

AN ANALYSIS OF THE LAW
REGARDING SAME-SEX
MARRIAGE, CIVIL UNIONS,
AND DOMESTIC PARTNERSHIPS

A WHITE PAPER

Revised and updated through March 2005.

AMERICAN BAR ASSOCIATION
SECTION OF FAMILY LAW
WORKING GROUP ON
SAME-SEX MARRIAGES
AND NON-MARITAL UNIONS

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I. INTRODUCTION

The issue of same-sex marriage and non-marital unions burst with a fury into the national consciousness in 2003. It became obvious that this issue would be a central part of the national debate for the immediate future. Therefore, upon becoming Chair of the ABA Section of Family Law in August 2003, I appointed a Working Group on Same-Sex Marriage and Non-Marital Unions. I asked Sandra Morgan Little, a former Section Chair, to lead this Working Group.

The Working Group published its first report in June 2004. This report is an update to that first report and includes all of the recent legislative, judicial and constitutional changes that have occurred at the local, state, national and international levels through March 2005.

The Section of Family Law is a leader on marital and family law issues. Therefore, the Section is in a position to lead the discussion within the ABA on this issue and to provide information and resources to those considering the complex implications of this issue.

The mission of the Working Group was to study and report to the ABA on the status and legal ramifications of recognition of same-sex marriages and non-marital unions. The charge to the group was to produce a report that would prove a useful roadmap to those considering this issue at the local, state, and national levels.

The Working Group was charged to not take a position on the legalization of gay marriage. (The policy making body of the American Bar Association — the ABA House of Delegates — has not taken a position on whether same-sex marriages should be legalized, although the House of Delegates in 2004 approved a resolution that regulation of marriage should continue to be handled by the states, rather than by the federal government.)

The members of the Working Group have again worked diligently to produce an objective report on the legal and policy issues impacted by this national debate. Group members included family law practitioners from the Section of Family Law as well as lawyers from other ABA sections impacted by this issue. The knowledge gained from lawyers in other practice areas added depth to this report.

It is our hope that this updated report will help those involved in this very important public policy debate to carefully consider the range of issues affected. Our report covers the history of marriage; the evolution of the laws regarding sexual orientation and same-sex couples; and areas of the law that are impacted by recognition of same-sex unions.

Finally, the Section of Family Law owes a debt of gratitude to all members of the Working Group. I would personally like to thank Sandra Morgan Little for chairing the group. Her leadership was constant and invaluable. In addition, I would like to thank Professor Jeff Atkinson for serving as reporter and editor of this final report. This white paper would not have been produced without his dedication and commitment. Lastly, I would like to thank Courtney Joslin, who has been a valuable resource throughout this process.

The Working Group hopes that this updated White Paper will serve as a useful guide and resource as we all grapple with the complicated issues presented by same sex unions.

Phyllis G. Bossin
Immediate Past Chair
ABA Section of Family Law

May 2005

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III. MISSION STATEMENT OF THE WORKING GROUP

The mission of the American Bar Association Family Law Section Working Group on Same-Sex Marriages and Non-Marital Unions is to study and report to the ABA on the status and legal ramifications of recognition of same-sex marriages and non-marital unions.

IV. EXECUTIVE SUMMARY

A prominent issue in recent years has been whether persons of the same sex should be able to marry, form civil unions, or enter into domestic partnerships. In the last ten years, the issue of the rights of couples of the same sex has been the subject of hundreds of statutes local ordinances, constitutional amendments, and proposed constitutional amendments. Scrutiny of the issue rose to an even higher level after the Supreme Judicial Court of Massachusetts held in November 2003 that same-sex couples have a right to marry under the state's constitutional principles of individual liberty and equality.

To help promote objective analysis of the subject, the American Bar Association Section of Family Law created a Working Group on Same-Sex Marriages and Non-Marital Unions. The working group produced this white paper to describe the state of the law in the United States and other countries regarding same-sex marriages, civil unions, and domestic partnerships, and to clarify areas of law that would be impacted by recognition of such unions.

History of Marriage

The concept of marriage has changed over the centuries. In Biblical times, polygamy (having more than one wife) was common. Throughout the nineteenth century, polygamy also was practiced by The Church of Latter-day Saints (the Mormons) in the United States and continues to be practiced in some Islamic cultures. Polyandry (having more than one husband) was practiced in Central Asia, particularly in Tibet, Sri Lanka, and southern India.

In second-century Rome, marriage contracts between two men of the same age were permitted, although men

who entered into such marriages also were ridiculed. The Catholic Church was not formally involved in marriage ceremonies until the Middle Ages. In 1753, England passed the Marriage Act, which took control of marriage from individuals and the church and vested it in the state as a legal entity. From that point on, marriages in England that had not taken place in the Church of England or in a synagogue were rendered invalid. Another marriage act, passed in 1836, provided that marriage was a civil action effected by mutual consent and did not require a religious ceremony.

American colonies provided a mixture of civil and religious marriage ceremonies, according to the laws and customs of the area. Common law marriages also were allowed. In the nineteenth century, members of the Oneida Community in New York practiced "complex marriage." Adult members of the community were married to all other adult members of the community, and the group regulated sexual contact. Interracial marriages were prohibited in many states until 1967, when the United States Supreme Court in *Loving v. Virginia* struck down such laws, saying: "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness. . . ."

The Census Bureau reports that in the year 2003, there were 58.6 million married couples in the United States (made up of a man and a woman). In the same year, there were 5.3 million couples that were living together, but were not married. Of that number, about one in eight couples (658,711) had partners of the same sex, although that may be a low estimate.

Developments in the Law Regarding Sexual Orientation and Gender Identity

Sodomy statutes. Over the last twenty years, the law has changed significantly regarding sexual orientation and gender identity. In 2003, the U.S. Supreme Court in the case of *Lawrence v. Texas*, overruled a 1986 case that upheld the sodomy conviction of two gay men for consensual conduct in the bedroom of one of the men's homes. The Court in *Lawrence* held that making private sexual conduct a crime was a violation of due process.

Equal protection. In another case, the U.S. Supreme Court struck down a state constitutional amendment that sought to preclude all enactments that would prohibit discrimination against persons based on their sexual orientation. The Court said that the state constitutional amendment was motivated by animus to a particular class of people and thus, under equal-protection analysis, the amendment was not rationally related to legitimate state interests.

Employment discrimination. Fifteen states and the District of Columbia have statutes that prohibit discrimination in employment on the basis of sexual orientation, and five of those states prohibit discrimination on the basis of gender identity. Some states use executive orders to prohibit such discrimination. No federal statute prohibits discrimination in employment on the basis of sexual orientation or gender identity.

Custody and visitation. A trend in the law is for states to treat a parent's sexual orientation as a neutral factor in deciding custody or visitation – meaning that a parent's sexual orientation will not justify loss of custody or a restriction on visitation, unless it is shown that the parent's sexual orientation or activities have harmed the child. In some states, however, being lesbian or gay, without any showing of harm, is sufficient to deny that parent custody or restrict visitation.

Adoption. Many states allow same-sex couples to enter into second-parent or joint adoptions. A second-parent adoption allows a same-sex partner to adopt her or his partner's biological or adoptive child without terminating the first legal parent's rights. Other states, however, including Florida, prohibit gay and lesbian individuals from adopting children.

Military. The "Don't Ask, Don't Tell Policy" has been in effect since 1993. The policy provides that a member of the armed forces shall be discharged if: (1) the member has engaged in or has solicited another to engage in "homosexual acts"; (2) the member has stated that he or she is lesbian, gay, or bisexual, or words to that effect; or (3) the member has married or attempted to marry a person of the same sex. In the year 2000, 1,231 service members were discharged under the policy. Multiple legal actions are challenging the policy.

Schools. Eight states and the District of Columbia have laws prohibiting discrimination or harassment of students on

the basis of sexual orientation, and three states (California, Minnesota, and New Jersey) explicitly prohibit discrimination or harassment in schools on the basis of gender identity or expression. At least four states have promulgated professional standards for educators, prohibiting discrimination against students on the basis of sexual orientation. In addition to these statutes, courts have held that failure of a school to respond to discrimination on the basis of actual or perceived sexual orientation violates the Equal Protection Clause.

Transgender people and marriage. Only a handful of courts have ruled on the validity of a marriage entered into after a transsexual person has undergone sex-reassignment. At least two courts have recognized the individual's reassigned sex for the purpose of marriage. In contrast, a few courts have ruled that, for purposes of marriage, a person's legal sex is irrevocably determined at birth.

Areas of Law Affected

The United States government's General Accounting Office (GAO) has identified 1,138 federal rights, responsibilities, and privileges automatically accorded to couples based on marital status. In addition, state and local governments as well as private organizations provide hundreds of additional rights based on marital status. The areas of law include: family law, taxation, health-care law, probate, torts, government benefits and programs, labor law, private-sector benefits, real estate, bankruptcy, immigration, and criminal law. If federal recognition is given to marriages and other unions or partnerships between two people of the same sex, more than one thousand rights and responsibilities of different-sex couples will be extended to cover couples of the same sex.

Case Law

Three state supreme courts have declared (or seemed prepared to declare) substantial rights to same-sex couples. In November 2003, the Supreme Judicial Court of Massachusetts held in *Goodridge v. Department of Public Health* that same-sex couples have a right to marry under the state constitution's principles of individual liberty and equality. Four years earlier, the Supreme Court of Vermont held that same-sex couples do not necessarily have a right to marry, but they do have a right under the state constitution to the same benefits and protections as different-sex couples who marry. In 1993, the Supreme Court of Hawaii held that a prohibition of marriage by same-sex couples might constitute sex discrimination under the state constitution. After that decision, Hawaii amended its constitution to allow the legislature "to reserve marriage to opposite-sex couples."

Courts of review in seven other jurisdictions (Arizona, the District of Columbia, Indiana, Kentucky, Minnesota, Pennsylvania, and Washington) have held that prohibitions of same-sex marriages were constitutional under different prin-

principles, including due process and equal protection. In the Massachusetts *Goodridge* case, three justices dissented, stating that the decision of whether to allow same-sex couples to marry should be made by the legislature, not the courts.

Statutory Protections

Many states provide statutory protections and rights to same-sex couples, and some states provide benefits to state employees in same-sex relationships. These rights, protections, and benefits vary from state to state.

Only two states permits civil unions (Connecticut and Vermont), two states provide reciprocal beneficiary relationships (Hawaii and Vermont), and three states provide state domestic partnership registries (California, Maine, and New Jersey). Vermont's civil-union status grants same-sex couples all of the hundreds of state-conferred rights and responsibilities as different-sex couples, at least while the couple resides in Vermont. California's domestic partnership registry is similar to Vermont's civil union statute—providing registered domestic partners with almost all of the state-conferred rights and responsibilities provided to married spouses. Other states provide more limited protections, ranging from one to two to approximately sixty to seventy of the hundreds of state-conferred rights. Such rights include, but are not limited to: hospital visitation, the right to make health-care decisions, eligibility for certain tort claims, workers' compensation, family leave, eligibility for family health insurance for state employees, inheritance under the intestacy laws, and state tax deductions or exemptions. In addition to statutory protections, approximately seventy cities and counties also provide domestic partner registries.

Defense of Marriage Acts (DOMAs)

In the mid-1990s, states began enacting so-called "defense of marriage acts" (DOMAs). The purpose of the state DOMAs is to prohibit same-sex couples from marrying within the state and to provide that the state will not recognize such marriages performed in other states. By March 2005, forty states had DOMAs, seventeen of which are provided in the respective state's constitutions.

The U.S. government has a defense of marriage act that provides for the purpose of federal laws and regulations: "'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." The federal DOMA also provides that no state shall be required to recognize a marriage entered into by a same-sex couple in another state.

In 2003 and 2004, resolutions were introduced in Congress to amend the United States Constitution to provide that "Marriage in the United States shall consist only of the union of a man and a woman" and to further provide that neither the federal constitution nor state

constitutions shall be construed to require that marital status or the legal incidents of marriage be conferred on any union other than the union of a man and a woman. Amendment of the U.S. Constitution requires a two-thirds vote of both the House and the Senate and approval by three-quarters of the states.

Recognition of Same-Sex Partnerships and Provision of Benefits by Private Sector Employers and Public Employers

As of March 2005, 7,602 private sector companies offer domestic-partnership health benefits. The number of Fortune 500 companies offering health benefits is now at 233.

Eleven state governments provide health benefits for domestic partners, and as of March 2005, 129 city and county employers provide such benefits. Only 2% or less of employees eligible for employer-provided domestic partnership benefits actually apply for coverage.

Recognition of Same-Sex Couples in Other Countries

Three countries allow same-sex couples to marry (Netherlands, Belgium, and several provinces in Canada). Canada is expected to extend such privileges to couples throughout the country some time in 2005. It is also expected that Spain will allow same-sex couples to marry sometime in 2005, a bill authorizing such marriages having been passed in the lower house of the Spanish Parliament at the time of this writing.

In addition to full marriage rights, many northern European countries allow same-sex couples to enter into legal relationships with most of the rights and responsibilities of marriage. In 1989, Denmark became the first country to offer same-sex couples the right to enter into a registered partnership, and Denmark was followed by Norway, Sweden, Iceland, and Finland. Generally, registered partnerships provide all rights and responsibilities associated with marriage, except that in some countries, partners cannot adopt children who are not biologically related to one of the parents.

In 1995, Hungary extended common law marriage to same-sex couples. Since that time, Croatia, France, Portugal, and Germany, have created legal recognition for same-sex couples. In France, the recognition is called a "civil solidarity pact" (PACS), which allows for the registration of private contracts between two unmarried and unrelated individuals – either same-sex or different-sex – and grants access to benefits and obligations similar to those that exist for married couples. In several other countries, including Brazil, Colombia, Costa Rica, the Czech Republic, Israel, and New Zealand, same-sex couples have been granted some rights or responsibilities associated with marriage.

V. HISTORY OF MARRIAGE

A review of the history of marriage shows that the institution of marriage, rather than being a single, unchanging concept of one man and one woman committed to each other for life, has been a fluid paradigm, changing with the culture and societal norms of the time.

Originally, polygamy (having more than one wife at a time) was common in ancient civilizations in the middle east. In the Bible, for example, marriage was traditionally polygamous. Abraham was married to both Sarah and Hagar and had children with both.¹ Jacob married Leah and Rachel, and then married two of their maidservants.² He had children with all of them. Solomon was said to have had more than one thousand wives.³ The Bible also recites that a deceased husband's brother was to marry his widow, even if he was already married.⁴ The Code of Hammurabi, written in approximately 1780 B.C., also makes reference to a man being able to take a second wife.⁵ When referring to marriage, the code refers to "man and wife" or "woman and husband."⁶

Polygamy was, and still is, common in Islamic cultures. The Quran permits a man to have up to four wives. Indeed the Prophet Mohamed was said to have taken four wives.⁷ Even today, polygamy is found throughout the Middle East

In Asia, the major religions are Buddhism and Hinduism. Buddhism neither prohibits nor allows same-sex marriage. This position of neutrality arises from the belief that individuals should move to the good, and each person must determine what is good for him or herself.⁸ However, King Sihanouk of Cambodia, a predominantly Buddhist country, recently proclaimed that same-sex marriages were to be allowed in his kingdom.⁹ Hinduism does not condone same-sex marriage; instead it defines a marriage as the joining together of one man and one woman into a single spirit.¹⁰

When reviewing marriage in Greek culture, the marriage tradition of seventh century Sparta deserves special mention. The role of woman was solely to be a reproductive mother and considered the equal of, and as important as, the role of reproductive father. Marriage was viewed simply as a basis for procreation. Procreation was not limited to "married" couples. Wife-sharing and selective breeding were common practices in Sparta's quest for the production of strong warriors. Spartan society prized physical strength and encouraged the breeding

of children, especially males, for strength. Thus, if a man were not physically strong, he likely would not procreate with his wife and instead would allow a stronger man to impregnate her. Moreover, if a union did not produce males, the woman was encouraged to seek another man to impregnate her so that she could have a son.¹¹

Polyandry (having more than one husband) was practiced in Central Asia, particularly in Tibet, Sri Lanka, and southern India, and a few areas in Africa. This practice is believed to have arisen from a demographic imbalance: men far outnumbered women or were absent for long periods of times.¹²

For upper-class Romans, marriage was simply a matter of consent. In second-century Rome, marriage contracts between two men of the same age were permitted, but often were ridiculed.¹³ A woman and man who lived together for more than one year were considered married. Likewise, parties who announced their intention to be married in front of ten witnesses were considered married. An elaborate civil or religious ceremony was not necessary, and marriage was basically a private affair. Under Roman law, marriage was a way to determine property distribution, ownership, and inheritance. A woman, once married, became legally removed from her former family and could not inherit from them, nor could she own property in her own name. Indeed, any property she owned at the time of the marriage passed to her husband.¹⁴

In about the tenth century, Rabbi Gershom of Germany propounded a formal regulation for all Ashkenazic (European) Jews, which stated that polygamist marriages were illegal.¹⁵

The Catholic Church was not formally involved in marriage ceremonies until the Middle Ages. Up until the twelfth century, if a priest were present at a marriage, he performed blessings and prayers during the ceremony and, in addition, the couple would offer their own prayers. The priest then asked the couple to agree to be committed to each other in the presence of all present.¹⁶ From the fifth to approximately the fourteenth century, the Roman Catholic Church conducted special ceremonies to bless same-sex unions, which were considered spiritual, though not sexual, unions.¹⁷

In England, weddings in the thirteenth century among the upper class became a religious event, but even then, the church only blessed the marriage and did not require the parties to make a civil, binding commitment to each other.¹⁸ That changed in 1563, however, when the

Council of Trent defined Catholic marriage as a ceremony celebrated by a priest in a Catholic church before two witnesses. By the seventeenth century, the wedding ceremony was a religious event in all of the countries in Europe.

In 1753, England passed the Marriage Act, which took control of marriage from individuals and the church and vested it in the state as a legal entity.¹⁹ From that point on, marriages that had not taken place in the Church of England or in a synagogue were rendered invalid. Although church law had regularized the ceremony of marriage by insisting that banns were read and licenses paid for, prior to 1753, the civil law required only that a marriage could be proved to have taken place. In less than one hundred years, a second act, the Marriage Act of 1836, was passed. During the period between 1753 and 1836, many people simply refused to marry officially because they did not recognize the authority of the relatively new Church of England. The new act reflected the essential view of marriage by the culture of the time, which was that marriage was a civil action effected by mutual consent and did not require a religious ceremony.²⁰

During Colonial times, Americans followed the customs of England. Thus, a religious ceremony was secondary to a civil ceremony in many colonies. In some colonies, civil magistrates were given authority to perform marriage ceremonies without any religious requirements. Some colonies, however, required that the customs of the church prevail and did not permit a civil marriage ceremony. Virginia was one such colony.²¹ Common law marriages were common, and some states still allow them today.²²

During colonial times and until the Emancipation Proclamation, slaves were not permitted to marry. Often, however, slaves did marry religiously, with another slave who was the leader of the church in their area officiating. The government did not recognize the union, and slave owners retained as property any children of the “marriage.”²³

In the seventeenth and eighteenth centuries, marriage in America evolved into the monogamous one-man one-woman model of today. This mode, however, was never totally accepted in American society. Several major philosophies and religions rejected the one-man, one-woman model. For example, Mormonism, a uniquely American religion, had as one of its basic tenets the practice of polygamy. Before Utah was allowed to enter the Union as a state, it was forced to outlaw polygamy. However, some Mormons still practice polygamy in Utah and other Mormon areas of the western United States.²⁴

In addition, during the nineteenth century, the Utopians were a religious movement that considered the transformation of the institution of marriage to be fun-

damental to their visions of a reordered society. Members of the Oneida Community in New York, for example, practiced “complex marriage.” Adult members of the community were considered married to all other adults members of the community, and sexual contact was regulated solely by the group.²⁵

During the early part of the twentieth century, advocates of the “free love” movement argued that monogamous marriage oppressed women and that marriage was an obsolete institution.²⁶ At the same time in America, cohabitation between heterosexual couples without benefit of marriage was illegal. Indeed, in the 1990s, in six states (Florida, North Carolina, North Dakota, Mississippi, Virginia, and West Virginia) cohabitation was illegal,²⁷ although after the U.S. Supreme Court decision in *Lawrence v Texas*,²⁸ the validity of such laws is in question.

Marriage laws in America have changed throughout its history. For example, until 1930, twelve states allowed boys as young as fourteen and girls as young as twelve to marry with parental consent.²⁹ As late as 1940, married women could not make a valid contract in twelve states.³⁰ Consanguinity laws continue to differ among the states.

Until 1967, in some states, a union between a white person and a person of color was void *ab initio*. At one point, forty states in this country made the marriage of a white person to a person of color a crime, and such marriages were decried as immoral and unnatural. In 1967, the U. S. Supreme Court in *Loving v. Virginia*³¹ struck down laws prohibiting interracial marriage as a violation of both due process and equal protection under the Fourteenth Amendment. The Court said: “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness”³² In a later case, the Supreme Court echoed that view stating: “the right to marry is of fundamental importance for all individuals.”³³

The Census Bureau reports that in 2003, there were 58.6 million married couples in the United States (made up of a man and a woman).³⁴ In the same year, there were 5.3 million couples that were living together, but were not married. According to 2000 data, of the unmarried couples, about one in eight (658,711) had partners of the same sex. Of the couples of the same sex, 332,645 couples had male partners and 326,066 had female partners.³⁵ The Census Bureau explained that “These figures may under-represent the number of cohabiting couples because only householders and their partners, not all unmarried couples present in a household, are tabulated. Moreover, respondents may be reluctant to classify themselves as cohabiting and may describe themselves as roommates, housemates, or friends.”³⁶

The institution of marriage has changed over the centuries and is likely to continue to do so.

VI. DEVELOPMENTS IN THE LAW REGARDING SEXUAL ORIENTATION AND GENDER IDENTITY

A. Introduction

The question of whether the law should set or reflect societal norms is nowhere better presented than in the evolution of the law in the area of sexual orientation. Affected areas of the law range from criminal statutes to discrimination in housing, employment, and schools and to eligibility for military service, to the custody and adoption of children, and now to the very definition of marriage.

B. Sodomy Statutes

A leading example of changes in the law regarding sexual orientation is the U. S. Supreme Court's treatment of cases involving sodomy statutes. In the 1986 case of *Bowers v. Hardwick*,³⁷ the Supreme Court upheld the constitutionality of a Georgia sodomy statute. Mr. Hardwick had been arrested for committing a consensual act "with another adult male in the bedroom of [Mr. Harwick's] home."³⁸ In upholding the statute, the Court referred to standards for identifying "rights qualifying for heightened judicial protection"³⁹ – including "those fundamental liberties that are implicit in the concept of ordered liberty such that neither liberty nor justice would exist if [they] were sacrificed . . . [and] liberties that are deeply rooted in this Nation's history and tradition."⁴⁰

The Court found that "neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy."⁴¹ The Court noted that when the Fourteenth Amendment was adopted in 1868, thirty-two out of thirty-five states had criminal sodomy laws; in 1961, all fifty states had such laws; and in 1986 (when *Bowers* was decided), twenty-four states and the District of Columbia continued, "to provide criminal penalties for sodomy performed in private and between consenting adults."⁴² Thus, the Court held that the Georgia statute did not violate fundamental rights and there was a rational basis for the law.

In 2003, seventeen years after *Bowers*, the Supreme Court overruled *Bowers* and held that a Texas sodomy statute violated the due process liberty rights of two gay men. In *Lawrence v. Texas*,⁴³ police who were investigating a report of a weapons disturbance, entered the apartment of John Lawrence, and found Mr. Lawrence and another "engaging in a sexual act."⁴⁴ The men "were arrested, held in custody over night, and charged and convicted before a Justice of the Peace."⁴⁵ In overruling *Bowers*, the Court said:

Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.⁴⁶

In reaching its decision, the Court noted that the number of states with sodomy statutes had dropped to thirteen, and that the European Court of Human Rights had held (prior to *Bowers*) that criminal laws prohibiting homosexual conduct were invalid under the European Convention on Human Rights.⁴⁷ The Court added that its decision in *Lawrence* "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."⁴⁸

Justice O'Connor concurred in the result. She said she did not join the Court in overruling *Bowers* on due process grounds, but she, nonetheless, found the Texas statute to be unconstitutional on the basis of the Equal Protection Clause of the Fourteenth Amendment, because the statute outlawed homosexual, but not heterosexual sodomy. Justice O'Connor said, "we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons."⁴⁹

Justice Scalia, Chief Justice Rehnquist, and Justice Thomas dissented, stating that a prohibition of sodomy does not infringe on a fundamental right, that "[w]hat Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new 'constitutional right' by a Court that is impatient of democratic change"⁵⁰

C. Application of Equal Protection to a State Constitutional Amendment

In *Romer v. Evans*,⁵¹ the U.S. Supreme Court split along lines similar to the Court's decision in *Lawrence v. Texas* (described above). In *Romer*, the Court reviewed a 1992 amendment to the Colorado Constitution that sought to preclude all enactments that would prohibit discrimination against, or otherwise protect the status of, persons based on their homosexual, lesbian, or bisexual orientation. The amendment applied to any level of state or local government, including the legislative, executive, and judicial branches of government. The Court said the impetus for the amendment was the enactment of ordinances by some Colorado municipalities, banning discrimination on the basis of sexual orientation in the areas of housing, employment, education, public accommodations, and health and welfare services.

The Court, in a decision by Justice Kennedy, held that the Colorado amendment violated the Equal Protection Clause of the Fourteenth Amendment, stating: "that the amendment seems inexplicable by anything but animus toward the class that it affects [and] it lacks a rational relationship to legitimate state interests We must conclude that Amendment 2 [of the Colorado Constitution] classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."⁵²

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented, arguing the Court should not "take sides in this culture war" but instead should let the issue "be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions."⁵³ Justice Scalia added, "The people of Colorado have adopted an entirely reasonable provision which does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment."

D. Employment Discrimination

Explicit Statutory Protection

Currently, no federal law explicitly prohibits discrimination based on sexual orientation or gender identity. As of February 1, 2005, fifteen states and the District of Columbia include sexual orientation among the characteristics protected by employment discrimination statutes.⁵⁴ The first such statute was passed in 1982 in Wisconsin. In addition, five of these states (California,⁵⁵ Illinois⁵⁶, Minnesota,⁵⁷ New Mexico,⁵⁸ and Rhode Island⁵⁹) prohibit discrimination on the basis of gender identity. Several states by executive order prohibit discrimination on the basis of sexual orientation in public employment,⁶⁰ and two states – Pennsylvania⁶¹ and Kentucky⁶² – have executive orders explicitly prohibiting discrimination based on gender identity in public employment.

Many municipalities have local ordinances prohibiting both public and private discrimination on the basis of sexual orientation and/or gender identity with a variety of remedial and enforcement mechanisms. Currently, at least 255 cities and counties have ordinances prohibiting discrimination on the basis of sexual orientation.⁶³ In addition, as of February 15, 2005, at least sixty-two cities and ten counties had local ordinances explicitly prohibiting employment discrimination against transgender people. In particular, the number of jurisdictions prohibiting discrimination on the basis of gender identity has increased greatly over the past four years. Between 2002 and February 2005, three states and 34 cities and counties have added explicit protections for transgender people.⁶⁴

Case Law

Federal courts uniformly have denied Title VII (a federal law) protection to lesbians and gay men who have alleged employment discrimination based on sexual orientation.⁶⁵ Courts have held, however, that if a lesbian or gay person is discriminated against because they are perceived not to conform to stereotypes about how men and women are supposed to look and behave, such conduct constitutes sex discrimination in violation of Title VII.⁶⁶

A similar approach has developed regarding transgender individuals. In the past, courts rejected Title VII claims brought by transsexual plaintiffs,⁶⁷ but more recently, courts have allowed such claims when the person was discriminated against because he or she was perceived not to conform to gender stereotypes.⁶⁸

E. Custody and Visitation of Children

The manner in which courts treat a parent's sexual orientation as a factor in deciding child custody and visitation varies markedly from state to state and court to court. The trend in the law is for courts to treat a parent's sexual orientation as a neutral factor – similar to a parent's non-marital heterosexual relationship – which will not justify loss of custody or a restriction on visitation unless the parent's sexual orientation or activities can be shown to have harmed the child.⁶⁹ In some states, being lesbian or gay, alone, without a showing of harm, is sufficient grounds to deny that parent custody or restrict visitation.⁷⁰

F. Adoption

Adoption by Lesbian and Gay Individuals

Currently, Florida is the only state that categorically prohibits lesbians and gay individuals from adopting children.⁷¹ New Hampshire, which adopted a similar ban in 1987, repealed its statute in 1999. The Florida Supreme Court previously upheld the constitutionality of the state

ban on gay adoption in 1995.⁷² The statute is now being challenged in federal court. The lower court upheld the statute.⁷³ The Eleventh Circuit recently affirmed this decision, and the parties have requested en banc review.⁷⁴

In addition, although not specifically directed at lesbian, gay, and bisexual people, Utah prohibits adoptions by “a person who is cohabitating in a relationship that is not a legally valid and binding marriage under the laws of this state,”⁷⁵ and Mississippi prohibits “adoption by couples of the same gender.”⁷⁶

Second-Parent and Joint Adoptions

Second-parent adoption (also called co-parent adoption) is a legal procedure that allows a same-sex partner to adopt a partner’s biological or adoptive child without terminating the first legal parent’s rights. Joint adoption is a legal procedure in which both partners in a couple simultaneously adopt a child who, at least in the usual case, has no biological or pre-existing adopting relationship to either party.

Second-parent and joint adoptions protect children in same-sex-parent families by giving the child the legal security of having two legal parents, entitling them to financial benefits, including inheritance rights, wrongful death and other tort damages, Social Security benefits, and child support. In many situations, second-parent adoptions are important to ensure health insurance coverage for the child and to allow both parents to make medical decisions for the child. Second-parent adoptions also protect the interests of the parent and the child by ensuring a legally recognized parental relationship if the parents separate or if the biological (or first adoptive parent) dies or becomes incapacitated.⁷⁷

The concept of second-parent adoption was originated by the National Center for Lesbian Rights (formerly the Lesbian Rights Project) in the mid-1980s, when the first such adoptions were granted in San Francisco.⁷⁸ Over the past two decades, second-parent adoptions have been granted in a steadily growing number of state and county jurisdictions. Currently, second-parent adoption is available by statute or appellate court decision in: California, Connecticut, the District of Columbia, Illinois, Indiana, Massachusetts, New York, New Jersey, Pennsylvania, and Vermont.⁷⁹ Second-parent adoptions also have been granted by trial court judges in certain counties of at least fifteen other states, including: Alabama, Alaska, Delaware, Hawaii, Iowa, Louisiana, Maryland, Michigan, Minnesota, Nevada, New Mexico, Oregon, Rhode Island, Texas, and Washington.⁸⁰

Only four final decisions by courts of review have held that second-parent adoptions are not permissible under their respective adoption statutes.⁸¹

G. Military

President Dwight D. Eisenhower adopted the first explicit policy regarding homosexuality in the military during the height of the McCarthy era. The 1953 executive order provided: “True, confirmed, or habitual homosexual personnel, irrespective of sex, will not be permitted to serve in the Army in any capacity and prompt separation of known homosexuals from the Army is mandatory.”⁸² Subsequently, the Department of Defense issued a series of directives mandating expulsion of lesbian and gay people from the armed forces.

President Bill Clinton signed the current military policy, “Don’t Ask, Don’t Tell,” into law in 1993.⁸³ Prior to this, the military required all lesbian and gay personnel to be discharged from the military, but this practice was never codified into law. Current Don’t Ask, Don’t Tell policy provides that a member of the armed forces shall be discharged if one or more of the following findings are made: (1) the member has engaged in, has attempted to engage in, or has solicited another to engage in “homosexual act[s]”; (2) the member has stated that he or she is lesbian, gay, or bisexual, or words to that effect; or (3) the member has married or attempted to marry a person of the same sex.⁸⁴ “Homosexual acts” is defined broadly, to include “(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described [in paragraph (A)].”⁸⁵

Although Don’t Ask, Don’t Tell is purported to be less harsh than older policies, the number of discharges have increased since the law was adopted. In 1994, just after Don’t Ask, Don’t Tell was implemented, 617 persons were discharged under the policy.⁸⁶ In 2000, six years into the policy, discharges had risen to 1,231 service members.⁸⁷ Reports of anti-gay harassment also have increased under the policy.⁸⁸

About a dozen challenges have been made to Don’t Ask, Don’t Tell.⁸⁹ Although some lesbian and gay plaintiffs have won at the trial level and others challenging prior policies have won at the appellate level, no federal appellate court has held that Don’t Ask, Don’t Tell is unconstitutional. The military policy may be more vulnerable, however, in light of the U. S. Supreme Court’s recent decision in *Lawrence v. Texas*,⁹⁰ holding that statutes prohibiting private, consensual adult sexual conduct violate the Due Process Clause of the U.S. Constitution.

Thus far, the military’s primary argument in support of the policy is that the presence of known lesbian and gay people may affect unit readiness and morale, because, the military argues, heterosexual service members may

be uncomfortable serving with others who are known to be lesbian or gay. In *Lawrence*, the Supreme Court held that moral disapproval is not a sufficient rationale upon which to uphold a law or policy that infringes a person's liberty interests. Currently, at least two challenges to Don't Ask, Don't Tell are pending in federal district courts, one in the First Circuit and one in the Ninth Circuit.

H. Schools

Studies have demonstrated that lesbian, gay, bisexual, and transgender (LGBT) students are disproportionately targeted for harassment and discrimination in schools. Left unchecked, harassment may escalate to physical violence. Specifically, results from the 2001 National School Climate Survey indicate that more than 80% of LGBT students reported being verbally harassed because of their sexual orientation and nearly 70% of LGBT students reported feeling unsafe in school because of their sexual orientation.⁹¹

As of February 2004, eight states and the District of Columbia have laws prohibiting discrimination or harassment of students on the basis of sexual orientation: California, Connecticut, Massachusetts, Maine, New Jersey, Washington, Wisconsin, and Vermont.⁹² Three of these states (California, Minnesota, and New Jersey)

explicitly prohibit discrimination or harassment in schools on the basis of gender identity or expression as well. At least four states have promulgated professional standards for educators, which prohibit discrimination against students on the basis of sexual orientation.⁹³ In addition to these state statutes, courts have held that failure of a school to respond to discrimination on the basis of actual or perceived sexual orientation violates the Equal Protection Clause.⁹⁴

I. Transgender People and Marriage

Only a handful of courts have ruled on the validity of a marriage entered into *after* a transsexual person has undergone sex-reassignment. At least two courts have recognized the individual's reassigned sex for the purpose of marriage.⁹⁵ In contrast, a few courts have ruled that, for purposes of marriage, a person's legal sex is irrevocably determined at birth. In 2002, the Kansas Supreme Court ruled that the marriage between J'Noel Gardiner, a male-to-female transsexual, and her deceased husband was invalid, even though she had undergone sex-reassignment many years prior to the marriage.⁹⁶ An appellate court in Texas reached the same result, invalidating a marriage between a transsexual woman and her deceased husband on the ground that one's legal gender is fixed at birth.⁹⁷

VII. AREAS OF LAW THAT WOULD BE AFFECTED BY RECOGNITION OF SAME-SEX MARRIAGES AND NON-MARITAL UNIONS

More than one thousand rights and responsibilities are automatically accorded to couples based on marital status. In 1997, the Government Accounting Office (GAO) conducted a computerized search of the United States Code to determine the federal rights, responsibilities, and privileges that were accorded to married couples and denied to same-sex couples.⁹⁸ The study identified at least 1,049 federal statutes in which marital status was factor.

This study was updated in 2004, and the number statutes involving rights, responsibilities, and privileges that appeared to be related to marriage increased to 1,138.⁹⁹

At least five states (California,¹⁰⁰ Colorado,¹⁰¹ Hawaii,¹⁰² Massachusetts,¹⁰³ and Vermont¹⁰⁴) have conducted similar studies to enumerate the rights, benefits, and responsibilities associated with marriage. Draft studies have been done in Ohio¹⁰⁵ and Maryland.¹⁰⁶

Some of these rights and responsibilities can be replicated partially by private agreements, such as the right to make medical decisions for a partner, but most such rights and responsibilities cannot. For example, couples may not enter into a private agreement to create a statutory right to sue for the wrongful death of a partner.

Although cataloguing these hundreds of rights and responsibilities is difficult, the following list provides an overview of rights and responsibilities automatically accorded to married spouses.

Family Law

- Distribution of property upon divorce (particularly marital or community property)
- Right to seek spousal support (alimony, maintenance)
- Right to seek custody, visitation, or parenting time
- Automatic presumption of parentage for children born during marriage
- Right to adopt, including stepparent adoptions
- Eligibility to care for a foster child
- Application of common law marriage (in states that recognize common law marriage)
- Right to enter into premarital agreements
- Right to change name at time of marriage or restore former name upon termination of marriage
- Domestic violence laws, including restraining

- orders and right to occupy home
- Duty to support spouse during marriage
- Liability for family expenses
- Automatic coverage of spouse under most auto policies

Taxation

- Right to file jointly
- Tax rates
- Availability of exemptions
- Transfer of property between partners without tax consequences, including at time of divorce (gift tax or estate tax)

Health Care Law

- Surrogate decision-making (authorizing treatment or withdrawal of treatment) for partner or partner's children
- Access to medical records
- Right to visit in hospital
- Right to share room with spouse at adult-care facility
- Consent to organ donation
- Consent to autopsy
- Right to make funeral arrangements or dispose of remains
- Family health insurance, including rights under COBRA

Probate

- Intestate succession (rights to property when person dies without a will)
- Protection from being disinherited (right to challenge will if not receiving a certain proportion of estate)
- Preferential status to be named guardian, conservator, or executor/executrix

Torts

- Right to seek compensation for wrongful death
- Right to seek compensation for loss of consortium
- Right to seek compensation for intentional infliction of emotional distress

Government Benefits and Programs

- Survivor benefits (Social Security)
- Military benefits (survivor, housing, commissary,

- education for children)
- Eligibility (and consideration of family income) for welfare benefits
- Disqualification from programs because of status of family member (*e.g.*, health-care fraud and abuse laws that prohibit reimbursement of health-care expenses to provider if provider is married to person who owns interest in certain entities through which reimbursement is sought)

Private Sector Benefits; Labor Law

- Family health insurance, including rights under COBRA
- Eligibility for life insurance (such group coverage for spouse/partner)
- Eligibility for disability insurance
- Right to take sick leave to care for seriously ill partner (federal Family Medical Leave Act)
- Qualified Domestic Relations Orders (QDROs); state law counterparts
- Ability to roll over spouse's 401(k) or other retirement accounts; tax deferral on income distributed by the deceased spouse's estate
- Discrimination based on marital (or relationship) status
- Eligibility for family memberships and discounts

Real Estate

- Eligibility for tenancy by the entirety (traditionally only available to husbands and wives — a form of tenancy in which the joint ownership and right of survivorship generally cannot be eliminated as a result of one partner transferring his or her interest to another)

- Need for partner's approval for real estate transaction
- Homestead rights (which can protect home from forced sale for collection of debts or grant favorable property tax treatment)
- Exemption from transfer tax for transfers between spouses
- Benefits and rules pertaining to family farms
- Rent-control protections (where available)

Bankruptcy

- Joint filing
- Preferential treatment for spouse for claims made under divorce decree or separation agreement, including nondischargeability of spousal support

Immigration

- Joint petitions to immigrate
- Preferred status for spouses or family members (immigrating separately)

Criminal Law

- Privilege not to testify
- Application of domestic violence laws and protections

Miscellaneous

- Native American's rights to tribal property
- Right to request and obtain absentee ballot
- Consideration of family income for purpose of student aid eligibility
- Access to campus housing for married students
- Economic disclosure requirements and regulation of receipt of gifts for public officials (and their family members)

VIII. CASE LAW REGARDING RIGHTS OF SAME-SEX COUPLES TO MARRY OR FORM CIVIL UNIONS

A. Overview

Cases decided by state supreme courts and appellate courts regarding the rights of same-sex couples to marry or form civil unions or domestic partnerships vary markedly across the country. Following is a summary of cases.

- The Supreme Judicial Court of Massachusetts has declared that same-sex couples have a right to marry under the state constitution's principles of individual liberty and equality.
- The Supreme Court of Vermont held that same-sex couples do not necessarily have a right to marry, but they do have a right under the state constitution to the same benefits and protections as different-sex couples who marry.
- The Supreme Court of Hawaii held that a prohibition of marriage by same-sex couples may constitute sex discrimination under the state constitution. Before the Hawaii Supreme Court was able to issue a final ruling in the case, the state constitution was amended to allow the legislature "to reserve marriage to opposite-sex couples." The case was subsequently dismissed as moot.
- The Indiana Court of Appeals has held that excluding couples of the same sex from the right to marry did not violate the Equal Privileges and Immunities Clause of the Indiana Constitution, the state constitutional provision guaranteeing a right of privacy, or the "remedy by due course of law" of the State Constitution.
- The Arizona Court of Appeals held that prohibition of same-sex marriages was constitutional under principles of due process, equal protection, and rights of privacy.
- The District of Columbia Court of Appeals upheld a statute restricting marriage to a man and a woman and held that same-sex marriage is not a fundamental right.
- Prior to 1992, state supreme and appellate courts uniformly held that denying same-sex couples the right to marry was not unconstitutional.

In *Goodridge v. Department of Public Health*,¹⁰⁷ the Supreme Judicial Court of Massachusetts in its majority and dissenting opinions illustrates clearly key arguments on different sides of the legal issue.

B. Massachusetts (declaring that denying same-sex couples the right to marry violates the state constitution)

The Massachusetts Supreme Judicial Court has held that limiting civil marriage to different-sex couples violates principles "of individual liberty and equality under law protected by the Massachusetts Constitution."¹⁰⁸ The court said that, in the future, "civil marriage [will] mean the voluntary union of two persons as spouses, to the exclusion of all others."¹⁰⁹ The remainder of the state's marriage law was unaffected. The court stayed its order for 180 days "to permit the Legislature to take such action as it may deem appropriate in light of this opinion."¹¹⁰ Marriage licenses are being issued to same-sex couples in Massachusetts, beginning May 17, 2004.

The case of *Goodridge v. Department of Public Health*, decided in November 2003, was brought by seven same-sex couples from five counties in Massachusetts. Massachusetts' highest court described each plaintiff as being in "a committed relationship" and seeking the opportunity to marry.¹¹¹ The couples, however, were not able to obtain marriage licenses on the ground that Massachusetts does not recognize same-sex marriage. The court held that denying same-sex couples the right to marry, like the historical prohibition of interracial marriages, "deprives individuals of access to an institution of fundamental legal, personal, and social significance . . ."¹¹²

The court summarized three reasons advanced by the Department of Public Health regarding why the legislature would restrict marriage to opposite-sex couples: "(1) providing a 'favorable setting for procreation'; (2) ensuring the optimal setting for child rearing, which the department defines as 'a two-parent family with one parent of each sex'; and (3) preserving scarce State and private financial resources."¹¹³

The court held that even under "the rational basis test for either due process or equal protection,"¹¹⁴ the department's arguments were insufficient:

General Laws [of Massachusetts] c. 207 contains no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by

coitus. Fertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married . . . The 'best interests of the child' standard does not turn on a parent's sexual orientation or marital status.¹¹⁵

The court said the department's third rationale, regarding conserving state resources, was "conclusory" since the department did not contend that the children of same-sex couples were less needy or less deserving than the children of different-sex couples, and, in any case, state benefit programs are not conditioned on marital status or the degree to which couples commingle finances.¹¹⁶

The court noted arguments "that broadening civil marriage to include same-sex couples will trivialize or destroy the institution of marriage as it has historically been fashioned."¹¹⁷ The court responded:

Certainly our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries. But it does not disturb the fundamental value of marriage in our society.

Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. . . . If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities.¹¹⁸

The Massachusetts Supreme Judicial Court said state constitutions can provide more protection of individual liberties than the federal constitution and cited a 1995 U.S. Supreme Court decision written by Chief Justice Rehnquist that held, "state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individuals' rights than do similar provisions of the United States Constitution."¹¹⁹

Justice Greaney issued a concurring opinion, stating that prohibiting same-sex couples from marrying "constitutes a categorical restriction of a fundamental right. . . . Simple principles of decency dictate that we extend to the plaintiffs, and to their new status, full acceptance, tolerance and respect."¹²⁰

Three justices on the Massachusetts Supreme Judicial Court dissented. All three justices said that the decision whether to allow same-sex couples to marry should be made by the legislature, not the court.

Justice Spina said: "The power to regulate marriage lies with the Legislature, not with the judiciary. . . . Such a dramatic change in social institutions must remain at the behest of the people through the democratic process."¹²¹ He said that before a court declares a new

constitutional right of a fundamental nature, the asserted right must be "objectively, deeply rooted in this Nation's history and tradition," which same-sex marriage is not.¹²² Justice Spina said the statute does not discriminate between the sexes since it applies to men and women equally. He also argued that the statute does not discriminate on the basis of sexual orientation since individuals of any sexual orientation still have a right to marry (a person of a different sex).

Justice Sosman dissented, arguing that the statute prohibiting same-sex marriages should be upheld if "it satisfies a minimum threshold of rationality."¹²³ He said that the majority of the court "has tortured the rational basis test beyond recognition,"¹²⁴ adding that scientific studies of the ramifications of raising children by same-sex couples are still in their infancy.

Justice Cordy in his dissent said that although public attitudes toward marriage and same-sex marriage have changed, "contemporary values" regarding same-sex marriage are reflected in the legislation of a large majority of states that prohibits same-sex marriage or does not recognize such marriages.¹²⁵ Justice Cordy said: "Given the critical importance of civil marriage as an organizing and stabilizing institution of society, it is eminently rational for the Legislature to postpone making fundamental changes to it until such time as there is unanimous scientific evidence, or popular consensus, or both, that such changes can safely be made."¹²⁶

Soon after the Supreme Judicial Court's decision in *Goodridge*, the Massachusetts State Senate asked the court to issue an advisory opinion regarding whether a civil union bill under consideration in the senate¹²⁷ would comply with the Massachusetts Constitution. The bill "prohibits same-sex couples from entering into marriage but allows them to form civil unions with all 'benefits, protections, rights and responsibilities' of marriage."¹²⁸ A majority of the court answered the question "No," stating, "The bill maintains an unconstitutional, inferior, and discriminatory status for same-sex couples, and the bill's remaining provisions are too entwined with this purpose to stand independently."¹²⁹ The majority made clear that only full marriage rights would comply with its earlier *Goodridge* decision.

Justice Sosman, joined by Justice Spina, issued an opinion, stating that the bill did not violate the equal protection or due process provisions of the Massachusetts Constitution and the Massachusetts Declaration of Rights. The two justices said that there was a rational basis for using different labels for "marriages" and "civil unions" since the federal government and many states will not recognize same-sex marriages, and such a substantive difference justifies using different terms.¹³⁰ Justice Cordy issued a separate opinion, stating he "would

withhold judgment until such time as the Legislature completed its deliberative process” and perhaps provided “documentation of its reasoning and objectives.”¹³¹

C. Vermont (holding that same-sex couples are entitled under the state constitution to the same benefits and protections provided to married couples of different sexes)

In *Baker v. State* (1999), the Supreme Court of Vermont held the state constitution’s Common Benefits Clause required that same-sex couples receive the same benefits and protections as married couples of different sexes.¹³² The court did not require that same-sex couples be allowed to marry, but it did require that the state legislature provide them with “the common benefits and protections that flow from marriage under Vermont law.”¹³³ The Vermont Constitution’s Common Benefits Clause, which the court said was similar to principles of equal protection, provides: “That government is, or ought to be, instituted for the common benefit, protection, and security of the people . . . and not for the particular emolument or advantage of any single person, family, or set of persons”¹³⁴ In response to the state attorney general’s argument that rights for same-sex couples should not be expanded under the constitution because of the historical intolerance for intimate same-sex relationships, the Vermont Supreme Court said: “‘equal protection of the laws cannot be limited by eighteenth-century standards.’ . . . The extension of the Common Benefits Clause to acknowledge plaintiff as Vermonters . . . is simply, when all is said and done, a recognition of our common humanity.”¹³⁵

Justice Johnson, concurring in part and dissenting in part, said, “we should simply enjoin the State from denying marriage licenses to plaintiffs based on sex or sexual orientation.”¹³⁶ Justice Johnson also said the prohibition of same-sex marriage constituted sex discrimination because under current law marriage licenses can be denied based on the sex of a person’s chosen partner.¹³⁷ (For further discussion of Vermont’s statutory protections for same-sex couples, see pages 28-29.)

D. Hawaii (holding that denying same-sex couples the right to marry may violate equal protection under the state constitution; constitution then amended)

In *Baehr v. Lewin* (1993), the Supreme Court of Hawaii held that the Hawaii Constitution does not give same-sex couples a fundamental right to marry because the court did not believe “that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate fundamental principles of liberty and justice”¹³⁸ The court, however, went on to hold that the state’s prohibi-

tion of marriage by same-sex couples appeared to be sex discrimination and a denial of equal protection under the state constitution. The case was remanded to apply “strict scrutiny” to the statute and to hold the statute unconstitutional unless the state could demonstrate “that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights.”¹³⁹

Hawaii’s circuit court held the statute to be unconstitutional.¹⁴⁰ While the case was pending on appeal, the Hawaii constitution was amended in 1998 to add a provision that “The legislature shall have the power to reserve marriage to opposite-sex couples.”¹⁴¹ The state’s statute provides that a “valid marriage contract . . . shall be only between a man and a woman”¹⁴² The Hawaii Supreme Court subsequently dismissed the case as moot.¹⁴³

E. Arizona (upholding statute prohibiting same-sex couples from marrying)

In *Standhardt v. Superior Court* (2003),¹⁴⁴ two gay men challenged an Arizona statute that provides: “Marriage between persons of the same sex is void and prohibited”¹⁴⁵ and also defined a “valid marriage” as one “contracted by a male person and a female person with a proper marriage license.”¹⁴⁶ The Arizona Court of Appeals held the statute was constitutional under principles of due process, equal protection, and rights of privacy. (The Arizona Constitution has an explicit provision protecting the right of privacy.¹⁴⁷)

The plaintiffs in *Standhardt* based many of their arguments on the U.S. Supreme Court’s 2003 decision in *Lawrence v. Texas*,¹⁴⁸ which struck down a Texas criminal statute prohibiting sexual activity between persons of the same sex. (For further discussion of *Lawrence*, see pages 18-19). The Arizona court said the U.S. Supreme Court’s decision “[did] not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”¹⁴⁹ The Arizona court went on to say: “This court does not dispute that a homosexual person’s choice of life partner is an intimate and important decision . . . [But] . . . [t]he history of the law’s treatment of marriage as an institution involving one man and one woman, together with recent, explicit reaffirmations of that view, lead invariably to the conclusion that the right to enter a same-sex marriage is not a fundamental liberty interest protected by due process.”¹⁵⁰

Because the court did not find a fundamental right to enter into a same-sex marriage, the court applied a “rational basis analysis”¹⁵¹ and concluded, “the State has a legitimate interest in encouraging procreation and

child-rearing within the marital relationship, and that limiting marriage to opposite-sex couples is rationally related to that interest.”¹⁵²

F. Indiana (upholding statute prohibiting marriage of two people of the same sex)

In *Morrison v. Sadler*,¹⁵³ three Indiana same-sex couples filed a suit seeking the right to marry or, alternatively, full recognition of their civil union status. The trial court dismissed the case. On January 20, 2005, the Indiana Court of Appeals held that excluding same-sex couples from the right to marry did not violate the Equal Privileges and Immunities Clause of the Indiana Constitution, the State Constitution’s provision guaranteeing the right to privacy, or the “remedy by due course of law” provision of the State Constitution.

The Court held that excluding Plaintiffs from marriage does not violate the Equal Privileges and Immunities Clause of the Indiana Constitution because, according to the court, limiting marriage to different-sex couples is “reasonably related” to “responsible procreation”: “The State, first of all, may legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from ‘casual’ intercourse. Second, even where an opposite-sex couple enters into a marriage with no intention of having children, ‘accidents’ do happen, or persons often change their minds about wanting to have children. The institution of marriage not only encourages opposite-sex couples to form a relatively stable environment for the ‘natural’ procreation of children in the first place, but it also encourages them to stay together and raise a child or children together if there is a ‘change in plans.’”¹⁵⁴ The plaintiffs have indicated that they will not appeal this decision to the Indiana Supreme Court.

G. District of Columbia (upholding statute prohibiting marriage of two people of the same sex)

In *Dean v. District of Columbia* (1995),¹⁵⁵ the court held that the District of Columbia statute restricting marriage to a man and a woman did not violate the D.C. Human Rights Act, and “that same-sex marriage is not a ‘fundamental right’ protected by the due process clause, because that kind of relationship is not ‘deeply rooted in this Nation’s history and tradition.’”¹⁵⁶

H. Pending Cases

Currently there are case seeking the right to marry for same-sex couples in California, Connecticut, Florida, Maryland, New Jersey, New York, and Washington

State.

California – Six cases related to the right to marry for same-sex couples – including *Woo v. Lockyer* and *City and County of San Francisco v. Lockyer* -- have been coordinated before a trial judge in San Francisco. On March 14, 2005, the trial judge issued a tentative decision holding that excluding same-sex couples from the right to marry violates the California Constitution by discriminated on the basis of sex and by infringing the fundamental right to marry. The Court rejected the State’s argument that the creation of a domestic partnership law remedies the constitutional infirmity of the marriage exclusion, explaining: “[t]he idea that marriage-like rights without marriage is adequate smacks of a concept long rejected by the courts: separate but equal.”¹⁵⁷

Connecticut – On August 25, 2004, seven same-sex couples filed suit in New Haven Superior Court challenging the State’s exclusion of same-sex couples from the right to marry. The case is called *Kerrigan v. Connecticut Department of Public Health*. The case is still pending before the trial court.

Florida – On April 15, 2004, a lawsuit was filed in Monroe County seeking the right to marry for same-sex couples. The case is *Higgs v. Kohlage*. Several other lawsuits seeking marriage equality for same-sex couples also have been filed in both state and federal court. Some of these cases also seek determinations that the federal Defense of Marriage Act is unconstitutional. On January 19, 2005, a federal district court in one such case rejected the plaintiffs’ claims and held that the federal DOMA is constitutional. *Wilson v. Ake*.¹⁵⁸

New Jersey — On June 26, 2002, seven New Jersey couples sued for the right to marry in New Jersey, in the case of *Lewis v. Harris*. In the spring of 2003, the state of New Jersey moved to dismiss the lawsuit. On November 5, 2003, the trial court granted the state’s motion to dismiss. The case is now on appeal.

New York – At least five cases seeking the right to marry for same-sex couples are winding their way through the New York Courts. One court, a trial court in Manhattan, has ruled in favor of the plaintiffs. *Hernandez v. Robles*.¹⁵⁹ Four other trial courts – two in Albany, one in Ithaca, and one in Rockland County – have ruled against the plaintiffs. All five decisions are now on appeal.¹⁶⁰

Oregon – On April 20, 2004, in a lawsuit brought by nine same-sex couples, an Oregon trial court held that denying same-sex couples the right to marry violated the Oregon Constitution. In its decision, the court also ordered the state of Oregon to honor and register the more than 3,000 marriages that had been granted to same-sex couples by Multnomah County.¹⁶¹ As the

court did in Vermont, the Court declined to hold that marriage was required, and instead allowed the state legislature either to extend marriage to same-sex couples or devise an alternative system to provide equal rights and responsibilities to those couples. The case was appealed, and oral argument was heard before the Oregon Supreme Court in December 2004. Shortly before oral argument was held in the case, on November 2, 2004, the voters of Oregon approved an amendment to the State Constitution, providing that marriage is between a man and a woman. A decision is expected shortly.

Washington – In the summer of 2004, two trial courts in Washington State held that denying same-sex couples the right to marry violated the Washington State Constitution.¹⁶² These cases have been consolidated on appeal. Oral argument was heard before the Washington Supreme Court on March 8, 2005

I. Cases Decided Before 1992

Cases decided before 1992 held that it was not unconstitutional to deny same-sex couples the right to marry or otherwise deny them the rights and protections granted to married couples.

Kentucky — *Jones v. Hallahan* (1973),¹⁶³ finding “no constitutional sanction or protection of the right of marriage between persons of the same sex” and stating

that even if the Kentucky statute did not specifically prohibit the marriage of persons of the same sex, the common definition of marriage restricts marriage to one woman and one man.

Minnesota — *Baker v. Nelson* (1971),¹⁶⁴ holding that prohibiting same-sex marriage “does not offend the First, Eighth, Ninth, or Fourteenth Amendments to the United States Constitution.”

Pennsylvania — *DeSanto v. Barnsley* (1984),¹⁶⁵ holding that two men could not enter into a common law marriage and, therefore, when the relationship broke up, a member of the couple was not entitled to a divorce and distribution of property under the divorce laws.

Washington — *Singer v. Hara* (1974),¹⁶⁶ holding a statutory prohibition of same-sex marriages was permissible under the federal and state constitutions, including constitutional prohibitions of discrimination based on sex.

Ninth Circuit Court of Appeals — *Adams v. Howerton* (1982),¹⁶⁷ holding that U.S. immigration laws that denied preferred immigration status to spouses of same-sex couples were not unconstitutional because “Congress has almost plenary power” regarding immigration laws and, in any case, the “decision to confer spouse status . . . only upon the parties to heterosexual marriages has a rational basis and therefore comports with the due process clause and its equal protection requirements.”

IX. STATUTORY PROTECTIONS AND RIGHTS FOR SAME-SEX COUPLES

A. Overview

Five states provide between approximately ten and several hundred statutory protections and rights to same-sex couples (California, Connecticut, Hawaii, New Jersey and Vermont). Eleven states provide at least health insurance and/or pension benefits to some or all state employees in same-sex relationships (California, Connecticut, Hawaii, Iowa, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington), and Illinois will join such states in 2007. Some of the same states, as well as several other states provide between one and a few hundred rights or protections to registered same-sex couples, and those rights and protections vary from state to state.

Only two states permit civil unions (Connecticut and Vermont), two states provide reciprocal beneficiary relationships (Hawaii and Vermont), and three states provide state domestic partnership registries (California, Maine, and New Jersey). By entering into a civil union or registering as either a domestic partnership or reciprocal beneficiaries, same-sex couples are afforded certain state-conferred rights and responsibilities. Most states that afford protections to same-sex couples also afford unmarried, different-sex couples the same protections, although certain states require that the different-sex couples be over age 62.

Married different-sex couples are automatically granted hundreds of state-conferred rights and duties and more than one thousand state and federal rights and responsibilities. Currently, because of the federal Defense of Marriage Act (DOMA), no status that is currently granted to same-sex couples provides them with any of the federally conferred rights and responsibilities based on marital status. This is true for married same-sex couples in Massachusetts. Couples in several jurisdictions, however, do get all or almost all of the state-conferred rights and duties of married couples. For example, Vermont's civil unions grant couples all of the hundreds of state-conferred rights and responsibilities, at least while the couple resides in Vermont. Similarly, California's domestic partnership status conveys almost all of the state-conferred rights and responsibilities.

The laws of the five states with the broadest statutory protections (California, Connecticut, Hawaii, New Jersey and Vermont) have similarities as well as differences. All

five states provide benefits relative to hospital visitation and the right to make health-care decisions. Other benefits may include: eligibility for certain tort claims, worker's compensation, family leave, inheritance under the intestacy laws and state tax deductions or exemptions.

While not as broad as the statutory protections afforded by California, Connecticut, Hawaii, New Jersey, and Vermont, Maine also affords some significant statutory protections for same-sex couples. The new law, which went into effect at the end of July, 2004, provides inheritance protections to domestic partners.

The most common protections afforded and, consequently, the protections afforded by most of the remaining states discussed in this section, are benefits to domestic partners of state employees. In addition to health benefits, several states offer other benefits to state employees, such as life insurance, long-term care benefits, bereavement leave, or family sick leave. In the remaining states discussed in this section, the only rights granted to domestic partners are rights to hospital visitation or health-care decision making.

More detailed information regarding the statutory protections afforded same-sex couples by various states may be found in the following sub-sections as well as the chart in the appendix. The states covered in this section are: Alaska, Arizona, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington.¹⁶⁸ More extensive information is included on California, Connecticut, Hawaii, Maine, New Jersey, and Vermont due to the nature of the benefits provided by these states.

B. Alaska

Alaska affords statutory protections to domestic partners in the limited area of surrogate decision-making for protective services. If an individual is in need of protective services, but is unable to provide informed consent for such services, and has no guardian or attorney to serve as surrogate decision maker, the Department of Health and Social Services may recognize the individual's domestic partner as surrogate decision maker for the purpose of deciding whether to consent to the protective services. The preference afforded the

domestic partner as surrogate decision maker is second only to the individual's spouse, if such individual's spouse is not separated from the individual and no divorce or dissolution proceedings have been initiated.¹⁶⁹ For purposes of surrogate decision-making, a "domestic partner" means a person who is cohabiting with another person in a relationship that is like a marriage but that is not a legal marriage.¹⁷⁰ No affidavit or other documentation need be filed.

C. Arizona

Arizona also affords statutory protections to domestic partners in the limited area of surrogate decision-making. In Arizona, if an adult patient is unable to make or communicate health-care treatment decisions, and such patient has not executed a health-care directive or health-care power of attorney, and the court has not appointed a guardian for the purpose of making health-care treatment decisions, a health-care provider shall attempt to consult with a family member who is available and willing to serve as a surrogate for health-care decision making. Such surrogate shall have the authority to make health-care decisions for the patient and shall follow the patient's wishes if they are known. Domestic partners are one of several people who may be considered to serve as a surrogate. The preference afforded the domestic partner as surrogate decision maker is behind that of a spouse, adult children, or parent of the patient.¹⁷¹

In addition, domestic partners in Arizona are given the authority to make an anatomical gift of all or a part of a decedent's body if the decedent has not executed a document of gift or has not refused to make an anatomical gift. As with surrogate health care decision-making, the preference afforded the domestic partner with regard to anatomical gift decision-making is behind that of a health-care power-of-attorney agent, a court-appointed guardian, a spouse, adult-child, or parent of the patient.¹⁷²

D. California

As of January 1, 2000, California recognized domestic partnership registration. Although the registry was established on January 1, 2000, at that time only two rights were associated with being registered: hospital visitation and domestic-partner benefits for certain state employees.¹⁷³ On January 1, 2002, the rights granted to domestic partners increased. The domestic partnership statute provides same-sex couples and different-sex couples in which at least one of the partners is over the age of 62 the opportunity to formalize relationships affording certain legal rights.¹⁷⁴

To be eligible for domestic partnership rights, same-sex partners must:

- be at least 18;
- capable of consenting to the domestic partnership;

- not married to someone else;
- not in another domestic partnership;
- share a residence;
- agree to be jointly responsible for one another's basic living expenses;
- not be related in a way that would prevent them from legally marrying one another under California law; and
- not have been in another registered domestic partnership for six months.¹⁷⁵

As of January 1, 2002, registered domestic partners were granted approximately sixteen rights that included laws relating to:

- tort claims for spouses of injured or deceased people, including negligent infliction of emotional distress and wrongful death;
- stepparent adoption;
- continued health coverage for domestic partners and their dependent children upon the death of a covered state or local government employee;
- death benefits and survivor allowances for covered domestic partners in San Francisco, San Mateo, Los Angeles, Santa Barbara, and Marin counties (subject to approval of the county boards);¹⁷⁶
- health-care decision making on behalf of partners in some circumstances;
- requirement that health insurers provide employers with the option of coverage for domestic partners;
- family and sick leave;
- entitlement to inherit a share of the separate property of his or her domestic partner if the property is not otherwise disposed of by will or other estate plan; in addition, exemption from the prohibition on receiving from a will that one helped draft;
- conservatorship, property transfer, revocation of bequests, statutory wills, and some estate administration rules;
- exemption of registered partners for state tax purposes for the value of domestic partner benefits;
- unemployment eligibility when an employee quits a job to accompany a relocating domestic partner; and
- authority to file disability claims on behalf of incapacitated partners.¹⁷⁷

Recently, the rights and responsibilities of domestic partners were once again increased substantially.

As of January 1, 2005, registered domestic partners became entitled to almost every *state-conferred* right and responsibility of married spouses.¹⁷⁸ California's new law provides registered domestic partners with the same rights, protections, obligations, and duties under state law, whether derived from "statutes, administrative regulations, court rules, government policies, common law, or

any other provision or sources of law, as are granted to and imposed upon spouses.¹⁷⁹ The law also provides that California recognizes relationships other than a marriage between two people of the same sex from other jurisdictions as a California domestic partnership. Although outlining an exhaustive list of rights and responsibilities is difficult, following is a partial list of the protections and responsibilities afforded domestic partners under the new law:

- financial support during and after the relationship and community property protections;
- protection from threats and crimes against the families of public officials;
- child custody, visitation, and duties of financial support of children;
- anatomical gifts, consent to autopsy, disposition of remains, and burial in family cemeteries;
- legal claims dependent on family status, including claims for victims' compensation;
- housing protections, including access to student family housing, senior citizen housing, and rent-control protections;
- bereavement leave, family care and medical leave, pension rights, and death benefits for surviving partners of firefighters and police officers;
- obligations to make disclosures regarding family relationships and to take other steps to avoid nepotism, conflict of interest and self-dealing;
- access to family court for dissolution of relationships for long-term partners, couples with children, and couples with significant assets;
- mutual responsibility for certain debts to third parties;
- government-regulated benefits, including worker's compensation, public assistance, transfer of licenses upon death, and the ability to apply for absentee ballots for a partner;
- communication privileges, including the right not to be forced to testify against a partner.

In addition to the foregoing, changes were also made in the area of insurance. On September 13, 2004, the California Insurance Equality Act was signed into law by Governor Arnold Schwarzenegger.¹⁸⁰ The Act prohibits insurance providers from issuing policies or plans that treat registered domestic partners differently than married spouses. The Act applies to all insurance plans, including but not limited to, health, automobile, rental, disability and life. The law became effective on January 2, 2005 for group health insurance plans, on January 1, 2005 for all other types of insurance.¹⁸¹

As of January 1, 2005, California's domestic partnership laws are similar to Vermont's civil union statute. Like couples in a civil union, registered domestic partners in

California are not entitled to any of the more than 1,000 federally conferred rights and responsibilities of married couples. In addition, like couples in a civil union, registered domestic partners will face uncertainty as to whether other states will recognize their relationship should something happen to one of them outside of California.

E. Connecticut

Pursuant to the terms of a collective bargaining agreement and the resulting Comptroller's Memorandum No. 200-13, dated March 10, 2000, to the heads of all state agencies, health-care and pension benefits are offered for same-sex domestic partners of state employees and retirees. Employees also may cover their eligible dependent children. Different-sex domestic partners and their dependent children remain ineligible for coverage.

For Connecticut state employees and retirees to access the health-care and pension benefits available to their domestic partners, a Domestic Partnership Affidavit must be completed and submitted to the State Comptroller's Retirement & Benefits Services Division. Without the affidavit, neither health-care coverage nor pension coverage will be extended to domestic partners. The affidavit will be treated in the same manner as a certificate of marriage for purposes of all available benefits. The person filing the affidavit may elect to seek only pension protection for a same-sex domestic partner and forgo available health-care benefits.

The affidavit, which must be filed with the comptroller, must state that the domestic partners are:

- in a relationship of mutual support, caring, and commitment and intend to remain in it for the indefinite future;
- not married to anyone else;
- not members of any other domestic partnership;
- not related by blood in a way that would bar marriage in Connecticut;
- at least 18 years of age and competent to contract;
- sharing a legal residence and have done so for at least twelve months; and
- jointly responsible for maintaining their common household.¹⁸²

In addition to the rights conferred by the collective bargaining agreement, Public Act No. 02-105, which became effective October 1, 2002, extends certain legal rights to persons legally designated by another to make medical decisions and end-of-life choices, such as organ donation and life support. The act also allows for private visits in nursing homes by legally designated people and requires employers to allow emergency phone calls to their workers from legally designated people.

The same act directed the Judiciary Committee of Connecticut's state legislature to study the potential public policy impact of extending marriage rights or civil unions to same-sex couples. The committee prepared such reports as requested, but made no recommendations or findings with respect to such reports.¹⁸³

In addition to the limited rights conferred by the collective bargaining agreement and those rights conferred in the limited area of health care decisions, as of October 1, 2005, same sex couples will be able to enter into civil unions in Connecticut. On April 20, 2005, Governor M. Jodi Rell enacted into law Substitute Senate Bill 963 ("sSB963") which authorizes same sex couples to enter into civil unions and grants them the same legal benefits, protections and responsibilities as married couples.

To be eligible to form a civil union, the following requirements must be met:

- neither of the persons may be party to another civil union or a marriage;
- both persons must be of the same sex;
- the persons may not be close family members (related more closely than first cousins);
- both persons must be age 18 or older unless the person or persons under age 18 have been declared emancipated;
- neither person may be under conservatorship, unless the conservator consents in writing.

The rights which will be extended to civil union partners will mirror those rights extended to married couples under statute, administrative regulations, or court rules, policy, common law or any other source of civil law. The rights and obligations extended to civil union partners are too numerous to mention in detail, but are generally encompassed within the following categories:

- Family law, including divorce and support;
- Title, tenure, descent and distribution, intestate succession (distribution of property in the event of death without a will), wills, waiver of wills (right of surviving partner to share in portion of deceased partner's estate where no provision is made in the will for the surviving partner), survivorships, or other incidents of the acquisition, ownership, or transfer (during life or at death) of real or personal property;
- State and municipal taxation;
- Probate courts and procedure;
- Group insurance for government (but not private-sector) employees;
- Family leave benefits;
- Financial disclosure and conflict-of-interest rules;
- Protection against discrimination based on marital status;
- Emergency and non-emergency medical care treat-

ment, hospital visitation and notification, and authority to act in matters affecting family members;

- State public assistance benefits;
- Worker' compensation;
- Crime victims' rights;
- Marital privileges in court proceedings; and
- Vital records and absentee voting procedures.¹⁸⁴

Connecticut's civil union statute also recognizes civil unions performed in other countries in the same manner as foreign heterosexual marriages would be recognized. Accordingly, a same sex civil union entered into in a foreign country will be recognized by the State of Connecticut if at least one of the civil union partners is a Connecticut resident, and either (i) the couple could have entered into a civil union in Connecticut and the ceremony was performed in accordance with the other country's laws; or (ii) the couple holds the ceremony in the U.S. consulate's jurisdiction, before that country's U.S. ambassador, minister, or other accredited consular official, and has a licensed clergy member officiate.¹⁸⁵

As is true with Vermont civil unions and California domestic partnerships, couples in a Connecticut civil union will continue to be denied all of the federal rights and duties accorded to different-sex married spouses.

F. Delaware

Since 1992, Delaware has offered bereavement leave to same-sex and different-sex domestic partners of state employees.¹⁸⁶ Leave is given with pay for the death of any immediate family member. An immediate family member is defined to include a domestic partner, a child of the employee's domestic partner, and any minor child for whom the employee has assumed and carries out parental responsibility.¹⁸⁷ Sick leave also may be used for attendance at the doctor's appointments of domestic partners or for the serious illness or injury of a domestic partner.¹⁸⁸ No other benefits are offered to state employees with a same-sex partner.

G. Hawaii

The Reciprocal Beneficiaries Law (Act 383) was enacted July 8, 1997.¹⁸⁹ The law allows any two single adults, both same-sex couples and different-sex couples, who may not marry under the state's marriage laws to enter into a reciprocal beneficiary relationship as long as neither is currently a part of another reciprocal beneficiary relationship. The prohibition against marriage may be for a variety of reasons, including that the couple is of the same sex or related. A notarized declaration of the relationship must be filed with the department of health.

Reciprocal beneficiary couples have many of the rights of marriage that Hawaii can grant as a state, except family court rights (*e.g.*, alimony, divorce, child

custody resolution) and access to health insurance. The benefits available to persons in a reciprocal beneficiary relationship include the following areas:

- worker's compensation;
- inheritance under the intestacy laws (where a person dies without a will);
- wrongful death;
- loss of consortium;
- family and bereavement leave;
- hospital visitation;
- health-care decisions;
- consent to perform an autopsy;
- limited health-care insurance;
- eligibility for disaster loans to couples and their families;
- property rights (including joint tenancy);
- right of election against a will;
- tort liability; and
- protection under domestic violence laws.

As a result of an opinion letter issued by the attorney general of Hawaii, the reciprocal beneficiaries law was determined to extend reciprocal beneficiary family coverage for health insurance only in the instance of insurance company coverage as distinct from health maintenance organizations or mutual benefit societies. Accordingly, only a very small number of reciprocal beneficiaries, those covered by insurance companies, will qualify for family coverage. It is estimated that the number of persons who will qualify under the strict interpretation by the attorney general is approximately one-half of one percent.¹⁹⁰

In addition to the foregoing benefits offered reciprocal beneficiaries, state employees also may name their reciprocal beneficiary as the beneficiary of retirement plan benefits.¹⁹¹ Further, domestic partners of state employees are eligible for health insurance coverage. To qualify as a domestic partner, the parties must:

- intend to remain in this domestic partnership indefinitely;
- have a common residence and intend to reside together indefinitely;
- be jointly and severally liable for each other's basic living expenses incurred in the domestic partnership;
- not be married or in a domestic partnership with another person;
- not be related by blood in a way that would prevent them from being married under the laws of the state of Hawaii;
- be at least 18 years of age and competent; and
- sign and file a declaration of domestic partnership with the Hawaii Employer Union Health Benefits Trust Fund.¹⁹²

H. Illinois

On August 5, 2004, the American Federation of State, County and Municipal Employees ("AFSCME"), Illinois' largest state-worker union, ratified a contract which will provide state employees who are members of the union access to health, dental and vision benefits for their same-sex domestic partners.¹⁹³ While the contract went into effect immediately upon ratification, the benefits extended to employees with respect to their domestic partners will not become effective until January 1, 2007, the third year of the contract. AFSCME represents approximately 37,000 of Illinois' state government workers. Requirements have not yet been established to qualify persons for same-sex domestic partner benefits.

I. Iowa

Effective January 2004, state employees are eligible for health and dental benefits for their domestic partners and the children of their domestic partners. Domestic partners include both same-sex and different-sex partners. The benefits were secured by collective bargaining negotiations and union contracts by Iowa's largest union for government employees, the American Federation of State, County and Municipal Employees for the 2003-2005 contract term.¹⁹⁴ The only state employees who are not eligible for health and dental benefits for their domestic partners are those who belong to the smaller union of Iowa United Professionals because that union did not bargain for benefits.

For state employees to be eligible for domestic partnership benefits, they must file an affidavit of domestic partnership with the personnel assistant. To qualify as domestic partners, the employee and partner must attest that:

- they are each other's sole domestic partner and intend to remain so indefinitely;
- they are responsible for their common welfare;
- they agree to financially support each other during the domestic partnership and be responsible for each other's necessities;
- they are not legally married to anyone;
- they are at least age 18;
- they are mentally competent;
- they are not related by blood so as to bar marriage in Iowa;
- they have had a relationship for at least 12 months;
- they have shared the same residence for at least six months; and
- they have financial interdependence, which may be proven by common or joint ownership or leasing of a residence, joint ownership of a motor vehicle, checking accounts or credit cards, having durable power of attorney for health care or financial management for the other, or naming the other as primary beneficiary of life insurance, retirement

benefits, or a will.¹⁹⁵

Upon termination of a domestic partnership, a new affidavit of domestic partnership may not be filed for twelve months.

J. Maine

A 2001 Maine law requires insurers and other health care service providers doing business in the state to offer individuals and group policyholders the option of enrolling a covered person's domestic partner at rates and under the same terms and conditions as it offers spousal coverage.¹⁹⁶ Insurers and health care service providers can require the covered person and domestic partner to sign an affidavit and provide documentary proof of their relationship.

Under the law, partners must be adults and:

- have lived with the covered person for at least one year;
- be single and not part of another domestic partnership;
- be the sole partner of the covered person and expect to remain so;
- be jointly responsible for each other's common welfare as evidenced by joint (a) living or financial arrangements or (b) ownership of real or personal property.

On April 28, 2004, Maine's Governor, John Baldacci, signed L.D. 1579 into law. The law, which went into effect on July 30, 2004 (approximately 90 days from the date it was signed by the Governor), provides inheritance and other limited protections to domestic partners. The law also creates an official registry for domestic partners.

Under the law, a domestic partner is defined as a person who has signed and filed in the office of the Secretary of State a notarized affidavit attesting to a domestic partnership.¹⁹⁷ Two individuals may form a domestic partnership if:

- Each individual is a mentally competent adult;
- Neither individual is legally married to, legally separated from, or registered in a domestic partnership with another individual;
- Each individual is the sole domestic partner of the other and expect to remain so; and
- The two individuals are jointly responsible for each other's common welfare as evidence by joint living arrangements, joint financial arrangements or joint ownership of real or personal property.¹⁹⁸

The law provides domestic partners the same rights as spouses in the following areas:

- inheritance under the intestacy laws (where a person dies without a will);
- election against a will;
- right to make funeral and burial arrangements;
- right to receive victim's compensation; and

- preferential status to be named as a guardian and/or conservator in the event that his or her domestic partner is incapacitated

K. Massachusetts

Since 1992, Massachusetts has offered bereavement and family sick leave to same-sex and different-sex domestic partners of managerial and "confidential" state employees. Confidential employees are labor relations or human resource employees who are not managers but are exempt from collective bargaining. The benefits are provided pursuant to Governor's Executive Order No. 340 (1992).

L. Minnesota

Minnesota provided domestic partner benefits to state employees through June 30, 2003, as a result of collective bargaining.¹⁹⁹ Domestic partner benefits, including insurance benefits for Minnesota state employees, were temporarily in effect through June 30, 2003. Domestic-partner tuition waivers were temporarily in effect until the semester ending after April 10, 2003. Union contracts with same-sex-partner benefits had become effective June 20, 2002, as an interim measure. The collective bargaining agreement was submitted on May 20, 2002, and after having not been acted upon, it was implemented thirty days later. However, in 2003, an act passed by the state legislature and signed by the governor ratified the collective bargaining agreement but not to the extent of any domestic partner benefits, thereby ending any such benefits.²⁰⁰ As a result of the refusal to ratify the sections of the collective bargaining agreement providing domestic partner benefits, Minnesota became the first state in the nation to grant domestic partner benefits and then rescind them.²⁰¹

M. Nevada

Since July 1, 2003, Nevada has extended statutory protections to domestic partners in the limited area of visitation in a health care facility and decision-making relative to burial, cremation and anatomical gifts.²⁰² If an individual designates his or her domestic partner in a writing for such purpose in a form substantially similar to that which is provided by statute, the individual's domestic partner may visit the individual in a health care facility in the same manner as if the domestic partner were a legal family member, despite the individual's incapacity.²⁰³ Further, an individual's domestic partner may make all determinations relative to burial, cremation and anatomical gifts for an individual if the individual so designates his or her domestic partner for such purposes in a written document as provided by statute.²⁰⁴ It is worthy of note, however, that the individual may designate any person for such purposes, and that an individual's domestic partner receives no special treatment in the

absence of such written authorization and designation.

N. New Jersey

On January 12, 2004, the Domestic Partnership Act was signed into law.²⁰⁵ The act became effective on July 10, 2004 (six months from its date of enactment). The act grants individuals who file an affidavit of domestic partnership a variety of rights previously afforded only to married couples. Same-sex couples age 18 or older and different-sex couples age 62 and older may register as domestic partners. To establish a domestic partnership under the law, the following requirements must be met:

- both persons must share a common residence as well as joint financial arrangements or joint ownership of real or personal property;
- both persons agree to be jointly responsible for each other's basic living expenses during the domestic partnership;
- neither person is married or in another domestic partnership;
- neither person is related to the other by blood or affinity up to and including the fourth degree of consanguinity;
- both persons have chosen to share each other's lives in a committed relationship of mutual caring;
- both persons file jointly an affidavit; and
- neither person has been a partner in a domestic partnership that was terminated less than 180 days prior to the filing of the current affidavit of domestic partnership, unless one of the partners died.

Of note, a domestic partnership, civil union, or similar relationship entered into outside of New Jersey, which is valid under the laws of the jurisdiction under which the partnership was created, will be valid and recognized in New Jersey.

Upon the filing of an affidavit, the domestic partners shall be entitled to the following rights:

- to visit domestic partner in a health-care facility (visitation rights also extend to children of the patient's partner and the domestic partner of the patient's parent or child);
- to make medical or legal decisions for an incapacitated domestic partner;
- to give consent for an autopsy;
- to authorize donation of the deceased partner's organs;
- to be exempt from New Jersey inheritance tax on same grounds as a spouse;
- to claim an additional personal exemption under the New Jersey Gross Income Tax Act for the domestic partner who does not file a separate income tax return;
- to be eligible for state health-benefits program

where domestic partner is a state employee whereby domestic partner is deemed a dependent, but such eligibility is extended only to same-sex domestic partners (coverage at the county and municipality level and by private employers is not required);

- to be eligible for dependent benefits under state-administered retirement systems, but such eligibility is extended only to same-sex domestic partners;
- to be eligible for dental and health insurance as a dependent, but such eligibility is only extended to same-sex domestic partners.

The grounds for termination of a domestic partnership are similar to the grounds for termination of a marriage, including the following:

- voluntary sexual intercourse between a person who is in a domestic partnership and an individual other than the person's domestic partners;
- willful and continued desertion for a period of 12 or more consecutive months; extreme cruelty;
- separation for a period of 18 or more consecutive months;
- voluntarily induced drug addiction or habitual drunkenness for a period of 12 or more months;
- institutionalization for mental illness for a period of 24 or more consecutive months; or
- imprisonment of the defendant for 18 or more consecutive months.

In the instance of a domestic partnership between persons of different sexes, the partnership also shall terminate if the two persons enter into a valid marriage.

The Superior Court has jurisdiction over all proceedings to terminate a domestic partnership, including the division and distribution of jointly held property. Upon the termination of a domestic partnership, it is the obligation of a former domestic partner who has previously notified a third party, such as an insurance company, of the existence of the partnership to notify such third party that the partnership has been terminated. Termination of a domestic partnership also will end a designation of a domestic partner as a health-care representative.

Domestic partners may enter into contracts, akin to a prenuptial agreement, to modify their rights and obligations with respect to one another. Unless provided to the contrary in such a contract, a domestic partner shall not be liable for any debts of the other partner contracted prior to the establishment of the domestic partnership or contracted by the other partner in his or her own name during the domestic partnership.

Even when an affidavit has not been filed, the two persons may nonetheless be treated as domestic partners in an emergency medical situation for the purposes of

visiting and accompanying an ill partner on the same basis as a member of the ill partner's immediate family. Further, health-care providers, social-services providers, employers, and other individuals may treat a person as a member of a domestic partnership even in the absence of the filing of an affidavit.

O. New Mexico

On April 9, 2003, an executive order was issued providing domestic partners of state employees with the same benefits as those provided to spouses.²⁰⁶

P. New York

Since 1995, the state of New York has offered health benefits to same-sex and different-sex domestic partners of state employees. The benefits were extended through a union contract. Employees may cover their same-sex or different-sex domestic partner as their dependent under the New York State health insurance program, vision care program, and dental care program. To be eligible to receive benefits under the state program, both members of the domestic partnership must meet the following requirements:

- 18 years of age or older,
- unmarried, unrelated in any way that would bar marriage;
- living together;
- involved in a lifetime relationship; and
- financially interdependent.

In addition, the employee must have been in the partnership for one year prior to enrollment and must be able to provide proof of residency.²⁰⁷

Recently, rights were also extended to domestic partners in New York in the limited area of patient visitation. On October 1, 2004, Governor George Pataki signed into law legislation which provided domestic partners with the same hospital and nursing home visitation rights as spouses.²⁰⁸

In addition, the Attorney General of New York has indicated that New York must honor marriages legally entered into elsewhere between same-sex couples.²⁰⁹ As a result of this opinion, the Office of the State Comptroller has indicated the New York State and Local Retirement System (NYSLRS) will honor marriages between two people of the same sex.²¹⁰

Q. Oregon

Since June 1, 1998, Oregon has offered medical, dental, life insurance, and long-term care benefits to same-sex and different-sex domestic partners of state employees.²¹¹ This benefit came about as a result of the Public Employees Benefit Board.

R. Pennsylvania

Effective July 1, 2003, the state has extended to some state employees family and sick leave to care for domestic partners and their children. The benefits come as part of a four-year collective bargaining agreement between the state of Pennsylvania and 13,000 members of the Service Employees International Union and its affiliated locals. Other unions, including the largest union representing government employees, the American Federation of State, County and Municipal Employees, did not bargain for the benefit and therefore did not receive it. The covered employees may now take sick time to care for domestic partners or children who are ill, as well as bereavement time when a domestic partner or a member of their domestic partner's family dies. Such workers also may take up to 12 weeks of unpaid family and medical leave to care for their domestic partners.²¹²

S. Rhode Island

Since the summer of 2001, health-insurance coverage and benefits have been extended to domestic partners of state employees under Rhode Island law.²¹³ The benefits were extended by changing the definition of "dependent."

T. Vermont

Although Vermont had offered medical and dental benefits to same-sex and different-sex domestic partners of state employees since 1994, the Vermont civil union statute now confers greater benefits and does not limit such benefits to state employees. Vermont's Civil Union Law (Act 91) went into effect on July 1, 2000; insurance and tax sections went into effect on January 1, 2001. The law permits eligible couples to be joined in civil union and accords partners of a civil union all the benefits, protections, and responsibilities of spouses in a marriage under Vermont law, whether the rights and responsibilities are derived from statute, administrative or court rule, policy, common law, or any other source of civil law.²¹⁴ To be eligible to be joined in a civil union, the following requirements must be met:

- neither of the persons may be party to another civil union, a marriage, or a reciprocal beneficiary relationship;
- both persons must be of the same sex;²¹⁵
- the persons may not be close family members (parent, child, grandparent, grandchild, sibling, niece, nephew, aunt or uncle to the other);²¹⁶
- both persons must be age 18 or older;
- both persons must be of sound mind;
- neither person may be under guardianship, unless the guardian consents in writing.²¹⁷

A judge, a justice of the peace, or clergy members resid-

ing in Vermont may certify the civil union. A town or county clerk or the commissioner of health or the director of public records may issue the civil union certificate.²¹⁸

Although it is difficult to outline an exhaustive list of rights and responsibilities to which partners of a civil union are afforded under Vermont law, because of the sweeping nature of Act 91, the following is a partial list.

- Access to the laws of domestic relations, including those governing an annulment, separation, divorce, child custody, child support, property division and maintenance;
- Rights with respect to a child of whom either partner becomes the natural parent during the term of the civil union;
- Laws relating to title, including tenancy by the entirety;
- Laws relating to administration of estates, including descent and distribution, intestate succession (distribution of property in the event of death without a will); waiver of will (right of surviving partner to share in portion of deceased partner's estate where no provision is made in the will for the surviving partner); survivorship; and transfers during life or at death;
- Causes of action related to or dependent on spousal status, including but not limited to wrongful death, emotional distress, and loss of consortium;
- Probate law and procedure, including but not limited to appointment as administrator;
- Adoption laws and procedures;
- Group insurance for state employees;
- Continuing care contracts;
- Spousal abuse programs;
- Victims' compensation rights;
- Workers' compensation rights;
- Laws relating to emergency and non-emergency medical care, treatment, hospital visitation and notification;
- Family leave benefits;
- Public assistance benefits under state law;
- Laws relating to taxes imposed by the state or a municipality other than estate taxes;
- Laws relating to immunity from compelled testimony and the marital communication privilege;
- Homestead rights of surviving spouse;
- Homestead property tax allowance;
- Laws relating to loans to veterans under state law;
- Definition of family farmer under state law;
- Laws relating to objecting to anatomical gifts by others;
- State pay for military service;
- Application for absentee ballot;
- Family landowner rights; and
- Legal requirements for assignment of wages.

In addition to the rights afforded parties to a civil union, the parties also assume certain responsibilities. For example, by entering into a civil union, each partner assumes responsibility for the support of the other partner to the same degree and in the same manner as prescribed under law for married persons. The parties to a civil union may, however, modify the effects of their civil union by contract, akin to a prenuptial agreement between persons prior to a marriage.

The Vermont family court has jurisdiction over all proceedings relating to the dissolution of a civil union. The dissolution of a civil union follows all of the same procedures involved in the dissolution of a marriage. Likewise, it is subject to the same substantive rights and obligations that are involved in the dissolution of a marriage. Residency requirements will apply.²¹⁹ A complaint to dissolve a civil union in Vermont may only be brought if either party to the civil union has resided within the state for a period of six months or more, but dissolution cannot be granted unless one of the parties has resided in the state for at least one year prior to the date of the final hearing.

It should be noted that, although Vermont offers a wide variety of benefits at the state level for parties to a civil union that are identical to those of married persons, such benefits do not extend to federal benefits, rights, and protections. In particular, access is not extended to Social Security or benefits associated with the federal tax regime, immigration, or other federal-specific matters.

In addition to civil unions, Vermont offers reciprocal beneficiary status to same-sex and different-sex couples under Act 91. Reciprocal beneficiary status permits two related people to qualify for certain benefits otherwise available only to spouses.²²⁰ Unlike a couple who enters into a civil union, reciprocal beneficiaries are required only to present to the health commissioner a notarized declaration to establish or terminate their reciprocal beneficiary relationship.²²¹

Any persons wishing to establish such a relationship must be:

- at least age 18;
- related by blood or adoption and therefore barred by law from entering into a civil union or marriage;
- not presently married or a party to a civil union; and
- competent to contract.²²²

Persons in a reciprocal beneficiary relationship are extended rights equal to those of spouses in the following areas:

- hospital visitation and medical decision making;
- anatomical gift, burial, and cremation decisions;
- authority to act under a durable power of attorney for health care and terminal care decisions;
- coverage under the state patient's and nursing

home resident's bill of rights; and

- entitlement to abuse-prevention law coverage.²²³

In addition to authorizing reciprocal beneficiary relationships, Act 91 establishes a study commission charged with educating the public and collecting information about the implementation, operation, and effect of the law and how other states and jurisdictions treat Vermont civil unions, as well as studying whether reciprocal beneficiary rights should be enlarged or made available to nonrelated persons over age 62. The commission's final report, which was issued on January 15, 2002, indicated that the civil union law had negligible impact to date on state government, the courts, and other states and that reciprocal beneficiary relationships should not be extended, in large part, due to the lack of interest in establishing such relationships.²²⁴

U. Washington

Effective January 1, 2001, Washington offers same-

sex partners of state workers and retired state employees medical, dental, and life insurance benefits. A domestic partner is included in the definition of "dependent" for the purposes of state employment benefits.²²⁵

V. Cities and Districts Offering Same-Sex Benefits

As of March 2005, approximately 70 cities and counties have domestic partner registries. Additional cities and counties do not have actual registries, but extend domestic partner benefits to their employees, thereby bringing the total number of cities and counties which extend recognition or benefits to domestic partners to approximately 130.²²⁶ The District of Columbia extends limited domestic partner benefits (to be paid by the employee) to district government employees who are registered as domestic partners.²²⁷

X. DEFENSE OF MARRIAGE LAWS

A. Introduction

In the mid-1990s, states began enacting so-called “defense of marriage acts” (DOMAs). The purpose of state DOMAs is to prohibit same-sex couples from marrying within the state and to provide that the state will refuse to recognize same-sex marriages between two people of the same sex performed in other states. By 2005, forty states had passed laws or state constitutional amendments that purport to ban marriage between same-sex couples.

The following is a state-by-state summary of defense-of-marriage laws as of early March 2005. Domestic partnership information has been included as well to demonstrate the difference in attitudes that often exists between state DOMAs and state and municipal laws that recognize domestic partnerships and allow certain benefits for domestic partners. For a more detailed examination of statutory rights and protections for same-sex couples, see Section IX.

B. DOMAs and Other Government Action with Respect to Marriages Between Same-Sex Couples²²⁸

Alabama: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 1998. Ala. Code § 30-1-19. No municipalities offer domestic partnership benefits.

Alaska: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such relationships entered into in another jurisdiction was passed in 1996. Alaska Stat. § 25.05.0133. In a challenge to the law, a superior court judge ruled the same-sex couple who brought the lawsuit had a right to a marriage license unless the state could show a compelling reason why the issuance of a marriage license would be adverse to the best interests of the people of the state. Thereafter, in 1998, the people of Alaska voted to amend the state constitution to provide that marriage is only between a man and a woman. Alaska Const., Art I, § 25. The City of Juneau provides domestic partner benefits to its employees.

Arizona: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 1996. Ariz. Rev. § 25-101; § 25-112. Four cities and one county provide domestic partnership benefits.

Arkansas: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 1997. Domestic partnership benefits are not offered. A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 1997. Ark. Code Ann. § 9-11-107; § 9-11-109; § 9-11-208. In 2004, the voters of Arkansas approved a citizen-initiated amendment to the Arkansas Constitution providing that marriage consists only of the union of one man and one woman. The constitutional amendment also provides that a legal status for unmarried couples that is identical to or substantially similar to marriage is not valid or recognized in Arkansas. AK Const. Art. 1, § 25. Domestic partnership benefits are not offered.

California: In 2000, the citizens of California voted to pass a law providing that a marriage between two people of the same sex is not valid or recognized in California. Cal. Fam. Code § 308.5. A statewide domestic partner registry exists that provides registered domestic partners with almost all of the state-conferred rights and responsibilities provided to married couples. Approximately thirty-seven municipalities also offer domestic partnership benefits.

Colorado: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 2000. Colo. Rev. Stat. § 14-2-104. State government employers do not offer domestic partnership benefits, but three cities and one county do offer them, and the City of Denver has a domestic partnership registry.

Delaware: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 1996. Del. Code Ann. tit. 13, § 101. The county of New Castle provides domestic partnership benefits.

Florida: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 1997. Fla. Stat. § 741.212. State government employers do not offer domestic partnership benefits, but at least five cities and two counties do offer them and three cities—Key West, Miami Beach and West Palm Beach—have domestic partnership registries.

Georgia: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 1996. Ga. Code Ann. § 19-3-3.1. In 2004, the voters approved an amendment to the Georgia Constitution providing that Georgia will only recognize marriages between one man and one woman. The constitutional amendment also provides that Georgia will not recognize any unions between two people of the same sex as “entitled to the benefits of marriage,” that Georgia shall not give effect to any public act, record, or judicial proceeding from another state respecting a relationship between persons of the same sex that is treated as a marriage in another state, and that Georgia courts will not have jurisdiction to grant a divorce or separate maintenance regarding such a relationship. Ga. Const. Art. I, § IV. State government employers do not offer domestic partnership benefits, but two cities and two counties offer benefits and the City of Atlanta and Fulton County have domestic partner registries.

Hawaii: In 1998, voters approved an amendment to the state constitution, allowing the legislature to “reserve marriage to opposite-sex couples.” Hi. Const., Art. I, § 23. Also in 1998, a law was passed prohibiting marriage between two people of the same sex. Haw. Rev. Stat. § 572.1. The state provides rights and responsibilities to same-sex couples via the Reciprocal Beneficiaries Law, which was passed in 1997.

Idaho: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 1996. Idaho Code § 32-209. Domestic partnership benefits are not offered.

Illinois: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 1996. Ill. Comp. Stat. §§ 5/201; 5/212, 5/213.1. Domestic partnership benefits are available for state government employees, as well as employees of the City of Chicago and Cook County. In addition, Cook County and the Village of Oak Park have domestic partnership registries.

Indiana: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 1997. Ind. Code Ann § 31-11-1-1. Domestic partnership benefits are not offered by the state, but benefits are provided to employees of Bloomington.

Iowa: A law prohibiting marriage between two people of the same sex and providing that the state will not

recognize such marriages entered into in another jurisdiction was passed in 1998. Iowa Code §§ 595.2; 595.20. Domestic partnership benefits are offered to certain state employees, as well as to employees of the Iowa City Iowa City also has a domestic partnership registry.

Kansas: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 1996. Kan. Stat. Ann. §§ 23-101; 23-115. Domestic partnership benefits are not offered.

Kentucky: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 1998. Ky. Rev. Stat. Ann. §§ 402.005; 402.20; 402.040; 402.045. In 2004, the voters of Kentucky approved an amendment to the Kentucky Constitution providing that only marriages between one man and one woman will be recognized by the state. The amendment also provides that “[a] legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.” Ky. Const. § 233A. Domestic partnership benefits are not offered.

Louisiana: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 1999. La. Civ. Code Ann. art. 96; art. 3520(B). In 2004, the voters of Louisiana approved an amendment to the Louisiana Constitution providing that marriage only consists of the legal union of one man and one woman. The amendment also provides that “[a] legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.” La. Const. Art. XII, § 15. State government employers do not offer domestic partnership benefits. However, New Orleans offers domestic partnership benefits and a domestic partner registry.

Maine: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 1997. Me. Rev. Stat. Ann. tit. 19, § 650; tit. 19 § 701; tit. 19, §705. State government employers do not offer domestic partnership benefits, but three cities and one county do.

A state-wide domestic partner registry exists. In 2004, the governor signed a bill into law granting limited rights to domestic partners. Portland also has a domestic partnership registry.

Michigan: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 1996. Mich. Comp. Laws §§ 551.1; 551.271. In 2004, the voters of Michigan

approved a citizen initiated amendment to the Michigan Constitution providing that “the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.” Mich. Const. Art. I, § 25. State government employers do not offer domestic partnership benefits, but four municipalities do offer them.

Minnesota: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 1997. Minn. Stat. §§ 517.03; 517.20; 518.01. State government employers do not offer domestic partnership benefits, but Minneapolis does. Minneapolis also has a domestic partnership registry.

Mississippi: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 1997. Miss. Code Ann. §§ 93-1-1, 93-1-3. In 2004, the voters of Mississippi approved an amendment to the Mississippi Constitution providing that marriage is only the union of one man and one woman, and that marriages between two people of the same sex entered into in another jurisdiction are “void and unenforceable” in Mississippi. Miss. Const. § 263-A. Domestic partnership benefits are not offered.

Missouri: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 2001. Mo. Rev. Stat 451.022. In 2004, the voters of Missouri approved an amendment to the Missouri Constitution providing that marriage is only the union of one man and one woman. Mo. Const. Art. I, § 33. State government employers do not offer domestic partnership benefits, but St. Louis and Kansas City have domestic partner registries.

Montana: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 1997. Mont. Code Ann. §§ 40-1-103; 40-1-401. In 2004, the voters of Montana approved a citizen initiated amendment to the Montana Constitution providing that “[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in this state.” Mont. Const. Art. XIII, § 7. Domestic partnership benefits are not offered by the state, but the County of Missoula provides them for its employees.

Nebraska: In 2000, an amendment to the Nebraska Constitution was approved by the voters. The amendment provides that marriages between two people of the same sex will not be valid or recognized in Nebraska. The amendment also provides that “[t]he uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not

be valid or recognized in Nebraska.” Domestic partnership benefits are not offered.

Nevada: In 2000 and 2002, the voters of Nevada approved a constitutional amendment that limits marriage to a union between a man and a woman. Domestic partnership benefits are not offered.

New Hampshire: In 2004, New Hampshire passed a law prohibiting marriages between people of the same sex and providing that marriages between two people of the same sex will not be treated as valid in New Hampshire. N.H. Rev. Stat. Ann §§ 457:1; 457:2; 457:3.

North Carolina: A law banning marriages between two people of the same sex was passed in 1996. N.C. Gen. Stat § 51-1.2. State government employers do not offer domestic partnership benefits, but at least four municipalities offer them. In addition, the towns of Carrboro and Chapel Hill have domestic partnership registries.

North Dakota: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 1997. N.D. Cent. Code §§ 14-03-01; 14-03-08. In 2004, the voters of North Dakota approved a citizen initiated amendment to the North Dakota Constitution providing that marriage is only the legal union of one man and one woman. The amendment also provides that “[n]o other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent effect.” N.D. Const. Art. XI, § 28. Domestic partnership benefits are not offered.

Ohio: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was signed into law in 2004. The new law also provides that Ohio will not “extend . . . the specific statutory benefits of legal marriage to nonmarital relationships between persons of the same sex.” Ohio Rev. Code Ann. § 3101.01. Also in 2004, the voters of Ohio approved a citizen initiated amendment to the Ohio Constitution providing that only marriages between one man and one woman will be valid in or recognized by Ohio. The amendment also provides that Ohio “shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.” Ohio Const. Art. XV, § 11. Domestic partnership benefits are not offered by the state, but the Cities of Cleveland Heights and Columbus do. Cleveland Heights also has a domestic partnership registry.

Oklahoma: A law providing the state will not recognize marriages between two people of the same sex was passed in 1996. Okla. Stat. tit. 43, § 3.1. In 2004, the vot-

ers of Oklahoma approved an amendment to the Oklahoma Constitution providing that marriage consists only of the legal union of one man and one woman and that marriages between two people of the same sex entered into in another state shall not be recognized as valid in Oklahoma. Okla. Const. Art. II, § 35. Domestic partnership benefits are not offered.

Oregon: In 2004, the voters of Oregon approved a citizen initiated amendment to the Oregon Constitution providing that only marriages between one man and one woman “shall be valid or legally recognized as a marriage.” Ore. Const. Art. XV, § 5a. Domestic partnership benefits are offered to state employees, as well as to employees of at least five other municipalities. Multnomah County has a domestic partnership registry.

Pennsylvania: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 1996. 23 Pa. Const. Stat. § 1704. The state and some municipalities offer domestic partner benefits to some government workers (often via collective bargaining agreements). Philadelphia has a domestic partnership registry.

South Carolina: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 1996. S.C. Code Ann. § 20-1-15. Domestic partnership benefits are not offered.

South Dakota: A law prohibiting marriage between two people of the same sex was passed in 1996. S.D. Codified Laws § 25-1-1. An additional law was passed in 2000 which prohibits the recognition of marriages between two people of the same sex performed in other states. S.D. Codified Laws § 25-1-38. Domestic partnership benefits are not offered.

Tennessee: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 1996. Tenn. Code Ann. § 36-3-113. Domestic partnership benefits are not offered.

Texas: A 1973 law provides that a marriage license may not be granted to two people of the same sex. Tex. Fam. Code § 2.001. An additional law was passed in 2003 providing that Texas will not recognize marriages or civil unions of two people of the same sex. Tex. Fam. Code § 6.204. Domestic partnership benefits are not offered to state employees, but Travis County does provide them to its employees. Travis County also has a domestic partnership registry.

Utah: A law prohibiting marriage between two people of the same-sex marriage was passed in 1995. Utah Code Ann. § 30-1-2. In 2004, the voters of Utah approved an amendment to the Utah Constitution pro-

viding that marriage consists only of the legal union of one man and one woman. The amendment also provides that “[n]o other domestic status or union, however denominated, between persons is valid or recognized or may be authorized, sanctioned, or given the same or substantially equivalent legal effect as a marriage.” Utah Const. Art. I, § 29. Domestic partnership benefits are not offered.

Virginia: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 1997. Va. Code Ann. § 20-45.2. In 2004, the Legislature approved another statute that provides that “[a] civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.” Va. Code Ann. § 22-45.3. Domestic partnership benefits are not offered.

Washington: A law prohibiting marriage between two people of the same sex and providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 1998. Rev. Code Wash. §§ 26.04.020. Domestic partnership benefits are offered by the State, as well as by eight municipalities. There is no state registry, but four municipalities have registries.

West Virginia: A law providing that the state will not recognize such marriages entered into in another jurisdiction was passed in 2001. W. Va. Code § 48-2-603. Domestic partnership benefits are not offered.

Other developments: The passage in November 2004 of constitutional amendments in eleven states defining marriage as between one man and one woman illustrates some of the areas where same-sex and non-marital relationships are treated differently from opposite-sex marriages.

In Arkansas, for example, House Bill 119 has passed the House of Representatives. The bill would prohibit the state from placing foster children with most unmarried couples and would further restrict who may adopt children within the state. Since passage of the state’s constitutional amendment, the Arkansas House of Representatives has also passed legislation requiring use of the state’s constitutional definition of marriage as the only permissible definition in public school textbooks. The bills are now before the Arkansas Senate.

In Michigan, the state attorney general has ruled that the state’s recent constitutional amendment prohibits state and local governments from providing benefits to employee’s same-sex partners.

In Ohio, the passage of one of the most restrictive constitutional amendments has led to two recent trial court decisions in Cuyahoga County denying protections under the state's domestic violence law to victims of abuse from their opposite-sex partner. The courts have reasoned that convicting a non-married man or woman of domestic violence against his or her partner would be according the relationship rights similar to those of marriage and would, therefore, violate Ohio's constitutional amendment. Similar court proceedings are now pending in Utah which also adopted a constitutional amendment in the November 2004 election.

C. States Without Statutory or Constitutional DOMAs (and discussion of some of the legislative action)

Connecticut: No ban on marriages between two people of the same sex exists. A DOMA bill was blocked in 1999. Domestic partnership benefits are available to state employees, but no domestic partner registry exists.

Maryland: No ban on marriages between two people of the same sex exists. Three attempts to ban such marriages and one attempt to legalize them have failed. State government employers do not offer domestic partnership benefits, but nine municipalities (including Baltimore) do offer them.

Massachusetts: No ban on marriages between two people of the same sex exists. A DOMA introduced in 2000 was referred for "study," and is still pending. On March 29, 2004, the state legislature approved a proposed amendment to the state constitution that would limit marriage to a union between one man and one woman and would create a system for civil unions (comparable to Vermont's civil union system). To become law, this proposed amendment must pass the state constitutional convention again and then be approved by the voters. Same-sex couples have been able to marry in Massachusetts since May 17, 2004.

New Jersey: No ban on marriages between two people of the same sex exists. However, a DOMA bill was introduced in 2000, and a similar bill is pending. Domestic partnership benefits are offered, including domestic partnership health care benefits for state employees. There is also a state-wide domestic partnership registry.

New Mexico: No ban on marriages between two people of the same sex exists. Several attempts to pass DOMA legislation have failed. Domestic partnership benefits are offered to state employees, but no domestic partner registry exists.

New York: No ban on marriages between two people of the same sex exists. A DOMA bill was proposed

in 2000. Domestic partnership benefits are offered, but no statewide registry exists. Six municipalities (including Ithaca, New York City, and Rochester) have domestic partner registries.

Rhode Island: No ban on marriages between two people of the same sex exists. In 2000, a DOMA bill was blocked. Also in 2000, a bill was introduced to allow same-sex couples to marry. Domestic partnership benefits are offered, but there is no registry.

Vermont: In 2000, the legislature created civil unions, a new marital status that affords same-sex couples the same state protections, benefits, and responsibilities as conferred by civil marriage. Domestic partnership benefits are offered, but there is no registry.

Washington, DC: No marriage legislation has been introduced. Domestic partnership benefits and a registry are offered.

Wisconsin: No ban on marriages of two people of the same sex currently exists. In 2004, however, the Wisconsin legislature passed a proposed constitutional amendment that would restrict marriage to the union of a man and a woman. If the legislature approves the proposal again in 2005, and if the voters then approve the proposal, the state constitution would be amended. Domestic partnership benefits are not offered.

Wyoming: No ban on marriages of two people of the same sex exists. A DOMA bill that would have banned same-sex marriage and prohibited recognition of such marriages performed in other states was blocked in 1997. Domestic partnership benefits are not offered.

D. Federal Defense of Marriage Act

The federal Defense of Marriage Act provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.²²⁹

★ ★ ★ ★ ★

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.²³⁰

E. Proposed Federal Constitutional Amendment

Two proposed federal constitutional amendments seek to prohibit marriage between two people of the same sex. The first (S.J. Res. 26) was introduced in the U.S. Senate on November 25, 2003, by Senator Allard and four cosponsors (the parallel version in the U.S. House of Representatives is H.J. Res. 56). The amendment provides:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the Constitution of any State, nor State or Federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

The second proposed constitutional amendment (S.J. Res. 30) was introduced in the U.S. Senate on March 22, 2004, also by Senator Allard, and eight cosponsors. The amendment has a short title of “Federal Marriage Amendment” and provides:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

The second proposed amendment (S. J. Res. 30) deletes the words of the first proposal (S. J. Res. 26) “nor State or Federal Law” and appears to provide more flexibility. The first proposal appears to prohibit any state or federal law that would provide legal incidents of marriage to same sex-couples. For example, the first proposal could be construed to prohibit a state law that would provide for family health insurance or family leave for same-sex couples. The second proposed

amendment appears to permit state or federal governments to enact such statutes, but does not allow state or federal constitutions to require such statutes or other legal protections.

The second proposed amendment also deleted the reference to conferring marital status or the legal incidents of marriage on “unmarried . . . groups.” In both proposals, the scope of the phrase “legal incidents of marriage” is uncertain.

President George W. Bush has expressed his support for a federal constitutional amendment to restrict marriage to man and a woman. In a statement on February 24, 2004, President Bush said:

After more than two centuries of American jurisprudence, and millennia of human experience, a few judges and local authorities are presuming to change the most fundamental institution of civilization. Their actions have created confusion on an issue that requires clarity. . . .

Marriage cannot be severed from its cultural, religious and natural roots without weakening the good influence of society. Government, by recognizing and protecting marriage, serves the interests of all. Today I call upon the Congress to promptly pass, and to send to the states for ratification, an amendment to our Constitution defining and protecting marriage as a union of man and woman as husband and wife. The amendment should fully protect marriage, while leaving the state legislatures free to make their own choices in defining legal arrangements other than marriage.²³¹

An amendment to the United States Constitution must be approved by a two-thirds vote of both the House and the Senate and by three-quarters of the states.²³²

XI. RECOGNITION OF SAME-SEX PARTNERSHIPS AND PROVISIONS OF BENEFITS BY PRIVATE SECTOR EMPLOYERS AND PUBLIC EMPLOYERS

A. Number of Private Sector Employers Offering Health Benefits

According to data collected by the Human Rights Campaign Foundation, the number of private sector companies offering domestic partnership health benefits has been steadily increasing, from 4,892 in 2001 to 7,602 in 2005, an increase of 55%.²³³ The number of Fortune 500 companies offering health benefits is now at 233, up from 61 in 1998.²³⁴

Some states and municipalities have equal benefit laws that require all private employers who contract with the state or local jurisdiction over a certain dollar amount to provide health insurance and other benefits to domestic partners equivalent to what they provide to employees' spouses.²³⁵

When employers offer benefits, they may include:

- health insurance,
- dental insurance,
- vision insurance,
- life insurance,
- retirement and profit sharing benefits,
- parental/family leave,
- cafeteria plans,
- child care,
- sick leave,
- bereavement leave,
- relocation assistance,
- spousal invitations to company functions, and
- achievement awards (trips, etc.).

Other work-related issues include worker's compensation and Social Security. Most workers contribute to Social Security through payroll tax and receive payments upon reaching retirement age. Spouses can receive retirement payments based on the working spouse's account. Spouses and children of deceased workers also receive Social Security survivor benefits. The federal DOMA (discussed in Section X(C)) prohibits Social Security benefits from being awarded to domestic partners and their children (who have not been adopted or who are not biologically related to the deceased or disabled worker). The provision of some other benefits, including retirement benefits, also are affected by the federal DOMA.

B. Health Benefits for State Government Employees

Eleven state governments provide (or soon will provide) health benefits for domestic partners. Those states are: California, Connecticut, Illinois, Iowa, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. For more discussion, see Section IX, "Statutory Protections and Rights for Same-Sex Couples." The Human Rights Campaign Foundation reports that as of April 2005, 129 city and county governments provide domestic partner health benefits.²³⁶ More than 40% of these entities began offering such rights since 2000.

C. Cost of Benefits

Expanding eligibility for benefits to domestic partners means increasing costs, but the experience of major employers and municipalities has shown that this cost is relatively small.

Employers that provide domestic partner benefits have found that only 1% to 2% of eligible employees actually apply for coverage. Some companies and municipalities reported that less than 1% of employees apply when eligibility is limited to same-sex partners, whereas enrollment may increase to 4% when eligibility includes different-sex partners.²³⁷ In general, employers have found that same-sex and opposite-sex domestic partners have fewer dependents than traditional couples and usually have little or no maternity costs.

When employers initially began extending health coverage to domestic partners, insurers did so cautiously because of a lack of underwriting experience with domestic partners and a lack of control over the risk pool. Many insurers initially levied surcharges to cover expected additional claims. Most surcharges have now been dropped because experience has failed to justify them.²³⁸

D. Employers' Determination of Eligibility

Employers considering extending eligibility for benefits to their employees' domestic partners must set policies to govern these benefits. Policies should set forth:

- **Nature of partnership.** Some employers offer domestic partnership benefits to different-sex partnerships and same-sex partnerships. Other employers restrict eligibility to same-sex partners, perhaps on the rationale that gay and lesbian couples do not have the option to marry.
- **Requirements.** Most definitions of domestic partnership include three core requirements. Partners must: (1) be involved in a committed relationship; (2) live together; and (3) be financially interdependent. Additional requirements may specify that the partner must be over 18, unmarried, competent to contract, and not a blood relative of the employee.
- **Documentation.** Employers usually require an affidavit from the employee attesting that the domestic partnership has existed for a minimum period of time established by the employer (six to 12 months are common waiting periods). In states and cities where same-sex partners may register as domestic partners, the registration certificate may take the place of the affidavit. Employers also may require documentation of financial co-dependence between the two partners and an additional affidavit promising to reimburse the employer if the domestic partnership is later found not to meet the designated criteria. If the relationship ends, some employers require that the employee submit another affidavit to terminate the coverage. Some

employers limit eligibility to add another domestic partner to six to twelve months from the termination of coverage for a prior domestic partner.

E. The Effect of DOMA's on Health Benefits for State Government Employees

In nine of the eleven states approving amendments to their state constitutions in 2004 prohibiting marriage between couples of the same sex, the language of the amendments is potentially broad enough to result in challenges to state, counties, cities and public universities that provide employee benefits for same-sex couples.²³⁹

On March 16, 2005, the Attorney General of Michigan issued a ruling that the City of Kalamazoo's Domestic Partner Benefits Policy is contrary to the 2004 Marriage Amendment. The Michigan Marriage amendment prohibits state and local governmental entities from conferring benefits on their employees on the basis of a "domestic partnership" agreement that is characterized by reference to the attributes of a marriage. The opinion was limited to future employment contracts and did not apply to current contracts.²⁴⁰

A challenge to the Attorney General's Opinion was filed on March 21, 2005 in Ingham County, Michigan requesting declaratory judgment that the Amendment does not bar employers from providing domestic partner benefits.²⁴¹

XII. RECOGNITION OF SAME-SEX COUPLES IN OTHER COUNTRIES²⁴²

A. Overview

Presently, two countries allow same-sex couples to marry – Netherlands, Belgium, as do three provinces in Canada: Ontario, British Columbia and Quebec. Canada is expected to have marriage available to same-sex couples throughout the country some time in 2005.

On April 21, 2005, the lower house of the Spanish Parliament passed a bill which would permit same sex couples to marry by a 183-136 vote. At the time of this writing, the bill is scheduled to go to the Senate where it is anticipated that there is ample support for its passing. If passed, Spain, a traditionally Roman Catholic country, will become only the third European country to legalize same-sex marriages.²⁴³ Besides these countries that have granted full marriage rights, many other European countries allow same-sex couples to enter into legal relationships with most of the rights and responsibilities of marriage. In 1989, Denmark became the first country to offer same-sex couples the right to enter into a registered partnership. Since 1989, four other Nordic countries have followed suit, Norway (1993), Sweden (1995), Iceland (1996), and Finland (2002). Generally, registered partnerships provide for all of the rights and responsibilities associated with marriage, except for differences in adoption and international recognition of partnerships.

In 1995, Hungary extended the rights of cohabitants to same-sex couples. Since that time, the Netherlands, Belgium, France, Germany and 11 of the 17 regions of Spain have created forms of legal recognition for same-sex couples. The United Kingdom and Switzerland will join this group by the end of 2004. Although Croatia and Portugal do not have registered partnership legislation (de jure recognition), these two countries grant rights to same-sex couples who live together (de facto recognition). In France, the same-sex couple recognition is called a “civil solidarity pact” (PACS), which allows for the registration of private contracts between two unmarried and unrelated individuals – either same-sex or different-sex – and grants access to benefits and obligations similar to those which exist for married couples. In several other countries, including Brazil, Columbia, Costa Rica, the Czech Republic, Israel, and New Zealand, same-sex

couples have been granted some rights or responsibilities associated with marriage.

B. Country-by-Country Description of Laws

Argentina: The city of Buenos Aires has passed legislation that grants some of the rights of married couples to same-sex couples.

Belgium: On January 30, 2003, Belgium became the second country in the world to allow gay and lesbian couples to marry. In order to marry, at least one party to the marriage needs to be a citizen or legal resident of Belgium. In addition, Belgium also has registered partnerships, allowing couples to decide which system they wish to enter.

Brazil: A legislator representing the Workers Party brought forward a partnership bill which “assures rights to inheritance, succession, welfare benefits, joint income declaration, right to nationality in case of a foreign partner...” The bill passed a Senate Committee. In 2000, the Brazilian government provided that lesbian and gay partners had a right to inherit each other’s pension and social security benefits. In 1998, the Brazil High Court granted property rights to a surviving same-sex partner.

Canada: Same-sex couples are regulated by a growing number of statutory cohabitation provisions which give them spousal treatment, but not the status of being married. These provisions apply automatically after specified periods of cohabitation and are not elective. In 2003, an appellate court in Ontario held that denying same-sex couples the right to marry violated the Canadian Constitution, and the court made its decision effective immediately.²⁴⁴ This ruling was followed in British Columbia within a few weeks, and in April 2004 in Quebec. In addition, Quebec has enacted civil union legislation and Nova Scotia offers a limited form of registered domestic partnership. The federal government has committed to extending full marriage rights across the country by 2005, after it receives an advisory opinion on its new enabling legislation from the Supreme Court of Canada in the fall of 2004.

Croatia: In July 2003, the legislature passed a law providing protections involving property rights of same-sex couples who have lived together for three

years.

Czech Republic: Same-sex couples have the right to intestate succession and the right to inheritance and succession rights in housing under the Civil Code.

Denmark: On October 1, 1989, Denmark passed a statute allowing same-sex couples to enter into registered partnerships. At least one partner must be a Danish national and live in Denmark or both partners must be permanent residents of Denmark for two years. The status includes almost all of the rights associated with marriage, including inheritance, insurance plans, pension, social benefits, income tax reductions, unemployment benefits, and social benefits. It also makes members of same-sex couples responsible for alimony payments if they divorce. Starting in 1999, gay and lesbian couples were allowed to adopt their partner's children and share joint custody with the child.

Finland: In 2002, Finland created registered partnerships. For a description of registered partnerships, see "Denmark," above. The one difference between Denmark and Finland registered partnership legislation is that the Finland does not allow the partners to use each other's last name.

France: In 1999, France created a new legal status of Civil Solidarity Pact (PACS) that can be entered into by same-sex and different-sex couples. After "three years of stated fidelity" the couple is eligible to file joint tax returns. This status grants members of the couple the same tax advantages and welfare benefits that are provided to married couples. Partners are also entitled to intestate succession and can sponsor their partner for immigration status. In a PACS, partners commit to providing for the support and needs of the other partner, and they are jointly responsible for household debts. Dissolution of the PACS is by death or at the request of either party after a three-month waiting period. In the case of different-sex couples, a PACS also will end if the couple marries.

Germany: The Life Partnerships Act 2000 became effective in August 2001. This status is similar to the registered partnerships that are available in the Scandinavian countries. It confers almost all of the rights granted to married couples, except for the right to adopt a child not related to either party. This law allows gay and lesbian couples to exchange vows at a local government office. They would receive several of the benefits of heterosexual married couples, including: inheritance tax exemptions, next-of-kin rights, joint eligibility for some social security benefits, similar rights in the benefits of tenancy, and immigration concessions for the foreign partner. The partnership is ended by court declaration and the law

provides for continuing maintenance obligations. There is no right to adopt, and life partnerships will not receive the same tax benefits afforded to heterosexual married couples. However, the law does allow joint custody over a child for whom one partner already has custody.

Hungary: In 1995, the Constitutional Court of Hungary extended the rights granted unmarried different-sex cohabitants to same-sex couples. The rights of cohabitants allow these couples to obtain most of the economic benefits of marriage. It does not, however, include the right to adopt. This ruling was codified by the Hungarian legislature the following year.

Iceland: A law passed in 1996 gives gay and lesbian couples the right to enter into registered partnerships, similar to that allowed in other Scandinavian countries. Registered partnerships provide most of the rights associated with married couples, but registered partnerships do not provide the right to adopt children who are not biologically related to either party or the right to free access to artificial insemination.

Latvia: Registered partnership legislation has been introduced in parliament.

Luxembourg: Registered partnership legislation has been introduced in parliament.

The Netherlands: Since 2001, gay and lesbian couples, who are either citizens of the Netherlands or who have a valid residency title, have been allowed to marry and to adopt children. This made the Netherlands the first western country in recent history to have legalized gay and lesbian marriages. In addition, both different-sex and same-sex couples have the option of entering into a registered partnership instead of a marriage.

New Zealand: In 2001, the New Zealand Parliament passed four laws granting same-sex couples some rights associated with marriage, including property, inheritance, and spousal support. There is a federal law which bans discrimination based on sexual orientation. Although New Zealand's marriage act does not specifically prohibit same sex-marriages, marriages which "damage the gene pool" are disallowed.

Norway: Registered partnership legislation was passed in 1993. This status is similar to that in other Scandinavian countries, and was based on the Danish act. Registered partnerships entitle couples to almost all of the rights associated with marriage, except for the right to adopt a child that is not biologically related to one of the partners and access to artificial insemination.

Republic of Ireland: In 2004, Senator David Norris introduced the Domestic Partnership Bill. This bill is now pending in the Irish Senate.

Spain: There is no federal legislation providing registration for same-sex couples, although 11 of the 17 Spanish regions have adopted various partnership registration laws for same-sex partners. These regions are Madrid, Catalonia, Aragon, Navarra, Valencia, Asturias, Andalucia, Baleric Islands, Canary Islands, Basque Country, Extremadura. In April 2004, the incoming Spanish Prime Minister announced his intention to open marriage to same-sex couples.

On April 21, 2005, the lower house of the Spanish Parliament passed a same-sex marriage bill. It is anticipated that it will pass the Senate as well at the time of this writing. If passed, the right to marry and adopt children will be extended to same-sex couples.

Sweden: Registered partnerships became available in 1995. This statute was based on the Danish act and is similar to that provided in the other Scandinavian countries. Registered partners have almost all of the rights associated with marriage, except for access to artificial insemination.

Switzerland: Although there is no federal law, several states have enacted legislation providing some rights to same-sex couples. Civil solidarity pacts (like those in France) passed in 2001 for Geneva canton. Law on the

registration of same-sex couples (similar to German laws) were adopted in 2002 for Zurich canton. A proposal for registered partnerships came before the federal Swiss parliament in December of 2003 and passage of this legislation is likely.

United Kingdom (England, Wales, Scotland, Northern Ireland): Currently there are numerous cities (London, Manchester, Caerphill, Darwen, Leeton, Newport, Richmond-Upon-Thames, Swansea, Thurrock and Liverpool) that allow same-sex couples to register their relationships, but the registration does not carry with it any legal consequences. In 2001 and 2002, registered partnership legislation was introduced in the House of Commons and the House of Lords, respectively. Both proposals were removed from consideration. However, on June 30, 2003 a consultation paper drafted by the U.K. government was published, stating its intention to introduce registered partnerships, known as civil partnerships. On March 30, 2004, the government submitted the Civil Partnership Bill to the House of Lords. The merits of the bill were discussed in the House of Lords April 22, 2004, and gained widespread cross-party and denominational (Church of England) support.

X. APPENDICES

- A. State Statutory Protections
(table format begins on page 39)
- B. Recognition of Non-Marital Registered Relationships in Europe
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- C. American Bar Association Policy on Sexual Orientation and Regulation of Marriage
(begins on page 43)

Appendix A: Statutory Rights and Responsibilities of Same-Sex Couples Compared State-by-State

	Alaska (A. S. §47.24.016 §39.50.200)	Arizona (A.R.S. §36-3231 §36-843)	California (ABs 26, 25, 2005, 2208 and 2216, SB 1661)	Connecticut (§SB 963, P.A. 02-105, Comptroller Memo 200-13)	Delaware (Merit Rules 5.3.4, 5.3.6.2, 5.3.6.3, 19)	Hawaii (H.I.R.S. §572C)	Illinois (AFSCME contract)
Hospital and Nursing Home Visitation	No provision	No provision	Private visits in hospitals and nursing homes	Hospital and nursing home visitation rights parallel with spouses Rights to emergency notification	Hospital and nursing home visitation rights parallel with spouses Rights to emergency notification	Hospital and nursing home visitation	No provision
Medical Decision-making	Priority in protective service decision-making above all but surviving spouse	Priority in anatomical gift and health care decisions behind that of a patient's spouse, adult child or parent	Health care and end-of-life decisions for incapacitated partner	Health care decisions Consent to perform autopsy Anatomical gift, burial and cremation decisions	No provision	Health care decisions Consent to perform an autopsy	No provision
Civil Claims	No provision	No provision	Wrongful death of partner Negligent infliction of emotional distress when serious injury to partner observed	Wrongful death of partner Loss of consortium Infliction of emotional distress General tort liability Protection under domestic violence laws Victim's compensation rights Access to all domestic relations laws	No provision	Wrongful death of partner Loss of consortium Tort liability Protection under domestic violence laws	No provision
Property Transfer Upon Death	No provision	No provision	to leave property to surviving partner Inheritance under the intestacy laws identical to surviving spouse	Inheritance under the intestacy laws Waiver of will equivalent to surviving spouse Property rights (including tenancy by the entirety) Homestead rights of surviving spouse Assumption of motor vehicle ownership upon maker's death	No provision	Inheritance under the intestacy laws Property rights (including joint tenancy) Family and homestead allowances and exempt property amount Right of election against will	No provision
Appointment as Estate Administrator	No provision	No provision	Same priority as a surviving spouse	Same priority as a surviving spouse	No provision	Same priority as surviving spouse	No provision
Employment	No provision	No provision	Unemployment benefits upon partner relocation Family and medical leave to care for ill partner or partner's child Health insurance coverage for domestic partners Health insurance continuation upon death for partner and partner's children (state employees only) Death benefits and survivor's allowances (certain county employees)	Group insurance for state employees Pension benefits for partners of state retirees and employees Workers compensation Family leave benefits Employers must notify employees of emergency phone calls involving designees Employers cannot discipline designees for attending court proceedings as homicide victim's representative	Bereavement leave to same-sex and different-sex domestic partners of state employees Sick leave for attendance at doctor's appointments of domestic partners or for the serious illness or injury of a domestic partner	Workers compensation Family and bereavement leave Limited health insurance coverage Death and retirement benefits for certain state and local employees	State employees of largest union are eligible for health benefits for their domestic partners
Taxation	No provision	No provision	Money spent to cover domestic partner and partner's children under employer's health plan is not taxable as income	Benefits of laws relating to taxes imposed by the state or a municipality parallel those of married couple	No provision	Gifts of certain real estate interests between reciprocal beneficiaries are exempt from transfer taxes	No provision
Other	No provision	No provision	No distinctions between any insurance provided to domestic partners and that provided to spouses	Spousal Immunity Privilege Access to family law and probate courts	No provision	No provision	No provision

	New York (union contract and N.Y. Pub. Health Law § 2805-q)	Oregon (Or. Adm. R. 101-015-0005, 101-010-0005, 101-020-0020, 101-020-0035, 101-030-0005)	Pennsylvania (collective bargaining)	Rhode Island (R.I. Gen. Laws §36-12-1 et seq.)	Vermont (15 V.S.A. §1201 et. seq. and 18 V.S.A. §5160 et. seq.)	Washington (WAC §182-12-119)
Hospital and Nursing Home Visitation	Hospital and nursing home visitation for domestic partners equal to that of spouses	No provision	No provision	No provision	Hospital and nursing home visitation rights parallel with spouses Rights to emergency notification	No provision
Medical Decision-making	No provision	No provision	No provision	No provision	Health care decisions Consent to perform autopsy Anatomical gift, burial and cremation decisions	No provision
Civil Claims	No provision	No provision	No provision	No provision	Wrongful death of partner Loss of consortium Infliction of emotional distress General tort liability Protection under domestic violence laws Victim's compensation rights Access to all domestic relations laws	No provision
Property Transfer Upon Death	No provision	No provision	No provision	No provision	Inheritance under the intestacy laws Waiver of will equivalent to surviving spouse Property rights (including tenancy by the entirety) Homestead rights of surviving spouse	No provision
Appointment as Estate Administrator	No provision	No provision	No provision	No provision	Same priority in appointment as surviving spouse	No provision
Employment	State employees are eligible for health, vision and dental benefits for their domestic partners	Medical, dental, life insurance and long-term care benefits available to domestic partners of state employees	Family and sick leave to care for domestic partners of some state employees and their children	Health insurance coverage and benefits for domestic partners of state employees	Group insurance for state employees Workers compensation Family leave benefits	Medical, dental and life insurance benefits available to domestic partners of State workers and retired State employees
Taxation	State employees are eligible for health, vision and dental benefits for their domestic partners	No provision	No provision	No provision	Homestead property tax allowance Benefits of laws relating to taxes imposed by the state or a municipality other than estate taxes	No provision
Other	No provision	No provision	No provision	No provision	Access to family law and probate courts	No provision

Appendix B: The current level of recognition of non-marital registered relationships in Europe

Country	Introduced	Gender	Qualifying Period	Next of Kin	Inheritance Rights	Social Security	Tax Benefit	Adoption	Dissolution
EUROPEAN UNION (AS OF 30TH April 2004)									
Belgium	1998	SS / OS	No	Yes	No	No	No	No	By agreement
Denmark	1989	SS	No	Yes	Yes	Yes	Yes	Yes (step-child only)	As marriage
Finland	2002	SS	No	Yes	Yes	Yes	Yes	No	As marriage
France	1999	SS / OS	No	Yes	No	Yes	Yes (after 3 years)	No	By agreement
Germany	2001	SS	No	Yes	Yes	Yes	No	No	As marriage
Netherlands	1998	SS / OS	No	Yes	Yes	Yes	Yes	Yes (not international)	By agreement
Spain*	1998	SS / OS	No	Yes	Yes	No	No	No	Varies per region
Sweden	1995	SS	No	Yes	Yes	Yes	Yes	Yes	As marriage
UK	2004 (proposal)	SS	No	Yes	Yes	Yes	Yes	Yes	As marriage
Luxembourg	2002	<i>Proposal submitted</i>							
Ireland	2004	<i>Proposal submitted</i>							
Austria		No legislation							
Greece		No legislation							
Italy		No legislation							
Portugal		No legislation							
EUROPEAN FREE TRADE ASSOCIATION COUNTRIES (AS OF 30TH April 2004)									
Switzerland	2003 (proposal)	SS	No	Yes	Yes	Yes	Yes	No	As marriage
Norway	1993	SS	No	Yes	Yes	Yes	Yes	No	As marriage
Iceland	1996	SS	No	Yes	Yes	Yes	Yes	Yes (step child only)	As marriage
Liechtenstein	2003	<i>Proposal submitted</i>							

Table 2: The current level of recognition of same-sex marriages in Europe

Country	Introduced	Parentage	Adoption
EUROPEAN COUNTRIES			
Belgium	2003	No	No
The Netherlands	2001	No	Yes (not international)

Table 3: Legislation List

Belgium (1998)

Loi instaurant la cohabitation légale, 23-11-1999

Denmark (1989)

Lov nr 372 af 07-06-1989 amended by Lov nr 821 af 19-12-1989, Lov nr 360 af 02-06-1999 (and ministerial orders 929/2001 and 198/2002)

Finland (2001)

Act on Registered Partnerships (950/2001) amended by Act 1229/2001 (Governmental decree 141/2002)

France (1999)

Loi no 99-944 du 15-11-1999 relative au pacte civil de solidarité

Germany (2001)

Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften (2001) 9 Bundesgesetzblatt Teil I 265 (16th February 2001)

Iceland (1996)

Act on Registered Partnership Number 87, 12-06-1996 amended by Act No. 52/2000

Norway (1993)

Lov nr 40 af 30-04-1993 amended by Lov nr 104 af 21-12-2000 and Lov nr 36 af 15-06-2001

Portugal (2001)

Lei N° 7/2001 de 11-05-2001, Adopta medidas de protecção das uniões de facto

Sweden (1995)

Lag (1994:1117) amended by Ändring (1995:1245), Ändring (2000:374) and Ändring (2002:603)

Switzerland (proposal)

Loi sur le partnariat du 15 février 2001

Spain: Catalonia (1998)

Ley 10/1998 de 15 de Julio de Uniones Estables de Pareja

Spain: Aragón (1999)

Ley 6/1999 de 26 de marzo relativa a Parejas Estables No Casadas

Spain: Navarra (2000)

Ley Foral 6/2000 de 3 de Julio para la Igualdad Jurídica de las Parejas Estables

Spain: Valencia (2001)

Ley 1/2001 de 6 de abril por la que se regulan las Uniones de hecho

Spain: Balearic Islands (2001)

Ley 18/2001 de 19 de diciembre de Parejas Estables

Spain: Madrid (2001)

Ley 11/2001 de 19 de diciembre de Uniones de Hecho de la Comunidad de Madrid

Spain: Asturias (2002)

Ley 4/2002 de Parejas Estables del Principado de Asturias

Spain: Andalucía (2002)

Ley 5/2002 de 28 de diciembre de Parejas de Hecho de Andalucía

Spain: Extremadura (2003)

Ley 5/2003 de 20 de marzo de Parejas de Hecho de la Comunidad Autónoma de Extremadura

Spain: Canary Islands (2003)

Ley 5/2003 de las Parejas de Hecho de la Comunidad Autónoma de Canarias

Spain: Basque Country (2003)

Ley 2/2003 de 7 de mayo reguladora de las parejas de hecho

United Kingdom (proposal)

Civil Partnership Bill 2004

Explanatory Notes

Spain: Regions in Spain to have introduced forms of registered partnership are: Catalonia, Aragon, Navarra, Valencia, Asturias, Canary Islands, Balearic Islands, Extremadura, Basque Country, Madrid, Andalusia.

Year introduced: This refers to the year that the partnership scheme came into force. For example, in the Netherlands the Act was passed in 1997, but the first registered partnerships were not registered until 1st January 1998.

Gender: SS is a shortened form for same-sex couples; OS for opposite-sex couples

Qualifying period: In some jurisdictions, couples are required to have lived together for a minimum period of time before they are allowed to benefit from the rights and duties attached to the registered partnership scheme.

Next of Kin: This term is used to signify the relations of a party who has died intestate. In general no one comes within this term who is not included in the provisions of the

statutes of distribution. For example, a spouse cannot, in general, claim as next of kin of their spouse, nor the other spouse as next of kin of their spouse. This column refers to whether these rights are extended to registered partners.

Inheritance, social security, tax benefits and adoption: Of course, it is impossible in such an overview to thoroughly describe the rights and obligations attached to these various forms of registered partnership. These columns attempt to give a quick comparison of whether the scheme has some consequences for these various effects with respect to registered partners.

Authorship: These tables have been designed and completed by Mr. Ian Sumner MA (Hons) Cantab, PhD Candidate at the Molengraaff Institute for Private Law, Utrecht University, Nobelstraat 2a, 3512EN Utrecht, The Netherlands. These tables form an updated version of the tables submitted to the Women and Equality Unit for the preparation of the United Kingdom Consultation Paper 2003.

Appendix C: American Bar Association Policies and Constitutional Amendments Pertaining to Sexual Orientation and Regulation of Marriage

1. Policy adopted by the House of Delegates, August 1973 – Be It Resolved, That the legislatures of the several states are urged to repeal all laws which classify as criminal conduct any form of non-commercial sexual conduct between consenting adults in private, saving only those portions which protect minors or public decorum.

2. Policy adopted by the House of Delegates, February 1979 – Be It Resolved, That the American Bar Association favors the ratification by the United States of the International Covenant on Civil and Political Rights and urges the Senate to give its advice and consent to ratification of the Covenant subject to the following reservations, declarations, statements and understandings recommended to the Senate by the Departments of State and Justice (and an understanding on “right to life”):

A. The Constitution of the United States and Article 19 of this Covenant contain provisions for the protection of individual rights, including the right of free speech, and nothing in this Covenant shall be deemed to require or authorize legislation

or other action by the United States which would restrict the right of free speech protected by the Constitution, laws, and practice of the United States.

B. The United States’ adherence to Article 6 (concerning the “right to life”) is subject to the Constitution and other laws of the United States.

C. The United States reserves the right to impose capital punishment on any person duly convicted under existing or future laws permitting the imposition of capital punishment.

D. The United States does not adhere to Paragraph (5) of Article 9 or to the third clause of Paragraph (1) of Article 15 (compensation for unlawful arrest, and retroactive lighter criminal penalties).

E. The United States considers the (prisoner segregation and rehabilitation standards) rights enumerated in Paragraphs (2) and (3) of Article 10 as goals to be achieved progressively rather than through immediate implementation.

F. The United States understands that subparagraphs (3)(b) and (d) of Article 14 do not require the provision of court-appointed counsel when

the defendant is financially able to retain counsel or for petty offenses for which imprisonment will not be imposed. The United States further understands that Paragraph (3)(e) does not forbid requiring an indigent defendant to make a showing that the witness is necessary for his attendance to be compelled by the court. The United States considers that provisions of United States law currently in force constitute compliance with Paragraph (6). The United States understands that the prohibition on double jeopardy contained in Paragraph (7) is applicable only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, which is seeking a new trial for the same cause.

G. The United States declares that the (natural resources utilization) right referred to in Article 47 may be exercised only in accordance with international law.

H. The United States shall implement all the provisions of the Covenant over whose subject matter the Federal Government exercises legislative and judicial jurisdiction; with respect to the provisions over whose subject matter constituent units exercise jurisdiction, the Federal Government shall take appropriate measures, to the end that the competent authorities of the constituent units may take appropriate measures for the fulfillment of this Covenant.

I. The United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.

3. Policy adopted by the House of Delegates, August 1987 – BE IT RESOLVED, That the ABA condemns crimes of violence including those based on bias or prejudice against the victim's race, religion, sexual orientation, or minority status, and urges vigorous efforts by federal, state, and local officials to prosecute the perpetrators and to focus public attention on this growing national problem.

4. Policy adopted by the House of Delegates, August 1989 – BE IT RESOLVED, That the American Bar Association urges the Federal government, the states and local governments to enact legislation, subject to such exceptions as may be appropriate, prohibiting discrimination on the basis of sexual orientation in employment, housing and public accommodations.

“Sexual orientation” means heterosexuality, bisexuality and homosexuality.

5. Policy adopted by the House of Delegates, August 1990 – BE IT RESOLVED, That the American Bar Association adopts the Model Code of Judicial Conduct (August 1990), as amended, including the Preamble, Terminology Section, Canons, text, Commentary and Application Section, to replace the ABA Code of Judicial Conduct (adopted August 1972, as amended August 1982 and August 1984).

6. Policy adopted by the House of Delegates, August 1991 – BE IT RESOLVED, That the American Bar Association supports the enactment of authoritative measures requiring studies of the existence, if any, of bias in the federal judicial system, including bias based on race, ethnicity, gender, age, sexual orientation and disability, and the extent to which bias may affect litigants, witnesses, attorneys and all those who work in the judicial branch. BE IT FURTHER RESOLVED, That the American Bar Association urges that such studies include the development of remedial steps to address and eliminate any bias found to exist.

7. Policy adopted by the House of Delegates, February 1992 – BE IT RESOLVED, That the American Bar Association opposes any efforts by government to withhold funds from, or otherwise penalize, educational institutions for denying access to campus placement facilities to government employers who contravene university policies by discriminating on the basis of sexual orientation.

8. Amendment adopted by the House of Delegates, August 1992 – PROPOSAL: Amend the Constitution to provide that the National Lesbian and Gay Law Association (hereinafter “NLGLA”) is an affiliated organization. Amend Section 6.8(a)(1) to read as follows: (1) The American Judicature Society, the American Law Institute, the Association of American Law Schools, the Conference of Chief Justices, the Hispanic National Bar Association, the National Asian Pacific American Bar Association, the National Association of Attorneys General, the National Association of Bar Executives, the National Association of Women Judges, the National Bar Association, the National Conference of Bar Examiners, the National Conference of Commissioners on Uniform State Laws, the National Conference of Women's Bar Associations, the National Lesbian and Gay Law Association and the National Organization of Bar Counsel.

9. Policy adopted by the House of Delegates, August 1994 – BE IT RESOLVED: That Standard 211 of the

American Bar Association Standards for the Approval of Law Schools be amended to read as follows:

(a) The law school shall maintain equality of opportunity in legal education, including employment of faculty and staff, without discrimination or segregation on ground of race, color, religion, national origin, sex or sexual orientation.

(b) A law school shall not use admission policies or take other action to preclude admission of applicants or retention of students on the basis or race, color, religion, national origin, sex or sexual orientation.

(c) The denial by a law school of admission to a qualified applicant will be treated as made upon the ground of race, color, religion, national origin, sex or sexual orientation if the ground of denial relied upon is

(i) a state constitutional provision or statute that purports to forbid the admission of applicants to a school on the ground of race, color, religion, national origin, sex or sexual orientation; or

(ii) an admissions qualification of the school that is intended to prevent the admission of applicants on the ground of race, color, religion, national origin, sex or sexual orientation though not purporting to do so.

(d) The denial by a law school of employment to a qualified individual will be treated as made upon the ground of race, color, religion, national origin, sex or sexual orientation if the ground of denial relied upon is an employment policy of the school which is intended to prevent the employment of individuals on the ground of race, color, religion, national origin, sex or sexual orientation though not purporting to do so.

(e) This Standard does not prevent a law school from having a religious affiliation or purpose and adopting and applying policies of admission of students and employment of faculty and staff that directly relate to this affiliation or purpose so long as (1) notice of these policies has been given to applicants, students, faculty and staff before their affiliation with the law school, and (2) the religious affiliation, purpose or policies do not contravene any other Standard, including Standard 405(d) concerning academic

freedom. These policies may provide a preference for persons adhering to the religious affiliation or purpose of the law school, but shall not be applied to use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, sex or sexual orientation. This Standard permits religious policies as to admission, retention and employment only to the extent that they are protected by the United States Constitution. It shall be administered as if the First Amendment of the United States Constitution governs its application. (f) Equality of opportunity in legal education includes equal opportunity to obtain employment. Each school should communicate to every employer to whom it furnishes assistance and facilities for interviewing and other placement functions the school's firm expectation that the employer will observe the principle of equal opportunity and will avoid objectionable practices such as

(i) refusing to hire or promote members of groups protected by this policy because of the prejudices of clients or of professional or official associates;

(ii) applying standards in the hiring and promoting of such individuals that are higher than those applied otherwise;

(iii) maintaining a starting or promotional salary scale as to such individuals that is lower than is applied otherwise; and

(iv) disregarding personal capabilities by assigning, in a predetermined or mechanical manner, such individuals to certain kinds of work or departments.

10. Policy adopted by the House of Delegates, August 1995 – RESOLVED, That the American Bar Association supports the enactment of legislation and the implementation of public policy providing that child custody and visitation shall not be denied or restricted on the basis of sexual orientation.

11. Policy adopted by the House of Delegates, August 1996 –

RESOLVED, That the American Bar Association urges state, territorial and local bar associations to study bias in their community against gays and lesbians within the legal profession and the justice system and make appropriate recommendations to eliminate such bias.

12. Policy adopted by the House of Delegates, February 1999 – RESOLVED, That the American Bar Association supports the enactment of laws and implementation of public policy that provide that sexual orientation shall not be a bar to adoption when the adoption is determined to be in the best interests of the child.

13. Policy adopted by the House of Delegates, August 2002 – RESOLVED, That the American Bar Association urges federal, state, territorial, and local governments to enact legislation, promulgate regulations, or take other necessary action to ensure that an unmarried surviving partner who shared a mutual, interdependent, committed relationship with a victim of terrorism or other crime can qualify for crime victim compensation and assistance funds provided by that government to eligible spouses.

FURTHER RESOLVED, That eligibility for such funds should be determined without reference to intestate succession laws and should not affect the operation of such laws.

14. Amendment adopted by the House of Delegates, August 2002 – Amend §§6.4(e) of the Constitution to read as follows: §§6.4(e) A state or local bar association may not be represented in the House if its governing documents discriminate with respect to membership because of race, sex, religion, creed, color, national origin, ethnicity, age, persons with disabilities and/or sexual orientation.

15. Policy adopted by the House of Delegates, August 2002 – RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to enact and fully implement legislation that promotes tolerance and anti-bias instruction, multicultural awareness training, hate crime/violence prevention education, and anti-bullying/harassment programs for children, parents, teachers, and school administrators;

FURTHER RESOLVED, That the American Bar Association urges public education agencies, school boards, juvenile courts, and other community agencies to adopt policies that:

a) urge juvenile courts to create and utilize appropriate diversionary programs or, where necessary, alternative dispositions that educate children on the negative impact of hate and prejudice-motivated behavior;

b) consider the unique circumstances of each hate crime or incidence of violence committed by and against children when responding to any such reported act;

c) provide for national, state, local, college/university, and elementary/secondary school data collection on juvenile hate crimes, and reported acts of harassment, bullying, or other violence committed by and against children; and

d) encourage government-funded agencies responsible for residential care settings for children to implement and enforce nondiscrimination policies for children in their care and promptly investigate and resolve incidents of harassment, violence or other mistreatment directed toward those children.

FURTHER RESOLVED, That the American Bar Association urges the organized bar, and individual lawyers, to facilitate tolerance and anti-bias education in school and community settings and to promote programs that respond to hate crimes and prejudice-motivated acts by children.

16. Policy adopted by the House of Delegates, August 2003 – RESOLVED, That the American Bar Association supports state and territorial laws and court decisions that permit the establishment of legal parent-child relationships through joint adoptions and second-parent adoptions by unmarried persons who are functioning as a child's parents when such adoptions are in the best interests of the child.

17. Policy adopted by the House of Delegates, February 2004 – RESOLVED, That to preserve the authority of the states and territories to regulate marriage under our federal system, the American Bar Association opposes any federal enactment that would restrict the ability of a state or territory to:

(a) prescribe the qualifications for civil marriage between two persons within its jurisdiction; and

(b) determine when effect should be given to a civil marriage validly contracted between two persons under the laws of another jurisdiction.

XII. ENDNOTES

1. Genesis, 11–23.
2. Genesis, 25–35.
3. Kings, 1.
4. Genesis, 38.
5. Code of Hammurabi, ¶¶ 144 – 146.
6. Code of Hammurabi, ¶¶ 127 – 175.
7. Quran, 4:3.
8. Christmas Humphrey, *Popular Dictionary of Buddhism* (NTC Publishing Group 1962).
9. BBC News, *Cambodian King Backs Gay Marriage* (Feb. 20, 2004).
10. Gyan Rajhans, *Ideals of a Hindu Marriage*, at <http://www.bhajanawali.com/articles>
11. Jennifer Goodall Powers, *Ancient Weddings* (1997).
12. <http://en.wikipedia.org/wiki/Polyandry>
13. Rictor Norton, *Gay History and Literature* (Feb. 12, 2004), at <http://www.infopt.demon.co.uk/marriage.htm>
14. Lucette Gatehouse, *Marriage in Ancient Rome* (1999)
15. David Fine, *Ask the Rabbi: Banning polygamy embodies original intent for marriage*, *Wisconsin Jewish Chronicle*, *Banning Polygamy*, Apr. 11, 2004.
16. Mary Kathleen Glavich, *Called to Love: Your Christian Vocation* (2000).
17. John Boswell, *Same-sex Unions in Pre-modern Europe* (1st ed. 1994).
18. Jennie Batchelor, *Marriage Act: 1753*, in *The Literary Encyclopedia and Literature Dictionary* (Robert Clark et al eds. 2003).
19. *Id.*
20. *Id.*
21. Edmund Sears Morgan, *The Puritan Family: Religion and Domestic Relations in 17th Century New England* at 32 (rev. ed., Harper & Row 1966).
22. *Black's Law Dictionary* (7th ed. 1999) defines “common-law marriage” as “A marriage that takes legal effect, without license or ceremony, when a couple lives together a husband and wife, intend to be married, and hold themselves out to others as a married couple.” *Black's Law Dictionary* also states that common-law marriages are permitted in 14 states and the District of Columbia.
23. *The Readers Companion to American History, Marriage* (Houghton Mifflin 1991).
24. Richard S. Van Wagoner, *Mormon Polygamy: A History* (3rd ed. 1992).
25. Randall Hillebrand, *The Shakers/Oneida Community* (Part Two), at <http://www.nyhistory.com/central/oneida.htm> (last visited May 19, 2004).
26. Wendy McElroy, *The Free Love Movement and Radical Individualism*, 19 *The Libertarian Enterprise* (Dec. 1, 1996).
27. Toni Lynne Ihara & Ralph Warner, *The Living Together Kit: A Legal Guide for Unmarried Couples* (Robin Leonard ed, 8th ed. 1997).
28. ___ U.S. ___, 123 S.Ct. 2472 (2003).
29. Steven Mintz & Susan Kellog, *Domestic Revolutions: A Social History of American Family Life* at 126 (1998).
30. Carl N. Degler, *At Odds: Women and the Family in America From the Revolution to the Present* at 333 (1980).
31. 388 U.S. 1, 87 S. Ct. 1817 (1967).
32. 388 U.S. at 12, 87 S.Ct. at 1824.
33. *Zablocki v. Redhall*, 434 U.S. 374, 384, 98 S.Ct. 673, 680 (1978) (holding that a statute prohibiting a Wisconsin resident from marrying if the resident had an unpaid child support obligation was unconstitutional as a violation of equal protection).
34. Jason Fields, U.S. Census Bureau, *America's Families and Living Arrangements: 2003*, Table 2, at page 7 (P20-533) (Nov. 2004), available online at <http://www.census.gov/prod/2004-pubs/p20-553.pdf>
35. U.S. Census Bureau, *American FactFinder, Marital Status by Sex, Unmarried Partner Households, and Grandparents as Caregivers: 2000*, Census 2000 Summary File 4 (QT-P18).
36. Jason Fields, U.S. Census Bureau, *America's Families and Living Arrangements: 2003*, at page 16 (P20-533) (Nov. 2004), available online at <http://www.census.gov/prod/2004-pubs/p20-553.pdf>
37. 478 U.S. 186, 106 S.Ct. 2841 (1986) (Court's opinion by Justice White).
38. 478 U.S. at 188.
39. 478 U.S. at 191.
40. 478 U.S. at 191–92 (quotations and citations omitted).
41. 478 U.S. at 192.
42. 478 U.S. at 193–94.
43. ___ U.S. ___, 123 S.Ct. 2472 (2003) (Court's opinion by Justice Kennedy).
44. 123 S.Ct. at 2476.
45. 123 S.Ct. at 2476.
46. 123 S.Ct. at 2484, quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 847, 112 S.Ct. 2791.
47. 123 S.Ct. at 2481, citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H. R. (1981) & ¶ 52.
48. 123 S.Ct. at 2484.
49. 123 S.Ct. at 2486.
50. 123 S. Ct at 2497.
51. 517 U.S. 620, 116 S.Ct. 1620 (1996) (Court's opinion by Justice Kennedy).
52. 517 U.S. at 631, 635.

53. 517 U.S. at 652, 636.
54. See CAL. GOV'T. CODE §§ 12920, 12921, 12926, 12940 (1999–2000); CONN. GEN. STAT. §§ 46a–60, 46a–81a (1999); D.C. CODE §§ 2–1401.01, 2–1401.03, 2–1402.11; HAW. REV. STAT. § 378(1)–(2) (1999); 775 ILL. COMP. STAT. 5/1–102 (effective Jan. 1, 2006); MASS. GEN. LAWS ch. 151B, § 4 (1999); MD. ANN. CODE art. 49B, § 14 (2001); MINN. STAT. § 363A.08 (2003); NEV. REV. STAT. § 613.330, 613.340, 281.370, 338.125 (2002); N.H. REV. STAT. ANN. §§ 21–I: 58, 354–A:1 et seq. (1999); N.J. REV. STAT. §§ 10:5–4, 10:5–5, 10:5–12 (1999); N.M. STAT. ANN. §§ 28–1–1 et seq.; N.Y. EXEC. LAW § 296; R.I. GEN. LAWS § 28–5–7 (1999); VT. STAT. ANN. tit. 21, § 495 (1999); WIS. STAT. ANN. §§ 111.31–.395 (1999).
55. Cal. Gov't. Code §§ 12940; 12926 –12949 (as amended by A.B. 196, 2003–04 Sess. (Cal. 2003)).
56. 775 ILL. COMP. STAT. 5/1–102 (effective Jan. 1, 2006); 775 ILL. COMP. STAT. 5/1–103(O-1) (effective Jan. 1, 2006).
57. Minn. Stat. § 363A(44). In Minnesota, transgender people are included within the definition of “sexual orientation,” which is defined as follows: “‘Sexual orientation’ means having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness.” *Id.* (emphasis added).
58. N.M. Stat. Ann. § 28–1–7 (as amended by S.B. 28, 2003 Reg. Sess. (N.M. 2003)).
59. R.I. Gen. Laws § 28–5–7.
60. Executive orders are in place in a number of states. See, e.g., Alaska, Exec. Order No. 195 (March 5, 2002), Ariz. Exec. Order No. 2003–22 (June 21, 2003); Kentucky Exec. Order No. 2003–533 (May 29, 2003); Md Exec. Order. No. 01.01.1995.19; N.M. Exec. Order No. 85–15 (Apr. 1, 1985); N.Y. Comp. Codes R. & Regs. tit. 9, §§ 4.28, 5.32, 5.33 (codifying N.Y. Exec. Order No. 33); 4 Pa. Code § 1.161; Wash. Admin. Code § 356–05–493.
61. Penn. Exec. Order No. 2003–10 (July 28, 2003).
62. Ky. Exec. Order No. 2003–533 (May 29, 2003).
63. Over 255 such ordinances exist. See, e.g., ATLANTA, GA., CODE OF ORDINANCES , §§ 2–1381, 94–68, 94–112 (2000); CHICAGO, ILL., MUNICIPAL CODE, § 199 et seq. (1999); DALLAS, TEX., CITY CODE, §§ 46–1 et seq. (2002); DENVER, COLO., REV. CITY CODE, § 28–91 et seq., (1990); DETROIT, MICH., CITY CODE, § 27–3–1 (1979); LOUISVILLE, KY., MUNICIPAL CODE ORD. §§ 98.00 (1999); LOS ANGELES, CAL., CITY CODE, ch. IV, art. 12 (1979); NEW YORK CITY, N.Y., ADMIN. CODE § 8–102(20) (1991); ORLANDO, FLA., CITY CODE, § 57.14 (2002); PHIL. PA, FAIR PRACTICE ORDINANCE., ch. 9–1100 et seq. (1982); PORTLAND, ME., CITY CODE, ch. 13.5, arts. I, III (1992); St. Louis, Mo., City Ordinance 62710 (1992); SALEM, OR., REV. CODE, § 97.020 (2002); SEATTLE, WASH., MUNICIPAL CODE, ch. 14.04 (1980); TAMPA, FLA., CODE OF ORDINANCES § 12–2 et seq. (1991).
64. For more information, see Transgender Law & Policy Institute at <http://www.transgenderlaw.org>
65. See, e.g., *Bibby v. Philadelphia Coca-Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) (holding that harassment on the basis of sexual orientation is not actionable under Title VII); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (“The law is well-settled in this circuit and in all others . . . [that] Title VII does not prohibit harassment or discrimination because of sexual orientation”); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000) (“harassment based solely upon a person’s sexual preference or orientation (and not one’s sex) is not an unlawful employment practice under Title VII”); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999).
66. See, e.g., *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (allowing claim to proceed where plaintiff was harassed for walking and carrying his tray “like a woman,” mocked for not having sexual intercourse with a female friend, and referred to as “she” and “her”); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (acknowledging that Title VII claim may exist for gay employee who is discriminated against “because he [does] not meet stereotyped expectations of masculinity” but upholding summary judgment for employer where employee raised issue only on appeal); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (denying defendant’s motion for summary judgment where plaintiff’s evidence suggested she was harassed because she did not conform to stereotypes of how a woman should behave; plaintiff was ridiculed for wearing shoes because a co-worker believed them to be men’s shoes, and she endured comments like “I thought you were the man,” “I thought you wore the pants,” and “who [wears] the dick in the relationship?”); *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002) (holding that plaintiff stated a viable Title VII claim where evidence showed that the terminated plaintiff’s co-workers taped pictures of Richard Simmons in pink hot pants to plaintiff’s work space (suggesting harassment based on gender stereotypes)).
67. See, e.g., *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 749 (8th Cir. 1982) (“Courts have expressly refused to extend Title VII coverage to those discriminated against because of their transsexuality.”) (citation omitted); *Vóyles v. Ralph K. Davies Medical Center*, 570 F.2d 354 (9th Cir. 1978), *aff’g*, 403 F. Supp. 456 (N.D. Cal. 1975); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977); *Grossman v. Bernards Township Bd. of Educ.*, 538 F.2d 319 (3d Cir. 1976), *aff’g*, No. 74–1904, 1975 WL 302 (D.N.J. Sept. 10, 1975); *Powell v. Read’s, Inc.*, 436 F. Supp. 369 (D. Md. 1977) (noting that the position of the Equal Employment Opportunity Commission is that discrimination against transsexuals is not prohibited by existing law).
68. See, e.g., *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004) (“As such, discrimination against a plaintiff

- who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman.”); *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) (“The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*.”); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (holding that a biologically male plaintiff dressed in “traditionally feminine attire” may seek redress under *Price Waterhouse* for discrimination based on perception that his “attire did not accord with his male gender”); *Barnes v. City of Cincinnati*, No. C-1-00-780, 2002 U.S. Dist. LEXIS 26207, at *14 (S.D. Ohio March 8, 2002) (holding that a transsexual plaintiff can state a Title VII claim if the he was discriminated against because he fails to “conform to the stereotypes associated with being male”); *Doe v. United Consumer Financial Services*, No. 1:02 CV 1112, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001) (denying defendant’s motion to dismiss transsexual plaintiff’s Title VII claim on ground that plaintiff could state a claim of sex discrimination under a *Price Waterhouse* sex stereotyping theory). See also *Lie v. Sky Publishing Corp.*, No. 013117J, 2002 WL 31492397 at *5 (Mass. Super. Ct. Oct. 7, 2002) (holding that a transgender plaintiff had stated a claim of sex discrimination where she alleged “that the defendant’s conduct was based on stereotyped notions of ‘appropriate’ male and female behavior in the same manner as the conduct of the defendant in *Price Waterhouse*”); *Jette v. Honey Farms Mini Market*, No. 95 Sem 0421, 2001 WL 1602799 (Mass. Comm’n Against Discrimination Oct. 10, 2001) (holding that transsexual people are protected by state law prohibiting sex discrimination); *Declaratory Ruling on Behalf of John/Jane Doe* (Conn. Human Rights Comm’n Nov. 9, 2000) (relying on *Price Waterhouse*, *Schwenk*, *Rosa*, and other recent federal court decisions in holding that the Connecticut state statute prohibiting discrimination on the basis of sex encompasses discrimination against transgender individuals); *Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at * 3-4 (Mass. Super. Ct. Oct. 11 2000), *aff’d sub nom*, *Doe v. Brockton Sch. Comm.*, No. 2000-J-638, 2000 WL 3342399 (Mass. App. Ct. Nov. 30, 2000) (holding that a transgender student had stated a viable sex discrimination claim under state law); *Rentos v. Oce-Office Systems*, No. 95 Civ. 7908 LAP, 1996 WL 737215 (S.D.N.Y. Dec. 24, 1996) (refusing to dismiss transsexual woman’s claim that she had been discriminated against on the basis of sex in violation of the New York State Human Rights Law and the New York City Human Rights Law); *Maffei v. Kolaeton Industry, Inc.*, 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995) (holding that city ordinance prohibiting “gender” discrimination protects transsexuals).
69. See, e.g., *Damron v. Damron*, 2003 ND 166, 670 N.W.2d 871, 875 (2003) (reversing modification of custody from the mother to the father that had been ordered because of the mother’s lesbian relationship and stating, “Other courts generally have recognized that, in the absence of evidence of actual or potential harm to the children, a parent’s homosexual relationship, by itself, is not determinative of custody”); *In re Marriage of Birdsall*, 197 Cal. App. 3d 1024, 243 Cal. Rptr 287 (1988) (vacating restriction on a homosexual father’s visitation and holding that there needs to be a showing of harm before restricting visitation); *In re Marriage of Walsh*, 451 N.W.2d 492, 493 (Iowa 1990) (removing a restriction on fathers visitation that limited visitation to times when “no unrelated adult” was present and noting the father was “a good, loving and responsible father to his children”); *In re Marriage of R.S.*, 286 Ill. App. 3d 1046, 1048 & 1051 (3d Dist. 1996) (reversing modification of custody to the father based on the mother’s “homosexual relationship and the possibility that the children could experience social condemnation as a result of this relationship” and stating “While a court may consider the custodial parent’s homosexual relationship when making a custody determination, the trial court’s function is limited to determining the effect of the parent’s conduct upon the children”).
70. See, e.g. *Ex Parte J.M.F.*, 730 So.2d 1190, 1196 (Ala. 1998) (modifying custody to father and declaring a preference for father’s heterosexual marriage to mother’s same-sex relationship); *Taylor v. Taylor*, 345 Ark. 300, 47 S.W.3d 222 (2001) (affirming a restriction on custody to the mother that allowed the mother custody only if she did not live in a house with her same-sex partner or have the partner as an overnight guest). Compare *Hodson v. Moore*, 464 N.W.2d 699, 700-02 (Iowa Ct. App. 1990) (granting custody to a homosexual mother and stating, “While we do not find a discreet homosexual relationship to be a *per se* bar against a mother’s custody, we do find the behavior of those sharing a custodial parent’s home an important factor to continuing that custody and if that behavior can be found to harm the child, the child’s interests would require either curtailment of the harmful situation or a change of custody.”).
- In 1994, the *New England Journal of Medicine* published an article surveying many issues related to homosexuality. Regarding homosexuals as parents, the article stated:
- The literature on the children of lesbian mothers indicates no adverse effects of a homosexual orientation, as evidenced by psychiatric symptoms, peer relationships, and overall functioning of the offspring. The frequency of a homosexual orientation has not been greater in such children than in children of heterosexual mothers. The data on gay fathers are more scant. No evidence has emerged, however, to indicate an adverse effect of sexual orientation on the quality of fathering. Enough information has accumulated to warrant the recommendation that sexual orientation should not in itself be the basis for psychiatric and legal decisions about parenting or planned parenting.
- Richard Friedman, M.D. & Jennifer Downey, M.D., *Homosexuality*, 331 (No. 14) *NEW ENG. J. MED.* 923, 927 (Oct. 6, 1994) (footnotes omitted). Dr. Friedman is affiliated with the Department of Psychiatry, Columbia University College of Physicians and Surgeons, New York, N.Y. Dr.

Downey is affiliated with the Department of Psychology, Adelphi University, Garden City N.Y.

71. FLA. STAT. ch. 63.042(3) (West 1985 & Supp. 1995) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”). The Florida statute applies to adoption only and does not prohibit lesbians and gay men from being foster parents. See *Matthews v. Weinberg*, 645 So.2d 487 (Fla. Dist. Ct. App. 1994) (holding that lesbians and gay men may not be excluded from being foster parents).

Massachusetts sought to prohibit lesbians and gay men from becoming foster parents by regulation, but the policy was dropped in 1990 in settlement of a lawsuit. For a detailed description of this controversy, see Wendell Ricketts, *Lesbians and Gay Men as Foster Parents* 67-87 (National Child Welfare Resource Center 1991). On January 6, 1997, the Child Welfare Agency Review Board for the state of Arkansas voted to ban lesbians and gay men from being foster parents. Arkansas is the only state with such a ban. “Arkansas Board Votes to Refuse Homosexual Foster Parents,” *The Commercial Appeal*, January 7, 1999, at B4.

72. *Cox v. Florida Dep’t of Health & Rehabilitative Services*, 656 So. 2d 902, 903 (Fla. 1995) (subsequently the petition was withdrawn).

73. *Lofton v. Kearney*, 157 F. Supp. 2d 1372 (S.D. Fla. 2001), *aff’d sub nom.*, *Lofton v. Sec’y of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004).

74. *Lofton v. Sec’y of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004).

75. UTAH CODE ANN. §78-30-1(3)(b).

76. MISS. CODE ANN. §93-17-3(2).

77. Numerous health and child welfare organizations have opposed discrimination against lesbian, gay and bisexual parents and have issued statements supporting second-parent and joint adoptions by lesbian, gay and bisexual couples. See, e.g., American Academy of Pediatrics, *Co-parent or Second-Parent Adoption by Same-Sex Parents*, 109 *Pediatrics* 339-340 (Feb. 2002) (supporting “legislative and legal efforts to provide the possibility of adoption of the child by the second parent or co-parent in [same-sex parent] families”); Jane Stoeber, *Delegates Vote for Adoption Policy*, FPR report (American Acad. of Family Physicians, San Diego, Cal.), Oct. 17, 2002 (resolution calling upon the American Academy of Family Physicians to establish policy and support legislation that would protect children in same-sex parent families); Press Release, American Psychiatric Association, New Position Statement Adopted by the American Psychiatric Association (APA): Adoption and Co-Parenting of Children by Same-Sex Couples (Dec. 13, 2002) (statement endorsing the right of gay and lesbian couples to adopt); American Psychoanalytic Association, *Position Statement on Gay and Lesbian Parenting* (May 16, 2002); Child Welfare League of America, *CWLA Standards of Excellence for Adoption Services* (Feb. 2000) (standard regarding sexual orientation of applicants provides that “[a]pplicants should be fairly assessed on their abilities to successfully parent a child needing family membership and not on their appearance,

differing lifestyle, or sexual preference.”); National Association of Social Workers, *Lesbian and Gay Issues, in Social Work Speaks: NASW Policy Statements* 93, 162 (1st ed. 1988) (providing that NASW shall work for the adoption of policies and legislation to end all forms of discrimination on the basis of sexual orientation).

78. See, e.g., *In re Adoption Petition of N.* Case No. 18086, (Cal. Super. Ct., San Francisco County, filed Mar. 11, 1986).

79. See CAL. FAMILY CODE § 9000(f); CONN. GEN. STAT. § 45a-724(3); *In re M.M.D.*, 662 A.2d 837 (D.C. 1995); *In re Petition of K.M.*, 274 Ill. App. 3d 189, 653 N.E.2d 888, 210 Ill. Dec. 693 (Ill. App. Ct. 1995); *In re Adoption of M.M.G.C.*, 785 N.E.2d 267 (Ind. Ct. App. 2003); *In re Adoption of Tammy*, 416 Mass. 205, 619 N.E.2d 315 (Mass. 1993); *In re Jacob*, 86 N.Y.2d 651, 660 N.E.2d 397, 636 N.Y.S.2d 716 (N.Y. 1995); *In re the Adoption of Tivo Children by H.N.R.*, 285 N.J. Super. 1, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995); *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002); *In re Adoption of B.L.V.B.*, 160 Vt. 368, 628 A.2d 1271 (Vt. 1993); VT. STAT. ANN. tit. 15A, § 1-102(b).

80. See Jane Schacter, *Constructing Families in a Democracy: Courts, Legislatures and Second-parent Adoptions*, 75 *Chi.-Kent L. Rev.* 933, 934 (2000).

81. See, *In re Adoption of T.K.J.*, 931 P.2d 448 (Colo. Ct. App. 1996); *In re Adoption of Luke*, 640 N.W.2d 374 (Neb. 2002); *In re Adoption of Doe*, 719 N.E.2d 1071 (Ohio Ct. App. 1998), *appeal denied*, 709 N.E.2d 173 (Ohio Ct. App. 1999); *Interest of Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994).

82. Army Reg. 600-443, § I, ¶ 2 (Apr. 10, 1953).

83. 10 U.S.C. § 654 (1994).

84. 10 U.S.C. § 654(b) (1994).

85. 10 U.S.C. § 6549(f)(3).

86. See Servicemember Legal Defense Network, Annual Discharges Under “Don’t Ask, Don’t Tell,” 1993-2003, at <http://www.sldn.org>

87. See Press Release, Servicemember Legal Defense Network, Pentagon Discharges Record Number of Service Personnel Under “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” (June 1, 2001) available at www.sldn.org

88. Servicemember Legal Defense Network, *Survival Guide: A Comprehensive Guide to “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass,” and Related Military Policies* (4th ed. 2003), available at www.sldn.org

89. See, e.g., *Thorne v. United States Dep’t of Defense*, 139 F.3d 893 (4th Cir. 1998); *Holmes v. California Army Nat’l Guard*, 124 F.3d 1126 (9th Cir. 1997); *Phillips v. Perry*, 106 F.3d 1420 (9th Cir. 1997); *Able v. United States*, 88 F.3d 1280 (2d Cir. 1996); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996); *Selland v. Perry*, 100 F.3d 950 (4th Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir. 1996) (en banc).

90. 123 S. Ct. 2472, 156 L.Ed.2d 508 (2003). *Lawrence* is discussed *supra* at pages 18 - 19.

91. Office for Public Policy of the Gay, Lesbian Straight Education Network (GLSEN), *The 2001 National School Climate Survey: Lesbian, Gay, Bisexual and Transgender*

- Students and their Experiences in Schools* (2001), available at www.glsen.org
92. Cal. Educ. Code § 220; Cal. Penal Code §§ 422.6(a), 422.76; Conn. Gen. Stats. § 10-15c; D.C. Code § 2-1402.41; Mass. Gen. Laws., ch. 76, § 5; Minn. Stat. §§ 363A.02, 363.03A(13); N.J. Stat. § 10:5-5; N.J. Stat. Ann. §§ 10:5-12(f)(1), 18A:37-15; Vt. Stat., tit. 9, §§ 4501, 4502; Vt. Stat., tit. 16, §§ 11(26), 565; Wash. Rev. Code § 9A.36.080(1)(c); Wash. Rev. Code §§ 28A.300.285; Wash. Rev. Code § 49.60.030; Wis. Stat. §§ 118.13, 118.40.
 93. Alaska Admin. Code tit. 20 § 10.020(b)(6) (2003); Fla. Admin. Code Ann. r. 6B-1.006(3)(g) (2003); Mass. Regs. Code tit. 603 § 26.01 (2003); 22 Pa. Code. § 235.8 (2003).
 94. See *Flores v. Morgan Unified High School District*, 324 F.3d 1130 (9th Cir. 2003) (holding that students could maintain claims alleging discrimination on the basis of sexual orientation under the Equal Protection Clause where school district failed to protect the students to the same extent that other students were protected from harassment and discrimination); *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996) (holding student could maintain claims alleging discrimination on the basis of gender and sexual orientation under the Equal Protection Clause where school district failed to protect the student to the same extent that other students were protected from harassment and harm by other students due to the student's gender and sexual orientation). In *Nabozny*, after the student and his parents reported the incidents of physical violence to the appropriate school administrator, the administrator told the student and his parents that such acts should be expected because the student was openly gay. *Id.* at 451. See also *Montgomery v. Independent Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1089 (D. Minn. 2000) ("We are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation, and the defendants do not offer us one.") (quoting *Nabozny*, 92 F.3d at 458). The school district eventually settled the *Flores* case for over \$1.1 million, in addition to mandatory training for all school staff and all 7th and 9th grade students. The school district in *Nabozny* eventually settled the case for almost \$1 million in damages.
 95. See *M. T. v. J. T.* 355 A.2d 204 (N.J. Super Ct. App. Div. 1976) (upholding validity of a marriage involving a "post-operative" transsexual woman). See also Stuart Pfeifer, "Transsexual Can Sue for Custody," Orange County Register. Nov. 26, 1997, at B1 (discussing the unreported California case of *Vecchione v. Vecchione*, which upheld the validity of a marriage between a female-to-male transsexual and his female spouse).
 96. *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002).
 97. *Littleton v. Prange*, 9 S.W.3d 223 (Tex. Ct. App. 1999) (holding that post-operative transsexual woman who had obtained a female birth certificate was legally male for the purpose of marriage).
 98. Rep. No. 97-16 (Jan. 31, 1997), available online at: <http://www.gao.gov/archive/1997/og97016.pdf> Representative Henry J. Hyde (R. Ill.) asked the GAO to identify federal laws in which benefits, rights, and privileges were contingent on marital status. In response, the GAO conducted word searches of the United States Code to locate laws in which marital status was a factor, even though some of those laws might not directly create benefits, rights, or privileges. In conducting such searches, the GAO identified 1,049 federal laws in which marital status was a factor. The GAO said that its search probably did not identify every individual law in the United States Code in which marital status was a factor. Additionally, the GAO cautioned that a conclusion should not be drawn that married individuals are, in every case, advantaged by each of the federal laws identified. Indeed, the GAO pointed out that a particular law may create either advantages or disadvantages for those who are married. For example, unmarried individuals generally fare better under federal loan programs than their married counterparts because a married individual's entitlement to benefits is generally based on both the individual's income and income of the individual's spouse.
 99. Report No. 04-353R (Jan. 4, 2004), available online at: <http://www.gao.gov/new.items/d04353r.pdf>
 100. Report, National Center for Lesbian Rights, "Left At The Altar: A Partial List Of Marital Rights and Benefits That Are Denied To Same-Sex Couples and Their Families in California," (Feb. 13, 2003), available online at: <http://www.nclrights.org/publications/pubs/altar2003.pdf>
 101. Hawaii Commission on Sexual Orientation and the Law, "The Governor's Commission on the Rights and Responsibilities of Same-Sex Relationships" (July 8, 1998).
 102. Hawaii Commission on Sexual Orientation and the Law Report, Report of the Commission on Sexual Orientation and the Law (Dec. 8, 1995), available online at: <http://www.hawaii.gov/lrb/rpts95/sol/>
 103. Gay & Lesbian Advocates & Defenders, "Protections, Benefits and Obligations of Marriage under Massachusetts and Federal Law: Some Key Provisions of a Work-in-Progress," (June 21, 2001), available online at: [http://www.glad.org/Publications/CivilRightProject/PB OsOfMarriage.pdf](http://www.glad.org/Publications/CivilRightProject/PB%20Of%20Marriage.pdf), and Brief of Amicus Curiae Boston Bar Ass'n Massachusetts Lesbian & Gay Bar Association in *Goodridge v. Department of Public Health*, No. SJC 08860 (Mass. filed Nov. 8, 2002) available online at: http://www.glad.org/marriage/Rights_and_Benefits_Brief.pdf
 104. Vt. Stat. Ann. tit. 15, § 1204; Vermont Freedom to Marry Task Force, "History, Supports and Obligations of Civil Marriage," (Apr. 2004), available online at: <http://www.vtfreetomarry.org/New%20Site/history.htm>; Vermont Civil Union Review Commission, "Report of the Vermont Civil Union Review Commission," (January, 2001), available online at: <http://www.leg.state.vt.us/baker/cureport.htm>, and Report, Vermont Civil Union Review Commission, "Report of the Vermont Civil Union Review Commission" (Jan. 2001), available online at: [http://www.leg.state.vt.us/baker/Final%20CURC%20 Report%20for%202002.htm](http://www.leg.state.vt.us/baker/Final%20CURC%20Report%20for%202002.htm)

105. Human Rights Campaign, “Analysis: [A partial survey of the responsibilities, protections and benefits associated with marriage in Ohio]” (2001), on file with Human Rights Campaign, Washington, D.C.
106. Free State Justice, Inc. & Human Rights Campaign, “Differential Treatment: An Analysis of Maryland Laws Impacting Lesbian and Gay Relationships” (2003), on file with Human Rights Campaign, Washington, D.C.
107. 440 Mass. 309, 798 N.E.2d 941 (2003).
108. *Goodridge v. Department of Public Health*, 440 Mass. 309, 342, 798 N.E.2d 941 (2003) (opinion by Chief Justice Marshall).
109. *Id.* at 343, 798 N.E.2d at 969.
110. *Id.* at 344, 798 N.E.2d at 970.
111. *Id.* at 313–14, 798 N.E.2d at 949.
112. *Id.* at 328, 798 N.E.2d 958.
113. *Id.* at 331, 798 N.E.2d at 961.
114. *Id.*
115. *Id.* at 331, 334, 798 N.E.2d at 961, 963.
116. *Id.* at 336, 798 N.E.2d at 964.
117. *Id.* at 337, 798 N.E.2d at 965.
118. *Id.*
119. *Id.* at 328, 798 N.E.2d at 959, quoting *Arizona v. Evans*, 514 U.S. 1, 8 (1995) (opinion in *Evans* written by Chief Justice Rehnquist).
120. *Id.* at 345, 349–50, 798 N.E.2d at 970, 973.
121. *Id.* at 351, 355, 798 N.E.2d at 974, 977.
122. *Id.* at 354, 798 N.E.2d at 976, quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion in *Moore*) (internal quotations omitted).
123. *Id.* at 357, 798 N.E.2d at 978.
124. *Id.* at 363, 798 N.E.2d at 982.
125. *Id.* at 374, 798 N.E.2d at 990.
126. *Id.* at 393, 798 N.E.2d at 1003.
127. S.B. 2175 (2003), 183rd Gen. Ct., 2003–04 Sess. (Mass. 2003).
128. Opinion of the Justices to the Senate, 440 Mass. 1201, 802 N.E.2d 565, 566 (2004) (opinion issued on Feb. 3, 2004), quoting from the “‘important question of law’” submitted by the Senate. The opinion was written by Chief Justice Marshall and joined by three associate justices.
129. *Id.* at 1210, 802 N.E.2d at 572.
130. *Id.* at 1213–14, 802 N.E.2d at 574.
131. *Id.* at 1223, 802 N.E.2d at 581.
132. 744 A.2d 864 (Vt. 1999) (Court’s opinion by Chief Justice Amestoy).
133. *Id.* 867.
134. Vt. Const. ch. I, art. 7.
135. 744 A.2d at 885, 889 (citation omitted).
136. *Id.* at 898.
137. *Id.* at 904–12.
138. 852 P.2d 44, 57 (Haw. 1993) (plurality opinion written by Judge Levinson).
139. *Id.* at 68.
140. *Baehr v. Miike*, No. 91–1394 1996 WL 694235 (Haw. Cir. App. Dec. 3, 1996), *aff’d*, 87 Haw. 34, 950 P.2d 1234 (Haw. 1997).
141. Haw. Const. art I, § 23.
142. Haw. Rev. Stats. § 572–1 (2003).
143. For more information, see Lambda Legal Defense & Education Fund, Hawaii State Law, at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=543>
144. 206 Ariz. 276, 77 P.3d 451 (Ct. App. 2003) (Court’s opinion by Judge Timmer).
145. Ariz. Rev. Stats. § 25–101(C) (2003).
146. Ariz. Rev. Stats. § 25–125(A) (2003).
147. Ariz. Const. Art. 2, § 8 provides: “No person shall be disturbed in his private affairs or his home invaded, without authority of law.” The court said: “although the records of Arizona’s 1910 constitutional convention do not reflect the framers’ intent in adopting the privacy provision, it is unlikely the framers intended to confer a right to enter a same-sex marriage.” 77 P.3d at 460 (citation omitted).
148. 539 U.S. ___, ___, 123 S.Ct. 2472 (2003).
149. 77 P.3d at 456, quoting *Lawrence v. Texas*, 539 U.S. ___, ___, 123 S.Ct. 2472, 2484 (2003).
150. 77 P.3d at 459–60.
151. 77 P.3d at 461.
152. 77 P.3d at 463–64.
153. 821 N.E.2d 15 (Ind. Ct. App. 2005).
154. *Id.* at 24–25.
155. 653 A.2d 307 (D.C. Ct. App. 1995) (per curiam opinion by Justice Ferren).
156. 653 A.2d at 331, quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 1938, 52 L.Ed.2d 531 (1977). In re Estate of Cooper, 149 Misc.2d 282, 564 N.Y.S.2d 684 (Surrogate’s Ct. 1990), *aff’d*, 187 A.D. 2d 128, 592 N.Y.S.2d 797 (1993), *appeal dismissed*, 82 N.Y.2d 801, 624 N.E.2d 696, 604 N.Y.S.2d 558 (1993), the trial court held and the appellate division affirmed that a member of a same-sex couple could not claim a “spousal relation” and thereby obtain a share the decedent’s estate.
157. The decision in *Woo v. Lockyer*, Judicial Council Coordinated Proceeding No. 4365, can be accessed at: <http://www.nclrights.org/cases/pdf/CourtDecision031405.pdf>.
158. 2005 U.S. Dist. LEXIS 755 (D. Fla. 2005).
159. — N.Y.S.2d —, 2005 WL 363778 (N.Y. Super. Ct. 2005).
160. *Seymour v. Holcomb*, — N.Y.S.2d —, 2005 WL 440509 (N.Y. Super. 2005); *Kane v. Marsolais*, Sup. Ct., Albany Cty, RJI#01–04–ST4671, available at: [http://www.nclrights.org/cases/pdf/CourtDecision031405.pdf](#); *Samuels v. New York Dep’t. of Public Health*, Sup.Ct. of N.Y., Case No. 1967–04; *Shields v. Madigan*, 5 Misc.3d 901, 783 N.Y.S.2d 270 (N.Y. Super. 2004).
161. *Li v. State*, 2004 WL 1258167 (Or. Cir. Ct. 2004).
162. *Anderson v. King County*, 2004 WL 1738447 (Wash. Super. Ct. 2004); *Castle v. State*, 2004 WL 1985215 (Wash. Super. Ct. 2004).
163. 501 S.W.2d 588, 590 (Ky. Ct. App. 1973).
164. 291 Minn. 310, 191 N.W.2d 185, 187 (1971), *appeal dismissed*, 409 U.S. 810, 93 S.Ct. 37 (1972).
165. 328 Pa. Super. 181, 476 A.2d 952 (1984).
166. 11 Wash App. 247, 522 P.2d 1187, *review denied*, No.

- 43391, 1974 WL 45234 (Wash. Oct. 10, 1974).
167. 673 F.2d 1036, 1042 (9th Cir. 1982). In addition, *Brause v. Dep't of Health and Social Services*, 21 P.3d 357 (Alaska 2001) held that a claim by members of a same-sex couple that they were denied the same benefits as married couples was not to be ripe for adjudication.
 168. In Nevada, legislation enacted in 2003 permits individuals to designate other persons authorized to visit them as patients in a health care facility. SB 386, 2003 Sess., 72nd Sess. (Nev. 2003); Nev. Rev. Stat. § 449.715. While domestic partners are not specifically referenced in the legislation, the authorization encompasses them. The designation must be in writing. Once designated, such persons are afforded rights of visitation commensurate with family members of the patient. Under the new legislation, domestic partners will be permitted to visit their partners who are patients in health care facilities even if the patient is unable to communicate his or her desires with respect to visitation, but only if the patient has executed the requisite designation document. The same legislation also permits individuals to designate persons authorized to order the burial of a decedent's remains. SB 386, 2003 Sess. 72nd Sess. (Nev. 2003); Nev. Rev. Stat. § 451.024. Again, while domestic partners are not specifically referenced in the legislation, they are included within its meaning.
Nebraska also has a statute that allows a patient to designate individuals not related by blood or marriage to have the same hospital visitation privileges as an immediate family member. Neb. Rev. Stat. § 71-20,120.
Benefits to domestic partners, including family health insurance covering the domestic partner, do not have the tax benefits that generally accompany benefits to a man and woman who are married. Accordingly, no premiums for domestic partners may be paid on a pre-tax basis.
 169. Alaska Stats. § 47.24.016.
 170. Alaska Stats. § 39.50.200.
 171. Ariz. Rev. Stats. § 36-3231.
 172. Ariz. Rev. Stats. §36-843.
 173. A.B. 26, 1999-2000 Sess. (Cal. 1999).
 174. An additional 12 benefits were created by the passage of A.B. 2001-02 Sess. (Cal. 2001). *See also* Connecticut Office of Legislative Research Rep. No. 2002-R-004, *Civil Unions and Domestic Partner Rights and Responsibilities – Other States' Laws and Proposals* (2002).
 175. A.B. 26, 1999-200 Sess. (Cal. 1999).
 176. S.B. 1049, 2001-02 Sess. (Cal. 2001) granted San Mateo the ability to offer death benefits to surviving domestic partners of county employees and AB 2777, 2001-02 Sess. (Cal. 2002) extended such benefits to Los Angeles, Santa Barbara, and Marin counties.
 177. A.B. 205, 2003-04 Sess. (Cal. 2003).
A.B. 205, 2003-04 Sess. (Cal. 2003).
 179. Cal.Fam. Code § 297.5(a). *See also* www.nclrights.org/publications/ab205faq_012005.htm.
 180. A.B. 2208, 2004-05 Sess. (Cal. 2004). *See also* www.nclrights.org/publications/ab2208_faq_0904.htm.
 181. www.nclrights.org/publications/ab2208_faq_0904.htm.
 182. Connecticut Office of Legis. Research Report No. 2003-R-0859, *Rights of Gay and Lesbian Couples in Connecticut* (2003) .
 183. Joint Comm. on Judiciary, Conn. Gen. Assem, Reports Pursuant to Sec. 16 of P.A. 02-105 (2002).
 184. Connecticut 2005 sSB963, *An Act Concerning Civil Unions*.
 185. Connecticut 2005 sSB963, *An Act Concerning Civil Unions*
 186. Del. State Merit R. 5.4.1 (2004).
 187. Del. State Merit R. 19 (2004).
 188. Del. State Merit R. 5.3.6.2, 5.3.6.3 (2004).
 189. Haw. Rev. Stats. § 572C (2001). *See also* Connecticut Office of Legis. Research Report No. 2002-R-004; *Civil Unions and Domestic Partnership Rights and Responsibilities – Other States' Laws and Proposals* (2002).
 190. Haw. Att'y Gen. Opinion Letter 05 (Aug. 14, 1997) and Haw. Att'y Gen. Opinion Letter 10 (Dec. 2, 1997).
 191. Hawaii Department of Human Resources Development, *Summary of Employee Benefits for State of Hawaii Employees, Contributory Plan Information for Prospective Retirees* (Mar. 2004); *Hawaii Employees' Retirement System, Noncontributory Plan Information for Prospective Retirees* (Mar. 2004).
 192. Hawaii Employer-Union Health Benefits Trust Fund, *Reference Guide for Active Employees* (effective July 1, 2004).
 193. www.hrc.org/content/contentgroups/news3/2004_august/AFSCME_members_ratify_contract.htm.
 194. American Federation of State, County and Municipal Employees Iowa Council 61, *AFSCME/Courts Employees 2003-2005 Master and Courts Contract Master*, at www.uiowa.edu/hr/relations/AFSCME_K.html#IX_4
 195. State of Iowa Affidavit of Domestic Partnership.
 196. 182. 2001 Maine Pub. L. ch. 347, § 2,5; Maine Rev. Stat. Ann. tit. 24-A, §§ 2741-A, 2832-A
 197. 183. Maine Rev. Stat. Ann. tit. 18-A, §1-201(10-A).
 198. 184. Maine Rev. Stat. Ann. tit. 18-A, § 1-201(10-B).
 199. Some agreements went into effect at a slightly later date.
 200. S.F. 293, 3rd Engrossment, 83rd Legis. Sess. (Minn. 2003).
 201. Human Rights Campaign Foundation, *Minnesota Laws Affecting GLBT People at*
 202. Senate Bill No. 386.
 203. Nevada Revised Statutes, Chapter 449.715.
 204. Nevada Revised Statues, Chapter 451.024, 451.557 and 451.650.
 205. 2003 N.J. Sess. Law Serv. 246 (June 5, 2003).
 206. N.M. Exec. Order. No. 2003-010 (April 9, 2003).
 207. Employee Benefits Division, State of New York Department of Civil Service, www.dcs.ny.gov
 208. S7688, A.B. 9872, Act effective Sept. 21, 2004, L.2004, c. 471, § 1 (to be codified at N.Y. Pub. Health Law § 2805-q); *see also* Press Release of Governor George E. Pataki of October 1, 2004 at www.state.ny.us.
 209. http://www.oag.state.ny.us/press/2004/mar/mar3a_04_attach2.pdf.
 210. http://www.prideagenda.org/pdfs/Hevesi%20Letter_

- 100804.pdf.
211. Or. Const. art. 1, § 20 (2001); Or. Admin. R. 101-015-0005 (2002); Or. Admin. R. 101-010-0005 (2002); Or. Admin. R. 101-020-0020 (2002); Or. Admin. R. 101-020-0035 (2002); Or. Admin. R. 101-030-0005 (2002).
212. Mario F. Cattabiani, "Gay Partners of Pennsylvania Workers Gain Some Benefits," *Philadelphia Inquirer*, Aug. 6, 2003, at B01.
213. R.I. Gen. Laws §36-12-1 (2001).
214. 2001 Vt. Acts & Resolves 91; Vt. Stat. Ann. tit. 15, §§ 1201 - 1207; Vt. Stat. Ann. tit. 18, §§ 5160 - 5169 (2001).
215. Vt. Stat. Ann. tit. 15, § 1202.
216. Vt. Stat. Ann. tit. 15, § 1203.
217. Vt. Stat. Ann. tit. 18, § 5163.
218. Vt. Stat. Ann. tit. 18, § 5167.
219. Vt. Stat. Ann. tit. 15, § 1206.
220. Vt. Stat. Ann. tit. 15, § 1301.
221. Vt. Stat. Ann. tit. 15, § 1304.
222. Vt. Stat. Ann. tit. 15, § 1303.
223. Vt. Stat. Ann. tit. 15, § 1301.
224. Vermont Civil Union Commission, Office of Legislative Council, Report of the Vermont Civil Union Commission, at Conclusion 4 (Jan. 2002).
225. Wash. Admin. Code § 182-12-119 (2002).
226. See domestic partner registries and chart referencing employers that offer domestic partner health benefits under domestic partner benefits at www.hrc.org.
227. D.C. Code §§ 32-704 to 706 (2001).
228. Sources for this section of the paper include: Ontario Consultants on Religious Tolerance, at www.religioustolerance.org; Lambda Legal Defense and Education Fund, at <http://www.lambdalegal.org>; MSNBC.com, at www.msnbc.com; American Civil Liberties Union, at www.aclu.com; and Marriage Watch, at www.marriagewatch.org
- The following is a list of citations to the state statutes, constitutional amendments, and executive orders restricting marriage to a man and woman:
- Ala. Code § 30-1-19; Alaska Stat. § 25.05.013; Alaska Const. art. I, § 25; Ariz. Rev. Stat. Ann. § 25-101; Ark. Code Ann. § 9-11-109; Cal. Fam. Code § 308.5; Colo. Rev. Stat. § 14-2-104; Del. Code Ann. tit. 13, § 101; Fl. Stat. Ann. § 741.212; Ga. Code Ann. § 19-3-3.1; Haw. Rev. Stat. § 572-1; Haw. Const. art I, § 23; Idaho Code § 32-209; 750 Ill. Comp. Stat. Ann. 5/212; Ind. Code § 31-11-1-1; Iowa Code § 595.2; Kansas Stat. Ann. § 23-101; Ky. Rev. Stat. § 402.020; La. Civ. Code Ann. arts. 89, 3520; Me. Rev. Stat. Ann. tit. 19-A, § 701; Mich. Comp. Laws Ann. § 551.1; Minn. Stat. Ann. § 517.01; Miss. Code Ann. § 93-1-1; Mo. Rev. Stat. 451.022; Mont. Code Ann. § 40-1-401; Neb. Const. art I, § 29; Nev. Const. art I, § 21; N.C. Gen. Stat. § 51-1.2; N.D. Cent. Code § 14-03-01; Ohio (just signed); H.B. 272, 125th Gen. Assem. (Ohio 2004); Okla. Stat. Ann. tit. 43, § 3.1; 23 Pa. Cons. Stat. Ann. § 1704; S.C. Code Ann. § 20-1-15; S.D. Laws § 25-1-1; Tenn. Code Ann. § 36-3-113; Utah Code Ann. § 30-1-2; Va. Code Ann. § 20-45.2; Wash. Rev. Code § 26.04.010; W.Va. Code § 48-2-104; Wis. A.J.R. 66.
229. P.L. No. 104-199, 110 Stat. 2419 (1996), codified as amended at 28 U.S.C. § 1738C.
230. P.L. No. 104-199, 110 Stat. 2419, § 3(a) (1996), codified as amended at 1 U.S.C. § 7.
231. President's Remarks Calling for a Constitutional Amendment Defining and Protecting Marriage, 40 Weekly Comp. Pres. Doc. 9 (Feb. 24, 2004), at <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html>
232. U.S. Const. art. V.
233. Human Rights Campaign Foundation, www.hrc.org ("Work Life" and "Domestic Partner Benefits") and HRC's publication "State of the Workplace 2002" ("Publication and Resources.") (Accessed on Apr. 10, 2004).
234. Human Rights Campaign Foundation, www.hrc.org ("Work Life," "Domestic Partner Benefits") and HRC's publication "State of the Workplace 2001," page 7) ("Publication and Resources.") (Accessed on April 10, 2004.)
235. See Human Rights Campaign, Equal Benefits Ordinances, at http://www.hrc.org/Template.cfm?Section=Equal_Benefits_Ordinances&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=23&ContentID=16122
236. Human Rights Campaign Foundation, www.hrc.org ("Work Life," "Domestic Partner Benefits"). (Accessed on Apr. 10, 2004.)
237. Paul E. Sullivan, Jr. & Barry M. Newman, Aon Consulting, Domestic Partner Benefits: An Employer's Perspective.
238. Paul E. Sullivan, Jr. & Barry M. Newman, Aon Consulting, Domestic Partner Benefits: An Employer's Perspective.
239. Human Rights Campaign Foundation, ("Work Life" on "Domestic Partner Benefits") accessed on March 28, 2005.
240. Michigan OAG, 2003-2004, No. 7171 (March 16, 2005).
241. National Pride At Work, Inc, et. al. v. Jennifer Granholm, in her official capacity as Governor of the State of Michigan, Case No. 05368-CZ, Ingham County, Michigan. (Filed 3-21-05).
242. Sources for this section include: Citizenship 21, at www.c21project.org.uk <<http://www.c21project.org.uk>> Canada Dep't of Justice, at canada.justice.gc.ca Ontario Consultants on Religious Tolerance, at www.religioustolerance.org <<http://www.religioustolerance.org>> marriage.about.com en.wikipedia.org www.samesexmarriage.ca
243. See Ciaran Giles, Gay Marriage Bill Makes Progress in Spain, at http://www.boston.com/news/world/europe/articles/2005/04/21/spain_parliament_passes_gay_marriage_bill/
244. 219. Halpern v. Canada (Attorney General), [2002] O.J. No. 2714, (2002) 215 D.L.R. (4th) 223.