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The Continued Relevance of Domestic Partnerships in the Post-*Obergefell* United States

Grace J. Anderson†

Introduction

Ashley and James met while attending college and, after a three-year relationship, got married in 2020. They live together, share their incomes, and are expecting their first child. Meanwhile, their friends Jess and Sarah are same-sex partners who have been in a committed relationship for five years. They share a townhome and are planning to use artificial insemination to have children in the next few years. However, they do not feel comfortable marrying for a few reasons: first, because they are morally opposed to entering an institution that, for most of its history, excluded same-sex couples and provided a structure conducive to the oppression of women, and second, because Jess wants to pay off her student debt before making a legal commitment with financial implications. Finally, Ashley and James' other friend Nick is asexual, and lives with Amanda, with whom he is in a committed platonic partnership. Amanda is in the process of adopting a child, and Nick plans to co-parent the child with Amanda.¹

The variety of living situations and relationships in Ashley and James' friend group is baffling to their older family members, who are friends with other married couples whose most complex family stories involve divorce and remarriage.² They have plenty of questions about

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1. Examples inspired by Diana Adams, *Equality for Unmarried America: Expanding Legal Choice for America's Diverse Families*, 4 CHARLOTTE L. REV. 231, 239–43 (2013); JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* 45–47 (Oxford Univ. Press, 2014); Angela Chen, *How to Build a Three Parent Family*, THE ATLANTIC (Sept. 22, 2020), <https://www.theatlantic.com/family/archive/2020/09/how-build-three-parent-family-david-jay/616421/> [<https://perma.cc/YR9H-2UNW>].

2. See Julianna Horowitz, Nikki Graf & Gretchen Livingston, *Marriage and Cohabitation in the U.S.*, PEW RSCH. CTR. (Nov. 2019), <https://www.pewresearch.org/social-trends/2019/11/06/marriage-and-cohabitation-in-the-u-s/> [<https://perma.cc/LT4S-HXB7>] (stating that cohabitation is more common and accepted among younger generations).

cohabitation without the intention to marry and platonic co-parenting, many of which involve legal issues—what would happen to their friends' children if the biological parent were to unexpectedly suffer an accident and die or become permanently hospitalized? Could the child's non-biological parent make legal decisions for the child? What would happen to one partner's financial resources and property if the couple were to break up? Now interested in finding answers to these questions, Ashley and James begin to research what rights unmarried partners have in the United States.

The vast majority of potential legal issues arising between Jess and Sarah or Nick and Amanda are not governed by family law—in other words, the same law is applied to them that would be applied between any two unrelated, unmarried people.³ However, Ashley and James discover that if either of these couples entered a domestic partnership—a legal status that unmarried partners can register for in some states, cities, or counties in the United States—they could attain a number of legal rights that married couples have.⁴ Ashley and James let their friends know about this option, and they are all excited to learn more. However, the group is quickly overwhelmed by the complexities of current domestic partnership laws. The law seems to be different in every state and city, and both sets of unmarried couples worry that if they entered a domestic partnership, the rights they would acquire would change or disappear if they wanted to move.⁵ Also, both sets of unmarried couples find that the domestic partnership law in their state is not ideal for their situations. Jess and Sarah find that a domestic partnership in their state imposes all the financial burdens of marriage onto domestic partners.⁶ These burdens were a reason they chose not to marry in the first place. Nick and Amanda previously agreed that if Amanda enters a committed romantic relationship with somebody else, Nick would still be considered

3. See LESLIE J. HARRIS, JUNE CARBONE, LEE E. TEITELBAUM & RACHEL REBOUCHÉ, *FAMILY LAW* 228 (6th ed. 2018) (“Traditionally, if a couple lived together without being ceremonially married . . . they were at best roommates and at worst outlaws.”). *But see* UNIF. COHABITANTS' ECON. REMEDIES ACT, prefatory note (UNIF. L. COMM'N 2021) (“As cohabitation and its acceptance have changed over the years, so too have available claims and remedies . . . that derive from cohabitation.”); *Marvin v. Marvin*, 577 P.2d 106, 122 (Cal. 1976) (recognizing the potential rights between unmarried cohabitants).

4. See generally Robin Cheryl Miller, *Validity of Governmental Domestic Partnership Enactment*, 74 A.L.R. 439 (summarizing cases illustrating the variety of domestic partnership laws and protections around the country).

5. See generally NAT'L CTR. FOR LESBIAN RTS., MARRIAGE, DOMESTIC PARTNERSHIPS, AND CIVIL UNIONS: SAME-SEX COUPLES WITHIN THE UNITED STATES (2020), <https://www.nclrights.org/wp-content/uploads/2015/07/Relationship-Recognition.pdf> [<https://perma.cc/YQL8-2JZQ>] (providing a state-by-state overview of relationship recognition).

6. See, e.g., CAL. FAM. CODE § 297 (Deering 2021) (establishing that domestic partners in California have the same rights and duties as married partners).

by the family as one of the child's parents. But under state law, if Amanda married or entered into a domestic partnership with this potential romantic partner, Nick would lose his domestic partnership rights.⁷

Though partnerships and families are now more diverse in structure than at any other point in American history,⁸ current family law in the United States is overwhelmingly focused on the law of marriage and divorce. Options such as domestic partnerships are limited in their availability,⁹ and the lack of availability disadvantages many of today's unmarried partners.¹⁰ Unfortunately, these issues are getting worse, not better, in many states.¹¹ However, if domestic partnership law is reformed and widely passed in all jurisdictions, domestic partnerships would be an opportunity for unmarried partners to gain legal validation of their partnership and families. Domestic partnerships, far from being obsolete after the national legalization of same-sex marriage, can be a useful tool for unmarried partners to attain legal protections that promote security and stability within their families without incurring the risks and burdens associated with formal marriage.¹² To best ensure that domestic partnership laws are available to all that they would benefit, state legislatures should consider and adopt a uniform domestic partnership law which recommends the expansion of domestic partnerships to opposite-sex partners and partnerships of more than two people.

I. Background

A. *The Changing Structure of Marriage and Family in the United States*

The idea of the "American Family Unit," exemplified by a "breadwinner" father and "homemaker" mother, is no longer the

7. See, e.g., *id.* (requiring that both individuals are not in a marriage or other domestic partnership before entering a domestic partnership).

8. Horowitz et al., *supra* note 2.

9. See NAT'L CTR. FOR LESBIAN RTS., *supra* note 5 (demonstrating that domestic partnerships and civil unions are not available in many states).

10. Adams, *supra* note 1 (explaining that, though many unmarried couples do not wish to take on the responsibilities of marriage, a lack of domestic partnership systems deprives them of legal validation for their family).

11. See, e.g., Terese J. Singer, *Wisconsin Ends Domestic Partnership Registration*, MILWAUKEE DIVORCE LAW BLOG (Oct. 30, 2018), <https://www.milwaukeeivorcecelawyer.com/wisconsin-ends-domestic-partnership-registration/> [https://perma.cc/PH9G-WT2P] (detailing Wisconsin's termination of its domestic partnership registry). See generally Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509 (2016) (summarizing state decisions to terminate domestic partnership statutes or convert domestic partnerships into marriages).

12. Adams, *supra* note 1, at 240.

universal view of family life in the United States.¹³ Changing family structures in the United States, brought on by both social and economic trends of the last half-century, have led to lower rates of marriage and an increase in nontraditional family structures, especially for marginalized groups such as low-income families and the LGBTQ+ community.¹⁴ Recent statistics on family structure show that compared to past decades, today's Americans are delaying or completely forgoing marriage. The marriage rate in the United States in 2018, 6.5 marriages per 1,000 people, was the lowest rate ever recorded by the Vital Statistics Division of the CDC; the highest rate, reported in 1972, was 10.5 marriages per 1,000 people.¹⁵ As the rate of marriage has decreased, the number of unmarried partners choosing to cohabit has risen steadily over past decades.¹⁶ As of 2019, more Americans have lived with an unmarried partner at some point in their lives (59%) than have been married (50%), and the majority of Americans approve of cohabitation for unmarried partners.¹⁷

Falling marriage rates and higher rates of cohabitation have also affected the home lives of American children. The percentage of children who live with both parents (whether they are married or not) has fallen from 85.2% in 1970 to 68.9% in 2018.¹⁸ As both the rate of cohabitation and the average age of marriage have risen,¹⁹ it is not surprising that the rate of children living with two unmarried parents has likewise steadily risen over the last decade.²⁰ Single-parent families are also on the rise. As of 2018, 27% of children live with one parent (compared to 11% in

13. CARBONE & CAHN, *supra* note 1, at 13–14.

14. *See id.*, at 46 (stating that social and economic trends have led to a lower marriage rate in lower socioeconomic groups); Megan M. Sweeney, *Two Decades of Family Change: The Shifting Economic Foundations of Marriage*, 67 AM. SOCIO. REV. 132 (2002) (explaining that the greater number of women entering the workforce has contributed to falling marriage rates and the rising age of first marriage in the United States); PEW RSCH. CTR., PARENTING IN AMERICA: OUTLOOK, WORRIES, ASPIRATIONS ARE STRONGLY LINKED TO FINANCIAL SITUATION 15–26 (2015) (exploring some of the social and economic trends that have contributed to the growing complexity and diversity of family structures).

15. Sally C. Curtin & Paul D. Sutton, *Marriage Rates in the United States*, NAT'L CTR. FOR HEALTH STAT. (2020), https://www.cdc.gov/nchs/data/hestat/marriage_rate_2018/marriage_rate_2018.htm#:~:text=From%201982%20to%202009%2C%20marriage,of%20the%201900%E2%80%932018%20period [<https://perma.cc/KUM3-68BX>].

16. Horowitz et al., *supra* note 2.

17. *Id.* (reporting that 69% of Americans believe it is acceptable for unmarried couples to live together before marriage, regardless of their intention to become married in the future).

18. Wendy Wang, *The Majority of U.S. Children Still Live in Two Parent Homes*, INST. FOR FAM. STUD. (Oct. 4, 2018), <https://ifstudies.org/blog/the-majority-of-us-children-still-live-in-two-parent-families> [<https://perma.cc/QX5B-VN6P>].

19. Horowitz et al., *supra* note 2.

20. Wang, *supra* note 18.

1970).²¹ Additionally, in single-parent families, it has become more common for a child to live with their parent's unmarried partner.²²

Scholars working in social sciences have noted that two economic and social trends in the country have contributed most to the recent patterns of marriage and family structure. First, scholars note the entry of women into the workforce, which has given women a new autonomy and ability to provide for their children without the help of a male partner, and second, they identify the growing inequality within the class system in the United States.²³ Today, women's employment and contribution to family income is not only normal but a desired trait in a partner, and at times, a real or perceived necessity for family survival.²⁴ In the modern marriage market, a woman's ability to contribute to the financial well-being of her family is considered before she enters a marriage, and women also have greater autonomy to forgo marriage if they feel they can support themselves and their children better without marrying their partner.²⁵ Unmarried cohabitants or parents may feel that they do not have the financial stability that is culturally required to marry.²⁶ This pressure is, unsurprisingly, most common in individuals who are in the lower economic class and have lower levels of educational attainment.²⁷

Alongside economic factors, the feminist and LGBTQ+ movements in the 1970s and beyond have emphasized an "ascendant" view of marriage, which focuses on the love, companionship, and support that a partner can provide over the differentiation of roles and child rearing.²⁸ Many partners have discovered this type of relationship can be achieved outside of marriage—in fact, Pew researchers found that 84% of Americans feel that marriage is not essential to live a fulfilling life.²⁹ Further, married and cohabitating partners both cite love as the primary reason for marrying or moving in together.³⁰ While some partners simply do not feel that marriage is necessary to express their love and commitment, others do not feel comfortable engaging in an institution that has historically excluded the LGBTQ+ community and oppressed

21. *Id.*

22. *Id.*

23. CARBONE & CAHN, *supra* note 1, at 46.

24. Sweeney, *supra* note 14, at 134.

25. *Id.*; CARBONE & CAHN, *supra* note 1, at 46.

26. CARBONE & CAHN, *supra* note 1, at 46; Sweeney, *supra* note 14, at 134.

27. CARBONE & CAHN, *supra* note 1, at 19–20; Horowitz et al., *supra* note 2.

28. Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 91 (Feb. 2014).

29. Horowitz et al., *supra* note 2.

30. *Id.*

women.³¹ Some partners decide not to marry because they are uncomfortable with the social and cultural significance put on marriage and feel this is inappropriate for the nature of their relationship.³² Finally, polyamorous partners are altogether excluded from entering a marriage.³³

After decades of social and economic change in the United States, the country is left with a wide range of family structures as opposed to the common and idealized “American Family” of the 1960s and before. Partners are marrying later or not at all, and children are more likely to be raised in single-parent, blended, or cohabitating families.³⁴ Law professors June Carbone and Naomi Cahn point out that current family law, which centers married partners, is outdated for the modern state of marriage and families in the United States.³⁵ In order to provide legal protection outside of legal marriage, family law must adapt to find solutions for unmarried partners. One such solution is the domestic partnership. Though first established for same-sex couples before same-sex marriage was legalized, this system of establishing legal rights and duties for partners can be expanded to include all unmarried partners who wish to gain legal protections for themselves and their families.³⁶

B. Beginnings of Domestic Partnership Law

Domestic partners can be understood as “nonmarital life partners.”³⁷ Some states, counties, and cities offer domestic partnerships as a legal status that an unmarried couple may enter to be afforded some of the rights and benefits given to married couples in that jurisdiction.³⁸ Beyond this basic concept, the term domestic partnership is almost impossible to define concisely, as the requirements for entering into a domestic partnership, the rights afforded to domestic partners, and the legal duties of domestic partners vary in nearly every jurisdiction in

31. Adams, *supra* note 1, at 240.

32. *Id.* at 241.

33. *Id.* at 242; see also *Cambridge Becomes 2nd U.S. City to Legalize Polyamorous Domestic Partnerships*, POLYAMORY LEGAL ADVOC. COAL. (Mar. 9, 2021), <https://static1.square-space.com/static/602abeb0ede5cc16ae72cc3a/t/6047c7f856dc6d6501ec8e10/1615316984759/2021-03-09+PLAC+Press+Release+revised.pdf> [<https://perma.cc/5TJU-SU5B>] (describing the disadvantages faced by polyamorous partners due to lack of legal recognition).

34. Horowitz et al., *supra* note 2; Wang, *supra* note 18.

35. CARBONE & CAHN, *supra* note 1, at 183.

36. Adams, *supra* note 1, at 245.

37. Miller, *supra* note 4, at [*1a] n.2.

38. *Id.* at [*1b]; *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, FINDLAW (2021), <https://www.findlaw.com/family/marriage/same-sex-marriagecivil-unions-and-domestic-partnerships.html> [<https://perma.cc/5DAY-ZCL5>]; see NAT'L CTR. FOR LESBIAN RTS., *supra* note 5 (providing a state-by-state overview of domestic partnership).

which domestic partnerships exist.³⁹ Further, many jurisdictions allow for unmarried couples to enter into a civil union—a legal status very similar to a domestic partnership. Often, civil unions are thought to give unmarried couples more legal rights and duties than domestic partnerships, but as the rights and duties of domestic partners vary so highly between jurisdictions,⁴⁰ the comparison is not so straightforward.

Domestic partnerships began in the 1980s and 1990s as a method for same-sex partners to attain some of the rights afforded to married couples before the legalization of same-sex marriage.⁴¹ During this time, LGBTQ+ activists in California began advocating for the passage of domestic partnership ordinances in individual municipalities.⁴² Drawing on the anti-discrimination ordinance passed in San Francisco in 1978, which prohibited discrimination on the basis of sexual orientation for housing and employment, these activists reasoned to politicians that denying hospital and prison visitation and employee benefits granted to spouses to committed same-sex couples was also discrimination on the basis of sexual orientation.⁴³

Instead of lobbying for same-sex marriage, activists developed the idea for a legal status of domestic partners, which would allow partners to register and obtain benefits. After facing several rejections in the 1980s—with little victories achieved in smaller, progressive California cities like West Hollywood—the cities of San Francisco and Los Angeles both established domestic partner registries in 1991 and 1993, respectively.⁴⁴ Activism surrounding domestic partnerships in California inspired work in other states. In 1999, Vermont became the first state to establish civil unions statewide,⁴⁵ while California’s statewide domestic partnership law was still being negotiated in the state legislature.⁴⁶

Early domestic partnership laws in Los Angeles, San Francisco, and eventually the State of California, required a couple registering for a domestic partnership to share a common residence and assume responsibility for one another’s basic living expenses—a relatively high

39. FINDLAW, *supra* note 38; see NAT’L CTR. FOR LESBIAN RTS., *supra* note 5.

40. See NAT’L CTR. FOR LESBIAN RTS., *supra* note 5 (summarizing the jurisdictional requirements for civil unions and domestic partnerships across the United States).

41. Nejaime, *supra* note 28, at 104; see also CAL. FAM. CODE § 297 (Deering 2021) (explaining through legislative notes that the act was created “to help California move closer to fulfilling the promises of inalienable rights . . . by providing all caring and committed couples, regardless of their gender or sexual orientation, the opportunity to obtain essential rights, protections, and benefits . . . and to further the state’s interest in promoting stable and lasting family relationships”).

42. Nejaime, *supra* note 28, at 114–21.

43. *Id.* at 114–17.

44. *Id.* at 144.

45. Nat’l Ctr. for Lesbian Rts., *supra* note 5, at 20–21.

46. See Nejaime, *supra* note 28, at 149–53.

standard compared to future iterations of California's domestic partnership law and domestic partnership laws in other states.⁴⁷ This high standard reflected the emphasis that activists put on the marriage-like quality of a domestic partnership. The framing of domestic partnerships as similar to, or a step toward, same-sex marriage both reflected the wishes of many activists and assuaged politicians' fears that the definition of domestic partner would be too broad and cost businesses inordinate amounts of money in extending benefits to the domestic partners of employees.⁴⁸

While some proponents of domestic partnership laws intended for these laws to be passed as a step towards same-sex marriage, others saw domestic partnerships as a queer institution separate from the institution of marriage and did not wish for LGBTQ+ communities to embrace marriage.⁴⁹ The Gay Liberation Front, as well as many lesbian activists, spoke of marriage as the root of oppression for women and LGBTQ+ individuals.⁵⁰ Marriage was characterized as an institution which pushed heteronormativity and subordination of women, and many activists believed that the LGBTQ+ community should "attack the marriage system."⁵¹ For activists of this opinion, a domestic partnership was a separate system entirely that would celebrate and embody the equal partnership of same-sex partners.⁵² Though the "pro-marriage" goal eventually gained traction in the LGBTQ+ community, and state legislatures and courthouses took steps towards marriage equality, this was never the universal goal of LGBTQ+ activists.⁵³ As same-sex marriage was legalized in several states and was making progress towards federal legalization in the Supreme Court, LGBTQ+ legal scholars warned that a sole focus on marriage would lead to the retraction of other legal means of recognition for couples who did not want to get married.⁵⁴ After the federal legalization of same-sex marriage in 2015, these warnings came to fruition in many states.

47. *Id.* at 140–41; CAL. FAM. CODE § 297 (Deering 2021) (showing that in 2003 California removed the requirement that domestic partners must live together and be responsible for each other's living expenses).

48. *See* Nejaime, *supra* note 28, at 140 (reporting that the original legislation was revised to ensure that it was not used by relatives or friends).

49. *E.g., id.* at 104–12.

50. *Id.* at 95.

51. *Id.*

52. *Id.*

53. *Id.* at 104 (stating that "LGBT leaders in the 1980s and early 1990s debated whether the movement should view marriage as a long-term goal" amid differing opinions on marriage).

54. *See* Adams, *supra* note 1 (arguing that legislatures should not ignore the rights of unmarried partners).

C. Domestic Partnership Law After *Obergefell v. Hodges*

On June 26, 2015, the Supreme Court announced one of its most famous decisions in *Obergefell v. Hodges*, when it ruled that same-sex marriage is a constitutional right protected by the Fourteenth Amendment.⁵⁵ The very case that achieved marriage equality for the LGBTQ+ community, however, became the impetus for the restriction and reversal of rights for domestic partners in several states.⁵⁶ States' and municipalities' differing responses to domestic partnership law post-*Obergefell* is the result of a difficult question: if domestic partnership statutes primarily exist to protect the rights of same-sex couples, and now same-sex couples in all states can choose to marry, should domestic partnerships still be an option for unmarried couples? States approached this issue in vastly different ways. For example, while Wisconsin ended its domestic partnership registry and Washington converted civil unions into legal marriages,⁵⁷ California continued to see the use for domestic partnership statutes and ordinances even after same-sex partners' rights could be protected by marriage, and it expanded these statutes to encompass a variety of unmarried partners regardless of sexual orientation.⁵⁸ The following Sections provide examples showing the various ways in which states and cities are responding to the changing view of partnerships and marital relationships. This section also previews the proposed uniform legislation drafted to address the lack of standards governing unmarried partners across states.

i. Rolling Back and Closing Registries: The Wisconsin Approach

Wisconsin, which had originally passed its domestic partnership legislation in 2009,⁵⁹ officially closed the domestic partnership registry in April of 2018, with the important caveat that couples who were registered as domestic partners would retain this legal status.⁶⁰ Wisconsin's domestic partnership law only allowed for same-sex couples to register for benefits.⁶¹ After the right to marry opened up to same-sex couples, the number of domestic partnerships registered in Wisconsin

55. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

56. Matsumura, *supra* note 11, at 1509.

57. See Christopher S. Krimmer, *Imminent Demise: Register for Domestic Partnership Status Before It Disappears on April 1*, INSIDE TRACK (Feb. 7, 2018), <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=10&Issue=2&ArticleID=26139#> [<https://perma.cc/ECE8-RRVP>]; see Matsumura, *supra* note 11, at 1523.

58. See S.B. 30, 2019 Leg., Reg. Sess. (Cal. 2019) (amending California's domestic partnership statute to remove the requirement that persons be of the same sex to enter into a domestic partnership).

59. See WIS. STAT. § 770.01–18 (2009).

60. *Id.* § 770.07; Singer, *supra* note 11.

61. WIS. STAT. § 770.05 (2009).

dropped dramatically from thousands in 2009 and hundreds per year following that, to only forty couples registering in 2015.⁶² This decrease in domestic partnership registries following the adoption of same-sex legal marriage is presumed to be the reason that Wisconsin closed the registry.⁶³ Critics of this decision say that domestic partnerships provided partners who did not wish to marry with legal protections that would now become wrongfully unavailable to future unmarried partners in the state.⁶⁴ Christopher Sean Krimmer, writing for the Wisconsin Bar's weekly newsletter, opined that the statute should instead be expanded to include unmarried adult partners regardless of their sexual orientation.⁶⁵ New Jersey, Rhode Island, and Vermont also took the same approach as Wisconsin.⁶⁶

ii. Converting Domestic Partnerships and Civil Union to Marriages: The Washington Approach

Washington State passed its domestic partnership law in 2007, which was akin to California's in that it was essentially "marriage by a different name."⁶⁷ However, after legalizing same-sex marriage in 2012, the State closed its domestic partnership registry to all partnerships in which both partners were under the age of sixty-two.⁶⁸ Instead of allowing partners who were already registered as domestic partners to retain the rights that had been established under the law, Washington gave current domestic partners the choice to either dissolve their legal relationship and lose all rights afforded under the domestic partnership statute or apply for a marriage license.⁶⁹ If the partners failed to make this decision by June 10, 2014, their domestic partnership would automatically convert into a marriage.⁷⁰ Connecticut, Delaware, and New Hampshire—which used to allow for civil unions—also followed this Washington approach after the legalization of same-sex marriage in their jurisdiction.⁷¹

62. Krimmer, *supra* note 57.

63. *See id.*; Singer, *supra* note 11.

64. *See* Singer, *supra* note 11.

65. Krimmer, *supra* note 57.

66. *See* NAT'L CTR. FOR LESBIAN RTS., *supra* note 5, at 15, 18, 20–21.

67. Matsumura, *supra* note 11, at 1522; *see* Domestic Partnership Act, WASH. REV. CODE §§ 26.60.010–26.60.901 (2007).

68. Matsumura, *supra* note 11, at 1522–23.

69. *Id.*

70. *Id.*

71. *See* NAT'L CTR. FOR LESBIAN RTS., *supra* note 5, at 6–7, 15.

iii. Expanding Rights to Heterosexual Couples: The California Approach

California has a unique history of domestic partnership statutes, being among the first states to adopt a domestic partnership law in response to municipal ordinances and activism from the LGBTQ+ community.⁷² Same-sex marriage was legalized in California in 2008, after which the domestic partnership registry remained open.⁷³ California reaffirmed its belief in protecting the rights of unmarried couples in 2019 when the legislature passed Senate Bill 30, which amended its domestic partnership statute to allow heterosexual couples to register.⁷⁴ The Senate Report regarding the bill acknowledges the Domestic Partnership Act's history in protecting the rights of same-sex couples, but also states that the exclusion of heterosexual couples from registering as domestic partners deprives these couples of an opportunity to their "preferred means of formalizing their relationship and expressing their love."⁷⁵

iv. Expanding Rights to Non-Traditional Families Made Up of More Than Two Committed Partners: The Recent Response from Somerville and Cambridge

In June 2020 and March 2021, respectively, the cities of Somerville, Massachusetts and Cambridge, Massachusetts passed ordinances allowing more than two people to register as domestic partners.⁷⁶ The definition of a domestic partnership in Cambridge still requires these partners to be "in a relationship of mutual support, caring, and commitment and intend to remain in such a relationship" and to "consider themselves to be a family."⁷⁷ The Cambridge ordinance was passed with input from the Polyamory Legal Advocacy Coalition, which stated in a later press release that this decision would help not only polyamorous couples and their families, but also "non-nuclear" families including multi-parent families, families where multiple generations live

72. NeJaime, *supra* note 28, at 112.

73. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (holding that same-sex marriage is a right under the Constitution of California).

74. S.B. 30, 2019 Leg., Reg. Sess. (Cal. 2019).

75. S. JUDICIARY COMM., REPORT ON DOMESTIC PARTNERSHIP: PERSONS UNDER 62 YEARS OF AGE, S.B. 30, 2019 Leg., Reg. Sess., at 1 (Cal. 2019).

76. See Ellen Barry, *A Massachusetts City Decides to Recognize Polyamorous Relationships*, N.Y. TIMES (July 1, 2020), <https://www.nytimes.com/2020/07/01/us/somerville-polyamorous-domestic-partnership.html> [https://perma.cc/8XT6-CSZN]; POLYAMORY LEGAL ADVOC. COAL., *supra* note 33.

77. CAMBRIDGE, MASS., MUN. CODE OF ORDINANCES ch. 2.119.020 (2021).

in the same household and assist with child rearing, and step-family relationships.⁷⁸

v. Proposed Uniform Legislation from the Uniform Law Commission

In response to the need for uniformity in law governing unmarried partners, the Uniform Law Commission created the Uniform Cohabitants' Economic Remedies Act (UCERA).⁷⁹ Published in 2021, UCERA is yet to be introduced as a bill in any state's legislature.⁸⁰ This Act's purpose is "to remove bars to claims so that cohabitants are treated as other litigants under applicable state law and are not precluded from bringing claims solely because their relationship is possibly sexual and certainly nonmarital."⁸¹ This Act does not create any special status for unmarried cohabitants, and is not an act which establishes a domestic partnership or civil union system.⁸² Instead, UCERA would govern litigation of express and implied contracts and equitable relief claims between unmarried cohabitants upon separation.⁸³ Though a helpful step for unmarried partners undergoing separation, it does not create any rights for unmarried partners during their relationship and is not an adequate replacement for a domestic partnership system.⁸⁴

II. Analysis

A. Domestic Partnerships are a Viable Tool for Unmarried Partners to Protect Their Rights as a Family Unit

Unmarried partners should have the choice to attain certain rights given to married couples, both because of the right to make choices about intimate relationships and because it is in the state's best interest to provide a method to promote family stability to unmarried partners and their children.⁸⁵ Domestic partnership laws are a viable way for

78. POLYAMORY LEGAL ADVOC. COAL., *supra* note 33.

79. UNIF. COHABITANTS' ECON. REMEDIES ACT (UNIF. L. COMM'N 2021).

80. *Uniform Cohabitants' Economic Remedies Act*, UNIF. L. COMM'N <https://www.uniformlaws.org/committees/community-home?communitykey=c5b72926-53d2-49f4-907c-a1cba9cc56f5#LegBillTrackingAnchor> [https://perma.cc/ZN7K-D4U4] (Feb. 15, 2023) (tracking legislative action for UCERA).

81. UNIF. COHABITANTS' ECON. REMEDIES ACT, §3 cmt. ¶ 1 (UNIF. L. COMM'N 2021).

82. *See id.* at prefatory note.

83. *Id.*

84. *See infra* Section III.C.i.

85. *See* Matsumura, *supra* note 11 (raising constitutional concerns upon state's changing domestic partnership law); Gregg Strauss, *The Positive Right to Marry*, 102 VA. L. REV. 1691 (2016) (arguing that constitutional rights surrounding choices about marriage

unmarried couples to attain these rights and benefits without incurring burdens associated with the social and legal status of marriage.⁸⁶ In addressing the legal benefits and burdens of domestic partnership laws, it is important to note that the lack of uniformity among domestic partnership statutes from various jurisdictions renders it impossible to analyze these statutes in a way that is applicable to unmarried partners living in every jurisdiction with a domestic partnership system in place.⁸⁷ Instead, this Section uses examples from existing and theoretical domestic partnership acts to demonstrate their practical use in improving the legal protection of unmarried partners.

i. Potential rights and benefits gained by unmarried partners through domestic partner registration

The rights of domestic partners vary from jurisdiction to jurisdiction and fall on a spectrum from not marriage-like to marriage-like.⁸⁸ On one extreme, California's current domestic partnership statute gives domestic partners the same "rights, protections and benefits" as married spouses.⁸⁹ Other systems, such as Wisconsin's former domestic partnership registry, explicitly limit the rights of domestic partners as compared to those of legal spouses.⁹⁰

During the course of a domestic partnership, legislation can ensure that domestic partners are entitled to the same benefits under their employers as married couples. In certain states and municipalities, these rights apply only to domestic partnerships where one or both partners are employees of the state or city.⁹¹ Under California's expansive domestic partnership regime, the laws passed require all employers to extend the same benefits to an employee's domestic partner as they would to an employee's spouse.⁹² These employer rights include (depending on the employer's policy for spouses) access to an employer's healthcare provider for domestic partners, a leave of absence upon the death of a partner, and/or sick leave to care for an injured or sick

can be framed as power rights) [<https://perma.cc/LYE8-LQ34>]; Adams, *supra* note 1 (stating that marriage is not essential to creating a stable family, and rather, non-traditional partners can create stable families with the help of domestic partnership laws).

86. See Adams, *supra* note 1 (exploring domestic partnerships as a method for unmarried partners to attain legal recognition and rights).

87. See NAT'L CTR. FOR LESBIAN RTS., *supra* note 5 (summarizing the jurisdictional requirements for domestic partnership statutes across the United States)

88. *Id.*

89. See CAL. FAM. CODE § 297 (West 2020).

90. Singer, *supra* note 11.

91. See CAMBRIDGE, MASS., MUN. CODE OF ORDINANCES ch. 2.119 (2021).

92. See CAL. FAM. CODE § 297 (West 2020).

partner.⁹³ The potential to access these rights and abilities could improve the financial situation of unmarried partners, and provide an unmarried partner with care and comfort upon grief, illness, and injury.

Aside from employer benefits, further protections upon the unexpected injury or death of a partner commonly included among domestic partnership statutes are medical visitation and decision-making rights,⁹⁴ the right to inherit property from a deceased partner,⁹⁵ and the right to sue on behalf of a deceased partner in an action for wrongful death.⁹⁶ These rights give an unmarried partner, who may be closer to their partner than members of their family who would receive these rights without a domestic partnership in place, the ability to make decisions that are best for their partner and ensure financial stability in case of a tragedy.

In terms of child custody and childcare, many domestic partnership statutes assume that after a domestic partnership has been terminated by death or dissolution, the former partner has no special legal right to custody or care of the child.⁹⁷ Cambridge's domestic partnership ordinance provides a domestic partner with access to the school records of their partner's children, access to personnel records regarding concerns about the child, and grants them the ability to remove the child from school in the event of an emergency or illness.⁹⁸ However, the ordinance specifies that after a partnership is terminated, so too are these rights.⁹⁹ Wisconsin's previous domestic partnership statute gave no mention to the rights of a domestic partner in regards to their partner's legal child, including any rights after the partnership has terminated.¹⁰⁰ However, California—characteristically broad in its scope of rights afforded to domestic partners—states that the rights of former or surviving partners are the same in regard to their partner's child as those of former or surviving spouses.¹⁰¹

93. *Id.*

94. *See, e.g.*, CAMBRIDGE, MASS., MUN. CODE OF ORDINANCES ch. 2.119 (2021) (granting medical visitation rights to domestic partners).

95. Singer, *supra* note 11.

96. *Id.*

97. *See, e.g.*, CAMBRIDGE, MASS. MUN. CODE OF ORDINANCES ch. 2.119 (2021) (omitting special rights or status to a child after the partnership has been terminated by separation or death).

98. *Id.*

99. *See id.*

100. *See* WIS. STAT. § 770 (2009).

101. *See* CAL. FAM. CODE § 297 (West 2020).

ii. Burdens Imposed on Registered Domestic Partners Range from Minimal to Extensive Depending on the Controlling Law

As the rights provided to domestic partners increase towards a resemblance of the rights granted to married couples, so too do the burdens imposed by a domestic partnership. While California gives the same rights to domestic partners as they do to married spouses, so too does the State impose the same responsibilities onto domestic partners as they do for spouses.¹⁰² In jurisdictions where the rights of domestic partners are less extensive than those of spouses, the burdens are also less extensive. For instance, domestic partners in Wisconsin do not have to go through divorce proceedings upon dissolution of a domestic partnership, and they are additionally not presumed to be responsible for their partner's debts.¹⁰³

B. Current Deficiencies in Domestic Partnership Law Raise Constitutional Questions and do not Align with the State's Duty to Protect Family Units

Unmarried partners have the right, grounded in a constitutional right to privacy, to choose not to marry. On its face, this statement is not controversial—after all, the State is hardly forcing couples down the aisle without their consent. The debate is instead to what extent a state's legislature or courts should be involved in unmarried partners' relationships. In not marrying, committed and long-term partners in many jurisdictions who feel that marriage is not an appropriate option for them are not afforded any rights based on their relationship.¹⁰⁴ The post-*Obergefell* response from states that do not have domestic partnership or similar systems in place seems to be, "Sorry, that's not the State's business. If you would like these rights, you can always make the choice to marry." This response raises constitutional concerns in certain contexts and further ignores the long-held governmental interest in "promoting stable and lasting family relationships."¹⁰⁵

i. Legal Debates Regarding the Extent to which the Constitutional Right to Privacy Protects the Right to Establish Domestic Partnerships

The right to privacy and freedom surrounding one's personal decisions about intimate relationships has driven Supreme Court

102. *Id.*

103. See Singer, *supra* note 11.

104. See, e.g., NAT'L CTR. FOR LESBIAN RTS., *supra* note 5.

105. See CAL. FAM. CODE § 297 (West 2020).

decisions expanding the right to marry, and the flowery prose within these cases frames the importance of personal choice in family decision-making in the context of choosing to marry.¹⁰⁶ The toppling of the right for unmarried couples to access employer and healthcare benefits raises an interesting constitutional question surrounding whether the right *not* to marry exists. Language from the Supreme Court could suggest that a right to make decisions pertaining to marriage without government interference extends to all decisions about marriage, such as the right to forgo it altogether.¹⁰⁷ The California Judges Association addressed this concern in the report preceding the passage of Senate Bill 30, which amended California's domestic partnership statute to allow for heterosexual couples to register as domestic partners:

In light of the U.S. Supreme Court ruling in 2015 to make marriage legal for all, it follows that domestic partnerships should be broadened as well. Whether two people decide to enter into a marriage or domestic partnership is a personal decision and one that should be available to all, no matter one's age or sexual orientation.¹⁰⁸

Despite debates on the right not to marry and recognition of this right as the driving force of Senate Bill 30, no court case to date has successfully established a constitutional right to enter a domestic partnership.¹⁰⁹ One constitutional hurdle to overcome is that most constitutional rights are "negative" rights, which prevent government interference into personal liberties and freedoms, whereas a right to establish domestic partnerships may be a positive right that entitles individuals to government benefits.¹¹⁰ This same argument was used by opponents of same-sex marriage as a constitutional right, including Justices Thomas and Roberts in their dissent in *Obergefell*, who argued that unlike privacy rights such as freedom of speech, which prevent the State from interfering in a citizen's personal choices, the right to marry instead is a right which requires the government to act to establish legal rights and duties.¹¹¹ In critique of this logic, author Gregg Strauss instead posits that the right to marry is better understood as a "power" right, not a positive right.¹¹² He explains that the right to marry is the right to

106. See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 666 (2015) ("[D]ecisions concerning marriage are among the most intimate that an individual can make.").

107. *Id.*

108. S. JUDICIARY COMM., REPORT ON DOMESTIC PARTNERSHIP: PERSONS UNDER 62 YEARS OF AGE, S.B. 30, 2019 Leg., Reg. Sess., at 3 (Cal. 2019).

109. Matsumura, *supra* note 11, at 1512.

110. *Id.* at 1529; Strauss, *supra* note 85 (comparing negative rights such as the right to freedom of speech and religion to the right to marry).

111. Strauss, *supra* note 85, at 1692-93 (citing *Obergefell v. Hodges*, 576 U.S. 644 (2015) (Roberts, J., dissenting)).

112. *Id.* at 1694.

establish a legal relationship with its associated obligations and benefits without state interference, and that this right is grounded in the Constitution's commitment to equal liberty.¹¹³ Though only applied to marriage in his article, this reasoning could be used to establish the right for unmarried partners to establish a domestic partnership.

Current legal debates over whether the right to establish domestic partnerships is grounded in the Constitution also address situations in which domestic partnership status is retracted in a jurisdiction. Author Kaiponanea T. Matsumura points out that the denial of rights previously available under a domestic partnership law could coerce a couple into marriage.¹¹⁴ This is especially true where a couple loses rights after a domestic partnership system is terminated in a state (which occurred in Arizona) or where a state automatically converts a domestic partnership or civil union into a marriage unless the couple opts out and loses previous benefits (which occurred in Washington).¹¹⁵ Matsumura argues that, because the decision not to marry involves constitutional issues of privacy and choice, state infringements to this choice, such as the Washington approach of converting civil unions into marriages without the partners' participation, infringe on partners' Fourteenth Amendment rights.¹¹⁶ In this context, the right implicated by potential plaintiffs is a negative right—opposing state interference in their previously established legal relationship—rather than the “power” right discussed by Strauss. Because of the more established precedent regarding protection of negative rights, unmarried partners whose previously attained benefits have been taken away in their jurisdiction have a distinct and potentially more successful constitutional claim.¹¹⁷

The constitutional law surrounding the rights of unmarried partners to enter a domestic partnership and the legality of retracting domestic partner benefits that were previously established have not been successfully established in the courts, and whether these rights exist is still being analyzed by legal scholars.¹¹⁸ There are potential policy bases for establishing a system of domestic partnership law in the United States beyond unresolved but valid constitutional concerns, the most promising of which is the State's continued interest in promoting stable family relationships.

113. *Id.* at 1695.

114. Matsumura, *supra* note 11, at 1547.

115. *Id.* at 1521–22.

116. *Id.* at 1547.

117. *Id.* (“These conversions threaten the values of autonomy and stability and therefore present a strong case for the application of a right not to marry.”).

118. *See id.*; Strauss, *supra* note 85 (arguing that there is a limited right to not marry and that there is a positive right to marry, respectively).

ii. Establishing a Means for Legal Protection for Unmarried Partners Furthers the State's Interest in Protecting and Maintaining Stable Family Relationships

Every day, state and federal courts protect the rights of family units. In countless judicial decisions, including those involving the right to marry, this country reaffirms its continued compelling interest in guarding the legal rights of children and family units.¹¹⁹ For instance, one of the policy bases cited in *Obergefell v. Hodges* was that legal marriage “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”¹²⁰ Courts most often frame this interest in the context of marriage, even when judging cases of property division and parental rights at the end of a long-term non-marital relationship.¹²¹ Author Albertina Antognini analyzed case law pertaining to unmarried partners and concluded that courts judge the rights of unmarried partners based on the extent to which their relationship resembles a marriage.¹²² However, the State could promote stable family relationships through the use of domestic partnership statutes and ordinances, if only they are willing to recognize that stable family relationships have the potential to exist outside of marriage.¹²³

Despite the shift towards a variety of non-traditional family models, studies suggest that children living in “stable” family environments (defined as living with two married parents) go on to attain higher levels of education and career success than their peers who grew up in “unstable” families.¹²⁴ Organizations which support conservative family values have interpreted this data to mean that cohabitation is bad for children’s development, with the Institute for American Values claiming in a study that “[c]hildren are less likely to thrive in cohabiting

119. This is a rather broad proposition. See MINN. STAT. § 518.17 (2022), for a concrete example of the State’s interest in the “best interests of the child” and the rights afforded to married couples during and after a marriage. See also Adams, *supra* note 1, at 234 (noting that legal marriage creates 1,138 legal rights and responsibilities under federal law). This impacts family law legislation. See, e.g., CAL. FAM. CODE § 297 (“This act is intended to . . . further the state’s interests in promoting stable and lasting family relationships . . .”).

120. *Obergefell v. Hodges*, 576 U.S. 644, 667 (2015).

121. See Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1 (2017); Courtney M. Cahill, *Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 ARIZ. L. REV. 43 (2012).

122. Antognini, *supra* note 121, at 6.

123. Indeed, courts have called for legislative attempts to update law governing cohabitants. See, UNIF. COHABITANTS’ ECON. REMEDIES ACT (UNIF. L. COMM’N 2021) (citing *Blumenthal v. Brewer*, 69 N.E.3d 834, 838 (Ill. 2016)) (“Significantly, the [Illinois] court suggested that the appropriate source for change was the state legislature, not the courts.”).

124. Adams, *supra* note 1, at 243–44 (citing INST. FOR AM. VALUES, WHY MARRIAGE MATTERS, THIRTY CONCLUSIONS FROM THE SOCIAL SCIENCES (3d. ed. 2011)).

households, compared to intact, married families.”¹²⁵ Later, the National Marriage Project put out a press release based on this study.¹²⁶ Though the study acknowledges that marriage rates have fallen in lower income communities and that economic factors are linked to educational attainment,¹²⁷ the National Marriage Project claims that traditional marriage can benefit these communities by rebuilding family stability and characterizes the “intact, biological, married family” as the “gold standard” for family life.¹²⁸

This interpretation of the data surrounding educational attainment and career success is explicitly suggested for use by legislatures and courts to justify their support of marriage and/or the exclusion of unmarried couples and their families.¹²⁹ However, the relationship between the marital status of parents and the future success of children may be one of correlation, not causation. Because individuals who are part of a lower economic class or have less educational attainment are less likely to marry, the lesser economic security of the cohabitating couple may be the cause of both their choice not to marry as well as the lower levels of achievement their children experience.¹³⁰ In fact, the study conducted by the Institute for American Values makes several conclusions about the wellbeing of children who grow up with unmarried parents that could be better explained by lower socioeconomic status, such as these children being more likely to engage in criminal behavior, try drugs, or have children as teenagers.¹³¹ In suggesting marriage as a solution for lower class communities, the authors of the study merely report statistics about the happiness, health, and economic security outcomes of married couples as opposed to analyzing the reasons why partners choose not to marry or the legal benefits enjoyed by married partners.¹³²

As cohabitation itself is likely not the cause of family instability, the State should promulgate policies which strive to improve family stability outside of merely promoting marriage as the solution to a family’s problems. Giving legal benefits to unmarried partners through a domestic partnership status is a way to increase economic stability by ensuring

125. INST. FOR AM. VALUES, *WHY MARRIAGE MATTERS, THIRTY CONCLUSIONS FROM THE SOCIAL SCIENCES* 7 (3d. ed. 2011) [<https://perma.cc/K2QH-QD7J>].

126. Press Release, Nat’l Marriage Project, *New NMP Report: Cohabitation Eclipses Divorce as Key Risk Factor for Children in America* (Aug. 16, 2011).

127. INST. FOR AM. VALUES, *supra* note 125, at 23–27.

128. Press Release, Nat’l Marriage Project, *supra* note 126.

129. INST. FOR AM. VALUES, *supra* note 125, at 7, 20.

130. *See* CARBONE & CAHN, *supra* note 1, at 83–84.

131. INST. FOR AM. VALUES, *supra* note 125, at 16–17, 30, 37–38.

132. *See id.* (briefly mentioning, but failing to analyze, the effect of socioeconomic factors on both marriage rates and health outcomes for children).

that unmarried partners can receive employment benefits and inheritance rights.¹³³ Domestic partnership also increases family stability outside of economic factors, such as by providing hospital and prison visitation rights, guaranteed leave of absence to care for an ailing partner, and the right to be involved in the education and medical care of a partner's children.¹³⁴ A domestic partnership can improve these non-economic factors of family stability without requiring partners to risk the financial burdens associated with marriage.

C. Ideal Domestic Partnership Law for Today's Unmarried Partners

Domestic partnership laws should be created in jurisdictions where none exist and bolstered in jurisdictions with existing domestic partnership systems to protect the rights of unmarried partners. Laws should be made more uniform to address the issue of the wide variation in domestic partnership law across jurisdictions. Unmarried partners have their own unique situations and reasons as to why marriage is not an appropriate choice for them, so the requirements for entering a domestic partnership should not exclude anyone based on sexual orientation. Further, the law should not require a partner's relationship to resemble a marriage to enter a domestic partnership. Finally, domestic partnership law should ideally establish limited rights and responsibilities for partners as compared to marriage.

i. The Need for Uniformity in Domestic Partnership Statutes Across the United States

The current variation of domestic partnership law across jurisdictions makes life difficult for unmarried partners who wish to move. For example, domestic partners in California—a state which establishes all of the legal rights and obligations of legal marriage for domestic partners—would lose all of these rights upon moving to Alabama, a state which does not provide for domestic partnerships.¹³⁵ Even if partners moved to another state with a domestic partnership system, the state law likely would have different requirements, rights, and responsibilities.¹³⁶ This variation creates confusion for partners who

133. FINDLAW, *supra* note 38; *see, e.g.*, CAMBRIDGE, MASS., MUN. CODE OF ORDINANCES ch. 2.119 (2021) (providing employment benefits to domestic partners).

134. *See, e.g.*, CAMBRIDGE, MASS., MUN. CODE OF ORDINANCES ch. 2.119 (2021) (providing non-economic benefits to domestic partners like hospital visitation rights, correctional facility visitation rights, and rights regarding the education of a partner's children).

135. *See* AM. COLL. OF TRUST & EST. COUNS., DOMESTIC PARTNERSHIP SURVEY 1 (William P. LaPiana ed. 2012), <https://www.actec.org/assets/1/6/LaPiana-Domestic-Partnership-Chart.pdf?hssc=1> [<https://perma.cc/N7WL-4MLM>].

136. *See, e.g., id.* (surveying jurisdictional requirements and rights across states).

have established or are considering entering into a domestic partnership.¹³⁷

One potential solution to remedy the legal system's inconsistent treatment of unmarried partners is the Uniform Law Commission's proposed legislation, UCERA.¹³⁸ Though UCERA is helpful for cohabitants who have separated, it is an imperfect solution—or at least only a small part of the whole solution—to the question of the legal treatment of unmarried partners under the law as a whole. Even if UCERA were passed in all jurisdictions, it would not be a sufficient replacement for a potential universal domestic partnership law. Because UCERA does not govern domestic partnerships, it does not include any rights to make medical decisions on behalf of a partner, visitation at a hospital or prison, or standing to sue for wrongful death of a partner.¹³⁹ Contract-based claims and claims for equitable relief are more accessible under UCERA, so economic benefits could be easier to attain after a partnership ends.¹⁴⁰ However, this economic relief would only occur upon a dispute between the cohabitants or upon the termination of the relationship, so partners are placed in a win-or-lose scenario to obtain relief.¹⁴¹ Providing economic benefits to partners during the course of a partnership through access to employer healthcare is not included in UCERA. Though UCERA is not contrary to the goals of unmarried partners in the United States, an additional act should be passed which establishes an opt-in status to enable unmarried partners to gain affirmative rights during the course of a partnership.

To ensure that domestic partners and their families can move across state lines without losing the rights granted to them in their original jurisdiction, each state should have domestic partnership laws; these laws should convey a uniform set of regulations for the requirements of domestic partners. This uniform regulation could be achieved through promulgation of a uniform domestic partnership code similar to UCERA by an organization such as the American Law Institute, American Bar Association, or Uniform Law Commission. This hypothetical Uniform Domestic Partnership Act (UDPA) should aim to

137. See Adams, *supra* note 1, at 236.

138. See *supra* Section II.C.v (setting out the purposes of UCERA).

139. UNIF. COHABITANTS' ECON. REMEDIES ACT § 3 (UNIF. L. COMM'N 2021) ("This [act] applies only to a contractual or equitable claim between cohabitants concerning an interest, promise, or obligation arising from contributions to the relationship.").

140. See *id.* § 4(a) ("An individual who is or was a cohabitant may commence an action on a contractual or equitable claim that arises out of contributions to the relationship.").

141. See *id.* § 6(c) ("A claim for breach of a cohabitants' agreement accrues on breach and may be commenced . . . during cohabitation or after termination of cohabitation."); *id.* § 7(b) ("An equitable claim based on contributions to the relationship accrues on termination of cohabitation[.]").

create an opt-in status for unmarried partners. This status could award certain rights and duties that would support family stability for a wide range of marriage-averse partners. Achieving this ultimate goal would be a lengthy process, likely requiring years of activism to push uniform law organizations to research and draft a uniform code.¹⁴² The specific definitional elements, rights, and duties imposed by this hypothetical UDPA legislation are discussed in the following Sections.

ii. Requirements for Entering into a Domestic Partnership Under Hypothetical Uniform Legislation

Due to the variety of partners who may benefit from domestic partnership laws, the requirements for entering a domestic partnership should be broad. Current domestic partnership laws tend to require that domestic partners resemble a married couple. For example, some jurisdictions require that partners be “in a relationship of mutual support, caring and commitment and intend to remain in such a relationship;” “reside together;” be “each other’s sole domestic partner;” and “consider themselves to be a family.”¹⁴³ However, jurisdictions such as California have removed requirements that domestic partners must live together and be responsible for one another’s basic living expenses.¹⁴⁴ This signals a shift to a more expansive view of what domestic partnerships in the state look like.¹⁴⁵

UCERA’s definition of unmarried cohabitants provides guidance on how to establish an inclusive definition for domestic partners. The Act defines unmarried cohabitants as “two individuals not married to each other who live together as a couple after each has reached the age of majority or been emancipated.”¹⁴⁶ Individuals who are too closely related to legally enter a marriage in their jurisdiction are excluded from this definition.¹⁴⁷ Though the phrase “who live together as a couple” is concerning given the variety of living situations unmarried partners may find themselves in, UCERA clarifies that this phrase is not meant to

142. *Frequently Asked Questions*, UNIF. L. COMM’N, <https://www.uniformlaws.org/aboutulc/faq> [<https://perma.cc/TQ9D-DWS5>] (describing the process of drafting a uniform code).

143. CAMBRIDGE, MASS., MUN. CODE OF ORDINANCES ch. 2.119 (2021).

144. The California Domestic Partner Rights And Responsibilities Act of 2003, A.B. 205, 2003 Leg. Reg. Sess., (Cal. 2005) (repealing the requirements that domestic partners must share a residence and be responsible for each other’s basic finances).

145. See CAL. FAM. CODE § 297 (West 2020) (defining domestic partners as “two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring”).

146. UNIF. COHABITANTS’ ECON. REMEDIES ACT § 2(1) (UNIF. L. COMM’N 2021).

147. *Id.*

require unmarried cohabitants to share a common residence.¹⁴⁸ Instead, whether potential claimants meet this definition “is a factual question that will be determined based on the unique circumstances of the cohabitants’ relationship.”¹⁴⁹ Further, living together as a couple under UCERA does not require that the cohabitants have a sexual relationship, and two individuals can qualify as cohabitants even if one or both are married to another individual.¹⁵⁰

UCERA’s definition—although helpful in most regards for establishing a definition for domestic partners under the hypothetical UDPA—has two flaws which should be changed for UDPA. First, UCERA does not apply to more than two cohabitants.¹⁵¹ Under UDPA, more than two partners should be able to opt into a domestic partnership status as to not exclude polyamorous partners.¹⁵² Second, the fact-based determination of the phrase “who live together as a couple”—though better than a strict requirement that the partners share a common residence—could allow the judicial trend of determining the validity of a non-marital relationship through its comparison to an ideal of marriage to continue.¹⁵³

The ideal definition of domestic partners under the hypothetical UDPA should not implicitly draw comparisons with marriage. Instead, the only definitional requirements should be that the partners are at or above the age of majority, are not related in a way that would bar them from entering a marriage, and that all partners agree to the rights and duties they would undertake by entering a domestic partnership. Intentionally left out of this definition is any requirement that the partners share a common residence or are financially responsible for each other’s living expenses, as well as any requirement having to do with the nature of the relationship between the partners (except the requirement that the relationship is not familial). Though ideally domestic partners should share a deep connection regardless of romantic or sexual attraction and be committed to the wellbeing of their partner, leaving these vague, fact-based requirements out of the definition of domestic partners prevents judicial actors from judging a relationship against the standards of an ideal of marriage. Finally, this definition should not exclude partners

148. *Id.* § 2(1) cmt.

149. *Id.*

150. *Id.*

151. *Id.* § 2 (“‘Cohabitant’ means each of *two* individuals”) (emphasis added).

152. See discussion *supra* Section I.C.iv.

153. See Antognini, *supra* note 121, at 10–11, 59–60 (explaining how courts may revert to the traditional form of marriage and noting the prevalence of judges making decisions on non-marital relationships based on factors like sexual relations, domestic work, or sharing the same residence).

based on gender composition or the number of partners who wish to opt-in.

This proposed definition of domestic partners, which does not include requirements based on the financial or living situations of the partners or the nature of their relationship, is ideal for many unmarried partners today. Financial concerns are a prevailing reason that unmarried couples choose not to marry, so requiring domestic partners to be responsible for housing and living expenses for one another makes a domestic partnership an equally risky choice for these partners.¹⁵⁴ Domestic partnerships should also be available to the wide variety of unconventional partnerships that exist in the United States, including partners of all gender identities and partners whose bond does not include a romantic or sexual relationship.¹⁵⁵ Eliminating restrictions on domestic partnership law that exclude polyamorous partnerships would continue the legacy of domestic partnership as a system outside of marriage in which queer partnerships can be validated and thrive.¹⁵⁶ Providing domestic partnerships only to same-sex couples ignores both the practical benefits of domestic partnerships for all unmarried partners and the reality that opposite-sex couples could morally oppose marriage for the same reasons as same-sex couples.¹⁵⁷

The few restrictions on the hypothetical UDPA's definition of domestic partners—that the partners have reached the age of majority, are not married to one another, and are not too closely related to prevent them from being married in the state where they reside—are put in place for practical reasons. Requiring partners to have reached the age of majority follows from the near universal legal premise that minors are incompetent to enter into a contract or legal relationship.¹⁵⁸ Next,

154. See CARBONE & CAHN, *supra* note 1 (exploring how economic concerns explain changing marriage patterns).

155. See Adams, *supra* note 1, at 248 (“Partnerships should not be limited to couples that cannot marry, but instead, should include any two committed people who will take responsibility for one another.”).

156. See *id.* at 239–40 (“While shut out of the institution of marriage, creativity flourished in the gay community, inspiring the rest of our society with examples of more than two individuals living together as a family Gay couples, as well as straight couples . . . created polyamorous triads of three partners.”); see also FINDLAW, *supra* note 38 (describing how the Harvard Law School LGBTQ+ Advocacy Clinic and Chosen Family Law Center partnered with mental health professionals and lawyers to create the Polyamory Legal Advocacy Coalition, which drafted and passed a domestic partnership ordinance aimed at recognizing and protecting polyamorous families and relationships).

157. See Adams, *supra* note 1, at 239–41 (describing the benefits of domestic partnership law for partners regardless of sexual orientation and detailing a number of reasons as to why partners, regardless of sexual orientation, may oppose marriage).

158. See, e.g., Cheryl B. Preston & Brandon T. Crowther, *Infancy Doctrine Inquiries*, 52 SANTA CLARA L. REV. 48 (2012) (providing a summary of the infancy doctrine under common law, the rationale underlying the doctrine, and the jurisprudential development of the doctrine).

prohibiting domestic partners from being legally married to one another is a practical matter based on the rights and duties imposed on married couples. Entering into a domestic partnership while already married would provide neither additional rights nor protections that marriage did not already provide, and requiring that domestic partners not be married would prevent legal disputes over what legislation and precedent would govern a potential dispute in court over the relationship.

Though the first two requirements are straightforward and do not contradict commonly held viewpoints about domestic partnership law, the third—that domestic partners cannot have a familial relationship that would prevent them from entering a marriage—is slightly more controversial. The existing domestic partnership laws surveyed for this Article contain the requirement that domestic partners cannot have a close familial relation.¹⁵⁹ However, the Polyamory Legal Advocacy Coalition calls for the legal protection of non-nuclear families, including “single parents supported by relatives” and “multi-generational families.”¹⁶⁰ Though legal protections for non-traditional household structures which include relatives should be explored through further scholarship, the hypothetical UDPA bars family members from entering into domestic partnerships to attempt to prevent the common argument that these laws are liable to be applied too broadly.¹⁶¹

iii. Balancing the Legal Rights and Duties of Domestic Partners

To best serve unmarried partners who nevertheless wish to enter a legal commitment, domestic partnership laws should serve as a middle ground between the legal rights and duties imposed on married couples and the absence of legal rights and duties imposed upon individuals in a non-marital relationship. Just as domestic partnership law should not require partners to have a relationship that resembles traditional marriage to enter a domestic partnership, it should not impose the same rights and responsibilities as marriage. Domestic partnership laws that impose on cohabitants the same rights and responsibilities as marriage—such as California’s—are impractical for the post-*Obergefell* era, where all

159. See, e.g., CAL. FAM. CODE § 297(b)(2) (West 2020) (“The two persons are not related by blood in a way that would prevent them from being married to each other in this state.”); WIS. STAT. § 770.05(4) (2018) (“The 2 individuals are not nearer of kin to each other than 2nd cousins, whether of the whole or half blood or by adoption.”); WASH. REV. CODE § 26.60.030(5)(a) (“The persons are not nearer of kin to each other than second cousins, whether of the whole or half blood computing by the rules of the civil law[.]”).

160. FINDLAW, *supra* note 38.

161. See, e.g., James M. Donovan, *An Ethical Argument to Restrict Domestic Partnerships to Same-Sex Couples*, 8 L. & SEXUALITY 649, 650 (recounting arguments against domestic partnership bills on the grounds that they are too “expansive” and broadly extend benefits).

partners who are prepared to take on these responsibilities have the choice to marry.¹⁶²

The hypothetical UDPA would ideally include medical decision-making power, visitation rights for hospitals and prisons, the right to sue for wrongful death of a domestic partner, and rights to register with a domestic partner's child's school to receive educational information about the child and remove the child from school in case of emergency or illness.¹⁶³ Rights to employer benefits given to the spouses of employees are slightly more complicated. A system like California's—in which all domestic partners have the same eligibility for their partner's employer healthcare policies as a legal spouse—promotes financial and familial stability, but it may strain small employers and create legal disputes based upon organizational beliefs or religious affiliations.¹⁶⁴ Following Wisconsin's approach to domestic partnerships before the registration closed in 2018, UDPA should include rights to join a domestic partner's state employer healthcare plan and encourage, but not require, private companies to extend similar benefits to the domestic partners of employees as they do for spouses.¹⁶⁵

As stated in the definition of domestic partners under UDPA, domestic partners are not required to be responsible for each other's living expenses.¹⁶⁶ The low responsibility that domestic partners have for each other's finances is proportional to the financial benefits they could receive under UDPA. Not included in UDPA is the ability to jointly file taxes, to inherit from a deceased partner, or to benefit from support payments after separation akin to spousal support that can be received after a divorce. For the two-thirds of unmarried cohabitants that cite financial concerns as a reason for delaying or forgoing marriage,¹⁶⁷ a system in which there is no potential for financial liability to a previous domestic partner assuages the fear that by gaining certain rights and benefits from a domestic partnership, one is in danger of incurring a

162. See CAL. FAM. CODE § 297 (West 2020) (imposing on cohabitants the same rights and responsibilities as marriage).

163. See, e.g., CAMBRIDGE, MASS., MUN. CODE OF ORDINANCES ch. 2.119 (2021).

164. See, e.g., Nejaime, *supra* note 28, at 119 (providing a historical account of how politicians' concerns about the potential cost of domestic partnership and its impact on businesses prevented initial attempts at passing domestic partnership legislation in Los Angeles); *Religious Groups Weigh in on Domestic Partner Benefits Idea*, MYSA NEWS (Aug. 29, 2011) https://www.mysanantonio.com/news/local_news/article/Religious-groups-weigh-in-on-domestic-partner-2146537.php [<https://perma.cc/E9KF-H2F4>] (describing how a religious coalition opposed an initiative to extend benefits to the domestic partners of city employees).

165. WIS. STAT. § 40.51(2m)(a) (2016) (amended 2022).

166. See discussion *supra* Section III.C.ii.

167. Horowitz et al., *supra* note 2.

financial burden in the future.¹⁶⁸ Not including claims for support payment from an ex-domestic partner, though preventing financial resources for one partner, protects the other partner from financial burdens they did not wish to take on. Similarly, though a lack of inheritance rights to a deceased domestic partner is a potential hurdle to financial stability after losing one's partner, the exclusion of inheritance rights also prevents a partner from inheriting the debt of their deceased partner.¹⁶⁹ The exclusion of these financial benefits for domestic partners is further warranted because if domestic partners were to receive all possible financial benefits with none of the risks or burdens—like inheriting a deceased partner's assets but not their debt—domestic partners would be receiving preferential treatment under the law as compared to married spouses or those with no legal relationship-based status.

Upon termination of a domestic partnership—either through separation of the partners or death to one of the partners—domestic partners would have little responsibility to the other partner. However, they would also have few options to recover from an ex-partner. Since the proposed UDPA does not include any right to financial support of an ex-partner, any claims between the partners would be brought in court under common law principles (or UCERA, if it were to be passed in the jurisdiction where the partners reside). The only right to bring a claim that would be affected by UDPA is the right to sue on behalf of oneself and the estate of a deceased partner in a claim for wrongful death. Following dissolution of a domestic partnership, any remaining rights, such as the right to state employer healthcare plans and rights to visit children of a domestic partner in medical settings or access school and medical records, should be terminated.

The proposed UDPA would almost certainly be opposed by some on the grounds that too many people would be able to opt into domestic partnership status, even despite restrictions on family members entering into a domestic partnership. Lawmakers may worry that roommates or friends with no intention to care and support each other long term will use the system to gain financial benefit such as access to insurance. However, the proposed rights gained for domestic partners under UDPA are not primarily related to finances of the partners and instead aim to promote partner and familial stability through non-monetary means. Nonetheless, it is true that under UDPA, two people with no intention of

168. Matsumura, *supra* note 11, at 1515.

169. *Id.* (citing Steve Branton, *After Gay Marriage Ruling, What Financial Steps Should Couples Take?*, CHRISTIAN SCI. MONITOR (July 3, 2015), <http://www.csmonitor.com/Business/Saving-Money/2015/0703/After-gay-marriage-ruling-what-financial-steps-should-couples-take> [<https://perma.cc/MWH4-DLGA>]).

maintaining a long-term relationship of care and commitment may enter a domestic partnership; through this status, one partner could gain access to another partner's state employer healthcare plan. Though this does not comport with the spirit of domestic partnership law, it is important to note that the intentions of a couple entering legal marriage are not closely analyzed and criticized by lawmakers.¹⁷⁰ The risk of individuals entering a domestic partnership with impure intentions is outweighed by the need to create a system without implicit comparisons to marriage and which does not impose more scrutiny on domestic partners than it does on married couples.

Conclusion

Domestic partnership law in the United States is in a state of flux. Laws vary between states and even cities, and jurisdictions with domestic partnership laws have taken different approaches on how to treat domestic partnerships after the legalization of same-sex marriage.¹⁷¹ Additionally, the restrictions on who can enter a domestic partnership as well as the burdens imposed by the law in many jurisdictions are impractical and provide little benefit for many of today's unmarried couples.¹⁷² For unmarried partners post-*Obergefell*, such as Sarah and Jess, and Nick and Amanda—discussed in the Introduction to this Article—an accessible domestic partnership system which establishes some legal rights to partners without imposing the same practical duties as a marriage would improve familial stability and provide rights essential to a partnered life. However, current domestic partnership law must be reformed and made uniform in all states to ensure that it can benefit all unmarried partners who may wish to become domestic partners.

170. Adams, *supra* note 1, at 246.

171. See NAT'L CTR. FOR LESBIAN RTS., *supra* note 5.

172. See *supra* Part III (describing how definitional requirements and financial ramifications of domestic partnership status can be improved to increase accessibility of domestic partnership law through new legislation).