

ESSAY

An Ethical Argument to Restrict Domestic Partnerships to Same-Sex Couples

James M. Donovan*

I.	INTRODUCTION	649
I.	DOMESTIC PARTNERSHIPS	655
A.	<i>Heterosexuals and Domestic Partnerships</i>	656
1.	Possibility of Heterosexual Inclusion within Marriage.....	658
2.	Grounds for Heterosexual Exclusion from Marriage.....	661
B.	<i>Homosexuals and Domestic Partnerships</i>	665
II.	CONCLUSION	669

I. INTRODUCTION

Domestic partnerships and the benefits adhering thereto claim an increasing share of the national attention. Seen in conjunction with the hot-button issue of same-sex marriage, partnerships are often viewed as the lesser of the two evils, a way of according economic and legal equality to gay and lesbian couples while withholding the magic symbolism of “marriage.”¹

Partnership schemes raise delicate issues of their own, however, as a recent uproar in Massachusetts demonstrated. Acting Governor Paul Cellucci vetoed a measure that would have allowed Boston to extend health benefits to domestic partners of city employees.² His

* Librarian for Access Services (on leave), Tulane University School of Law; Chair, New Orleans Mayor’s Advisory Committee on Lesbian, Gay, Bisexual, and Transgender Issues. Ph.D. in Anthropology, 1994, Tulane University; M.L.I.S. 1989, Louisiana State University; B.A., 1981, University of Tennessee at Chattanooga. This article is dedicated to my partner in life, the late Jorge M. Vásquez. Paraphrasing S. Kierkegaard’s sentiments about his own Regina, my work as an author may be regarded as a monument to Jorge’s honor and praise.

1. The distinction between domestic partnerships and same-sex marriage can be lost, usually because the conflation furthers other agenda items. Anti-gay evangelical Chuck McIlhenny, for instance, treats them as interchangeable synonyms. See CHUCK MCILHENNY, ET AL., *WHEN THE WICKED SEIZE A CITY* 91 (1993). He rhetorically eliminates the middle ground of being *for* domestic partnerships but *against* same-sex marriage, because in his view they are identical. See *id.*

2. See Tatsha Robertson, *Edict Expected on Partner Benefits*, BOSTON GLOBE, Aug. 4, 1998, at B1. The city defined “the term domestic partner . . . as two people over 18 who share

stated rationale was that the measure was too expansive.³ While he supported the provision of such benefits to same-sex couples, “he believed the bill, by broadly extending benefits [also] to unmarried heterosexual couples, could discourage marriage.”⁴ He noted that to sign the partners bill in its proposed form would undermine his support for strengthening traditional marriage.⁵ He indicated his willingness to sign an alternative bill which limited benefits to same-sex couples who are denied the option to marry.⁶

The response was immediate, loud, and hysterical, even as filtered through press accounts. Cellucci had “betrayed the gay and lesbian community,” according to Sean Cahill, Chairman of the Lesbian and Gay Political Alliance of Massachusetts.⁷ “I think he’s playing to the intolerant right wing of the Republican party and voters don’t want this kind of divisiveness from our leaders.”⁸ Significantly, Cahill concluded that “*whatever* his rationale, this is an anti-gay act.”⁹ Boston Mayor Thomas Menino immediately issued an executive order extending benefits to domestic partners of all types.¹⁰

The Boston drama has been repeated to a lesser or greater degree in workplaces across the country.¹¹ Citing unknown costs, Tulane University’s Board of Administrators narrowly voted to deny employee benefits to domestic partners.¹² Sponsors of the rejected program portrayed the Board’s veto as thinly disguised homophobia.¹³ Critics accused the university of betraying its progressive tradition, current employees threatened to resign, prospective faculty allegedly

basic living expenses, assume the responsibility for the welfare of their partner, are competent to enter into a contract, and are not married to anyone else. The sex of the couple is not included in the definition.” *Id.*

3. See *id.*; Adrian Walker & Tina Cassidy, *Cellucci Rejects City’s Partners Bill*, BOSTON GLOBE, July 31, 1998, at A1.

4. Walker & Cassidy, *supra* note 3, at A1.

5. See *id.*

6. See Hilary Sargent, *Mayor Sets Order on Partner Benefits*, BOSTON GLOBE, Aug. 5, 1998, at B7.

7. Martin Finucane, *Gay Groups Outraged over Cellucci Veto Threat*, BOSTON GLOBE, July 30, 1998, at A1.

8. *Id.*

9. *Id.* (emphasis added).

10. See Hilary Sargent, *End “Political” TV Ads for Big Dig*, BOSTON GLOBE, Aug. 6, 1998, at B5.

11. See *Panel Votes Benefits to Gay and Unmarried Partners of [Oregon] State Workers*, IMPACT, Feb. 13, 1998, at 10.

12. See Nick Marinello, “Domestic Partners” May be Headed Back to Board of Administrators, 17(5) INSIDE TULANE, Jan. 1998, at 2; Toni J.P. Pizanie, *Sappho Psalm: The Tulane University Community v. the Tulane University Board*, AMBUSH MAG. 2000, Jan. 23-Feb. 5, 1998, at 8.

13. See Pizanie, *supra* note 12, at 8.

chose other campuses, and gay students claimed to feel unwelcome on the campus.¹⁴

Despite this disgruntlement, legitimate objections to the Tulane plan, other than the proposition that the Board hates homosexuals, are imaginable. The Tulane proposal runs afoul of the same objection Cellucci voiced against the Boston program, namely it extends domestic partner benefits not only to same-sex couples, but to heterosexual couples as well. Like Cellucci, I¹⁵ agree that this is a fatal flaw, and as a gay member of the Tulane community I too would have voted against this policy's implementation. Unlike Cahill, I do not believe that anything which has positive immediate impact upon gays and lesbians is an unqualified good, to be pursued at any cost.¹⁶ The desirability of any present-at-hand action must be judged against the standard of long-range objectives, and not of short-term satisfactions.

The politics of our movement proceed best when based upon sound first principles: When we know what is true, we can do what is right.¹⁷ In a complex milieu of competing values, we must prioritize the relative importance of each. When values conflict, we should compromise the less important in order to preserve and further the more important. This process does not imply that a losing issue has no importance, only that it ranks lower on the hierarchy of movement values, and thus must yield. Any other procedure would be counterproductive and arbitrary.¹⁸

14. See Tracy Schafer, *Gays Left Standing at the Altar: Tulane Gets Cold Feet over Domestic Partnership Benefits*, IMPACT, Dec. 19, 1997, at 16.

15. There is some discomfort in writing in the first person for an academic publication, especially because this Essay aspires toward something broader than a mere opinion piece. However, as Kierkegaard made pungently clear in CONCLUDING UNSCIENTIFIC POSTSCRIPT (1941), the ethical resides in the subjective, which is the interiority of the individual. Only the "I" can be ethical, since only the "I" can make decisions. This Essay indicates where an ethical decision must be made by each individual, and does so in the only way it really can, by recounting how one particular individual, I, has already committed himself.

16. For instance, note how Philip S. Horne can only imagine two reasons for businesses to refrain from extending benefits to "unrecognized couples": intolerance or information deficiency. See Philip S. Horne, *Challenging Public- and Private-Sector Benefit Schemes which Discriminate against Unmarried Opposite-Sex and Same-Sex Partners*, 4 LAW & SEXUALITY 35, 49 (1994). He does not allow even for the logical possibility that these benefits have been considered by fair-minded persons, and rejected as being in conflict with higher values.

17. See James M. Donovan, *A Philosophical Ground for Gays' Rights: We Must Learn What Is True in Order to Do What Is Right*, 4 (1 & 2) GEO. MASON U. CIV. RTS. L.J. 1 (1993/1994).

18. Although the principle sounds simplistic, it can be complex in its application. A recent example involves the endorsement of the national lobbying group, the Human Rights Campaign (HRC), of Republican Senate incumbent Alfonse D'Amato over the strenuous

In this case the relevant principle is that marriage is a bedrock institution, unique among all other forms of interpersonal relationships, which should be nurtured by our society. Not every queer activist would agree with that statement, and I do not defend it here. The claim is inherently valuational, and as such cannot be justified rationally. The best one could hope for is to point out all the valuable benefits of socially nurtured marriage.¹⁹ But that does not necessarily require the concession that marriage should continue to be nurtured in this way, or that it should be prioritized above other relational forms. One could only conclude from such an argument that if this privileged status for marriage were not preserved, the society we know would become something other than it is. That is as far as logic will take us. It cannot tell us if any such change would be

objections of New York gays and lesbians. See Human Rights Campaign, HRC Endorses Alfonso D'Amato for U.S. Senate [Press Release], Oct. 21, 1998.

At first blush, HRC's action would seem to be of the type advocated here. The organization claimed to be uniformly applying its policy of endorsing incumbents who support its mission of equal rights for gays and lesbians. See *id.* D'Amato's record on this issue is surprisingly satisfactory for a senior Republican. See *id.* Although his opponent, and the eventual victor, Charles Schumer, scored at least as well as D'Amato, the latter's incumbency gave him the edge in the eyes of HRC. See *id.*

The objection to HRC's endorsement comes from D'Amato's staunch opposition on other issues. "When you look at gun control, abortion, and a host of broader issues, many of HRC's constituents, including me, would prefer Schumer," says Ethan Geto, a New York gay activist. Charles Kaiser, *The Best Man*, NEW YORK MAGAZINE, Oct. 5, 1998, at 23. "But then you look at HRC's mission. They're there to get pro-gay legislation passed to protect the interests of the gay and lesbian communities and make policy advances on behalf of gay people. There's only one way they're going to do it: they have to attract moderate Republicans." *Id.*

HRC's endorsement could be read as principled pursuit of its highest goals even when that action incurs costs among its primary constituents, who weigh in their decisions other factors beyond the explicit purview of HRC's agenda. Keeping such people "happy" would conceivably be an important consideration for any organization, but a lesser one than the accomplishment of its chartered purpose, and thus should yield.

Another reading is possible, however. While HRC rightfully ignored the additional issues which are not part of its explicit functions, it also ignored others which are implicit to its own political self-justification. By essentially vetoing the choice of New York gays and lesbians as to their preferred representative, HRC undermined the credibility of its claim to speak on our behalf on Capitol Hill. Instead, it attempted to reverse the flow of authority, dictating to New York who they should support in disregard to their own interests but in furtherance of HRC's. From this perspective, HRC pursued the lesser value of formulaic adherence to policy over the greater principle of preserving its moral claim to represent a larger constituency than its overt membership (which got considerably smaller after the D'Amato endorsement). Without that veneer of grassroots support, HRC loses whatever clout or persuasiveness it might have wielded, and consequently makes accomplishment of its goals almost impossible.

Pursuing the greater principle over the lesser is thus not an easy strategy for action, because it requires positioning oneself from any number of possible perspectives within that one which correctly identifies what is, in fact, the greater principle.

19. One list of such social benefits of marriage can be found in WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 66-67 (1996). He also provides a shorter list of the obligations of marriage. See *id.* at 70.

“good,” or if we are better off with what we have. Anyone who has read Plato should be readily familiar with the difficulties of identifying what is the good.

For many radical social and sexual revolutionaries, a social revolution overturning the exclusive privileges of marriage would be a good thing.²⁰ But for the much larger majority of our community the good lies with according marriage a special status, and removing the bar to its enjoyment for gays and lesbians. The last thing we intend is to destroy or diminish the status of marriage.²¹ It is because marriage is regarded by most persons of all sexual orientations as being so fundamental that we talk about it a great deal,²² expending vast energy to gain that status for same-sex relationships. This high regard for marriage is not attributable solely to the “incidents of marriage—the legal and economic protections, benefits, and responsibilities that come with this central social institution.”²³ These factors are indeed “incidents,” gaudy if attractive ornaments which too often obscure the view of its underlying preciousness. Even if “marriage conferred no legal rights or obligations, it seems likely that the state would continue to solemnize marriages because that is what people want—a public commitment and a right to hold themselves out as something different than they were before the marriage.”²⁴ The power of ritual and social signification should not be underestimated.

“[S]ociety as a whole has certain *generally shared expectations* about the kind of relationship that married couples typically have (while it lacks any such clear expectations about relationships of other sorts). Once a couple is legally married, society will come to expect

20. See Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, in SAME-SEX MARRIAGE: PRO AND CON 118 (Andrew Sullivan ed., 1997); Urvashi Vaid, *Status Quo or Queer*, ADVOCATE, Mar. 17, 1998, at 72; Steven K. Homer, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505 (1994). Homer, for instance, is concerned that if traditional marriage was extended to gays and lesbians, it would privilege the couple over other types of relationships he enjoys, such as with his “fuck-buddies.” See Homer, *supra*, at 530.

21. See *The 1997 Polls: Civil Rights*, ADVOCATE, Jan. 20, 1998, at 20. 22% of responders said that “legalizing same-sex marriage” was “the most important goal for gay rights activists.” *Id.* The only other response category receiving higher affirmation (31%) was that “all are equally important.” *Id.*

22. See *Advocate Readers Rank Their Interests for 1997*, ADVOCATE, Jan. 20, 1998, at 20. Marriage was the top subject of the year for readers of *The Advocate* in 1997. See *id.* Other subjects making the list were the Employment Non-Discrimination Act (#2), Protease inhibitors (#3), *Ellen* (#4), and Hate crimes (#5). See *id.*

23. Evan Wolfson, *How to Win the Freedom to Marry*, 4 HARV. GAY & LESBIAN REV. 29 (1997).

24. Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1185 (1992).

that their relationship is of this kind.”²⁵ Critical here is the role of public expectation. “It is the public recognition of the status of ‘married’ that constitutes the most important benefit of marriage, and what is most crucially abridged when the State discriminates against gay couples who want to marry.”²⁶ Does it matter that this public recognition is withheld? Frankly, yes. “It is all too easy for the rest of society to ignore same-sex relationships, and to assume that they are only sexual, or involve no serious long-term commitment or sharing of finances and household responsibilities.”²⁷ When society expects the best of us, and encourages us, we tend to aspire to achieve those goals. Similarly, when it expects little or the worst from us, and places obstacles in our path, we tend to meet those goals as well. Those looking to explain the frequent collapse of our relationships need look no further than this failure of the public to “expect” marriage-like behavior from us. Like heterosexuals, we need acknowledgment by the public in all those little ways that remind us, often when we most need such reminding, that yes, we are a couple, and whatever comes, we are intertwined. Even with such reminders heterosexual couples forget; the wonder is that we remember as often as we do without them.

Public expectation constitutes the forgotten, almost subliminally effectuated core of marriage. The fact that marriage does confer legal rights and obligations makes the debate over same-sex marriage of increased practical vitality for all concerned, but these riders are not the central concern for either side.

For purposes of this Essay then, the preservation of marriage in its present superior *status*, albeit not necessarily in its present *form*, constitutes a good. Further, it is a very high good within the hierarchy of values. Within the arena of domestic relations, in fact, there is no higher good. Marriage is the ground from which all other relations in an ordered society spring. Those who disagree need read no further, as they will surely be unmoved by what follows.

Extremists aside, gays and lesbians desire the right to marry because we value the institution,²⁸ and we will herein take this state of

25. Ralph Wedgwood, *What Are We Fighting For?*, 4 HARV. GAY & LESBIAN REV. 32, 33 (1997).

26. *Id.*

27. *Id.*

28. For instance, most gays and lesbians would be disturbed by the observation that “regardless of the duration of the relationship, or the degree of commitment, cohabitants and same-sex couples are not afforded the legal recognition and rights allotted to traditional married couples.” Ron-Christopher Stamps, *Domestic Partnership Legislation: Recognizing Non-Traditional Families*, 19 S.U. L. REV. 441, 445-446 (1992) (emphasis added).

affairs to be “good.”²⁹ That cannot be overstated. We like marriage, we appreciate what it stands for and what it entails. We (the gay and lesbian community) believe that we (the whole of society) will be better off both collectively and individually if we (the gay and lesbian community) undertake its responsibilities and enjoy its benefits.

Accepting the specific goal of preserving the *status* of marriage, but in revised form, and the guiding principle that lesser goals must yield to higher goals, we arrive at the conclusion that anything undermining the marriage institution should be avoided unless one is willing to argue that an even higher principle is at stake. The question then becomes: What is the effect of domestic partnerships upon marriage?

I. DOMESTIC PARTNERSHIPS

Andrew Sullivan characterizes domestic partnerships as an unqualified “bad.”³⁰ For him, the very “concept of domestic partnership chips away at the prestige of traditional relationships and undermines the priority we give them.”³¹ But he paints with too broad a brush. Domestic partnerships can be a push for an alternative to marriage, as the radicals might like, but they can also be temporary remedial compensations for those persons who are currently excluded from marriage.

Even supporters of domestic partnerships predicate their arguments on the premise that unmarried couples can possess the *same* degrees of commitment and duration as married couples, and on that basis should be socially nurtured. See Rebecca L. Melton, Note, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of “Family”*, 29 J. FAM. L. 497, 498-99 (1990-91) (“The denial of legal protection seems odious when it is recognized that the family interests of unmarried heterosexual and homosexual couples are identical to those of the traditional family.”).

29. The argument that marriage should be extended to gays and lesbians because it is a social good is severable from the argument that because marriage is a fundamental right, gays and lesbians cannot be excluded from its enjoyment. Writer Andrew Sullivan presents both arguments, but favors the latter. See Andrew Sullivan *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* (1995).

Just because something is a right, however, does not entail that it is good that we exercise that right. On the other hand, denial of a right is really only worth getting agitated about if that denial prevents us from realizing a good. To fight for a right that will have an undesirable outcome in operation, or to grouse about a lack of a right we do not intend to exercise anyway, seems hardly worth the energy. Moreover, if same-sex marriage is a social good, it should be encouraged regardless of whether it is a “right.” Driving a car is not a “right,” but the practice is encouraged because of the positive effect personal mobility has had on our economy.

Severing the “rights” argument from the “good” argument is intellectually understandable, but they should stand together. Same-sex marriage is *both good and right*.

30. See Andrew Sullivan, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, in *BEYOND QUEER: CHALLENGING GAY LEFT ORTHODOXY* 252, 254 (Bruce Bawer ed., 1996).

31. *Id.*

To the extent ordinances and policies advance marriage alternatives, Sullivan is correct that domestic partner schemes should be turned aside; to the extent that they offer stop-gap remedies for exclusion, however, they could be pursued. A remedy is not an alternative.³² Domestic partnership as an alternatives should, by the stated principle, be discouraged; domestic partnership as a remedy is permissible. The primary argument of this Essay is that partnership provisions for *unmarried* heterosexual couples fall into the first category, while those for *unmarriageable* same-sex couples fall into the second. The spirit of the argument is ethical, not legal. This means that it seeks to ascertain what principles we would like our laws to reflect, and not to discover what principles our laws have foisted upon us.

A. *Heterosexuals and Domestic Partnerships*

Domestic partnership plans do not fall monolithically into one type or another based upon the types of couples they include. However, most plans, according to the Lambda Legal Defense and Education Fund (LLDEF), extend their benefits to unmarried heterosexuals,³³ including the one recently approved by New York

32. See Robert L. Eblin, Note, *Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)*, 51 OHIO ST. L.J. 1067, 1070 (1990) (stating that "domestic partnership provisions, although not a substitute for marriage, mitigate the economic discrimination otherwise suffered by gay couples").

33. See Ruth E. Harlow, *While Opposition Fades, Lesbian and Gay Workers Win Important Benefits Nationwide*, 3 THE LAMBDA UPDATE, at 8 (1997).

An earlier article, on the other hand, suggested that "most of these [larger] companies have limited the partnerships to persons of the same-sex," and cited one authority which estimated "twenty-four colleges and universities offer health care benefits to lesbian and gay employees' domestic partners," but at least five extended similar privileges to unmarried heterosexual couples. Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163, 180, 180 n.82 (1995). One explanation for the discrepancy between these data and that reported by LLDEF is that in the intervening years the situation has altered considerably. Another possible cause of the difference is that LLDEF includes municipal ordinances in its analysis and this category may have a different skew when compared to businesses and universities. Publications from LLDEF list the names of those entities which sponsor domestic partnerships, but do not include citation information, or sponsor a databank of the primary texts, making systematic analysis of many programs prohibitively difficult.

The situation in New Orleans shows how difficult it can be to take such a count. The City Ordinance (MCS 15,986, June 17, 1993) which authorized a domestic partners registry included both lesbian and gay couples and unmarried heterosexual couples. However, the Mayoral Executive Order (MHM 97-005, May 17, 1997) which extended health benefits to domestic partners of city employees, restricts participation to those domestic partners who "may not enter into a contract of marriage because of the provisions of Louisiana Civil Code Article 89 which prohibits the marriage of persons of the same sex," thereby excluding heterosexuals. MHM 97-005 (May 17, 1997). When counting recognition of domestic partnerships, New Orleans is all-

City.³⁴ Indeed, these plans typically result in unwed straight couples being the *majority* of beneficiaries.³⁵ A similar result would attach itself to United States Representative Barney Frank's "Domestic Partnership Benefits and Obligations Act," which applies to both homosexual and heterosexual partners of federal employees.³⁶

Unmarried heterosexual couples claiming status as domestic partners seek the economic benefits of marriage without the social responsibilities.³⁷ Achieving this end would require that marriage obligations become independent of marriage rewards, whereas presently marriage implies that duties entail rewards. In the first instance you have two different categories of social accounting, in the second you have only one such category, but with two faces.

This change, perhaps subtle, still constitutes a fundamental reordering of the institution. More relevantly, it is a lowering of that institution in status and prestige. As such, heterosexual domestic partnerships transgress the higher principle of preserving marriage in its present status, and on this basis their encouragement should be judged antisocial. Those who desire the benefits of marriage, and are able to marry, should get married.

Some measure of this over-inclusion may be defensive, because a few programs which have limited domestic partner benefits to same-sex couples, like that at Bell Atlantic, have been challenged in court by excluded heterosexuals.³⁸ The true motives, however, are probably

inclusive; but regarding the extension of employee benefits to domestic partnerships, New Orleans includes only same-sex couples.

34. See Michael Blood, *New York Plan Cements Gay Rights*, TIMES-PICAYUNE, May 13, 1998, at A13.

35. See Eblin, *supra* note 32, at 1073. In Santa Cruz, 90% of the couples filing Affidavit of Domestic Partnerships [ADPs] are heterosexual; in Seattle, 70%; in Berkeley, 85%. See *id.* at 1072-74. See also Horne, *supra* note 16, at 36 n.1 (noting that "while the gay and lesbian civil rights movement may be the leading lobby for extending benefits to traditionally unrecognized couples, opposite-sex partnerships are the primary beneficiaries of such schemes").

36. Domestic Partnership Benefits and Obligations Act of 1997, H.R. 2761, 105th CONG. (1997). A similar bill was introduced into the United States Senate by Senator Paul Wellstone which correctly restricts domestic partnership benefits to same-sex partners. See Domestic Partnership Benefits and Obligations Act of 1998, S. 1636, 105th CONG. (1998).

37. See O'Brien, *supra* note 33, at 182 ("These couples, whether homosexual or heterosexual, are seeking legal and economic benefits without the obligations of marriage."). Subsequent discussion within this Essay will ascertain whether homosexual couples merit being lumped together with heterosexuals in this way.

38. See Larry Neumeister, *Heterosexual Partner Wants Benefits*, Associated Press Release, AOL NEWS, May 18, 1998. Alice Rickel has collected the type of arguments which might be offered by both sides in such a case. See Alice Rickel, *Extending Employee Benefits to Domestic Partners: Avoiding Legal Hurdles while Staying in Tune with the Changing Definition of the Family*, 16 WHITTIER L. REV. 737 (1995).

Legal challenges to domestic partnership provisions have been frequently raised by the so-called "religious right." See Cynthia Burton, *Suit Attacks City Domestic Partner Laws*,

less pragmatic and more high-minded, even if misguided. For example, exclusion of heterosexuals from domestic partner plans could be discouraged as an unjust discrimination based upon sex or sexual orientation.³⁹ But this would be true only if heterosexual and same-sex couples were already similarly situated with regard to the right to marry.⁴⁰

There are at least two ways in which unmarried heterosexual couples and same-sex couples are differently situated relative to marriage and its benefits. These are the *possibility* of inclusion and the *grounds* for exclusion.

1. Possibility of Heterosexual Inclusion within Marriage

Consider the following statement:

Similar discrimination may be found in most state provisions for worker's compensation. Worker's compensation benefits are usually provided exclusively to covered employees and their "dependents."

PHILADELPHIA INQUIRER, Aug. 15, 1998, at B1. Those mounting these attacks seem oblivious to the internal contradiction between this stance and another which their faction espouses with equal ease. According to Randy Tate, executive director of the Christian Coalition, "as Americans. . . we need to extend Christian charity to all individuals. That doesn't mean in the public policy realm that we need to extend special privileges to individuals based on their private sexual behavior." Transcript, *Hardball with Chris Matthews* (CNBC Television Broadcast, Aug. 11, 1998).

Reserving privileges to individuals based upon marital status, which in turn is currently based upon sexual behavior, is exactly what is going on now. Gays and lesbians, in true fact, are the ones fighting the battle to end this kind of privileging based on bedroom preferences, which religionists claim also to disapprove. The Christian Coalition, despite its rhetoric, seeks to *enforce* distribution of socio-legal benefits based upon sexual behavior when it contests domestic partnership ordinances.

The most rational conclusion from its stated position is that it should be receptive to the idea of gay marriage, because this would then allow its leadership to argue consistently that benefits should be distributed by marital status, and not sexual behavior. The vehement disgust with which most Christians regard same-sex marriage, however, is nigh irrational but well-documented. See James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamental Christian Christianity*, 4 MICH. J. GENDER & L. 335 (1997).

39. In the context of the Boston debate, this argument was frequently voiced. Heterosexual couples could not be excluded in the way Acting Governor Cellucci wished due to a "widespread legal opinion that extending benefits to gays and lesbians exclusively would violate both the constitutional requirement of equal protection and state law." Adrian Walker & Tina Cassidy, *Cellucci Rejects City's Partners Bill*, BOSTON GLOBE, July 31, 1998, at A1. Mary Bonauto of the Gay and Lesbian Advocates and Defenders misleadingly exaggerated the pervasiveness of this "widespread legal opinion" when she claimed that "[e]very city that has this [domestic partner benefits] makes it available to same-sex and heterosexual couples." *Id.* Cellucci cites several municipalities (Chicago, New Orleans, Philadelphia, Bangor, and Tucson) which have restricted benefit programs to same-sex couples in the way he favored. See Hilary Sargent, *Mayor Sets Order on Partner Benefits*, BOSTON GLOBE, Aug. 5, 1998 at ____.

40. See *Phillips v. Wisconsin Personnel Comm'n*, 482 N.W.2d 121, 126 (Wis. Ct. App. 1992). ("[N]ot all disparate treatment is discriminatory. It is only where similarly situated persons are treated differently that discrimination is an issue.")

“Dependents” are generally limited to those who are married to the employee or who share a blood relationship to the employee. Clearly, this limitation excludes opposite-sex unmarried and same-sex couples.⁴¹

This discussion lumps these two situations together as being two instances of a single type, the discrimination against committed but unmarried couples. But actually they are not. Unmarried heterosexuals are excluded from these marriage benefits in the same way that six-year-olds are excluded from college. The disability is neither permanent nor prejudicial when, at a more appropriate time, the person chooses to claim this prerogative. That all benefits and privileges are not available at all stages of life is not presumptively discriminatory, nor even particularly unusual.

Gays, on the other hand, are “excluded” from marriage benefits in the way that dogs are excluded from college. The proper question is not whether, at any given moment, one has access to all benefits society has to offer, but whether these benefits are *permanently* out of reach, especially through no fault of your own.⁴² By this standard, unmarried heterosexual couples are not similarly situated to same-sex couples with respect to employment benefits.

Another analogy which highlights this difference would be for heterosexuals to claim that they want a good salary and are able to work, but *refuse* to work for this salary. By comparison, gays want a good salary and are willing to work, but are *not permitted* to work. In any side-by-side “snapshot” both gays and heterosexuals are unemployed, and would seem to have equal claim to unemployment benefits. The average citizen, however, would feel that those who are able but unwilling to work should be distinguished from those who are not allowed to work, and that only the latter should receive socially funded benefits. Replace “work” with “marriage,” and

41. Home, *supra* note 16, at 40.

42. Rickel, for one, disagrees. He advocates that, “[a]s a matter of social policy, in determining whether two groups are similarly situated for purposes of a discrimination analysis, a court must not look to what legal rights the groups may or may not exercise in the *future*. Instead, it must compare the groups’ respective situations *at that point in time*.” Rickel, *supra* note 38, at 762.

With all due respect, this position is nonsensical, logically if not legally. A person who has not yet completed his college degree cannot claim discrimination if he is today rejected for a job which requires one. He cannot now expect to collect benefits based upon future promises to be qualified for them somewhere down the line. Even the law recognizes phases of life, such as when one becomes eighteen, and then twenty-one, when new privileges and responsibilities are bestowed. A ten-year-old cannot sue to get the rights of a mature adult; she must wait until in the fullness of time she arrives at them. All groups differ when examined synchronically; the real issue is whether over time (diachronically) those differences persist.

“unemployment benefits” with “domestic partnership benefits,” and the parallels should be readily apparent.

Rare is the author who favors restricting domestic partnerships in the way herein advocated. Not uncoincidentally, the language of articles on this topic obscures the fundamental differences situating homosexuals and heterosexuals. “No longer will partners pay taxes for benefits they are denied,” rallies one author.⁴³ Only same-sex couples are “denied” anything. Heterosexuals choose not to qualify, and that is a world of difference, a difference of ethical distinction, whether or not it rises to one of legal notice.

Same-sex couples are qualitatively in a different situation: they are excluded from benefits attached to marriage because they are excluded from marriage. Unmarried heterosexual couples may be currently barred from enjoyment of marriage benefits, but they always have the option of claiming them should they choose, simply by marrying.⁴⁴

In fact, unmarried heterosexual couples can in many states be quite smug about their situation. While presenting themselves as avant-garde and cutting edge because they resist the marriage tide, they do so knowing they can often fall back on the doctrine of common law marriage to secure many marriage benefits for themselves as soon as such provisions should prove convenient.⁴⁵ While choosing not to marry, and claiming to be oppressed for that choice, they retain for themselves a back-door access to that status and its privileges should it become expedient.⁴⁶ Again, this possibility

43. Home, *supra* note 16, at 52.

44. One anticipated reaction to this assertion will be for someone to trot out a fantastical set of facts which portray a heterosexual couple who cannot, because of whatever reason, marry, but who no one with a heart would wish to penalize for this lack. Perhaps the following scenario qualifies: “[O]ne can easily imagine related single parents, for example, who would like to pool their resources and assist each other with child-care responsibilities. If one parent were the principal caretaker, should he not be eligible for coverage on the other’s health insurance plan?” Bowman & Cornish, *supra* note 24, at 1205. Their point is that restrictions on inclusion within domestic partnership should not include criteria on relatedness, as domestic partnership should not be construed to entail sexual activity between the partners.

I am not altogether convinced a domestic partnership is necessary to resolve this situation. As blood related dependents, they may all be eligible under present criteria in many programs.

45. See Melton, *supra* note 28, at 508. The anti-palimony agreement outlined by O’Brien, *supra* note 33, at 213-14, stipulates that the unmarried but cohabitating couple disclaims any intent to enter into a common law marriage. Such a provision would presumably waive the option for either member of the couple to claim rights or benefits in the future based upon that doctrine.

46. While available, this option is not only nonexistent in some states, such as Louisiana, but may also be out of reach by some legal reasoning. “Parties to extralegal relationships now seek to obtain the incidents of a legal status they deliberately rejected. To confer legal rights and impose legal duties often is contrary to the expectations of the parties and disregards their

is one which is not currently available to same-sex couples, and further identifies deep and distinguishing differences between the legal situations of unmarried heterosexual couples and same-sex couples.

In short, unmarried heterosexual couples are not similarly situated to unmarriageable same-sex couples. To confound these two contexts belittles the aspirations of many gays and lesbians, and succors the weaker character traits of not a few heterosexuals.

2. Grounds for Heterosexual Exclusion from Marriage

Let us look more closely at that “choice.” Why do some heterosexual couples choose not to marry, all the while arguing that their relationship is so marriage-like that they should enjoy its social and economic benefits? After all, they *could* marry if they wished, and they obviously recognize the many important benefits that come from that status. The social obligation to provide them with compensations should hinge on whether unfair alternatives have been thrust upon them. Failing to identify a Hobson’s dilemma which compels such couples to choose between marriage and either (a) a principle of equal or higher importance (i.e., some kind of religious obstacle), or (b) a social or legal imposition (i.e., if the military should deliberately discourage marriage among its enlisted men), it is unclear why they should elicit our sympathies.⁴⁷

The issue of heterosexual marriage-avoidance is not often raised.⁴⁸ One statement on this point, however, is the following: “Some individuals may simply not feel ready to assume what they

contrary intention.” Charles F. Crutchfield, *Nonmarital Relationships and Their Impact on the Institution of Marriage and the Traditional Family Structure*, 19 J. FAM. L. 247, 258 (1980-81) (quoting Foster & Freed, *Nonmarital Partners: Sex and Serendipity*, 1 J. Div. 195, 206 (1978)). The emphasis here is on the “deliberate rejection” of the legal structure surrounding marriage. *See id.* As the relationship was built upon this willful rejection, the authors apparently feel that it may be problematic to retroactively reinterpret the relationship and its adhering obligations and rights *as if* that legal structure had been presumed. *See id.* This case describes an implicit rejection, as opposed to the explicit rejection described above.

47. I disagree utterly with Rickel, *supra* note 38, at 767, when she states that “[a]s a matter of social policy, why an employee is married or unmarried, whether it is ‘by reason of personal choice or sexual orientation,’ is not relevant to a benefits analysis,” even if she is able to cite judicial support from courts.

“Why” is often the central question governing reaction to the “what.” If a person is doing poorly in school, it matters whether this is because she is being lazy, or if she is trying hard but lacks ability. Each scenario merits a different social response. The argument being made here, though, is ultimately ethical and not legal. The charge is to identify the “right” thing to do; I will leave it to others to ascertain whether the law will permit the right thing to be done.

48. For example, Horne, *supra* note 16, at 36, refers only to unelaborated “personal or spiritual reasons” for heterosexuals to choose not to marry.

perceive to be the life-long commitment of marriage but would be willing to assume the obligations of domestic partnership. Others may have philosophical objections to marriage, given its history of rigidly defining roles for husband and wife.⁴⁹ The obligations they would be willing to consider assuming are phrased most often in terms of “mutual support,” which “does not imply a broad claim on all the assets of a partner, nor responsibility for all debts of a partner. Mutual support does however require that each partner be responsible for the food, clothing, shelter, and medical attention of the other.”⁵⁰ In other words, you must be willing to provide for your partner what the law requires you to give to your pet, but no more.

The issues raised are these: Are these kinds of relationships an end, as they are for heterosexuals, or a means to an end, as they are for gays and lesbians? Even if heterosexuals resolutely possess the freedom to form these kinds of relationships among themselves, are they the kind of relationships society should nurture, encourage and even applaud? Most importantly, are the reasons heterosexuals would prefer domestic partnerships over marriage the kinds of justifications society would wish to reward?

No, no, and no again. Supporters of heterosexual domestic partnerships are sympathetic to unmarried heterosexuals, and present what we can presume to be the most compelling reasons in the best possible light. But even there, the heterosexuals they describe sound rather pathetic. What does it mean not to be “ready” to assume the obligations of marriage while being ready to claim its benefits? How is this not like saying, “I’m not ready to be held responsible for reckless driving, but I demand that I be allowed to drive because it would be personally convenient”? As with so much of our culture today, these overaged children want the perks without the works. This is not a lesson that should be reinforced by positive rewards. If “readiness”—or the lack thereof—is the best explanation that can be mustered to defend unmarried heterosexual couples, then we should accept their private conclusions that they are not ready for marriage, but reject their demand that this unreadiness entitles them to anything, much less marriage benefits. The appropriate social response would be to initiate actions that would facilitate and increase their “readiness.”

Other grounds offered for unmarried heterosexual couples to remain in that status fall under the rubric of “philosophical

49. Bowman & Cornish, *supra* note 24, at 1187.

50. *Id.* at 1206.

objections.”⁵¹ The particular philosophical objection cited above has no bearing on the immediate argument, however, and is easily dismissed. The fear is that historically marriage has been used to treat women as property, and often not very highly valued property at that, and is thus an institution beyond redemption. “The skeptics know first hand the power wielded by white men who have used marriage to establish ownership over women and children, to promote rules of sexual morality to which all but they must adhere, and to revoke or extend full citizenship rights, according to their whim.”⁵² Within this leftist feminist paradigm, repudiation, not revision, is the answer.

But this is like saying that because blacks were once required to ride at the back of the bus, public transportation should be eliminated. The “use” of marriage is distinguishable from the inherent requirements of marriage. Without denying our retrospective disapproval of many former marriage practices,⁵³ how marriage is “used” is decided today by the participating parties. No one forces any couple to structure its private relationship along gender-stereotypical lines.⁵⁴ To the extent that these divisions appear, the couple itself has adopted such interactive styles either willfully or accidentally. Whether the relationship is a “marriage” or a “domestic partnership” will be irrelevant to the interpersonal dynamics of the dyad. A partnership can be just as stereotypically gender role structured as a marriage.

Let us then concoct our own philosophical objection. Continuing to try to put the best face on this argument, let us imagine a philosophical objection that runs so deeply as to qualify as being religious. Suppose that just as Jehovah Witnesses refuse to pledge allegiance to the flag,⁵⁵ our hypothetical marriage objector finds it religiously offensive that his marriage must be certified by the state to be valid. Accept also that he resides in a state that does not recognize common law marriage, and that the matter has been fully litigated with the conclusion that requiring third party marriage validation (as

51. See *supra* note 49.

52. Paula Ettelbrick, *Legal Marriage is Not the Answer*, 4 HARV. GAY & LESBIAN REV. 34 (1997) [hereinafter Ettel brick, *Legal Marriage*].

53. A more even-tempered assessment of the marriage institution can be found in LAWRENCE STONE, *THE FAMILY, SEX, AND MARRIAGE IN ENGLAND 1500-1800* (1977).

54. For example, the recent resolution by the Southern Baptists that women should subordinate themselves to their husbands was newsworthy because that attitude is atypical of contemporary marital mores. See Gustav Niebuhr, *Husband Leads at Home, Southern Baptists Say*, TIMES-PICAYUNE, June 10, 1998, at A1. I can imagine the feminist reaction, that the Southern Baptists were merely reaffirming the status quo, but that would dismiss the public astonishment which followed.

55. See *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

opposed to recognition)⁵⁶ does infringe on his religious beliefs and practices. Surely if any heterosexual couple has a legitimate need for alternative access to marriage benefits, this would be the one.

Even I could probably be swayed by such a set of individual circumstances, and could find myself favoring marriage alternatives for the couple. But note that exempting Amish children from compulsory school attendance laws did not require a change in the laws, but only a judicial exemption.⁵⁷ In the main, compulsory school attendance is judged to be a social good; only the unique context of Amish socialization justified this slim exemption. The existence of an exemption was not read as a cause to do away with the universal compulsion.

Analogously, the blanket provisions for domestic partnerships should be tailored to the larger social good, that is, in a way to preserve the unique status of marriage. This stipulation necessitates the exclusion of heterosexuals. If legitimate heterosexual exceptions arise, these can be dealt with in ways which do not dilute the message that these partnerships are not to be routinely extended to heterosexuals. Meaning: the bald text of the provisions should continue to exclude heterosexuals, even if in practice compassionate exceptions are allowed.⁵⁸ The goal here is not to be rigid or cruel, but to advance the larger good. Society can be flexible without being spineless, generous without being profligate.

The choice not to marry, then, is one each heterosexual couple may exercise for itself. But in its uniqueness marriage is a “package deal,” full of unseverable benefits and obligations. To reject the obligations must entail denial of the benefits, unless one hopes to

56. The distinction here is that the parties can be required to notify governmental officials that a marriage has occurred, but are not required to apply to the state to have the marriage validated (to obtain licenses, etc.).

57. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

58. I will, however, state the following: If permitting exceptions opens the program to charges of discrimination, such that the threat is posed that all heterosexual couples would be thereby permitted to participate in domestic partnerships, I would terminate the compassionate exceptions.

Rickel suggests the one way that employers could protect themselves against such suits is by “removing marital status or sexual orientation from its nondiscrimination policy contained in any governing plan document.” Rickel, *supra* note 38, at 769. Without them, heterosexuals have no legal standing to complain when they are excluded from domestic partnership benefit programs. Just as pursuit of domestic partnerships can conflict with the movement’s other goal of securing same-sex marriage, it seems ironic that it also may undo these long sought guarantees against discrimination.

eviscerate marriage and parcel out its many “incidents.” Who would accept the obligations under these terms?⁵⁹

B. Homosexuals and Domestic Partnerships

Same-sex-only domestic partnerships are an effort to balance the scales in the arena of domestic relations. To include heterosexuals would preserve their significant advantage by giving them two options where we would have only the one. What is remedial for the one is an alternative for the other.

Perhaps I am wrong on this point. Perhaps no reasoned distinction can be maintained which would ethically (not to mention legally) permit same-sex domestic partnerships while precluding heterosexual ones. This would do nothing to mitigate the fact that heterosexual domestic partnerships threaten to undermine the status of marriage, and that the preservation of that institution is a superior principle for gays and lesbians. The only thing this fact should change is the response of the gay and lesbian community.

In this case the principled response for our movement should be to forego domestic partnerships for ourselves, coming as they do at too high a price. What a pyrrhic victory it would be to open the floodgates of marriage alternatives to immediate benefit to ourselves, but to great harm for larger society over the long haul. Rather, in that environment all efforts should be redirected toward securing the marriage option. In an all-or-nothing context we may actually find it easier to sway in our direction the moderate fence-sitters, presently content to deny us marriage so long as we can get domestic partnerships.⁶⁰

At the very least, how narrowly to define eligibility for domestic partner benefits is not as simple an issue as some would pretend. As David Boaz noted, gay leaders “invariably urge that heterosexual couples be included in legislation and corporate policies.”⁶¹ Each of the “big three” organizations—Human Rights Campaign (HRC), National Gay and Lesbian Task Force (NGLTF), and LLDEF—advocates inclusion of unmarried heterosexuals within domestic

59. Louisiana enacted a second kind of marriage, “covenant marriage,” which carried with it stricter obligations by significantly raising the bar before a divorce could be granted. See LA. REV. STAT. ANN. § 9:272 (West 1997). No new benefits, however are associated with the heavier responsibilities. Response among newlyweds has been underwhelming, as they opt for the more traditional marriage contract.

60. Senators Paul Wellstone (D-Minn.) and Mary Landrieu (D-La.) come to mind.

61. David Boaz, *Domestic Justice*, in BEYOND QUEER: CHALLENGING GAY LEFT ORTHODOXY 290, 291 (Bruce Bawer ed., 1996).

partnership plans.⁶² Reasoned explanations for this stance are not easily elicited.⁶³

This organizational attitude is positively schizophrenic in that popular, horror movie sense. On the one hand, Dr. Jekyll rushes to argue in court that same-sex couples should be allowed to marry. His briefs and press releases are replete with references to earlier Supreme Court decisions which extol the unique virtues and unparalleled importance of the marriage institution in our society. Indeed, precisely due to this importance, he argues, it is unconscionable if not unconstitutional to exclude us from its practice.

Even as he offers these arguments, however, other projects within the same organizations seek to purge marriage of any special attribute, benefit, or status. Mr. Hyde's argument here is that marriage should just be one of a number of possible relationship configurations, none of which should be legally, socially, or economically privileged relative to the others.⁶⁴ What Dr. Jekyll upholds as sacred and precious, Mr. Hyde disparages as outmoded and prejudicial.

Obviously both arguments cannot be legitimate. They each begin with the premise that the married state is unique and special. The marriage project seeks to reinforce this premise, while the domestic partnership project aims to obliterate it. The attitude of our gay leaders toward marriage demonstrably and sadly depends upon the audience, and not on any principle.

Same-sex couples of course do not at present have the option to marry, and it is toward them that domestic partnership benefits should

62. See discussion *infra* note 62 (detailing the reasons behind LLDF's support for inclusion of heterosexuals in domestic partnership plans); Tracey Conaty, *Equal Benefits Means Business in San Francisco: NGLTF Urges United Airlines to Comply with New Law* (visited Mar. 10, 1999) <<http://www.nglrf.org/press/equalbene.html>> (showing NGLTF's support for the San Francisco Domestic Partnership Action, which is not limited to gays and lesbians); HRC, *Domestic Partnership Benefits for Same-Sex Couples* (visited Mar. 10, 1999) <<http://www.hrc.org/issues/worldplac/dp/index.html>> (showing HRC's acquiescence to the standard definition of "domestic partner" which is not restricted to same-sex couples).

63. In an effort to better understand the organizational perspectives on these issues, I e-mailed Urvashi Vaid at the NGLTF (who chose neither to respond nor to forward the query to a more helpful staff member) and the LLDEF. On behalf of the LLDEF, staff attorney Suzanne Goldberg promptly and helpfully clarified its view that these are largely economic issues of equal compensation, and that LLDEF apparently views marriage and domestic partnerships as equal routes to this end. "Lambda's marriage project does not work to encourage gay people to marry—its aim, instead, is to ensure that gay people, like non-gay people, have an equal opportunity to marry if they so choose" (personal communication, Feb. 23, 1998). Ms. Goldberg did not explain why anyone would want to get married if all marital benefits can be obtained through a less personally demanding "domestic partnership," and why LLDEF does not regard this situation as diminishing the *unique* value of marriage.

64. "[I]t is unjust, irrational, and injurious to privilege marital families over non-marital ones." Ettelbrick, *Legal Marriage*, *supra* note 51 at 34, 35.

be *exclusively* tailored. Domestic partnerships should be pursued solely to compensate for at least the lack of marriage “incidents.” But domestic partnerships will always be inferior to marriage for just that reason, that is, they are limited to the economic “incidents” of marriage, and do not reach to the core benefit of marriage, what I have called “public expectation.” To refuse us marriage is at root not to refuse us economic goodies, but it is to refuse to see the same-sex couple as a *couple*.⁶⁵

Hence to acquire partnerships does not lessen the need to continue to battle for same-sex marriage. Passage of the Reciprocal Beneficiaries Act in Hawaii,⁶⁶ which granted some sixty socioeconomic benefits to couples who cannot legally marry (i.e., excluding heterosexual couples who simply choose not to marry), did not render bootless the outcome of the *Baehr*⁶⁷ case, nor should it.⁶⁸ Granted, as same-sex couples obtain these partnership benefits it can become more difficult to articulate why they continue to be unsatisfied. Most people do not recognize the value of public expectation, nor would they like to admit it if they did given our high cultural esteem of radical individuality.

Still, one day the struggle for same-sex marriage will be won. A well-designed, philosophically defensible domestic partner law or policy should anticipate that outcome, and specify the conditions of its own recession.⁶⁹ When marriage becomes an option for same-sex couples, then domestic partner benefits for same-sex couples should immediately terminate. Again, those who can marry, should, if they want the benefits of marriage. The goal of most gay people, if not their organizations, is to be welcomed into the institution of marriage, not to undermine or devalue it.

65. I will cite a personal example of such refusal. I believe my parents genuinely liked my late partner, Jorge. However, they could never bring themselves to fully acknowledge and accept the nature of our relationship. Thus, at Christmas time, my parents never failed to remember Jorge, but he got his own card, and his own gift. Never was anything addressed to us jointly, as a couple.

66. Reciprocal Beneficiaries Act, Act 383, July 8, 1997; HAW. REV. STAT. ANN. § 572 (Michie 1997).

67. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997) (table decision).

68. If nothing else, a marriage certificate is still needed to sleep with your partner in the White House. Who would want to miss out on their chance to sleep in the Lincoln Bedroom? See J.E. Bourgoyne, *No Room at the Inn*, TIMES-PICAYUNE, Feb. 10, 1998, at A9.

69. One well-crafted program is that at Lotus, a computer software company. See Rickel, *supra* note 38, at 760-61 n.110. First, this company appropriately targeted the benefits of its domestic partners program by limiting its participants to same-sex couples. See *id.* Second, the need for such benefit programs, according to company officials, “would be reconsidered if same-sex marriage is legalized.” *Id.*

The uncritical promotion of all-inclusive domestic partnerships, even when they work against our long term goals, bespeaks the immaturity of our movement.⁷⁰ We have been either unable or unwilling, on a plethora of issues, to make the finer distinctions which are necessary for ethically sophisticated advocacy of our needs. And here our needs include, but are not limited to, our needs as homosexuals. We also have needs arising from our membership in other groups, not least of which is that of larger contemporary American society. Thoughtful advocacy will balance the specialized concerns against our own stake in the broader culture. This task would be immeasurably advanced if we took the time to prioritize our values and principles.

Whatever the state of our internal movement politics, though, no excuse should be handed the far right to accuse us of seeking to destroy the traditional marriage institution,⁷¹ especially since that

70. Stephen H. Miller says it well: “[L]inking benefits for gay partners who are not allowed to be married with benefits for heterosexuals who don’t want to make a commitment puts the gay rights movement in the position of appearing to oppose all bedrock values.” Stephen H. Miller, *Honey, Did you Raise the Kids*, in *BEYOND QUEER: CHALLENGING GAY LEFT ORTHODOXY* 279, 281 (Bruce Bawer ed., 1996). This “appearance” would be less objectionable if it were deliberate, because then, despite its error, it would be principled. But instead we have endorsements of “bedrock values” followed by actions whose cumulative impact immediately undermines those values.

71. See, e.g., *McILHENNY ET AL.*, *supra* note 1 (discussing the conflict between homosexuals and the Church). The fathomless depths of some people’s hatred and contempt for gays and lesbians should not be underestimated. There seems no contradiction they will not accept if it will justify hounding homosexuals. For example, Gilbert Meilaender argues that “compassion. . . kills morality.” *Affirming Ourselves to Death*, 22(9) *AFA JOURNAL*, Sept. 1998, at 16.

McIlhenny is known in San Francisco as the evangelical preacher spearheading every anti-gay legal action. Believing that “the wages of sin is death,” He gleefully ticks off the names of his gay opponents who have since died of AIDS. *McILHENNY, ET. AL.*, *supra* note 1, at 231.

Particularly repugnant in his book is his constant paranoia that the lives of himself and his family have been and continue to be seriously threatened because of their battles to deny civil liberties to gays and lesbians. There is no denying that they have been the targets of harassment, some of which crossed the line of decency. But no anti-gay activist has *ever* been killed because of his or her hatred of homosexuals, a restraint I personally find superhuman given the provocations we endure, and something I wish homophobic pontificators would consider as they tiresomely repeat the accusation that we are creatures of unrestrained impulses and immediate gratifications.

The contrary is not true, however. Gays and lesbians have often been the focus of lethal attention from anti-gay hatemongers. As I write this, newspapers are announcing the death of Matthew Shepard, targeted for a fatal beating because he “embarrassed” his killer earlier in the evening by “flirting” with him. See Tom Kenworthy, *Wyoming Student Dies of Beating Injuries*, *TIMES-PICTAYUNE*, Oct. 13, 1998, at A4. This case is reminiscent of the “Jenny Jones” murder, where a man found the publicly confessed attractions of his gay neighbor to be sufficient cause to assassinate him.

Where did these people learn that homosexuality was such an evil thing that, without being told so directly, it was reasonable to conclude that the proper response to homosexuality was a killing frenzy? The answer is no mystery. Of course, some do say so directly: Bob Enyart, a

result is the last thing we want. Ill-considered domestic partnership proposals, however well-intentioned, may provide just such a bludgeon.

II. CONCLUSION

Left to their own inertia, domestic partnership programs will continue to multiply in our society. The next question is to whom should they be made available. The overwhelming response has been: To all unmarried couples.

Whereas for same-sex couples domestic partnerships have a remedial effect of minimizing the economic disadvantages of not being allowed to marry, for heterosexual couples they also have the result of undermining the unique status of marriage by rewarding those who choose not to marry. Society also has its choices to make, and each option sends a powerful message of where our priorities are.

First, we can continue to allow heterosexual couples access to domestic partnership benefits. This choice would signal that marriage is not very special because the extra social nurturing associated with the status will have been redistributed to all relational forms. Accusations from social conservatives that homosexuals are out to destroy the traditional marriage is more true about this type of domestic partnership structure than about the struggle for same-sex marriage.

Second, we can opt to exclude heterosexual couples from domestic partnership programs. This exclusion should be routine and formal, but could still be sufficiently flexible to accommodate the rare and unusual circumstance. The formal exclusion, however, would communicate the social expectation that heterosexuals who wish the benefits of marriage must access them through marriage. This choice preserves the uniqueness of the married status.

Finally, we can choose to eliminate domestic partnerships altogether. This option should be exercised in either of two cases. If heterosexuals cannot be rationally or legally excluded from such programs, then in order to avoid the pitfalls associated with their inclusion homosexuals should forego their own benefits for the larger good. Or, if same-sex marriage is finally achieved, again we should eliminate all domestic partnerships. This is the most unlikely of the

Colorado based televangelist, proudly advocates the death penalty for homosexuality. And yet these anti-gay haranguers disingenuously disclaim any responsibility for these atrocities, since transcripts of their speeches do not reveal an explicit order to kill.

Clearly, we are always at more risk from the likes of McIlhenny and the recipients of his message of hate than he ever has been from us.

options, since it requires an air of martyrdom in the first instance, or the surrender of achieved material gains in the second. Broad based altruism is not a quality one should bank on.

Ultimately, however, which option one selects is not a rational inquiry, but as argued earlier, a valuational one. How highly does one value marriage as a unique status? How does this principle rank against the immediate benefits of domestic partnerships for ourselves? Are we willing to pursue these immediate benefits at the risk of sacrificing less visible but more fundamental values? What kind of people do we want to be, and in what kind of society do we wish to live?

These questions can only be addressed by each individual. But when resolved, the answers will dictate fairly mechanically the ethically responsible domestic partnership policy. For myself, the choice is clear: Preserve marriage, offer domestic partnerships to same-sex couples as remedial and temporary benefits until same-sex marriage becomes available, and deny these benefits to unmarried heterosexuals.