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The Tie That Binds: Recognizing Privacy and the Family Commitments of Same-Sex Couples

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THE TIE THAT BINDS: RECOGNIZING PRIVACY AND THE FAMILY COMMITMENTS OF SAME-SEX COUPLES

INTRODUCTION

"I do not know, condone, comprehend or understand homosexuality in any way, shape, form or size."

Rock musician Sebastian Bach[1]

In his fable "The Lover and His Lass," James Thurber tells the story of two parrots who listen with disdain and derision to a pair of hippopotamuses making love, unable to comprehend what the hippos see in each other.[2] The parrots consider reporting the offensive lovemaking to the ABI (African Bureau of Investigation) on the grounds that the hippos' ungainly amorous activities are "probably a threat to the security of the jungle."[3] Instead, the parrots merely gossip to their neighbor parrots about the shameless hippos.[4]

Later that evening the hippos overhear the parrots engaged in affectionate foreplay, and express their own incomprehension that beings as alien as parrots could have any conceivable sex appeal, and joke with their own neighbors about the incomprehensible parrots.[5] The moral of the story is: Laugh and the world laughs with you, love and you love alone.[6]

Many heterosexuals look upon gay and lesbian couples with this kind of incomprehension. Same-sex relationships are often understood as mere friendships lacking the supposedly closer bonds resulting from opposite-sex relationships as exemplified by marriage.[7] Out of this incomprehension and misunderstanding, three structures emerged to stigmatize homosexual people for expressing their love for one another: psychoanalysis had identified them as sick;[8] many organized religions identified

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1. Goldstein, "Skid Row's Sebastian Bach Embroiled in AIDS Row," L.A. Times, Jan. 21, 1990, Calendar at p. 34, col. 1 (quoting Sebastian Bach).

2. J. THURBER, FURTHER FABLES FOR OUR TIME 36-39 (1956).

3. *Id.* at 38.

4. *Id.*

5. *Id.* at 38-39.

6. *Id.* at 39. For an exhaustive examination of the fable and a thorough explication of how it illustrates ways of knowing and imagining others, see Greimas, *The Love-Life of the Hippopotamus: A Seminar with A.J. Greimas*, in ON SIGNS 341-62 (1985).

7. The parrots' misunderstandings about lovemaking as a security threat suggest the current reasoning underlying the military's exclusion of gay men and lesbians from the armed services. *See, e.g.*, Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989) (en banc); Ben-Shalom v. Secretary of the Army, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 1990 U.S. LEXIS 1125 (Feb. 26, 1990) (No. 89-876).

8. K. LEWES, THE PSYCHOANALYTIC THEORY OF MALE HOMOSEXUALITY 29-30 (1988).

them as immoral;[9] and the law had identified them as criminals.[10]

All three systems are now being revised. The psychoanalytic community long ago abandoned its definition of homosexuality as an illness.[11] Some modern religious scholars do not accept the supposed monolithic religious bias against homosexuals; theologians and religious scholars have challenged the very foundations of religious dogma that assume homosexual immorality without analysis or inquiry.[12] And since at least the mid 1950s, legal scholars have questioned the use of the criminal law to penalize acts defined as consensual adult sodomy, whether heterosexual or homosexual.[13]

Issues relating to homosexuality are now squarely before courts all over the country. Federal courts alone have recently decided cases dealing with discrimination against homosexual citizens by the military,[14] general anti-homosexual discrimination by the Department of Defense,[15] and a university's refusal to fund gay student groups.[16] While this Comment will necessarily touch on some issues presented in those contexts, its focus is on a parallel concern which will remain unresolved despite the outcome of those cases: What is the status, not of homosexual individuals, but of same-sex couples? Specifically, how are gay or lesbian relationships best viewed within a context that presumes family relationships are exclusively heterosexual? In this century the Constitution has been interpreted to protect sexuality within the marital relationship from governmental intrusion.[17] While homosexual citizens are generally prohibited from marrying,[18] they consistently form identical relationships for nearly identical reasons.[19] Gay men and lesbians have the same emo-

9. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring).

10. *See id.* at 187-88 (citing GA. CODE ANN. § 16-6-2 (1984)).

11. *See* K. LEWES, *supra* note 8, at 213-29.

12. *See, e.g.*, J. BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY (1980); N. PITTENGER, *The Morality of Homosexual Acts* in HOMOSEXUALITY AND ETHICS 139-45 (1980). For a broader philosophical inquiry into the morality of homosexuality see M. RUSE, HOMOSEXUALITY: A PHILOSOPHICAL INQUIRY (1988).

13. H.L.A. HART, LAW, LIBERTY AND MORALITY 13-15 (1963); *see also Hardwick*, 478 U.S. at 199 (Blackmun, J., dissenting); *id.* at 214-16 (Stevens, J., dissenting).

14. Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989) (en banc); Ben-Shalom v. Secretary of the Army, 881 F.2d 454 (7th Cir. 1989); Pruitt v. Weinberger, 659 F. Supp. 625 (C.D. Cal. 1987), *appeal filed* No. 87-5914.

15. High-Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990).

16. Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361 (8th Cir. 1988).

17. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965).

18. *See* Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1981), *cert. denied*, 458 U.S. 1111 (1982); Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974).

19. *See, e.g.*, Peplau & Gordon, *The Intimate Relationships of Lesbians and Gay Men*, in

tional, social and sexual needs as heterosexuals; intimate relationships are equally integral to their lives. The United States Supreme Court has stated that certain intimate human relationships must be protected against state intrusion.[20] This Comment will argue that stable and significant homosexual relationships meeting the Court's criteria must be protected under that reasoning.

Part One of this Comment discusses the Supreme Court's framework for analyzing certain sexual relationships between consenting adults, focusing on the Court's analysis of nonprocreative acts such as sodomy and heterosexual sex using contraception. The Comment then examines the Court's major decisions on marriage and intimate family relationships under the first and fourteenth amendments.

The second section of the Comment introduces the central problem: because same-sex couples have not been viewed as families in the same way opposite-sex couples have, state courts and legislatures may have assumed that the Supreme Court's language extending protection to sexual relationships which fall under the rubric of "family" does not apply to gay or lesbian couples.

Part Three first examines how we view same-sex couples differently from opposite-sex couples. For example, we have a word and a ceremony, marriage, to legitimate the relationships of opposite-sex couples which we deny to same-sex couples. Moreover, no matter how we try to disguise our bias against same-sex couples (if in fact we try to disguise it) the bias is evident in the language we use when we discuss them, or choose not to discuss them. Part Four examines illustrative cases from state courts across the country in which the question of same-sex families was central.

Finally, Part Five suggests three possible solutions to the problem: 1) recognizing same-sex couples as de facto families; 2) legalizing same-sex marriage; and 3) creating a relationship that permits legal recognition of same-sex relationships for some purposes—a proposal that is gaining increasing acceptance.

I. BACKGROUND

A. Problems in Defining the Class

A constant theme of this Comment is that an important barrier to society's understanding of homosexuality arises from the misuse of lan-

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CHANGING BOUNDARIES: GENDER ROLES AND SEXUAL BEHAVIOR 226-44 (1983) [hereinafter Peplau].

20. Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984).

guage. Before such a discussion can even begin, it is important to look briefly at the word "homosexual" itself, and the class of people it describes.

The word "homosexual" was not invented until 1891, and does not appear in English until the early part of the 20th Century.[21] While the Latin term "sodomita" was used to describe people who engaged in homosexual acts in the Middle Ages, it also connoted a variety of other unenumerated sexual acts,[22] primarily due to the vagueness inherent in the Old Testament story of the city of Sodom.[23] Prior to the 20th Century, this lack of a word to describe people who engaged in homosexual acts as a distinct class would have obscured the idea that homosexual persons as a class were being denied legal rights.

Even in this century the concept of a class of homosexual persons causes confusion. Rhonda Rivera notes that the following have all been labeled as "homosexual":

> —a married father who engaged in same-sex behavior in his late teens.
> —a man with a single conviction for a same-sex sex crime.
> —a woman whose friends were bisexuals.
> —a man who said he was a homosexual but never admitted any overt same-sex behavior.
> —women in mannish attire.
> —persons who exhibited characteristics and mannerisms which evidenced homosexual propensities.[24]

This Comment will follow Rivera's convention of using "homosexual" only as an adjective.[25] A large part of our misunderstanding of gay men and lesbians is evident in the linguistic usage which allows sexual orientation to eclipse all other aspects of character and personality. By identifying gay men and lesbians as "homosexuals," it may too easily be assumed that they have permitted this aspect of their identity to become their primary identity. This is very different from the way most heterosexuals view their own sexual orientation, which is to say heterosexuals would

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21. *See* J. BOSWELL, *supra* note 12, at 42-43 & n.4.

22. *Id.* at 93 & n.2.

23. *Id.* at 93.

24. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 801-02 (1979) (footnotes omitted).

25. A person's sexual preference is but one part of his or her character, and acting upon it occupies a small part of his or her actual existence. Hence, the author has used the word "homosexual" only as an adjective which describes the sexual orientation of the individual rather than using "homosexual" as a noun which implies a being whose sole dimension is an erotic one.

Id. at 804.

not ordinarily identify themselves as heterosexual, but view their heterosexuality as a subordinate, though still important part of who they are. Homosexuality is similarly only an aspect of identity.[26] Assumptions by heterosexuals that homosexual citizens view their sexuality differently simply reinforce the stereotype that homosexual people identify themselves solely or primarily in the erotic realm in a way that heterosexuals typically do not. Thus the use of "homosexual" as an adjective will be a means of presenting homosexuality to heterosexual readers in a way that more fully accords with the way most homosexual people, as well as most heterosexuals, truly view their own sexual orientation.

Preconceptions about homosexual people which are at work in the unconsidered use of language are illustrated by use of the phrase "life style," which is commonly appended to "homosexual."[27] The concept that homosexuality is a "life style" is a means of importing stereotypes and prejudices into the discussion. What is a homosexual "life style?" How is it different from a heterosexual "life style?" What, in fact, would a heterosexual "life style" be? Does Orrin Hatch or Debbie Gibson live a heterosexual "life style?" How about John Tower? Hugh Hefner? All are clearly heterosexual, but what useful information does that bare fact provide about any other aspect of their lives?[28]

"Life style" does not appear in discussions of any other minority. There is no discussion of a black "life style," a female "life style," a handicapped "life style." The variety of those group members' lives is—at least in most modern legal analysis—assumed. But for prejudice, the variety in the lives of gay men and lesbians would also be apparent. The presuppositions tucked into the phrase "homosexual life style" are invidious and discriminatory. We assume a commonality based on homosexuality that may or may not exist in any individual case. This commonality is not similarly assumed based on heterosexuality. Such presuppositions hinder, rather than help, discussion of the issue, and have no place in legal discourse.

A second linguistic barrier to understanding homosexual people is

26. *Id.*

27. *See* L. v. D., 630 S.W.2d 240, 244 (Mo. Ct. App. 1982) (seven uses of term in one column of court's printed opinion).

28. For an example of an appropriate use of the phrase, see Scott, *Life Style of Mormons Cuts Risk of Death*, L.A. Times, Dec. 6, 1989, at A1, col. 3. The study specifies what constitutes the Mormon "life style" (e.g., regular churchgoing, refraining from tobacco or alcohol, regular exercise, a good night's sleep) and, most importantly, *relates* those factors to a specified context—in this case, health. *Id.* Equally important, the study examined a separate group of non-Mormons who exhibited the same life style traits, thus acknowledging that the characteristics are not confined to the group at issue, a step seldom taken when charging homosexual people with living a particular life style.

the confusion among the concepts of sexual orientation, gender identity and gender role behavior.[29] Sexual orientation is an attraction to same-gender, as opposed to opposite-gender partners.[30] Gender identity is an individual's belief that she or he is male or female.[31] Gender role behavior involves acting in traditionally "masculine" or "feminine" ways.[32] A common stereotype dictates that if an individual varies in one category he or she will inevitably vary in the others as well.[33] This is not true. As Letitia Ann Peplau notes:

> [A] typical heterosexual woman is attracted romantically and sexually to men (sexual orientation), she knows without doubt that she is female (gender identity), and she frequently enacts the roles or behaviors that society defines as appropriate for women. A lesbian differs from this pattern in that her sexual and romantic attraction is to women. The stereotype assumes that the lesbian must also differ in her gender identity and gender role behavior. This assumption is wrong.
>
> Homosexual people are not confused about their gender identity: lesbians are not different from heterosexual women in their sureness of being female, nor do gay men differ from heterosexual men on this dimension. In terms of [gender role] behavior, research indicates that most gay men are not effeminate in dress or manner, nor are lesbians usually "masculine" in their behavior.[34]

This Comment deals only with sexual orientation. Issues of gender identity and gender role behavior are entirely separate from a discussion of the law as it relates to sexual orientation. As Peplau notes, research indicates most gay men and lesbians do not have confused gender identities, nor do they typically enact cross-gender role behavior.[35] Even if this were not true, though, it is unclear how that would affect a discussion of the legal issues of due process, equal protection and freedom of intimate association. Why would it be legally significant that a homosexual man affects conventionally feminine mannerisms? Would it be le-

29. *See* Peplau, *supra* note 19, at 227-28.

30. *Id.*

31. *Id.*

32. *Id.*

33. For example, the Reverend Lou Sheldon has stated his belief that high school students who identify themselves as homosexual are experiencing "gender confusion." FRONTIERS NEWSMAG., Sept. 21, 1988, at 7.

34. Peplau, *supra* note 19, at 228-29 (citations omitted).

35. *Id.*

gally significant if a heterosexual man adopted the same conventional feminine characteristics? On what theory?

Another difficulty in defining the class of homosexual people is the relationship among homosexual behavior, heterosexual behavior and bisexual behavior. At least since the famous Kinsey studies of 1948 and 1953,[36] it has been clear that humans act in a continuum of sexual behavior. The studies showed some people engaged only in heterosexual behavior, some only in homosexual behavior, and many engaged in both.[37] It is certainly, then, possible to argue from behavior to orientation: those who engage in only homosexual acts can safely be described as having a homosexual orientation; those who engage in exclusively heterosexual acts can be assumed to be of heterosexual orientation. Everyone else is bisexual. But that argument relies on an assumption that sexual conduct and sexual orientation have some sort of direct correspondence. Such a correspondence may or may not exist. The categories of sexual conduct and sexual orientation, even at the extreme ends of Kinsey's behavioral spectrum, do not need to be identical.[38]

This Comment takes the position that the Kinsey studies suggest that at least some people are truly, completely and immutably homosexual in orientation, and thus that the state may not pass laws which permit penalties based on that status. While the Kinsey studies suggest this would be a relatively small group,[39] the size of the group would be irrelevant to laws criminalizing status.[40]

Defining a class of homosexual people is important because the United States Supreme Court has held that the Equal Protection Clause of the Unites States Constitution protects citizens against arbitrary and invidious discrimination.[41] Discrimination based on categorization by

36. A. KINSEY, W. POMEROY & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948); A. KINSEY, W. POMEROY, C. MARTIN & P. GEBHARD, SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953) [hereinafter HUMAN MALE and HUMAN FEMALE, respectively].

37. HUMAN MALE, *supra* note 36, at 650-51; HUMAN FEMALE, *supra* note 36, at 488.

38. *See* Watkins v. United States Army, 875 F.2d 699, 711-16 (9th Cir. 1989) (en banc) (Norris, J., concurring) (Army regulations which purport to target only homosexual conduct in fact target homosexual orientation). *See id.* at 715 ("In short, the regulations do not penalize soldiers who have engaged in homosexual acts; they penalize soldiers who have engaged in homosexual acts only when the Army decides that those soldiers are actually gay.").

39. HUMAN MALE, *supra* note 36, at 650-51; HUMAN FEMALE, *supra* note 36, at 488. While it is possible that some people whose behavior is entirely homosexual might not claim a homosexual identity, it is equally likely that some from the much larger group whose behavior was bisexual would claim to be homosexual.

40. The United States Supreme Court has long held that a status may not be made criminal. Robinson v. California, 370 U.S. 660, 666 (1962).

41. Loving v. Virginia, 388 U.S. 1, 10 (1967).

race, for example, is subject to the Court's strictest scrutiny.[42] Other class-based distinctions must be reasonable, not arbitrary, and must rest on characteristics that have a fair and substantial relation to a statutory purpose to assure that all persons similarly situated are treated alike.[43] Those who argue that homosexuality is simply a behavior engaged in by fundamentally heterosexual persons remove this line of equal protection analysis.[44] The argument that homosexuality is an immutable characteristic like race or ethnicity suggests that the Equal Protection Clause's class-based analysis is appropriate.[45]

Immutable and permanent membership in a discrete and insular minority is not a prerequisite for a separate branch of analysis which guarantees that the political process will not be distorted by unfair prejudice.[46] For example, the Court has recently held that in order to state a cause of action under sections 1981 and 1982 of Unites States Code Title 42, a plaintiff need only show discrimination based on racial ancestry or characteristics.[47] Use of the word "characteristics" suggests that *actual* membership in the class is not necessary if discrimination occurred because of perceived membership in the group.

This analysis can be applied to perceptions of homosexuality. A person may be perceived to be homosexual based on something as simple as attendance at a fundraiser for a gay-rights organization.[48] Actual sexual conduct or orientation is irrelevant to this societal imposition of the stigma which attaches to a homosexual identity. Subjective judgments about a person's homosexuality are not uncommon. At least one federal court of appeals has held that a prisoner's status as a homosexual may be determined by "a purely subjective judgment" based on the appearance of weakness, small size or effeminacy.[49] In the present system, legislators who are afraid of being identified as homosexual may not vote in favor of

42. *Id.* at 11.

43. Reed v. Reed, 404 U.S. 71, 75-76 (1971).

44. *See, e.g.*, Watkins v. United States Army, 847 F.2d 1329, 1356-58 (9th Cir. 1988) (Reinhardt, J., dissenting), *vacated*, 875 F.2d 699 (9th Cir. 1989) (en banc).

45. *See Watkins*, 875 F.2d at 724-28 (Norris, J., concurring).

46. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). *See also* Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 UCLA L. REV. 915, 924-26, 929-32 (1989).

47. Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987); Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617 (1987). *See also* School Bd. v. Arline, 107 S. Ct. 1123 (1987) (section 504 of Rehabilitation Act of 1973, which denies federal funds to state programs that discriminate based on physical handicap, protects those discriminated against who are "regarded" as handicapped).

48. Halley, *supra* note 46, at 970.

49. Gay Inmates v. Barksdale, 819 F.2d 289 (6th Cir. 1987); *see* Halley, *supra* note 46, at 947 & n.15.

legislation favorable to the gay community because the political risks of the rumor that the politician is gay or lesbian are high, regardless of whether the legislator is, in fact, homosexual.

In short, prejudice against homosexual people is not limited to people who engage in homosexual sex, or identify themselves as homosexual. It is certainly easier to discriminate against a self-identified lesbian or gay man, but self-identification is not a necessary prerequisite. If you are reading this Comment where someone can see you, or leave it open on your desk, or, more strongly, argue its position, the prejudice against homosexual people is available against you, regardless of whether you engage in homosexual sex, heterosexual sex or no sex at all. And the more forcefully you make the argument in favor of gay rights, the more skeptically many people will view protestations of heterosexuality.[50] The prejudice against homosexual orientation suggests that a court should carefully review laws that burden homosexual citizens.[51]

B. The Constitution and Sex

The Justices of the United States Supreme Court, like most of us, have some difficulty dealing with human sexuality.[52] The cases discussed here are often convoluted and contradictory. Discussions of sex in our fundamentally puritan, yet nominally libertarian culture are bound to be problematic. This is especially true when the issues arise in a constitutional context.

1. Confusing sodomy and homosexuality: *Bowers v. Hardwick*

The Supreme Court's decision in *Bowers v. Hardwick*[53] illustrates the difficulty in discussing sexual activities. *Hardwick* is the only decision of the Court—at least as the majority frames the issue—that deals squarely and solely with a right to engage in particular sex acts. *Griswold*

50. Presumptions of homosexuality are so powerful that arguing *against* gay rights will also raise eyebrows and rumors. Reverend Lou Sheldon, an avid anti-gay rights activist has been suspected of latent homosexuality. Lichtblau, *A Savvy "Free Agent for God,"* L.A. Times, Nov. 26, 1989, at A1, col. 1.

51. In *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, the California court held that the state's labor code provisions protecting political activity protect against discrimination against people "who identify themselves as homosexual, who defend homosexuality, or who are identified with activist homosexual organizations." 24 Cal. 3d 458, 488, 595 P.2d 592, 610-11, 156 Cal. Rptr. 14, 32-33 (1979).

52. For a discussion of this difficulty in the related context of obscenity, see Paris Adult Theatre I v. Slaton, 413 U.S. 49, 78-93 (1973) (Brennan, J., dissenting).

53. 478 U.S. 186 (1986).

v. Connecticut,[54] *Eisenstadt v. Baird*,[55] *Stanley v. Georgia*,[56] and *Skinner v. Oklahoma*,[57] each implicated the right to engage in some form of sexual activity, but in those cases the Court framed the issue in other terms. *Griswold* was decided on the issue of marital privacy;[58] *Eisenstadt* was decided on equal protection grounds;[59] *Stanley* was framed and decided as a first amendment issue;[60] and *Skinner* addressed the right to have offspring.[61] In each case the Court avoided the issue which the *Hardwick* majority squarely addressed: the fact that human beings engage in voluntary sexual activity simpliciter, without reference to a relational context.[62] This decontextualization occurred in *Hardwick* because the majority framed the issue in terms of homosexuality. In the prior cases the Court had dealt with heterosexual activity, and that permitted the Court in each case to view the familiar sexual activity in a constitutional context which allowed analysis of some issue other than the sexual act implicated. But in *Hardwick*, because of the alienated status of homosexuality, the majority was able to decide the case outside the constitutional referents as if only sex were involved.[63]

The facts of the case were not in question. Michael Hardwick was arrested under a Georgia statute which criminalized as sodomy performing or submitting to "any sexual act involving the sex organs of one person and the mouth or anus of another."[64] The prior version of the statute had defined sodomy as "the carnal knowledge and connection against the order of nature by man with man, or in the same unnatural manner with woman."[65] Both clearly include acts of heterosexual sodomy.

The Georgia prosecutor decided not to press charges against Hard-

54. 381 U.S. 479 (1965) (married couples have constitutional right to purchase contraceptives).

55. 405 U.S. 438 (1972) (Massachusetts statute permitting married couples to purchase contraceptives, but prohibiting sale to unmarried couples violates Constitution).

56. 394 U.S. 557 (1969) (state cannot constitutionally punish private possession of obscene material).

57. 316 U.S. 535 (1942) (statute which permits sterilization of certain criminals violates Constitution).

58. *Griswold*, 381 U.S. at 486.

59. *Eisenstadt*, 405 U.S. at 454-55.

60. *Stanley*, 394 U.S. at 565.

61. *Skinner*, 316 U.S. at 536.

62. *Hardwick*, 478 U.S. at 191 ("No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated."). "Family," "marriage" and "procreation" are the contexts within which sexual activity can occur.

63. *Id.*

64. *Id.* at 214 n.1 (Stevens, J., dissenting) (citing GA. CODE ANN. § 16-6-2 (1984)).

65. *Id.* at 215 n.6 (Stevens, J., dissenting) (citing GA. CODE, tit. 1, pt. 4, § 4251 (1861)).

wick, but Hardwick had standing to challenge the statute because he remained in danger of prosecution.[66] A heterosexual couple who had not been arrested joined the action as plaintiffs, but were dismissed by the Eleventh Circuit Court of Appeals for lack of standing.[67] This left Hardwick as the sole plaintiff, and allowed Justice White and Chief Justice Burger, in his concurrence, to isolate the issue as *homosexual* sodomy, even though, in the Respondent's Brief, Hardwick is never once identified as a homosexual, nor is the sex of his partner mentioned.[68] For the adjudication of the constitutional issue these facts were irrelevant.[69]

As Hardwick's counsel pointed out, Georgia defined this "crime" "in terms of the anatomical parts involved, not in terms of any relationships violated."[70] Yet the Court found this most private conduct offensive enough to allow states to condemn it with the criminal law.[71] Hardwick noted that "[t]he State of Georgia labors long in its brief to establish a proposition Respondent has never denied: namely, that the protection of the *public* realm is a legitimate interest that may be advanced by state law."[72] This is, of course, irrefutable, and it is precisely the issue the Court should have addressed: How is a private act of sex a threat to the public realm?

The word "public" did not appear in the majority opinion. The Court did not address the nature of the public harm posed by sodomy, except to invoke notions of morality.[73] According to the majority, morality, like legislation, is something that may be voted on and passed by majority consent.[74] The Court's majority not only rejected natural law as a constitutional standard, but rejected it as a standard for judging moral conduct, accepting a kind of democratic moralism without further inquiry.[75] This is, of course, just the reverse of the claim Aristotle made for natural law, that it "does not depend upon acceptance."[76]

It is elementary in the law that for an act to be criminal it must

66. *Id.* at 188.

67. *Id.* at 188 n.2.

68. *See generally* Brief for Respondent, Bowers v. Hardwick, 478 U.S. 186 (1986).

69. *See generally Hardwick*, 478 U.S. at 200 (Blackmun, J., dissenting).

70. Brief for Respondent at 23, Bowers v. Hardwick, 478 U.S. 186 (1986).

71. *Hardwick*, 478 U.S. at 196.

72. Brief for Respondent at 19, Bowers v. Hardwick, 478 U.S. 186 (1986) (citations omitted) (emphasis in original).

73. *Hardwick*, 478 U.S. at 196.

74. *Id.* (rejecting claim that "majority sentiments about the morality of homosexuality should be declared inadequate").

75. *Id.*

76. THE ETHICS OF ARISTOTLE: THE NICHOMACHEAN ETHICS 189 (1955) ("There are

ordinarily consist both of a wrongful act and a guilty mind.[77] That mental state is a critical factor in determining, for example, culpability for various degrees of murder.[78] In the case of sodomy, though, there is virtually no defense available once the act has been proved.[79] This suggests that the state views sodomy as an especially grave moral harm. But what is the moral harm of sodomy? Why is sodomy a proper subject of criminal law? If, as the majority suggests, the criminal law is based on notions of morality, then, at the very least the Court has a duty to make sure the state has asked the relevant moral questions, rather than merely asserting the existence of one moral position and nothing more.[80] This is a central problem with the majority opinion. The morality of heterosexual acts is not so easily, or often, called into question. The morality of marital sexual acts of any nature seems to be beyond question. In *Griswold* the issue of morality was raised by only one justice.[81] The open question of whether *Hardwick* applies *only* to homosexual sodomy permits an argument that heterosexual sodomy might not be so inherently immoral. The majority in *Hardwick* never discussed why or if there would be a difference between heterosexual or homosexual sodomy.

The Court did not examine any of the literature which suggests there is no reason to view the morality of homosexuality as per se different from heterosexuality. For example, H.L.A. Hart argued that sodomy, including homosexual sodomy does not violate moral standards.[82] Hart is joined by theologians such as Norman Pittenger, who examined this stance with specific reference to homosexuality in "The Morality of Homosexual Acts."[83] After discussing the requirements for any act to be sinful (i.e., immoral),[84] Pittenger, like Hart before him, is unable to dis-

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two sorts of political justice, one natural and the other legal. The natural is that which has the same validity everywhere and does not depend upon acceptance.").

For a discussion of the significance of rejecting the natural law theory as it would apply to sodomy, see *infra* note 266.

77. *See* P. JOHNSON, CRIMINAL LAW 1 (1985) ("A defendant is not guilty unless he performed the wrongful act with the required 'culpability.' ").

78. *See, e.g.*, CAL. PENAL CODE §§ 187-92 (West 1988); MODEL PENAL CODE § 210.2 (1985).

79. Focus on the act, to the exclusion of anything else, is complete, for example, in Georgia, where sodomy is defined as performing or submitting to "any sexual act involving the sex organs of one person and the mouth or anus of another." GA. CODE ANN. § 16-6-2 (1984).

80. *Hardwick*, 478 U.S. at 196.

81. *See Griswold*, 381 U.S. at 505 (White, J., concurring) ("There is no serious contention that Connecticut thinks the use of artificial or external methods of contraception immoral or unwise in itself.").

82. H.L.A. HART, LAW, LIBERTY AND MORALITY (1963).

83. N. PITTENGER, *supra* note 12, at 139-45.

84. *Id.* Pittenger argues that the inner spirit of the actor and the manifest intentionality of the action must both be analyzed to make a moral determination. *Id.* at 139.

tinguish any per se difference between homosexual and heterosexual acts.[85]

Michael Ruse arrived at the same position on philosophical grounds.[86] His conclusion is that:

> [O]nce you strike out as fallacious arguments about biological naturalness, and bring forward modern realizations of the possibilities for homosexuals of meaningful relationships, the Kantian and utilitarian positions come very much closer together. Certainly, at a minimum, there is moral worth in the close-coupled relationships of the Second Kinsey study, and probably more . . . . Homosexuality within a loving relationship is a morally good thing.[87]

The Court's failure to address these arguments is significant. Once the issue of procreation is removed from the discussion as *Griswold* and *Eisenstadt* seem to do, the differences between heterosexual sex and homosexual sex are surely only those of physical geography but for the gender of the parties.[88] If a state can say that sodomy is immoral, then why is morality an issue in some sexual positions (i.e., anal or oral intercourse under the Georgia statute) but not others (for example non-procreative vaginal intercourse). If sexual positioning is a moral issue, may a state find vaginal intercourse in the missionary position moral but not vaginal intercourse in some more creative or athletic configuration? The difficulty of the Court's reasoning is illustrated by altering the facts of *Stanley v. Georgia*,[89] where the Court held that the plaintiff was protected by both the privacy associated with his home, and the first amendment for possessing obscene films in his home.[90] Instead of possessing obscene films, if Mr. Stanley had brought home an inflatable doll, would the *Stanley* rule cover him in his home, or the *Hardwick* rule? If *Hardwick* applies,[91] would the state's defined and proscribed sodomitic activities apply to what he did with the doll? Would vaginal intercourse with the doll be protected by *Griswold* or *Eisenstadt*? After *Hardwick*, would the

85. *Id. See also* FINAL REPORT OF THE TASK FORCE ON FAMILY DIVERSITY FOR THE CITY OF LOS ANGELES, Supp. Part I, at S-204 (1988) [hereinafter CITY OF LOS ANGELES TASK FORCE REPORT].

86. *See* M. RUSE, *supra* note 12, at 196.

87. *Id.*

88. Procreation is, of course, the typical reason for "justifying" sex. *See* E. PAGELS, ADAM, EVE AND THE SERPENT 11-12 (1988).

89. 394 U.S. 557 (1969).

90. *Id.* at 565.

91. A doll would probably not receive the same first amendment protection that a film or a book would.

sex of the doll be relevant? Dispositive? The Court's failure to address or distinguish the clearly separable issues of sodomy and homosexuality[92] has led to the conclusion by some state courts that *Hardwick* is about homosexuality, not sodomy.[93]

The source of the confusion is obvious. The majority asserts that the line of family rights cases described in *Carey v. Population Services International*[94] did not support the claimed right of homosexuals to engage in sodomy, then argues that "[n]o connection between family, marriage or procreation on the one hand and *homosexual activity* on the other" had been shown.[95] At this point the Court indicated it had collapsed *all* homosexual activity into "homosexual sodomy." As a result of that collapse, the Court was able to refer to the right to "homosexual conduct"[96] as if it were synonymous with a purely sexual "right," the right to engage in "homosexual sodomy."[97] Homosexual *conduct*, however, extends well beyond the limited sexual activities proscribed by Georgia's law.[98] It is possible to read this as the Court tailoring a very narrow opinion to the specific facts of the case. But another reading is that the Court viewed homosexual people as a different class from heterosexuals when it comes to sodomy.

In reality, the "homosexual activity" the Court referred to, as well as the "homosexual conduct" cited by both Justice White and by the Chief Justice encompass a far broader range of activities than mere sodomy. If Georgia had wished to prohibit homosexual conduct or activity, it would have had to draw its lines much differently. If, for example, the police officer who accidentally observed Hardwick and his companion had found them engaged in mutual masturbation (or any of a number of

92. *Hardwick*, 478 U.S. at 195. *See also id.* at 196 (Burger, C.J., concurring).

93. *See* Cruzan v. Harmon, 760 S.W.2d 408, 418 (Mo. 1988) (en banc), *cert. granted*, 109 S. Ct. 3240 (No. 88-1503 1989) ("In *Bowers v. Hardwick* the Supreme Court considered whether the right to privacy extended to the conduct of homosexuals.").

94. 431 U.S. 678, 685 (1977).

95. *Hardwick*, 478 U.S. at 191 (emphasis added).

96. *Id.* at 195.

97. *Id.* at 196. In an article the majority relied on, *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521 (1986), the authors also conflate sodomy and homosexuality. For example, the very first words of the Introduction are: "At common law, and at one time by statute in every state of the United States, *sodomy* was a criminal act. Traditionally, states have considered *homosexuality* to be 'sinful, sick and criminal.' " *Id.* at 523-24 (emphasis added).

98. *Compare* GA. CODE ANN. § 16-6-2 (1984) *with* Army Regulation 635-200, *discussed in* Watkins v. United States Army, 875 F.2d 699, 713 n.5 (9th Cir. 1989) (en banc) (Norris, J., concurring). For activities covered by the Army regulation, but not by the Georgia statute, compare activities listed *infra* note 99 with the Army Regulation.

other non-sodomitic acts open to them[99]), he could not have arrested them under the Georgia law. Georgia defined the "crime" in terms of the anatomical parts involved, utterly ignoring the relationships noted by the Supreme Court[100] which provide a context for the sexual act. This is the ultimate decontextualization of sex. It restricts the focus to nothing more than body parts in motion, and ignores the human beings to which those body parts are attached. But what is the importance of family, marriage or procreation with regard to sexual activity?

The reference to procreation is, of course, absurd as a justification for sodomy. Like sex using contraception, sodomy is definitionally non-procreative. Marriage, though, would absolutely have prevented the state from scrutinizing the couple's sexual relationship after *Griswold*, regardless of procreation.[101] For whatever reason, marriage justifies even non-procreative sex.

The Court's inclusion of "family" relationships on the list is curious. Not all traditional family relationships protect a sexual relationship. For example, sexual relationships with family members related by blood are not legally protected since incest is clearly a reason for a state to intrude on a sexual relationship.[102] In fact, of the traditionally understood family relationships, it appears that only those based on ties of marriage would protect a sexual relationship from state intrusion.[103] This inclu-

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99. For example, in a recent proposed survey of American sexual practices by the National Institutes of Health, which was denied funding by the House Appropriations Committee, thirteen potential sex acts were listed:

Hug
Kiss
Deep or tongue kiss
Undress your partner
Stimulate your partner's breast or chest with your hand
Stimulate your partner's breast or chest with your mouth
Rub your genitals on your partner's body
Stimulate your partner's genitals with your hand
Stimulate your partner's genitals with your mouth
Vaginal intercourse
Stimulate your partner's anus with your fingers
Stimulate your partner's anus with your mouth
Anal intercourse

Of these, only three—stimulating genitals by mouth, stimulating anus by mouth and anal intercourse—are sodomitic under Georgia's law. Even considering that same-sex couples cannot engage in vaginal intercourse, that still leaves nine activities considered by the NIH to be sexual open to gay or lesbian Georgia citizens. Malanowski, "The Fine Print," SPY, Nov. 1989, at 31-32.

100. *Hardwick*, 478 U.S. at 191.

101. *Id.* at 217-18 & n.10 (Stevens, J., dissenting).

102. *Id.* at 196.

103. *See id.* at 218 n.10 (Stevens, J., dissenting).

sion may have content, however. As discussed below, Supreme Court decisions suggest that there may be a broader definition of family that could include unmarried same-sex couples.[104] In addition, cases discussing the right to marry suggest that states could not have prohibited Hardwick from marrying his partner.[105] *Hardwick*'s citation of marriage and family, then, suggests that the context in which sexual relationships occur is of considerable, perhaps determinative importance.

2. Marriage

Marriage is among the most easily comprehensible relationships between two adults. The Supreme Court has dealt with it in several situations.

In *Loving v. Virginia*,[106] the Supreme Court held that "marriage is one of the 'basic civil rights of man.' "[107] In that case the Court invalidated a Virginia statute which prohibited whites and blacks from marrying,[108] holding that the statute violated the fourteenth amendment because it involved invidious racial discrimination.[109] The Court said:

> To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the fourteenth amendment, is surely to deprive all the states' citizens of liberty without due process of law.[110]

Further, in *Zablocki v. Redhail*,[111] the Court held that "the right to marry is of fundamental importance for *all individuals*."[112] In *Zablocki*, the Court struck down a statute which provided that a divorced resident who was required to support non-custodial children could not marry without court approval.[113] The Court, in striking down the statute, indicated that the right to marry is buttressed by the right to privacy: " 'Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political

104. *See infra* notes 151-81 and accompanying text.
105. *See infra* notes 106-50 and accompanying text.
106. 388 U.S. 1 (1967).
107. *Id.* at 12.
108. *Id.* at 4.
109. *Id. See also* Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988).
110. *Loving*, 388 U.S. at 12.
111. 434 U.S. 374 (1978).
112. *Id.* at 384 (emphasis added).
113. *Id.* at 390-91.

faiths; a bilateral loyalty, not commercial or social projects.' "[114]

The right to marry, though, may be curtailed for certain valid state reasons.[115] Thus, "[l]aws prohibiting marriage to a child, a close relative, or a person afflicted with venereal disease," are valid.[116] And, in a decision from the term prior to *Zablocki*, the Court in *Califano v. Jobst*[117] held valid a provision of the Social Security Act which cut off benefits to a dependent handicapped child upon marriage, even if the child were permanantly disabled and married another disabled person who was not receiving social security benefits.[118] The respondent claimed the statute infringed on his right to marry because it penalized him for marrying members of a certain class—other disabled persons not receiving benefits.[119] The Court ruled that the statute had a legitimate rationale: cutting off child dependency benefits at marriage follows from the reasonable assumption that children who marry will no longer be dependent on their parents.[120] Thus, the statute treated married persons as a class differently than unmarried persons as a class, and was constitutionally acceptable, contrasting sharply with the Wisconsin statute in *Zablocki*, which determined solely "who may lawfully enter into the marriage relationship."[121]

These decisions indicate that a homosexual state resident could challenge a state law which prohibited persons of the same sex from marrying unless the state could provide some compelling interest to prohibit homosexual residents from marrying.[122] When a fundamental right is at stake, under a due process analysis, the Court may not presume facts unless they are "necessarily or universally true in fact."[123] Thus, the Court would be bound to carefully examine the state's interest in preventing same-sex couples from exercising their fundamental right to marry.

Thus far, no federal court has so carefully examined any asserted

114. *Id.* at 384 (quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965)).

115. *Id.* at 404 (Stevens, J., concurring).

116. *Id.* (Stevens, J., concurring).

117. 434 U.S. 47 (1977).

118. *Id.* at 58.

119. *Id.* at 48-49.

120. *Id.* at 53-54.

121. *Zablocki*, 434 U.S. at 403-04 (Stevens, J., concurring).

122. When a fundamental right is at stake the Court requires a state to show a compelling interest in order to justify interfering with the right. Roe v. Wade, 410 U.S. 113, 155 (1973).

123. Vlandis v. Kline, 412 U.S. 441, 452 (1973) (state cannot presume college student is non-resident simply because she applied from out of state). *See also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 644 (1974) (state cannot conclusively presume that women four or five months pregnant are incapable of continuing service as teachers).

state interest in preventing same-sex couples from marrying. In 1971, the Court dismissed for want of a substantial federal question the case of *Baker v. Nelson*,[124] in which the plaintiffs challenged a Minnesota law authorizing only heterosexual marriages.[125] Ten years later, the Court denied certiorari in the case of *Adams v. Howerton*,[126] in which a minister had married a male United States citizen and a male alien.[127] The effect of the marriage would have been to qualify the alien as the citizen's spouse for immigration purposes.[128] This was challenged by the Immigration and Naturalization Service (INS), and the Ninth Circuit upheld the INS challenge, without having to determine whether the marriage statute was constitutional.[129] Instead, the court found that Congress had intended to exclude persons of the same gender from being one another's spouse.[130] The court said, "The term 'marriage' ordinarily contemplates a relationship between a man and a woman."[131] But the court then went on to cite *Fiallo v. Bell*[132] and observed that "[i]n the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.' "[133] While *Adams* can hardly be cited as a ringing endorsement of the rights of gay men and lesbians, it does give some judicial recognition that a rule prohibiting homosexual persons from exercising a right "of fundamental importance for all individuals," might be, to some, "unacceptable."[134]

In fact, states have an interest in promoting intimate relationships between their citizens. This has been referred to as the "relational interest."[135] The United States Supreme Court has addressed this relational interest on several occasions. In *Griswold v. Connecticut*,[136] the Court noted two distinct rights: the rights "to marital privacy *and* to marry and raise a family,"[137] separating the relational interest—the right to marital privacy—from the interests surrounding procreation and child-

124. 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972).
125. *Id.* at 311, 191 N.W.2d at 185.
126. 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982).
127. *Id.* at 1038.
128. *Id.*
129. *Id.* at 1039 n.2.
130. *Id.* at 1040.
131. *Id.*
132. 430 U.S. 787, 792 (1977).
133. *Adams*, 673 F.2d at 1042 (quoting Matthews v. Diaz, 426 U.S. 67, 80 (1976)).
134. *Zablocki*, 434 U.S. at 384.
135. Note, *Loss of Consortium: Should California Protect Cohabitants' Relational Interest?*, 58 S. CAL. L. REV. 1467 (1985).
136. 381 U.S. 479 (1965).
137. *Id.* at 495 (emphasis added).

rearing.[138] As regards the relationship between spouses, the Court stated, "it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations."[139]

Seven years later, in *Eisenstadt v. Baird*,[140] the Court struck down a Massachusetts statute which prohibited the distribution of contraceptives to unmarried persons while permitting distribution to married couples.[141] Justice Brennan, writing for the Court, dealt only with this relational interest when he said that "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."[142] This view implies that the state is not interested in the marital relationship solely for the relationship's own sake; it takes the analysis one step further and looks at why such relationships are important to society. A state cares about the effect those relationships have on the individuals involved; people who are in close, intimate relationships can provide each other with emotional and spiritual support, can enrich one another in ways that are important to the functioning of society as a whole.

Thirteen years later, a federal district court in Michigan decided *Briggs v. North Muskegon Police Department*.[143] In that case, the plaintiff police officer, separated from his wife, and living with another woman, was dismissed from his position for violating a state statute against illegal cohabitation.[144] The district court overturned the conviction, viewing the relationship as one akin to marriage, "characterized by intimacy, voluntary commitment, stability, psychological involvement, and in the heterosexual context, procreative potential. It has . . . been noted that the idea that the intimate relationship, rather than the formal marriage ceremony, as the essence of marriage finds support in the tradition of common-law marriage."[145]

While *North Muskegon* is not a United States Supreme Court opinion, it provides two important insights into the problem faced by homosexual couples. First, intimacy, voluntary commitment, stability and psychological involvement are all highly private factors that recall the

138. *Id.*

139. *Id.* (quoting Poe v. Ullman, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting)).

140. 405 U.S. 438 (1972).

141. *Id.* at 441-43.

142. *Id.* at 453.

143. 563 F. Supp. 585 (W.D. Mich. 1983), *aff'd*, 746 F.2d 1475 (6th Cir. 1984), *cert. denied*, 473 U.S. 909 (1985).

144. *Id.* at 586.

145. *Id.* at 589 (citing Note, *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1289-96 (1980)).

"harmony in living" and "bilateral loyalty" cited in *Griswold*,[146] and are not exclusive to marital relationships. As the *North Muskegon* court pointed out, common-law marriage was a way of recognizing those qualities in relationships that had not achieved the talisman of a marital contract.[147]

Second, the *North Muskegon* court recognized that there is a context other than the heterosexual context in which these factors may be present. This recognition exposes the position in which homosexual couples find themselves—at present they cannot declare their good intentions up front and get legally married to prove they value intimacy, voluntary commitment, stability and psychological involvement.[148] But even if they do exhibit all the requisite qualities which we value as a society through the maintenance of a relationship over time, same-sex couples are sometimes even barred from receiving common-law recognition of their relationship (and accomplishment) for any legal purpose.[149]

Nevertheless, marriage is not the only kind of family relationship that is possible. In fact, the Supreme Court's decisions about the constitutional status of family relationships indicate that, even absent a marriage, certain voluntary relationships between two adults may be protected family relationships.[150]

3. State definitions of "family"

The United States Supreme Court is apparently unwilling to interfere with a legislature's power to define family except in the most egregious circumstances. In *Village of Belle Terre v. Boraas*,[151] the Court upheld a zoning ordinance which limited land use to single-family dwellings and defined "family" as one or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, or not more than two persons living and cooking together as a single housekeeping unit though not related by blood, marriage or adoption.[152] A landlord who had rented his house to six unrelated college students challenged the ordinance on several bases, including that it was

146. *Griswold*, 381 U.S. at 486.

147. *North Muskegon*, 563 F. Supp. at 589.

148. *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974); CAL. CIV. CODE § 4100 (West 1983).

149. For example, in states like California, which have abolished common-law marriage by requiring formalities, CAL. CIV. CODE § 4100 (West 1983), same-sex couples have no way of forming a legally binding marriage.

150. *See* Roberts v. United States Jaycees, 468 U.S. 609, 618-19 (1984).

151. 416 U.S. 1 (1974).

152. *Id.* at 2.

of no concern to the villagers whether the residents of the house were married or unmarried.[153]

In its opinion, the Court pointed out that the ordinance did not prohibit two unmarried people from constituting a family[154] and held the ordinance was a rational exercise of legislative discretion in defining family.[155] The Court explained that "every line drawn by a legislature leaves some out that might well have been included,"[156] and, citing Justice Holmes, acknowledged that deference must be shown to the legislative decision "unless we can say that it is very wide of any reasonable mark."[157] The Court held that this particular ordinance did not implicate any protected rights to privacy or association.[158] Significantly, the Court pointed out that the challenged ordinance in *Belle Terre did* include in its definition of "family," two otherwise unrelated people living together.[159]

The ordinance invalidated in *Moore v. City of East Cleveland*[160] also included two otherwise unrelated people as families. The problem with the ordinance was that it defined "family" in a way that prohibited a grandmother from living with her two grandsons, who were first cousins.[161] Relying on the Due Process Clause of the fourteenth amendment which the Court said protected "personal choice in matters of marriage and family life,"[162] the plurality cited cases dating back to 1923 which recognized "'a private realm of family life which the state cannot enter.' "[163] In such cases, the Court said, it was bound to examine the governmental interest "carefully."[164]

In *Moore*, the plurality opinion and Justice Brennan's concurring opinion take for granted that families are institutions for raising children.[165] Yet both opinions suggest, as the plurality explicitly states, that

153. *Id.* at 7.

154. *Id.* at 8.

155. *Id.* at 9.

156. *Id.* at 8.

157. *Id.* at 8 n.5 (quoting Louisville Gas & Elec. v. Coleman, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting)).

158. *Id.* at 7-9.

159. *Id.* at 8.

160. 431 U.S. 494 (1977).

161. *Id.* at 496-97. Note this is a non-procreational family relationship which the Court is protecting.

162. *Id.* at 499.

163. *Id.* (quoting Prince v. Massachusetts, 321 U.S. 158 (1944)).

164. *Id.*

165. *Id.* at 503-04. ("It is through the family that we inculcate and *pass down* many of our most cherished values."); *id.* at 504-05 ("millions of our citizens have *grown up* in just such an

there is a "larger conception of family."[166] Specifically, Justice Brennan argued, in concurrence, that limiting the definition to conventional "nuclear families" failed to include family forms commonly adopted by blacks.[167] In his words, "the Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living."[168] Brennan clearly acknowledged and rejected the notion that the government was operating on the unstated assumption that "families" ought to be like conventionally defined "white" families—father, mother, children. This acknowledgement recognizes one unstated preconception lurking in East Cleveland's definition of family—that families are, or ought to be, like white families. By a parity of reasoning, the state should not be able to assume that families are, or must be, like heterosexual families.

Roberts v. United States Jaycees[169] suggests the constitutional minimum for defining family relationships, based on the right to intimate association. In that case, the Court found that Minnesota's Human Rights Act,[170] which prohibited discrimination based on sex, applied to a state chapter of a national organization which did discriminate based on sex.[171] More important, the Court held that the Act did not violate the organization's first amendment rights of association.[172] In discussing what those rights are, the Court stated, in a unanimous section of the opinion, that individual liberty includes protection of certain relationships:

> Without precisely identifying every consideration that may underlie this type of constitutional protection, we have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation . . . . [T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any

environment"); *id.* at 511 (Brennan, J., concurring) (noting "role of the family in raising and training successive generations of the species") (all emphasis added).

166. *Id.* at 505. Justice Brennan notes in his concurrence that the ordinance "displays a depressing insensitivity toward the economic and emotional needs of a very large part of our society." *Id.* at 507-08 (Brennan, J., concurring).

167. *Id.* at 508 (Brennan, J., concurring).

168. *Id.* (Brennan, J., concurring).

169. 468 U.S. 609 (1984).

170. MINN. STAT. § 363.03, subd. 3 (1982).

171. *Roberts*, 468 U.S. at 628-29.

172. *Id.*

concept of liberty.[173]

Thus, relationships that "attend the creation and sustenance of a family"[174] as well as similar "highly personal relationships"[175] are protected against state intrusion by a coalition of the first and fourteenth amendments.[176]

A focus on the couple's relationship itself, as opposed to the environment provided for their children, addresses the questions raised by a strict view of marriage as solely for the purpose of procreation. If marriage is only for raising children, why, for example, should infertile persons be allowed to marry? Or those who decide not to have children? Or women who have passed menopause? Or homosexual couples? The only group of adults we prohibit marriage to is the last. We use lack of procreative ability against gay men and lesbians in a way we do not use it against heterosexuals. Similarly, homosexual couples who *do* have children, or wish to, are also prohibited from marrying, despite our insistence that children ought to be brought up in a stable, two-parent home.

This connection between family, marriage and intimate association was explicitly addressed in *Hardwick*. Justice Blackmun said in his dissent:

> We protect the decision whether to marry precisely because marriage "is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects . . . ." We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful and multiply . . . . And we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households . . . . The "ability independently to define one's identity that is central to

173. *Id.* at 618-19.

174. *Id.* at 619.

175. *Id.* at 618.

176. The first amendment is critically important to gay men and lesbians. Unlike racial characteristics, or differences based solely on gender, homosexual citizens must assert their identity *as a homosexual person* through some form of speech before they may even have a public identity as homosexual. Thus, phrases such as "acknowledged," "admitted" or "self-identified" nearly always accompany the word "homosexual" in conventional public discourse when referring to a homosexual speaker. As the Court has noted, "The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak . . . when others wish him to be quiet." Harper & Row v. Nation Enters., 471 U.S. 539, 559 (1985) (quoting Estate of Hemingway v. Random House, 23 N.Y.2d 341, 348, 244 N.E.2d 250, 255 (1968)).

> any concept of liberty" cannot truly be exercised in a vacuum; we all depend on the "emotional enrichment from close ties with others."[177]

While Justice Blackmun's dissent in *Hardwick* relied heavily on substantive due process and privacy arguments to protect intimate sexual activities,[178] it has been pointed out[179] that an argument based solely on privacy is inadequate to deal with homosexuality within family relationships because those relationships extend beyond the confines of the home:

> [A privacy argument] assumes that homosexuality is merely a form of conduct that can take place in the privacy of the bedroom at a specified time, rather than a continuous aspect of personality or personhood that usually requires expression across the public/private spectrum . . . relegating sexuality to the private sphere revives an element of the old "separate but equal" doctrine—the belief that the separation of one group from the world of more general social interaction is neither unequal nor stigmatizing.[180]

Families are by their nature social units. As far as voluntary sexual aspects of adult relationships are concerned, "the state creates the private sphere by determining its contours and limits, and protects it by granting it alone the shield of privacy."[181] By failing to recognize that same-sex couples exist within this relational context, and have a need for this protection, states create a world for homosexual citizens which looks very different from the world the state creates for heterosexuals.

II. STATEMENT OF THE PROBLEM

> *"I come from the old school. Anybody of the same sex I consider friends, not as a girlfriend or boyfriend."*
>
> *—U.S. District Judge R. Brooks Smith*[182]

The central problem, then, for homosexual couples, is that they are not usually viewed within this relational context. The United States Supreme Court cases may be viewed as providing one set of rules which

177. Bowers v. Hardwick, 478 U.S. 186, 204-05 (Blackmun, J., dissenting) (1986) (citations omitted) (quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965) and Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984)).

178. *Id.* at 202-06 (Blackmun, J., dissenting).

179. Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1290 (1985).

180. *Id.*

181. *Id.*

182. FRONTIERS NEWSMAG., Dec. 29, 1989, at 13.

apply to heterosexuals, based on relationships, and a separate set of rules for homosexual people that focuses only on non-relational sexual activity. Thus, *Loving v. Virginia*,[183] can be read as holding that marriage is a fundamental right for heterosexuals.[184] *Griswold v. Connecticut*[185] would only protect the sexual aspect of heterosexual marriage from state scrutiny regardless of the procreative nature of the act.[186] On this reading, *Bowers v. Hardwick*[187] only needs to apply to homosexual people because only homosexual couples cannot get married.[188] *Moore v. City of East Cleveland*[189] and *Village of Belle Terre v. Boraas*[190] may similarly be narrowly read to protect only heterosexual family relationships. This narrow reading would also apply to *Roberts v. United States Jaycees*.[191]

Same-sex couples are nearly always denied family privileges which opposite-sex couples may receive by getting married.[192] Stated another way, opposite-sex couples are viewed as one another's family members while same-sex couples are not. While most privileges arising from a relationship are economic ones such as employment benefits, tax advantages or recovery for certain relational torts such as loss of consortium, an overriding issue for homosexual couples is the benefit of sexual privacy. If the Supreme Court means to assert through *Griswold* and *Hardwick* that a state may penalize as immoral certain sexual acts outside of marriage or family relationships, but those same acts are protected when they take place within a marriage or family relationship, and if a state may prohibit same-sex couples from marrying or forming any other recognized family relationship, then homosexual citizens are deprived of access to any sexual privacy in a way heterosexual citizens are not. Such a construction of the law would effect more than just a pernicious or dis-

183. 388 U.S. 1 (1967).

184. *Id.*

185. 381 U.S. 479 (1965).

186. *Id.* at 497 (Goldberg, J., concurring).

187. 478 U.S. 186 (1986).

188. *Id.* at 196.

189. 431 U.S. 494 (1977).

190. 416 U.S. 1 (1974) (definition of "family" in zoning ordinance which limits—with exceptions—single family dwellings to occupancy by "traditional" families, or groups of not more than two "unrelated" persons does not violate due process).

191. 468 U.S. 609 (1984) (first and fourteenth amendments protect certain intimate associations).

192. Coon v. Joseph, 192 Cal. App. 3d 1269, 237 Cal. Rptr. 873 (1987) (denying gay couple tort recovery granted to married couples); Hinman v. Department of Personnel Admin., 167 Cal. App. 3d 516, 213 Cal. Rptr. 410 (1985) (denying gay couple employment benefits granted to married couples). *But see* Braschi v. Stahl Assoc., 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989) (granting gay survivor lease-succession rights granted to married couples).

criminatory scheme: it is imposing a self-fulfilling prophecy on homosexual state citizens. The state may determine that sexual relationships outside marriage are immoral and then may assure that homosexual citizens *are* immoral by denying them the only available means of legitimizing their relationship.

Two related barriers prevent us from recognizing the dimensions, or even the existence of the problem. The first aspect of the problem is a restricted point of view: because most legislators and judges are heterosexual, the problem faced by homosexual couples may too easily be seen as being no problem. Heterosexuals may discount or ignore entirely the world as viewed by a homosexual person, and make a decision based on a world-view that perceives homosexual citizens as if they were heterosexuals making incorrect choices.

Secondly, a heterosexual world-view is inherent in the very language we use. Positive words like "family" and "marriage" are perceived to have no content for homosexual citizens at all. Moreover, words with negative connotations like "sodomy" are seen as stigmatizing only homosexual people, even if they facially apply to heterosexuals as well.

More important, because there is no named relationship for same-sex couples, judges use the only words for same-sex relationships that are available to them: words such as "friends" or "roommates."[193] Such words are grossly inadequate to describe permanent, lifetime commitments between two people, and serve to diminish or ignore the importance of the relationship to the parties. Married couples do not view themselves only as roommates or friends, and any insinuation that that was the extent of their relationship would be greeted with frosty hostility. Yet for same-sex couples this trivialization of their relationships is common.

III. DISCUSSION: THE SOCIAL AGENDA OF LEGALIZED HETEROSEXUALITY

"What's the game?"
Harold Pinter[194]

A. Unacknowledged Bias

I remember one evening this past winter, talking with a group of

193. *See, e.g., In re* Guardianship of Kowalski, 382 N.W.2d 861, 863 (Minn. App. 1986) (lesbian partner referred to as "friend" and "roommate"); Coon v. Joseph, 192 Cal. App. 3d 1269, 1272, 237 Cal. Rptr. 873, 874 (1987) (gay men who described their relationship as "exclusive lifetime committment" referred to by court as "friends").

194. "The Caretaker," H. PINTER, TWO PLAYS BY HAROLD PINTER 29 (1960).

> *men who were taking the journal-writing class I was teaching to persons with AIDS and their care givers. A long article in the Minneapolis Star-Tribune had implied that we were lucky that in Minneapolis AIDS had hit only gay men and had not spread to heterosexuals. The anger in the room was palpable, the weariness apparent . . . due not to the disease these men or their lovers suffered but rather to the never ending dismissal of their worth as human beings.*[195]

A primary reason for trying to exempt gay and lesbian couples from the normal rules of human relationships is to uphold our belief that they are "different." In her discussion of the United States Supreme Court's 1986 Term, Martha Minow explores the way in which judges deal with those they perceive to be "different."[196] She points out that " 'difference' is only meaningful as a comparison. I am no more different from you than you are from me. A short person is different only in relation to a tall one."[197] Minow then notes that "[l]egal treatment of difference tends to take for granted an assumed point of comparison: women are compared to the unstated norm of men, 'minority' races to whites, handicapped persons to the able-bodied, and 'minority' religions to 'majorities.' "[198] This leads to the conclusion that "attributions of difference reflect choices by those in power about what characteristics should matter,"[199] and the implication that "the assignment of differences in Western thought entails not just relationships and comparisons but also imposition of hierarchies."[200] A dramatic example of this hierarchy is the Constitution's original formula for determining the number of representatives each state would be entitled to in the House—while both free persons and slaves were to be counted in each census, slaves were valued at only three-fifths of a free person.[201] There can probably be no clearer illustration of how the perception of difference implies lower worth than this purely mathematical one.

The same hierarchy is strikingly demonstrated with regard to homosexual people in *Schochet v. State*.[202] In concluding that *Bowers v. Hard-*

195. Landsman, *The Long Breath of Grieving*, HUNGRY MIND REV., Sept. 1989, at 3.

196. Minow, *The Supreme Court 1986 Term, Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

197. *Id.* at 13 (footnote omitted).

198. *Id.* (footnote omitted).

199. *Id.* at 38.

200. *Id.* (footnote omitted).

201. U.S. CONST., art. I, § 3.

202. 75 Md. App. 314, 541 A.2d 183 (1988).

wick[203] does allow a state to prohibit private acts of heterosexual sodomy, the Maryland Court of Special Appeals pointed out that a claimant who had engaged in a sodomitic act would "fall into one of three classes that may have constitutional significance: part of 1) a homosexual couple (male or female); 2) an unmarried heterosexual couple; or 3) a married heterosexual couple, *in roughly ascending hierarchy of favor.*"[204] To the Maryland court, the understood consequence of there being homosexual persons is to rank them at a lower level than heterosexuals without any further analysis. If homosexual persons did not exist as a class with a significant difference (i.e., if they were seen as being members of a broader class called "citizens") the court would have had only two categories to consider, married and non-married people, and *that* difference, also seen as significant, would have involved ranking the married people above the non-married. Differences seen as insignificant, such as hair color, involve no such assumed hierarchical structure.

The dissenters in *Hardwick* also pointed to this hierarchy implicit in the majority's analysis. Justice Blackmun noted the majority's "almost obsessive focus on homosexual activity,"[205] and continued: "Unlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens."[206] Likewise, Justice Stevens faults the majority for positing "as a justification for the Georgia statute the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable,"[207] and cites the broader reading that the law "reflects the belief that *all sodomy* is immoral and unacceptable."[208] Thus the majority in *Hardwick* assigned significance to Hardwick's sexual orientation while the dissenters found that difference insignificant.

There is, however, an even deeper significance to the concept of difference in a legal context. As Minow points out, "legal treatment of difference . . . tends to treat as unproblematic the point of view from which difference is seen, assigned, or ignored."[209] Thus, for example, under the *Schochet* court's analysis, a court may assume that homosexual people, like the court itself, accept as inevitable the hierarchy of favor based on

203. 478 U.S. 186 (1986).
204. *Schochet*, 75 Md. App. at 319, 541 A.2d at 185 (emphasis added).
205. *Hardwick*, 478 U.S. at 200 (Blackmun, J., dissenting).
206. *Id.* (Blackmun, J., dissenting).
207. *Id.* at 219 (Stevens, J., dissenting).
208. *Id.* (Stevens, J., dissenting).
209. Minow, *supra* note 196, at 14.

sexual orientation.[210] To the extent that the point of view of gays and lesbians differs, it may be viewed as irrelevant. This is so because "difference may seem salient not because of a trait intrinsic to the person, but instead because the dominant institutional arrangements were designed without that trait in mind."[211]

Minow uses *California Federal Savings & Loan Association v. Guerra*[212] as an example of how institutionalized bias becomes invisible. *Guerra* addresses the issue of pregnancy in the workplace, and Minow discusses the different ways the issue may be viewed:

> The Court debated whether the [Pregnancy Disability Act] forbids differentiation based on pregnancy even if the differentiation benefits rather than injures even the person who becomes pregnant. The case presented a choice between "equal treatment" and "special treatment." Thus framed, this question treated men as the norm and presumed a workplace designed for men (or nonpregnant persons). Any effort to remake the workplace to accomodate pregnancy would be "special treatment."[213]

Because the complaining women were employed in a workplace that was not designed to accomodate pregnancy, an accomodation which attempted to permit women a qualified right to reinstatement following a pregnancy leave created a classic conflict in perception.[214] From the institutional point of view, because men cannot get pregnant, any attempt to give a woman a right to return to her job after a pregnancy leave would treat women differently than men (who cannot get pregnant), and thus afforded women special treatment. This assumes that a workplace designed exclusively for those who do not get pregnant is both inevitable and right.

But from another point of view a workplace designed exclusively for the non-pregnant is a product of historical forces, and gives women no opportunity for equal treatment from the start. The "special" treatment they ask for would not be special at all if the workplace had been designed in the first place to include female employees. Under such a view the difference of pregnancy would be of minor relevance—a wo-

210. *Schochet*, 75 Md. App. at 319, 541 A.2d at 185.

211. *Id.*

212. 479 U.S. 272 (1987). *See* Minow, *supra* note 196, at 41.

213. Minow, *supra* note 196, at 41.

214. *Compare Guerra*, 479 U.S. at 289 (equal treatment) *with id.* at 304 (White, J., dissenting) (special treatment).

man's return to work after pregnancy would be the accepted norm, and would need cause no comment.

The first view diminishes a woman's claim that the system is unfair, treating her complaint as unproblematic. It views the existing institutionalized workplace as neutral and sees the complaint as an attempt to undo that neutrality. This is precisely the position gays and lesbians are in with regard to marriage and families. It is believed that these institutions exist by nature without homosexual couples in mind. Thus, in *Jones v. Hallahan*,[215] a Kentucky court held that two lesbians were not prevented from marrying one another because of the Kentucky statute involved (which did not specify the sex of eligible marriage partners), but "rather by their own incapability of entering into a marriage as that term is defined."[216] Even more to the point is *Singer v. Hara*[217] in which two gay men were prohibited from marrying under a Washington statute.[218] The court concluded that "[I]t is apparent from a plain reading of our marriage statutes that the legislature has not authorized same-sex marriages."[219] As one commentator has pointed out, "the meaning of the statute is not quite as 'plain' as the court would like to convey. A 1970 amendment to the statute substituted the word 'persons' for 'men and women.' "[220] Given the fact that the possibility of same-sex marriage had been publicly debated when the citizens voted for the statute,[221] and the revision had been enacted anyway,[222] a powerful argument can be made that the relationship designated by the word "marriage" had been altered to fit an emerging cultural change.

In both cases, the courts had to go to some linguistic effort in order to avoid a statutory construction that would challenge a received and conventional notion of marriage.[223] And in each case the court used, as its rationale, a conclusory approach which accepted the conventional as unchallengable; for example, the Kentucky court appealed to dictionary definitions of marriage.[224] But, of course, dictionary definitions are only present indications of the relationship between a word and what it signifies. It now appears that marriage originally did include homosexual

215. 501 S.W.2d 588 (Ky. 1973).
216. *Id.* at 589.
217. 11 Wash. App. 247, 522 P.2d 1187 (1974).
218. WASH. REV. CODE § 26.04.010 (1973).
219. *Singer*, 11 Wash. App. at 248, 522 P.2d at 1188-89.
220. Rivera, *supra* note 24, at 877 n.470.
221. *Singer*, 11 Wash. App. at 249 n.5, 522 P.2d at 1190 n.5.
222. *Id.*
223. *Id.*; *Jones*, 501 S.W.2d at 589.
224. *Jones*, 501 S.W.2d at 589.

couples,[225] and laws which prohibited such marriages were not passed until more than four centuries into the Christian era.[226] Further, it now appears that the original Christian ceremony for uniting couples united same-sex couples.[227]

We are engaged in this country in a difficult struggle to determine which differences matter for legal purposes, and which do not. We have seen the harm done to blacks by making skin color a difference that matters—blacks were viewed because of their race alone as inferior.[228] The reason *for* making race a difference that mattered was to accomplish just that hierarchical end. Similarly with women, we know that to view gender as a difference that matters outside of contexts to which sex is directly relevant, such as childbearing, is to decide, for that reason alone, that women are less important than men.

We face precisely this question today with respect to sexual orientation. We wish to believe that sexual orientation is a difference that matters so that we may treat homosexual citizens as being on a lower hierarchical rung than heterosexuals. We, in fact, sometimes view only homosexual people as having a sexual orientation. Thus, in a recent election in Irvine, California, one minister attempting to revoke the city's Human Rights Ordinance as it applied to homosexuals claimed that the ordinance gave "special rights" to homosexual citizens because it assured equal protection based on sexual orientation.[229] To this man, the concept of sexual orientation simply does not implicate heterosexuality at all. An ordinance that prohibits discrimination based on sexual orienation gives special rights only to those who have a sexual orienation—gay men and lesbians.[230] On this analysis, the concept of heterosexuality becomes completely, and utterly, invisible.

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225. *See* J. BOSWELL, *supra* note 12, at 82-83 nn.100-03 and accompanying text. Professor Boswell's upcoming book will explore the subject of same-sex relationships during the early Christian era in much more depth.

226. J. BOSWELL, *supra* note 12, at 123.

227. *See* C. Glaser, *A Love Without Pretense: Lesbian & Gay Union Ceremonies*, MORE LIGHT UPDATE, May 1988, at 1-3 (discussing and citing ceremony in extant Christian texts); Wockner, *Christian Gay Marriage Rites Uncovered*, FRONTIERS NEWSMAG., Feb. 8, 1989, at 8 (citing address by John Boswell at University of Chicago, discussing fourth century Christian ceremony uniting same-sex couples).

228. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954).

229. Zonana, *Gay Agenda Takes Beating—Even in San Francisco*, L.A. Times, Nov. 9, 1989, at A1, col. 1.

230. Perceptions of gender difference lead to the same result. In that area, too, it is sometimes assumed that only women and not men, *have* a gender. Thus a defendant sought to disqualify a female judge from hearing an employment discrimination case because of her ability to identify with those who have suffered race or sex discrimination. The judge refused to recuse herself, stating, "If background or sex or race of each judge were, by definition, suffi-

B. Language

"I am convinced it is a lesson which has universal application: namely, that it always pays to be suspicious of words and to be wary of them, and that we can never be too careful in this respect. . . . [T]his is not just a linguistic task. Responsibility for and towards words is a task which is intrinsically ethical."

Vaclav Havel[231]

"[L]anguage is the condition of the unconscious."

Jacques Lacan[232]

We tend to believe that language is a highly rational tool invented by rational beings for rational purposes. This is true, to an extent. Language is a primary means of communication. Nevertheless, language is only a collection of words used to clarify our thoughts, which are not words but mind processes that words help to make public. In the last half of this century semiotics has examined the relationship of signs, such as words[233] to the thoughts or ideas they are supposed to represent by examining the cultural code systems by which we generally understand a word to mean a given thing.[234] This can be relatively uncomplicated when the thing a word signifies is quite concrete. When I identify a piece of citrus fruit as an orange anyone who understands the English noun "orange" will understand me.[235]

The process becomes considerably more complicated when the concept to be identified is not so concrete. If I use the word "orange" as an adjective color, for instance, the connection between the signifier "orange" and the signified concept becomes more tenuous. The perception of color is a highly subjective act, and depends largely on very controlled cultural training.[236] Perceptions about sexuality share much of this same subjectivity and cultural conditioning, as Thurber pointed out with the

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cient grounds for removal, no judge of this court could hear this case, or many others, by virtue of the fact that all of them were . . . of a sex." Minow, *supra* note 196, at 13 n.15.

231. Havel, *Words on Words*, NEW YORK REV. OF BOOKS, Jan. 18, 1989, at 8.

232. Lacan, *Sign, Symbol, Imaginary*, in ON SIGNS 206 (M. Blonsky ed. 1985).

233. This discussion deals only with language signs. There are, of course, an infinite variety of other kinds of signs which the literature of semiotics analyzes. *See generally* J. SOLOMON, THE SIGNS OF OUR TIMES (1988); ON SIGNS, *supra* note 232.

234. ON SIGNS, *supra* note 232, at xvii.

235. This, of course, can be complicated by subdividing "oranges" into subcategories, species, varieties, etc. Thus to a botanist, "orange" might not be definite enough to be meaningful. To a grocery shopper, however, it will usually be sufficient.

236. Umberto Eco has pointed out how culture plays an important role in what colors we identify and how we identify them. U. Eco, *How Culture Conditions the Colours We See*, in ON SIGNS, *supra* note 232, at 157-75.

parrots and the hippos.[237]

That there are difficulties inherent in language will come as no surprise to those who practice law. At least as early as 1824, Justice Johnson pointed out that "[o]ne half the doubts in life arise from the defects of language."[238] But these difficulties generally go unremarked upon when the subject is homosexuality. We take it for granted that we understand the language of sexuality, and know what is signified by words such as "sodomy," "family," etc. Yet the language we use to discuss sexuality is, perhaps, more culturally conditioned than much of the language we use in legal discourse. Words dealing with sex, such as "sodomy," and words like "family" which appear to be non-sexual may conceal a cultural agenda inherited from the past, importing unexamined preconceptions into the discussion.[239] Because of that concealment, tension between the words, themselves, and what they are supposed to signify has stretched to near the breaking point, thus precipitating the cases discussed below. This is not to say that "family" and "sodomy" are words without content. On the contrary, their content has been gradually redefined through the centuries. In our present age it is believed their content has always been used against homosexual people.[240] This belief is demonstrably untrue: "Sodomy" has not always historically been used solely to persecute homosexual people.[241] More importantly, there is room within even the most currently conventional notions of "family" to include same-sex couples within its confines.

The following sections will examine the three words which dominate the cases: "sodomy," "marriage" and "family," and look at some ways that conventional understandings of their meanings are consciously or unconsciously skewed against homosexual people.

1. Sodomy

The term sodomy has, since its invention, never had a clear defini-

237. *See supra* text accompanying notes 2-5.

238. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 232 (1824).

239. Jack Solomon explicitly discusses how the concept of "natural-ness" is used against homosexuality as a means of concealing cultural agendas. *See* J. SOLOMON, *supra* note 233, at 11-12 n.23.

240. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 196 (Burger, C.J., concurring) (1986).

241. Indeed, seven states currently define sodomy so that it includes only acts between members of the same sex. *See* ARK. STAT. ANN. § 5-14-122 (1987); KAN. CRIM. CODE ANN. § 21-3505 (Vernon 1988); KY. REV. STAT. ANN. § 510.100 (Baldwin 1985); MO. ANN. STAT. § 566.090(3) (Vernon 1987); MONT. CODE ANN. § 45-5-505 (1988); NEV. REV. STAT. ANN. § 201.190 (Michie 1986); TEX. PENAL CODE ANN. § 21.06 (Vernon 1989). These statutes provide strong evidence of the ways in which sodomy can be used as a tool against a disfavored group. *See* Halley, *supra* note 46, at 919-20 n.14.

tion. "It . . . has connoted in various times and places everything from ordinary heterosexual intercourse in an atypical position to oral sexual contact with animals. At some points in history it has referred almost exclusively to male homosexuality and at others almost exclusively to heterosexual excess."[242] The sin of Sodom in Genesis[243] is never specified, and has been variously described by Christian theologians as sloth or gluttony.[244] Some modern scholars consider the sin to be inhospitality,[245] an interpretation consonant with Jesus' own single reference to the city, which does not include a condemnation based on any sexual activity,[246] and accords with the writings of early Christian thinkers such as Origen and St. Ambrose.[247] Because of the assumption that sodomy was a sexual transgression, it is available as a weapon against sexual acts out of favor at a given time, or against a given group of people.

The variety of acts currently permitted or prohibited by the states is illustrative of the word's inherent vagueness. In Maryland, "sodomy" is proscribed in one section of the statute[248] while oral intercourse requires a separate prohibition.[249] In South Carolina, "buggery" (a word usually defined as anal intercourse), is prohibited without definition, apparently permitting lesbianism.[250] In Kentucky, heterosexuals are permitted to perform acts which for homosexual citizens are criminal.[251] In Alabama, fellatio is acceptable within marital bounds, but criminal for single people of whatever sexual orientation.[252] Missouri is the only state which defines sodomy to include hand-to-genital contact.[253]

The problematization of particular sexual *acts* was an unusual development in the history of sexuality. Both the Hellenic and Roman empires had codes of sexual conduct, but those codes focused on sexual pleasure as it applied to the *health* of the individual.[254] Thus guidance

242. *See* J. BOSWELL, *supra* note 12, at 93 n.2.

243. *Genesis* 19:1-29.

244. *See* J. BOSWELL, *supra* note 12, at 98.

245. *Id.* at 93 n.3.

246. *Matthew* 10:15-16; *cf. Luke* 10:10-13; *see also* J. BOSWELL, *supra* note 12, at 94.

247. J. BOSWELL, *supra* note 12, at 98.

248. MD. CRIM. LAW CODE ANN. § 553 (1987).

249. *Id.* § 554.

250. S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985). There have been no cases dealing with the statute.

251. KY. REV. STAT. ANN. § 510.100 (Baldwin 1985).

252. ALA. CODE §§ 13A-6-65(a)(3), 13A-6-60(2) (1982).

253. MO. ANN. STAT. § 566.010(2) (Vernon 1979). Since intent is not an element of the crime, police in Missouri apparently have probable cause to arrest many physicians in that state, including virtually all of those who specialize in gynecology or urino-genitary medicine.

254. M. FOUCAULT, THE USE OF PLEASURE 104 (1986) [hereinafter USE OF PLEASURE]. *See generally id.* at 97-139.

was given for good or bad times of day for sex, or places where it would be best or worst to engage in sexual activities; but who did what to whom was of little interest to those giving the advice.[255] Catalogues of acceptable and proscribed sexual activity, sometimes elaborate in their detail, apparently did not have normative moral force until several centuries into the Christian era.[256] This prohibition of certain sexual acts was used specifically against homosexual people as a class around the thirteenth century, as popular antipathy to gay people gained momentum after more than a century of acceptance.[257] John Boswell notes that the urban revival of the tenth through twelfth centuries coincided with the reemergence of a distinct gay subculture in southern Europe,[258] and that gay men and lesbians are well represented in the highly romantic literature of the period.[259]

The prohibition against sodomy was crystallized in Thomas Aquinas' *Summa Theologiae*.[260] This was partly due to the rise of intolerance of *all* deviations from the Church's assertions of infallibility. As Boswell notes:

> It was particularly significant for gay people that Thomas [Aquinas'] ideas about homosexuality triumphed just at the moment when the church began to enforce orthodoxy more rigorously than ever before and to insist that everyone accept in every detail not just the infallible pronouncements of popes and councils but every statement of orthodox theologians. Although the intent was not to eradicate acceptance of homosexuality in particular, the effect was to eliminate all opinion in the church which did not accord with accepted theology on every matter, and since it was Aquinas'[ ] authority which ultimately became the rule, acceptance of homosexuality ceased to

255. *Id.* at 104.

256. Some medeival "penitentials," which set out various sins, and their accompanying punishments were highly specific. At least one particularly influential penitential was specific enough to include penalties for interfemoral homosexual sex, a distinction which does not appear in any modern sodomy laws. J. BOSWELL, *supra* note 12, at 183 n.47. *See also* E. PAGELS, *supra* note 88, at 29 (Clement of Alexandria proscribing marital intercourse in morning, during daytime, after dinner, or even at night unless intercourse is performed "with modesty."); *cf.* M. FOUCAULT, CARE OF THE SELF 235-40 (1986) [hereinafter CARE OF THE SELF].

257. *See* J. BOSWELL, *supra* note 12, at 330.

258. *Id.* at 208.

259. *Id.* at 208-09 & n.6 (" '[C]ourtly love' occurred between women and between men just as between women and men; statistically, the proportion of gay literature surviving from this period is astonishing.").

260. T. AQUINAS, *Summa Theologiae* (1952). *See* J. BOSWELL, *supra* note 12, at 318-19.

be a safe option for Catholics liable to prosecution for heresy.[261] It is important to note that this is the climate which immediately preceded and precipitated the Spanish Inquisition.[262]

Aquinas' theological basis for opposition to sodomy, based on the concept that it is "unnatural," despite inconsistencies,[263] is evident in state sodomy laws.[264] Aquinas' rationale is evident in Blackstone, upon whom Justice Burger relied so heavily in his concurring opinion in *Hardwick*.[265] The theological position regarding sodomy on which Blackstone relied was ultimately adopted in the states.[266] While theological foundations for secular laws are not objectionable in themselves, there is no reason to conflate all theological thought into all morality.[267] The intol-

261. J. BOSWELL, *supra* note 12, at 330.

262. *Id.* at 269-302.

263. Boswell examines the inconsistencies in some detail. *See id.* at 303-34.

264. *Hardwick*, 478 U.S. at 211, n.6 (Blackmun, J., dissenting).

265. *Id.* at 197 (Burger, C.J., concurring) (citing 4 W. BLACKSTONE, COMMENTARIES 215).

266. *Survey on the Constitutional Right to Privacy In the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 526 (1986) ("Blackstone's characterization of sodomy, as a 'crime against nature,' would serve as the basis for most American sodomy laws.").

The idea that sodomy is "unnatural," found in both Aquinas and, ultimately, Blackstone, is evident in American sodomy statutes. Compare, for example, the language of the nineteenth-century version of the Georgia sodomy statute, GA. CODE, tit. 1, pt. 4, § 4251 (1861) (sodomy is carnal knowledge "against the order of nature") with Blackstone's language, 4 W. BLACKSTONE COMMENTARIES 215 (sodomy is "the infamous crime against nature"). The language referring to "nature" still continues in some states. *See* ARIZ. REV. STAT. ANN. § 13-1411 (1989) ("infamous crime against nature"); FLA. STAT. ANN. § 800.02 (West 1976) ("unnatural and lascivious act"); LA. REV. STAT. ANN. § 14:89 (West 1986) ("crime against nature"); VA. CODE ANN. § 18.2.361 (1988) ("Crimes Against Nature"). The *theological* rationale that sodomy is unnatural because it is not procreative is of considerable importance. Boswell describes four distinct definitions of "nature." J. BOSWELL, *supra* note 12, at 11-13. Of these, sodomitic acts, including sexual acts between members of the same sex, are usually considered "unnatural" under only one of the definitions, the ideal sense of nature, or what is known in legal discourse as natural law. For example, both sodomy and homosexual acts are observable in animals, and are not the product of technology. Under these "realistic" views of nature, it would be possible to conclude that sodomy is "natural." *Id.* Thus, when the Court rejects natural law in *Hardwick*, 478 U.S. at 196 (*see supra* notes 74-76 and accompanying text) it leaves—apparently—no alternative definition of "nature" under which either sodomy or homosexual acts would be "unnatural," except the theological one deriving from the morality associated with procreation—a rationale not yet adopted by the Supreme Court.

267. The possible misuse of, specifically, Christian morality, is pointed out by Vaclav Havel:

> What was the true nature of Christ's words? Were they the beginning of an era of salvation and among the most powerful cultural impulses in the history of the world—or were they the spiritual source of the crusades, inquisitions, the cultural extermination of the Americas, and, later, the entire expansion of the white race that was fraught with so many contradictions and had so many tragic consequences, including the fact that most of the human world has been consigned to that wretched category known as the "Third World?" I still tend to think that His words belonged to the former category, but at the same time I cannot ignore the umpteen books that demonstrate that, even in its purest and earliest form, there was something unconsciously encoded in Christianity which, when combined with a thousand and one

erance, fear and open hatred of homosexual citizens based on fundamental acts of human connection through sex—acts which for heterosexuals are given due respect, not to mention process—such intolerance is an example of the potential dangers of this misuse of the word "sodomy."

The selective use of sodomy against only disfavored groups is starkly illustrated in Georgia. While the Georgia statute proscribing sodomy applies to all persons regardless of sexual orientation, or the relative gender of the parties,[268] the wording of the Supreme Court's opinion in *Hardwick* regarding the statute treats it as if it only proscribes homosexual sodomy.[269] More important, responding to a Georgia court which recently convicted a heterosexual man of committing consensual sodomy, a Georgia legislator has stated his legislative plan to exempt heterosexuals from the law.[270]

Georgia would not be the first state to use its sodomy laws only against homosexual citizens. Seven other states currently have sodomy laws which do not apply to heterosexuals.[271] This section should make clear that such a distinction is an historical and definitional aberration. The "traditional" sodomy laws which the Court in *Hardwick* relied upon so heavily[272] overwhelmingly did not discriminate on the basis of sexual orientation.[273]

This attempt to treat homosexual people differently than heterosexuals based solely on their sexual orientation dramatically illustrates the core purpose of the Equal Protection Clause of the Constitution. The heterosexual majority and homosexual minority are both capable of committing identical acts of sodomy as that term is generally understood in its modern sense (e.g., anal and oral intercourse). The majority wishes to

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other circumstances, including the relative permanence of human nature, could in some way pave the way spiritually, even for the sort of horrors I mentioned.

Havel, *Words on Words*, THE NEW YORK REV. OF BOOKS, Jan. 18, 1990, at 6. The conflation of morality into religion has also presented unnecessary problems in presenting morality in our schools. *See* Freund, *Public Aid to Parochial Schools*, 82 HARV. L.REV. 1680, 1689-90 (1969).

268. GA. CODE ANN. § 26-2002 (1988).

269. *See, e.g.*, *Hardwick*, 478 U.S. at 200 (Blackmun, J., dissenting) (pointing out "[t]he Court's almost obsessive focus on homosexual activity").

270. Harding, *Sodomy on my Mind*, THE ADVOCATE, Oct. 24, 1989, at 18 (quoting state representative J.E. "Billy" McKinney).

271. *See* statutes cited *supra* note 241.

272. *Hardwick*, 478 U.S. at 192 n.5, at 193 n.6, at 197 (Burger, C.J., concurring).

273. Those which did discriminate did so, as Georgia originally had, by prohibiting sex between men, but not women. *See, e.g., id.* at 200 n.1 (Blackmun, J., dissenting). Thus, it would not be accurate to say that those sodomy laws which have historically discriminated have discriminated against *homosexuals*, since they have only discriminated against homosexual *men*. If there is a tradition of discrimination against lesbians, it does not arise from the sodomy laws. Lesbian "sodomy" is of more recent origin. *See The Crimes Against Nature*, 16 J. PUB. L. 159, 163-69, 173 (1967).

criminalize those acts, but exempt itself from its own restriction. The minority, working against a tide of bias and misunderstanding, has proven unable to prevent or undo the discriminatory law through the political process. Thus, a law which could apply equally to all citizens is written (or enforced) to disadvantage only a particular minority.

2. Marriage

The issue of marriage is complicated by the fact that it involves three hopelessly intertwined ideas: 1) procreation; 2) providing an environment for the raising of children; and 3) the relationship between the partners themselves, which has been referred to as the "relational" interest.[274]

The assumption that the first two interests are vitally important in a family context is unchallengable. The overwhelming number of marriages are undertaken with the idea of creating a nuclear family in mind, which is in the best interest of both society and the species. But as discussed below,[275] society also values the relationship between the partners.

Conventional Western notions of marriage tend toward the romantic. It was not always so. Arranged marriages, mail-order brides, shotgun weddings, marriages of convenience, and those to join financial, real estate, corporate or international interests or empires are also solidly lodged in the lore of connubial relations.[276]

Society may benefit from the modern policy of romanticized marriage. In a society where divorce is relatively non-stigmatized, it encourages individuals to find a mate with whom they will be satisfied, thus promoting the stability of the marriage, and the resulting environment in which the couple may raise children.

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274. Note, *Loss of Consortium: Should California Protect Cohabitants' Relational Interest*, 58 S. CAL. L. REV. 1467, 1468 n.3 (1985) (citing W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 124, at 915 (5th ed. 1984)). The value of sexual relationships to the individual is also a cornerstone of Freudian analysis. *See* BROWN, LIFE AGAINST DEATH 24 (1970) ("[W]hile adult sexuality serves the socially useful purpose of breeding children, it is for the individual in some sense an end in itself as a source of pleasure—according to Freud, the highest pleasure."). The Vatican recognizes the dual purposes of a sexual act, designating them "the unitive meaning and the procreative meaning," but views those purposes as only existing within marriage. INSTRUCTION ON RESPECT FOR HUMAN LIFE IN ITS ORIGIN AND ON THE DIGNITY OF PROCREATION, 26, Vatican City (1987).

275. *See infra* notes 277-91 and accompanying text.

276. *See* CARE OF THE SELF, *supra* note 256, at 72 (marriage began as "a private transaction, a piece of business concluded between two heads of family . . . unconnected with the political and social organization").

But this spiritual bond between mates is socially useful in another context as well: It benefits the individuals themselves by fulfilling certain relational needs that all human beings possess.[277] One of those needs is sexuality.

Sexual exclusivity was not originally expected of marital partners. Both polygamy and divorce were permitted by Jewish law, and in some cases they were customary.[278] The Roman law prohibiting adultery, written prior to the first century B.C., prohibited a married woman from having sex with any man other than her husband, and prohibited a married man from having sex with a married woman not his wife, but did not prohibit a married man from having sexual relations with an unmarried woman[279] or, with any man.[280] Sexual relationships could be an adjunct to a marriage, at least for a man.[281] Further, homosexual relationships (and not merely sexual relations) were common enough so that, for example, the Emperor Hadrian's relationship with his male lover, Antinous, became a model of love throughout Europe for centuries, despite Hadrian's official marriage to a woman.[282] Gay marriages were both known and written about.[283]

While the increasing sexual exclusivity of marriage was rationalized for Christians of the time by reference to Jesus' statement that there are no legitimate grounds for divorce,[284] permanent and inalterable marriage was considered radical in those early centuries[285] and, of course, only applied to the Christian minority. For the non-Christian majority, reasons for marital fidelity were framed in terms of the development of the

277. *See* Note, *supra* note 274, at 1475, nn.41-42. Foucault specifically notes that procreation was not viewed as the sole purpose of marriage as the institution of marriage developed. *See* CARE OF THE SELF, *supra* note 256, at 147:

> From this subordination of marriage to civic or familial utilities one should not infer that marriage itself was considered an unimportant tie that had no value other than that of producing descendents for the benefit of families and states. We have seen how demanding were the precepts that Xenephon, Isocrates, Plato or Aristotle imposed on spouses so that they might conduct themselves properly in marriage. . . . All this would suggest a mode of relations that went far beyond generative functions alone.

278. E. PAGELS, *supra* note 88, at 11.

279. CARE OF THE SELF, *supra* note 256, at 73.

280. J. BOSWELL, *supra* note 12, at 62-71.

281. CARE OF THE SELF, *supra* note 256, at 166. ("Apart from the question of illegitimate births, and allowing for the ethical requirement of self-mastery, there was no reason to expect a man, even a married man, to reserve all his sexual pleasures for his wife, and for her alone.").

282. *See* J. BOSWELL, *supra* note 12, at 84-86.

283. *Id.* at 82.

284. *Matthew* 19:4-6.

285. E. PAGELS, *supra* note 88, at 13.

self.[286] The idea of a "conjugal honor"[287] had enough force that Musonius notes in *On the Purpose of Marriage* that while the procreative function is important to a marriage it cannot, of itself, justify the institution.[288] For example, Michel Foucault notes, between 200 B.C. and 200 A.D.:

> The art of leading the married life was considered and defined in several important texts in a relatively new way. The first change appears to consist in the fact that the art of matrimonial existence, while continuing to be concerned with the household, its management, the birth and procreation of children, places an increasing value on a particular element in the midst of this ensemble: the personal relationship between husband and wife, the tie that joins them, their behavior toward each other, and this relationship, rather than borrowing its importance from the other exigencies of the life of a master of a household, seems to be regarded as a primary and fundamental element around which all the others are organized, from which they derive, and to which they owe their strength. In sum, the art of conducting oneself in marriage would appear to be defined less by a technique of government and more by a stylistics of the individual bond.[289]

A second change involved, specifically, the sexual relationship of the couple, as the problematization of sexual fidelity arises:

> These problems [of infidelity] are still treated in a rather discreet and allusive manner, but the fact remains that one finds, in authors like Plutarch, a concern with defining a certain way for marriage partners to act, to conduct themselves in pleasure relations. Here, the interest in procreation is combined with other significations and values, which have to do with love, affection, understanding, and mutual sympathy.[290]

This further suggests that it is possible, and perhaps necessary, to view the sexual relationship between a couple as having value aside from and independent of procreation.

Then, as now, this reasoning applies equally to heterosexuals and homosexuals, and to non-marital, long-term relationships as well as to formal marriages. Modern research consistently finds the same needs be-

286. CARE OF THE SELF, *supra* note 256, at 163-64.
287. *Id.* at 78.
288. *Id.* at 151 (citation omitted).
289. *Id.* at 148.
290. *Id.* at 149.

ing met by all relationships, homosexual or heterosexual: among them love, affection, personal intimacy and companionship.[291]

Some may object that recognizing the relationships of unmarried couples will dissolve a state's interest in promoting marriage. But the state's interest can be looked at in two ways: 1) the state has an interest in promoting marriage as against non-marriage; or 2) the state has an interest in promoting marriage as against single-ness. The two are not the same. The first promotes marriage strictly for marriage's sake. Any other relational state—single or non-marital—is disfavored because it is not marriage. In the second, the state promotes marriage because of the bond of the marriage—the "legal obligations toward one another"[292] embodied in the marital contract which single people *avoid* by failing to get married. In either case married people are favored and single people are disfavored. The rationales differ in how they treat non-married, non-single people.

The first treats non-married, non-single people as single people—their relationship is not a marriage, so they are not a favored group; since marriage is the only relationship the state favors, no other relationship is adequate. The second treats non-married, non-single people like married people on the condition they have undertaken legal obligations to one another. On this rationale, the state does not favor relationships per se, but relationships of a certain kind, those in which the partners are legally obligated to one another. Marriage is an exemplar of this relational obligation, but is not the only such relationship. Obligated but not-married couples are clearly not "single" people avoiding relational obligations by not getting married. It would be *against* the state's interest to treat them as single people, since under this rationale the state's interest is in getting people to form legal obligations to one another, and marriage is one way of forming that legal obligation, but not the only way. For example, contracts between unmarried couples under *Marvin v. Marvin*[293] may include obligations of support that are enforceable after the couple breaks up.[294] The only restriction in *Marvin* is that the contract not rest on sexual services as inseparable consideration.[295] The discussion below will demonstrate that courts sometimes assume married couples have obligations to one another which unmarried couples lack, yet fail to examine

291. Peplau, *Research on Homosexual Couples: An Overview*, 8 JOURNAL OF HOMOSEXUALITY Winter, 1982, at 5 (citations omitted).

292. Elden v. Sheldon, 46 Cal. 3d 267, 275, 758 P.2d 582, 587, 250 Cal. Rptr. 254, 259 (1988).

293. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1978).

294. *Id.* at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

295. *Id.*

the express or implied contracts between unmarried partners to see if those contracts include obligations between the partners that are analagous to, or even greater than the obligations married couples take on.[296]

Another argument is that the state's *consent* to marriage is important.[297] But whatever statutory protection the state may offer married couples, that protection is in the name of promoting marriage. Again the question must be asked, promoting marriage as against what? If the state offers benefits to married couples, to the exclusion of nonmarital partners with similar or identical legal obligations to one another, solely because the former are married, then the state values marriage for itself, and has an equally substantial interest in preventing divorce. The state has no such interest.[298] The laws permitting divorce suggest that the state's interest lies with the relationship of the parties—the state has little, if any, interest in requiring people to remain in bad marriages; the quality of the relationship is important. Yet if people are forming good relationships similar to marriages[299] which are obviously important to them, how is the state's consent relevant to the state's interest in promoting good relationships? If the only issue is that of bookkeeping, where is the state's interest in prohibiting people such as gay and lesbian couples from forming relationships with the state's bookkeeping procedure?

Marriages are by their nature social units. They have a clear and pervasive influence in the public realm. By defining privacy *with relation to* marriage,[300] the state literally has the power to create the private sphere. But marriage also implicates another, and broader state power: the power to define "family."

3. What is a family?

> *Family . . . may be . . . a particular group of people related by blood or marriage, or not related at all, who are living together in the intimate and mutual interdependence of a single home or household.*[301]

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296. *See infra* notes 401-10, 422-51, and accompanying text.

297. *See Elden*, 46 Cal. 3d at 274, 758 P.2d at 586, 250 Cal. Rptr. at 258.

298. *Id.* at 275, 758 P.2d at 587, 250 Cal. Rptr. at 259 ("a detailed set of statutes governs requirements for the entry into *and termination of* marriage") (emphasis added).

299. For example, the plaintiff in *Elden* described his relationship to his deceased partner as "stable and significant and parallel to a marital relationship." *Id.* at 269, 758 P.2d at 582, 250 Cal. Rptr. at 255.

300. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

301. Moore Shipbuilding Corp. v. Industrial Accident Comm'n, 185 Cal. 200, 207, 196 P. 257, 259 (1921).

"A family is a mommy and a daddy and their children."[302]

The legal definition of "family" changes according to the context being considered.[303] The American Bar Association Code of Judicial Conduct provides a good example. The Canons use at least four different definitions of the word "family" for different situations. Canon 3(C)(1)(c) provides that a judge should disqualify himself if his impartiality might be questioned because "he, individually . . . or his spouse or minor child residing in his household has a financial interest in the proceeding . . . ."[304] The same Canon, in (C)(1)(d) suggests he should disqualify himself if "he, or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person" is party to the proceeding or is acting as a lawyer in the proceeding.[305] Canon 5 (C)(5) defines "family" for purposes of a judge's financial and business dealings as any relative residing in the judge's household who is related to the judge by blood or marriage, "or a person treated by a judge as a member of his family who resides in his household."[306] In the very next subsection of that Canon the definition changes again, to include "a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship" within the context of a judge acting as executor, administrator, trustee, or guardian.[307]

The term "family" comes from the Latin *familia*, which denoted any household members over whom the head of the Roman household exercised his control, or *patria potestas*.[308] This source definition, with its focus on those who live in the same household, corresponds with the flexible modern concept of family evident in some parts of the Judicial Code, as well as other contexts.[309] According to a 1982 California sur-

302. Footlick, *What Happened To The Family?* NEWSWEEK SPECIAL EDITION, Winter/Spring 1990 at 18 (quoting Midge Decter).

303. *See* BLACK'S LAW DICTIONARY 543 (5th ed. 1979) ("The meaning of word 'family' necessarily depends on field of law in which word is used, purpose intended to be accomplished by its use, and facts and circumstances of each case."). *See generally* CITY OF LOS ANGELES TASK FORCE REPORT, *supra*, note 85, Supp. pt. 1 at S-1-27 (Report on Legal Definition of Family).

304. CODE OF JUDICIAL CONDUCT Canon 3 (1972).

305. *Id.*

306. *Id.* Canon 5.

307. *Id.*

308. *See* BLACK'S LAW DICTIONARY, *supra* note 303, at 543. See *id.* for a definition of *"familiares regis."*

309. *See* Braschi v. Stahl Assoc., 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989). *See also* PLANNING A FAMILY POLICY FOR CALIFORNIA: FIRST YEAR REPORT OF THE JOINT SELECT TASK FORCE ON THE CHANGING FAMILY, 10-11 (1989) (recommending definition of "family" relying on function, rather than form).

vey of 128 federal, state, county and city programs in California, 85% provided services to household members who were not related by blood, marriage or adoption.[310] This administrative policy reflects a reality of family life—that in the infinite variety of the human comedy people sometimes form family relationships that do not fit bright-line definitions. For example, handicapped individuals who experience an uncommonly high rate of unemployment and poverty[311] often share housing to save resources,[312] and because of their shared experiences and problems form close relationships of mutual support very much like married couples.[313] Similar bonds may also arise with the handicapped individual's aide or attendant.[314] Since a handicapped person loses benefits if he or she marries a non-disabled person, such couples often avoid marriage for the obvious financial reasons.[315]

The group that is most affected by restrictive definitions of family, though, is the homosexual community. Not only are lesbians and gay men discouraged by still-popular prejudice from even making their individual presence known, they are prohibited by law from marrying.[316] The benefits and legitimacy which flow from marriage are impossible for gay and lesbian couples to attain. Yet committed same-sex couples do exist, and in growing numbers.[317] Further, they are not content to accept the manifest unfairness of a system of rules which proscribes their lives, yet has never, in this country, acknowledged their existence, much less solicited their participation in writing those rules.[318]

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310. CITY OF LOS ANGELES TASK FORCE REPORT, *supra* note 85, Supp. pt. 1 at S-11-13.

311. *Id.* at 75.

312. *Id.*

313. *Id.* at S-394. *See also id.* at S-399-401 (marriage disincentives for people with disabilities).

314. *Id.* at S-394.

315. *Id.* Public Hearing Testimony at 163 (testimony of Linda Knipps).

316. *See, e.g.*, CAL. CIV. CODE § 4100 (West 1983).

317. R. ACHTENBERG, PRESERVING AND PROTECTING THE FAMILIES OF GAY MEN AND LESBIANS (1986) (published by Lesbian Rights Project, San Francisco, California); Wheeler, *2,000 Gay Couples Exchange Vows in Ceremony of Rights*, Wash. Post, Oct. 11, 1987, at B1, col. 2.

318. CITY OF LOS ANGELES TASK FORCE REPORT, *supra* note 85, Supp. pt. 1 at S-208:

> Any policy regarding homosexuality will, of necessity, affect the most fundamental aspects of the lives of millions of men and women who are gay and lesbian, and to formulate such a policy without their input would be unconscionable and inhumane, going against just about everything we as a society believe about the dignity and self-determination of the individual, and his or her position with regard to the state. For too long in this country laws have been passed against homosexuals, which depended on a mostly unstated understanding that homosexuals were *de facto* criminals who had no place in society, no moral or human worth, and no right to say anything to the contrary, particularly with respect to government. Needless to say, homosexuals did not contribute to the formulation of this policy.

A particularly troublesome illustration of the problems that may arise when assumptions about the word "family" are left unexamined arises in the use of phrases such as "old-fashioned family values."[319] Like "life-style,"[320] this is a phrase which is seldom examined for content. It is often a concept used against homosexual people.[321] But what are family values? How is the issue of sexual orientation relevant to whether a given person demonstrates or holds family values? While there is probably no definitive list of such values, an article by Dr. Benjamin Spock suggests what some of them may be: helpfulness, cooperation, generosity, love, and, in general, the way partners treat one another and their children.[322] While this is hardly an exhaustive list, it is an example of what would happen if any list of "family values" is formulated. Given specific values as a context, it is difficult to see how homosexual people could be excluded from holding them. Values such as generosity, love, cooperation, or commitment would hardly be exclusive to heterosexual families. In fact, it is difficult to imagine a value that would be held exclusively by heterosexuals, unless the ability to experience one's affectional relationships only with members of the opposite sex is considered a "value." Again, the problem seems to be the assumptions we make about families being only heterosexual.

As discussed below, the United States Supreme Court's discussions of "family" indicate that states which define family relationships to entirely exclude same-sex couples violate the constitutional guarantees of intimate association, equal protection and due process.[323] The cases discussed in the next section illustrate some of the ways states define or construe "family" to create such an exclusion.

IV. ILLUSTRATIVE CASES

Because the vocabulary we have available to discuss family relationships is inadequate to describe the territory signified by the words, those who are unwilling to allow "family" to include gay and lesbian couples can leave such couples no way to discuss their relationships. The cases discussed in this section illustrate the battle being waged in the courts by

319. Footlick, *What Happened To The Family?*, NEWSWEEK SPECIAL EDITION Winter/Spring 1990, at 17.

320. *See supra* notes 27-28 and accompanying text.

321. For example, the Traditional Values Coalition of Orange County, California, has taken a leading role in invalidating laws which are viewed as pro-homosexual. Zanona, *Gay Agenda Takes Beating—Even in San Francisco*, L.A. Times, Nov. 9, 1989, A1 at col. 1.

322. Spock, *"It's All Up to Us,"* NEWSWEEK SPECIAL EDITION Winter/Spring 1990, at 107.

323. *See infra* notes 686-719 and accompanying text.

gay and lesbian couples to assert their existence in that protected realm, couples whose relationships in every respect fall into the territory we call family.

The cases fall into five broad categories: 1) torts; 2) property/lease succession; 3) employment benefits; 4) child custody; and 5) medical care. While the contexts differ, the problem in each case is the same—how to account for a long-term, committed and stable relationship between two people who are not heterosexual.

A. Torts

The relational interest[324] directly affects recovery for two torts: negligent infliction of emotional distress and loss of consortium. The California Supreme Court has recently dealt with each in the context of unmarried couples, with significant implications for gay and lesbian couples.

1. Negligent infliction of emotional distress

In *Dillon v. Legg*,[325] the California Supreme Court held that tortfeasors owe a duty of care to all persons who are foreseeably endangered by the defendant's conduct,[326] and that the foreseeable risk may be an emotional one.[327] The Court formulated a three part test to determine whether liability was reasonably foreseeable: 1) the plaintiff's location—the nearer to the injury, the more foreseeable the risk; 2) the time the plaintiff learned of the injury—the more immediate, the more foreseeable; and 3) the plaintiff's relationship to the victim—in the Court's words, "whether plaintiff and the victim were closely related, as contrasted with the absence of any relationship or the presence of only a distant relationship."[328]

The third criterion is presumptively met in any of the traditional family relationships: spouse;[329] sibling;[330] grandparents.[331] Recovery has also been allowed in a broader family context—a child who witnessed an automobile strike his stepfather's mother;[332] a foster mother who witnessed doctors negligently administer a fatal dose of glucose so-

324. *See supra* notes 274-91 and accompanying text.
325. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
326. *Id.* at 739, 441 P.2d at 919, 69 Cal. Rptr. at 80.
327. *Id.* at 739-40, 441 P.2d at 920, 69 Cal. Rptr. at 79.
328. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.
329. *See* Krouse v. Graham, 19 Cal. 3d 59, 562 P.2d 1022, 157 Cal. Rptr. 863 (1977).
330. *See* Walker v. Clark Equip. Co., 320 N.W.2d 561 (Iowa 1982).
331. *See* Genzer v. City of Mission, 666 S.W.2d 116 (Tex. Ct. App. 1983).
332. Leong v. Takasaki, 55 Haw. 398, 408, 520 P.2d 758, 766 (1974).

lution to her foster child.[333]

Courts did not uniformly grant relief to non-married couples. For example, in *Drew v. Drake*[334] the California Court of Appeal denied recovery to a woman who had been living with a man for three years prior to his injury.[335] Recovery was allowed, though, in *Ledger v. Tippitt*,[336] where an unmarried couple had been living together for two years.[337] In *Ledger*, a stranger stabbed the woman's lover in her presence after a minor auto accident.[338] The court held that it was foreseeable as a matter of law that the woman in the car witnessing the stabbing was the victim's loved one who would suffer severe emotional distress when her lover died in her arms.[339]

The California Supreme Court attempted to resolve the conflict between *Drew* and *Ledger* in *Elden v. Sheldon*,[340] by overruling *Ledger*.[341] In *Elden*, an unmarried heterosexual couple were involved in an auto accident caused by defendant Sheldon.[342] Elden's partner was thrown from the car, and later died.[343] Elden sued Sheldon for negligent infliction of emotional distress and loss of consortium.[344]

While voicing concern that unmarried couples might be "bound by emotional ties as strong as those that bind formally married partners,"[345] and that the emotional injury to the physically non-damaged partner could be "as devastating as that suffered by a member of the immediate family,"[346] the court could see no "principled distinction between an unmarried cohabitant who claims to have a de facto marriage relationship" and "de facto siblings, parents, grandparents or children,"[347] and thus denied recovery to the entire class of unmarried couples.[348] It should be stressed here that the court was not engaging in statutory interpretation

333. Mobaldi v. Board of Regents, 55 Cal. App. 3d 573, 576-77, 127 Cal. Rptr. 720, 722 (1976), *disapproved on other grounds*, Baxter v. Superior Ct., 19 Cal. 3d 461, 466 n.4, 563 P.2d 871, 874 n.4, 138 Cal. Rptr. 315, 318 n.4 (1977).

334. 110 Cal. App. 3d 555, 168 Cal. Rptr. 65 (1980).

335. *Id.* at 557, 168 Cal. Rptr. at 65.

336. 164 Cal. App. 3d 625, 210 Cal. Rptr. 814 (1985).

337. *Id.* at 630, 210 Cal. Rptr. at 816.

338. *Id.* at 631, 210 Cal. Rptr. at 816.

339. *Id.* at 646, 210 Cal. Rptr. at 826.

340. 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988).

341. *Id.* at 277, 758 P.2d at 588, 250 Cal. Rptr. at 260.

342. *Id.* at 269, 758 P.2d at 582, 250 Cal. Rptr. at 254.

343. *Id.*, 250 Cal. Rptr. at 255.

344. *Id.*

345. *Id.* at 273, 758 P.2d. at 585-86, 250 Cal. Rptr. at 258.

346. *Id.* at 277, 758 P.2d at 588, 250 Cal. Rptr. at 260.

347. *Id.*

348. *Id.* at 280, 759 P.2d at 590, 250 Cal. Rptr. at 262 (Broussard, J., dissenting).

in referring to the marital relationship. The issue was purely one of deciding what the *Dillon* court meant when it required a close relationship.

Whatever reasons people may have for forming relationships with de facto siblings, parents, grandparents or children, the de facto marriage relationship is qualitatively different in that it is the primary relationship the couple would form. The third *Dillon* requirement for recovery contrasts the presence of a close relationship with "the absence of *any* relationship, or the presence of only a distant relationship."[349] Denying recovery for injury to a person's primary life partner, particularly when the plaintiff meets the other two *Dillon* requirements of physical presence and temporal immediacy to the injury[350] is more than just a hard rule—it effectively dispenses with *Dillon*'s assertion that "no immutable rule can establish the extent of [a tortfeasor's] obligation for every circumstance of the future."[351]

The harshness of *Elden* is most clear in the case of gay and lesbian couples. After *Elden*, the California statute barring same-sex marriage[352] will preclude same-sex couples from any tort recovery for negligent infliction of emotional distress.[353] Even in areas which are well-known to have disproportionately high populations of gay and lesbian residents,[354] the foreseeability element of the tort is irrelevant.[355] Justice Broussard points out in his dissent that "the categorical exclusion of same-sex couples particularly highlights the injustice of an approach that recognized only those commitments ratified by the state."[356]

The case of *Coon v. Joseph*[357] is illustrative. Gary Coon and his life partner, Ervin, attempted to board a San Francisco bus.[358] The driver denied Coon entry, and when Ervin entered, the driver struck him in the face in full view of Coon, and verbally abused Ervin.[359] The court of appeal held that Coon had failed to state a cause of action for negligent

349. *Dillon*, 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80 (emphasis added).

350. *Id.*

351. *Id. See also Elden*, 46 Cal. 3d at 280, 758 P.2d at 590, 250 Cal. Rptr. at 262 (Broussard, J., dissenting).

352. CAL. CIV. CODE § 4100 (West 1983).

353. *Elden*, 46 Cal. 3d at 282 n.2, 758 P.2d at 588 n.2, 250 Cal. Rptr. at 264 n.2 (Broussard, J., dissenting).

354. Such areas include the Castro district of San Francisco, West Hollywood, California and Greenwich Village in New York, among others.

355. *Elden*, 46 Cal. 3d at 282, 758 P.2d at 588, 250 Cal. Rptr. at 264 (Broussard, J., dissenting).

356. *Elden*, 46 Cal. 3d at 282 n.2, 758 P.2d at 592 n.2, 250 Cal. Rptr. at 264 n.2 (Broussard, J., dissenting).

357. 192 Cal. App. 3d 1269, 237 Cal. Rptr. 873 (1987).

358. *Id.* at 1272, 237 Cal. Rptr. at 874.

359. *Id.*

infliction of emotional distress[360] because he failed to meet the third *Dillon* requirement of a "close relationship" to the injured party.[361] The court reasoned that close relationships did not include "friends or housemates."[362] In fact, the majority opinion was only able to refer to Ervin as Coon's "friend."[363] This is at odds with Coon's description of Ervin as his "exclusive life partner."[364]

The difference between these characterizations is at the heart of the opinion. The court cites Prosser & Keeton on Torts to the effect that tort recovery should not be extended to "every bystander shocked at an accident, and every distant relative of the person injured, as well as all his friends."[365] Again, the third *Dillon* requirement is a "close relationship as contrasted with the absence of any relationship, or the presence of only a distant relationship."[366] Clearly Coon was more than a "bystander" or "distant relative." The court's characterization of the relationship as that of friends or housemates is wholly inadequate to describe the couple's understanding of their own relationship to one another. This relationship was an exclusive lifetime commitment.[367] The court's inability to view the relationship *as the parties viewed it* allowed it to impose an extremely narrow interpretation of the legal standard involved, that the parties have a close relationship,[368] and trivialized what the parties, themselves, viewed as their primary lifetime relationship. The court, in Minow's words, "treats its own perspective as unproblematic" and makes the perspective of the couple "invisible," putting it "beyond discussion."[369]

In denying recovery, the court invoked the spectre of "inconsistent results,"[370] dependent (ironically, in this case) on "personal, completely subjective viewpoints of the trier of fact."[371] *Elden*, too, relied on the "difficult problems of proof"[372] leading to "mischief and inconsistent re-

360. *Id.* at 1277, 237 Cal. Rptr. at 877-78.
361. *Id.*
362. *Id.* at 1275, 237 Cal. Rptr. at 876 (citation omitted).
363. *Id.* at 1272, 237 Cal. Rptr. at 874.
364. *Id.*
365. *Id.* at 1274, 237 Cal. Rptr. at 876 (citing W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON TORTS 366 (5th ed. 1984)).
366. *Dillon*, 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.
367. *Coon*, 192 Cal. App. 3d at 1272, 237 Cal. Rptr. at 874.
368. *Dillon*, 68 Cal. 2d at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 79.
369. Minow, *supra* note 196, at 53.
370. *Coon*, 192 Cal. App. 3d at 1276, 237 Cal. Rptr. at 877.
371. *Id.*
372. *Elden*, 46 Cal. 3d at 276, 758 P.2d at 587, 250 Cal. Rptr. at 259 (citation omitted).

sults."[373] But this shifts the focus away from foreseeability. As presiding judge White pointed out in his dissent in *Coon*, "In contemporary society (and particularly in San Francisco) it is foreseeable a homosexual relationship might exist. Such a relationship may be significant enough to meet the third *Dillon* requirement."[374] In neither *Coon* nor *Elden* did the majority "conclude that the plaintiff was unrelated or distantly related to his injured lover," the standard the California high court, not the legislature, had set in *Dillon*.[375] A per se rule of marriage, in effect dispenses with that requirement by giving marriage an irrebuttable presumption of closeness that no other voluntary adult relationship may even attempt to claim.

While *Elden* appears to treat all unmarried couples alike for the purposes of the tort, its ultimate effect is far more burdensome on homosexual couples. In states like California, homosexual couples cannot "in any case choose marriage,"[376] and are thus "precluded from ever recovering for negligent infliction of emotional distress."[377]

2. Loss of consortium

The court's reasons in *Elden* for denying recovery to unmarried couples for intentional infliction of emotional distress are reiterated in the second part of the opinion, dealing with loss of consortium.[378] In 1974, in the case of *Rodriguez v. Bethlehem Steel Corp.*,[379] the California Supreme Court held that a married person whose spouse has been injured by the negligence of a third party may recover for the loss of conjugal society, comfort, affection, companionship and sexual relations.[380]

Originally, the tort was available only to husbands, and was primarily designed to protect his property interest in his wife's services,[381] though his "intangible interest in his wife's company"[382] was also incidentally protected. For years the California Supreme Court refused to

373. *Id.* (citing Ledger v. Tippitt, 164 Cal. App. 3d 625, 637-39, 210 Cal. Rptr. 814, 820-22 (1985)).

374. *Coon*, 192 Cal. App. 3d at 1284, 237 Cal. Rptr. at 883 (White, P.J., dissenting).

375. *Elden*, 46 Cal. 3d at 280, 758 P.2d at 591, 250 Cal. Rptr. at 263 (Broussard, J., dissenting).

376. *Id.* at 282 n.2, 758 P.2d at 588 n.2, 250 Cal. Rptr. at 264 n.2 (Broussard, J., dissenting).

377. *Coon*, 192 Cal. App. 3d at 1283, 237 Cal. Rptr. at 883 (White, P.J., dissenting).

378. *Elden*, 46 Cal. 3d at 277, 758 P.2d at 588, 250 Cal. Rptr. at 260.

379. 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974).

380. *Id.* at 404-05, 525 P.2d at 686, 115 Cal. Rptr. at 779-80.

381. *See* Note, *supra* note 274, at 1469.

382. *Id.* at 1468-69 n.5.

allow the cause of action to wives,[383] holding to its position that it was the legislature's duty to grant the relief.[384] The legislature never acted, and in *Rodriguez* the court recanted and allowed recovery to both husbands and wives.[385] While *Rodriguez* was clearly in the context of the marriage relationship, the language is equally poignant for any couple:

> An important aspect of consortium is thus the *moral* support each spouse gives the other through the triumph and despair of life. A severely disabled husband may well need all the emotional strength he has just to survive the shock of his injury, make the agonizing adjustment to his new and drastically restricted world, and preserve his mental health through the long years of frustration ahead. He will often turn inwards, demanding more solace for himself than he can give to others. Accordingly, the spouse of such a man cannot expect him to share the same concern for *her* problems that she experienced before his accident. As several of the cases have put it, she is transformed from a happy wife into a lonely nurse. Yet she is entitled to enjoy the companionship and moral support that marriage provides no less than its sexual side, and in both cases no less than her husband. If she is deprived of either by reason of a negligent injury to her husband, the loss is hers alone . . . . [T]his is an example of a single tortious act which harms two people by virtue of their relationship to each other.[386]

This passage not only expressed the need of the spouse for recovery, but revealed the social policy in granting that recovery—a validation of the relationship which encourages the partners to stay together through the difficult period of adjustment. The state benefits if the physically non-injured partner remains by the side of the injured party rather than abandoning the relationship, leaving the injured partner to recover and adjust for him or herself. Moreover, it is the tortfeasor's responsibility to pay the cost suffered by the relationship.

The court in *Elden* states that denying tort recovery to unmarried couples furthers the state's interest in promoting marriage because "[f]ormally married couples are granted significant rights and bear important responsibilities toward one another which are not shared by

383. *Id.* at 1469.

384. *Id.*

385. Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 408, 525 P.2d 669, 686, 115 Cal. Rptr. 765, 782 (1974).

386. *Id.* at 405-06, 525 P.2d at 684, 115 Cal. Rptr. at 780 (emphasis in original) (citations omitted).

those who cohabit without marriage."[387] These include obligations such as the duty of spousal contract rights and support.[388] This illustrates the thesis that courts may easily assume unmarried couples do not bear legal obligations toward one another.[389] Here, the court did not examine the couple's relationship to see if there were any legal obligations between the partners. The court merely noted the couple were unmarried, and thus, should not be permitted to recover for injuries to their partners "to the same extent as those who undertake these responsibilities."[390] This assumption fails for two reasons.

First, the issue is not the "extent" of recovery—the court does not allow unmarried couples to recover any amount for negligent infliction of emotional distress or loss of consortium. In the case where a tortfeasor negligently causes serious, permanent damage to a person's lifetime nonmarital relationship by causing damage to the person's partner, the physically non-damaged partner has no cause of action against the tortfeasor.[391] The couple is treated as two individual people with no significant relationship at all. The court refers to the state's interest in promoting "the responsibilities of marriage,"[392] but does not offer even the most cursory analysis of how limiting recovery to the couple would promote marriage.[393] In any case this analysis is irrelevant for gay and lesbian couples who can not marry if they wish to,[394] and suggests a world in which they do not exist.

More important, a broader construction of "family" would not denigrate marriage's status. As Justice Broussard suggested in *Elden*, under a broader rule protecting the relational interest,

> [m]arriage would maintain its preferential status since married persons are *presumed* to be "closely related" for the purpose of *Dillon*. Rather, the proposal is merely to elevate unmarried cohabitants to a *neutral* status by permitting them to prove on a case-by-case basis that their relationship is equivalent in all rel-

387. *Elden*, 46 Cal. 3d at 275, 758 P.2d at 587, 250 Cal. Rptr. at 259.

388. *Id.*

389. See *infra* notes 422-51 and accompanying text for another illustration of this thesis.

390. *Elden*, 46 Cal. 3d at 275, 758 P.2d at 587, 250 Cal. Rptr. at 259.

391. *Id.* at 278, 758 P.2d at 588, 250 Cal. Rptr. at 261.

392. *Id.*, 258 P.2d at 588, 150 Cal. Rptr. at 262.

393. As the dissent pointed out,

> [i]t is difficult to fathom how granting relief to a person who is already injured, regardless of marital status, will detract from society's interest in marriage. Presumably, a person who would not otherwise choose to marry would not be persuaded to do so in order to assure his or her legal standing in a future personal injury action . . . .

Id. at 281, 758 P.2d at 591, 250 Cal. Rptr. at 263 (Broussard, J., dissenting).

394. *Coon*, 192 Cal. App. 3d at 1278, 237 Cal. Rptr. at 879 (Barry-Deal, J., concurring).

> evant respects to a good marriage and equally deserving of legal protection.[395]

The difference in judicial perception here is marked. The majority views marriage as the only relationship worth giving judicial recognition as being close. Justice Broussard, on the other hand, sees commitment as the test, and marital commitment as strong, even irrefutable, but not exclusive, evidence of commitment. The proposed recovery is an attempt by the group of committed, but unmarried couples to have their commitment recognized. As noted in the dissent, the state's "policy in favor of marriage . . . does not imply a corresponding policy *against* nonmarital relationships."[396]

The second problem with the court's assessment of the state's interest in promoting marriage is the court's assertion that the holding in *Marvin v. Marvin*[397] would not lead to a different conclusion.[398] According to the court in *Elden*, *Marvin* only permits the enforcement of express or implied contracts between unmarried couples relating to a division of property or support.[399]

Even given that this is a somewhat constricted reading of *Marvin*,[400] the *Elden* court cites exactly these two factors to support its rationale that marital relationships are superior to non-marital relationships.[401] Even within the most constricted reading of "support" it is a *duty* to support one's partner that is similar to the spousal marital support which the court points to as supposedly making marriage superior to cohabitation.[402] As spelled out in the California Civil Code, a married couple's obligations to one another are "obligations of mutual respect, fidelity and support."[403] Mutual respect, fidelity and support are hardly unique to marital relationships, yet California statutory law requires no more of married couples, and there is no reason to believe unmarried couples may

395. *Elden*, 46 Cal. 3d at 281, 758 P.2d at 591, 250 Cal. Rptr. at 263 (Broussard, J., dissenting) (emphasis added).

396. *Id.* (Broussard, J., dissenting) (emphasis in original) (quoting Norman v. Unemployment Ins. Appeals Bd., 34 Cal. 3d 1, 14, 663 P.2d 904, 909, 192 Cal. Rptr. 134, 143 (Broussard, J., dissenting) (1983)).

397. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

398. *Elden*, 46 Cal. 3d at 279, 758 P.2d at 590, 250 Cal. Rptr. at 262.

399. *Id.*

400. The *Marvin* court held that "express agreements [between unmarried couples] will be enforced." 18 Cal. 3d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831. The court placed no restrictions on the terms of the contract except that it may not rest on "unlawful meretricious consideration." *Id.*

401. *Elden*, 46 Cal. 3d at 275, 758 P.2d at 586, 250 Cal. Rptr. at 259.

402. *Id.*

403. CAL. CIV. CODE § 5100 (West 1983).

not also contract for them with one another.[404]

It is, in fact, insulting to think that unmarried couples who have indicated a contract with one another for mutual trust, support and obligation do not have, for one another, mutual respect or fidelity in addition to their clear contractual obligation of support. The court noted that the plaintiff presented "no convincing reason why cohabiting unmarried couples who do not bear . . . legal obligations toward one another, should be permitted to recover for injuries to their partners to the same extent as *those who undertake these responsibilities.*"[405] But by framing the issue this way, the court apparently assumes either that the class of unmarried cohabiting couples is coextensive with the class of couples who have not undertaken legal responsibilities to one another, or else that *Marvin* contracts do not include responsibilities and obligations between the partners. The first is clearly wrong; while it is unclear in *Elden* whether the parties had any legally enforceable obligations to one another, the partners in cases like *Coon* apparently had such obligations.[406] As to the second, in *Marvin* itself, there is no bar to the terms of the contract except that it may not rest on the inseparable consideration of meretricious sexual services.[407] Under *Marvin* as written, couples may design a contract with mutual obligations identical to those in a marriage contract.

Nor does the court in *Elden* anywhere indicate a reading of *Marvin* that would make such contracts unenforceable. The court merely assumes that unmarried partners would not *wish* to undertake such obligations, and are, by refusing to marry, seeking to avoid those obligations.[408] Even if this were true for heterosexual couples who do not choose to marry,[409] it is not true for gay and lesbian couples who may not enter

404. The *Elden* court also argues that the state's consent to the marriage contract is also important. *Elden*, 46 Cal. 3d at 274, 758 P.2d at 586, 250 Cal. Rptr. at 258. As discussed above, *supra* notes 297-300 and accompanying text, this argument only makes sense for same-sex couples if they can choose to marry, which in California, they cannot at present. CAL. CIV. CODE § 4100 (West 1983).

405. *Elden*, 46 Cal. 3d at 274, 758 P.2d at 586, 250 Cal. Rptr. at 258 (emphasis added).

406. *Coon*, 192 Cal. App. 3d at 1272, 237 Cal. Rptr. at 874. Other cases, such as Hinman v. Department of Personnel Admin., 167 Cal. App. 3d 516, 521, 213 Cal. Rptr. 410, 412 (1985) leave no doubt, by stating the partners had a "covenant of mutual economic support." *Id.*

407. *Marvin*, 18 Cal. 3d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

408. *Elden*, 46 Cal. 3d at 275, 758 P.2d at 587, 250 Cal. Rptr. at 259. The assumption is clear in the court's equative wording: "cohabiting unmarried couples, who do not bear . . . legal obligations toward one another . . . ."

409. It is not at all clear from the the facts in *Elden*, *id.* at 269, 758 P.2d at 582, 250 Cal. Rptr. at 255, or other cases that the couples were seeking to avoid any obligations. *See, e.g.*, MacGregor v. Unemployment Ins. Appeals Bd., 37 Cal. 3d 205, 689 P.2d 453, 207 Cal. Rptr. 823 (1984) (unmarried cohabitant left job to remain with partner who had been relocated);

into the marriage contract, yet wish to.[410]

Elden is nevertheless notable because it attempts to explore why we value the marriage contract, rather than merely asserting the state's interest in promoting marriage with no further analysis. As the court pointed out, marriage is important because of the rights and duties required in the marital contract.[411] As discussed previously, those duties have value in an ethical and personal sense.[412] Gay and lesbian couples who see that value and desire the relationship for themselves are increasingly involving themselves in activities such as holy union ceremonies,[413] political activism[414] and private contracts[415] which indicate how strongly this issue affects them. There truly is no convincing reason "cohabiting unmarried couples [without legal responsibilities to one another] should be permitted to recover . . . to the same extent as [couples] who undertake these responsibilities."[416] But the *Elden* court offers no reason couples who have undertaken legal duties and obligations under *Marvin* contracts should be treated differently than those who have contracted for identical or similar duties and obligations under marital contracts. In Justice Broussard's words, "[w]hile the marital relationship is accompanied by a well-defined set of legal rights and obligations, the law also protects analagous rights and obligations voluntarily undertaken by unmarried cohabitants."[417] Even this language hedges more than it needs to: the rights and obligations for which unmarried couples may contract do not need to be "analogous" to those of married couples. They may be identical to those required under state law.

Again, the *Elden* court was not deciding a case of statutory interpretation, but one of tort injury. As the court learned in the history of one of the very torts before it, loss of consortium, the legislature does not

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Norman v. Unemployment Ins. Appeals Bd., 34 Cal. 3d 1, 663 P.2d 904, 192 Cal. Rptr. 134 (1983) (same).

410. Hinman v. Department of Personnel Admin., 167 Cal. App. 3d 516, 520-21, 213 Cal. Rptr. 410, 412 (1985) (gay employee who had entered into covenant of mutual economic support with lifemate; partners "would marry if they were not prohibited from doing so").

411. *Elden*, 46 Cal. 3d at 275, 758 P.2d at 587, 250 Cal. Rptr. at 259.

412. *See supra* notes 277-91 and accompanying text.

413. Dart, *Bay Area Episcopal Delegates Urge Church to Bless Gay Relationships*, L.A. Times, Oct. 29, 1988, pt. II at 6, col. 1; Wheeler, *2,000 Gay Couples Exchange Vows in Ceremony of Rights*, Wash. Post, Oct. 11, 1987, Metro at B1, col. 2.

414. Gutis, *Family Redefines Itself, and Now the Law Follows*, N.Y. Times, May 28, 1989, pt. 4 at 6, col. 1 ("Gay rights organizations are leading the push for changes in government regulations defining the family."), Wheeler, *supra* note 413.

415. *Hinman*, 167 Cal. App. 3d at 520-21, 213 Cal. Rptr. at 412.

416. *Elden*, 46 Cal. 3d at 275, 758 P.2d at 587, 250 Cal. Rptr. at 259.

417. *Id.* at 282, 758 P.2d at 592, 250 Cal. Rptr. at 264 (Broussard, J., dissenting) (citation omitted).

always act to provide fair and adequate tort recovery for its citizens. The Court waited seventeen years for the legislature to provide wives the cause of action for loss of consortium that their husbands had[418] and finally had to provide the cause of action themselves.[419] As the *Elden* dissent noted, the majority abdicated the Court's responsibility for the upkeep of the common law.[420]

B. Property/Lease Succession

Another area in which courts will become increasingly involved is disputes over the property rights of gay and lesbian couples. Because homosexual people are not at present able to form any legally cognizable relationship which would dictate property interest by default, and since gay men and lesbians sometimes do not expressly contract for property rights when they form relationships, litigation in this area is almost inevitable.

The failure of legislators to address the fact that gay men and lesbians make lifetime commitments to one another has created a mass of such litigation in New York City. In less than two years, six reported cases dealt with the status of gay and lesbian couples in one legal area alone: the right of legal succession to an apartment upon the death of the named tenant.[421]

In the landmark case of *Braschi v. Stahl Associates*,[422] New York's highest court held that same-sex couples are protected by a provision in the New York City Rent and Eviction Regulations which prohibits landlords from evicting surviving members of a named tenant's family who live with the tenant, in the event the tenant dies.[423] The decision is the first by any state high court to deal directly with the status of gay and lesbian families.

Miguel Braschi and Leslie Blanchard had lived in a rent-controlled apartment in New York City for eleven years when, in 1986, Blanchard

418. Note, *supra* note 274, at 1469-70.

419. *Id.*

420. *Elden*, 46 Cal. 3d at 286, 758 P.2d at 594, 250 Cal. Rptr. at 266-67 (Broussard, J., dissenting).

421. *See* Koppelman v. O'Keeffe, 140 Misc. 2d 828, 535 N.Y.S.2d 871 (N.Y. App. Term 1988); Raynes Assoc. Ltd. v. Augresani, 530 N.Y.S.2d 497 (N.Y. Civ. Ct. 1988); Yorkshire Towers v. Harpster, 134 Misc. 2d 384, 510 N.Y.S.2d 976 (N.Y. Civ. Ct. 1986) (incorporating two other cases, Bren-El Realty Co. v. Coleman and Thompson Realty Co. v. Baker); Two Assoc. v. Brown, 131 Misc. 2d 986, 502 N.Y.S.2d 604 (N.Y. Sup. Ct. 1986), *rev'd*, 127 A.D.2d 173, 513 N.Y.S.2d 966 (N.Y. App. Div. 1987).

422. 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

423. *Id.* at 206, 543 N.E.2d at 51, 544 N.Y.S.2d at 786.

died.[424] The landlord attempted to evict Braschi, who was not named in the lease.[425] This eviction would have permitted the landlord to place the apartment on the market under the less-stringent Rent Stabilization law.[426] Braschi moved for an injunction and a declaration that he was a member of Blanchard's family, and thus that he had a right to continue living in the apartment under the stricter rent-control law.[427] That law provides that the surviving spouse of a deceased tenant, or "some other member of the deceased tenant's family who has been living with the tenant" may continue to live in the apartment under the protection of rent control.[428] The word "family" is not defined in the regulation.[429]

A New York Supreme Court had granted the injunction, finding that the relationship of Blanchard and Braschi fulfilled "any definitional criteria of the word 'family.' "[430] The appellate division reversed, holding that the statute provided eviction protection only to already legally recognized family relationships.[431] The court of appeals reversed.[432]

The plurality on the high court found that the regulation's protections "should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life."[433] More important, the opinion viewed unmarried partners whose relationship is long-term, and is characterized by traits such as emotional or financial commitments and interdependence as located within our society's traditional concept of family.[434] Finally, the opinion overcame the most significant obstacle to viewing the relationship as the couple views it by rejecting the position that the parties were simply "roommates."[435]

To determine whether such a relationship is, in fact, familial, the court looked to four factors: 1) exclusivity and longevity of the relationship; 2) the level of emotional and financial commitment; 3) the manner in which the parties have conducted their everyday lives and held their relationship out to society (and, presumably, friends and other family members); and 4) the reliance the parties place on one another for daily

424. *Id.*, 543 N.E.2d at 50-51, 544 N.Y.S.2d at 785.
425. *Id.*, 543 N.E.2d at 51, 544 N.Y.S.2d at 786.
426. *See id.* at 208, 543 N.E.2d at 53, 544 N.Y.S.2d at 787.
427. *Id.* at 206, 543 N.E.2d at 51, 544 N.Y.S.2d at 786.
428. N.Y. UNCONSOL. LAW § 2204.6(d) (McKinney 1987).
429. *Braschi*, 74 N.Y.2d at 208, 543 N.E.2d at 52, 544 N.Y.S.2d at 787.
430. *Id.* at 206, 543 N.E.2d at 51, 544 N.Y.S.2d at 786.
431. *Id.*
432. *Id.*
433. *Id.* at 211, 543 N.E.2d at 53, 544 N.Y.S.2d at 788.
434. *Id.*, 543 N.E.2d at 54, 544 N.Y.S.2d at 789.
435. *Id.* at 212 n.4, 543 N.E.2d at 54 n.4, 544 N.Y.S.2d at 789 n.4.

family services.[436] The opinion specifically emphasized that while these factors are helpful, "the presence or absence of one or more of them is not dispositive since it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control."[437]

Measured against these criteria, Braschi and Blanchard were clearly family members. They had lived together for more than a decade,[438] were regarded by friends and family as spouses,[439] and attended family functions together as a couple.[440] Even the building's superintendant and doormen viewed the two men as a couple.[441] In addition, the apartment was clearly Braschi's home.[442] The men also had joint checking and savings accounts and joint credit cards.[443] Finally, the court noted Braschi had Blanchard's power of attorney, was beneficiary in Blanchard's life insurance policy, and was primary legatee and co-executor of Blanchard's estate.[444]

The two-judge dissent argued that the plurality's test was "unworkable . . . [and] subject to abuse,"[445] and that the only individuals protected as family members are those who are related by blood, marriage or adoption.[446] The problem in the *Braschi* dissent is, ultimately, the same

436. *Id.* at 212, 543 N.E.2d at 55, 544 N.Y.S.2d at 790. While the opinion did not specify what "daily family services" are, they could include, among other things, shopping, housekeeping, cooking, paying household bills, making social arrangements, caring for children, and caring for one another.

437. *Id.* at 213, 543 N.E.2d at 55, 544 N.Y.S.2d at 790.

438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.*

443. *Id.*

444. *Id.*

445. *Id.* at 216, 543 N.E.2d at 57, 544 N.Y.S.2d at 792 (Simons, J., dissenting).

446. *Id.* at 221, 543 N.E.2d at 60, 544 N.Y.S.2d at 795 (Simons, J., dissenting). The dissent implied that these factors are more easily ascertained than the majority's unworkable ones. This is not necessarily true. A general criterion no more specific than "related by blood" can include a myriad of geneological possibilities, many requiring at least as much court time and subjective proof as the test relied on by the plurality. *See, e.g., In re* Wendell's Will, 143 Misc. 480, 257 N.Y.S. 87 (Surr. Ct. of N.Y. 1932) (over sixteen hundred people claimed to be related in various degrees to decedent).

Moreover, even the facts involving a marriage are hardly immune from question in the courts. In *Estate of Vargas,* 36 Cal. App. 3d 714, 111 Cal. Rptr. 779 (1974), a husband was married to two women, and the question arose of which was his legal wife. In *Estate of Leslie,* 37 Cal. 3d 186, 689 P.2d 133, 207 Cal. Rptr. 561 (1984), a marriage in Mexico had not been recorded as required by Mexican law, and the legitimacy of the marriage in California was questioned. In *Wagner v. County of Imperial,* 145 Cal. App. 3d 980, 193 Cal. Rptr. 820 (1983), a wife believed she was validly married to her husband, but their vows had never been solemnized as required by law. This is not to say that category determinations by legislatures are to

difficulty the California Supreme Court had in *Elden v. Sheldon*.[447] In both cases, judges discuss a preferred form of family structure as imposing "certain legal obligations" on the parties,[448] and assume that relationships not meeting the formal definition do not include the necessary obligations.[449] Again, it must be stressed that some unmarried couples, by virtue of their relationship to one another, as well as more blatant indications of contractual and affectional ties, may have undertaken the very same legal obligations to support one another which characterize ties such as marriage. A bare assertion that family members have "certain" obligations to one another, without elaboration, paired with the assumption that partners like Braschi and Blanchard do not have such obligations, is a covert way of dismissing the same-sex relationship. Given the facts of this case, there is little, if any question that Braschi and Blanchard's relationship contained every kind of mutual obligation found in the formalized family relationships preferred by the dissent.[450] A contrary assumption otherwise ignores existing New York law, which clearly permits *Marvin*-type contracts between unmarried partners, in which such obligations of support may be found.[451] The difference between the plurality and the dissent in *Braschi* is that the plurality chose to look for those obligations; the dissent did not.

C. *Employment Benefits*

In the area of employment benefits, too, gay and lesbian couples feel the effects of a system that was designed without them in mind. Two cases from California demonstrate the problem.

In *Donovan v. Worker's Compensation Appeals Board*,[452] Earl Donovan, the long-term lover of a Los Angeles County deputy district attorney, sought review of a decision by the Worker's Compensation Appeals

be ignored. On the contrary, in New York, the legislature had determined the category to be protected: family members. Given the many ways "family" can be defined, a *judicial* narrowing is arguably more violative of legislative intent than the broader reading the *Braschi* plurality uses. People sometimes fall through the cracks of categories like "marriage" or "blood relative" just as they sometimes fall through cracks in a category like "family." When that happens, justice would seem to require a court to examine the facts and, if possible, fill in the crack.

447. 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988).

448. *See id.* at 275, 758 P.2d at 586, 250 Cal. Rptr. at 259; *Braschi*, 74 N.Y.2d at 218, 543 N.E.2d at 54, 544 N.Y.S.2d at 793.

449. *Braschi*, 74 N.Y.2d at 221, 543 N.E.2d at 57, 544 N.Y.S.2d at 792 (Simons, J., dissenting).

450. *Id.* at 213, 543 N.E.2d at 55, 544 N.Y.S.2d at 790 (Simons, J., dissenting).

451. *See* Morone v. Morone, 50 N.Y.2d 481, 413 N.E.2d 1154, 429 N.Y.S.2d 592 (1980).

452. 138 Cal. App. 3d 323, 187 Cal. Rptr. 869 (1982).

Board (WCAB) that he was not entitled to the death benefits of his deceased lover on an issue not related to homosexuality.[453] The court of appeal remanded the case to the WCAB[454] and in resolving the underlying issue in favor of Donovan, the court found that the WCAB would be required to determine whether Donovan was a dependent of the deceased state employee in order to recover under California Labor Code section 3503[455] which defined "dependent" as a "good faith . . . member of the family or household of the employee."[456] On remand, the WCAB found that Donovan was such a dependent member of the household, because he had been living with the employee for twenty-seven years.[457]

Two years later, however, the court of appeals decided *Hinman v. Department of Personnel Administration*.[458] Unlike the broad definition in the Labor Code, the *Hinman* court was construing a benefit scheme under the State Employees' Dental Care Act (Act).[459] The Act contains no definition of "family"[460] but the Department of Personnel Administration (DPA), which administers the benefits plans for state employees, had incorporated the definition of "family" from the immediately preceding Health Care Act[461] which defined "family member" as an employee's spouse and unmarried children.[462]

The plaintiff, Boyce Hinman, enrolled his lover, with whom he had been living for twelve years, for coverage under Hinman's dental plan.[463] The DPA deleted the lover's name.[464] After complying with a grievance procedure, Hinman petitioned the court for a writ of mandate requesting declaratory and injunctive relief.[465] The DPA demurred and the trial court sustained the demurrer.[466]

On appeal, Hinman claimed unlawful discrimination on two theories: denial of equal protection under the state constitition, and violation of state Executive Order B-54-79, which prohibited discrimination in ex-

453. *Id.* at 325, 187 Cal. Rptr. at 870-71.
454. *Id.* at 329, 187 Cal. Rptr. at 874.
455. CAL. LAB. CODE § 3503 (West 1989).
456. *Id. See Donovan,* 138 Cal. App. 3d at 328, 187 Cal. Rptr. at 873.
457. Oliver, *Homosexual Lover Awarded Death Benefits,* L.A. Times, Dec. 13, 1983, at B1, col. 1.
458. 167 Cal. App. 3d 516, 213 Cal. Rptr. 410 (1985).
459. *Id.* at 521-22, 213 Cal. Rptr. at 413.
460. *Id.* at 523, 213 Cal. Rptr. at 414.
461. *Id.* (referring to Public Employees' Medical and Hospital Care Act § 22754).
462. *Id.*
463. *Id.* at 520-21, 213 Cal. Rptr. at 412.
464. *Id.* at 521, 213 Cal. Rptr. at 412.
465. *Id.*, 213 Cal. Rptr. at 412-13.
466. *Id.*

ecutive branch departments, boards and commissions based on sexual orientation.[467]

The court appears to have decided the case in the first paragraph of the facts. Noting that Hinman referred to his lover as his "family partner"[468] the court said it would "decline to use the term, as it carries a conclusory implication of family relationship, yet is not established by blood relationship or the operation of law."[469] Throughout the opinion, the court refused to view voluntary family relationships between members of the same sex as legally cognizable. Whenever the court used the term "family" in a homosexual context, the court placed the word in quotation marks.[470] This grammatical wincing demonstrates how wide the perceptual chasm was between the plaintiff's view of his relationship and the court's view.[471]

This was not the only indication of the court's unwillingness to recognize the relationships of homosexual people. When the court asserted the state's interest in promoting marriage as the public policy which supported a decision to give benefits to spouses or family members, the court viewed homosexual people as "simply a part of the larger class of unmarried persons,"[472] and pointed out with apparent bewilderment that the "plaintiffs are not similarly situated to heterosexual state employees *with* spouses. They are similarly situated to other *unmarried* state employees."[473] The implication is that if homosexual people want these benefits, they should get married. But who should they get married *to*? The court, in its refusal to see that homosexual couples have different problems from those of unmarried heterosexual couples, pointed out that a marriage license provides a

> verifiable method of proof . . . . [N]umerous problems of standards and difficulties of proof would arise if we imposed upon an administrative agency the function of deciding which relationships merited treatment equivalent to the treatment af-

467. *Id.* at 520, 213 Cal. Rptr. at 412.

468. *Id.* at 521, 213 Cal. Rptr. at 412.

469. *Id.* at 520 n.2, 213 Cal. Rptr. at 412 n.2.

470. "The distinction plaintiffs argue here is one between heterosexual families and homosexual 'families.' We are unable to establish the nature of a homosexual 'family' . . . ." *Id.* at 526, 213 Cal. Rptr. at 416; "[T]he unmarried 'family' partners of homosexual state employees . . . ." *Id.* at 531, 213 Cal. Rptr. at 420 (Blease, A.J., concurring).

471. Lesbians and gay men often find themselves within such quotation marks. Columnist George Will has recently worried about colleges which try to enforce "officially approved thinking about race, 'sexual preference' and other items of liberal orthodoxy." Will, *U.S. Campuses Are Putting Sensitivity Police on Patrol*, L.A. Times, Nov. 5, 1989, at M7, col. 1.

472. *Hinman*, 167 Cal. App. 3d at 526, 213 Cal. Rptr. at 416.

473. *Id.* (emphasis in original).

> forded those with formal marriages. The inevitable questions would include issues such as the facts deemed relevant, the length of the relationship, the parties' eventual plans as to marriage, and the sincerity of their beliefs as to whether they should ever marry.[474]

This is precisely the situation the court had been in two years earlier when it sent *Donovan* back to the WCAB, and which the Board had resolved.[475] Significantly, the quoted material is from *Norman v. Unemployment Insurance Appeals Board*,[476] a case denying benefits to an unmarried heterosexual couple.[477] What are the plaintiffs in *Hinman* to make of the argument that they should be denied benefits because the state isn't sure of their "eventual plans as to marriage"[478] or "their beliefs as to whether they should ever marry"?[479] More important, what are they to make of that argument in light of the fact that they have publicly stated to the court that "they would marry if they were not prohibited from doing so?"[480] How often do supposedly "similarly situated" heterosexual couples claim they would marry if they were not prohibited from doing so?

Again, the court spoke, like the California Supreme Court in *Elden v. Sheldon*[481] in the vocabulary of "familial obligations."[482] In fact, the court cited *MacGregor v. Unemployment Insurance Appeals Board*,[483] a case in which the California Supreme Court explicitly *declined* to hold that legal marriage was a prerequisite to recovery of unemployment insurance where "other indices of compelling familial obligations" existed.[484] The *Hinman* court, in its zeal to deny Hinman's recovery, read *MacGregor* as applying only to relationships between parents and children—an unnecessarily cramped reading of that case, since *MacGregor* can easily be read as requiring ascertainable *obligations* between family members, and that obligations parents have to their children are merely

474. *Id.* at 528, 213 Cal. Rptr. at 417 (quoting Norman v. Unemployment Ins. Appeals Bd., 34 Cal. 3d 1, 10, 663 P.2d 904, 910, 192 Cal. Rptr. 134, 140 (1983)).

475. Oliver, *Homosexual Lover Awarded Death Benefits*, L.A. Times, Dec. 13, 1983, at B1, col. 1.

476. 34 Cal. 3d 1, 663 P.2d 904, 192 Cal. Rptr. 134 (1983).

477. *Id.* at 10, 663 P.2d at 910, 192 Cal. Rptr. at 140.

478. *Hinman*, 167 Cal. App. 3d at 528, 213 Cal. Rptr. at 417.

479. *Id.*

480. *Id.* at 521, 213 Cal. Rptr. at 412.

481. 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988); *see supra* notes 400-07 and accompanying text.

482. *Hinman*, 167 Cal. App. 3d at 529, 213 Cal. Rptr. at 418.

483. 37 Cal. 3d 205, 689 P.2d 453, 207 Cal. Rptr. 823 (1984).

484. *Hinman*, 167 Cal. App. 3d at 529, 213 Cal. Rptr. at 418 (citations omitted).

an example of such ascertainable obligations. Under that reading, and respecting the California Supreme Court's discussion in *Elden* about obligations[485] the relationship between Hinman and his partner is manifest. Not only had they been living together for more than a decade as partners, they owned their own home together, had their assets in a joint bank account, were primary beneficiaries in one another's wills and life insurance policies, and had "entered into a covenant of mutual economic support."[486] This last, quite specifically, would stand as an enforceable contract under *Marvin*, legally imposing certain obligations between the partners. This is "verifiable" proof that the relationship is not one of "roommates, acquaintances or companions,"[487] and if it is not akin to a marital relationship, it is difficult to see how a marital relationship would be more intricately intertwined.

In concluding that the plaintiffs had not been discriminated against, either on the basis of sexual orientation or marital status,[488] the *Hinman* court revealed its central misunderstanding of the issue it was asked to address. The court pointed out that the plaintiffs' "real quarrel is with the California legislature if they wish to legitimate the status of a homosexual partner."[489] In stating that Civil Code section 4100 defines marriage as a contract between a man and a woman, the court concluded "we cannot change that law here."[490] But changing the law was not the issue in the case. The court was being asked to apply an equal protection analysis to a statutory definition of "family" that did not include gay or lesbian couples.[491] While it was true that Hinman and his partner would marry if they were not prohibited from doing so,[492] they were not asking the court to marry them, they were asking the court to examine the legislative definition of family under the state's equal protection guarantee to see if it could withstand constitutional scrutiny.[493] By equating "marriage" and "family," the court blinded itself to the broader question of family relationships which the plaintiffs had asked it to consider.

485. *See supra* notes 400-07 and accompanying text.
486. *Hinman*, 167 Cal. App. 3d at 520-21, 213 Cal. Rptr. at 412.
487. *Id.* at 528, 213 Cal. Rptr. at 418.
488. *Id.* at 531, 213 Cal. Rptr. at 419-20.
489. *Id.*, 213 Cal. Rptr. at 419.
490. *Id.*, 213 Cal. Rptr. at 420.
491. *Id.* at 519, 213 Cal. Rptr. at 411.
492. *Id.* at 521, 213 Cal. Rptr. at 412.
493. *Id.* at 519, 213 Cal. Rptr. at 411.

D. Child Custody

It is no accident that this section contains, by far, the most cases.[494] The current policy of "promoting" relationships only for heterosexuals, coupled with the policy of encouraging homosexual people to deny their orientation and act as if they were heterosexual, quite naturally results in homosexual people who find themselves in opposite-sex marriages. This affects not only the homosexual spouse, but the heterosexual one, too, who is essentially the victim of a deception society requests of its homosexual members. To expect these marriages to end in anything other than divorce is only one example of how we prefer to deal with the issue of homosexuality by trying to pretend it does not exist, with a cost borne not only by the couples whose marriages end in failure, but by any children they may have.

1. Cases ruling against gay and lesbian couples

As argued above,[495] courts may apply sodomy statutes in a way that discriminates against homosexual people even if the sodomy statute is facially neutral regarding sexual orientation. One of those applications is in child custody cases in which gay or lesbian couples have formed a home after the divorce of one or both partners, and file for custody of either or both partners' children. If they were allowed to get married, of course, any sexual activity with their partner would be presumed to be protected.[496] Because gay and lesbian couples are not allowed to achieve that relational privacy, their sexual relationship is always open to scrutiny and condemnation that has no parallel for heterosexuals. Concomitantly, no state discussed in this section has relied on its sodomy statutes as the principal reason for denying a heterosexual couple child custody.[497]

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494. This Comment includes only a sampling of the literally hundreds of cases dealing with homosexual parents and child custody, with research restricted to those (mostly) recent cases dealing with the issue of gay or lesbian couples. For more cases, see Rivera, *supra* note 24, at 883-904; Annotation, *Visitation Rights of Homosexual or Lesbian Parent*, 36 A.L.R. 4TH 997 (1985); Annotation, *Initial Award or Denial of Child Custody to Homosexual or Lesbian Parent*, 6 A.L.R. 4TH 1297 (1981); Annotation, *Custodial Parent's Sexual Relations with Third Persons as Justifying Modification of Child Custody Order*, 100 A.L.R. 3D 625 (1980).

495. *See supra* notes 267-73 and accompanying text.

496. Bowers v. Hardwick, 478 U.S. 186, 217-18 & n.10 (1986) (Stevens, J., dissenting) ("[W]hen individual married couples are isolated from observation by others, the way in which they voluntarily choose to conduct their intimate relations is a matter for them—not the State—to decide.").

497. Missouri and Virginia have facially neutral sodomy statutes, and New Jersey has, since the decision in *In re J.S. & C.*, 129 N.J. Super. 486, 324 A.2d 90 (1974), decriminalized consensual sodomy.

In *J.L.P.(H.) v. D.J.P.*[498] a Missouri court restricted a politically active gay father's visitation rights by invoking the state's sexual misconduct statute,[499] suggesting that the father might "induce" similar behavior (i.e. sodomy) in the son.[500] And in *Roe v. Roe*,[501] the Virginia Supreme Court pointed out with candor and clarity that Virginia's sodomy statute is frequently used to prosecute "conduct inherent in the [gay] father's relationship"[502] while the heterosexual offense of adultery is seldom prosecuted.[503]

Virginia and Missouri had facially neutral sodomy statutes which the cases suggest are only discriminatory as applied. This is particularly true in the Missouri case, where the father was politically active in attempting to change the law.[504] Absent the shield of marital privacy discussed by Justice Stevens in *Bowers v. Hardwick*[505] child custody can be used as leverage to deter gay or lesbian parents' political conduct in this area. Since the sodomy laws are not used against unmarried heterosexual partners, heterosexuals seldom feel the need to reform those laws that their gay and lesbian counterparts do.

This is true *a fortiori* in the seven states which have sodomy laws that apply only to homosexual relationships,[506] illustrated in the Arkansas case of *Thigpen v. Carpenter*.[507] In *Thigpen* a woman and her lesbian life partner were denied joint custody of the former wife's children.[508] In his concurring opinion, Judge Cracraft attacked the mother for her "fixed determination to continue that course of illegal conduct for the rest of her life, in a home in which the children also reside," daring her to

498. 643 S.W.2d 865 (Mo. App. 1982).

499. *Id.* at 869 (citing MO. REV. STAT. § 566.090.1(3)).

500. *Id.* This notion of the origins of sexual orientation was apparently shared by the father himself. *See id.* (father's testimony that he thought it would be "desirable" for his son to "become" homosexual).

501. 228 Va. 722, 324 S.E.2d 691 (1985).

502. *Id.* at 727-28, 324 S.E.2d at 694. Note the Virginia sodomy statute is facially neutral but has apparently not been used to deny custody to heterosexual parents in the reported cases. VA. CODE ANN. § 18.2-361 (1988).

503. *Roe*, 228 Va. at 728, 324 S.E.2d at 694.

504. *J.S. & C.*, 129 N.J. Super. at 494, 324 A.2d at 95. In *J.L.P.(H.)*, the court noted that the father was "oriented toward the 'cause' of homosexuality." *J.L.P.(H.)*, 643 S.W.2d at 869. This suggests the court viewed homosexuality not so much as a sexual orientation as a kind of political orientation. This in turn suggests the court understood the issue as one of politics rather than intimate relationships.

505. 478 U.S. 196, 217-18 (1986) (Stevens, J., dissenting). *See also* Griswold v. Connecticut, 381 U.S. 479, 491 (1965) (Goldberg, J., concurring) (right to marital privacy protected by ninth amendment).

506. Arkansas, Kansas, Kentucky, Montana, Nevada and Texas. *See supra* note 241.

507. 21 Ark. App. 194, 730 S.W.2d 510 (1987).

508. *Id.* at 196, 730 S.W.2d at 514.

"justify her conduct to the children if and when they find her out."[509]

Judge Cracraft's concurrence went well beyond even the *Hardwick* majority's opinion regarding sodomy.[510] He chastised the appellant for her "preference for homosexual sodomy."[511] The phrase is telling; it denies that homosexuality has a status distinct from conduct. If someone merely "prefers" something, she can certainly "prefer" something else.[512] Yet since the Arkansas statute only applies to homosexual sodomy,[513] it is not conduct alone that is at issue, but the status of homosexuality. A sexual "preference" for sodomy would be irrelevant for a heterosexual in Arkansas.

The majority in *Thigpen* initially appeared to assume that the mother had sex in the presence of her child.[514] Thus, the court was able to reject the wife's argument that the husband had failed to provide evidence that the wife's sexual orientation would adversely affect the best interests of the children.[515] All the husband had to show the court was that the wife engaged in lesbian conduct.[516] But more than just *sexual* conduct is at issue here. The court ultimately admitted the women had never had sex in front of the child[517] but stated that the women had not taken precautions "to shield the children from exposure to their sexual activities."[518] But if the women do not have sex in front of the child, from what other sexual activities should they protect the child? What was being argued, whether the court understood it or not, was the political implications of homosexuality. It is here that courts which wish to do so extend their antipathy toward private acts of sodomy into the public realm.

509. *Id.* at 200, 730 S.W.2d at 514 (Cracraft, J., concurring).

510. Judge Cracraft believes *Hardwick* stands for the proposition that state sodomy statutes violate "no constitutional guarantees," *id.* (Cracraft, J., concurring), despite the *Hardwick* plurality's explicit statement that Hardwick had not defended the lower court judgment on eighth or ninth amendment grounds, or more importantly, on the basis of the Equal Protection Clause. *Hardwick*, 478 U.S. at 196 n.8; *see also id.* at 198 (Powell, J., concurring) ("[r]espondent has not raised the Eighth Amendment issue below. . . . [T]his constitutional argument is not before us.").

511. *Thigpen*, 21 Ark. App. at 200, 730 S.W.2d at 514 (Cracraft, J., concurring).

512. Though even this thesis is open to question; if a person "preferred," for example, prime rib over liver, would his *preference* be any different if he were required by law to eat liver, or would it only be his conduct which was different, assuming he complied with the law?

513. ARK. STAT. ANN. § 41-1813 (1977).

514. 21 Ark. App. at 197, 730 S.W.2d at 512 ("Arkansas courts have never condoned a parent's promiscuous conduct or lifestyle when such conduct has been in the presence of the children.").

515. *Id.* at 198, 730 S.W.2d at 512-13.

516. *Id.*, 730 S.W.2d at 513.

517. *Id.*

518. *Id.*

Thigpen demonstrates that courts are worried about much more than the private acts of sodomy involved in a sexual relationship. The issue in child custody cases is, of course, the best interests of the children.[519] Homosexuality of the parents is itself not a per se harm to children on which denial of custody can be based.[520] Some harm to the child's best interests must be demonstrated.[521] It is the discussion of this harm that provides insight into how courts misunderstand homosexuality.[522]

In a case from New Jersey, *In re J. S. & C.*,[523] the court was never able precisely to locate the harm the father's political activity would cause to the children, but its discussion of the issue is illuminating. The court discussed drawings by the children in which figures carry signs saying "Gay is proud" and "We want equal rights,"[524] and noted that such thoughts "would not occur to children of this age without prodding and indoctrination by an adult."[525] The harm the court saw becomes clearer when, in the next paragraph, the court stated that neither child appeared to be disturbed by the father's activities.[526] The necessary implication is that the children should have been disturbed—as disturbed as the court was. The court initially rejected the theory that exposure of the children to the "gay movement" would "alter" the children's sexual orientation.[527] What the court seemed to be worried about here, then, was that this exposure had taught them sympathy for the rights of gay men and lesbians. Apparently, this sympathy was the harm that the father's political activity caused the children.

The court cited, with apparent approval, testimony that the father's

519. *See, e.g., In re* Marriage of Cabalquinto, 100 Wash. 2d 325, 330, 669 P.2d 886, 889 (Stafford, J., concurring in part and dissenting in part) (1983) (en banc) ("[T]he best interests of the child must be the paramount concern of the court.").

520. *See, e.g., J.S. & C.*, 129 N.J. Super. at 492, 324 A.2d at 94.

521. *See, e.g.*, CAL. CIV. CODE § 4601 (West 1983) (unless it can be shown that parental visitation would be detrimental to child's best interests, reasonable visitation must be awarded to parents).

522. In *J.S. & C.*, for example, the New Jersey court examined the father's "involvement with and dedication to furthering homosexuality," and mentioned "periodicals with a homosexual orientation." 129 N.J. Super at 494, 324 A.2d at 95.

523. 129 N.J. Super. 486, 324 A.2d 90 (1974).

524. *Id.* at 495, 324 A.2d at 95-96.

525. *Id.*, 324 A.2d at 96. The two children were eleven and eight years old. *Id.* The court's statement raises the question of whether *any* thoughts occur to children that are not, at some level, instigated by adults.

526. *Id.*

527. *Id.* at 496, 324 A.2d at 96. It is certain the court assumes this means "alter" from assumed heterosexuality to homosexuality. A child who was already homosexual could not be so altered.

political involvement "had become an obsessive preoccupation,"[528] and that it had gone "beyond the bedroom,"[529] "way above and beyond the actual homosexual involvement."[530] This suggests that the tolerable level of "homosexual involvement" was thus confined to the bedroom; when homosexual parents, for example, bring their children to political events to demonstrate that stereotypes of homosexual people are not always accurate, or even when the parents attend such events by themselves, they are acting beyond the limited sphere in which homosexuality can be accepted, i.e. the bedroom.

The court eventually granted the father visitation, with four restrictions.[531] Two are public in nature: during visitation, the father may not take the children to a gay meeting hall or involve them in "any homosexual related activities or publicity."[532] The other two restrictions are strictly related to the father's private life: during visits by the children he may not "be in the presence of his lover" or "cohabit or sleep with any individual other than a lawful spouse."[533] This is a large step toward breaking down any conceptual barrier between public and private. The father's relationship with his lover is now part of the "homosexually oriented milieu in which defendant has submerged himself,"[534] and which also, presumably, includes the acceptable level of homosexual "involvement" in the bedroom. Thus, the court suggests homosexual involvement will be tolerated as long as it is confined to the bedroom, but not if there is another homosexual person there.

More important, the father may not apparently even live with his lover, or any adult except a "lawful spouse."[535] The requirement has a clear punitive effect. The father may not validate his choice of a partner in accordance with his sexual orientation by doing what nearly all couples do to fulfill the potential of their life relationships, move in together. The court effectively required the father to present a fictitious private life to his children. It is highly unrealistic to think that such a fiction can be maintained for very long. As one court in New Jersey has stated, "There is little to gain by creating an artificial world where the

528. *Id.*
529. *Id.*
530. *Id.*
531. *Id.* at 498, 324 A.2d at 97.
532. *Id.*
533. *Id.*
534. *Id.*, 324 A.2d at 96.
535. *Id.*, 324 A.2d at 97. An alternate construction, that they may "cohabit" together when the children are not visiting, but cease cohabition when the children arrive, implies that it is possible to live together and not live together.

children may deem that life is different than it is."[536]

Eight years after *J.S. & C.*, a Missouri court of appeals decided *L. v. D.*[537] in which a lesbian sought to change the custody of her two younger children, who had been awarded to their father.[538] The court affirmed the lower court's judgment which not only denied the motion, but placed limitations on the children's visits to their mother similar to those in *J.S. & C.*, specifying that "any contact between K.C. [the mother's partner] or any other lesbian lover of the appellant and the children would, in fact, impair their emotional development."[539] The court seemed to have two worries: that the environment was "unwholesome"[540] and that it would lead toward the children either becoming homosexual[541] or at least suffering "social ostracism, contempt and unhappiness."[542] These problems resulted from the mother's lesbian "life-style."[543] In dismissing the mother's expert witnesses, the court found that "[the] evidence of the realities of appellant's life-style demonstrates that the testimony of her expert witnesses dealt with abstractions."[544]

The only evidence of this "life-style" cited by the court was that the couple had a poster of two naked women, and "naked females were portrayed on the shower curtain and the toilet seat cover."[545] Even assuming that no heterosexual men have representations of nude women in their homes while their children are growing up, how do such decorations constitute the whole of a person's lifestyle? More seems to be at work here than judicial disapproval of a parent's taste in home decor. The critical phrase in the court's language is that the expert witnesses were dealing with "abstractions."[546] The experts had addressed and rejected the claim that these children would be harmed by living with their mother and her lover.[547] This is far from an abstraction in the case; it dislocates the homosexual parent's real life into the world of ideas. What

536. M.P. v. S.P., 169 N.J. Super. 425, 436, 404 A.2d 1256, 1262 (1979).
537. 630 S.W.2d 240 (Mo. App. 1982).
538. *Id.* at 241.
539. *Id.* at 245.
540. *Id.*
541. *Id.*
542. *Id.* The court, giving the linguistics of sexual orientation a new twist, stated that homosexuality is a "sexual *dis*orientation." *Id.* (emphasis added). Thus, to the court, the issue was not that all people have an orientation—some to members of the same gender, most to members of the opposite gender—but rather that heterosexuals have a sexual orientation, and gay men and lesbians, having lost sight of their sexual compass, have become disoriented.
543. *Id.* at 244.
544. *Id.*
545. *Id.*
546. *Id.*
547. *Id.* at 243.

could possibly be less abstract in a case of child custody than testimony about potential harm to the children? The court reinforced the notion that it was unable to grasp the real lives of the people involved when it noted that it was aware of "no authority . . . that does not view the homosexual with bewildered compassion."[548]

This willingness to discredit testimony that custody by homosexual parents is not harmful is hardly uncommon. In *J.L.P.(H.) v. D.J.P.*,[549] another court of appeals in Missouri dismissed "uncontradicted evidence" by psychologists that no per se harm would come to the children by virtue of living with a homosexual parent,[550] that a child's sexual orientation is set by age four or five,[551] and that the fear of child molestation by homosexual persons is rare, if not quite nonexistent.[552]

The court cited to other appellate opinions in which gay men molested male minors.[553] Molestation was a heavy focus of the opinion, despite the fact that the mother made no accusation that the father had molested the child.[554] The court based its opinion on the problem of male molestation of minor boys by citing to seven cases in which this was an issue,[555] but cites no comparable cases dealing with heterosexual molestations, nor any evidence of the number of homosexual people who do *not* molest minors. This would be necessary in order to ascertain statistical accuracy, since the issue is not a charge that this father has molested his son, but that homosexual people, as a class, are likely to molest children. Yet, based on this evidence, the court concluded that "given the statistical incidence of homosexuality . . . homosexual molestation is probably, on an absolute basis, more prevelant [than heterosexual molestation]."[556] Thus, "the father's acknowledgement that he is living with an avowed homosexual certainly augurs for potential harm to the child."[557] Far from being neutral about potential strengths that a stable homosexual home environment could have, the *J.L.P.(H)* court assumed such a home would be harmful because of the likelihood that the child would be molested.

Molestation is a clear and obvious harm, assuming it can be proved.

548. *Id.* (citation omitted).
549. 643 S.W.2d 865 (Mo. App. 1982).
550. *Id.* at 867.
551. *Id.* at 866-67.
552. *Id.*
553. *Id.* at 869.
554. *Id.* at 867. The most serious charge the mother seems to have made is that the child's "bedwetting" had become more serious. *Id.*
555. *Id.* at 869.
556. *Id.*
557. *Id.*

The harm caused by a child's learning tolerance or compassion is much less difficult to state, and is therefore seldom obvious in court opinions. But in *In re Marriage of Cabalquinto*,[558] the trial court was quite candid about this issue. While the Washington Supreme Court held that the case should be remanded for further proceedings to determine if the lower court had decided the case on the improper basis of the father's homosexuality alone,[559] four justices had no doubts that the trial court had, indeed, impermissibly found against allowing the father to have the children visit him in his own home with his life partner.[560] The dissenters found that "the trial judge clearly allowed his personal feelings to dictate the result."[561] They arrived at this conclusion by reviewing the transcript of the trial judge's oral opinion, in which that judge had said:

> Well, in my view a child should be led in the way of heterosexual preference, not be tolerant of this thing. God Almighty made the two sexes not only to enjoy, but to perpetuate the human race . . . .
>
> . . . .
>
> I certainly can't find that the boy's best interest would be served by being subjected to this tolerant attitude . . . .[562]

Cabalquinto involved no claims of political activity by the father or his partner. The source of the harm would be the child's visits to the father's home in California.[563] The relational issue here is crucial. It is utterly conventional for couples who love one another, and particularly those willing to share their lives together, that they live in the same home. But rulings like the one by the trial judge in *Cabalquinto* view even that home environment as being infected by the sexual aspects of the relationship. It places a penalty on homosexual parents who do form lasting relationships, preferring single gay men and lesbians to partnered ones. This is precisely the opposite of the way we tend to view heterosexual parenting after divorce, where opposite sex couples are encouraged to remarry so their home will be more desirable in custody arrangements.

The sexual infection of the gay and lesbian home was also the issue in *Roe v. Roe*[564] in which a gay father with joint custody who had been

558. 100 Wash. 2d 325, 669 P.2d 886 (1983) (en banc).

559. *Id.* at 329, 669 P.2d at 888.

560. *Id.* at 334, 669 P.2d at 889 (Stafford, J., concurring in part and dissenting in part).

561. *Id.* at 331, 669 P.2d at 889 (Stafford, J., concurring in part and dissenting in part).

562. *Id.* at 332, 669 P.2d at 890 (Stafford, J., concurring in part and dissenting in part).

563. *Id.* at 326, 669 P.2d at 887. The father had previously had to travel to the mother's home in Washington for his visitation. *Id.*

564. 228 Va. 722, 324 S.E.2d 691 (1985).

single began a domestic relationship with another man,[565] and by virtue of the *relationship* was found to be unfit for continued joint custody.[566] There was no allegation that the daughter had been exposed to any sexual activities of the couple. The couple testified that they did not "flaunt" their relationship.[567] Nevertheless, the trial court found that "this relationship, of sharing the same bed or bedroom with the child being in the home would be one of the greatest degrees of flaunting that one could imagine."[568]

This redefines "flaunt," which ordinarily contains an implication of ostentation,[569] and points up the degree to which marriage protects a sexual relationship. Nearly all married couples share "the same bed or bedroom" in the same home with children, and yet there is no thought of this being the "flaunting" of a sexual relationship, much less "one of the greatest degrees of flaunting that one could imagine." According to this definition, a homosexual couple could flaunt their relationship by inviting friends over for dinner.

But the court went even further into the couple's ordinary life to discover this sexual infection in their home. While sharing the same bedroom would also be grounds for restrictive custody in Virginia if the couple were unmarried and heterosexual,[570] the court took offense at the spectre of "males hugging and patting each other on the behind."[571] This is hardly offensive conduct when performed by heterosexual couples, even if unmarried, and, as the court points out, is also commonly engaged in by football players.[572] But the court considered how the daughter would explain this conduct when she began dating or wanted to have a slumber party.[573] This at least suggests a world in which her daughter's friends will be hostile toward homosexual people. While that might be true, there is another possibility: that the men's relationship might need no explanation, that the daughter's friends might, by this time, have spent time in the home and been fully aware of

565. *Id.* at 725, 324 S.E.2d at 692. Up to that time he had been "a fit, devoted and competent custodian." *Id.*

566. *Id.* at 723-24, 324 S.E.2d at 691.

567. *Id.* at 725, 324 S.E.2d at 693.

568. *Id.*

569. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 867 (1976) ("To wave or flutter showily; to display or obtrude oneself to public notice, esp. by reason of excessive or gaudy finery or impropriety of behavior").

570. *See Roe*, 228 Va. at 726, 324 S.E.2d at 693 (citing Brown v. Brown, 218 Va. 196, 237 S.E.2d 89 (1977) (mother was living with male lover)).

571. *Id.*

572. *Id.*

573. *Id.*

the relationship between her father and his partner, or might be accepting of homosexual relationships by virtue of some other exposure.[574]

Similarly, in *S.E.G. v. R.A.G.*[575] the court raised the concern that the town is a "small, conservative community . . . [where h]omosexuality is not openly accepted or widespread."[576] This is another case where the tainted homosexual conduct is not sex per se, but ordinary relational conduct. Not only do the mother and her partner "sleep together in the same bed,"[577] they "show affection toward one another in front of the children."[578] Thus, courts have reached the point at which virtually every act of affectional conduct between same-sex partners, from sex itself, to kissing, hugging, patting, touching, or, apparently, now, even looking at one another fondly, is a source not only of infection of the home, but of disqualification of the parent for custody. Despite the courts' repeated protests that homosexuality per se is not grounds for removing custody,[579] there is virtually no conduct a parent can perform in a domestic partnership with a long term, same-sex lover, either in the home or outside it, that is immune from judicial scrutiny as pregnant with some potential "harm" to the child. Everything that a homosexual parent does is public, on view, in a way that acts of heterosexual parents are not.

Thus, for homosexual couples, the arguments made by the courts cited at the beginning of the section regarding the parents' political activity have no bounds.[580] The court in *J.S. & C.* meant far more than it said when it argued that "homosexual involvement" is improper if it goes "beyond the bedroom."[581]

2. Cases ruling in favor of gay and lesbian couples

Nevertheless, homosexual couples are not uniformly denied child custody. In *S.N.E. v. R.L.B.*,[582] the Supreme Court of Alaska reversed a

574. This attitude is common to nearly all of the decisions in this section. Courts seldom posit the existence of people in the community who would be tolerant of the gay or lesbian citizens who already live in the community.

575. 735 S.W.2d 164 (Mo. App. 1987).

576. *Id.* at 166. Note that homosexuality is nowhere "widespread." It is tolerated or not tolerated, but seems not to exceed certain fairly low statistical bounds in any given population. *See, e.g.*, HUMAN MALE, *supra* note 36, at 650-51; HUMAN FEMALE, *supra* note 36, at 488.

577. *S.E.G.*, 735 S.W.2d at 166.

578. *Id.*

579. *See, e.g.*, *In re J.S. & C.*, 129 N.J. Super. 486, 492, 324 A.2d 90, 94 (1974); *In re* Marriage of Cabalquinto, 100 Wash. 325, 329, 669 P.2d 886, 888 (1983) (en banc).

580. *See supra* notes 498-536 and accompanying text.

581. *J.S. & C.*, 129 N.J. Super. at 496, 324 A.2d at 96.

582. 699 P.2d 875 (Alaska 1985).

lower court which had granted a father sole custody on a finding that the mother was living with her lesbian partner.[583] The father had originally sought custody on the grounds that the mother held "radical political views."[584] While the Alaska Supreme Court found there was much on the record about the mother's homosexuality,[585] the court was unable to discover a nexus between the mere fact of her homosexuality and any adverse effect on the child.[586] The only connection the lower court had found was that the mother's lesbian relationship "might be less stable and longlasting" than the father's recent marriage.[587] The supreme court, however, found this to be "conjecture by the [lower] court, since there was no evidence Mother's relationship was not committed. Instead the court relied on its own unsupported opinion that homosexual relationships are unstable and usually of short duration."[588]

The court hurdled three significant obstacles in this opinion. First, the court simply ignored the "political views" problem of cases like *J.S. & C.*[589] Aside from the father's allegation, the mother's politics were not referred to again in the opinion.[590] This may have been because the court faced head-on the second, and much more important analytical problem, the nexus between parental conduct and harm to the child.[591] The Arkansas court in *Thigpen* simply dispensed with the nexus requirement if the parent's conduct was homosexual.[592] The Alaska court viewed the nexus issue as the central problem in the case.[593] The mother's homosexuality was a strong focus at the trial.[594] Yet, according to the Alaska court, mere evidence that the mother was a lesbian was not necessarily evidence that she was unfit for custody.[595] In fact, the record indicated the opposite to the Alaska court: the child had been raised in the mother's home for three years, and his development had been "excellent."[596]

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583. *Id.* at 877.
584. *Id.*
585. *Id.* at 878-79.
586. *Id.* at 876.
587. *Id.* at 879 n.6.
588. *Id.*
589. *See* cases discussed *supra* notes 495-536.
590. *S.N.E.*, 699 P.2d at 877.
591. *Id.* Contrast this with *Thigpen*, 21 Ark. App. at 197-98, 730 S.W.2d at 513.
592. *Thigpen*, 21 Ark. App. at 197-98, 730 S.W.2d at 513. That court seemed to view homosexuality as synonymous with "illicit." *Id.*
593. *S.N.E.*, 699 P.2d at 879.
594. *Id.* at 878 & n.4.
595. *Id.* at 879.
596. *Id.* The court also dispensed with the argument that being raised by a homosexual parent would influence a child to somehow "become" homosexual. *Id.*

The court addressed the theory of indirect harm caused by social disapproval. Relying on the United States Supreme Court's decision in *Palmore v. Sidoti*[597] in which the Court held that general community prejudice against interracial couples was an insufficient justification for removing custody of a child from the parent involved in an interracial relationship,[598] the Alaska court stated: "Simply put, it is impermissible to rely on any real or imagined social stigma attaching to Mother's status as a lesbian."[599] Homosexuality, unlike heterosexuality, can be viewed by those so inclined, as a per se disqualifying factor—the "harm" is inherent in the status because the community disapproves. Here, this was questioned. The court required an inquiry into some real harm to the child.[600] Absent a "finding that a parent's conduct has or reasonably will have an adverse impact on the child,"[601] a court may not conclude the child of a homosexual parent will be harmed solely on the basis of community prejudice. By defusing the argument attaching social stigma to the status of homosexuality via *Palmore*, the court, in effect, removed the only available reason for treating homosexuality differently than heterosexuality. The argument reduces to this: social stigma against homosexual people is fundamentally all that separates them from heterosexuals. Public prejudice is not the fault of a homosexual parent, and therefore, the court cannot punish the parent (and the child) by calling public prejudice "harm."

In doing this, the court addressed the third obstacle many courts face, the point-of-view problem itself. The court insisted on a neutral view of the status of sexual orientation, a view which sees sexual orientation as a difference without significance, requiring that homosexual parents not be treated differently under the law than heterosexual parents.[602] This is the power that the "social stigma" argument carries—heterosexuality has no such stigma, so the purely non-sexual activities of only homosexual couples, such as affectionate hugging, or more public political activities designed to change public awareness, can be reached by the "harm to the child" analysis in a way they cannot be reached for unmarried heterosexual couples. And this is the force *Palmore* has, for it blocks such status stigma.[603]

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597. 466 U.S. 429 (1984).

598. *Id.* at 433.

599. *S.N.E.*, 699 P.2d at 879.

600. *Id.*

601. *Id.*

602. *Id.* at 879 n.6.

603. *But see S.E.G.*, 735 S.W.2d at 166 (rejecting *Palmore* argument because *Hardwick* denies homosexual citizens all constitutional protection).

The California Court of Appeal in *In re Marriage of Birdsall*[604] has taken the same position of requiring "an affirmative showing of harm or likely harm to the child" in order to restrict parental custody, even when the social stigma comes in its severest form, religious intolerance.[605] In *Birdsall*, the child's mother, a Jehovah's Witness[606] tried to restrict overnight visitation of the son with the father because the father shared a home with two other gay men.[607] The lower court had found that the father's sexual practices "have hardly been discreet"[608] solely on the basis that his membership in the Jehovah's Witnesses was terminated because of his status as a homosexual.[609] The court of appeal found this conclusion "meritless" and stated, "[T]here is no evidence of any indiscretion attendant upon the father's acknowledgment of his homosexuality or of his leaving the church."[610] The court saw "[n]o current harm to the child" attributable to the father's sexual orientation alone,[611] nor any "evidence of future detriment" due to that factor.[612] The court rejected a per se rule that a homosexual parent's visitation must be subject to restraining orders, and accomplished the same effect as *Palmore* by precluding a showing of harm based on generalized bias alone.[613]

Perhaps the most persuasively argued opinion in favor of granting custody to a homosexual couple is *M.A.B. v. R.B.*[614] in which a gay father sought sole custody of his twelve-year-old son, and tried to block the mother's attempt to move to Florida from her home in New York with the two younger children.[615] While the mother had had custody of all three children since the couple's separation, she had suffered health problems which resulted in the children being cared for by their father or grandparents during the mother's periods of hospitalization.[616]

The older son had discipline problems at school, and at the suggestion of the school psychologist, who was aware of the father's homosexuality, the boy moved into the father's home for five months.[617] The

604. 197 Cal. App. 3d 1024, 243 Cal. Rptr. 287 (1988).
605. *Id.* at 1030, 243 Cal. Rptr. at 290.
606. *Id.* at 1027, 243 Cal. Rptr. at 288.
607. *Id.*
608. *Id.* at 1030, 243 Cal. Rptr. at 290.
609. *Id.*
610. *Id.*
611. *Id.* at 1031, 243 Cal. Rptr. at 290-91.
612. *Id.*, 243 Cal. Rptr. at 291.
613. *Id.* at 1030 n.4, 243 Cal. Rptr. at 290 n.4.
614. 134 Misc. 2d 317, 510 N.Y.S.2d 960 (1986).
615. *Id.* at 318, 510 N.Y.S.2d at 960.
616. *Id.*, 510 N.Y.S.2d at 960-61.
617. *Id.* at 319-20, 510 N.Y.S.2d at 961.

father took a job demotion in order to be more available to the boy and the school, and the boy's behavior improved, as noted by the school principal, the psychologist, the father, and the boy himself.[618]

The boy then moved in with the mother again, and his behavior again deteriorated.[619] The boy consistently persuaded the mother to let him terminate his emotional therapy sessions.[620] On these facts, the court awarded custody to the father as being in the boy's best interests.[621]

The court addressed the mother's concern that the father's homosexuality would have an adverse effect on the boy by looking, not at the sexual aspect of the father's relationship with his partner, but at the relationship's domestic character.[622] The court noted the eight-year stability of the relationship, as well as its exclusivity.[623] While noting that the boy himself had some difficulty accepting his father's homosexuality, the court said the boy would eventually be required "to integrate the fact of his father's homosexuality into his own life."[624] To the social stigma argument, the court responded, "to accept these problems are inevitable is, however, a long distance from saying that the father's homosexual *conduct* has had an adverse effect on the boy."[625]

The New York court then cited an opinion from New Jersey, *M.P. v. S.P.*[626] in which a lesbian mother was given custody of her children.[627] In rejecting the approach of courts which require a homosexual parent to present an asexual facade to their children, the New Jersey court had said:

> [T]here is little to gain by creating an artificial world where the children may deem that life is different than it is . . . . There is no reason to think that the girls will be unable to manage whatever anxieties may flow from the community's disapproval of their mother . . . . If defendant retains custody, it may be that because the community is intolerant of her differences these girls will sometimes have to bear themselves with greater than ordinary fortitude. But this does not necessarily portend that their moral welfare or safety will be jeopardized. It is just as

618. *Id.* at 320, 510 N.Y.S.2d at 961.
619. *Id.*, 510 N.Y.S.2d at 962.
620. *Id.*
621. *Id.* at 321, 510 N.Y.S.2d at 962.
622. *Id.* at 323, 510 N.Y.S.2d at 963.
623. *Id.*
624. *Id.*
625. *Id.*, 510 N.Y.S.2d at 963-64 (emphasis in original).
626. *Id.* (citing M.P. v. S.P., 169 N.J. Super. 425, 436-39, 404 A.2d 1256, 1262-63 (1979)).
627. M.P. v. S.P., 169 N.J. Super. 425, 439, 404 A.2d 1256, 1263 (1979).

> reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of current popular sentiment or prejudice.
>
> Taking the children from the defendant can be done only at the cost of sacrificing those very qualities they will find most sustaining in meeting the challenges inevitably ahead. Instead of forebearance and feelings of protectiveness, it will foster in them a sense of shame for their mother . . . .
>
> We conclude that the children's best interests will be disserved by undermining in this way their growth as mature and principled adults . . . . Nothing suggests that [the mother's] homosexual preference in itself presents any threat of harm to her daughters or that in the ordinary course of their development they will be unable to deal with whatever vexation may be caused to their spirits by the community.[628]

The New York court reinforced the New Jersey court's reasoning with the United States Supreme Court's language in *Palmore* that "[t]he Consititution cannot control . . . prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot directly or indirectly give them effect."[629]

By this route courts can, at least minimally, reconstruct some territory of private life for a homosexual couple. Courts that rule against homosexual couples import an anti-homosexual bias into the supposed privacy of the home, by attributing to the child a societal bias. The New Jersey court in *S.P.* and the New York court in *M.A.B.*, on the other hand, assume the child is a participant with his or her parents in the struggle against a sometimes hostile community. Rather than participating in the creation of "an artificial world" where a homosexual parent, unlike a heterosexual parent, is supposed to pretend she does not have a need to form a meaningful relationship, these courts recognize the homosexual parents' reality, and invest that with moral worth. Far from being harmed by the prejudice against their parents, children can, in fact, become "better equipped" to deal with the world.[630] Moreover, rather

628. *Id.* at 436-39, 404 A.2d at 1262-63.

629. *M.A.B.*, 134 Misc. 2d at 324-25, 510 N.Y.S.2d at 964 (citing Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).

630. *M.P.*, 169 N.J. Super. at 437, 404 A.2d at 1262.

than merely accepting the biased status quo as inevitable, these courts give children and their parents a possibility of recognizing bigotry as bigotry, and perhaps challenging it.[631] By recognizing bigotry as bigotry, a court allows a child to align with her or his homosexual parents, in a way we quite easily assume children align with their parents if those parents are heterosexual. This is quite different from the lower court's attitude in *Cabalquinto*, in which the judge was certain the child would be harmed "by being subjected to this tolerant attitude,"[632] or *J.S. & C.*, where the court noted with surprise that the children were not "disturbed" by their father's political activities.[633] In each of those cases the judge treated the child as if the child necessarily shared, or should share, the judge's view of the parent.

E. Health Care

The single case discussed here, *In re Guardianship of Kowalski*[634] is, in a significant way, different from all the other cases discussed in this Part. In this case, Sharon Kowalski, who had been living with her lover, Karen Thompson, was injured in a 1983 auto accident.[635] The accident left Kowalski physically and mentally impaired and with only a limited ability to communicate.[636] Thompson fought for six years for the right to be Kowalski's guardian.[637] Unlike any other case in this Comment, Thompson was not asking the courts for any conventionally defined benefit. Her ultimate victory won her no tort recovery, no employment ben-

631. The New York court in *M.A.B.* also quoted with approval this language from the New Jersey court:

> Instead of courage and the precept that people of integrity do not shrink from bigots . . . [a denial of custody would counsel] the easy option of shirking difficult problems and following the course of expedience . . . . It diminishes [the children's] regard for the rule of human behavior, everywhere accepted, that we do not forsake those to whom we are indebted for love and nurture merely because they are held in low esteem by others.

M.A.B., 134 Misc. 2d at 324, 510 N.Y.S.2d at 964 (quoting M.P. v. S.P., 169 N.J. Super. 425, 437, 404 A.2d 1256, 1263 (1979)).

632. *Cabalquinto*, 100 Wash. at 332, 669 P.2d at 890 (Stafford, J., concurring in part and dissenting in part).

633. *J.S. & C.*, 129 N.J. Super. at 495, 324 A.2d at 96.

634. 382 N.W.2d 861 (Minn. App. 1986), *cert. denied*, 106 S. Ct. 1467 (1986).

635. *Id.* at 862-63.

636. *Id.* at 863.

637. *See* Cuniberti, *Whose Life Is It?*, L.A. Times, Aug. 5, 1988, pt. V at 1, col. 1 (Thompson "has been in and out of Minnesota courts more than 20 times" trying to gain the same rights a married partner would have for guardianship of her injured spouse); K. THOMPSON & J. ANDRZEJEWSKI, WHY CAN'T SHARON KOWALSKI COME HOME? 193-217 (1988) [hereinafter K. THOMPSON]. Thompson ultimately won, and is now allowed to visit her partner as well as to provide for her care. FRONTIERS NEWSMAG., Dec. 29, 1989, at 33.

efits, no child custody, no lease succession. What Thompson asked the court for was her right to share the burden of care implicit in her relationship with Kowalski, the right to care for her disabled partner and nothing more. This is, in essence, the "right" to fulfill the obligations, so important in the cases discussed above,[638] that she felt toward her partner. To this end she went to court more than twenty times[639] and expended over $125,000 in legal fees.[640] In many ways this case is the quintessential battle over the definition of family in the context of same-sex relationships.[641]

On March 2, 1984, after Sharon Kowalski was disabled by the auto accident, Thompson petitioned to become Kowalski's guardian.[642] Sharon Kowalski's father, Donald Kowalski, cross-petitioned.[643] While recognizing that Thompson and the parents "each have a significant relationship" with Sharon, and that each was "suitable and qualified" for guardianship,[644] the trial court awarded the father guardianship, giving no reason for its choice of him over Thompson, but explicitly stating that the choice was not "a recognition that he is the most suitable or best qualified among those available and willing to discharge the trust."[645] The court dismissed the idea of joint guardianship "in light of the diffi-

638. *E.g.*, Elden v. Sheldon, 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988); Braschi v. Stahl Assoc., 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1988). *See supra* notes 400-10 and 419-23 and accompanying text.

639. *See* Cuniberti, *supra* note 637.

640. *Id.*

641. It may be useful to compare this case to a recent case with similar facts in the context of a heterosexual marriage, Cruzan v. Harmon, 760 S.W.2d 408 (Mo. 1988) (en banc), *cert. granted*, 109 S. Ct. 3240 (No. 88-1503 1989). In that case, Nancy Cruzan went into a persistent vegetative state after an auto accident. *Id.* at 410. Her husband saw to her care for a short time, and then filed for, and was granted, a divorce. *Id.* at 431 (Higgins, J., dissenting). This left his ex-wife's parents to care for their daughter.

While the husband's action in *Cruzan* may not be typical of marriages in general—indeed, it is probably atypical—his action illuminates two things pertinent to the discussion of *Kowalski*: first, the pressures involved in these cases are considerable. But more important, it is not the marital relationship which is at issue, but the duty which arises in the uninjured party to care for the injured person. While that duty was not felt strongly enough by the husband in *Cruzan* (and was mentioned only in the dissent, and then, only in passing), it was and is felt keenly by Thompson in *Kowalski*, and not only felt, but acted upon *despite* the lack of a formal sanction to the relationship by the state, a church, or anyone else. In this sense, Thompson's relationship to Kowalski was more akin to the family relationship of her lover's blood relatives than to the formalized and dissolved relationship Cruzan's husband had with his wife. The important factor is, as the California Supreme Court suggested in *Elden*, the obligations the parties have to one another. *Elden*, 46 Cal.3d at 275, 758 P.2d at 586, 250 Cal. Rptr. at 259.

642. *Kowalski*, 382 N.W.2d at 863.

643. *Id.*

644. *Id.*

645. *Id.*

culties" that existed between the parents and Thompson.[646] Nevertheless, both parties were given equal access to Sharon's medical and financial records and equal visitation rights.[647]

Over the next several months, Sharon was moved numerous times.[648] This was followed by a series of restraining orders against both Thompson and the father, ending with both parties petitioning for a change in the guardianship order.[649] The court reviewed medical evidence suggesting Sharon became depressed after Thompson's visits and concluded that this was sufficient evidence of harm to award guardianship to the father without restrictions.[650] Donald Kowalski immediately terminated Thompson's visitation rights.[651]

The court of appeals began its analysis of these facts by referring to the "alleged" relationship of Sharon and Thompson.[652] As was the case in *Hinman v. Department of Personnel Administration*,[653] the case was all but decided before the end of the first paragraph of analysis. The court referred to Thompson as Sharon's "friend"[654] and "roommate."[655] Despite the fact that these "friends" had "exchanged rings," and named one another as beneficiaries in their life insurance policies, the court described the women's relationship as "uncertain" because Sharon Kowalski had allegedly closed their joint bank account and, based solely on the testimony of Sharon's sister, that Sharon was "considering" moving to Colorado at some time prior to the accident.[656] The court said Thompson "claims" this was a lesbian relationship.[657]

It is difficult to see how it could have been anything else. Heterosexual "friends" of the same sex who are living together seldom, if ever, exchange rings and name one another as beneficiaries in life insurance policies. Nevertheless, the court cited as further evidence of uncertainty

646. *Id.*
647. *Id.*
648. *Id.*
649. *Id.*
650. *Id.*
651. *Id.*
652. *Id.*
653. 167 Cal. App. 3d 516, 213 Cal. Rptr. 410 (1985). *See supra* notes 468-71 and accompanying text.
654. *Kowalski*, 382 N.W.2d at 863.
655. *Id.*
656. *Id.* Thompson stated after the decision that she, not Kowalski, had closed the account, a fact not brought up at the trial. K. THOMPSON, *supra* note 637, at 181. Sharon's sister, like the rest of the Kowalski family, exhibited clear hostility to the relationship between Sharon and Karen. *See* Cuniberti, *supra* note 637.
657. *Kowalski*, 382 N.W.2d at 863.

that Kowalski never told her family of the relationship.[658] How this would prove the uncertainty of the relationship is a mystery: given subsequent events, any fear the women may have had that the parents would react to this news with firmly-held prejudice and rejection was fully justified. There was clear evidence of the father's difficulty with his daughter's relationship—Donald Kowalski testified at the trial that he did not believe his daughter loved Thompson, without stating any reason for his belief.[659] While it is not unusual for a court to believe one version of the facts over another, the court apparently failed to consider at any level the interests of the parties making their claims. Thompson's interest was to be certain Sharon was receiving the best care possible,[660] and to be granted access to the person she loved most in the world.[661] While it is certain the parents also had a strong interest in their daughter's care, they also exhibited an interest in maintaining a fiction about their daughter's sexual orientation. The result of this second interest is to deny Thompson's place in Sharon's life as either partner, caregiver or lover.[662]

This suggests that homophobia was a significant issue in the case. Both the trial court and the court of appeals referred repeatedly to the difficult relationship between the parties,[663] but neither court ever examined what the source of the difficulties was. This viewed homophobia as unproblematic in exactly the way Minow describes,[664] and ignored the very battle that Thompson was waging. Even if the trial court had been correct in granting Donald Kowalski unrestricted guardianship, the proper analysis would have had to include a determination that Sharon was being harmed by visits from her chosen partner, not merely her "friend" or "roommate."[665] And it is the fear of homosexuality which perceieves a lifetime commitment as if it were only an ordinary friendship.

The court gave weight to the "unconditional parental love"[666] Kowalski had for his daughter, and, in dismissing Thompson's relationship, stated that she "fails to acknowledge the strong confidential relationship which exists between parent and child."[667] The power of the parent-

658. *Id.*
659. K. THOMPSON, *supra* note 637, at 134 (quoting testimony at trial).
660. *Id.* at 28.
661. *Id.* at 37.
662. *Id.*
663. *Kowalski*, 382 N.W.2d at 863, 867.
664. Minow, *supra* note 196, at 53.
665. *Id.* at 863.
666. *Id.* at 865.
667. *Id.*

child bond is beyond question. But whatever else a parent-child relationship is, it is not voluntary, at least not as viewed by the child. As between adult family relationships rooted in blood and adult family relationships based on commitments, the voluntary and mutual choices made in the latter would seem to indicate that they should be given preference in a legal context where the wishes of the party are at issue.[668]

And that was exactly the problem in this case. The guardian is expected to carry out "any reliably expressed wishes of the ward" and determine what will be in the ward's "best interest."[669] Because the court was apparently unable even to address the women's voluntary relationship as the women viewed it, it appeared that the only "family" Sharon had was her parents. The court was apparently not willing to view Thompson as a member of Sharon's family.[670] When looking at the evidence of the ward's best interests, the court gave overriding weight to the fact that Sharon "regularly experiences depression and moodiness following Thompson's visits."[671] The court did not discuss the possibility that this may have been because Sharon *missed* Thompson when she was gone. That was borne out by the testimony of two doctors at trial.[672]

The court also did not consider the far more important problem of granting the father the power to terminate Thompson's visits entirely. The evidence of Sharon's wishes may have been contradictory.[673] Yet there was no evidence that she did not want Karen to visit, and abundant evidence that it is important for the concerned loved ones to spend time with an injured person.[674] The lower court's order produced a result that cut off that benefit.[675] Like the courts in the child custody cases dis-

668. *See id.* at 867.

669. *Id.*

670. *Id.* at 865 (quoting *In re* Guardianship of Schober, 303 Minn. 226, 230, 226 N.W.2d 895, 898 (1975) (those with "family ties" to ward are generally selected as guardians, but others may also serve as guardians)).

671. *Id.* at 866.

672. K. THOMPSON, *supra* note 637, at 130, 136 (testimony of Drs. Cowan and Gregor).

673. *See* Cuniberti, *supra* note 637 (questioning of Sharon):

Q. Do you want to live with your father?
A. Yes.
Q. Do you want to live with your mother?
A. Yes.
Q. Do you want to live with Karen?
A. Yes.

See also K. THOMPSON, *supra* note 637, at 152-53 (tests of Sharon indicate she was fully aware of her relationship with Thompson as lesbians who loved one another); *id.* at 111-15 (same).

674. K. THOMPSON, *supra* note 637, at 137 (testimony of Dr. Gregor that "I can't imagine any circumstances why anyone would want to exclude any person wanting to continue to be involved with a brain-injured person"); *id.* at 138.

675. Karen Thompson never planned to similarly exclude the parents, despite their hostil-

cussed above,[676] the *Kowalski* court apparently assessed the harm in the case by positing a world in which homosexuality itself constitutes harm.[677]

The decision is not merely the result of a homophobic bias. The opinion, in fact, has both sexist overtones and suggests paternalistic stereotypes about the disabled. Thus women's groups and the disabled joined the gay community in protesting the decision.[678] This is what Minow points out when she makes her plea for "deliberate attention to our own partiality."[679] If we are aware of our biases, whatever they are, "we can begin to acknowledge the dangers of pretended impartiality. By taking difference into account, we can overcome our pretended indifference to difference, and people our worlds with those who can surprise and enrich one another."[680]

In this case particularly, but in many of the cases discussed in this Part, if the court had acknowledged the often obvious point that the homosexual parties have experienced bias because of their sexual orientation, it could have overcome its own "indifference to difference." It is just this indifference that the *Kowalski* court demonstrates when it ignores the very tangible problem of the Kowalskis' fear of homosexuality. But for that fear, the parents could have seen not only the commitment their daughter had made to Thompson, but acknowledged that Thompson's commitment to their daughter's well-being is extraordinary by any standards. That is the commitment that defines, or ought to define, the boundary of family.

V. RECOMMENDATIONS

It should be apparent that while a central problem in understanding the relationships of same-sex couples is, and will continue to be, the problem of perspective, the underlying problem is the assumptions we make about the meaning of words like "family." Because the realm of voluntary adult relationships is still all but preempted by marriage, and be-

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ity, and throughout intended to work together with them for Sharon's recovery. *See id.* at 23-25, and 103-04. One of Karen's initial letters to the Kowalskis stated, "I have never and would never want to keep you from Sharon." *Id.* at 37.

676. *See supra* notes 498-581 and accompanying text.

677. Here, unlike the "harm" asserted to children in custody disputes, the harm to Sharon is not to the *formation* of a homosexual person out of a pre-sexual child, but the recognition of a homosexual relationship the parents clearly wish had never occurred, and continue to deny ever existed. *See, e.g.*, Cuniberti, *supra* note 637 (Donald Kowalski "does not think his daughter was or is a lesbian").

678. Cuniberti, *supra* note 637; *see also* K. THOMPSON, *supra* note 637, at 209-17.

679. Minow, *supra* note 196, at 95.

680. *Id.*

cause marriage, itself, still supposes only heterosexual preoccupations, gay and lesbian couples find themselves in a linguistic void.

Implicated in this is the problem of proof. Courts have repeatedly stressed the fact that they cannot be sure the same-sex relationships before them are as the parties claim them to be.[681] Because gay and lesbian couples are prohibited from forming legally cognizable family relationships in any of the usual ways,[682] courts are able to use an evidentiary argument to devitalize homosexual relationships. Thus, couples do not "claim" to be married—they are or they are not, and can prove it. Gay and lesbian relationships, however stable and committed, though, are always open to being merely "claimed" relationships.[683]

There are three potential solutions to these problems. The first is legalizing same-sex marriage. The second is the recognition of de facto family relationships. The third and, perhaps, most practical, is the introduction of both the concept and the term, "domestic partnership."

A. Same-Sex Marriage

Same-sex marriage is without question the most comprehensive and satisfactory answer to the problems facing gay and lesbian couples. It has been argued for in the legal literature,[684] at mass public demonstrations in the nation's capital,[685] and by churches.[686] Legislative failure to address the issue has been mentioned by the courts themselves.[687]

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681. *See, e.g.*, Elden v. Sheldon, 46 Cal. 3d 267, 276, 758 P.2d 582, 587, 250 Cal. Rptr. 254, 259 (1988); Hinman v. Unemployment Ins. Appeals Bd., 167 Cal. App. 3d 516, 528, 213 Cal. Rptr. 410, 417 (1985); *In re* Guardianship of Kowalski, 382 N.W.2d 861 (Minn. App. 1986).

682. Marriage—*see, e.g.* Friedman, *The Necessity for State Recognition of Same-Sex Marriage*, 3 BERKELEY WOMEN'S L.J. 134, 137-44 (1987-88); or adoption—*see In re* Adoption of Robert Paul P., 63 N.Y.2d 233, 471 N.E.2d 424, 481 N.Y.S.2d 652 (1984).

683. Note that this is not the case with unmarried heterosexual couples. In two California cases dealing with unmarried heterosexual couples, Norman v. Unemployment Ins. Appeals Bd., 34 Cal. 3d 1, 663 P.2d 904, 192 Cal. Rptr. 134 (1983), and MacGregor v. Unemployment Ins. Appeals Bd., 37 Cal. 3d 205, 689 P.2d 453, 207 Cal. Rptr. 823 (1984), the court never referred to the relationships as "claimed" or "alleged," nor did it assume that the couples were "friends" or "roommates." In both cases, the couples' claim to having a relationship was unquestioned.

684. *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1605-11, 1628 (1989); Friedman, *supra* note 684; Comment, *The Homosexual's Right to Marry: A Constitutional Test and a Legislative Solution*, 128 U. PA. L. REV. 193 (1979); Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573 (1973).

685. Wheeler, *2,000 Gay Couples Exchange Vows in Ceremony of Rights*, Wash. Post, Oct. 11, 1987, at B1, col. 2.

686. Dart, *Support Grows Among Clergy for 'Weddings' of Gay Couples*, L.A. Times, Dec. 7, 1987, pt. 1, at 3, col. 1; *Unitarians Endorse Homosexual Marriages*, N.Y. Times, June 27, 1984, A26, col. 4.

687. Hinman v. Department of Personnel Admin., 167 Cal. App. 3d 516, 531, 213 Cal.

Nevertheless, the antipathy to the idea of same-sex marriage is a powerful reality in our time.[688] Much of this antipathy may arise from our (mostly) unacknowledged sexist assumptions about the power relationships inherent in opposite-sex marriage.[689] The sexual inequality of the marriage myth runs deep, and is not touched without arousing dormant passions we seldom have occasion to examine.[690] Same-sex marriage is the very model of a relationship based on sexual equality, and challenges marriage as an institution which requires sex-linked difference for some unexamined reasons other than biology.

However, legal arguments are available.[691] Predominant among these is equal protection.[692] State laws which restrict marriage to members of the opposite sex discriminate on their face against homosexual citizens, as well as against bisexual people who wish to commit to and formalize a same-sex relationship. A state, however, may not "foist orthodoxy on the unwilling."[693] If homosexuality is declared a "suspect" classification, a state would have to offer a compelling reason for discriminating against gay men and lesbians.[694] Even absent a "suspect" classification for homosexual citizens the state would have to have at a minimum a rational basis for discriminating.[695] It has been suggested that such a rational basis must "*transcend[ ] the harm to the members of the disadvantaged class.*"[696] Because the harm suffered by lesbians and gay men under discriminatory marriage laws is so pervasive—most particularly in the area of privacy—states would have to be careful in justifying them.

Rptr. 410, 419 (1985); Coon v. Joseph, 192 Cal. App. 3d 1269, 1279, 237 Cal. Rptr. 873, 879 (1987) (Barry-Deal, J., concurring).

688. *See* Friedman, *supra* note 6, at 137-44.

689. CITY OF LOS ANGELES TASK FORCE REPORT, *supra* note 85, supp. pt. 1 at S-206-07:

> The perceived danger posed by homosexual relationships is that they present an opposing and threatening metaphor of equality, mutuality and respect that, if adopted as a model for heterosexual relationships, would seriously endanger male prerogatives of freedom, excess and authority which men have been taught to expect and hold dear.

Id.

690. When she raised the issue of same-sex marriage in a recent column, Ann Landers received 55,000 letters on the subject. Landers, *Gay Marriage Draws Mail*, L.A. Times, Nov. 27, 1989, at E9, col. 5.

691. *See Developments in the Law*, *supra* note 686, at 1603-23.

692. *See generally* Watkins v. United States Army, 875 F.2d 699, 711-31 (9th Cir. 1989) (en banc) (Norris, J., concurring); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985).

693. Bowen v. Gilliard, 483 U.S. 587, 601-02 (1987).

694. *Watkins*, 875 F.2d at 728 (Norris, J., concurring).

695. Reed v. Reed, 404 U.S. 71, 76 (1971).

696. Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 452 (1985) (Stevens, J., concurring) (emphasis added).

Under standard equal protection analysis, each of the two potential classes of homosexual couples not allowed to marry has a direct, similarly situated counterpart among heterosexual couples who are allowed to marry. The first class, homosexual couples without children, is identical but for the gender of the partners, to heterosexual couples who choose not to have children, or who are aware of a biological inability to have children prior to contracting marriage. To each group, heterosexual or homosexual, the desired family relationship is the voluntary adult couple. Similarly, homosexual couples who *desire* to have children, but cannot biologically produce them are identically situated to infertile heterosexual couples who desire to have children but biologically cannot. The marriage license which gives the heterosexual couple a preferred status in adoption proceedings[697] is denied to the homosexual couple solely on the basis of the gay or lesbian couple's lack of gender-difference.[698]

The differences based on sexual orientation reduce even further when reproductive technologies are considered. The lack of procreative *potential* used as an argument against gay and lesbian couples loses force when lesbian couples may become artificially inseminated, or gay male couples may engage a surrogate mother. Thus, drawing a distinction between heterosexual and homosexual couples based on gender difference, on the argument that gender difference implies procreative potential, yet failing to similarly distinguish non-procreative heterosexual couples from procreative heterosexual couples for the same reason is clearly underinclusive.[699]

The second group of homosexual couples prohibited from marrying, yet having a similarly situated counterpart among heterosexuals, is those who *do* have children. Given the traditional and powerful argument that children should be brought up in stable, two-parent homes whenever possible,[700] the reasons for denying only homosexual people the right to marry in order to form such a home virtually disappear. Given the fact that the parent's homosexuality was, most likely, one of the critical factors leading to the breakup of the opposite-sex marriage which produced

697. Fellner, *Gays' Difficulties with Adoptions Outlined*, L.A. Daily J., Nov. 16, 1989, pt. 1 at 5, col. 2.

698. *See, e.g.*, CAL. CIV. CODE § 4100 (West 1983).

699. "It is estimated that one in every six [heterosexual] couples of child-bearing age has a fertility problem." Levine, *Booming Baby Technology*, L.A. Times, Nov. 7, 1989, at E1, col. 3. Laws are underinclusive if they do not apply to enough of the activity which the law purports to be aimed at. *See* Tussman & tenBroeck, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

700. *See* Fellner, *Gays' Difficulties with Adoptions Outlined*, L.A. Daily J., Nov. 16, 1989, pt. 1, at 5, col. 2.

the children,[701] punishing such parents by denying them any right to rebuild a satisfying home within the protected confines of a legal marriage arbitrarily uses state power with the potential of harming the state by prohibiting some good homes from coming into existence.

Moreover, the discrimination in some states is quite overt. California, for example, had to amend its marriage statute to prohibit gay or lesbian marriages.[702] California Civil Code section 4100 had read, "Marriage is a personal relationship arising out of a civil contract." In 1977, the legislature added the words "between a man and a woman."[703] Thus, the law had not only a discriminatory effect, but a clear discriminatory purpose. What, besides bias, underlies this discrimination, is a question no state has yet successfully answered.[704]

Nor have states even begun to address the public advantages of same-sex marriage. For example, a state generally feels it has an interest in prohibiting promiscuity.[705] Marriage, thus, theoretically, keeps sexual encounters within relational bounds. Why, then, would a state wish to prohibit homosexual residents from forming relational ties? States, in fact, condemn homosexual citizens for their supposed promiscuity, based on a believed lack of sexual control.[706] But what option do homosexual citizens have? As noted in a City of Los Angeles task force report, "Public policy must either encourage relationships, or it must encourage the alternative to relationships, which is random sexual encounters."[707] Given the fact that adults have sexual needs, there is no middle ground. More to the point, given the realities of AIDS, public policy would seem to *demand* that gay men, particularly, be encouraged to form stable rela-

701. *See, e.g.*, M.A.B. v. R.B., 134 Misc. 2d 317, 510 N.Y.S.2d 960 (1986). *See also* cases discussed *supra* notes 498-632 and accompanying text.

702. *See Hinman*, 167 Cal. App. 3d at 524, 213 Cal. Rptr at 415 (discussing history of statute).

703. Act of Aug. 17, 1977, ch. 339, § 1, 1977 Cal. Stat. 1295. Note that a "boy" or "girl" could not legally contract a marriage (or anything else), and thus, the only reason for including "man" and "woman" is to differentiate the parties based on gender.

704. For an examination of the rationales often advanced by states in support of denying marriage licenses to gay or lesbian couples, and the answering arguments, see Friedman, *supra* note 684, at 160-69.

705. *See* Griswold v. Connecticut, 381 U.S. 479, 498-99 (1965) (Goldberg, J., concurring).

706. *See* Gold, *Morality and Homosexuality*, L.A. Times, Jan. 14, 1989, at B8, col. 4 (quoting Murray Kempton that homosexuality is "the vagrant impulse of the loins"). California Congressman William Dannemeyer stated recently on the floor of the House of Representatives that "the average homosexual has . . . sex two or three times a week" and with "1,000 or more partners in his lifetime." Malinowski, "The Fine Print," SPY, Nov. 1989, at 32 (quoting Dannemeyer speech, June 29, 1989).

707. CITY OF LOS ANGELES TASK FORCE REPORT, *supra* note 85, supp. pt. 1 at S-226.

tionships. A policy which does not allow them to do so would not seem to meet any standard of rationality at all.

In addition to equal protection, discriminatory marriage laws can be challenged under a substantive due process rationale. One commentator has described this approach as "uniquely concrete."[708] This approach would force courts to look at the real lives of gay and lesbian couples as the law affects them. More important, courts would have to address the fact that the right to marry is fundamental, "one of the basic civil rights of man."[709] In order to deny this right to an entire group of people, a state would have to show that its actions are narrowly drawn to protect compelling state interests.[710]

Another constitutional challenge to state marriage laws, as discussed above[711] is available under a coalition of the first amendment's protection of the freedom of association and the fourteenth amendment's due process clause, as laid out in *Roberts v. United States Jaycees*.[712] Whether a particular relationship can claim this protection depends on: 1) the number of people in the relationship; 2) its congeniality; 3) its duration; 4) the purposes for which it was formed; and 5) its selectivity in choosing participants.[713] The Ninth Circuit has recently utilized this test to determine that the relationship of women employed by an escort service and their clients was not protected because of the commercial nature of the relationship.[714] Where the commercial aspect is absent, the result should change accordingly.[715] Thus, the Eleventh Circuit found that a police officer has a constitutionally protected right to date the woman of his choice, even though she was the daughter of a convicted felon and reputed mobster.[716] Because of the nature and effects of marriage, both to society and to individuals,[717] state marriage statutes are especially important in establishing relational—and obligational—certainty. In this context, *Roberts* seems to be an ideal means of illuminating the constitutional boundaries of a state's marriage laws.

Other challenges are also available to discriminatory marriage laws. State constitutions may provide even greater protection than the United

708. Friedman, *supra* note 684, at 152.
709. Loving v. Virginia, 388 U.S. 1, 12 (1967).
710. Carey v. Population Serv. Int'l, 431 U.S. 678, 686 (1977); Roe v. Wade, 410 U.S. 113, 155 (1973).
711. *See supra* notes 169-76 and accompanying text.
712. 468 U.S. 609, 618-19 (1984).
713. *Id.*
714. IDK, Inc. v. County of Clark, 836 F.2d 1185, 1198 (9th Cir. 1988).
715. *Id.* at 1194.
716. Wilson v. Taylor, 733 F.2d 1539 (11th Cir. 1984).
717. Zablocki v. Redhail, 434 U.S. 374, 384 (1978).

States Constitution.[718] Whatever challenges are made, one thing is certain: public debate will be heated and divisive.[719] Our investment in marriage as a heterosexual institution is tremendous, and is sure to color any public discourse on the issue. It is for that reason that alternatives become so important.

B. De Facto Families

The New York court in *Braschi v. Stahl Associates, Co.*[720] utilized the most immediate interim solution to the marriage problem—it recognized same-sex couples as de facto family members.[721] This approach offers several advantages. Particularly in cases like those in New York, where the party has not only suffered the anguish of the loss of a life partner, but must also face an eviction proceeding with the prospect of a dramatically higher rent piled on to the already existing trauma of being forced to move out of the home he and his partner shared, sometimes for more than a decade—in such cases a court's sense of the equities must and can run in favor of this survivor.

More important, though, is that it is a method by which the court can, if it wishes, open its eyes to the facts of the relationship. Courts which permit a de facto family analysis allow the facts effect. Such courts are able to see that homosexual couples are born into a system that was not designed to be fair to them. De facto family status is a superficial remedy until the legislature or the courts can address the problem as it really exists. However inadequate, though, it is a remedy.[722] While this approach to family status can provide relief in individual circumstances, though, it is by no means universally accepted. Many judges reject appeals to individual justice and fairness as not in keeping with a more utilitarian conception of those terms.

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718. *See* Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269 (1985).

719. *See, e.g.*, Landers, *Gay Marriage Draws Mail*, L.A. Times, Nov. 27, 1989, at E9, col. 5 (columnist had received 55,000 letters regarding column about same-sex marriage).

720. 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

721. *Id.* at 213, 543 N.E.2d at 55, 544 N.Y.S.2d at 790.

722. *See generally* Brief *amici curiae* of Family Service America, Institute for the Study of Human Resources, Bar Association for Human Rights of Greater New York, Right Reverend Paul Moore, Episcopal Bishop of New York, Riverside Church Office of Peace and Social Justice, Reverend Forrest Church of Unitarian Church of All Souls, and Rabbi Balfour Brickner of Stephen Wise Free Synagogue, *Braschi v. Stahl Assocs.*, 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

C. Domestic Partnerships

Domestic partnership, the third solution, is one being offered by the gay and lesbian community itself, as well as others.[723] Domestic partnership is a contract between the parties ascertaining that their relationship exhibits the core characteristics of an intimate association like marriage.[724] Such a contract is a challenge to the traditional view that there are only two sorts of people in the world, those who are married and those who are single. Same-sex couples are inarguably not married, yet neither are they single as that word is understood—they would not, for example, consider themselves free to date others, one of the most common aspects of being single. Domestic partnership recognizes that "family" may include a third category of not-married, not-single people, and defines that category using already existing legal principles, so that it may be acknowledged not only by judges, but by legislators, employers, and a host of others.[725]

The concept begins with a most basic fact about the relationship—its domestic character. Recalling the origins of the word "family" in the Roman household,[726] domestic partnership requires that the partners live together.[727] While this is not a requirement made of married couples, it provides, in a legal context, a piece of threshold evidence that a relationship exists between the parties. A specified minimum time the couple have been living together may also be required.[728]

But people may live together for a variety of reasons that have nothing to do with a family relationship between them, including the obvious economic ones in increasingly expensive housing markets. The next requirement, then, is that the partners have what the California Supreme Court apparently believed to be a critical aspect of the marital relationship, responsibilities or obligations to one another.[729] Thus, the partners must assert mutual obligations of support.[730] And in order to deter abuse and assure the relationship's similarity to traditional voluntary

723. *See* PLANNING A FAMILY POLICY FOR CALIFORNIA: FIRST YEAR REPORT OF THE JOINT SELECT TASK FORCE ON THE CHANGING FAMILY, 79-83 (1989); Gutis, *Family Redefines Itself, and Now the Law Follows*, N.Y. Times, May 28, 1989, pt. 4 at 6, col.1; *Developments in the Law—Sexual Orientation and the Law*, *supra* note 684, at 1623-28.

724. *See* CITY OF LOS ANGELES TASK FORCE REPORT, *supra* note 85, at 81-82.

725. *Id.*

726. *See supra* note 308 and accompanying text.

727. CITY OF LOS ANGELES TASK FORCE REPORT, *supra* note 85, at 101.

728. *Id.* at 101 (twelve-month requirement).

729. *See* Elden v. Sheldon, 46 Cal. 3d 267, 275, 753 P.2d 582, 587, 250 Cal. Rptr. 254, 259 (1988).

730. CITY OF LOS ANGELES TASK FORCE REPORT, *supra* note 85, at 101.

adult family relationships, the partners must be each other's sole domestic partner.[731]

To distinguish domestic partnership from other kinds of already protected family relationships, the partners must not be married, nor may they be related by blood.[732] And, quite importantly, they must be over eighteen years old and competent to contract with one another.[733] Finally, the partners must make a provision to dissolve or alter the contract if any conditions change.

The definition of domestic partnership proposed for use in the City of Los Angeles is typical:

> Domestic partners are two persons who declare that:
> (1) they currently reside in the same household, and have been doing so for the previous 12 months
> (2) they share the common necessities of life
> (3) they have a mutual obligation of support, and are each other's sole domestic partner
> (4) they are both over 18 years of age and are competent to contract
> (5) neither partner is married
> (6) neither partner is related by blood to the other
> (7) they agree to notify the appropriate agency within 30 days if any of the above facts change.[734]

The contract of domestic partnership can be used in a variety of contexts: to secure employment benefits; as a private contract between the partners; to qualify partners for the family discount on insurance policies, or at private institutions such as health clubs. Regardless of the context in which such contracts would be used, the partners will have created documentary evidence of their relationship. Under *Marvin v. Marvin*,[735] the contract would be binding on the parties.[736] Thus, the contract defuses objections like those of the California Supreme Court in *Elden v. Sheldon*[737] that unmarried couples who do not have legally enforceable obligations to one another should not be eligible for tort recov-

731. *Id.*
732. *Id.*
733. *Id.*
734. *Id.* Note that this proposal was made in the context of receiving certain city employment benefits, thus the agency notification in (7). *Id.* This requirement would be worded differently depending on the context in which it were being used (i.e. private contract between the partners, affidavit on file with insurance carrier for health benefits, etc.).
735. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).
736. *Id.* at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.
737. 46 Cal. 3d 267, 275, 753 P.2d 582, 587, 250 Cal. Rptr. 254, 259 (1988).

ery.[738] Domestic partners do have legally enforceable obligations to one another, including contract rights and support.[739]

In fact, the constitutional arguments in favor of legalizing same-sex marriage take on even more vigor in the context of domestic partnership. While it may be possible for courts to try to distinguish marriage as (for whatever reasons) a peculiarly heterosexual institution, arguments to deny gay men and lesbians a potential family relationship analagous to marriage would, in fact, deny gay and lesbian couples the right to *any* family relationship. The right to intimate association mentioned in *Roberts v. United States Jaycees*[740] becomes meaningless for all but heterosexual people. To be permitted to have a lifetime relationship with someone that has virtually no legal effect including, most importantly, the privacy protection given the sexual aspects of marital relationships,[741] is a gross example of distinctly unequal treatment.

Nor is this mere speculation. The Illinois Supreme Court rejected *Marvin* in *Hewitt v. Hewitt*.[742] This apparently leaves gay and lesbian couples in Illinois with no legal relational options at all. In states which accept *Marvin*, while it would be advantageous to challenge the marriage laws, challenges become less urgent as long as this relational option (even though it is an inferior one on many counts) is available. Further, the Supreme Court would be less likely to strike down discriminatory marriage laws if the state could show homosexual couples had a legitimate way of forming a comparable family relationship with concomitant relational protection.

Domestic partnership is not a proposal for spousal equivalency. In the present legal system married couples, by virtue of their marriage receive certain benefits, such as tax preferences, employment benefits and tort recovery to which no other relationship may lay claim.[743] Because domestic partnership is not a marriage, it does not automatically entitle the partners to established statutory benefits. But it is a new category of family relationship which may eventually be considered within those

738. *Id.*

739. *Marvin*, 18 Cal. 3d at 674-75, 557 P.2d at 116, 134 Cal. Rptr. at 825.

740. 468 U.S. 609, 618-20 (1984). *See also* Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 544-45 (1987); IDK, Inc. v. County of Clark, 836 F.2d 1185, 1191-93 (9th Cir. 1988).

741. *See* Bowers v. Hardwick, 478 U.S. 186, 217-18 (1986) (Stevens, J., dissenting).

742. 77 Ill. 2d 49, 394 N.E.2d 1204 (1979).

743. Elden v. Sheldon, 46 Cal. 3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988) (tort recovery); Hinman v. Department of Personnel Admin., 167 Cal. App. 3d 516, 213 Cal. Rptr. 410 (1985) (employment benefits); *but see* Braschi v. Stahl Assoc., 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989) (gay couple may claim lease succession rights as one another's family members).

statutory schemes. If discriminatory marriage statutes are successfully challenged the need for this new category disappears because all citizens may opt for marriage, and the issue of whether to marry or not truly becomes a choice. As long as it is not a meaningful choice for homosexual and bisexual people, domestic partnership offers employers, legislators, private businesses and courts a way to avoid discrimination against a family relationship which exhibits many or most of the characteristics we value as a society.

There is no question that domestic partnership begins as an inferior solution to the marriage problem, a "separate but equal" status for yet another group of people disenfranchised by the majority. A genuine question arises whether we wish to reenact in one more context the separate but equal battle which has once before torn this country apart. Domestic partnership, by its nature, is only permissive; where marriage mandates certain benefits be given, domestic partnership allows such benefits. Why then, bother with it when, clearly, discrimination on the basis of marriage is the true evil?

First, domestic partnership acknowledges a class that already exists, but is ignored with vigor by the public at large. The stereotype of the lonely, aging homosexual outcast is one of our most powerful imaginative punishments for the "lifestyle" of homosexuality. Its satisfactory force is dissolved by admitting into the imaginative realm the reality that gay and lesbian couples spend their lives together, relaxing into old age side by side, as heterosexual couples do.[744] That the admission of this most basic fact is a step forward demonstrates how deeply imaginative stereotypes have burrowed into our public conscience.

Equally important, though, is the fact that domestic partnership is a method by which gay and lesbian couples may declare publicly their intentions and obligations toward one another in a legally significant way. Rather than the de facto determinations made by the New York court in *Braschi*, domestic partners may state their beliefs about their relationship at the outset (or, given the minimum time-limit for the requirement of living together, within a reasonable time after the onset of the relationship's domestic character), and may point to that contract if the relationship is questioned for any reason. The existence of such a document in cases like *In re Guardianship of Kowalski*[745] or *Hinman v. Department of*

744. *See, e.g.*, Wockner, *Canadian Couple Fights for Pension*, FRONTIERS NEWSMAG., Nov. 16, 1988, at 9 (Canadian couple together for 40 years suing Canadian Health and Welfare Department for joint old-age pension).

745. 382 N.W.2d 861 (Minn. App.), *cert. denied*, 485 U.S. 1085 (1986).

Personnel Administration[746] would almost certainly have had a significant impact on the courts' analyses, and could well have changed the outcome of either case. Even if it had not, it would likely have exposed the courts' apparent bias against homosexual couples even more clearly than was already the case. Gay and lesbian couples like those in *Hinman* and *Kowalski* are striving for precisely this ability to make their intentions clear and legally significant. Recognition of domestic partnerships would be a genuine improvement over the current state of the law.

VI. CONCLUSION: SHARED VALUES

"Yes . . . people are meant to go through life two by two. 'Tain't natural to be lonesome."[747]

This Comment has been a first attempt to examine the set of interlocking problems and paradoxes which face homosexual couples under a statutory and linguistic scheme that makes no provision for their existence. Appeals have been made by some to the traditions of this country in an effort to continue to deny recognition to gay and lesbian couples, or give legal force to the bond of love and commitment which holds them together. If it is the tradition of this country to deny important ties based on love, it is a tradition which relies on intolerance, fear and hatred, and it does not apply to everyone. A more powerful tradition exists in the United States, though: the tradition of pluralism, of making room in the law for all who wish to participate in and meaningfully contribute to this country, the states, and the communities in which they live. It is only in the last century of our history that we have begun to realize that tradition means giving life to the idea of equality proclaimed at the nation's birth and reaffirmed as a result of the Civil War.

The problem of equality continues to vex our courts, our legislatures and our people. One of the questions underlying this Comment which transcends the narrower legal scope is the question of why we insist that some differences matter and some do not. Why did race or gender or sexual orientation take on the proportions of significance they have, while height, or hair color which are equally notable distinctions remain matters of indifference to the law? More specifically why does the legal system need to use factors such as gender or race or sexual orientation as criteria upon which to recognize rights and deny benefits?

The sociological earthquake that occurred in the 1950s and 1960s helped us recognize the validity of those questions. That earthquake is

746. 167 Cal. App. 3d 516, 213 Cal. Rptr. 410 (1985).

747. T. WILDER, *Our Town,* in THREE PLAYS BY THORNTON WILDER 34 (1958).

not over. Every day gay and lesbian couples face the marriage statutes and must ask "Why should the laws applying to us be so different?" While I have discussed the problem narrowly in the context of gay and lesbian couples, the broader question of our treatment of difference remains. It underlies, not only our treatment of gay and lesbian couples, women, or non-Caucasian races, but also other groups such as the disabled, the poor and the elderly. In our majoritarian culture many deviations from a purely statistical norm are not only looked on as suspect, they are often punished in ways that differ only in their degree of subtlety. In light of this, it is important to question the law's ultimate purpose. When punishment is the point, the law's purpose in not to punish the different, it is to punish the wrong. The two are not the same. One of the philosophical underpinnings of this country is that dissenters may sometimes hold the truth.

This holds with even more force for those whose difference was never intended as dissent. Blackness is not a dissent. A black woman may hold ideas and beliefs identical to those of a white woman, and yet her blackness is too often taken a priori as a kind of disagreement. Similarly, any woman may hold to the same political or religious tenents as any man, and yet there is nearly always an unstated assumption that her very sex provides a conflict, that the man and the woman may not ever achieve perfect identity solely because of her condition as a woman. But a condition is different from a dissent.

This is powerfully true for gay men and lesbians. They do not intend their sexual orientation itself to be a dissent from heterosexuality. Yet it may be assumed that politically active gay men and lesbians are challenging the fact of heterosexuality. This is not true. The challenge is not to heterosexuality, but to institutions created only *for* heterosexuals. Similarly, many blacks never meant to challenge people who were white, but only the institutions whites had created which treated blacks as inferior.

In fact, the constant proof that minority groups are not dissenting from the values held by the society of which they are a part is that they inevitably appeal to the repository of the country's shared values as their vindication and justification: the Constitution. The claim is not that the majority and the minority hold different values, but that the majority have not acted on the values that all have proclaimed they share. Rather than asserting dissent, the minority is asserting a commonality that is not present in the existing legal system. The challenge is not founded on fundamental difference, but on a fundamental similarity that has gone unrecognized—shared values.

This Comment has been an attempt to illustrate how homosexual couples are trying to assert the shared value of family relationships. The claim is that the majority, taking their cue from the limited available understanding of our present vocabulary, have constructed a legal system that asserts that value only on behalf of itself. The heterosexual majority not only deny love and commitment as values held by homosexual citizens, but prevent homosexual couples from claiming them as values even when that is empirically not the case. The Constitution was not designed as a tool to divide the citizens of this country from one another, nor as a device to maintain a majority's fiction about a minority. Its use to those ends has been a wrong this country has perpetrated upon itself. There are enemies enough to the values we share; we threaten our own good when we create enemies out of friends. The Constitution holds equality up as an ideal. It cannot be used to enforce inequality where inequality does not exist. That is precisely what laws that distinguish between heterosexual couples and homosexual couples do. The divisiveness, irrationality and fear at the heart of those laws cannot be tolerated. The law should beat with better blood.

*David Link**

* This is dedicated to my parents, Rose and Francis Link, who taught me, through 37 years—and counting—of their example that love is nothing if it is not honest. This Comment is an application of that simple and fundamental lesson.

My special thanks to Thomas F. Coleman.

Finally, a tip of the hat in memory of Kary Londagin, who died of AIDS on December 21, 1989, at the age of 36.