NEW JERSEY DOMESTIC PARTNERSHIP ACT IN THE AFTERMATH OF *LEWIS V. HARRIS*: SHOULD NEW JERSEY EXPAND THE ACT TO INCLUDE ALL UNMARRIED COHABITANTS?

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Les concubins se passent de la loi, la loi se désintéresse d'eux.[1]

I. INTRODUCTION

Napoleon's pronouncement regarding the law's disregard for unmarried cohabitants may have genuinely reflected the social, legal, and moral significance of marriage in early nineteenth-century France.[2] However, this statement no longer provides an accurate representation of the legal status of unmarried cohabitants. In more recent times, judicial systems in the United States and abroad have struggled with legal concerns of protection and equality arising from the cohabitation of unmarried individuals involved in committed relationships.[3] The number of unmarried cohabitants in the United States has risen significantly in the past few decades,[4] and, for the first time ever, married couples now account for slightly less than

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1. Rainer Frank, *The Status of Cohabitation in the Legal Systems of West Germany and Other West European Countries*, 33 AM. J. COMP. L. 185, 188 (1985) (quoting Napoleon's proclamation that because cohabitants put themselves outside of the law, the law is not concerned with them).

2. *See* David Bradley, *Regulation of Unmarried Cohabitation in West-European Jurisdictions—Determinants Of Legal Policy*, 15 INT'L J.L. POL'Y & FAM. 22, 22 (2001).

3. For a historical discussion of international approaches to the legal issues of cohabitation without marriage, see MICHAEL D. A. FREEMAN & CHRISTINA M. LYON, COHABITATION WITHOUT MARRIAGE, AN ESSAY IN LAW AND SOCIAL POLICY 117-41 (1983).

4. Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J.L. & FAM. STUD. 135, 178 (2005); Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435, 1435 (2001).

half of American households.[5] Yet, despite the increase of nonmarital cohabitation, marriage continues to be a privileged and preferred status. Moreover, "a distinction between marriage and cohabitation is maintained everywhere, with marriage being accorded a central position in family law."[6] Although a number of states have attempted to provide some needed protections to unmarried cohabitants, especially in areas of property law, the vast majority of states have traditionally denied such couples most of the rights and privileges associated with the institution of marriage.[7] Nevertheless, "the shift from marriage as the almost universal living arrangement to unmarried cohabitation has instigated both statutory and judicial solutions of various kinds [and] . . . [a] variety of mechanisms for recognizing unmarried cohabitants' relationships have been proposed and implemented in the United States."[8]

One mechanism adopted by states to provide some marital-like rights and benefits to unmarried cohabitants is the "domestic partnership" scheme.[9] Domestic partnership laws "provide a sense of equality and recognition for loving, committed relationships between couples who cannot, or will not, marry."[10] A majority of domestic partnership schemes adopted by states have resulted not only from the steady increase in unmarried cohabitation, but, more importantly, from the wider social recognition of nontraditional family structures.[11] Moreover, the implementation of such statutory schemes has been fueled by the urgent need to address the lack of equal rights and benefits available for same-sex couples prohibited from entering into a legally recognizable marriage.[12]

Domestic partnership schemes are far from perfect. Most of these schemes, if not all, fall short of providing alternative means of protection to the vast majority of unmarried cohabitants,[13] or from

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5. Sam Roberts, *It's Official: To Be Married Means to Be Outnumbered*, N.Y. TIMES, Oct. 15, 2006, at A22. In 2000, married couples represented fifty-two percent of American households; however, that number declined to 49.7% by 2005. *Id.* Additionally, the number of self-recognized, unmarried opposite-sex couples increased by fourteen percent during the five-year period. *Id.*

6. YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES 40 (2002).

7. *Id.* at 39-40.

8. *Id.* at 191.

9. Terry S. Kogan, *Competing Approaches to Same-Sex Versus Opposite-Sex, Unmarried Couples in Domestic Partnership Laws and Ordinances*, 2001 BYU L. REV. 1023, 1023-25.

10. Heidi Eischen, *For Better or Worse: An Analysis of Recent Challenges to Domestic Partner Benefits Legislation*, 31 U. TOL. L. REV. 527, 529 (2000).

11. *See* Kogan, *supra* note 9, at 1025.

12. *Id.*

13. While extending domestic partnership benefits to same-sex couples and opposite-sex couples over the age of sixty-two, New Jersey and California do not

providing sufficient equality to same-sex couples as a marriage substitute.[14] For example, even with the passing of the New Jersey Domestic Partnership Act,[15] same-sex couples did not receive the same panoply of rights and benefits available to married couples in New Jersey,[16] including, but not limited to, the ability to own property as tenants by the entirety,[17] workers' compensation survivorship benefits,[18] spousal privilege in a criminal action,[19] tax deductions for medical expenses of a spouse,[20] and higher education tuition assistance for children and spouses of volunteer firefighters.[21] The New Jersey Supreme Court determined that the Domestic Partnership Act was wholly inadequate because the then-current statutory scheme did not provide the same rights and benefits to same-sex couples as enjoyed by heterosexual married couples, thus violating the equal protection guarantee of the New Jersey Constitution.[22] The court further mandated that the legislature had one hundred and eighty days to "either amend the marriage statutes or enact an appropriate statutory structure" providing same-sex couples the ability to acquire the same rights, benefits, burdens, and obligations as their married heterosexual counterparts.[23]

In response to the New Jersey Supreme Court's directive in *Lewis v. Harris*, the state legislature passed, and Governor Jon S. Corzine signed, a bill into law in December 2006 establishing civil unions for same-sex couples.[24] The law came into effect on February 19, 2007 and raises questions about the future of domestic partnerships in New Jersey.[25] For example, once civil unions became available for same-sex couples, only couples over the age of sixty-two

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provide similar statutory benefits to unmarried cohabitants under the age of sixty-two. *See* N.J. STAT. ANN. § 26:8A-4 (West 2006); CAL. FAM. CODE § 297(5)(B) (West 2006).

14. In October 2006, the New Jersey Supreme Court determined that New Jersey's Domestic Partnership Act "failed to bridge the inequality gap between committed same-sex couples and married opposite-sex couples." Lewis v. Harris, 908 A.2d 196, 215 (N.J. 2006).

15. N.J. STAT. ANN. § 26:8A.

16. *Lewis*, 908 A.2d at 215-17.

17. *See* N.J. STAT. ANN. § 46:3-17.5.

18. *See id.* § 34:15-13.

19. *See id.* § 2A:84A-17(2).

20. *See id.* § 54A:3-3(a).

21. *See id.* § 18A:71-78.1.

22. Lewis v. Harris, 908 A.2d 196, 224 (N.J. 2006).

23. *Id.*

24. *See Governor Signs Law Creating Civil Union for Same-Sex Couples*, CHI. TRIB., Dec. 22, 2006, at C10; *see also* Assemb. B. 3787, 212th Leg., 1st Sess. (N.J. 2006).

25. *See* N.J. STAT. ANN. § 26:8A-4.1 (West Supp. 2007) ("Limitation on domestic partnerships on or after February 19, 2007; effect of law establishing civil unions.").

could enter into domestic partnerships in New Jersey.[26] Moreover, the legislature established the New Jersey Civil Union Review Commission to study all aspects of the newly enacted civil unions law, including a review of the Domestic Partnership Act and a recommendation as to whether it should be repealed.[27]

While the future of New Jersey's Domestic Partnership Act is currently unknown, this Note examines the scope of the Domestic Partnership Act as well as other alternatives aimed at creating a recognizable legal status for unmarried cohabitants. Furthermore, this Note analyzes whether the New Jersey Domestic Partnership Act should be repealed as inferior law after the legislature's response to the *Lewis v. Harris* decision, or whether the Domestic Partnership Act should be modified and extended as a source of legally recognizable status, creating some contractually based martial-like benefits to all unmarried or "un-unionized" cohabitating couples regardless of age or sexual orientation.

II. BACKGROUND

A. Varying Approaches: The Legal Status of Unmarried, Cohabitating Couples in the United States and Abroad

1. Domestic Approaches

A growing number of states and municipalities have adopted statutory mechanisms providing some form of legal recognition and protection to unmarried cohabitants.[28] These statutory schemes vary

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26. *Id.* ("On or after the effective date of [the civil unions] act, no domestic partnerships shall be registered under P.L.2003, c. 246 (C.26:8A-1 et seq.), except that two persons who are each 62 years of age or older may establish a domestic partnership pursuant to the provisions of P.L.2003, c. 246 (C.26:8A-1 et al.).").

27. N.J. STAT. ANN. § 37:1-36c(7). As of February 2008, the New Jersey Civil Union Review Commission had not yet reviewed or made any recommendations as to the Domestic Partnership Act. *See* N.J. CIV. UNION REV. COMM'N, FIRST INTERIM REPORT OF THE NEW JERSEY CIVIL UNION REVIEW COMMISSION 3-4 (2008), *available at* http://www.state.nj.us/oag/dcr/downloads/1st-InterimReport-CURC.pdf.

28. *See, e.g.*, CAL. FAM. CODE § 297 (West 2006) (domestic partnerships); CONN. GEN. STAT. §§ 46b-38aa to -38pp (2007) (civil unions); HAW. REV. STAT. ANN. §§ 572C-1 to -7 (LexisNexis 2005) (reciprocal beneficiaries); ME. REV. STAT. ANN. tit. 22, § 2710 (2006) (domestic partner registry); N.J. STAT. ANN. § 26:8A-4.1 (domestic partner status for couples over age sixty-two); *id.* § 37:1-28 (civil unions for same-sex couples); R.I. GEN. LAWS § 36-12-1 (2006) (domestic partner status for state employee benefits); VT. STAT. ANN. tit. 15, §§ 1201-1207 (2002) (civil unions for same-sex couples); *id.* §§ 1301-1306 (reciprocal beneficiaries for blood-relatives); N.Y., N.Y., ADMIN. CODE § 3-241 (2006) (providing domestic partner status for couples of same-sex as well as couples of opposite-sex); S.F., CAL., ADMIN. CODE ch. 62 (2004) (defining domestic partners liberally as "two adults who have chosen to share one another's lives in an

from state to state, but some general patterns have emerged regarding the types of benefits created by the state (or municipality) and the specific groups of unmarried cohabitants provided for under the statute. Generally, states have enacted three major types of statutory schemes aimed at providing some degree of legal recognition for unmarried cohabitants: civil unions,[29] reciprocal beneficiaries,[30] and domestic partnerships.[31]

Civil unions are designed to be virtually identical to traditional marriages between a man and a woman, but are limited in scope to same-sex couples.[32] The first civil union statute was enacted in Vermont[33] in response to the Vermont Supreme Court's landmark decision in *Baker v. State*,[34] which declared that same-sex couples are constitutionally entitled "to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples."[35] In addition to Vermont, Connecticut and New Jersey have now granted same-sex couples the ability to enter into civil unions.[36] However, while civil union laws are designed to address the legal concerns of unmarried same-sex cohabitants, this statutory scheme is primarily concerned with creating a legal status equal to that of married spouses and designed to serve as a substitute for those couples excluded from the traditional definitions of marriage.[37] Therefore, same-sex cohabitants who do not desire the full marital-like rights and benefits afforded under civil union statutes cannot look to this mechanism for providing any other legal recognition of their status as cohabitants.

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intimate and committed relationship of mutual caring, who live together, and who have agreed to be jointly responsible for basic living expenses").

29. Civil unions for same-sex couples are currently available in Vermont, Connecticut, and New Jersey.

30. *See, e.g.*, HAW. REV. STAT. ANN. §§ 572C-1 to -7; VT. STAT. ANN. tit. 15, §§ 1301-1306.

31. *See, e.g.*, CAL. FAM. CODE § 297; N.J. STAT. ANN. § 26:8A.

32. *See* MERIN, *supra* note 6, at 211 (discussing Vermont civil unions).

33. VT. STAT. ANN. tit. 15, §§ 1201-1207.

34. 744 A.2d 864 (Vt. 1999).

35. *Id.* at 886.

36. *See* CONN. GEN. STAT. ANN. § 46b-38bb (2007) (mandating that a person is only eligible to enter into a civil union in Connecticut if that person is "[o]f the same sex as the other party to the civil union"); N.J. STAT. ANN. § 37:1-30 (West Supp. 2007) (requiring that two persons must "[b]e of the same sex" to establish a civil union in New Jersey).

37. *See generally* Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15 (2000).

Another approach to creating legally recognizable benefits between unmarried cohabitants is the reciprocal beneficiary status.[38] Depending on the applicable state statute, this mechanism "gives each person the option to [either] name another family member or a same-sex friend as . . . the person who under state law is entitled to a whole series of benefits."[39] The benefits afforded to unmarried cohabitants under reciprocal beneficiary statutes pale in comparison to benefits afforded to married couples or couples who have entered into a civil union,[40] and thus may be an appealing alternative for those desiring some legal protection, but not the level of rights and obligations pursuant to a marriage or a civil union. However, unmarried cohabitants of the opposite-sex who are not related by blood or otherwise are excluded from this statutory scheme because the status is meant to serve as a "second-best" option in instances where cohabitants are legally prohibited from marrying.[41] For example, Hawaii established a reciprocal beneficiary status "to extend certain rights and benefits which [were previously] available only to married couples to couples composed of two individuals who are legally prohibited from marrying under state law."[42] As a result, the Hawaii statute only applies to same-sex couples and close blood

38. *See* Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 108-09 (2001) (noting reciprocal beneficiary status exists in Hawaii and Vermont).

Some commentators prefer to classify the reciprocal beneficiary status as a form of domestic partnership. *See, e.g.*, Kogan, *supra* note 9, at 1025-27; William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, 2001 BYU L. REV 961, 963-65. However, this Note recognizes the reciprocal beneficiary status as a distinct statutory scheme because it is applicable only to unmarried cohabitants prohibited by law from marrying. *See, e.g.*, HAW. REV. STAT. ANN. § 572C-1 (LexisNexis 2005) (providing that reciprocal beneficiary status is only available to "two individuals who are legally prohibited from marrying under state law"); VT. STAT. ANN. tit. 15, § 1301 (providing that reciprocal beneficiary status is available to "two persons who are blood-relatives or related by adoption"). On the other hand, domestic partnership status may also be available to couples legally able to marry. *See, e.g.*, CAL. FAM. CODE § 297 (West 2006) (providing that domestic partnership may be available to two persons of the opposite sex if at least one of those persons is age sixty-two or older); ME. REV. STAT. ANN. tit. 22, § 2710(2) (2006) (providing that domestic partnership registry is available to "2 unmarried adults . . . domiciled together under long-term arrangements that evidence a commitment to remain responsible indefinitely for each other's welfare").

39. Symposium, *Unbending Gender: Why Family and Work Conflict and What to Do About It*, 49 AM. U. L. REV. 943, 965 (2000) (quoting oral statement by Professor Nancy Polikoff, participant in Panel Three: New Directions in Feminist Legal Theory).

40. *See* MERIN, *supra* note 6, at 215.

41. *See supra* note 38.

42. HAW. REV. STAT. ANN. § 572C-1.

relatives, since these two groups represent those prohibited from marrying under Hawaii law.[43]

Similarly, reciprocal beneficiary status in Vermont is only available to two persons related by blood or adoption and prohibited from entering into a marriage or a civil union.[44] Therefore, while reciprocal beneficiaries legislation may provide some added protections and benefits to individuals cohabitating without the traditional protections established through the institution of marriage or through a civil union, these statutory schemes are limited in scope with choice serving as a key qualification. Couples without the choice of marriage are included, while couples who *choose* to engage in a nontraditional cohabiting relationship are summarily excluded from such protections.

While civil unions and reciprocal beneficiaries schemes appear to be limited by traditional notions of marriage, a somewhat more flexible approach aimed at providing legal recognition and protection to unmarried cohabitants is the domestic partnership.

> The broad concept of domestic partnership is a form of business or government recognition given to two unmarried adults of the same sex or opposite sexes seeking to share benefits normally conferred upon married couples because of conformity with a procedure established by the business or government; it is a civil partnership supported by private or public policy, or both. . . . Domestic partnership provisions impose various eligibility requirements similar to those for marriage, such as the requirement that the parties be at least eighteen years old and mentally competent, that the parties not be related by blood ties that would bar marriage in the state, and that neither of the parties has an existing marriage or domestic partnership.[45]

Domestic partnership legislation is much more common than the alternative statutory schemes of civil unions or reciprocal beneficiaries and has been enacted to varying degrees at both the state and local level.[46]

Domestic partnership law varies widely in construction and application from state to state (and municipality to municipality). For example, some states have created a domestic partnership status to serve very limited functions,[47] while other states view domestic

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43. *See id.* § 572-1.

44. VT. STAT. ANN. tit. 15, § 1303.

45. MERIN, *supra* note 6, at 198-200.

46. *See supra* note 28; *see also* MERIN, *supra* note 6, at 57.

47. For example, Rhode Island creates the status of "domestic partner" solely for the purpose of extending health insurance and other employment-related benefits of a state employee to that employee's unmarried, nonfamilial cohabitating dependent. *See*

partnerships as a marriage substitute, providing as many marital-like benefits as possible.[48] Additionally, domestic partnership schemes vary in terms of the threshold requirements for eligibility; some states and municipalities require that the would-be partners be of a specific sexual orientation or of a certain age, while others permit any unmarried cohabitants engaged in a committed relationship to register as domestic partners.[49] As with the civil unions and reciprocal beneficiaries schemes discussed above, domestic partnership status is designed mainly out of concern for those individuals who cannot legally marry or for those who are financially deterred from marrying.[50] Therefore, the domestic partnership scheme is not primarily concerned with providing a legal status for those couples *choosing* unmarried cohabitation as an alternative to marriage.

Several years ago the American Law Institute (ALI) recognized that social norms are changing and proposed a more uniform—and slightly less rigid—approach to defining domestic partners that expanded the rights and obligations of unmarried cohabitants.[51] One of the main goals of the ALI Principles "is to provide financial protection for economically dependent or loss-suffering parties to long-lasting nonmarital cohabitation relationships that are truly marriage-like in quality and characteristics who made no express agreement about financial consequences."[52] Although the ALI's proposal is specifically focused on family dissolution, the specific criteria proposed by the ALI to evaluate a couple's domestic partner

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R.I. GEN. LAWS. § 36-12-1(3) (2005). Arizona also recognizes, but does not define, the status of domestic partner for the limited purpose of providing a domestic partner with the ability to make medical decisions or consent to an anatomical gift on behalf of his or her cohabitant, provided that a spouse, adult child, or parent of such cohabitant is unavailable. *See* ARIZ. REV. STAT. ANN. § 36-3231 (2007).

48. *See, e.g.*, CAL. FAM. CODE § 297.5(a) (West 2006) ("Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.").

49. *Compare* CAL. FAM. CODE § 297 (providing domestic partnerships for same-sex couples and couples with at least one party over age sixty-two), *with* ME. REV. STAT. ANN. tit. 22, § 2710 (2006) (identifying "domestic partners" status as not restricted by sexual orientation or limited to a certain age group), *and* N.Y., N.Y., ADMIN. CODE § 3-341 (2006) (permitting both same-sex couples and opposite-sex couples to register for a domestic partnership).

50. *See, e.g.*, N.J. STAT. ANN. § 26:8A-2(e) (West 2006).

51. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 6.03 (Am. L. Inst. 2002) [hereinafter ALI PRINCIPLES].

52. Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 BYU L. REV. 1189, 1197 (2001).

status in dissolution may be employed as a new model for defining domestic partnerships in general.

The ALI defines domestic partners as "two persons of the *same or opposite sex*, not married to one another, who for a significant period of time share a primary residence and a life together as a couple."[53] Under the ALI definition, domestic partners are not defined on the basis of their sexual orientation, but are instead evaluated on the character of their relationship. The ALI further establishes that "[p]ersons not related by blood or adoption are presumed to be domestic partners when they have maintained a common household . . . for a continuous period that equals or exceeds a duration, called the *cohabitation period*, set in a rule of statewide application."[54] This presumption, however, "is rebutabble by evidence that the parties did not share life together as a couple."[55] Additionally, while the ALI model may seem appealing because of its broad application, the determination of whether domestic partner status exists necessitates an essentially ad hoc review of the cohabitants' relationship. As a result, the ALI approach has attracted

53. ALI PRINCIPLES, *supra* note 51, § 6.03(1) (emphasis added).

54. *Id.* § 6.03(3). "Persons *maintain a common household* when they share a primary residence only with each other and family members; or when, if they share a household with other unrelated persons, they act jointly, rather than as individuals, with respect to management of the household." *Id.* § 6.03(4).

55. *Id.* § 6.03(3).

> Whether persons share a life together as a couple is determined by reference to all the circumstances, including: (a) the oral or written statements or promises made to one another, or representations jointly made to third parties, regarding their relationship; (b) the extent to which the parties intermingled their finances; (c) the extent to which their relationship fostered the parties' economic interdependence, or the economic dependence of one party upon the other; (d) the extent to which the parties engaged in conduct and assumed specialized or collaborative roles in furtherance of their life together; (e) the extent to which the relationship wrought change in the life of either or both parties; (f) the extent to which the parties acknowledged responsibilities to each other, as by naming the other the beneficiary of life insurance or of a testamentary instrument, or as eligible to receive benefits under an employee-benefit plan; (g) the extent to which the parties' relationship was treated by the parties as qualitatively distinct from the relationship either party had with any other person; (h) the emotional or physical intimacy of the parties' relationship; (i) the parties' community reputation as a couple; (j) the parties' participation in a commitment ceremony or registration as a domestic partnership; (k) the parties' participation in a void or voidable marriage that, under applicable law, does not give rise to the economic incidents of marriage; (l) the parties' procreation of, adoption of, or joint assumption of parental functions toward a child; (m) the parties maintenance of a common household . . . .

Id. § 6.03(7).

harsh criticism for being overly broad, difficult in application, and completely lacking in contractual character.[56]

2. International Approaches

The international community has also developed myriad approaches to address the equitable and legal concerns of unmarried cohabitants. These approaches vary in the scope of the benefits provided and the eligibility requirements that must be met prior to the extension of any rights and benefits to unmarried cohabitants. Furthermore, as with the United States, the motivation behind many of the statutory schemes currently in force around the world is the need to provide same-sex couples, unable to marry under the laws of the jurisdiction, with some form of legal recognition and status.[57] For instance, some Nordic countries have adopted a registered partnership model to place same-sex couples on "equal footing" with opposite-sex married couples.[58] "Registered partnership acts refer to and incorporate existing marriage legislation, offering same-sex couples the rights, benefits, and responsibilities associated with marriage, with a few exceptions."[59] Denmark was the first country to adopt a Registered Partnership Act,[60] followed shortly thereafter by Norway, Sweden, Iceland, and Finland.[61]

However, not all European countries require that cohabitants of the opposite-sex enter into a marriage to obtain protection and recognition under the law. Sweden, for example, can be identified as one of the first countries providing a legal status to opposite-sex cohabitants as the popularity of unmarried cohabitation grew within the country.[62] Under Sweden's Cohabitation Act,[63] cohabitees are defined as "two people who live together on a permanent basis as a couple and who have a joint household," and the "Act only applies to cohabitee relationships in which neither of the cohabitees is

56. For an in-depth critique of the ALI's broad protections for opposite-sex as well as same-sex couples, see generally Wardle, *supra* note 52.

57. For an in-depth overview of the legal status of same-sex couples around the world, see generally LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW (Robert Wintemute & Mads Andenæs eds., 2001) [hereinafter LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS].

58. *See id.* app. I, at 776-78 (noting same-sex legislation passed in Denamrk, Iceland, Norway, and Sweden).

59. MERIN, supra note 6, at 56.

60. Ingrid Lund-Andersen, *The Danish Registered Partnership Act, 1989: Has the Act Meant a Change in Attitudes?*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS, *supra* note 57, at 417.

61. MERIN, *supra* note 6, at 56.

62. *Id.* at 38.

63. S.F.S. 2003:376 (Swed.).

married."[64] The Swedish approach to unmarried and unregistered cohabitants is primarily concerned with the regulation of the couple's joint home and household goods;[65] therefore, a couple seeking more comprehensive protections and obligations vis-à-vis each other must either marry (if of the opposite-sex) or enter into a registered partnership (if of the same-sex). Thus, while the Swedish approach to informal cohabitation is inclusive of opposite-sex and same-sex couples, the protections afforded under this model are very limited.

Alternatively, France has adopted a model that is much more structured and comprehensive in addressing some of the legal concerns of unmarried cohabitation from the perspective of same-sex and opposite-sex couples alike.[66] Prior to 1999, France recognized two legal forms of partnership—civil marriage and *concubinage* (cohabitation); however, the legal status created under each form was only available to couples of the opposite-sex.[67] "While civil marriage requires a formal expression of the will of the parties, through a marriage ceremony, *concubinage* involves the legal recognition of the fact that two persons are living together as spouses, and does not depend on the will of the parties."[68] In 1999, France adopted the Pacte Civil de Solidarité (Civil Solidarity Pact or PACS)[69] and narrowed the gap between formalistic civil marriage and the informal *concubinage*, creating a previously unavailable legal status for same-sex couples.

The legal status created under the PACS is available to any cohabitating couple, regardless of sexual orientation[70] and signifies "an act of will that immediately creates a legal situation and produces juridical consequences, rather than a situation of fact to which juridical consequences are attached."[71] The contractual nature of the PACS provides the cohabitants with an identifiable legal status, but necessitates that the cohabitants consider the legal

64. *Id.* § 1.

65. *See id.* ("The Act applies to the joint dwelling and household goods of the cohabitees.")

66. *See generally* Daniel Borrillo, *The "Pacte Civil de Solidarité" in France: Midway Between Marriage and Cohabitation*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS, *supra* note 57, at 475.

67. *Id.* at 475.

68. *Id.*

69. CODE CIVIL [C. civ.] art. 515-1 (Fr.) *translated in* 39 I.L.M. 224 (2000).

70. *Id.* ("A civil solidarity pact is a contract concluded by two physically adult persons, of different sexes or of the same sex, for organizing their common life.").

71. Borrillo, *supra* note 66, at 475. Additionally, the creation of PACS under French law, and the inclusion of same-sex couples under the legislation, directly resulted in an extension of *concubinage* rights for same sex couples. *See* Bradley, *supra* note 2, at 34 ("In the absence of a PACS, rights for 'concubinage' are now available under the general law, regardless of sexual orientation."); *see also* C. civ. art. 515-8.

ramifications of their relationship. For example, the rights and benefits contemplated under the PACS include the level of financial support the couple will provide for one another,[72] the creation of joint and several liability between the cohabitants for debt obligations to third parties,[73] the common living and lodging expenses of the cohabitants,[74] and provisions addressing the joint ownership of property and the allocation of such property after the dissolution of the union.[75]

Finally, the PACS represents a statutory scheme "fundamentally different" from that of marriage, but also indicates a level of commitment significantly less than the commitment required of married couples.[76] The alternative approach provided through the PACS may serve as an appealing model for cohabitants in the United States wishing to refrain from or delay marriage or civil union. However, the liberal treatment of unmarried cohabitants afforded by the PACS is quite distinguishable from the statutory scheme of limited domestic partnership status currently in force in New Jersey.

B. Domestic Relations Legislation and Treatment of Unmarried, Cohabitating Couples in New Jersey

New Jersey's Domestic Partnership Act (NJDPA) was enacted in 2004.[77] In reviewing Assembly Bill No. 3743, which would become the NJDPA, the New Jersey Assembly Appropriations Committee noted that:

> The bill creates a mechanism, through the establishment of domestic partnerships, for New Jersey to recognize and support many adult individuals . . . who share an important personal, emotional and committed relationship with another adult. These familial relationships assist the State by establishing a private support network for the financial, physical and emotional health of their participants. This bill provides the State with the opportunity to recognize the important material and non-economic contributions that individuals in these relationships make to each other, and to the State, by conferring certain rights and benefits, as well as obligations and responsibilities, upon domestic partners.
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> Currently, a significant number of New Jersey residents live in families in which the heads of household are unmarried. Despite their interdependence and mutual commitment, these

72. C. civ. art. 515-4.
73. *Id.*
74. *Id.*
75. *Id.* art. 515-5.
76. Bradley, *supra* note 2, at 33.
77. *See* N.J. STAT. ANN. § 26:8A-1 (West 2006).

> families do not have access to the protections and benefits offered by the law to married couples; nor do they bear legal obligations to each other, no matter how interdependent their relationship. This bill seeks to redress this oversight and provide certain benefits to, and enforce certain obligations within, these families.[78]

Thus, at the time of enactment, the primary goal of the NJDPA, like most domestic partnership statutes, was to provide certain marriage-like benefits and protections to same-sex couples prohibited from entering into a marriage under state law.[79] These benefits included, but were not limited to, the protection of antidiscrimination laws, visitation rights to hospitalized partners, the power to make legal or medical decisions for an incapacitated partner, and certain tax benefits afforded to married couples.[80]

To be eligible for benefits under the NJDPA, persons seeking consideration as domestic partners are required to file an affidavit of domestic partnership with the local registrar.[81] A domestic partnership will then be established provided that such persons meet the following criteria: (1) both share a common residence and joint responsibility "for each other's common welfare"; (2) both agree to joint responsibility for basic living expenses; (3) neither person is currently married or a party to another domestic partnership; (4) both are not so closely related as to prohibit a domestic partnership; (5) "[b]oth persons have chosen to share each other's lives in a committed relationship of mutual caring"; (6) both persons have reached the age of eighteen; (7) both have jointly filed an affidavit of domestic partnership; (8) sufficient time has passed if either person was previously a partner in another domestic partnership; and (9) "[b]oth persons are of the same sex and therefore unable to enter into marriage with each other that is recognized by New Jersey law,

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78. Report to Assembly, No. 3743 (N.J. Dec. 11, 2003).

79. *See* N.J. STAT. ANN. § 26:8A-2e.

80. N.J. STAT. ANN. § 26:8A-2d. The NJDPA, however, did not purport to extend all the legal benefits and burdens of marriage to couples entering into domestic partnerships, but instead intended that "[a]ll persons in domestic partnerships should be entitled to *certain* rights and benefits that are accorded to married couples under the laws of New Jersey." *Id.* (emphasis added). The NJDPA identifies the rights that are afforded to domestic partners as including:

> [S]tatutory protection through the "Law Against Discrimination" . . . against various forms of discrimination based on domestic partnership status, such as employment, housing and credit discrimination; visitation rights for a hospitalized domestic partner and the right to make medical or legal decisions for an incapacitated partner; and an additional exemption from the personal income tax and the transfer inheritance tax on the same basis as a spouse.

Id.

81. *Id.* § 26:8A-4a.

except that two persons who are each 62 years of age or older and not of the same sex may establish a domestic partnership if they [otherwise] meet the requirements" of a domestic partnership.[82]

Thus, as the last criterion for domestic partnership status illustrates, the NJDPA was not limited to same-sex couples, but also extends the availability of certain marriage-like benefits to opposite-sex couples, provided that such couples have reached the age of sixty-two.[83] The inclusion of opposite-sex couples under the NJDPA was largely influenced by California's decision to permit a limited class of unmarried cohabitating couples of the opposite sex to register for domestic partnership status.[84] While the primary purpose of the NJDPA was to extend marriage-like benefits to same-sex couples unable to legally marry, California's precedent of including at least some opposite-sex couples undoubtedly impacted New Jersey's decision to permit unmarried couples of retirement age to enter into domestic partnerships.

During deliberations prior to the creation of the NJDPA, the New Jersey Senate Judiciary Committee recognized that "older persons often refrain from entering into marriage because remarriage could jeopardize their status as surviving spouse with regard to retirement income and benefits."[85] Therefore, the NJDPA could be viewed as promoting marital values because it is aimed at providing marriage-like benefits only to those individuals legally prohibited from marrying and those individuals who may decide not to marry in order to preserve benefits resulting from a prior marriage. As a result, cohabitating opposite-sex couples under the age of sixty-two are excluded from the domestic partnership scheme because such couples have the ability to marry in New Jersey and

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82. *Id.* § 26:8A-4b.

83. *Id.*

84. *See* CAL. FAM. CODE § 297 (West 2006). By extending domestic partnership status to elderly opposite-sex couples, the California legislature was:

> [R]esponding to the dilemma of the retired couples who are cohabitating but are reluctant to marry for fear of reduced Social Security or private pension benefits. [California] created the new status of "domestic partner" in order to extend such couples a few marriage-like benefits, even though the couples chose to remain in an unmarried state.

David L. Chambers, *For the Best of Friends and For Lovers of All Sorts, A Status Other Than Marriage*, 76 NOTRE DAME L. REV. 1347, 1355 (2001). One slight difference is notable between the New Jersey and California domestic partnership acts regarding the age qualifications for opposite-sex couples. In New Jersey, both individuals seeking to enter into a domestic partnership must have each reached the age of sixty-two, N.J. STAT. ANN. § 26:8A-4b(5), whereas California only requires that one of the individuals be at least sixty-two years of age, CAL. FAM. CODE § 297(5)(B).

85. Report to Senate Committee Substitute, No. 2820 § 4 (N.J. Dec. 15, 2003) [hereinafter Senate Committee Report].

can rely on the institution of marriage as a means of achieving legal recognition of their relationship.[86] Thus, New Jersey's goal of providing recognition for couples living together in nontraditional relationships[87] is limited in scope because New Jersey distinguishes couples based on age rather than the couple's state of emotional and financial commitment and dependence.

III. ANALYSIS

New Jersey's current domestic partnership scheme clearly discriminates between unmarried cohabitants based on age. Therefore, the first question that must be addressed is whether such discrimination is justifiable under state and federal law. However, even if the age-based access barrier created under the NJDPA may be considered a permissible distinction rationally related to serving a legitimate state interest,[88] such a determination would not preclude a review of whether the NJDPA should nevertheless be available to unmarried cohabitants under the age of sixty-two. The following section examines these two questions in detail and addresses several justifications for extending the availability of NJDPA benefits and obligations to *all* unmarried cohabitants regardless of age or sexual orientation.[89]

A. Does the Denial of the NJDPA to Cohabitating Couples Under the Age of Sixty-Two Constitute Impermissible Discrimination?

New Jersey's Constitution specifically protects against discrimination based on religion, race, ancestry, and national origin;[90] however, New Jersey does not provide any explicit constitutional guarantee to protect against age discrimination.[91] Instead, New Jersey provides a more implicit guarantee of equal protection to ensure protection "against injustice and against the unequal treatment of those who should be treated alike."[92] The state

86. *See infra* note 108.

87. *See supra* text accompanying note 78.

88. *See infra* text accompanying notes 95-98.

89. While this Note suggests that NJDPA benefits should be made available to all unmarried cohabitants "regardless of age," this statement is not meant to circumvent the minimum age requirement of eighteen existing under the NJDPA designed to protect the interests of minors. *See* N.J. STAT. ANN. § 26:8A-4b(7). Thus, the phrase "regardless of age" is intended to refer to unmarried cohabitants between the ages of eighteen and sixty-one currently excluded from the NJDPA. *See id.* § 26:8A-4.1 (West Supp. 2007).

90. N.J. CONST. art. 1, § 5.

91. *See id.*

92. Greenberg v. Kimmelman, 494 A.2d 294, 302 (N.J. 1985).

constitution provides that "[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and or pursuing and obtaining safety and happiness."[93] This language has been interpreted by the New Jersey Supreme Court to provide equal protection of the laws to every person within the state.[94]

Therefore, "[w]hen a statute is challenged on the ground that it does not apply evenhandedly to similarly situated people, [New Jersey] equal protection jurisprudence requires that the legislation, in distinguishing between two classes of people, bear a substantial relationship to a legitimate governmental purpose."[95] In determining whether such a legitimate purpose exists, courts "must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is arbitrary."[96] New Jersey courts essentially employ a three-factor balancing test for determining whether a particular statute violates the equal protection guarantee.[97] These factors include the nature of the asserted right, the extent such right is restricted by the statutory scheme at issue, and the public necessity for such restriction.[98]

An analysis of the NJDPA under the foregoing factors suggests that the "right" at issue is the right of unmarried cohabitants to receive the benefits and protections afforded under the NJDPA. In other words, the right sought is the ability of cohabitating couples engaged in a committed relationship,[99] to a distinct legal status with some marital-like benefits and protections.[100] Although the existence of such a right is not entirely clear, at least one New Jersey Supreme Court case indicates that unmarried cohabitants are entitled to some degree of enhanced legal protection derived from the presence of a contractual relationship.[101] In *Kozlowski v. Kozlowski* the court

93. N.J. CONST. art. 1, para. 1.

94. *See* Lewis v. Harris, 908 A.2d 196, 211-12 (N.J. 2006).

95. *Id.* at 212.

96. Robinson v. Cahill, 303 A.2d 273, 282 (N.J. 1973).

97. *See id.*

98. *Id.*

99. *See* N.J. STAT. ANN. § 26:8A-2a (West 2006).

100. *See supra* note 80 and accompanying text.

101. *See* Kozlowski v. Kozlowski, 403 A.2d 902, 906 (N.J. 1979) (holding support agreements between nonmarital partners legally enforceable when not based on sexual services). Relying on the holding in *Kozlowski*, a federal district court concluded that New Jersey would recognize the right of unmarried cohabitants to bring a loss of consortium claim after the loss of a partner, even though marriage would otherwise be required to sustain such a claim. *See* Bulloch v. United States, 487 F. Supp. 1078, 1087 (D.N.J. 1980) (concluding that "New Jersey courts would permit a cohabitant who has suffered the same types of injuries as a spouse to bring an action for loss of

considered whether two unmarried individuals, living together without the expectation or intention of marriage, could enter into a valid and enforceable contract.[102] The purported contract was one of household services in return for financial security for life.[103] The court ultimately determined that the contract between the unmarried cohabitants, whether express or implied, was valid and enforceable.[104] This precedent permits the inference that unmarried cohabitants, providing for one another emotionally and financially, maintain some form of enhanced legal status with respect to one another.

Assuming that a right of unmarried cohabitants to enjoy an enhanced legal status exists, such status is currently available under the NJDPA only to cohabitating couples where each partner has reached the age of sixty-two.[105] However, the New Jersey legislature purposefully imposed this age restriction in order to extend some marital-like benefits to such couples while preserving the retirement and income benefits either party might be receiving due to a previous marriage.[106] Therefore, the public necessity of the NJDPA's age restriction could be viewed as a protectionist measure preventing the disruption of income benefits to individuals who have reached the age of sixty-two.

Furthermore, another justification is apparent in the NJDPA's age-based classification scheme—preserving the institution of marriage. The primary intent of the NJDPA upon enactment was to provide same-sex couples, legally prohibited from marrying, with the same rights and benefits afforded to opposite-sex couples through the institution of marriage.[107] The legislature specifically limited the eligibility of domestic partnership status to same-sex couples and couples aged sixty-two and older because couples of the opposite-sex could enter into a state-authorized marriage as a means of achieving all of the protections afforded under the NJDPA.[108] The limitation of

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consortium"). However, the reasoning in *Bulloch* has not yet been adopted by the New Jersey Supreme Court, and has even been rejected in a few lower court decisions. *See, e.g.*, Leonardis v. Morton Chem. Co., 445 A.2d 45, 46 (N.J. Super. Ct. App. Div. 1982); Childers v. Shannon, 444 A.2d 1141, 1142-43 (N.J. Super. Ct. Law Div. 1982).

102. *Kozlowski*, 403 A.2d at 904.

103. *See id.* at 906 (reviewing trial court's factual findings).

104. *Id.*

105. N.J. STAT. ANN. § 26:8A-4.1 (West Supp. 2007).

106. *See supra* text accompanying note 85.

107. *See* Senate Committee Report, *supra* note 85.

108. The legislature's intent is clearly stated in the text of the statute:

> The Legislature, however, discerns a clear and rational basis for making certain health and pension benefits available to dependent domestic partners . . . in the case of domestic partnerships in which both persons are of the same sex and are therefore unable to enter into a marriage with each

the NJDPA to those who could not legally marry (or who might be receiving retirement support resulting from a prior marriage, and thus are deterred from remarrying) serves the state's goal of promoting the institution of marriage. The preservation of the institution of marriage is considered to represent a legitimate state interest accepted by the United States Supreme Court.[109] Therefore, since the NJDPA's age restriction is not arbitrary and may be viewed as bearing "a substantial relationship to a legitimate governmental purpose"[110]—the protection of retirement benefits and income—such restriction would not be violative of New Jersey's equal protection guarantee.[111] This conclusion accords with the notion that most age classifications will be upheld by courts provided some rationally related purpose exists for such classification.[112]

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other that is recognized by New Jersey law, unlike persons of the opposite sex who . . . have the right to enter into a marriage that is recognized by State law and thereby have access to these health and pension benefits[.]

N.J. Stat. Ann. § 26:8A-2e (West 2006).

109. *See* Lawrence v. Texas, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring) (noting that "preserving the traditional institution of marriage" is a legitimate state interest).

110. Lewis v. Harris, 908 A.2d 196, 212 (N.J. 2006).

111. In 2004, 83.4% of all cohabitants participating in a registered male-female domestic partnership who had reached the age of sixty-two were either widowed or divorced (47.8% divorced, 35.6% widowed). *See* Marriages, Divorces, and Domestic Partnerships, http://www.nj.gov/health/chs/stats04/marrdp04.pdf [hereinafter 2004 Center for Health Statistics] (Figure MD7. Previous Marital Status of Persons in Domestic Partnerships by Gender Pair). The data suggest that the legislature's rational of protecting retirement and income benefits resulting from a pervious marriage was, at the very least, plausible. However, even though the data suggest—and the legislature anticipated—that couples over the age of sixty-two might be deterred from marrying because of retirement income and benefits received as a result of a previous marriage, and would therefore benefit from the domestic partnership status without jeopardizing such retirement income, the data also suggest that very few partnerships were actually registered for such purpose. In 2004, when the NJDPA came into effect, 2826 couples registered domestic partnerships in New Jersey; however, only forty-five of such registered partnerships consisted of opposite-sex couples aged sixty-two and older. *See* 2004 Center for Health Statistics, *supra.* Similarly, in 2005 and 2006, partnerships registered between male-female partners represented a disproportionate minority of the total domestic partnerships registered in New Jersey. Preliminary data indicate that in 2005 only forty-three of the 1067 domestic partnerships registered in New Jersey were registered between male-female partners aged sixty-two and older. Such data also indicate that in 2006 only fourteen of 588 registered domestic partnerships were comprised of couples of the opposite sex. These preliminary statistics have been provided directly by the Center for Health Statistics of the New Jersey Department of Health and Senior Services.

112. *See, e.g.*, Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1077-82 (2003) ("Age classifications, whether aimed at the elderly or the young, are usually subject to the most minimal scrutiny, with the result that they are found to be constitutional.").

Although the age restriction in the NJDPA does not appear to violate New Jersey's equal protection guarantee, the age restriction must also comport with the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[113] The Fourteenth Amendment states that "[n]o State shall . . . deny any person within its jurisdiction the equal protection of the laws."[114] Unlike the flexible balancing approach employed by New Jersey,[115] a federal equal protection claim requires a more rigid structure of analysis.[116] In comparing the Equal Protection Clause of the Fourteenth Amendment to the equal protection guarantee of the state constitution, the New Jersey Supreme Court has noted that "[t]he extent to which statutory provisions are scrutinized under federal equal protection . . . depends on the class of persons affected, the nature of the right implicated, and the level of interference."[117] Moreover, the outcome of an equal protection claim will largely depend upon the standard of review applied by the court.[118]

The standard of review applied when an equal protection challenge is brought against a statutory age-based classification scheme is that of rational basis review.[119] In *Kimel*, the Supreme Court specifically articulated a deferential rule with respect to age discrimination claims based on the Fourteenth Amendment:

> States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest. The rationality commanded by the Equal Protection Clause does not require States to match age distinctions and the legitimate

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113. When examining issues of constitutionality, New Jersey courts will look to federal courts for guidance "when cognate provisions of the Federal Constitution are implicated." Sojourner A. v. Dep't of Human Servs., 828 A.2d 306, 313 (N.J. 2003); *see also* Greenberg v. Kimmelman, 494 A.2d 294, 302-03 (N.J. 1985) (noting that the court will "continue to look to both the federal courts and other state courts for assistance in constitutional analysis," but also indicating that the New Jersey Constitution "is not irrevocably bound by federal analysis").

114. U.S. CONST. amend. XIV, § 1.

115. *Lewis*, 908 A.2d at 212 ("The test is a flexible one, measuring the importance of the right against the need for the governmental restriction.").

116. *Id.* at 212 n.13. While New Jersey's equal protection analysis may differ from that applied under a federal cause of action, the same results are often reached under either regime. *Sojourner*, 828 A.2d at 315.

117. *Sojourner*, 828 A.2d at 313.

118. *See, e.g.*, R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 228 (2002) ("Depending on the standard of review, the statute's burden must not be irrational, substantially more burdensome than necessary, or it must be the least restrictive burden that would be effective in advancing the governmental interests.").

119. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000).

> interests they serve with razorlike precision. As we have explained, when conducting rational basis review "we will not overturn such [government action] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational."[120] . . . Under the Fourteenth Amendment, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. The Constitution does not preclude reliance on such generalizations. That age proves to be an inaccurate proxy in any individual case is irrelevant. "[W]here rationality is the test, a State 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.'"[121] Finally, because an age classification is *presumptively rational*, the individual challenging its constitutionality bears the burden of proving that the "facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."[122]

The Court bolstered its deferential standard of review for age-based classifications by noting that such classifications are presumptively rational.[123] In light of this extremely deferential standard of review, and considering New Jersey's justification for the NJDPA's age-based classification,[124] such classification would not violate the Equal Protection Clause of the Fourteenth Amendment.[125]

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120. *Id.* at 83-84 (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)).

121. *Id.* at 84 (quoting Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 316 (1976)).

122. *Id.* (quoting *Bradley*, 440 U.S. at 111) (emphasis added).

123. *Id.* The Supreme Court has applied this deferential standard in several cases involving mandatory retirement statutes, with the Court upholding the age-based classification in each instance. *See* Gregory v. Ashcroft, 501 U.S. 452, 472 (1991) (upholding Missouri constitutional provision requiring the retirement of judges at age seventy); *Bradley*, 440 U.S. at 94-95 (upholding statute requiring the retirement of foreign services officers who reached the age of sixty); *Murgia*, 427 U.S. at 317 (upholding Massachusetts statute calling for the retirement of state police officers at age fifty).

124. *See* Senate Committee Report, *supra* note 85, at 2.

125. Although New Jersey has asserted a rational justification for limiting domestic partnership benefits to couples who have reached the age of sixty-two, the conclusion that such classification does not violate the Equal Protection Clause of the Fourteenth Amendment would not necessarily be supported by all commentators. *See, e.g.*, George W. Dent, Jr., *"How Does Same-Sex Marriage Threaten You?"*, 59 RUTGERS L. REV. 233, 262 (2007). Professor Dent believes that the "*arbitrary* age cutoff in the Domestic Partnership Act could [not] survive an equal protection challenge." *Id.* (emphasis added). However, the legislature's choice of the age of sixty-two was not *arbitrary*; rather, it reflects a New Jersey statutory scheme already in place that makes certain retirement benefits available to some state employees who have reached the age of sixty-two. *See, e.g.*, N.J. STAT. ANN. § 18A:66-114(b) (West 2006) (providing that

However, even though the NJDPA could survive a constitutional equal protection challenge at the state and federal level, the NJDPA may still require modification as a public policy matter.

B. *Should* All *Adult Unmarried, Couples Living Together in Committed Relationships be Eligible to Receive the Benefits and Protections Afforded Under the NJDPA?*

Traditionally, domestic partnership schemes have been mainly restricted to same-sex partners.[126] One of the major justifications for this trend is that in most jurisdictions same-sex couples are legally prohibited from marrying, while opposite-sex couples are able to enjoy this legal status.[127] The restriction of domestic partnership benefits to same-sex couples "enables them to approximate those benefits they would have were they given the right to marry."[128] This approach is often referred to as "leveling of the playing field."[129] However, now that New Jersey offers civil unions for same-sex couples,[130] the "leveling of the playing field" justification for restricting those who have access to the NJDPA is not persuasive because *even* same-sex couples under the age of sixty-two are no longer eligible from entering into a domestic partnership.[131] Given the unusual application of the NJDPA to unmarried cohabitants aged sixty-two and older after the establishment of civil unions, the New Jersey Civil Union Review Commission must evaluate the current domestic partnership scheme and make recommendations as to its future.[132] Three potential options exist with respect to the future of domestic partnership status in New Jersey: (1) the NJDPA could remain in its current form, limited in scope to unmarried cohabitants

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veterans who have reached age sixty-two and have provided twenty years of aggregate service to a board of education or school district are eligible for pension benefits); *id.* § 40A-9-117.1 (providing that sheriff's secretary who has reached the age of sixty-two may be eligible for pension benefits).

126. *See, e.g.*, CAL. FAM. CODE § 297(b)(5)(A) (West 2006); N.J. STAT. ANN. § 26:8A-4.

127. *See* Kogan, *supra* note 9, at 1028 ("The major justification . . . is that opposite-sex, unmarried couples have the legal right to marry, while same-sex couples do not."). *But see* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2004) (holding that denial of civil marriage for same-sex couples violates Massachusetts constitution). Massachusetts is currently the only state in which same-sex couples can legally marry. *See* MASS. GEN. LAWS. ANN. ch. 207, §§ 1-14 (West 2007).

128. Kogan, *supra* note 9, at 1028.

129. *Id.*

130. *See* N.J. STAT. ANN. § 37:1-28 (West Supp. 2007).

131. *See id.* § 26:8A-4.1 (as of the effective date of the law establishing civil unions "no domestic partnerships shall be registered . . . except that two persons who are each 62 years of age or older may establish a domestic partnership").

132. *See id.* § 37:1-36c(7).

who have attained the age of sixty-two,[133] (2) the NJDPA could be modified, or (3) the NJDPA could be repealed.

Proponents of the current New Jersey domestic partnership scheme must justify the policy and necessity of extending NJDPA benefits to couples who have reached the age of sixty-two. Proponents of a modification or extension of the existing domestic partnership scheme must overcome the exceedingly persuasive rationale that unmarried cohabitants can achieve enhanced legal benefits and protections through the institutions of marriage or civil unions. Several justifications exist for repealing the NJDPA, including the original purpose behind limiting the availability of certain partnership benefits to same-sex couples—protecting the institution of marriage.[134] Some legal scholars and commentators argue that an extension of domestic partnership benefits to an unlimited class of cohabitants could have a detrimental effect on the institution of marriage.[135] Additionally, some commentators believe that making domestic partnership benefits widely available to all unmarried cohabitants would undermine the movement for gay rights and same-sex marriage.[136]

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133. For a discussion of possible justifications for allowing the NJDPA to remain in its current form, available only to couples aged sixty-two and older, see *supra* Part III.A.

134. *See supra* note 108.

135. *See, e.g.*, Kogan, *supra* note 9, at 1034-35 (conceding that "[a]ccepting domestic partnership status as a permanent alternative to marriage may not foster longevity of some relationships"); *see also* Duncan, *supra* note 38, at 989 (arguing that domestic partnership laws legally and socially promote nonmarital sexual relationships); Wardle, *supra* note 52, at 1206 ("The problem with creating a new domestic status is that it could undermine the institution of marriage, which has been the exclusive domestic relationship of adults in Anglo-American law for centuries."); Lynne Marie Kohm, *How Will the Proliferation of Recognition of Domestic Partnerships Affect Marriage?*, 4 J.L. FAM. STUD. 105, 108 (2002) (asserting domestic partnership schemes downgrade and degrade the institution of marriage); Christina Davis, Comment, *Domestic Partnerships: What the United States Should Learn from France's Experience*, 24 PENN. ST. INT'L L. REV. 683, 684 (2006) (arguing that "jurisdictions should not permit heterosexuals to register as domestic partners because it may degrade the institution of marriage and hurt society at large"). However, at least one state has refused to consider this argument in addressing contractually-based agreements between unmarried cohabitants. *See* Marvin v. Marvin, 557 P.2d 106, 122 (Cal. 1976) (indicating that "[t]he argument that granting remedies to . . . nonmarital partners would discourage marriage must fail").

136. *See generally* James M. Donovan, *An Ethical Argument to Restrict Domestic Partnerships to Same-Sex Couples*, 8 LAW & SEXUALITY 649 (1998). This particular argument is not sufficiently persuasive to justify the restriction of domestic partnership status in New Jersey because the NJDPA is no longer viewed as a marriage substitute for same-sex couples. *See* Lewis v. Harris, 908 A.2d 196, 215-21 (N.J. 2006).

While the potential negative effect on the institution of marriage may appear to be a persuasive argument against allowing an extension of domestic partnership status to all unmarried adult cohabitants, several arguments can be made highlighting the possible positive effects of such a modification. For example, one commentator suggests that "as unmarried cohabitation becomes a nondeviant alternative to formal marriage and is regulated by the state, the outcome may well be renewed strength for marriage."[137] Additionally, the expansion of a contractually based domestic partnership scheme could improve domestic relations in general by promoting equality between partners and disposing of the notions of sexism and patriarchy traditionally associated with marriage.[138] A well-defined legal system of rights and obligations for cohabitants electing against marriage, but still desiring some degree of legal protection and recognition, could relieve courts of the burden of conducting an ad hoc review into the (implied or express) contractual nature of cohabitants' living arrangements upon dissolution of the cohabitants' relationship.[139]

For the past several decades, the United States has witnessed a surge in the number of unmarried couples living together.[140] This growing trend of unmarried cohabitation may be partially attributed to an increase in the number of couples waiting longer before marrying or not desiring to marry at all.[141] The economic benefit of shared living expenses combined with the perception of domestic equality make cohabitation an attractive situation for many couples.[142]

The increased popularity of these domestic arrangements has led to a greater social acceptance and recognition of unmarried

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137. Harry D. Krause, *Marriage for the New Millennium: Heterosexual, Same Sex—Or Not At All?*, 34 FAM. L.Q. 271, 298 (2000); *see also* Kohm, *supra* note 135, at 110 (conceding that "[b]ecause of the specific, unique and complete legal protections marriage offers . . . marriage could become an elite category").

138. Kogan, *supra* note 9, at 1032-33.

139. For example, absent a preexisting express contract between two unmarried cohabitants, such as an affidavit of domestic partnership, a court may find itself at pains to craft an equitable remedy upon the dissolution of a long-term relationship. *See, e.g.*, *Marvin*, 557 P.2d at 122 (holding that a contract between unmarried cohabitants need not be express, but may be implied "to protect the parties' lawful expectations"); Kozlowski v. Kozlowski, 403 A.2d 902, 906 (N.J. 1979) (employing contract law as a means of crafting an equitable remedy); *see also* Levar v. Elkins, 604 P.2d 602, 603 (Alaska 1980) (upholding jury award for unmarried cohabitant based on implied or express contract after the termination of cohabitant's relationship lasting over twenty years).

140. *See* Mahoney, *supra* note 4, at 178; Regan, *supra* note 4, at 1435.

141. *See* Roberts, *supra* note 5.

142. *Id.*

cohabitation and nontraditional family units.[143] A change in social practice regarding employment benefits is one example of how unmarried cohabitation has affected society.[144] Currently, many private employers across the country have liberalized employee benefits schemes and are already offering benefits to partners of employees, regardless of whether such partners would be classified as a "domestic partner" under the applicable state statute.[145]

Furthermore, as previously noted, some courts have already begun to recognize changing social values with regard to unmarried cohabitation and have employed principles of contract law to protect cohabitants.[146] However, the legal protections established for the benefit of unmarried cohabitants are not necessarily limited to contractually based claims.[147] For example, the New Jersey Supreme Court has applied common law principles of tort recovery to extend legal protections to unmarried cohabitants.[148] The cause of action in *Dunphy v. Gregor* resulted from the "mental anguish, pain and suffering" experienced by the plaintiff after witnessing her fiancé struck by a motor vehicle—and ultimately killed—while changing a tire on the side of a highway.[149] The main issue in the case on appeal was "whether bystander liability allows recovery by a person who was not legally married to a deceased victim but who cohabitated with and was engaged to marry the decedent."[150] In holding that "unmarried cohabitant[s] should be afforded the protections of bystander liability for the negligent infliction of emotional injury," the court acknowledged the "existence of an *intimate familial*

143. *See id.*

144. *See* Eischen, *supra* note 10, at 531 ("Furthermore, extending benefits to domestic partners of employees reflects changes to the traditional American family."). For a discussion of the evolution of employer-subsidized benefits for unmarried cohabitants in the United States, see generally Jonathan Andrew Hein, *Caring for the Evolving American Family: Cohabitating Partners and Employer Sponsored Health Care*, 30 N.M. L. REV. 19 (2000).

145. *See* Paul R. Lynd, *Domestic Partner Benefits Limited to Same-Sex Couples: Sex Discrimination Under Title VII*, 6 WM. & MARY J. WOMEN & L. 561, 561-65 (2000).

146. *See supra* note 139. In *Marvin v. Marvin*, the Supreme Court of California recognized that social mores have "changed so radically in regard to cohabitation" and that it could not "impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many." 557 P.2d 106, 122 (Cal. 1976).

147. *See, e.g., Marvin*, 557 P.2d at 123 n.25 (noting that the court's "opinion does not preclude the evolution of additional equitable remedies to protect the expectations of the parties to a nonmarital relationship in cases in which existing remedies prove inadequate; the suitability of such remedies may be determined in later cases in light of the factual setting in which they arise").

148. *See* Dunphy v. Gregor, 642 A.2d 372, 380 (N.J. 1994).

149. *Id.* at 373.

150. *Id.*

relationship" between the plaintiff and her fiancé at the time of the accident.[151]

The court in *Dunphy* further reasoned that while marriage is indeed a preferred legal status, "[t]he State's interest in marriage would not be harmed if unmarried cohabitants are permitted to prove on a case-by-case basis that they enjoy a steadfast relationship that is equivalent to legal marriage and thus equally deserves legal protection."[152] While the outcome in *Dunphy* may be completely justifiable in terms of equitable principles, the case illustrates the burdens that courts may ultimately encounter in evaluating the relationships of unmarried cohabitants on a case-by-case basis to fashion an equitable remedy.[153]

The absence of a bright-line rule or a definitive test for determining the emotional commitment between unmarried cohabitants has dissuaded some courts from extending tort recovery to these individuals in areas such as emotional distress or loss of consortium.[154] Another drawback of the decisions in *Dunphy, Marvin*, and similar cases is that no identifiable legal status is created for unmarried cohabitants. Instead, courts are restricted to working within a framework of preexisting legal rules and common law principles. Moreover, while the courts in *Dunphy* and *Marvin* acknowledged a need to provide some level of protection to unmarried

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151. *Id.* at 380 (emphasis added). The court further noted that "[a]n intimate familial relationship that is stable, enduring, substantial, and mutually supportive is one that is cemented by strong emotional bonds and provides a deep and pervasive emotional security," and "that persons who enjoy such an intimate familial relationship have a cognizable interest in the continued mutual emotional well-being derived from their relationship." *Id.*

152. *Id.* at 379. *But see* Elden v. Sheldon, 758 P.2d 582, 587 (Cal. 1988) (concluding state's interest in promoting marriage would be inhibited if unmarried cohabitants could recover in tort based on emotional distress).

153. *See supra* text accompanying note 139.

154. The rationale behind denying unmarried cohabitants the ability to bring such claims focuses on the burden imposed upon the judicial system. *See, e.g., Elden*, 758 P.2d at 587. In declining to permit unmarried cohabitants recovery in emotional distress or loss of consortium claims, the Supreme Court of California emphasized the difficulties associated with an inquiry "into the relationship of the partners to determine whether the 'emotional attachments of the family relationship' existed between the parties and whether the relationship was 'stable and significant.'" *Id.* (citations omitted). The court further noted that:

> A determination whether a partner in an unmarried cohabitation relationship may recover damages for emotional distress based on such matters as the sexual fidelity of the parties and their emotional and economic ties would require a court to undertake a massive intrusion into the private life of the partners. Further, application of these factors *would not provide a sufficiently definite and predictable test to allow for consistent application from case to case.*

Id. (emphasis added).

cohabitants, some courts summarily "deny that cohabitation carries any legal significance and then apply traditional legal rules" to remedy the case at issue.[155]

Thus, a court's willingness to make a subjective inquiry into the nature of the relationship between two unmarried cohabitants who are not family members may be dispositve of whether such cohabitants are able to recover damages either in a contract or the tort setting. Additionally, for courts willing to conduct a case-by-case analysis to determine whether an unmarried cohabitant is entitled to recover, problems of arbitrary distinctions may arise due to the difficulty of ascertaining the true nature of the cohabitants' relationship.[156] Part of the problem with such ad hoc review is that in the end "courts will be forced to evaluate all sorts of personal relationships and necessarily assign to them a rank in some large hierarchy."[157] However, this subjective analysis into the emotional significance of personal relationships should not be the role of the courts;[158] instead, it is better left to the legislature to provide a definitive legal status with some protections for unmarried cohabitants.

Modification of the NJDPA could aid in reducing the burden on New Jersey courts to conduct case-by-case inquiries into the legitimacy of relationships between unmarried cohabitants. The New Jersey Supreme Court has already acknowledged that unmarried cohabitants can maintain "enduring, substantial, and mutually supportive" relationships and such couples "have a cognizable interest in the continued mutual emotional well-being derived from their relationship."[159] An extension of the NJDPA to unmarried cohabitants would further serve the purpose of promoting emotional well-being and social recognition. Furthermore, since the benefits currently offered under the NJDPA are substantially less than those provided through the institution of marriage,[160] couples seeking the traditional rights and obligations associated with marriage will not be deterred from marrying. Instead, the availability of the NJDPA to unmarried cohabitants under the age of sixty-two could serve to

155. Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1168 (2006).

156. *See Dunphy*, 642 A.2d at 381-82 (Garibaldi, J., dissenting).

157. *Id.* at 384.

158. *Id.* After all, "in the end, only the two people involved in the relationship really know how close and stable their relationship is." *Id.* at 383.

159. *Id.* at 380 (majority opinion).

160. *See supra* text accompanying notes 15-22.

foster long-term committed relationships and could promote marriage as a truly elite status.[161]

IV. CONCLUSION

In the aftermath of *Lewis v. Harris*, the NJDPA has undergone significant change. Under the current version of the statute, same-sex couples under the age of sixty-two can no longer enter into domestic partnerships because of the availability of civil unions, and the only individuals eligible to enter into domestic partnerships in New Jersey are unmarried cohabitants who have reached the age of sixty-two.[162] The New Jersey Civil Union Review Commission is now tasked with determining the future of the NJDPA[163] and may consider several possible alternatives with regard to the domestic partnership scheme. The commission must examine whether the NJDPA should (1) remain in its current form, (2) be extended to a broader class of unmarried cohabitants, or (3) be repealed altogether.[164]

While repeal of the NJDPA is one alternative, the state legislature has already recognized a legitimate state interest in providing domestic partnership benefits to unmarried cohabitants who have reached the age of sixty-two—protection of certain pension and other retirement benefits resulting from a previous marriage.[165] Thus, a repeal of the NJDPA would effectively controvert the legislature's original determination that unmarried cohabitants of retirement age should benefit from some enhanced legal protections. On the other hand, if the NJDPA were to remain in its current form, the statutory scheme would suggest that *only* unmarried cohabitants sixty-two and older are deserving of enhanced legal status and the protections afforded under the NJDPA. This notion runs contrary to New Jersey's preexisting judicial recognition of unmarried cohabitation and the need to craft equitable solutions for unique problems that may arise when couples who share a stable, committed, long-term relationship do not retain any statutorily identifiable legal status.[166]

Given the conflicting considerations with respect to repeal and retention without alteration, the commission should seriously consider a modification of the NJDPA and extend its availability to

161. *See* Kogan, *supra* note 9, at 1035 (noting that "if more . . . couples, who first enter into domestic partnerships later choose to marry, then state-sponsored domestic partnership schemes may in fact lead to long-term, stable, committed relationships").

162. N.J. STAT. ANN. § 26:8A-4.1 (West Supp. 2007).

163. *See id.* § 37:1-36C(7).

164. *See supra* notes 132-34 and accompanying text.

165. *See* Senate Committee Report, *supra* note 85, at 2.

166. *See supra* notes 146-155 and accompanying text.

all unmarried cohabitants regardless of age[167] or sexual orientation. While such an extension would create a unique statutory scheme in New Jersey for recognizing different degrees of cohabitation, the result is in no way revolutionary.[168] A contractually based system establishing legal recognition as well as *limited* rights, benefits, and obligations for unmarried cohabitants would ultimately create a "legal situation [that] produces juridical consequences, rather than a situation of fact to which juridical consequences are attached."[169] The burdens courts currently face in attempting to classify an intimate familial relationship between cohabitants and crafting "creative" equitable remedies would be significantly reduced, if not eliminated altogether. Finally, an extension of the NJDPA to a broader class of cohabitants would reflect the changing trends of social behavior as evidenced by the continuing growth of unmarried cohabitation and could even promote marriage as an elite and desirable legal and social status.[170]

167. *See supra* note 89.

168. Although New Jersey would be the first state in the U.S. to adopt a statutory scheme providing for marriage, civil unions, and domestic partnerships for unmarried or un-unionized individuals, several other jurisdictions have already extended equal domestic partnership benefits and registration for couples of all ages and sexual orientation. *See, e.g.*, ME. REV. STAT. ANN. tit. 22, § 2710 (2006); N.Y., N.Y., ADMIN. CODE § 3-241 (2006); S.F., CAL., ADMIN. CODE ch. 62, § 62.10 (2004).

169. Borrillo, *supra* note 66, at 475-76 (discussing the benefit of PACS contractually based system).

170. *See supra* note 137 and accompanying text.