Cleaves' non-marital partner were male and they otherwise met the criteria for domestic partnership, he would have been eligible for any benefits available to same-sex female couples The Ordinance is therefore legal discrimination on the basis of marital status, not sex discrimination involving discrimination against men (or women) because of marital status.²⁵

In effect, the court also adopted the Leveling Position, focusing on the fact that same-sex couples have no opportunity to marry. It is worth noting that the plaintiff in *Cleaves* did not assert that he was discriminated against based on his heterosexual orientation.²⁶ Courts have long held that discrimination on the basis of sexual orientation is not protected under Title VII, and this conclusion was recently re-

22. *Id.* at 330 (citations omitted).

23. 68 F. Supp. 2d 963 (N.D. Ill. 1999).

24. *Id.* at 966.

25. *Id.* at 967.

26. *See id.* at 966 n.2.

inforced by a decision of the Federal Ninth Circuit Court of Appeals.²⁷

Nonetheless, assuming Levelers are committed to principles of gender equality and fairness—principles that view discrimination based on sexual orientation and gender identity to be as egregious as discrimination based on a person's sex—they should be extremely wary of endorsing any governmental program, however favorable to same-sex couples, that relies on sexual orientation discrimination. Gay people have too often been the brunt of such discrimination, and we should be the last to rely on a person's sexual orientation as a basis for denying him or her governmental benefits.

How does the Leveling position fare from the viewpoint of advancing the long-term interests of gay and lesbian people? While the Leveling Position may at first blush seem attractive to gay rights advocates, this approach toward domestic partnership benefits in the public sphere has a tendency to cordon off and stigmatize gay and lesbian couples into a second-class status. Creating a domestic partnership status reserved solely to same-sex couples sends the unfortunate message that such relationships are fundamentally different from and inferior to relationships between opposite-sex couples. Limiting domestic partnership benefits to same-sex couples has the effect of creating a "separate and unequal" status that may well impede the long-term struggle for full marriage rights.²⁸ Having "thrown the bone" of domestic partnerships to gays and lesbians, a sense may develop that the electorate need go no further.

B. The Equality Position

Second, let us examine the Equality Position, which treats same-sex and opposite-sex, unmarried couples identically—the approach taken by chapter 6 of the ALI *Principles*.²⁹ This position is most defensible in terms of the underlying goals of family law, in terms of fundamental values of equality and fairness, and, finally, in terms of the long-term interests of gay and lesbian people.

27. See *Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206 (9th Cir. 2001) (concluding that a claim alleging discrimination based solely on sexual orientation does not state a cause of action for sex discrimination under Title VII).

28. See Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate but (Un)equal*, 25 VT. L. REV. 113, 123 (2000).

29. See also Habegger, *supra* note 2, at 1010–13.

The justification for this approach is two-fold. The Equality Position sees no moral difference between same-sex and opposite-sex, unmarried couples in terms of the worthiness of their relationships. Any relationship between two unrelated, loving adults is as worthy as any other such relationship, irrespective of the sex of the partners. Accordingly, to the extent that a state-sponsored domestic benefits program is made available to support relationships between unmarried couples, it should be made available to all such relationships.³⁰

Moreover, the Equality Position considers an opposite-sex, unmarried couple's choice to share their lives together in a cohabitation relationship as an acceptable alternative to marriage worthy of state recognition (whether or not marriage is to be preferred). In other words, the equality position is willing to recognize that there is value in relationships other than marriage. In part, this justification is based on the notion that couples should have the freedom to determine how best to structure their own relationships, including the freedom to determine whether or not to marry.

With respect to same-sex couples, the Equality Position recognizes the fact that although many same-sex couples would marry if given the opportunity to do so, not all would. Some loving, committed, long-term same-sex couples consciously reject the institution of marriage for many of the same reasons that some opposite-sex couples decide not to marry.³¹ Some commentators in fact view domestic partnership status as *preferable* to marriage. Charles Pouncey notes:

Rather than descending from a tradition in which marriage represented the sale or acquisition of a woman by a man and his family, domestic partnership arises from the traditions of business partner-

30. See Steven N. Hargrove, *Domestic Partnership Benefits: Redefining Family in the Work Place*, 6 LOY. CONSUMER L. REV. 49 (1994) ("The philosophy behind domestic partnership coverage is that an employee and his or her partner are, in effect, spouses. Benefits are made available to an employee and his or her partner just as they are available to an employee and his or her spouse. The goals of domestic partnership coverage are those of fairness, non-discrimination, and equality among all employees, regardless of marital status.").

31. See, e.g., Charles R. P. Pouncey, *Marriage and Domestic Partnership: Rationality and Inequality*, 7 TEMP. POL. & CIV. RTS. L. REV. 363, 376 (1998) ("Lesbian and gay domestic partnership as an institution, however, presents opportunities for its growth and development in response to its interactions with queer cultures, which will not be available in same-sex marriage."); Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535 (1993).

ships. Traditional business partnerships, unlike marriage, are envisioned as relationships in which the partners are equal and owe each other the utmost duties of care and loyalty. Therefore, domestic partnership has no necessary relationship to patriarchy or heterosexism.³²

The Equality Position is further based on the reality that fewer and fewer individuals live in a traditional family setting of a husband, a wife, and their own children.³³ Despite this fact, many nontraditional families are able to serve well the emotional, social, and financial needs of the couple and their children.³⁴ Accordingly, the State should be willing to support the needs of all nontraditional families through alternative domestic partnership schemes, irrespective of the genders of the partners at the head of such households.

This important characteristic of the Equality Position is worth emphasizing. While not asserting that domestic partnership relationships are necessarily better than or even equivalent to the marriage relationship, underlying the Equality Position is a belief that it is wrong for the State in general to dictate how couples should structure their private relationships.³⁵ Though the State may show its preference for marriage by offering more benefits to couples who marry, the Equality Position believes that those who choose to structure their relationships in a way other than marriage are still entitled to have those relationships supported with respect to certain essentials: hospital visitation, health care benefits, and inheritance rights, among others. The ALI *Principles* extend state support for nontraditional couples to the dissolution of the relationship by requiring that there be an equitable distribution of assets acquired during the partnership.³⁶

32. Pouncy, *supra* note 31, at 376.

33. See Habegger, *supra* note 2, at 1010 (suggesting that only twenty-five percent of this nation's households fit this traditional pattern).

34. *Id.*

35. Cf. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & LAW 13 (2000). In her work, Fineman argues for the abolition of traditional marriage, suggesting that the state should not be supporting or fostering voluntary adult sexual relationships through the institution of marriage, but rather should direct its laws toward fostering relationships of need such as that between a parent and child, or an adult and an aging parent.

36. See *generally* PRINCIPLES (Tentative Draft No. 4), *supra* note 2, ch. 6 (relating to "Domestic Partners").

Assessing the Equality Position in terms of the family law goal of fostering stable, long-term relationships is complicated. In contrast to the Levelers, who admit up front that domestic partnership status is flawed and at most a temporary solution, the Equality Position views domestic partnerships as a viable, valid alternative to marriage. To judge the success of this position along the lines of family law values, one must separate same-sex from opposite-sex, unmarried couples.

With respect to same-sex couples, the picture is relatively clear. Given that there currently exists no opportunity to marry, a same-sex couple seeking to formalize and gain recognition of their relationship may have but one choice—to take advantage of a domestic partnership scheme. As a general matter, the effect of engaging in the symbolic act of gaining state recognition of their relationship is likely to encourage a same-sex couple, their families, and their friends to take that relationship seriously and would thereby result in a more stable, longer-term commitment to one another. Though focusing on the State's recognizing same-sex marriage, Jennifer Wiggins's discussion of the expressive function of family law is equally applicable to the State's recognizing domestic partnerships:

The "story told by law" about lesbian and gay coupled, committed relationships by the exclusion from marriage is that they do not exist or do not count. Law tells all people that lesbians and gay men are lone individuals despite the fact that they have "familistic" relationships. This story is both false and stigmatizing. . . .

. . . .

"Familistic" relationships and relationships of mutual dependence and support between coupled adults are good for society, as well as the members of the relationship, and should be recognized and supported by law.³⁷

With respect to opposite-sex couples, the picture is blurrier. As Margaret Brinig notes, "Cohabiting partners . . . ha[ve] less commitment to each other than do married spouses and are more likely to think in terms of short-term rather than long-term consequences."³⁸ Accepting domestic partnership status as a permanent,

37. Wiggins, *supra* note 13, at 293, 298.

38. Margaret Brinig, Domestic Partnership: Missing the Mark, unpublished manuscript

alternative to marriage may not foster the longevity of some relationships. Nonetheless, longevity of a relationship is but one value fostered by family law. Allowing two individuals the autonomy and freedom to structure their relationship in a way that suits them is also an important family law value and one which may trump longevity for some couples.³⁹ Moreover, as noted above, some couples choose not to enter into the institution of marriage because of its historical association with sexism and hierarchy in our society.⁴⁰ The argument is made that longevity is only worth striving for in a relationship of equals and that the formal institution of marriage is not conducive to such a relationship.⁴¹

Domestic partnership schemes inevitably are less attractive than marriage in terms of state-derived benefits. This alone should keep the domestic partnership alternative from siphoning off large numbers of couples from marriage. Moreover, as Mark Strasser argues,⁴² domestic partnership laws, such as that embodied in the proposed *Principles* chapter 6 (“Principles on Domestic Partners”), tend to equalize the obligations associated with domestic partnerships in comparison to those associated with marriage. To the extent that a couple cannot avoid marital obligations through the domestic partnership alternative, more couples will be likely to choose to marry. In this sense, if more opposite-sex couples who first enter into domestic partnerships later choose to marry, then state-sponsored domestic partnership schemes may in fact lead to long-term, stable, committed relationships.

The Equality Position’s major appeal is its commitment to the values of fairness and equality. Its refusal to view any long-term couple, regardless of gender or sexual orientation, as less worthy of gov-

presented at Brigham Young University symposium on family law (2001).

39. Carl Schneider and Margaret Brinig note:

One of the most potent ideas in American law is the belief in the centrality of individual autonomy. Autonomy is not just institutionalized as a value of American law; it is cherished as the heart of American life. Americans of all stripes believe that at least some aspects of “private life” are not the law’s business, even though they disagree about just what aspects those are. It is thus no surprise that questions about the scope of individual autonomy pervade and perplex family law.

SCHNEIDER & BRINIG, *supra* note 4, at 165.

40. See Pouncy, *supra* note 31.

41. See sources cited *supra* note 31.

42. Mark Strasser, *A Small Step Forward: The ALI Domestic Partners Recommendation*, 2001 BYU L. REV. 1135.

ernment benefits makes this position particularly appealing in a society that highly values equality. By rejecting hierarchies among loving couples with respect to their worthiness for state recognition, the Equality Position fosters fundamental values of equality and fairness. Moreover, the Equality Position is immune from attack in those states that have laws prohibiting discrimination based upon, among other factors, sexual orientation and/or marital status.⁴³

Finally, the Equality Position is supportive of the goal of furthering the rights of gay and lesbian people.⁴⁴ By not cordoning off same-sex couples into a unique status maintained solely for gay and lesbian people, the Equality Position emphasizes the commonality that same-sex couples have with all loving couples. Moreover, any political attempt to repeal state-sponsored domestic partnership status for opposite-sex couples (perhaps out of concern that it undermines marriage) will be forced to confront the fact that same-sex couples are also covered by the domestic partnership scheme. Of course legislators could choose to maintain such a scheme only for same-sex couples. However, any debate on the weaknesses of domestic partnerships will inevitably force a legislature to confront directly arguments as to the inherent unfairness of not extending full marriage rights to gay and lesbian people.

C. The Moralistic Position

Finally, let us examine the Moralistic Position, which I believe to be the least defensible of the three positions and one that runs counter to basic goals of family law. The Moralistic Position begins from the premise that, to protect the institution of marriage, the State must refuse to recognize any alternative relationships, including domestic partnerships. To give such recognition would, in effect, give the State's imprimatur to such relationships, and thereby make marriage less attractive. This position is represented by a number of commentators. Typical is Lynne Marie Kohm's suggestion: "[U]nder chapter 6 of these proposals, marriage *per se* is no longer necessary for intimacy and companionship to be afforded many financial and

43. See Habegger, *supra* note 2, at 1007.

44. The major gay rights organizations—the Human Rights Campaign, the National Gay and Lesbian Task Force and Lambda Legal Defense and Education Fund—all either support or are not opposed to including unmarried opposite-sex couples within domestic partnership schemes. See Donovan, *supra* note 1, at 665–66.

legal benefits. Marriage will be downgraded, and pragmatically easier to abandon.”⁴⁵ She goes on to assert that “[d]iluted by options like domestic partnership, the institution of marriage will suffer from being watered down, weakened, even insipid.”⁴⁶ The Moralistic Position’s view that domestic partnership schemes might undermine the institution of marriage is surely not irrational, though it does rely on complex empirical assumptions that few seem concerned about verifying through social science research.⁴⁷

Let us assume, for the sake of argument, that allowing a proliferation of state-recognized, alternative relationships might in the long run undermine marriage. As suggested throughout this paper, a central function of family law is its channeling function—using law to encourage couples to marry in order to foster long-term, stable, mutually supportive relationships between two people, relationships that provide an emotionally healthy and economically-viable setting in which to rear children. Surely, this is a function of family law that Moralists would endorse, and, arguably, this function is not fostered by domestic partnership schemes.

But if Moralists truly seek to channel couples into long-term stable relationships (and on that basis refuse to recognize domestic partnerships schemes), there is no reason not to extend marriage rights to *all* couples who seek to spend their lives in long-term, stable, committed relationships and possibly raise children together—same-sex couples as well as opposite-sex couples. Why would a position that values marriage so highly not seek to open that institution to all couples willing to accept the rights and obligations inherent in marriage?

The reason is clear. Marriage is not the only value important to the Moralistic Position. It is emblematic of the Moralistic Position that it rejects any state recognition of same-sex relationships. In fact, based on this antihomosexual commitment,⁴⁸ the Moralistic Position

45. See Lynne Marie Kohm, *How Will the Proliferation and Recognition of Domestic Partnerships Affect Marriage?*, 4 J.L. & FAM. STUD. (forthcoming no. 1, 2001).

46. See *id.*

47. Margaret Brinig’s paper presented at this conference is one of the few attempts to actually employ social science research to support the view that domestic partnership schemes have a tendency to undermine marriage between opposite-sex couples. See Brinig, *supra* note 38. Brinig’s paper, which addresses only opposite-sex couples, is silent on same-sex relationships. Accordingly, her position does not fall within the Moralistic Position as defined in this article.

48. In my view, the body of scholarship by commentators such as Lynn Wardle warrants

not only refuses to extend marriage rights to same-sex couples. It goes further and opposes granting second-class, domestic partnership status to such couples. It is my contention that this antihomosexual value ends up consuming any consistent commitment that the Moralistic Position may have to the family law goals that underlie the institution of marriage.

How does the Moralistic Position attempt to reconcile its pro-marriage value and its antihomosexual value? It does this through two strategies. The first is to appeal to history and definition. The second, more insidious strategy is to resort to overstatement and distortion. Let us examine these two strategies by focusing on the work of Lynn Wardle.

First, let us examine his appeal to history and definition. Wardle states:

There is no doubt that historically marriage has always referred to the union of a man and a woman in a unique relationship of commitment and intimacy, and that marriage today is overwhelmingly defined as a heterosexual union. . . .

. . . .

. . . [T]he union of a man and a woman is part of the very nature and reality of the marriage relationship itself. The covenant union between a man and woman that we call marriage is unique.⁴⁹

History is a frightening touchstone on which to rely for the ultimate, unchanging meaning of marriage. Historically, marriage has meant an institution in which women were subjugated to men; historically, under miscegenation laws, marriage has meant an institution in which interracial couples were not allowed to have their loving relationships legally recognized.⁵⁰ Thankfully, the historical “meaning” of marriage has not stopped enlightened courts and legis-

the description “antihomosexual.” See, e.g., Wardle, *Redefining Marriage*, *supra* note 3; Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1 (1996); Lynn D. Wardle, *Loving v. Virginia and the Constitutional Right to Marry, 1790–1990*, 41 HOW. L.J. 289 (1998); Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833 (1997).

49. See Wardle, *Redefining Marriage*, *supra* note 3, at 748–49. See also David O. Coolidge & William C. Duncan, *Beyond Baker: The Case for a Vermont Marriage Amendment*, 25 VT. L. REV. 61, 66–67 (2000).

50. See *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down state miscegenation laws as unconstitutional).

latures from tossing those aspects of the “definition” of marriage onto the waste pile of other social prejudices that society has rejected.⁵¹

Because history and definition alone cannot do the trick, the second and more insidious strategy employed by the Moralistic Position to justify denying marriage rights to same-sex couples is a strategy of overstatement and distortion. To begin with, the Moralistic Position grossly overstates the benefits that have come to society from the fact that traditional marriage has been between a male and a female, and asserts that these supposed benefits could never be achieved by same-sex coupling. Again, Wardle’s writings supply numerous examples:

The nature of the relationship between two persons of the same sex is fundamentally different than the heterosexual relationship that is marriage. . . . [N]o other companionate relationship provides the same great potential for benefiting individuals and society as the heterosexual covenant union we call marriage, and that is why only committed heterosexual unions are given the legal status of marriage. . . .

. . . .

. . . The legal status of marriage has been reserved exclusively for special covenant heterosexual unions because those unions are unique and uniquely beneficial. The right to enter that unique relationship is now generally recognized to be one of the basic human rights because that relationship is unique and uniquely important to humanity.⁵²

Though Wardle is effusive in his use of the word “unique” to describe opposite-sex marriage,⁵³ his work is devoid of social science data to support these overstated claims. Moreover, also absent from his work is any support for the proposition that committed same-sex

51. With respect to marriage rights, other countries have moved more quickly than has the United States in casting aside anti-homosexual prejudices concerning same-sex marriage. On April 1, 2001, the Netherlands extended full marriage rights to same-sex couples. See *Dutch Gay Couples Prepare to Wed: First Legal Marriages to Take Place Sunday*, DENV. POST, Mar. 1, 2001, at A21, available at 2001 WL 6748047.

52. Wardle, *Redefining Marriage*, *supra* note 3, at 749–50.

53. It is surely a misdescription to use the term “heterosexual” to describe traditional marriage. The examples are rampant of gay individuals who bowed to social pressure by marrying someone of the opposite sex, only to cause extreme unhappiness both to their spouses and to themselves.

couples could not also gain the identical benefits from marriage that opposite-sex couples gain and, in turn, benefit the broader society through their legal union.

Apart from not supporting his exaggerated claims, Wardle's description of opposite-sex marriage simply does not match the reality of modern society. Given current divorce rates and the rise in domestic violence, empirical data cannot possibly support the glorification attributed by the Moralistic Position to the gendered nature of traditional marriage. Andrew Sullivan points out:

[T]oday's marriage law is utterly uninterested in character. There are no legal requirements that a married couple learn from each other, grow together spiritually, or even live together. A random woman can marry a multimillionaire of a Fox TV special and the law will accord that marriage no less validity than a lifelong commitment between Billy Graham and his wife. The courts have upheld an absolutely unrestricted right to marry for deadbeat dads, men with countless divorces behind them, prisoners on death row, even the insane."⁵⁴

At the same time, the Moralistic Position distorts the truth about gay and lesbian people by demonizing and dehumanizing virtually every aspect of their lives. Gays and lesbians are portrayed as dangerous, unstable, promiscuous, disease-spreading socio-paths, unable to sustain lasting meaningful relationships and therefore unworthy of marriage rights. A clear example is, again, set forth in the work of Lynn Wardle. In an effort to portray gay and lesbian people as psychologically flawed, Wardle attributes a root cause of homosexuality in modern society to the rise in divorce rates and general decline in our society's respect for marriage. In an attempt at armchair psychology, he states:

Many of those children of the first generation of liberal (no-fault) divorce and socially accepted childbearing out of wedlock are now of marriage age. Some may be drawn to homosexual relationships as a result of the childhood pains or fears associated with marital failure or other family dysfunctioning. . . .

54. Andrew Sullivan, *Marriage or Bust—Why Civil Unions Aren't Enough* (2001) available at http://www.andrewsullivan.com/text/hits_article.html?5.homosexuality; see also WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 62-66 (1996) (suggesting that, in granting marriage licenses, states have never imposed requirements that the applicants be good people or prove that they will be good spouses).

Likewise, marital breakup sours some divorced men and women on marriage. Among the ranks of lesbian and gay couples are many divorced persons. They, too, may have turned to homosexual relationships after the painful experience of their own marital failure.⁵⁵

Wardle is oblivious to the fact that gay people appear across societies and throughout history,⁵⁶ and his attempt to tie homosexuality to the decline of the modern family is less than compelling.

In addition, the Moralistic Position turns a blind eye to the fact that millions of children are currently being reared in families by same-sex couples, children who have the same need for the state to recognize and support their parents' relationships as do children being reared by opposite-sex couples.⁵⁷ Though the Moralistic Position grandstands the importance of marriage, its antihomosexual agenda keeps it from acknowledging that extending its bounds to all couples who seek to fulfill its underlying purposes would only strengthen the institution of marriage. Though the rhetoric of family values runs throughout the Moralistic Position, it is one of the least family-oriented movements in the history of family law.

So how does the Moralistic Position fare along the three parameters we have been examining? In terms of the channeling function of family law aimed at fostering long-term, stable relationships, the Moralistic Position is an abysmal failure. Its antihomosexual commitment blinds it to the fact that extending marriage rights to gay people would only enhance the possibility that same-sex couples would remain committed to one another for much longer periods of time than has been the norm in the gay community.⁵⁸ Moreover, the idea that somehow extending marital rights to same-sex couples will result in fewer opposite-sex couples choosing to marry is groundless.

55. Wardle, *Redefining Marriage*, *supra* note 4, at 764.

56. See JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY 41–59 (1980) (arguing that gay people have existed throughout history).

57. “Approximately three million gay men and lesbians in the United States are parents, and between eight and ten million children are raised in gay or lesbian households.” *Developments—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1629 (1989) (citing *ABA Annual Meeting Provides Forum for Family Law Experts*, 13 Fam. L. Rep. (BNA) 1512, 1513 (Aug. 25, 1987)).

58. See, e.g., ESKRIDGE, *supra* note 54, at 71 (“Getting married signals a significantly higher level of commitment, in part because the law imposes much greater obligations on the couple and makes it much more of a bother and expense to break up. . . . Moreover, the duties and obligations of marriage directly contribute to interpersonal commitment.”).

With respect to the values of fairness and equality, the Moralistic Position posits differences between same-sex and opposite-sex unmarried couples and then urges that these differences are grounds for not allowing same-sex couples to marry. For example, Wardle suggests that same-sex relationships are inherently nonmonogamous: "Obviously, sexual relations between persons of the same gender are different from sexual relations between male-female couples. But that is not the only difference. For instance, sexual fidelity is not an expected or typical characteristic in same-sex relationships, especially among gay men."⁵⁹

He uses this as an argument for not extending marriage rights to gay men. (It's less than clear how Wardle moves from this argument to an argument that lesbians also should not be allowed to marry.) Having pointed out that no state investigates an individual's character or suitability for marriage before issuing a marriage license, Andrew Sullivan offers a telling response to Wardle:

Even if you concede that gay men—being men—are, in the aggregate, less likely to live up to the standards of monogamy and commitment that marriage demands, this still suggests a further question: Are they less likely than, say, an insane person? A straight man with multiple divorces behind him? A murderer on death row? A president of the United States? The truth is, these judgments simply cannot be fairly made against a whole group of people. We do not look at, say the higher divorce and illegitimacy rates among African Americans and conclude that they should have the right to marry taken away from them. In fact, we conclude the opposite: It's precisely because of the high divorce and illegitimacy rates that the institution of marriage is so critical for black America. So why is that argument not applied to homosexuals?⁶⁰

Even if an identifiable group of people in our society were shown to have higher divorce or illegitimacy rate, nonetheless we would consider it a horrendous violation of human rights to prohibit such persons from marrying, believing that all should have the opportunity to take advantage of this fundamental human right.⁶¹ The argu-

59. Wardle, *Redefining Marriage*, *supra* note 3, at 759.

60. See Sullivan, *supra* note 54.

61. The Supreme Court has noted: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Loving v. Virginia*, 388 U.S. 1, 12 (1966).

ment that loving gay couples should not be allowed to marry because they are more likely to be promiscuous is one we would never allow for opposite-sex couples, irrespective of what statistics might show. The antihomosexual value of the Moralistic Position leads it to take what can only be described as immoral, inhuman positions when it comes to the rights of gay people to pursue happiness and fulfillment in their lives, pursuits fundamental to our society.

Finally, with respect to the consideration of gay rights, little need be said. It is the homophobic rhetoric of the Moralistic Position that has led so many people in our country to ignore the truth of the lives of gay and lesbian people.⁶²

IV. CONCLUSION

In the end, perhaps the Moralistic Position is right: domestic partnership arrangements may detract from the emphasis that our society has traditionally given to marriage relationships. As Bruce Hafen notes, “[L]egal marriage is *more* likely than is unmarried cohabitation to encourage . . . personal willingness to labor and ‘invest’ in relationships with other people, whether child or adult.”⁶³

Unfortunately, our society has not yet met the challenge of treating all loving couples in a fair and equal manner. Currently, same-sex couples have only the domestic partnership option available to them. In this second-best world, it is important that the ultimate values that motivate gay advocates to pursue extending the right to marry to same-sex couples—fair and equal treatment before the law—also guide decision-making along the road to that goal. So long as domestic partnership schemes are the only alternative available to same-sex couples, fairness dictates that these rights be extended equally to opposite-sex, unmarried couples. The Equality Position is, accordingly, the preferred approach for those drafting and enacting domestic partnership statutes and ordinances.

62. See William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327 (2000) (presenting a history of the rhetoric of antigay discourse).

63. Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 490 (1983).

