Balancing the Demands of the Workplace with the Needs of the Modern Family: Expanding Family and Medical Leave to Protect Domestic Partners

Kimberly Menashe Glassman
Catholic University of America, Columbus School of Law

Follow this and additional works at: https://repository.law.umich.edu/mjlr

Part of the Family Law Commons, Health Law and Policy Commons, Labor and Employment Law Commons, and the Legislation Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjlr/vol37/iss3/6

This Note is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
This Note addresses the importance of expanding the federal Family and Medical Leave Act and state family and medical leave laws to protect domestic partners. Congress passed the Family and Medical Leave Act to allow workers to balance their work lives and family lives by granting workers the right to take leave time to care for an immediate family member in times of medical necessity. The term “family member,” however, is generally limited to relation by blood, adoption, or marriage, and does not include an individual’s domestic partner. The concept of family has evolved in our legal system and is no longer limited by traditional notions of the family. Same and opposite sex unmarried partners have all of the appearances of marriage and should be granted the right and ability to care for one another when one partner is facing a medical emergency.

In recent years, many jurisdictions have begun to provide some of the legal benefits of marriage to domestic partners who live together, are financially interdependent, and generally act as married couples would act. Few states, however, have provided domestic partners with protection under state family and medical leave laws. This Note argues that family and medical leave benefits should be among the rights extended to unmarried partners and proposes a model to achieve this goal. This Note recounts personal stories from domestic partners who were unable to use family leave time to care for their partners, reviews the benefits provided in existing family and medical leave laws that include domestic partners, and recommends elements that a model family and medical leave act should include. The federal government, a state, or a local government might follow this guidance to craft a family and medical leave statute that permits employees to use leave time to care for their domestic partners.

Congress passed the Family and Medical Leave Act (FMLA) in 1993 to allow employees “to balance the demands of the workplace with the needs of families.” The FMLA provides an important benefit to workers: the right and ability to care for one’s immediate family members in times of medical necessity without fear of losing one’s job. While the FMLA permits employees to take up to twelve

* B.A. 2000, State University of New York College at Geneseo; J.D. and Certificate in Public Policy 2003, Catholic University of America, Columbus School of Law. The author would like to thank her husband, Jamie, and her family for all of their support, and Professor Lisa Lerman for her guidance.

weeks of unpaid leave to care for a family member with a serious health condition, the term "family member" does not include an individual's domestic partner.\textsuperscript{2} As a general definition, domestic partners are two adults who live together in a committed and interdependent relationship, and, in some jurisdictions, enter into legally recognized relationships by meeting statutory requirements.\textsuperscript{3} Domestic partners generally have all of the appearances of a marriage-relationship, except that they are not legally married. Because most family and medical leave laws do not include domestic partners, gay and lesbian couples who are precluded from getting married under state law and opposite sex couples who opt not to get married have no right to invoke the protection of these laws to care for their domestic partners in times of medical necessity.\textsuperscript{4}

\textsuperscript{2} See 29 U.S.C. § 2612(a)(C) (2002) (permitting leave to care for a "spouse, or a son, daughter or parent" with a serious health condition).

\textsuperscript{3} Some state laws use different terms to refer to domestic partners. For example, Hawaii provides benefits to same-sex couples who register as reciprocal beneficiaries and Vermont permits same-sex partners to enter into civil unions. Haw. Rev. Stat. § 572C-4 (Michie 1999) (defining reciprocal beneficiaries as unmarried adults legally prohibited from marrying one another); Vt. Stat. Ann. tit. 15, § 1204 (2002) (providing parties to a civil union with all of the benefits that married persons are entitled to under state law). Both Hawaii and Vermont require that the couples register as reciprocal beneficiaries or enter into valid civil unions before they can obtain the benefits of the respective state laws. For purposes of this Note, the term "domestic partner" includes reciprocal beneficiaries and parties to civil unions, regardless of gender or sexual orientation.

\textsuperscript{4} No state currently permits same-sex couples to marry. Human Rights Campaign (HRC), \textit{The State of the Family: Laws and Legislation Affecting Gay, Lesbian, Bisexual and Transgender Families} 3 (2002). However, in \textit{Goodridge v. Department of Public Health}, 798 N.E.2d 941 (Mass. 2003), the Massachusetts Supreme Judicial Court held that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution." \textit{Id.} at 969. The court then stayed the judgment for 180 days to allow the Massachusetts legislature to take appropriate action in light of the decision. \textit{Id.} at 970. In response to an inquiry from the Massachusetts Senate, the Massachusetts Supreme Judicial Court issued an opinion on February 3, 2004, stating that creating a separate civil union system for same-sex couples would not meet the mandates of the Massachusetts Constitution set forth in \textit{Goodridge}. Opinions of the justices to the Senate, SJC-09163 (Mass. Feb. 3, 2004). Members of the Massachusetts Senate had introduced a bill to enact create civil unions and include parties to a civil union in "any definition or use of the terms 'spouse,' 'family,' 'immediate family,' 'dependent,' 'next of kin,' 'husband,' 'wife,' and other terms that denote the spousal relationship." S. 2175, 183rd Gen. Court ch. 207A, § 4 (c) (Mass. 2003). The Supreme Judicial Court stated that "segregating same-sex unions . . . cannot possibly be held rationally to advance or 'preserve' what we stated in \textit{Goodridge} were the Commonwealth's legitimate interests in procreation, child rearing, and the conservation of resources. . . . The history of our nation has demonstrated that separate is seldom, if ever, equal." Opinions of the Justices to the Senate, SJC-09163 (Mass. Feb. 3, 2004). Based on this opinion, same-sex couples may be able to get married beginning May 17, 2004, 180 days after the \textit{Goodridge} decision. \textit{Id.} At the same time, members of the Massachusetts House of Representatives and Senate jointly introduced a measure to amend the Massachusetts Constitution to read that "only the union of one man and one woman shall be valid or recognized as a marriage in Massachusetts." H. 190, 183rd Gen. Court (Mass. 2003). Amending the Massachusetts Con-
Imagine this scenario: John and Mary have been married for twenty-five years. John works at a large corporation and Mary is a teacher. Mary was recently diagnosed with cancer and needs to undergo chemotherapy and radiation treatments. Because of the Family and Medical Leave Act, John can take time off from work to take care of Mary as she undergoes cancer treatment. John can be by her side at the hospital and not have to worry about his job security. Now replace Mary with Mark. Imagine that John and Mark have been living together for twenty-five years in a committed relationship. They share all living expenses, are the beneficiaries in one another’s wills and other legal documents, and all of their friends and family treat John and Mark as if they are married. Because the Family and Medical Leave Act and most state family and medical leave laws do not include domestic partners as family members, John cannot use family medical leave to care for Mark as he undergoes cancer treatment. Instead, John has to rely on the kindness of his employer to permit him to take the time to be by Mark’s side while he is at the hospital. John and Mark’s relationship is very much like John and Mary’s, yet in the latter scenario John is left without the protection of the law.

Though some consider “family” to be limited to relation by blood, adoption, or marriage, the modern American family is no longer bound by these limits. State governments, local governments, and courts have recognized that many couples function as families because they live together in relationships that have all of the appearances of marriage without being legally married. In recent years, many jurisdictions have begun to provide some of the legal benefits of marriage to same- and opposite-sex domestic partners who live together, are financially interdependent, and generally act as married couples would act. The federal constitution would require two successive votes in the Legislature that would then be subject to a statewide vote—meaning that the constitution cannot be amended until at least 2006. See Terence Neilan, Gays Have Full Marriage Rights, Massachusetts Court Says, N.Y. TIMES, Feb. 4, 2004 at http://www.nytimes.com/2004/02/04/national/04CND-Mass.html (on file with the University of Michigan Journal of Law Reform). Once same-sex couples are able to get married in Massachusetts, then they would be able to benefit from all state laws that relate to marriage, including the Massachusetts Family and Medical Leave Law. See MASS. GEN. LAWS ch. 149, § 52D (2003). However, even if same-sex marriages remain legal in Massachusetts, other states will not have to recognize same-sex marriages that are entered into in Massachusetts because of the federal Defense of Marriage Act (DOMA). DOMA provides that “no state, territory, or possession of the United States ... shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession or [Indian] tribe respecting a relationship between persons of the same sex that is treated as a marriage ...”. 28 U.S.C. § 1738C (2002).

5. See, e.g., D.C. CODE. ANN. § 32-701, et. seq. (2001) (creating the Washington, D.C. domestic partnership registry, which provides registered domestic partners with some
government, state, and local governments should continue this trend by expanding family and medical leave laws to include domestic partners.\textsuperscript{6}

The important policy considerations behind the FMLA—stability, economic security and preserving family integrity—apply equally to all couples who maintain marriage-like family relationships. In the 108th Congress, Representative Caroline Maloney proposed H.R. 1430, which would amend the FMLA to allow leave to care for "a domestic partner, parent-in-law, adult child, sibling, grandparent, or parent" with a serious health condition.\textsuperscript{7} This would provide essential benefits to a wider class of family members.\textsuperscript{8}

In addition, since Congress passed the FMLA in 1993, several states and the District of Columbia passed or amended their own family and medical leave laws to include domestic partners as immediate family members. Hawaii, Vermont, the District of Columbia, Oregon, and California permit employees to use their leave time to care for domestic partners with serious health conditions.\textsuperscript{9} Like the FMLA, these statutes apply to both public and

\begin{flushright}
\footnotesize
6. New Jersey, for example, recently enacted the Domestic Partnership Act, which extends limited benefits to same and opposite sex couples that register as domestic partners. 2003 N.J. Sess. Law Serv. 246 (West). Although this law provides many benefits to registered domestic partners—including statutory protection under anti-discrimination laws that prohibit discrimination based on domestic partnership status in employment, housing and credit discrimination; visitation rights for a hospitalized domestic partner; the right to make medical or legal decisions for an incapacitated partner; and an additional personal exemption under the New Jersey Income Tax laws—this new law does not amend the definition of "family member" in the New Jersey Family Leave Act. N.J. STAT. ANN. § 34:11B-3(j) (2003). The term "family member" in the Family Leave Act continues to mean "a child, parent, or spouse." Id. Domestic partners who register pursuant to this new law will not be able to use family leave time to care for one another if one partner has a serious health condition. N.J. STAT. ANN. § 34:11B-4(a) (2003). See also 2003 N.J. Sess. Law Serv. 246 (West).


8. H.R. 1430. This proposed amendment to FMLA does not define domestic partner or indicate whether the term is limited to same-sex partners or includes same and opposite-sex domestic partners. Part VII addresses the issue of how to define domestic partners. See infra notes 128-51 and accompanying text.

9. HAW. REV. STAT. ANN. § 398-5 (Michie 1999) (entitling an employee to up to four weeks of leave to care for a child, spouse, reciprocal beneficiary, or parent with a serious health condition); VT. STAT. ANN. tit. 15, § 1204 (2002) (providing that parties to a civil union are entitled to family leave benefits); VT. STAT. ANN. tit. 21, § 472 (2002) (providing
private employers. Most of these jurisdictions limit the definition of domestic partner to a same-sex partner.\(^\text{10}\) In addition, Delaware permits state employees to use their sick leave time to care for a domestic partner with a catastrophic illness.\(^\text{11}\) While a few states have taken action to protect domestic partners and a bill was introduced in the 108th Congress, in most states domestic partners are without legal protection of their jobs if they need leave to care for one another.

The purposes of this Note are (1) to analyze the reasons to include domestic partners in a family medical leave plan and (2) to propose a model for accomplishing this goal. Part I examines the purposes and history of the Family and Medical Leave Act and shows how those purposes apply to domestic partners. Part II explores how family is currently defined under the law and analyzes whether domestic partners can fit under a modern definition of family. Part III discusses why family and medical leave laws should be expanded by presenting personal stories of individuals who were unable to use family and medical leave. Part IV addresses the main arguments against expanding family and medical leave: that granting rights of marriage to unmarried persons will erode the institution of marriage, and that expanding family and medical leave will be too costly. Part V analyzes the constitutional issues that arise when a jurisdiction limits its domestic partner benefits to same-sex domestic partners, and concludes that doing so does not violate the Fourteenth Amendment. Part VI discusses the benefits provided by existing family and medical leave laws that include domestic partners. Finally, Part VII uses the statutes discussed in Section VI to recommend elements a model family and

up to twelve weeks of leave in a twelve month period to care for a family member with a serious illness); D.C. CODE ANN. § 32-502 (2001) (providing up to 16 workweeks of family leave during any 24 month period to care for a family member with a serious health condition); D.C. CODE ANN. § 32-501 (2001) (defining family member to include "a person with whom the employee shares or has shared, within the last year, a mutual residence and with whom the employee maintains a committed relationship"); OR. REV. STAT. § 659A.159 (2002) (allowing leave to care for a family member with a serious health condition); OR. ADMIN. R. 839-009-0210 (2002) (defining family member to include a same-sex domestic partner); 2002 Cal. Adv. Legis. Serv. 901 (Deering 2002) (establishing up to six weeks of paid leave to care for a family member with a serious health condition, including a domestic partner).


medical leave law should include. The federal government, a state, or local government might follow this guidance to craft a family and medical leave statute that permits employees to use the leave time to care for their domestic partners.

I. PURPOSES OF FAMILY AND MEDICAL LEAVE

A. Statutory Purposes and Legislative History of the Federal Family and Medical Leave Act

Congress passed the Family and Medical Leave Act in 1993 to “promote the stability and economic security of families, and to promote national interests in preserving family integrity.” When President Clinton signed the FMLA, he stated:

It is only when workers can count on a commitment from their employer that they can make their own full commitments to their jobs... When businesses do not give workers leave for family needs, they fail to establish a working environment that can promote heightened productivity, lessened job turnover, and reduced absenteeism.

The legislative history indicates that Congress passed the FMLA to prevent employees from having to choose between their jobs and their families. Congressman Ford stated that, “Workers should not be forced to stay on the job when they are needed at home to help a mother with a broken hip, a husband going for chemotherapy, or a child facing surgery.”

In addition, Congressman Gutierrez stated, “It seems like an idea that is self-evident—that in America your family comes first. That taking care of your loved ones comes first. That our Nation is strong enough and generous enough that we can allow our people to put their family before work every now and then.” These statements reveal the significance of the FMLA. For the first time, the United States passed a law that permitted employees to attend to important family needs without the fear that they would lose

their jobs. When President Clinton signed the Family and Medical Leave Act, he said:

As a rising number of American workers must deal with the dual pressures of family and job, the failure to accommodate these workers with adequate family and medical leave policies has forced too many Americans to choose between their job security and family emergencies. . . . It is neither fair nor necessary to ask working Americans to choose between their jobs and their families—between continuing their employment and tending to their own health or to vital needs at home.  

B. Extending Family and Medical Leave Benefits to Domestic Partners

Meets the Legislative Goals of Family and Medical Leave Laws

"[I]t is neither fair nor necessary" to force domestic partners to choose between job security and their families.  Providing broader coverage under the FMLA and state and local laws will prevent domestic partners from being forced to make this choice. It will allow domestic partners to rely on laws that recognize and protect their families rather than relying on the kindness of their individual employers.  Expanding family and medical leave laws at the

17. See id.
18. Some private employers provide their employees with domestic partner benefits that include family and medical leave time. See, e.g., HRC, IMATION: 2001 DOMESTIC PARTNER INFORMATION (providing that employees may take time off from work, as needed, to attend to a domestic partner with a serious health condition), available at http://www.hrc.org/Template.cfm?Section=The_Issues&CONTENTID=5338&TEMPLATE=/ContentManagement/ContentDisplay.cfm (on file with the University of Michigan Journal of Law Reform); HRC, Hewlett-Packard Co.—DOMESTIC PARTNER BENEFITS PROGRAM (providing "up to 12 weeks per year of unpaid, job-protected time off to care for a domestic partner with a serious health condition"), available at http://www.hrc.org/Template.cfm?Section=The_Issues&CONTENTID=5338&TEMPLATE=/ContentManagement/ContentDisplay.cfm (on file with the University of Michigan Journal of Law Reform); Benefits (AT&T provides leave of absence plans that include "Family Care Leave", permitting employees to use this leave to care for their domestic partners.), available at http://www.att.com/hr/life/benefits.html (on file with the University of Michigan Journal of Law Reform). These employers have chosen to provide some of the benefits traditionally reserved to married employees to employees in domestic partnership relationships. Other employers that provide similar leave benefits include Nike, Kodak, Bausch & Lomb, and British Petroleum. See also infra notes 61–66 and accompanying text (text of interviews with employees who were not covered by their state or the FMLA, but were able to take time to care for their partners because their employers' policies). For a more complete list of private corporations that provide domestic partner benefits, see the
federal, state, and local levels will effectuate the purposes of these laws. Doing so will promote the stability and economic security of the modern American family.

In the 2000 census, 5,475,768 individuals reported living in unmarried-partner households. Of those, 594,391 individuals (10.85 percent) reported living with a same-sex partner. The 2000 census revealed that gay and lesbian families live in 99.3 percent of all counties in the United States. Policy makers cannot continue to ignore the existence of unmarried-partner families and should recognize the need to provide them with protections under the law. Since same-sex partners cannot legally get married in any state, the only way to guarantee them the right to use family and medical leave to care for their partners is to amend these laws to include domestic partners. Since most states exclude opposite-sex domestic partners coverage from family and medical leave laws, those couples will remain unprotected as long as the laws are not changed. Domestic partners face similar pressures and have similar needs to married couples: to care for their partners in times of medical necessity and be secure in their jobs during these times of need. Federal, state and local laws should recognize these functional families in their family and medical leave laws.

II. The Changing Face of the Modern American Family

A. Legal Recognition of the Functional Family

Since the 1970s, courts have begun to recognize the concept of the "functional family." These courts acknowledge that partners with emotional and economic interdependence, though unmarried, can be in familial relationships. Elements of a functional


20. Id.


family generally include protecting the physical health and safety of one another; providing for "shelter, food, clothing, health care, and economic sustenance"; being economically interdependent; offering means for emotional support and growth; helping to shape goals and a value structure; and creating a place to recuperate "from external stresses."

These elements look at how the partners function rather than relying on the existence of a legal marriage to determine whether a family exists.

In the 1976 Marvin v. Marvin opinion, the California Supreme Court recognized "the prevalence of nonmarital relationships in modern society and the social acceptance of them," and held that the courts can enforce contracts made between unmarried cohabiting couples to provide benefits to one another. Although Marvin only dealt with whether courts could enforce agreements between cohabiting couples, in 1987, the Supreme Court of Wisconsin enforced an implied contract between non-marital partners who had lived together for twelve years and who had two children in Watts v. Watts. The court found that the parties intended to share the property acquired during their relationship as a husband and wife would. The court held that an unmarried cohabitant may assert contract and property claims against the other upon dissolution of the relationship. Marvin and Watts focused on opposite-sex couples. These cases recognize that individuals who live together outside of marriage can live in family relationships and that those relations can be the basis for legal obligations.

Recognizing the functional family is good public policy. Society benefits when individuals have both emotional and economic support, which often come from the family. Commentator Andrew

23. Mary Patricia Treuthart, Adopting a More Realistic Definition of "Family", 26 GONZ. L. REV. 91, 97 (1990/1991). See also HRC, KODAK DOMESTIC PARTNER BENEFITS available at http://www.hrc.org/Template.cfm?Section=The_Issues&Template=/ContentManagement/ContentDisplay.cfm&ContentID=11093 (on file with the University of Michigan Journal of Law Reform) (providing benefits to employees in a "spouse-like" relationship, defined as individuals who are "emotionally committed to one another and are jointly responsible for the common welfare and financial obligations of the household").

24. Marvin, 557 P.2d at 122. Before Marvin, agreements between cohabiting couples were found void because courts viewed them as contracts for the performance of sexual services. Id.

25. 405 N.W.2d 303, 305 (Wis. 1987).

26. Id. at 310, 313 (inferring that holding joint bank accounts, making joint purchases, filing joint tax returns, and being listed as husband and wife on other legal documents indicated that the parties intended to share equally). The court also found that the woman could assert a claim for unjust enrichment. Id. at 314 (stating "that unmarried cohabitants may raise claims based upon unjust enrichment following the termination of their relationships where one of the parties attempts to retain an unreasonable amount of the property acquired through the efforts of both").
Sullivan explains: "Marriage provides an anchor ... It provides a mechanism for emotional stability, economic security, and healthy rearing of the next generation."\(^{27}\) Studies show that married couples "live longer, are healthier, earn more, have lower rates of substance abuse and mental illness, are less likely to commit suicide, and report higher levels of happiness," and that marriage "confer[s] economies of scale and of joint consumption, mini-


29. See Braschi v. Stahl Assocs. Co., 543 N.E.2d 49, 53–54 (N.Y. 1989) (rent control); infra notes 38–44 and accompanying text (second-parent adoption); 2003 N.J. Sess. Law Serv. 246 (West); D.C. Code Ann. § 32-704 (2001) (hospital visitation); infra Appendix (family and medical leave); Vt. Stat. Ann. tit. 15, § 1204(e)(1),(3),(14) (2002) (property law, probate law, taxes); In re Bicknell, 771 N.E.2d 846 (Ohio 2002) (surname). In Bicknell, two women sought to change their surnames to a name that was a combination of letters from both of their last names so that they and their unborn child by artificial insemination would have the same last name in their family relationship. Id. at 847. Since the women did not seek to create the appearance of an Ohio sanctioned marriage, or intend a fraudulent purpose or to evade creditors, the court held that the women had complied with the statutory requirements and granted the name change. Id. at 849.
One example is the case of *Braschi v. Stahl Associates Co.* In *Braschi*, the New York Court of Appeals held that the appellant could seek protection from eviction under the New York City Rent and Eviction Regulation. Under the New York City rent control regulation, after the legal tenant died, only a surviving spouse or other family member of the deceased tenant was entitled to continue living in the apartment at the same price. If the tenant lived with someone other than a spouse or immediate family member, the landlord could evict that individual and then raise the rent if the individual wanted to remain in the apartment. The court found that Braschi and his same-sex partner “lived together as life partners for more than ten years,” and that the property owner could not evict Braschi’s partner. The court stated:

The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society’s traditional concept of “family” and with the expectations of individuals who live in such nuclear units.

The New York Court of Appeals recognized that the policy behind the rent control law, protecting the surviving spouse from eviction, could apply to same-sex couples that acted as married couples would act. In response, New York City amended its rent control ordinance, providing a list of eight factors used to establish whether a family exists, including:

1. the longevity of the relationship;
2. sharing of household and family expenses;
3. intermingling of finances . . . ;
4. engaging in family-type activities such as jointly attending family functions and social and recreational activities;
5. formalizing of legal obligations and responsibilities to

---

31. *Id.* at 53–54.
32. *Id.* at 52.
33. *Id.* at 53.
34. *Id.* at 55.
35. *Id.* at 53–54.
36. *Id.* at 54.
each other by executing wills naming each other as executor and beneficiary, conferring upon each other the authority to make health care decisions, and making a domestic partner declaration; (6) holding themselves out as family members to other family members and society in general; (7) regularly performing family functions such as caring for each other or each other's extended family members; and (8) engaging in any other action which evidences the intention of creating a long-term emotionally-committed relationship.37

Some states have also recognized same-sex couples as families through second-parent adoption. Second-parent adoption permits a second parent, such as a same-sex partner, to adopt the child without the first parent losing any parental rights.38 As a result, that child has two legal parents: the biological or adoptive parent and his or her partner.39 The state also typically grants adoptive parents the same rights as biological parents in custody and visitation matters upon dissolution of the relationship.40 California, Connecticut, Illinois, Massachusetts, New York, New Jersey, Pennsylvania, Vermont, and Washington, D.C., permit second-parent adoption.41 When the partner of a biological or adoptive parent becomes a legal second parent to the child, a legal family unit exists between

38. See infra note 41 and accompanying text.
39. See infra note 41.
40. In addition, some states grant visitation rights to "de facto" parents even without second-parent adoption. De facto parent status allows a non-legal parent to seek visitation by showing that the legal parent consented to the non-legal parent's relationship with the child; the non-legal parent lived with the child; the non-legal parent assumed parental responsibilities and obligations; or the non-legal parent has filled a parental role for a substantial part of the child's life. See *Lapsina-Williams v. Laspina-Williams*, 742 A.2d 840 (Conn. Super. Ct. 1999) (finding that the former same-sex partner of the biological mother had standing to petition for visitation of the biological mother's children after the couple broke up). Under Connecticut law, a person can seek visitation "when the minor child's family life has been disrupted in a [particular] manner." *Id.* at 843. The court found that the separation of a nontraditional family constituted a disruption of the family sufficient to permit the ex-partner to seek visitation. *Id.* at 843-44.
Expanding the Family and Medical Leave Act

the same-sex parents and the child.\textsuperscript{42} For example, in \textit{In re Jacob}, the New York Court of Appeals held that the lesbian partner of a child's mother could adopt the child without cutting off the mother's parental rights.\textsuperscript{43} The court found that permitting the second-parent adoption was in the best interests of the child. The court stated that allowing the adoption provided:

the emotional security of knowing that in the event of the biological parent's death or disability, the other parent will have presumptive custody, and the children's relationship with their parents, siblings and other relatives will continue should the coparents separate. Indeed, viewed from the children's perspective, permitting the adoptions allows the children to achieve a measure of permanency . . . . \textsuperscript{44}

The court recognized that it was in the best interests of the child to have two legal parents and live in a family unit, recognizing the same-sex couple as a family.

In addition to second-parent adoptions, many state and local governments have enacted domestic partnership registries. These registries extend to domestic partners some of the legal benefits that are typically reserved to spouses. Vermont went a step further in 2000 when it became the first state to recognize civil unions. When couples enter into civil unions, they obtain the same protections, benefits, and responsibilities that married couples receive under Vermont law. This Part discusses three of domestic partnership systems: those used in Hawaii, Vermont, and Washington, D.C.\textsuperscript{45}

Hawaii enacted the reciprocal beneficiaries system in 1997. This system extends some of the benefits of marriage to same-sex couples who register as reciprocal beneficiaries. In doing so, the Hawaii legislature recognized that "there are many individuals who have significant personal, emotional, and economic relationships with another individual yet are prohibited . . . from marrying."\textsuperscript{46}

This system grants reciprocal beneficiaries property rights, the right to visit a partner in a hospital and make health care decisions

\begin{itemize}
\item \textsuperscript{42} Second Parent Adoption, \textit{supra} note 41.
\item \textsuperscript{43} 660 N.E.2d at 398.
\item \textsuperscript{44} \textit{Id.} at 399.
\item \textsuperscript{45} In addition to the three systems discussed, former California Governor Gray Davis signed A.B. No. 205 into law. This law, which takes effect in 2007, provides that same-sex domestic partners "shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law" as married persons. A.B. 205, 2003 Leg., ch. 421 § 4 (Cal. 2003).
\item \textsuperscript{46} \textit{HAW. REV. STAT. ANN.} § 572C-2 (Michie 1999).
\end{itemize}
for her or him, the ability to inherit property without a will, protection under Hawai‘i’s domestic violence laws, and the ability to use family leave time to care for a reciprocal beneficiary with a serious health condition.\textsuperscript{47} With the exception of protection under the domestic violence laws, all these benefits had previously been reserved to married couples.

In Vermont, parties to a civil union are entitled to “\textit{all the same benefits, protections, and responsibilities under law . . . as are granted to spouses in a marriage.}”\textsuperscript{48} The Vermont statute provides a nonexclusive list of legal benefits that apply to parties to a civil union, including:

- Laws relating to title, intestate succession, survivorship, and waiver of will; causes of action related to or dependent upon spousal status; probate law and procedure; adoption law and procedure; group insurance for state employees; spouse abuse programs; prohibitions against discrimination based on marital status; victim’s compensation rights; workers’ compensation benefits; laws relating to emergency and nonemergency medical care, hospital visitation and notification; terminal care documents and durable power of attorney for health care execution and revocation; family leave benefits; public assistance benefits; laws relating to state or municipal taxes; laws relating to immunity from compelled testimony; homestead rights of a surviving spouse; laws relating to loans to veterans; the definition of family farmer; laws relating to anatomical gifts; state pay for military service; application for early voter absentee ballot; family landowner rights to fish and hunt; legal requirements for assignment of wages; and affirmance of relationship.\textsuperscript{49}

The rights afforded in the civil union statute acknowledge the marriage-like and familial relationship that exists among same-sex partners. Civil unions are an alternate system to marriage; they provide a means for same-sex partners to obtain the legal benefits of marriage. Vermont is the only state to recognize civil unions and

\textsuperscript{47} Id.

\textsuperscript{48} VT. STAT. ANN. tit. 15, § 1204(a) (2002) (emphasis added). The Vermont Civil Union statute provides benefits that come closest to marriage. See VT. STAT. ANN. tit. 15, § 1204(b)–(e) (2002). However, since civil unions are not recognized outside of the state of Vermont, the benefits are limited to couples who live in that state. This is unlike marriage, where a valid marriage is generally recognized in every state regardless of where the parties entered into the marriage.

\textsuperscript{49} VT. STAT. ANN. tit. 15, § 1204(e)(1)–(24) (2002).
thus far, no other state has recognized the validity of a Vermont civil union except in the context of dissolving the union.\textsuperscript{50}

The Washington, D.C., registry system is unique. It does not limit the definition of domestic partners to individuals who cannot get married, but includes both same and opposite sex partners. Washington, D.C., defines a domestic partner as "a person with whom an individual maintains a committed relationship." The statute defines "committed relationship" as "a familial relationship between [two] individuals characterized by mutual caring and the sharing of a mutual residence."\textsuperscript{51} The Washington, D.C., registry provides domestic partners with the power to make health care decisions for one another and the ability to visit one another in the hospital, and permits domestic partners to use family and medical leave to care for one another.\textsuperscript{52}

This evolving acceptance of same-sex couples is redefining American family law.\textsuperscript{55} These changes in state law afford same-sex couples with the legal protections that are ordinarily associated with marriage, and acknowledge that they are valid family relationships. This trend should grow to include family and medical leave laws.

\textsuperscript{50} Three couples have attempted to dissolve civil unions that they formed in Vermont in other states. Two courts granted the request and the other did not. A Texas court granted a same-sex couple that entered into a civil union in Vermont a "divorce" in Texas. Molly McDonough, \textit{Court Oks Divorce without Recognizing 'Marriage': Gay Couple's Civil Union, Created in Vermont, is Dissolved in Texas}, A.B.A. J. \textsc{Report}, Mar. 21, 2003, at \url{http://gaylaw.net/news.htm} (on file with the University of Michigan Journal of Law Reform); Sarah Schweitzer, \textit{Civil Unions in Vermont Easier to Enter Than Exit}, \textsc{The Boston Globe} (Nov. 15, 2002) at A1. An Iowa judge granted a divorce to a lesbian couple in 2003, stating that at the time he signed the order, he did not realize that the petition was from a same-sex couple. Nonetheless, the judge let the decision stand once he realized that he granted a divorce to a same-sex couple. \textit{Iowa Judge Grants Divorce to Lesbian Couple, then Lets Oversight Stand}, CNN.com, Dec. 12, 2003, at \url{http://www.cnn.com/2003/US/Midwest/12/12/lesbian.divorce.ap/} (on file with the University of Michigan Journal of Law Reform). A Connecticut court, however, refused to dissolve a civil union entered into in Vermont, citing a lack of jurisdiction to dissolve a civil union. \textit{Rosengarten v. Downes}, 802 A.2d 170, 174 (Conn. App. 2002).


\textsuperscript{52} \textit{Id.}

\textsuperscript{53} Joan Biskupic, \textit{Same-sex Couples Redefining Family Law in USA}, \textsc{USA Today}, Feb. 17, 2003, at A01.
III. WHY FAMILY AND MEDICAL LEAVE LAWS SHOULD BE EXPANDED TO INCLUDE DOMESTIC PARTNERS

Since the enactment of the FMLA, more than 35,000,000 Americans have taken leave for family or medical reasons.\(^{54}\) In 1996, The Commission on Family and Medical Leave, a Commission established by Congress to examine the impact of the FMLA, reported that the FMLA has become “an important tool in the effort to balance the demands of family and work.”\(^{55}\) The Commission studied both employers’ and employees’ experiences with the FMLA; it found that the FMLA benefited both employers and employees.\(^{56}\) For example, employers reported experiencing less turnover costs because employees were able to use the FMLA to attend to family needs rather than leave their jobs.\(^{57}\) In addition, the Commission reported that the demand for the kinds of leave provided among workers was substantial.\(^{58}\) The Commission provided a series of personal narratives from workers who benefited from the FMLA, including one from a married man who used the FMLA to care for his wife when she became ill. This story, from Mr. and Mrs. Fish, demonstrates the importance of the FMLA:

Walter Fish began taking vacation days from work when his wife, Debbie, was hospitalized for diabetes complications. While she was in the hospital, an infection in her right eye aggravated a glaucoma condition, and she lost her vision ... On February 29, 1995, Walter Fish took FMLA leave ... and rushed his wife to the W.K. Kellogg Eye Center, in Ann Arbor, MI. The Eye Center admitted her for four days, where doctors performed laser surgery on both eyes and glaucoma surgery on the right eye. Mr. Fish was able to remain with her until she was released ... When his wife returned home, she was unable to care for herself or their son. Mr. Fish cooked, cleaned house and cared for his wife and their child during her convalescence. On April 3, 1995, a little over a month later, he was able to return to work ... Mr. Fish said at the

\(^{54}\) S. 304, 108th Cong. § 2 Findings (Family and Medical Leave Expansion Act) (Feb. 3, 2003).

\(^{55}\) Id. at Chairman Dodd's Letter.


\(^{57}\) Id. at 127.

\(^{58}\) Id. at 149.
time: "I feel very strongly about the Family [and Medical] Leave Act because at my workplace they do have an attendance policy. I would have lost my job . . . I feel I helped strengthen my wife’s hopes and determination to keep fighting."^59

Very few people would question whether Mr. Fish should be able to take time off of work to care for his wife; they are married and have vowed to support and take care of one another. Yet, if you replace Walter with Wanda, the same couple would not be able to use the FMLA. The following stories involve same-sex couples who are not protected by the FMLA or their state family and medical leave laws. These narratives reveal the need to include same-sex domestic partners in federal, state, and local family and medical leave laws.^60

David has been working for the same employer for twenty-five years; David and his male partner have been together for twenty-three years.^61 For much of this time, neither David’s employer nor his co-workers knew his sexual orientation. David and his partner live together in a marriage-like relationship. They share a home and expenses, and David is covered by his partner’s health insurance. David lives and works in a rural area about fifty miles north of Pittsburgh. One day, while at work, David received the phone call informing him his partner had suffered a heart attack and been medically air-lifted into a Pittsburgh hospital. David notified his boss that he had to leave for personal reasons. The next day he returned to work, told his boss about the situation, and requested leave time to care for his partner. David originally asked to use FMLA time, but his boss said this was not possible because of government regulations. Although his boss was understanding, David felt discriminated against. David had to use his personal and vacation days to care for his partner following his heart attack and surgery. David said that, "in a similar situation of a heterosexual employee, the offer to use personal days and vacation is never offered. Management immediately processes the time off as FMLA."^62 Had his partner been his spouse, the FMLA would have given him the right to take the time off to care for his partner.

Jimmy and Brent were dating for seven years and had been living together for five. Brent had AIDS and was frequently

^59. Id. at 155.
^60. Last names and places of employment have been kept confidential to protect their privacy.
^62. Id.
hospitalized. Brent was covered on Jimmy’s medical insurance as his domestic partner, and Jimmy’s supervisor was aware of Brent’s illness. Jimmy used personal and vacation time to care for Brent. Jimmy’s boss allowed him to make up any additional time he took off of work after hours or on weekends. Jimmy was lucky. His supervisor permitted him to take whatever time he needed to care for his partner. However, Jimmy noted that if he had another supervisor, he may not have been able to take time off of work to care for his partner. Jimmy said that he was constantly worrying. At work, he worried how Brent was doing at home. At home he worried about missing work. Had applying the FMLA been an option, Jimmy would not have faced these stresses.

Patrick and Paul have been together since March 7, 1999 and live together in Texas. They were married in a religious ceremony on July 8, 2000. Neither Patrick nor Paul has ever been in a situation in which he needed to take leave time to care for his partner. However, they are both active Stonewall Democrats and concerned with the current state of the law. Patrick reports that his employer provides domestic partner benefits. Patrick believes that under his employer’s policy, it is up to the individual supervisor to decide whether an employee could take leave to care for a domestic partner. He believes that it would not be a problem if he sought to take leave to care for Paul. Paul, however, works for a Methodist Hospital that does not provide any domestic partner benefits. Paul reports that in his job, he lacks the security of knowing he could take time to care for Patrick.

Patrick and Paul are planning to adopt a child. Under Texas law, there is no second-parent adoption: only one of them can be the legal parent of any child they adopt. Patrick and Paul are concerned that if only one of them were the legal parent and the child were sick, only one of them could take leave to care for that child. The state family and medical leave acts that include domestic partners permit either partner to take leave to care for the partner’s child. Paul said, “Patrick is my husband and I will fight until I’m blue in the face. He is my husband.” Patrick said, “All we know is that we love each other.”

A hospital employee posed the following question to a professor of nursing:

63. Telephone Interview with Jimmy O. (Feb. 15, 2003).
64. Telephone Interview with Patrick and Paul (Feb. 16, 2003).
65. The Stonewall Democrats are an organization of gay, lesbian, bisexual, and transgender Democrats.
66. Telephone Interview with Patrick and Paul, supra note 64.
I've worked for the same hospital for 14 years. A few weeks ago, my domestic partner was critically injured in an auto accident and I've been at her side ever since. Now my employer is telling me I must return to work or lose my job. My partner and I have been together for 20 years, and I won't leave her until her condition stabilizes. Can my employer legally terminate me while I'm caring for a loved one?\footnote{Penny Simpson Brooke, \emph{No Time for Domestic Partner}, Nursing, Apr. 1, 2002, at 68, available at 2002 WL 11240748.}

Unfortunately, the answer to this question is yes. The FMLA does not consider an employee's partner of 20 years to be a family member. The employer has a legal right to terminate this employee for absenteeism when all she wants to do is be by her partner's side. This goes against the policy of the FMLA; it requires workers to choose between their jobs and their domestic partners. David and his partner, Jimmy and Brent, and Patrick and Paul do not have the legal protection of their jobs that Mr. Fish has under the FMLA. As long as federal, state, and local laws do not include domestic partners, domestic partners have to rely on the policies of their employers and the kindness of their supervisors. Federal, state, and local law should protect all families. The law should not force people to choose between their jobs and their families.

IV. BARRIERS TO EXPANDING FAMILY AND MEDICAL LEAVE LAWS

A. The Legal Definition of Family: The Traditional Family Values Argument

Those opposed to providing any type of domestic partner benefits often argue that these benefits damage the institution of marriage. Both the federal government, through the Defense of Marriage Act, and various court decisions recognize the traditional family values argument. Congress passed the Defense of Marriage Act (DOMA) in 1996 as a reaction to \emph{Baehr v. Lewin}, a case that could have legalized same-sex marriages in Hawaii.\footnote{852 P.2d 44 (Haw. 1993). In \emph{Baehr}, the Supreme Court of Hawaii declared that the ban on same-sex marriage violated the equal rights clause of the Hawaii Constitution. \emph{Id.} The court held that unless the state could show that limiting marriage to members of the opposite sex was justified by compelling state interests and was narrowly drawn "to avoid unnecessary abridgments of the applicant couples' constitutional rights," the marriage statutes violated the Hawaii Constitution. \emph{Id.} at 67. The Hawaii Supreme Court vacated and}
feared that if one state recognized same-sex marriages, then other states would be forced to recognize those marriages. DOMA provides that the meaning of marriage for purposes of any Act of Congress or administrative rule, regulation, or interpretation is "a legal union between one man and one woman as husband and wife." DOMA further states that "spouse" "refers only to a person of the opposite sex who is a husband or a wife." Those against granting marriage-like rights to same-sex couples point to DOMA. They argue that DOMA intends to protect the institution of marriage by preventing non-married same-sex couples from obtaining the benefits of marriage.

remanded the case. Id. at 68. On remand, the circuit court declared that the state failed to show a compelling state interest and held that the state had to open its marriage process to same-sex couples. Baehr v. Miike, No. 91-1394, 1996 WL 694235, (Haw. Cir. Ct. Dec. 3, 1996). In response to this decision, Congress passed DOMA. Since the Baehr decisions, Hawaii has amended its constitution to limit marriage to members of the opposite sex. At the same time, however, Hawaii passed the reciprocal beneficiary system to provide some benefits of marriage to same-sex couples. Haw. Rev. Stat. Ann. § 572-C (Michie 1999).

This is in recognition of the maxim that marriages that are valid where celebrated are valid everywhere, unless the law has declared invalid upon the ground of public policy. See, e.g., Xiong ex rel. Edmondson v. Xiong, 648 N.W.2d 900, 903 (Wis. Ct. App. 2002); Vandever v. Indus. Comm'n of Arizona, 714 P.2d 866, 869 (Ariz. Ct. App. 1985); United States v. Snyder, 177 F.2d 44, 46 (D.C. Cir. 1949). DOMA makes it national policy that same-sex marriages can be void against public policy.

DOMA § 7 (2002). The definition in DOMA is similar to the definitions of "marriage" and "family" in Black's Law Dictionary. Black's Law Dictionary defines "marriage" as "the legal union of a man and woman as husband and wife." BLACK'S LAW DICTIONARY 986 (7th ed. 1999). Black's Law Dictionary defines "family" as "[a] group consisting of parents and their children." Id. at 620.

70. 1 U.S.C. § 7 (2002). Same-sex marriages are recognized in the Netherlands and Belgium; however, the Defense of Marriage Act does not address marriages entered into outside of the United States. Belgium Votes to Recognize Gay Marriages, Chi. Trib., Jan. 31, 2003 at 6 (stating that Belgium became the second country to recognize same-sex marriages after the Netherlands approved same-sex marriages in 2001); 28 U.S.C. § 1738C (2002). See also supra note 4. Marriages entered into outside of the United States are often given comity and are voluntarily recognized by the jurisdictions in the United States. See TADDINGTON & O'BRIEN, DOMESTIC RELATIONS, 339–43 (5th ed.). However, in May 2003, in response to a move to legalize same-sex marriage in Canada, members of the House of Representatives proposed an Amendment to the United States Constitution to define marriage exclusively as "the union of a man and a woman." H.R.J. Res. 56, 108th Cong. (2003). In November 2003, Senate proposed the same amendment. S.J. Res. 26, 108th Cong. (2003). This proposed Constitutional amendment would preclude any state from recognizing any same-sex marriage performed in any country and would strip away any of the benefits of marriage that state and local governments have granted to same-sex couples. See Id.; see also Bill Schneider, Canada Acts on Same-Sex Marriages, at CNN.COM, June 20, 2003, at http://www.cnn.com/2003/ALLPOLITICS/06/20/ip.pol.opinion.canada.marriages/index.html (on file with the University of Michigan Journal of Law Reform).

Organizations against domestic partner legislation point to DOMA, and to the values it represents, to argue against these benefits. The Traditional Values Coalition, a conservative political organization that supports Pro-Christian, “Pro-Family” issues while strongly opposing issues which go against “moral” beliefs stated that the passage of domestic partnership legislation is bad for children, bad for our culture, and that we should not “promote cohabitation as a positive social good.” They continued that unmarried cohabitation has “weakened marriage and the intact, two-parent family and thereby damaged our social well-being, especially that of women and children,” and that “our society must not approve of domestic partnerships.”

Douglas Kmiec, former Dean of the Catholic University, Columbus School of Law, stated:

Homosexual liaison—like its all too prevalent cultural cohabitation—is not race or gender. It is instead a highly pertinent moral consideration that cannot be ignored. A society that by law or practiced condones—nay, encourages—the pursuit of sexual gratification outside of heterosexual marriage is destined to fall of its own weight.

These ideas have gained support in some court decisions. For example, in Hewitt v. Hewitt, the Illinois Supreme Court refused to recognize that property rights could exist between unmarried opposite sex partners. The court found that it was inappropriate for the court “to grant a legal status to a private arrangement substituting for the institution of marriage.” The court reasoned providing marriage-like benefits to non-marital couples would undermine the integrity of marriage. The court argued that marriage is a unique institution and integral to society, and that giving marriage-like benefits to unmarried persons degrades the institution of marriage.

---

74. Id. at 4.
75. Id.
77. 394 N.E.2d 1204 (Ill. 1979).
78. Id. at 1209.
79. Id. at 1211.
Those who originally opposed the FMLA argued that it would impose too burdensome a cost on American businesses. It is likely that lawmakers opposed to expanding the FMLA would make similar arguments. When debating the FMLA, Congressman Istook stated:

This bill will kill jobs in America. We cannot fool Mother Nature, nor the laws of economics. This bill makes it more expensive to hire each worker, so businesses will respond by hiring fewer workers. No matter how noble the goal may be, this bill artificially raises the price of labor. That makes it more expensive to operate a business and inflates the price of everything. This bill requires companies to pay health insurance for 3 months for people who are not working ... So, to those who want to create jobs, this bill says 'adios'.

Senator Orrin Hatch echoed these views, stating that a mandatory national leave policy would reduce overall employee benefits and burden small and mid-sized businesses.

Though opponents to the original FMLA argued that it would be too costly for American businesses, the Commission on Leave did not report this effect. The Commission on Leave reported that employers found the FMLA easy to implement, that it actually reduced turnover costs by encouraging employees to remain employed, and that, overall, it did not increase the cost of running their businesses. The Commission pointed out that, of all of the reasons that workers took time off work under the FMLA, caring for a spouse with a serious health condition accounted for only 3.7% of leave taken. If less than four percent of leave takers used the FMLA to care for spouses with serious health conditions, it is unlikely that adding domestic partners to the statute would greatly increase the cost.

---

83. _Id._ at 94.
84. This is especially true considering that only 5,475,768 individuals reported living in unmarried-partner households. _See U.S. Census Bureau, supra note 19; Smith & Gates, supra note 21_. Compared to the total United States population, it is unlikely that adding up to 5.5
In addition, most leave time taken to care for a seriously ill child, spouse, or parent lasts 14 days or fewer. In fact, if more workers are encouraged to take leave under the FMLA, they will feel less like they need to quit their jobs altogether or risk getting terminated for absenteeism. If Congress expands the FMLA to cover domestic partners, it will likely benefit workers and employers the same way that the original FMLA did: it will prevent turnover and allow workers to feel secure in their jobs.

V. LIMITING DOMESTIC PARTNER BENEFITS TO SAME-SEX COUPLES DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

Many jurisdictions limit domestic partner benefits to same-sex domestic partners. Some lawmakers contend that there should be a system that provides the legal benefits of marriage to same-sex couples because they cannot get married under state law, whereas opposite-sex domestic partners choose not to get married. The opposing view, however, is that limiting domestic partner benefits to same-sex couples violates the equal protection clause of the Fourteenth Amendment. This is an important issue in developing family and medical leave policy. Like Vermont and Hawaii, other jurisdictions may choose to provide an alternative system to marriage, one that provides the benefits and protections of marriage only to those who cannot get married under state law. Others, however, like Washington, D.C., may extend family leave benefits equally to same and opposite sex domestic partners. It is

85. COMM. ON FAM. MED. LEAVE, supra note 56 at 97.
86. This is the reasoning that Vermont followed in adopting civil unions and that Hawaii followed when creating the reciprocal beneficiary system. See HAW. REV. STAT. ANN. § 572G-1 (Michie 1999) (stating that the purpose of creating the reciprocal beneficiary system is to "extend certain rights and benefits which are presently available only to married couples to couples composed of two individuals who are legally prohibited from marrying under state law"); VT. STAT. ANN. tit. 15, § 1204(a) (providing that "[p]arties to a civil union shall have all the same benefits, protections and responsibilities . . . as are granted to spouses in a marriage").
87. HAW. REV. STAT. ANN. § 572G-4 (Michie 1999); VT. STAT. ANN. tit. 15 § 1204 (2002).
therefore useful to evaluate whether the constitution bars an extension of benefits that only includes same-sex domestic partners.

There are three possible arguments that limiting benefits to same-sex couples violates the Fourteenth Amendment: that doing so constitutes discrimination based on marital status or sexual orientation, that it violates fundamental rights, and that it constitutes discrimination based on gender. As discussed in more detail below, each of these arguments is unlikely to succeed. It would not violate the Fourteenth Amendment for the federal government, a state, or a local government to limit its extension of family and medical leave to same-sex domestic partners. This means that legislators have the discretion to determine what is best for their jurisdiction on this issue.

A. Discrimination Based on Marital Status or Sexual Orientation

To date, only one case has examined whether limiting domestic partner benefits to same-sex couples violates the equal protection clause of the Fourteenth Amendment as discrimination based on marital status or sexual orientation. In *Irizarry v. Board of Education of the City of Chicago*, the Seventh Circuit upheld a provision extending health care benefits to same-sex couples but not unmarried heterosexual couples. The court found that the School Board had rational reasons for limiting the extension of health care benefits to same-sex domestic partners. Though this case examined health
care benefits and not family medical leave, the analysis is the same. A common reason for extending family medical leave only to same-sex couples is that same-sex couples cannot marry and therefore have no other means of obtaining these benefits. \(^9\) If other courts find this to be a rational basis for limiting benefits to same-sex couples, the classification will likely be upheld. For similar reasons, an equal protection argument that claims discrimination based on sexual orientation is unlikely to succeed. \(^9\) Under rational basis review, a court will be highly deferential to the legislature. As such, it is unlikely that a heterosexual will succeed in a claim that the state illegally discriminated against him or her because of sexual orientation.

**B. Fundamental Rights Theory**

A statutory classification that substantially interferes with a fundamental right is subject to strict scrutiny. \(^9\) Conversely, if a law does not burden a fundamental right, it will be upheld so long as it "bears a rational relation to some legitimate end." \(^9\) The Supreme Court has found that "choices about marriage, family life, and the upbringing of children are among associational rights ... [that are] sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." \(^9\) The Supreme

---

\(^9\) See sources cited supra note 86.

\(^9\) The United States Supreme Court recently decided *Lawrence v. Texas*, 539 U.S. 558 (2003). In *Lawrence*, the petitioners argued that a Texas law, which criminalized sodomy between persons of the same-sex but not of the opposite sex violated equal protection as discrimination based on gender and sexual orientation. *Lawrence v. State of Texas*, 41 S.W.3d 349, 349-50 (Tex. 2001). The Supreme Court, however, rejected this argument. See *infra* notes 109-17 and accompanying text. In *Romer v. Evans*, the Supreme Court applied rational basis to strike down an amendment to the Colorado Constitution that discriminated based on sexual orientation. 517 U.S. 620, 632 (1996). Presumably, courts will continue to apply rational basis scrutiny to statutes that discriminate based on sexual orientation.


\(^9\) *Romer*, 517 U.S. at 631.

Court has not held that an opposite-sex couple has a fundamental right to cohabit without marrying. If a court finds that living together in an unmarried relationship is a fundamental right, then the denial of family and medical leave benefits must substantially interfere with exercising that right for the statute to be struck down. If a state does not provide family and medical leave benefits to opposite-sex cohabitants, it will not substantially interfere with the right to cohabit. Denying family medical leave benefits to opposite-sex couples does not prevent opposite-sex domestic partners from cohabiting; the only interference is that the state refuses to provide family medical leave. As such, the right to cohabit and enter into that family relationship is not substantially limited.

C. Discrimination Based on Gender

There is some question as to whether such a classification discriminates based on gender. The argument is that the government entity that denies benefits to unmarried opposite-sex couples does so because the person seeking the benefit is of the opposite-sex as his or her partner. Thus, the gender of the applicant causes the state to deny the benefits. If a court finds that limiting domestic partner benefits to same-sex couples is discrimination based on gender, then the policy will be subject to intermediate scrutiny. For a gender-based classification to withstand equal protection scrutiny, the defendant must establish that the challenged classification serves "'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives'. Based on the following analysis, limiting family and medical leave laws to same-sex domestic partners is not gender discrimination and will not trigger intermediate scrutiny.

Some commentators argue that limiting domestic partner benefits to same-sex couples amounts to discrimination based on association and should be prohibited under Title VII of the Civil

97. In Eisenstadt, the Supreme Court addressed whether a state could prevent opposite-sex unmarried couples from obtaining contraception, while providing opposite-sex married couples access to contraception. 405 U.S. at 443 (stating "[a] prohibition on contraception per se violates the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment").

98. See Zablocki, 434 U.S. at 387.


100. Id. (citation omitted).
Rights Act of 1964. Since Title VII is an exercise of Congress’s authority under Section 5 of the Fourteenth Amendment, this argument is important for analyzing this issue. Cases that analyzed this issue have generally arisen in the context of interracial marriage. These cases found that the employer did discriminate against the employee because of his or her race; had the employee been of the same race as his or her spouse, the discrimination would not have occurred. It is possible that, by analogy, the same argument can succeed for an opposite-sex domestic partner. If the government denies benefits to opposite-sex partners that it grants to same-sex domestic partners, the basis for discrimination is the association with a member of the opposite sex. To date, no court has interpreted an extension of benefits to be gender discrimination along these lines. Instead, courts that have addressed these issues have found that men and women are treated equally and that the distinction is based on either sexual orientation or marital status, which is not a violation of the Fourteenth Amendment.


102. See Gresham v. Waffle House, 586 F. Supp. 1442, 1445 (N.D. Ga. 1984) (finding that a white employee who alleged that her employer terminated her because she was married to a black man stated a cause of action for race discrimination under Title VII: “but for [their] being white, the plaintiffs in these cases would not have been discriminated against”); Erwin v. Mister Omelet of America, Inc., 1991 U.S. Dist. LEXIS 5119, *10 (M.D.N.C. 1991) (finding a black man who alleged employment discrimination based on his relationship with a white woman stated a cause of action under Title VII).

103. See Lynd, supra note 101, at 603. In the context of domestic partner benefits, the sex of the individual seeking the benefit caused the discriminatory treatment. If, for example, a man seeks to take family medical leave to care for his seriously ill female domestic partner and that benefit is denied, he may argue that if he were female then he would be entitled to take leave. Id. See also Debbie Zielinski, Domestic Partnership Benefits: Why Not Offer Them to Same-Sex Partners and Unmarried Opposite Sex Partners? 13 J.L. & HEALTH 281, 318 (1999) (stating that “an unmarried heterosexual couple . . . may attempt to argue an equal protection violation based on gender discrimination . . . [because] the only reason for the denial of benefits to the opposite-sex couple is the fact that one of the partners in the relationship is of a different gender than the other”).

104. There are no cases that analyze whether providing domestic partner benefits that are limited to same-sex partners violates equal protection as discrimination based on gender. However, two federal courts considered whether such extensions violated Title VII of the Civil Rights Act of 1964 as discrimination based on sex: Foray v. Bell Atlantic, 56 F. Supp. 2d. 327 (S.D.N.Y. 1999), and Cleaves v. City of Chicago, 68 F. Supp. 2d. 963 (N.D. Ill. 1999). Both cases found that the extensions did not violate Title VII as discrimination based on gender. In Foray, the plaintiff employee claimed that Bell Atlantic’s employee benefits policy, which provided employees in same-sex relationships with health care benefits equivalent to those enjoyed by married couples, violated Title VII as discrimination based on sex. Foray, 56 F. Supp. 2d. at 329. Foray, who had an opposite-sex domestic partner, alleged that he and his partner met all of the criteria for receiving benefits except for being of the same sex. Id. The complainant claimed that if he were a woman, his domestic partner would be an eligible dependent under the employers benefits plan. Id. The court rejected this argument and found that the policy did not discriminate based on gender. Id. at 330. In Cleaves v. City of
A family and medical leave law for same-sex domestic partners would be more likely to be found unconstitutional had the Supreme Court found that the Texas sodomy law at issue in *Lawrence v. Texas* unlawfully discriminated based on gender. The statute at issue in *Lawrence* made it a criminal offense to engage in sodomy with a person of the same sex, but did not criminalize sodomy between persons of the opposite sex. The appellants argued that the statute discriminated based on sexual orientation and gender, in violation of the Equal Protection clause of the Fourteenth Amendment. The Texas Supreme Court rejected both of these arguments. When it rejected the gender argument, the court found that the statute applied equally to men and women, and therefore did not “impose burdens or benefits upon a particular gender.”

The court stated that because the statute was gender-neutral on its face, it did not have an adverse impact on one gender, and that even if it did, that the impact could not be traced to a discriminatory purpose. In reversing the Texas Supreme Court, the United States Supreme Court did not find that the statute unlawfully discriminated based on sex. Instead, the Supreme Court held that the statute was unconstitutional under the Due Process clause of the Fourteenth Amendment. The Court stated, “the case involve[s] two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual life-

---


106. *Lawrence v. State*, 41 S.W.3d 349 (Tex. 2001). The appellants, John Lawrence and Tyron Garner, were convicted of engaging in homosexual conduct. They challenged the constitutionality of Section 21.06 of the Texas Penal Code, claiming it “offends the equal protection and privacy guarantees by both the state and federal constitutions.” *Id.* at 350. The Texas Court of Appeals upheld the statute. *Id.*

107. *Id.*

108. *Id.* at 354 (The court first found that Texas had a rational basis for criminalizing homosexual sodomy, namely, preserving public morals.).

109. *Id.* at 359.

110. *Id.*


112. *Id.*
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.\footnote{Id. at 2484.} The Supreme Court had the opportunity to find that laws that treat same-sex partners differently from opposite-sex partners made an unlawful classification based on sex, similar to the race association cases discussed above.\footnote{See supra notes 101–04 and accompanying text.} Because the Court did not so hold, it is presumable that a court will hold that a law based on sexual orientation is not an unlawful classification based on sex.

Justice O'Connor's concurrence in\textit{ Lawrence}, which was based on the Equal Protection Clause, also failed to find gender discrimination in the Texas statute.\footnote{Lawrence, 123 S. Ct. at 2485 (O'Connor J., concurring).} Justice O'Connor argued that the classification could not survive rational basis scrutiny because it irrationally discriminated based on sexual orientation; O'Connor did not approach this as discrimination based on sex.\footnote{Id.} This is in line with earlier cases where litigants argued that harassment based on sexual orientation did not have a claim under Title VII for sex discrimination. In February 2002, the Supreme Court denied certiorari to a Third Circuit case that held that an employee who alleged harassment based on his sexual orientation did not have a claim under Title VII for gender discrimination.\footnote{Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257 (3d. Cir. 2001), cert. denied 534 U.S. 1155 (2002).} In that case,\textit{ Bibby} v. \textit{Philadephia Coca Cola Bottling Co.}, the Third Circuit pointed out that Title VII does provide a cause of action for same-sex sexual harassment so long as that harassment is because of the sex of the employee and not because of his or her sexual orientation.\footnote{Id. (citing Oncale v. Sundowner Offshore Svs. Inc., 523 U.S. 75 (1998)).} Since the Supreme Court denied certiorari in\textit{ Bibby}, the Court presumably agreed that such harassment based solely on sexual orientation is not discrimination based on gender under Title VII. Based on\textit{ Bibby} and the approach taken in\textit{ Lawrence}, it is unlikely that limiting family and medical leave laws to same-sex domestic partners will be found unconstitutional discrimination based on sex.
VI. AN ANALYSIS OF THE BENEFITS THAT FAMILY AND MEDICAL LEAVE LAWS PROVIDE

A. The Federal Family and Medical Leave Act

The FMLA allows eligible employees who work for any employer with fifty or more employees to take up to twelve work-weeks of unpaid leave during any twelve month period; the leave may be used for the birth of a child, to care for a child, to adopt or take in a foster child, to care for his or her spouse, child, or parent who has a serious health condition, or because of the employee's own serious health condition.119 An eligible employee is an employee who has been employed "for at least 12 months by the employer with respect to whom leave is requested."120 The FMLA defines a "serious health condition" as "an illness, injury, impairment, or physical or mental condition that involves," either "inpatient care in a hospital, hospice, or residential medical care facility, or continuing treatment by a health care provider."121

Under the FMLA, leave may be taken intermittently if the employer agrees or when it is medically necessary.122 In addition, the employer may require that employees first exhaust any vacation, personal time, or other paid or unpaid leave that the employer provides before going out on FMLA leave.123 Upon return from leave, the employer must restore the employee to his or her position or to an equivalent position with equivalent "benefits, pay and other terms and conditions of employment."124

119. 29 U.S.C. § 2612(a)(1)(A)-(D) (2002) (setting forth the leave requirements under FMLA); 29 U.S.C. § 2611(4) (defining employer as "any person engaged in commerce or any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year").
B. Following the Lead from Existing State Family and Medical Leave Laws that Include Domestic Partners: An Examination of the Benefits these Laws Provide

Currently, four jurisdictions provide family medical leave benefits similar to those provided under the FMLA; these apply to both public and private sector employees. In addition, Delaware provides an administrative regulation allowing public employees to use their sick or other leave time to care for a domestic partner with a serious health condition. These statutes vary in how they define domestic partner, whether they include both same and opposite sex domestic partners, the length of leave—which ranges from four weeks to sixteen weeks—and whether the leave is paid, unpaid, or both. However, they all apply to both public and private sector employees. The chart in the Appendix summarizes the variations in each family and medical leave law.

VII. WHAT POLICY MAKERS SHOULD TAKE INTO ACCOUNT WHEN WRITING FAMILY AND MEDICAL LEAVE LAWS

The federal, state, and local governments should expand their family and medical leave laws by following the guidelines discussed in this Part. There are a number of questions that need to be addressed when formulating a family and medical leave law. The first step is to determine how to define domestic partners. How does a couple establish that they are domestic partners and not simply roommates? Should the laws include same and opposite sex domestic partners? Second, should these laws apply to public and private sector employees? Third, how much leave time should these laws provide? Fourth, should employers be required to have a minimum number of employees before family leave laws apply to them? Fifth, should these laws cover both a domestic partner and the domestic partner's child? This Part looks at each of these factors, and recommends a family leave plan that combines the best

125. Vermont, the District of Columbia, Hawaii, and Oregon family medical leave laws cover both private and public sector employees. VT. STAT. ANN. tit. 21, § 472 (2002); D.C. CODE ANN. § 32-502 (2001); HAWAI REV. STAT. ANN. § 398-3 (Michie 1999); OR. REV. STAT. § 659A.159 (2002). In addition, California recently passed a temporary disability program that will become effective on January 1, 2004. 2002 Cal. Adv. Legis. Serv. 901 (Deering 2002). Under this law, an employee may take up to six weeks paid leave to care for a domestic partner with a serious health condition. Id.

A. Defining Domestic Partners

When Representative Maloney proposed to amend the FMLA to permit workers to take leave time to care for domestic partners with serious health conditions, the proposed amendment did not include a definition of domestic partners. To maintain the legislative intent and spirit of family and medical leave laws, it is important that the law protect people in functional family relationships and not those who are just roommates. One way to do this is to look at the functions of a family and to formulate a statute that encompasses functions.

Common criteria used by states to establish whether couples meet the requirements to become domestic partners include:

1. The partners share a common residence;
2. The partners are jointly responsible for living expenses;
3. The partners are above 18 years of age;
4. The persons are not related by blood in a manner that would prevent them from getting married under state law;
5. Neither person is married or a member of another domestic partnership;

---


133. California, Hawaii, and Vermont each have this requirement, however, the language is somewhat different for each state. In Hawaii, neither of the parties can be a party
6. Both persons are mentally capable of consenting to the partnership;\(^{134}\)
7. The partners register as domestic partners pursuant to state law;\(^{135}\)
8. The parties consent and consent was not obtained by fraud, force, or duress; and\(^{136}\)
9. The partners are legally prohibited from marrying one another.\(^{137}\)


134. Both California and Vermont have these requirements. Cal. Fam. Code § 297(b)(6)(B) (2002). To enter into a civil union in Vermont, the parties must meet the criteria and obligations set forth in title 18, chapter 106 of the Vermont Statutes. These requirements are similar to those required to obtain a marriage license, and include, applying with a town clerk, proof of the legal qualifications to a civil union, and restrictions on minors and other incompetent persons. Vt. Stat. Ann. tit. 18, §§ 5160—5169 (2002).


137. California, Hawaii, and Vermont all include this requirement. California requires that either: (A) both persons are members of the same sex or (B) one or both persons meet the eligibility criteria under Title II of the Social Security Act. In most cases, to qualify as domestic partners, the parties must be members of the same sex. Cal. Fam. Code § 297(b)(6)(B) (2002). To enter into a valid reciprocal beneficiary relationship, the parties “must be legally prohibited from marrying one another.” Haw. Rev. Stat. Ann. § 572C-4 (Michie 1999). Similarly, to enter into a civil union, the parties must be of the same sex and excluded from the states marriage laws. Vt. Stat. Ann. tit. 15, § 1204(e)(12) (2002). Finally, the Oregon Administrative Regulation that interprets the family leave law states that “family member means spouse, same-sex domestic partner ... parent of same-sex domestic partner ... [and] the child of an employee’s same-sex domestic partner.” Or. Admin. R. 839-009-0210 (2002).

out parental responsibility.” The regulation then defines domestic partner as “a person with whom the employee’s life is interdependent, with whom the employee maintains a committed relationship and with whom the employee shares a mutual residence.”

The Delaware regulation does not require partners to meet specific criteria like those in the statues described above. Similarly, the Washington, D.C., law that permits employees to take leave to care for family members defines family member as:

(A) A person to whom the employee is related by blood, legal custody, or marriage; (B) a child who lives with an employee and for whom the employee permanently assumes and discharges parental responsibility; or (C) a person with whom the employee shares or has shared, within the last year, a mutual residence and with whom the employee maintains a committed relationship.

Though “committed relationship” is not defined in the D.C. Family and Medical Leave Act, the D.C. Health Care Benefits Expansion defines committed relationship as “a familial relationship between 2 individuals characterized by mutual caring and the sharing of a mutual residence.” This definition is not gender specific and, like Delaware’s, does not require that the partners meet statutory criteria.

To best accomplish the goal of including domestic partners in family and medical leave laws, the partners should have to register
as domestic partners pursuant to the laws of their jurisdiction or make some form of attestation as to their status, under penalty of perjury, before they can benefit from these laws. Just as married couples have to get a marriage certificate before obtaining the benefits of marriage, individuals who want to obtain the benefits of domestic partnership should have to take affirmative steps to have their relationship legally recognized. The domestic partners should also be required to take formal steps to dissolve the relationship, similar to a divorce. Containing a mechanism to legally dissolve the relationship ensures that the couple will no longer receive the benefits once they break up. Although some may fear that people may register fraudulently just to obtain the benefits, requiring attestation under penalty of perjury and requiring a formal process to dissolve the relationship makes the relationship harder to enter and exit and should protect against fraud.

The statutory mechanism used to recognize the legal relationship, whether a registry or other, less formal, means, should include specific statutory criteria that the partners need to meet to qualify as domestic partners. The most important criteria are those requiring the partners to demonstrate that they are in a committed relationship and not simply roommates. These criteria may include being jointly responsible for expenses and sharing a residence. The statute should also contain the criteria typically required before individuals can get married. These include being above the legal age to get married in the state, not being related by blood in a manner that would prevent them from getting married under state law, being capable of giving consent, and not being a member of another domestic partnership.

---

144. See, e.g., VT. STAT. ANN. tit. 15, § 1201 (2002). In Vermont, the requirements to obtain a marriage license and to obtain a civil union certificate are virtually the same. Id. Both require that the couple fill out an application, submit it to a town clerk, obtain a license, and have the marriage or civil union solemnized by a Justice of the Peace or other person authorized to perform a marriage ceremony. VT. STAT. ANN. tit. 16, § 5160 (2002).

145. The Vermont civil union statute, for example, requires that the couples formally dissolve the relationship in a divorce-like proceeding. VT. STAT. ANN tit. 15, § 1206 (2002).

146. Many private employers that provide domestic partner benefits require workers to file an affidavit of domestic partnership or spousal equivalency, which requires that the employee personally sign a declaration for his employer that he or she is in a domestic partner relationship. For example, at Fox, Inc., employees must sign an Affidavit of Marriage/Spousal Equivalency declaring that the employee and his or her spousal equivalent (1) have lived together for at least six months and intend to do so permanently, (2) are not related by blood to a degree of closeness that would prohibit legal marriage, (3) are mutually responsible for expenses, (4) are of the age of consent, and (5) are not married to anyone else. Fox also requires that if the employee lives in a jurisdiction that permits registration of domestic partners, that the employee so registers. HRC, Fox, INC., AFF. OF MARRIAGE/SPOUSAL EQUIVALENCY, available at http://www.hrc.org/Template.cfm?Section=The_Issues&Template=ContentManagement/ContentDisplay.cfm&ContentId=11101 (on file with the University of Michigan Journal of Law Reform).
Once the couple becomes legally recognized domestic partners by registering as domestic partners, the family and medical leave statute may define domestic partner as "a person with whom an individual has registered as a domestic partner in his or her state or political subdivision, having met all of the legal requirements for registration." Domestic partner registries may be more efficient. If, in the future, the jurisdiction provides a new benefit to domestic partners, lawmakers will not have to specifically define domestic partners in that statute. Future legislation can state that it applies to those registered as domestic partners pursuant to the registration laws.

However, if a jurisdiction does not have a domestic partner registry and wants to amend its family and medical leave law without first creating a registry, lawmakers should draft a more specific definition that encompasses the criteria discussed above. A couple should have to declare under penalty of perjury that it meets the criteria and should have to file formal documents if the partnership dissolves. Drafting the definition with specific requirements under penalty of perjury should prevent fraud by discouraging those who are not truly domestic partners from seeking benefits.

The final issue regarding the definition of domestic partner is to determine whether the law should require that partners be those who are legally prohibited from marrying under state law. From a policy perspective, there are good reasons to limit family and leave benefits to same-sex domestic partners and there are good reasons to include both same- and opposite-sex domestic partners. The strongest argument to support limiting domestic partner benefits to same-sex couples is that because same-sex couples cannot get married there ought to be a mechanism for same-sex couples to obtain the legal benefits of marriage.\textsuperscript{147} In comparison, the benefits of marriage are not permanently out of reach for heterosexual cohabitants. As one commentator noted, "[u]nmarried heterosexual couples claiming status as domestic partners seek the economic benefits of marriage without the social responsibilities. Achieving this end would require that marriage obligations become inde-

\textsuperscript{147} See, e.g., Baker v. State, 744 A.2d 864, 887 (Vt. 2000) (stating "[w]e hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law"). Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel "domestic partnership" system or some equivalent statutory alternative, rests with the Legislature. Whatever system is chosen, however, must conform with the constitutional imperative to afford all Vermonters common benefit, protection, and security of the law.
pendent of marriage rewards." Limiting family and medical leave benefits to same-sex domestic partners supports the goal of providing an alternative system to marriage for same-sex couples, similar to the civil union system in Vermont.

Advocates of broad domestic partnership policies argue that the right to privacy and notions of individual freedom require that people who care for one another and choose not to get married should not be discriminated against for that choice. The Alternatives to Marriage Project, an organization that advocates for the extension of domestic partner benefits to same- and opposite-sex domestic partners equally, asserts that "it is essential to recognize, embrace, and support the family diversity that exists today." The argument is that there should be no moral or legal distinction between unmarried couples and "[a]ny relationship between two unrelated, loving adults is as worthy as any other such relationship."

Both sides present strong arguments. On the one hand, opposite-sex cohabiting couples who choose not to get married make the decision not to avail themselves of the benefits of marriage. Why should those couples be entitled to the benefits of marriage without taking on the social responsibilities of marriage? On the other hand, people have good reasons for not getting married—maybe they do not believe in the institution of marriage, had a bad experience with a previous marriage and do not want to get married again, or do not believe that the state should be interfering with and regulating their personal and intimate affairs. These couples also function as families, have all of the appearances of married couples, and only lack a piece of paper affirming the validity of the relationship. Policy makers must make the ultimate decision that is best for their jurisdictions, whether on the federal, state, or local level.

150. Id.
B. Family and Medical Leave Laws Should Apply to Public and Private Sector Employees

State and local family and medical leave laws should mirror the FMLA. To protect the greatest number of workers possible, family and medical leave laws should apply to both the public and private sector. In addition, the Supreme Court recently found that Congress properly abrogated states' Eleventh Amendment immunity in the FMLA and that states may be sued for money damages\footnote{Hibbs v. Nevada Dep't of Human Res. 536 U.S. 938 (2002) (holding that Congress properly abrogated state sovereign immunity in enacting the FMLA under section 5 of the Fourteenth Amendment). Generally, the Eleventh Amendment grants states immunity from private damage actions in federal court. However, Congress is authorized to abrogate Eleventh Amendment immunity to enforce the anti-discrimination provisions of the Fourteenth Amendment if Congress does so expressly in the statute or it is evidenced through the legislative history or statutory intent. See generally Todd B. Tatelman, \textit{Nevada Department of Human Resources v. Hibbs: The Eleventh Amendment in a State's Rights Era: Sword or Shield?} 52 \textit{CATH. U. L. REV.} 683, 688-90 (2003).} \footnote{Hibbs v. Nevada Dep't of Human Res. 536 U.S. 938 (2002) (holding that Congress properly abrogated state sovereign immunity in enacting the FMLA under section 5 of the Fourteenth Amendment). Generally, the Eleventh Amendment grants states immunity from private damage actions in federal court. However, Congress is authorized to abrogate Eleventh Amendment immunity to enforce the anti-discrimination provisions of the Fourteenth Amendment if Congress does so expressly in the statute or it is evidenced through the legislative history or statutory intent. See generally Todd B. Tatelman, \textit{Nevada Department of Human Resources v. Hibbs: The Eleventh Amendment in a State's Rights Era: Sword or Shield?} 52 \textit{CATH. U. L. REV.} 683, 688-90 (2003).} It is important that state family leave laws provide benefits to state employees and permit these employees to sue for damages, just as they would be able to do if the federal FMLA covered domestic partners. Otherwise, workers who are denied family leave time will not be able to sue for damages and may be discouraged from seeking leave.

C. Family and Medical Leave Laws Should Follow the FMLA and Provide At Least Twelve Weeks of Leave

The Federal FMLA provides up to twelve weeks of leave time. As such, every state should provide at least twelve weeks of leave in its statute. For example, the Hawaii family leave law only provides four weeks of leave. Though this law does include reciprocal beneficiaries, because the federal law provides a greater amount of leave, reciprocal beneficiaries receive eight weeks less leave time than married couples receive under the FMLA. If a state is going to include domestic partners in its family leave laws, it should provide the same amount of leave that the federal law provides. This is especially important if progress continues at the state level, but not at the federal level. It ensures that domestic partners and married couples are entitled to the same amount of leave under federal and state law.
D. Family and Medical Leave Laws Should Mirror the FMLA and Apply to Employers with Fifty or More Employees

Following the same reasoning, the size of the employers covered under state law should be at least the same size as the federal FMLA provides. Since the FMLA covers employers with fifty or more employees, the state laws should at least cover the same sized employers. If the states want to include a greater number of employers within the ambit of the statutes coverage, they are free to do so. If states mirror federal law, then if a state includes domestic partners in its statute, the domestic partners will be entitled to leave on the same terms as married couples. The federal law should be a floor and not a ceiling.

E. Wage Replacement

Wage replacement is still unknown in the United States. Because the California law did not take effect until January, 2004, there is not yet data on how costly it is or how it may affect employees. Although the Commission on Leave pointed out that many employees needed but did not take family and medical leave because of financial restraints, the fact that the cost is not known may prevent lawmakers from taking this step. One possible approach is to wait and see how the California law works once it takes effect. Once the impact on employers is more ascertainable, other jurisdictions can follow California’s lead.

F. Family and Medical Leave Laws Should Cover Both the Domestic Partner and His or Her Children

Family and medical leave laws that permit employees to take leave to care for domestic partners with serious health conditions should also permit those employees to use leave to care for his or her domestic partners children. This is because in most states second parent adoption is not recognized, and therefore children cannot have two legal parents of the same sex. It is in the best interests of the child to allow either parent, or the parent’s domestic

153. COMM. ON FAM. MED. LEAVE, supra note 56, at 99.
partner that acts similarly to a step-parent and is a caretaker for that child, to take time off work to care for that child. If, for example, the child's legal parent has a higher salary than his or her domestic partner, it would be better for the family as a whole if the non-parent partner was able to take leave to care for the child. Washington, D.C., takes this approach, defining "family member" to include both a domestic partner and the dependent children of a domestic partner. This recognizes the family unit as a whole and not just the couple itself.

VIII. CONCLUSION: FAMILY AND MEDICAL LEAVE LAWS SHOULD RECOGNIZE MODERN FUNCTIONAL FAMILIES BY PROTECTING DOMESTIC PARTNERS

Family and medical leave laws provide significant benefits to workers. However, under current federal and most state laws, some families are excluded from protection under these laws. In recent years, many states have begun to recognize domestic partners as functional families and have provided these families with some of the benefits of marriage. Domestic partners, just as married couples, are one another's family. The purposes of family and medical leave are best accomplished by including domestic partners. The federal government, state, and local governments should continue this development by expanding family and medical leave to include domestic partners.

To accomplish this goal, lawmakers should look at the current state laws that include domestic partners and take the best attributes of those laws to draft one for their jurisdiction. A family and medical leave law that includes domestic partners must be specific. It must define domestic partners in a detailed manner to prevent fraud or require that the individuals first register as domestic partners pursuant to state or local law. These laws must at least mirror, if not go beyond, federal law. State family and medical leave laws should not provide less leave time or cover less employers than the federal law to ensure uniformity between state and federal law.

Every married person fears that he or she will one day get a phone call saying that a husband or wife has been in accident and needs immediate medical attention. Since the FMLA, most married persons know that they can be with their spouses during this time of medical need. They can be by their side at the hospital or

take time from work to help a spouse recover. Domestic partners are families: they too need the protection of family and medical leave laws and the security that their jobs will be safe when facing this type of family emergency.
<table>
<thead>
<tr>
<th></th>
<th>Includes Domestic Partners</th>
<th>Same Sex Only</th>
<th>Same and Opposite Sex</th>
<th>Length of Leave</th>
<th>Paid Leave</th>
<th>Public Sector Only</th>
<th>Private and Public Sectors</th>
<th>Size of Employer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal FMLA</td>
<td>No</td>
<td></td>
<td></td>
<td>12 weeks(^{155})</td>
<td>None</td>
<td>X</td>
<td>X</td>
<td>50 or more employees(^{156})</td>
</tr>
<tr>
<td>Washington, D.C.</td>
<td>Yes</td>
<td>X</td>
<td></td>
<td>16 weeks(^{157})</td>
<td>None</td>
<td>X</td>
<td>X</td>
<td>No minimum(^{158})</td>
</tr>
<tr>
<td>Vermont</td>
<td>Yes</td>
<td>X</td>
<td></td>
<td>12 weeks(^{154})</td>
<td>None</td>
<td>X</td>
<td>X</td>
<td>No minimum(^{159})</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Yes</td>
<td>X</td>
<td></td>
<td>4 weeks(^{161})</td>
<td>None</td>
<td>X</td>
<td>100 or more employees(^{162})</td>
<td></td>
</tr>
<tr>
<td>Delaware</td>
<td>Yes</td>
<td>X</td>
<td>Not stated</td>
<td>None</td>
<td>X(^{163})</td>
<td>X</td>
<td>All state employees(^{164})</td>
<td></td>
</tr>
</tbody>
</table>

159. VT. STAT. ANN. tit. 21, § 472 (2002).
161. HAW. REV. STAT. ANN. § 398-3(a) (Michie 1999).
162. HAW. REV. STAT. ANN. § 398-1 (Michie 1999).
163. Delaware permits state employees to use sick leave to care for a member of the employee's immediate family with a catastrophic illness. Catastrophic illness is defined as "any illness or injury to an employee or to a member of an employee's family which is diagnosed by a physician and certified by the physician as rendering the employee or a member of the employee's family unable to work..." The Delaware laws are separated into two sections: one for public school employees and one for other state employees. DEL. CODE ANN. tit. 14, § 1318 (2003); DEL. CODE ANN. tit. 29, § 5956 (2003). In addition, each section establishes a "donated leave program" where employees may transfer accrued, unused sick leave to other employees. DEL. CODE ANN. tit. 14 § 1318A (1999). The donated leave may be used to "only for a catastrophic illness of the recipient or of a family member of the recipient." Id.
<table>
<thead>
<tr>
<th>State</th>
<th>Includes Domestic Partners</th>
<th>Same Sex Only</th>
<th>Same and Opposite Sex</th>
<th>Length of Leave</th>
<th>Paid Leave</th>
<th>Public Sector Only</th>
<th>Private and Public Sectors</th>
<th>Size of Employer</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>Yes</td>
<td>X</td>
<td></td>
<td>6 weeks(^{166})</td>
<td>6 weeks(^{167})</td>
<td>X</td>
<td>No minimum(^{168})</td>
<td></td>
</tr>
<tr>
<td>Oregon</td>
<td>Yes</td>
<td>X</td>
<td></td>
<td>12 weeks(^{168})</td>
<td>None</td>
<td>X</td>
<td>25 or more employees(^{170})</td>
<td></td>
</tr>
</tbody>
</table>

165. This chart only addresses the new California law that includes domestic partners—the California Family Temporary Disability Insurance Program—which took effect on January 1, 2004. 2002 Cal. Adv. Legis. Serv. 901 (Deering 2002). There is a separate family care law, which provides up to twelve weeks of unpaid leave to care for a spouse with a serious health condition. Cal. Gov't Code § 12945.2(a), (c)(3)(B) (2002) (applying to any person that employs 50 or more persons, but does not include domestic partners). In addition, California law requires that any employer that provides sick leave for employees must permit employees to use that sick time to attend to the illness of a "child, parent, spouse, or domestic partner." Cal. Lab. Code § 233(a) (2002).


167. Id. On February 5, 2003, Senator Chris Dodd introduced a bill to amend the Family and Medical Leave Act of 1993, expanding the scope of the Act. Family and Medical Leave Expansion Act, S. 304, 108th Cong. (2003). This bill authorizes the Secretary of Labor to make grants for the cost of carrying out projects that provide wage replacement. If passed, this may present a model wage replacement system for states to follow. Id.


