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THE WHITE HOUSE
WASHINGTON

May 26, 1987

Dear David,

Much to my surprise, the enclosed article has turned up. Needless to say, it is not what I expected. Let's talk about this.

Sincerely,

Max Green
Associate Director
Office of Public Liaison

Mr. David Zweibel
Agudath Israel of America
84 William Street
New York, NY 10038



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up. Needless

to expect. Let's

THE WHITE HOUSE

WASHINGTON

May 21, 1987

MEMORANDUM FOR MAX GREEN
ASSOCIATE DIRECTOR
OFFICE OF PUBLIC LIAISON

FROM: ANN L. BANNING 
ASSOCIATE DIRECTOR
OFFICE OF PRESIDENTIAL PERSONNEL

SUBJECT: Writings of Arthur Silverstein

Per our discussion regarding the writings of Arthur Silverstein, I have attached copies of two articles written by Mr. Silverstein. As you can see they are both highly controversial topics.

I thought they would be of interest to you.

Max — sorry this has taken
so long - we had to call
his information up from
central files.
— Ann

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COMMENT

CONSTITUTIONAL ASPECTS OF THE HOMOSEXUAL'S RIGHT TO A MARRIAGE LICENSE

In 1965, two prominent social scientists and lawyers contended that "it is, of course, conceivable that decisionmakers may wish to authorize . . . a process and criteria for establishing 'marital status' for homosexual partners."¹ Six years later, no decisionmakers having exercised this option, two males attempted to force state recognition of their right to such status. In *Baker v. Nelson*,² the Minnesota Supreme Court held that the state statute concerning marriage³ did not authorize issuance of a license to two persons of the same sex, and that the statute so construed did not violate the United States Constitution. An appeal to the United States Supreme Court was dismissed.⁴

The *Baker* case presents many of the legal problems that arise whenever the government seeks to regulate fundamental societal institutions. The states have surrounded the institution of marriage with a variety of legal benefits and restrictions. As part of this regulation, they have also sought to control entry into that institution. This comment will examine the constitutional argument for granting homosexuals the right to enter into the legal status of marriage in terms

¹ J. GOLDSTEIN & J. KATZ, *THE FAMILY AND THE LAW* 9 n.1 (1965).

² 291 Minn. 310, 191 N.W.2d 185 (1971). Petitioners Richard John Baker and James McConnell had applied to respondent Gerald Nelson, clerk of the Hennepin County District Court, for a marriage license. Nelson had declined to issue the license on the sole ground that petitioners were of the same sex. In a terse opinion, the court rejected the petitioner's application for mandamus.

³ MINN. STAT. ANN. § 517.01 (1969):

Marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of the parties, capable in law of contracting, is essential. Lawful marriage hereafter may be contracted only when a license has been obtained therefor as provided by law and when such marriage is contracted in the presence of two witnesses and solemnized by one authorized, or whom the parties in good faith believe to be authorized, so to do.

⁴ ____ U.S. ____, 93 S. Ct. 37 (1973). The appeal was dismissed for want of a substantial federal question.

of the conflicting interests of the homosexual and of the state.⁵

The extent of the problem is difficult to determine because the civil rights of homosexuals have only recently become the subject of analysis by courts and commentators. There is, however, indication that homosexuals represent a large segment of the American population.⁶ Of course, there is no assurance that most or even many of these homosexuals would select the option of a same-sex marriage if it were available. In any case, the Supreme Court has never found the size of the group seeking to end a particular form of state discrimination to be relevant to the constitutionality of that discrimination. What is important is that the opportunity to marry should not be denied homosexuals if such denial is constitutionally impermissible.

Petitioners Baker and McConnell argued that the Minnesota statute, if interpreted as prohibiting issuance of marriage licenses to couples of the same sex, contravenes several constitutional protections. The core of their challenge was that the state had denied them equal protection of the law in violation of the fourteenth amendment.⁷ Their other grounds for attacking the statute, relying on the first,⁸

⁵ See generally Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573 (1973) (also by the author of this comment). See also 22 DRAKE L. REV. 206 (1972); 56 MINN. L. REV. 959 (1972).

⁶ Partly because homosexuals take pains to attract as little attention to their sexual orientation as possible, statistics in this area are probably unreliable. However, even a conservative estimate that homosexuals represent from two to four percent of the adult population leads to a population figure of several million.

⁷ 191 N.W.2d at 186.

⁸ The first amendment right to free speech and assembly, as construed by the Supreme Court, includes the right to engage in a free and private association. See, e.g., *Williams v. Rhodes*, 393 U.S. 23 (1968); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *NAACP v. Alabama*, 357 U.S. 449 (1958).

The Court has not yet specifically declared the marriage unit to be an association within the terms of the first amendment. Most right of association cases have dealt with associations organized for political purposes, and moreover, with existing associations rather than the formation of new ones. However, the language of *NAACP v. Alabama*, *supra* at 460, seems to cover formation as well as participation in existing associations and Justice Douglas' opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965), certainly seems to extend the protection given political groups to the marriage association.

eighth,⁹ and ninth¹⁰ amendments, lack a satisfactory basis in court precedent.

Justice Douglas, writing for the Court in *Griswold*, referred to the right of association as one of the "penumbras formed by emanations from those guarantees [specified in the Bill of Rights] that help give them life and substance." *Id.* at 484. The Court went on to hold that a Connecticut Statute outlawing the dispensation of birth control information and the dispensation or use of contraceptive devices violated the right of marital privacy emanating from several Constitutional provisions, among them the first amendment. *Id.* at 483-86. Justice Douglas' discussion of marriage is particularly significant:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. 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 faiths, a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior discussions. *Id.* at 486.

Should the Court choose to follow the implications of these decisions and recognize entry into marriage as protected by the first amendment, it will then have to decide whether there exists a compelling state interest in banning same-sex marriages. See, e.g., *NAACP v. Button*, 371 U.S. 415, 438 (1963) (There must be a compelling state interest for invasion of first amendment rights of expression and association).

⁹ Baker and McConnell's eighth amendment claim was premised on the assertion that the denial of their right to marriage constituted punishment for a status or condition which they were powerless to change. They based their argument chiefly on *Robinson v. California*, 370 U.S. 660 (1962), in which the Court struck down a state law under which a narcotics addict was sentenced to ninety days' imprisonment on the ground that to condemn a person for "an illness, which may be contracted innocently or involuntarily" constituted cruel and unusual punishment. *Id.* at 667. *Robinson* involved punishment for a "crime." Even Justice Fortas' liberal interpretation of *Robinson*, set forth in his dissent in *Powell v. Texas*, 394 U.S. 514 (1968), does not extend the holding beyond the context of criminal sanctions: "[C]riminal penalties may not be inflicted upon a person for being in a condition which he is powerless to change." *Id.* at 567 (emphasis added). Questions raised by a selective denial of rights or privileges outside of the criminal process are more appropriately dealt with in the context of the fourteenth amendment guarantee of equal protection, which applies to a much broader category of discriminatory state action.

¹⁰ Baker and McConnell's ninth amendment claim was apparently based upon Justice Goldberg's concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479, 486, 488-97 (1965). Justice Goldberg there contended that the ninth amendment was inserted into the Bill of Rights to protect certain fundamental rights not otherwise protected (in *Griswold*, the right to marital privacy) from federal interference. He argued that at least some of these fundamental rights, like some of the rights protected by the first eight amendments, were made applicable to the states by the Due Process Clause of the fourteenth amendment.

With this interpretation in mind, it might be argued that the ninth amendment shields the right to marry from governmental interference. Tangential support for

I. EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT

The requirement traditionally imposed upon statutes by the Equal Protection Clause of the fourteenth amendment has been that, while states are not forbidden to enact legislation which affects some people differently than others,

... [t]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.¹¹

The state's task in satisfying this requirement has been facilitated by a judicial presumption that a "fair and substantial relation" did exist at the time that a challenged law was passed.¹²

As the fourteenth amendment came to be used more to vindicate individual rather than economic rights,¹³ the Court

this contention could be derived from *Loving v. Virginia*, 388 U.S. 1 (1967), in which the Court held that the right to marry was fundamental and that denial of that right on racial grounds violated the Due Process Clause. However, it is doubtful that the ninth amendment significantly contributes to the resolution of this constitutional problem.

¹¹ *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (state law taxing local corporations on income derived both inside and outside the state, but exempting local corporations which only do business outside the state, is arbitrary and violates the Equal Protection Clause).

¹² *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911) (State can prohibit surface owner from depleting underlying reserves of gas, oil, and water common to him and other owners. The Equal Protection Clause admits a wide exercise of discretion, and is aimed only at classification which is arbitrary and without a reasonable basis). See Tussman & Ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

¹³ In *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the Court held that an Oklahoma law requiring the sterilization of "habitual criminals" violated the guarantee of equal protection. Justice Douglas explained:

... [T]he instant legislation runs afoul of the equal protection clause, though we give Oklahoma that large deference which the rule of the foregoing cases requires. We are here dealing with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. ... [S]trict scrutiny of the classifications which a state makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made. *Id.* at 541.

Korematsu v. United States, 323 U.S. 214 (1944), a World War II internment case, again raised the strict scrutiny standard, this time in a racial context:

It should be noted, to begin with, that all legal restrictions which curtail

developed a second, more severe test. This test, a strict scrutiny standard, is usually applied to legislation which either contains a classification that is suspect because of the nature of the disadvantaged group, or because it threatens a "basic civil right of man." When the standard is employed, the government is required to prove the existence of a "pressing public necessity . . . to justify the existence of such restrictions."¹⁴ This necessity is frequently termed a "compelling state interest."¹⁵

In order to determine whether or not the strict scrutiny standard should be applied to the practice of denying marriage licenses to homosexuals, one must compare that practice with the special circumstances which have in the past called the more severe test into play.

II. SUSPECT CLASSIFICATION

A. *The Suspect Classification Test*

The difficulty in forecasting whether a classification will be found to be suspect in any particular case arises from two sources. First, the Supreme Court has not been explicit as to its ground for labeling classifications as suspect. Second, whether a classification will be termed suspect seems, except in cases involving racial classification,¹⁶ to depend heavily on

the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can. *Id.* at 216.

This development has continued through subsequent cases. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (poll tax requirement for voting found to discriminate against the poor); *Loving v. Virginia*, 388 U.S. 1 (1967) (state miscegenation law held to constitute unconstitutional racial discrimination); *Levy v. Louisiana*, 391 U.S. 68 (1968) (denial to illegitimate children of right to sue under state wrongful death statute held unconstitutional); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (state residency requirements for welfare recipients said to unconstitutionally abridge the right to travel).

¹⁴ *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

¹⁵ See *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

¹⁶ See, e.g., *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam) (outlawing segregation of public golf courses).

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the second branch of the test: whether the right involved is fundamental.¹⁷

Despite these difficulties, examination of classifications thus far held to be suspect does reveal certain features which may point to unarticulated principles.

First, classifications based on attributes which are inherent in the individual and beyond his control—such as race,¹⁸ illegitimacy,¹⁹ or alienage²⁰—are often found to be suspect.²¹

¹⁷ Every classification, other than racial, which has been found to be suspect by the Court has arisen in the context of an important constitutional right. In the cases in which wealth/poverty distinctions were overturned, the rights infringed included voting, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); the right to adequate appellate review, *Griffin v. Illinois*, 351 U.S. 12 (1956); the right to adequate representation during such review, *Douglas v. California*, 372 U.S. 353 (1963); *Carrington v. Rash*, 380 U.S. 89 (1965), in which the suspect classification was between military and civilian members of a community, dealt with the right to vote; *Shapiro v. Thompson*, 394 U.S. 618 (1969), outlawing discrimination on the basis of residency for welfare recipients, dealt with the right to travel. Thus, while the inherently unfair nature of a classification against a group is important and may be sufficient independently to render a classification suspect, see *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 807 (1969) (dicta), the right infringed by that classification is often crucial in determining whether the Court will apply its stricter standard. See Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

¹⁸ See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

¹⁹ See, e.g., *Levy v. Louisiana*, 391 U.S. 68, 72 (1968). But see *Labine v. Vincent*, 401 U.S. 532 (1971) (state intestate inheritance law relegating illegitimate children to status of collateral heirs held not unconstitutional). The ruling under attack in *Levy* barred illegitimate children from suing under Louisiana's wrongful death statute to recover for the tortious death of their mother. The statute under scrutiny in *Labine* did not constitute an "insurmountable barrier" to illegitimate children, but merely regulated their rights vis-a-vis other heirs when the intestate deceased has not expressed a contrary or modifying wish. *Id.* at 539. The Court held that such regulation was no more discriminatory toward illegitimate children than toward other collateral heirs.

²⁰ *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 418-20 (1948) (state statute barring issuance of commercial fishing licenses to persons "ineligible to citizenship" held invalid under fourteenth amendment). "While it is not wholly clear what racial groups other than Japanese are now ineligible to citizenship, it is clear that Japanese are among the few groups still not eligible." *Id.* at 412 n.1.

²¹ Thus in *Levy v. Louisiana*, the Court asked rhetorically, "Why should the illegitimate child be denied rights merely because of his birth out of wedlock?" 391 U.S. at 72 (1968). But cf. *Labine v. Vincent*, 401 U.S. 532 (1971). While it is true that some classifications found to be suspect, such as poverty or military status, are not wholly immutable or beyond the plaintiff's control, they still represent statuses which are not always freely chosen or easily discarded.

Second, groups which are victims of suspect classification are frequently those that are the subjects of hostile myths or derogatory stereotypes which have the result of instilling fear or enmity toward such groups in the popular mind.²²

Third, the distinguishing characteristic of the class against whom the distinction is drawn is only marginally relevant, if at all, to many of the activities and institutions from which that class is frequently barred by private or government action. Classifications such as indigency are suspect because in most circumstances, "the mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed or color."²³ The same is true of length or permanence of residency.²⁴

²² It is arguable that racial prejudice "encouraged" the perception of Japanese-Americans as a potential threat during the Second World War, leading to the internment camps and *Korematsu*, while caucasians of German or Italian descent were left relatively undisturbed. See Rostow, *The Japanese-American Cases—A Disaster*, 54 YALE L.J. 489, 496 (1945). Stereotypes also played a role in the controversy over the poll tax ruled unconstitutional in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). Justice Black dissented:

The Court gives no reason at all to discredit the long-standing beliefs that making the payment of a tax a prerequisite to voting is an effective way of collecting revenue and that people who pay their taxes are likely to have a far greater interest in their government. *Id.* at 677.

The Court majority, in finding suspect the wealth-poverty classification in *Harper*, may well have been expressing its belief that the poor had suffered too long from the "long-standing beliefs" mentioned by Justice Black.

²³ *Edwards v. California*, 314 U.S. 160, 184-85 (1941) (Jackson, J., concurring) (California law barring importation into state of indigent persons held invalid burden on interstate commerce).

²⁴ See *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969) (classification of welfare eligibility on the basis of more or less than a year of residency was termed "invidious discrimination"). See also *Carrington v. Rash*, 380 U.S. 89 (1965) (involving discrimination in suffrage between the military and civilian members of a community). However, the right involved—voting—is so fundamental that it is difficult to determine whether the classification alone was sufficient to trigger the more severe review. See Justice Harlan's dissent in *Shapiro v. Thompson*, *supra* at 660.

It is not asserted that an individual's status should be legally neutral at all times and under all circumstances. Physical or mental abilities or disabilities, youth and age, and even residency are examples of qualities or statuses that may at times be the basis for legitimate legal distinctions, since they provide a rational basis for these distinctions. See *Oregon v. Mitchell*, 400 U.S. 112 (1970) (18-year-old minimum voting age requirement of Voting Rights Act of 1970 held valid for national, invalid for state and local elections); see also *Shapiro v. Thompson*, 394 U.S. 618 n.21 (1969); *Carrington v. Rash*, 380 U.S. 89, 91 (1965).

Fourth, groups found to be the targets of suspect classification usually have little or no voice in the political process.²⁵

Fifth, and perhaps most importantly, groups affected by suspect classification appear to be traditionally discriminated against. A past history of unjustified unequal treatment seems in itself a strong argument for the court to apply strict scrutiny to legislation adversely affecting such a group.²⁶

These five features are only speculations as to the criteria that are needed to establish the existence of a suspect classification. The Court continues to take each case as it

²⁵ In *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969), a District of Columbia case involving de facto school segregation, Judge J. Skelly Wright stated that:

Judicial deference to these [legislative and administrative] judgments is predicted in the confidence courts have that they are just resolutions of conflicting interests. This confidence is often misplaced when the vital interests of the poor and racial minorities are involved. For these groups are not always assured of a full and fair hearing through the ordinary political process, not so much because of the chance of outright bias, but because of the abiding danger that the power structure—a term which need carry no disparaging or abusive overtones—may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority. Those considerations impel a closer judicial surveillance and review of administrative judgments adversely affecting racial minorities, and the poor, than would otherwise be necessary. 269 F. Supp. at 507.

While Judge Wright mentioned specifically only two groups—the poor and racial minorities—shut out by the power structure, he did not preclude the existence of other similarly disadvantaged. Professor Karst has explicated the decision in *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (statute requiring opticians to receive written prescriptions from ophthalmologists or optometrists before duplicating or replacing lenses was upheld) in terms that buttress this notion:

In *Williamson*, the losers in the legislature were not permanently disadvantaged minorities. The opticians might well have anticipated new legislative alliances that would soften the impact of this legislation by amendment.

Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural Law—Due-Process Formula,"* 16 U.C.L.A.L. REV. 716, 724 (1969).

²⁶ See *Strauder v. West Virginia*, 100 U.S. 303 (1880) (state denial to Negro citizens of right to serve on juries held to violate the fourteenth amendment):

This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. *Id.* at 306.

arises without articulating its reasons for subjecting a particular classification to strict scrutiny. Nevertheless, we can use these five features as a framework against which to test the classification involved in denying marriage licenses to homosexuals.

B. Homosexuality as a Suspect Classification

Homosexuality appears to have each of the five features outlined in the previous section. First, although it is difficult to say that homosexuality is an inherent trait, it is in most cases permanent and can be changed only occasionally.²⁷ In any case, a status need not be completely unalterable to qualify as inherent: such qualities as alienage and poverty, for example, can be changed.

Second, myths and stereotypes about homosexuals are endemic to western society.²⁸ Common misconceptions abound: it is frequently but incorrectly believed that homosexuals are disposed to pedophilia,²⁹ that they predominate in certain social classes or professions,³⁰ and that most male homosexuals are effeminate³¹ and most female homosexuals over-masculine.³² These myths tend to further alienate homosexuals from "straight" society; both by generally picturing them as "different" and by supplying more specific excuses for denying them employment or legal status.

²⁷ For a recent discussion of the sociological and psychiatric debate centered on the concept of homosexuality as a disease which can be cured, see A. KARLEN, *SEXUALITY AND HOMOSEXUALITY* 572-606 (1971).

²⁸ See generally Taylor, *Historical and Mythological Aspects of Homosexuality*, in *SEXUAL INVERSION* 140-64 (J. Marmor ed. 1965).

²⁹ It is generally agreed in the literature that pedophiles are a group distinct from heterosexuals and homosexuals. See M. SCHOFIELD, *SOCIOLOGICAL ASPECTS OF HOMOSEXUALITY* 149 (1965); D. WEST, *HOMOSEXUALITY* 114-20 (1967), and sources therein cited. See also I. BIEBER, *HOMOSEXUALITY: A PSYCHOANALYTIC STUDY* 191 (1962). Bieber's figures show somewhat more pedophilia than the other sources cited, probably because he extends the age of childhood through 16. Other commentators, *supra*, do not regard contacts of adults with adolescents as instances of pedophilia. See also Note, *Private Consensual Homosexual Behavior: The Crime and its Enforcement*, 70 *YALE L.J.* 623, 629 (1961).

³⁰ See REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (THE WOLFENDEN REPORT) 36 (1957).

³¹ See M. HOFFMAN, *THE GAY WORLD* 180-86 (1968).

³² See Martin & Lyon, *The Realities of Lesbianism*, in *THE NEW WOMEN* 79-80 (J. Cooke, C. Bunch-Weeks, R. Morgan eds. 1970).

Third, classification against homosexuals occurs frequently in areas where their conduct should logically be a neutral factor. Discovery of homosexual acts or avowal of homosexuality may lead to dismissal or exclusion from government employment.³³ Homosexuality has been held to be included in the definition of "psychopath" which Congress had in mind when it barred the entry of "aliens afflicted with psychopathic personality."³⁴

Fourth, homosexuals as such are without effective political power. Judge Wright observed that the "power structure . . . may incline to pay little heed to even the deserving interests of blacks and the poor."³⁵ Given the unwarranted repugnance that many feel toward them, this observation would seem to apply with equal force to homosexuals. No publicly declared homosexual has been elected or appointed to any significant position of power in the United States. In

³³ One of the *Baker v. Nelson* petitioners, James McConnell was denied employment in the University of Minnesota library as a result of the publicity stemming from the case. See *infra* note 36. See generally Note, *Dismissal of Homosexuals from Government Employment: The Developing Role of Due Process in Administrative Adjudication*, 58 GEO. L.J. 632 (1970); Note, *Government Created Employment Disabilities of the Homosexual*, 82 HARV. L. REV. 1738 (1969); Note, *Is Governmental Policy Affecting the Employment of Homosexuals Rational?*, 48 N.C.L. REV. 912 (1970).

The Civil Service Commission, while tolerating other instances of "sexual misconduct" such as adultery, once applied strict standards to homosexual behavior because of what it perceived to be widespread public repugnance to homosexuality. See Note, *Government Created Disabilities of the Homosexual*, *supra* at 1741-43. Such overt discrimination has since been modified. *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969), held that there must be a specific connection between an employee's conduct and the efficiency of the civil service before such an employee could be dismissed.

³⁴ 8 U.S.C. § 1182(a)(4) (1970). See *Boutilier v. Immigration Service*, 387 U.S. 118 (1967) (Congress intended to include homosexuals among those aliens excludable from the United States as "afflicted with psychopathic personality"). On the other hand, *In re Labady*, 326 F. Supp. 924 (S.D.N.Y. 1971), held that, once a homosexual known to be such is admitted to the United States, his further private homosexual behavior is irrelevant as evidence going to show whether he meets the standard of "good moral character" required for naturalization. 8 U.S.C. § 1427 (a) (1970). Nor should *Boutilier* be read as indicative of the rights of homosexuals who are already American citizens, inasmuch as Congress has the right to make plenary rules for the admission or exclusion of aliens as it sees fit. 387 U.S. at 123.

³⁵ *Hobson v. Hansen*, 269 F. Supp. 401, 508 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969). See discussion in note 25 *supra*.

fact, hostility is manifest even to the expression of views espousing civil liberties for homosexuals.³⁶

Fifth, there is clearly a pervasive, though not universal,³⁷ condemnation of homosexuals in western society. Discrimination against homosexuals extends far back into the history of our culture. Early aversion to homosexuality is seen in the Torah.³⁸ The Talmudic law codes, relying on biblical references, further elaborated the laws against sodomy.³⁹ These codes were introduced into the Christian church by its early

³⁶ This point is underlined by a case involving one of the *Baker* petitioners, *McConnell v. Anderson*, 316 F. Supp. 809 (D. Minn. 1970), *rev'd*, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, — U.S. —, 92 S. Ct. 1312 (1972). *McConnell* was denied promised employment in the University of Minnesota library as a result of his application with *Baker* for a marriage license. The federal district court ruled that *McConnell* had been the victim of discrimination. The Court of Appeals reversed. Judge Stephenson wrote:

... [I]t is at once apparent that this is not a case involving mere homosexual propensities on the part of a prospective employee. Neither is it a case in which an applicant is excluded from employment because of a desire clandestinely to pursue homosexual conduct. It is a case . . . in which the prospective employee demands the right to pursue an activist role in implementing his unconventional ideas . . . and, thereby, to foist tacit approval of this socially repugnant concept upon his employer. 451 F.2d at 196 (emphasis in original).

Judge Stephenson appears to have condemned *McConnell* not for being a homosexual but for assuming an "activist role" in an attempt to foster acceptance of homosexuality. Whatever the legal merits of such a distinction, this opinion reveals the added hostility that homosexuals face when they seek to further their interests through the political process.

³⁷ Cf., e.g., PLATO, SYMPOSIUM, *passim*. In non-western societies some forms of homosexual activity are often tolerated. "In forty-nine (64 percent) of the seventy-six societies other than our own for which information is available, homosexual activities of one sort or another are considered normal and socially acceptable for certain members of the community." C. FORD & F. BEACH, PATTERNS OF SEXUAL BEHAVIOR 130 (1951).

³⁸ "Thou shalt not lie with mankind as with womankind; it is an abomination." *Leviticus* 28:22. The sin was considered so grave that the Bible admonishes, "And if man lie with mankind, as with womankind, both of them have committed abomination: they shall surely be put to death; their blood shall be upon them." *Leviticus* 20:13. The cities of Sodom, *Genesis* 13:13, 18:20, and Gibeah, *Judges* 19:22, were both alleged to have been steeped in homosexuality.

³⁹ Both male participants were condemned to death by stoning. MISHNAH, SANHEDRIN VII, 4. It was the possibility of sodomy that prompted the warning that males should not be secluded without chaperones. MAIMONIDES, YAD I, B XXII, 2; EBEN HAEZER XXIV, 1. Some maintained that young people should not be permitted to sleep together in one bed, so as to avoid putting temptation in their way. BAIS SHMUALE HELKAT MEHOKEK, on EBEN HAEZER, *supra*.

leaders, particularly St. Paul.⁴⁰ By the late Middle Ages, homosexuality was identified with heresy and often punishable by death. Modern views have modified but not erased this hostile attitude.⁴¹

Thus, in light of the fact that homosexuality exhibits each of the five features outlined above, it would be reasonable to conclude that legislation which expressly disadvantages homosexuals should have a suspect classification. As noted previously, however, the willingness of the Court to declare a classification to be suspect turns also on the importance of the right denied.

III. FUNDAMENTAL RIGHT

A. *The Right to Marry*

In *Strauder v. West Virginia*,⁴² the Court observed that "[t]he Fourteenth Amendment makes no attempt to enumerate the rights it was designed to protect. It speaks in general terms and those are as comprehensive as possible."⁴³ The Court has enumerated "fundamental rights" only on a case by case basis without satisfactorily describing the common elements which make them "fundamental."⁴⁴ The Court has, however, specifically stated that the right to marry is fundamental.⁴⁵ The right to marry has so far been

⁴⁰ A. KINSEY, W. POMEROY, C. MARTIN & P. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 482 (1953). See generally D. BAILEY, *HOMOSEXUALITY AND THE WESTERN TRADITION* (1955).

⁴¹ See KARLEN, *supra* note 27, at 1-39, 44-62, 66-81, 85-99; T. SZASZ, *THE MANUFACTURE OF MADNESS* 160-66 (1970); Taylor, *supra* note 28, *passim*. Kinsey has noted "the considerable conformity between the Talmudic and Catholic codes and present-day law on sex, including the laws on homosexual activity." KINSEY, *supra* note 40, at 482.

⁴² 100 U.S. 303 (1880).

⁴³ *Id.* at 310.

⁴⁴ Justice Harlan, a frequent opponent of the strict scrutiny test, stressed the difficulty of making this choice, observing that "[v]irtually every state statute affects important rights." *Shapiro v. Thompson*, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting).

⁴⁵ *Loving v. Virginia*, 388 U.S. 1 (1967) (overturning state anti-miscegenation law).

The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

in issue only in cases involving heterosexuals. It must, therefore, be demonstrated that a fundamental right exists with respect to homosexuals as well.⁴⁶

It appears that fundamental rights, such as marriage, are those basic civil rights which are of vital importance to

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. *Id.* at 12.

Loving declared marriage to be fundamental in the context of a violation of due process of law as did *Meyer v. Nebraska* , 262 U.S. 390, 399 (1923). *Skinner v. Oklahoma* , 316 U.S. 535 (1942), spoke of the fundamentality of marriage in an equal protection context, while *Griswold v. Connecticut* , 381 U.S. 479 (1965), noted that marriage draws special protection from a variety of constitutional provisions, including the first amendment. *Id.* at 486. In all of these cases, the fundamental nature of the marriage relationship was said to place a greater burden upon the government to justify actions which interfere with that relationship.

Several Supreme Court cases have linked marriage and procreation, at least by implication. *See, e.g., Skinner v. Oklahoma* , 316 U.S. 535, 541 (1942); *Meyer v. Nebraska* , 262 U.S. 390, 399 (1923). However, none of the cases stand for the proposition that marriage is dependent on procreation as its sole reason for being.

In *Eisenstadt v. Baird* , ____ U.S. ____, 92 S. Ct. 1029 (1972), Justice Brennan referred to marriage as "an association of two individuals." *Id.* at 1038. No mention is made of procreation as the goal of marriage or of the sexes of the individuals. Justice Brennan goes on to say, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." The Court extended this line of thinking in *Roe v. Wade* , ____ U.S. ____, 93 S. Ct. 705 (1973), and a companion case, *Doe v. Bolton* , ____ U.S. ____, 93 S. Ct. 739 (1973) (both cases involved state regulation of abortion). The Court held that a woman's decision to terminate her pregnancy was based on a fundamental right of personal privacy and that the state could not regulate this decision during the early portions of the woman's term. These holdings certainly envisage the possibility of a childless marriage which would still fulfill the purposes of the institution.

Cotner v. Henry , 394 F.2d 873 (7th Cir. 1968), *cert. denied* , 393 U.S. 847 (1968) could be interpreted as recognizing a right to a sexual relationship absent procreation. In that case a husband's sodomy conviction based on his wife's complaint was overturned. The decision was based in part on *Griswold* .

" Marriage has historically implied the union of one man and one woman. The fact is, however, other types of marriage are easily conceivable and often practiced in various areas of the world, *e.g.*, polygamy, although illegal in the United States, is within the definitional scope of marriage. The latest draft of the proposed Uniform Marriage and Divorce Act § 201, recognizes the existence of alternate forms of marriage by attempting to restrict legal marriage to the heterosexual couple. 5 FAMILY L.Q. 210 (1971). If the definition of marriage were *per se* limited, the section would be unnecessary. In any case, legal definitions cannot be restricted to their popular counterpart. In years past, the definition of a full citizen for purposes of enfranchisement was a white male property owner over 21 years of age.

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the individual.⁴⁷ Protecting rights in voting or criminal procedure is in the interest of society as a whole, but also particularly benefit the individual. Justice Traynor, speaking for the California Supreme Court, described these rights "as essential to the orderly pursuit of happiness by free men."⁴⁸ Whether the Court had in mind homosexual marriage when it declared marriage to be a fundamental right would seem irrelevant. Marriage for homosexuals is arguably as "essential to the orderly pursuit of happiness" as marriage is for heterosexuals. An analysis of the homosexual's interests in the right to marry reveals the fundamental nature of that right. It also provides a perspective from which to judge the importance of the governmental interests which may be raised to defeat that right.

B. The Interests of Homosexuals

The desire of homosexuals for legalization of homosexual activity between consenting adults is easily understandable. A more difficult question is, what advantages are gained by homosexuals in legalizing the marriage itself? The answer requires an understanding of the special problems of homosexuals in light of the role of marriage as a social and legal institution.

Most homosexuals resent being labeled as deviants.⁴⁹ Shunned by society via social and criminal sanctions, many lose their self-respect⁵⁰ or develop a permanent "systematic deviance."⁵¹ Most homosexuals want instead to be recog-

⁴⁷ *Loving v. Virginia*, 388 U.S. 1, 7 (1967); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

⁴⁸ *Perez v. Lippold*, 32 Cal. 2d 711, 714, 198 P.2d 17, 18 (1948) (striking down state anti-miscegenation law), quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

⁴⁹ This labeling has a pronounced effect with respect to the homosexual's social relations. He or she is suddenly viewed by others from the perspective of the deviant label; consequently the person is socially reconstituted by the process. E. RUBINGTON & M. WEINBERG, *DEVIANCE: THE INTERACTIONIST PERSPECTIVE* 9 (1968).

⁵⁰ Social scientists have termed this the "looking-glass" process. C. COOLEY, *HUMAN NATURE AND THE SOCIAL ORDER* (1902).

⁵¹ Systematic deviation is manifested by the development of a subculture or a unique behavior system which assigns its own mores, morals, values, and status differing from those of the dominant culture. E. LEMERT, *SOCIAL PATHOLOGY* 44 (1951).

nized as basically normal people with particular sexual proclivities.⁵² Government has the power to influence trends in public attitudes.⁵³ The present position of federal, state, and local governments on homosexuality encourages hostility rather than tolerance. Legalized same-sex marriage might reasonably be viewed as an important step in changing the attitude of the general public toward homosexuals.⁵⁴ That step could contribute to the recognition of homosexuals as a different, but not shameful, segment of society.

Homosexuals lack the legal assurances that inhere in lawful marriage. In heterosexual marriages, the partners have not only a socially approved relationship, but one which the state recognizes and consequently strengthens. The law provides protection for the individual spouses through the features associated with divorce—alimony, support, maintenance—and such causes of action as adultery, abandonment, seduction and alienation of affection. These laws often act to preserve the marriage relationship, or at least insure that its break-up will follow an orderly pattern.⁵⁵ Homosexual relationships lack such assurances.⁵⁶ Therefore, marriage would

⁵² Many observers state that people should not be characterized as heterosexual or homosexual, but as individuals with certain amounts of heterosexual or homosexual experience. A. KINSEY, W. POMEROY, & C. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 617 (1948).

⁵³ Finman & Macaulay, *Freedom to Dissent: The Vietnam-Protests and the Words of Public Officials*, 1966 WIS. L. REV. 632, 679.

⁵⁴ "Affirmation through law and governmental acts expresses the public worth of one subculture's norms relative to those of others, demonstrating which cultures have legitimacy and public domination." Gussfield, *On Legislating Morals: The Symbolic Process of Designating Deviancy*, 56 CALIF. L. REV. 54, 58 (1968).

⁵⁵ See, e.g., *Reports and Recommendations on the Uniform Marriage and Divorce Act and The Uniform Marriage and Divorce Act*, 5 FAM. L.Q. 123, 209 (1971). Note that the present draft of the act provides for both maintenance and child support.

⁵⁶ Slovenko, *Sexual Deviation: Response to an Adaptational Crisis*, 40 U. COLO. L. REV. 222 (1968). Slovenko also observed:

Violent disturbances occur during the breakup of a homosexual partnership, perhaps not so much because of the loss of affection, loyalty and dependence, or because of the loss of an orgiastic outlet, but primarily because it is rather a confirmation of their worst and continual fears that no one is to be trusted, that what existed before was not affection and loyalty. "I offered you love and the best I could; all I got in return, in the end, was a kick in the teeth." The breakup is more devastating than the

represent to homosexuals an instrument which could assist them in maintaining a secure and lasting relationship. Indeed, such security may be even more important to the homosexual than to the heterosexual. The homosexual's search for a new partner is fraught by dangers unknown to heterosexual "singles." Police harassment and offended reactions from heterosexuals who have been mistakenly approached are among the special risks facing the homosexual.

In addition to simple security, homosexuals, like heterosexuals, may acquire inner satisfactions from a formalized marriage relationship beyond the casual (or even lasting) unmarried liaison. Social scientists generally maintain that human beings, gregarious by nature,⁵⁷ need something more than fleeting contact and find it in formal marriage.⁵⁷ The homosexual who wishes to marry a person of the same sex may also be seeking these psychological advantages.⁵⁸

Numerous legal advantages are extended to couples married with state approval.⁵⁹ These include tax benefits,⁶⁰

worst of husband-wife quarrels, and the hostility is not localized against the partner. *Id.* at 232.

⁵⁷ See E. GRIFFITH, *MARRIAGE AND THE UNCONSCIOUS* 12 (1957); E. JAMES, *MARRIAGE AND SOCIETY* 204 (1952); A. MEARES, *MARRIAGE AND PERSONALITY* 7-8 (1958).

⁵⁸ While it is true that some homosexuals have been married by ministers or priests, such marriages are, of course, not recognized as legal by the state, a fact that arguably detracts from the psychological as well as the legal effect of the church ceremony. More importantly, only a very few individual clergymen will perform such marriages. It remains overwhelmingly difficult for homosexuals to have even a church wedding, and agnostic or atheist homosexuals may lack recourse to even this dubious means of evading state marriage laws.

⁵⁹ See generally H. KYRK, *THE FAMILY IN THE AMERICAN ECONOMY* (1953); J. MADDEN, *THE LAW OF PERSONS AND DOMESTIC RELATIONS* (1931); L. KANOWITZ, *WOMEN AND THE LAW* 35-93 (1969). All benefits mentioned in this paragraph which distinguish unfairly on the basis of sex may be subject to the effects of the twenty-seventh amendment if ratified.

⁶⁰ Benefits available under the present federal income tax law, for example, include:

Joint Returns. INT. REV. CODE OF 1954, § 6013(a) provides that "A husband and wife may make a single return jointly of income taxes under subtitle A, even though one of the spouses has neither gross income nor deductions." In addition to the general advantage of factoring two incomes of different amounts into a single tax return, there are instances of joint returns being given other preferential treatment: *Id.* § 179(b) (with regard to additional first year depreciation allowance for small business, the ordinary limitation of \$10,000 is raised to \$20,000 for hus-

the privilege of not having to testify against one's spouse,⁶¹ prison visitation preferences,⁶² adoption privileges,⁶³ tort recovery for wrongful death,⁶⁴ and intestate succession.⁶⁵ Legally recognized marriage also creates certain responsibilities of one spouse to the other which are enforceable by law. These include liability for the support,⁶⁶ maintenance,⁶⁷ fu-

band and wife filing jointly); *Id.* § 1244(b) (with regard to losses on small business stock, "loss from the sale or exchange of an asset which is not a capital asset shall not exceed \$25,000 or \$50,000 in case of husband and wife filing joint returns"); *Id.* § 121(a)(d) (if taxpayer has attained age of 65, gross income does not include gain from the sale or exchange of property). For husband and wife filing a joint return, even though only one spouse satisfies the age requirement, both shall be treated as satisfying it; *Id.* § 37(i)(2)(A) (similar provision for retirement income).

Deductions. Spouses are allowed deductions for each other as dependents in certain instances. *See* INT. REV. CODE OF 1954, § 214 (when incapacitated or institutionalized); *Id.* § 213 (for medical expenses not compensated by insurance); *Id.* § 151 (generally, \$750 and an additional \$750 if one is blind).

However, certain provisions of the Internal Revenue Code potentially disfavor married people. *See, e.g.,* INT. REV. CODE OF 1954, § 46(a)(4) (with regard to computing credit for investment in certain depreciable property, married individuals filing separate returns normally have only a \$12,500 limitation per individual instead of \$25,000); *Id.* § 48(C)(2)(b) (with regard to limitation on deductible cost of used property there is a \$25,000 ceiling for married persons filing separately instead of the normal \$50,000); *Id.* § 141 (standard deduction normally shall not exceed \$2,000, but for a married person filing separately, it shall not exceed \$1000). *See also* Richards, *Discrimination Against Married Couples under Present Income Tax Laws*, 49 TAXES 536 (1971); Richards, *Single v. Married Income Tax Returns under the Tax Reform Act of 1969*, 48 TAXES 301 (1970).

⁶¹ Generally a spouse has the privilege not to testify against his or her mate, in order to preserve familial harmony. 8 J. WIGMORE, EVIDENCE §§ 2237-2245 (3d ed. 1940).

⁶² When only limited visitation of a prisoner is allowed, the spouse is usually granted priority permission. *See* *Abamine v. Murphy*, 108 Cal. App. 2d 294, 238 P.2d 606 (1951).

⁶³ Statutes sometimes stipulate that unmarried persons cannot adopt a child. *See, e.g.,* *Tsilidis v. Pedakis*, 132 So. 2d 9 (Fla. Dist. Ct. App. 1961).

⁶⁴ In 1846 the English Parliament passed Lord Campbell's Act, which provided that whenever the death of a person would be caused by the wrongful act of another, an action for damages should ensue for the beneficiaries—spouse, parent, or child—of the deceased. "[A] law similar thereto has been enacted in nearly every state in the Union." *Coliseum Motor Co. v. Hestor*, 43 Wyo. 298, 3 P.2d 105 (1931).

⁶⁵ *See, e.g.,* *Fidelity Union Trust Co. v. Berenblum*, 198 A.2d 826 (N.J. Super Ct. 1964) (spouse's right to intestate succession).

⁶⁶ At common law and under various statutes the husband is bound to support his wife. *See, e.g.,* *In re Fawcett's Estate*, 232 Cal. App. 2d 770, 43 Cal. Rptr. 160 (1965).

⁶⁷ The husband is primarily liable for necessities furnished to his wife, including medical expenses. *See, e.g.,* *Cromwell v. Anderson Furniture Co.*, 195 A.2d 264

neral expenses,⁶⁸ and torts of one's spouse.⁶⁹ Those additional protections concerned directly with preserving the marriage relationship have already been mentioned.⁷⁰

Thus, the benefits of marriage to homosexuals are of comparable magnitude to those of heterosexuals. Of course, many homosexuals might choose to forego these benefits for the same reasons that some heterosexuals reject marriage. Additional factors, such as a desire to avoid attracting attention might prevent homosexuals from applying for a marriage license. Nevertheless, the benefits still provide those homosexuals who desire legal marriage with strong interests to balance against the state's justifications for denying them marital status.

IV. THE STATE'S INTEREST

A. *The Balancing Test*

Equal protection cases manifest an approach described by some commentators as a "sliding scale,"⁷¹ i.e., the suspect nature of the classification and the importance of the right affected, when considered together, determine how compelling must be the state's reasons for differential treatment.⁷²

(D.C. Ct. App. 1963). See also Wanderer, *Family Expense Legislation as Affecting Common Law Liabilities of Husband for Necessaries*, 68 Com. L.J. 36 (1963).

⁶⁸ The husband is primarily liable for funeral expenses on the theory that they are necessities. See, e.g., *Complete Auto Transit Inc. v. Floyd*, 104 S.E.2d 208 (Ga. 1958).

⁶⁹ Husband is liable for wife's torts or fraud committed while acting within the scope of her authority as husband's agent. See, e.g., *Lytle v. Kroenke*, 67 Cal. App. 2d 596, 154 P.2d 918 (1954).

⁷⁰ Additionally, there are numerous non-statutory legal benefits in the private sphere, such as employee's family health care, group insurance, and social security survivor's benefits. Automobile insurance premiums are lower for married people.

⁷¹ See, e.g., Note, *The Equal Protection Clause and Exclusionary Zoning after Valtierra and Dandridge*, 81 YALE L.J. 61, 71 (1971) and citations therein.

⁷² Thus, in *Harper v. Virginia Board of Education*, 383 U.S. 663 (1966), the Court held that a mere \$1.50 poll tax violated the fourteenth amendment guarantee of equal protection because it both created a suspect classification (wealth of the voter) and interfered with the exercise of a fundamental right (the right to vote).

Justice Black, dissenting, argued that the statute was justified by its reasonable relationship to the need for generating state revenue and by the popular belief that voters who pay a tax will be more concerned with the state's welfare. *Id.* at 674.

Justice Marshall articulated this "sliding scale" approach in his dissenting opinion in *Dandridge v. Williams*:⁷³

In my view equal protection analysis of this case is not appreciably advanced by the a priori definition of a "right," fundamental or otherwise. Rather, concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.⁷⁴

Since homosexuality is arguably a suspect classification and the right of homosexuals to marry is fundamental, the practice of denying marriage licenses to homosexuals, if challenged in court, would appear to call for application of the strict scrutiny standard.

Under this standard, the state must prove that it has a compelling and permissible interest in restricting the issuance of marriage licenses only to heterosexuals, that this interest outweighs the individual rights infringed,⁷⁵ and that such restriction is necessary for the accomplishment of that interest.⁷⁶ Moreover, the legislation must be narrowly drawn in order to minimize the impact upon individual rights, and there must not exist other less drastic means of reasonably accomplishing the state's purposes.⁷⁷

The burden on the state is extremely heavy—witness the fact that only in the Japanese internment cases⁷⁸ has the higher standard of the strict scrutiny test been met.⁷⁹ Those cases involved wartime necessities and emergency powers. Comparison of the issues reveals no analogous legitimate governmental interests that are both important and directly related to homosexual marriage that cannot be reasonably vindicated by means other than a ban on such marriages.

⁷³ 397 U.S. 471 (1970).

⁷⁴ *Id.* at 520-21 (Marshall, J., dissenting).

⁷⁵ *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968).

⁷⁶ See, e.g., *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (statute prohibiting unmarried interracial couple from habitually living in and occupying the same room in the nighttime held invalid).

⁷⁷ See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 637 (1969).

⁷⁸ *Korematsu v. United States*, 323 U.S. 214 (1944).

⁷⁹ Note, *supra* note 71, at 67 n.23.

B. Compelling State Interests

One possible argument against any official attempt to normalize the homosexual relationship is that the government's approach toward homosexuality should be one of treatment and rehabilitation rather than tolerance and legalization. However, the assumption that all homosexuals are in need of medical or psychiatric treatment is questionable. It is based on the supposition that homosexuality is in fact a psychological malfunction. This view is subject to considerable debate in current psychological and medical literature.⁸⁰ Moreover, the further assumption that most homosexuals can be successfully treated is clearly erroneous. Even those who advocate "curing" homosexuality admit that the condition can rarely be altered.⁸¹ In the treatment of patients having psychological problems connected with their homosexuality, success is viewed "not in terms of how many patients are converted to heterosexuality but in terms of how fully patients can be helped to accept their homosexuality and learn to live without undue tension and anxiety."⁸² Since homosexual marriage would probably serve these ends, the granting of marriage licenses to homosexual couples should not be viewed as a dereliction of society's duty toward the homosexuals themselves.

Homosexual marriage has also been condemned as a sterile relationship. The Minnesota court's reason for denying mandamus to Baker and McConnell was that "the institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."⁸³ There are those who maintain that the secular basis for marriage is to encourage procreation. Others have claimed that, should homosexuality become rife, the perpetuation of the human race

⁸⁰ See WOLFENDEN REPORT, *supra* note 30. For a more recent examination of this continuing controversy, see KARLEN, *supra* note 27, at 572-606.

⁸¹ The most optimistic psychotherapists do not put the "cure" rate above one-third of the willing patients. KARLEN, *supra* note 27, at 572-606.

⁸² Ford, *Homosexuals and the Law: Why the Status Quo?*, 5 CAL. WEST. L. REV. 233, 236 (1969).

⁸³ 191 N.W.2d at 186.

would be in jeopardy. Thus, it is considered a dangerous form of immorality, since it affects not only the health of society but arguably its continued existence.⁸⁴

These arguments ignore the elements of marriage which can exist independent of child bearing. Marriage also involves the intimate relationship between the marriage partners themselves and their relationship as a pair within society. Furthermore, denying marriage to homosexuals because they would not procreate is an example of underinclusive classification.⁸⁵ The government allows sterile people to marry; it does not require people to have children (if anything, the trend is towards discouraging procreation); it does not even require fertile people to marry.⁸⁶ None of the legal benefits of marriage are predicated upon procreation or intent to procreate.⁸⁷ If the ability or desire to procreate is not a prerequisite for the marriage of heterosexuals there is no rational reason why it should be one for homosexuals.⁸⁸

Furthermore, the benefits conferred by states upon children, and hence indirectly upon their guardians, are generally granted irrespective of whether the child is the product of the present marriage of his parents or of a former one. Nor does it matter whether the child is adopted, or whether he is legitimate or illegitimate. In short, encouraging procreation, if indeed it is a valid state policy, is not rationally related to the granting of marriage licenses.⁸⁹

⁸⁴ *Wolfenden Report: The Wider Aspects*, 121 *JUST. OF THE PEACE* 623, 624 (1957).

⁸⁵ See Tussman & ten Broek, *supra* note 12, at 347.

⁸⁶ With regard to this anomalous distinction of requiring procreation of homosexuals but not of heterosexuals, the court in *Baker v. Nelson* replied that "'abstract symmetry' is not required by the Fourteenth Amendment." 191 N.W.2d at 187.

⁸⁷ For example, people who have children out of wedlock still qualify for governmental child support. See, e.g., MINN. STAT. ANN. § 256.01. Furthermore, inability to procreate or the failure to rear children is not cause to rescind the marriage as was the case in some primitive societies, e.g., the Batak of northern Sumatra. C. KEYSERLING, *THE BOOK OF MARRIAGE* 71 (1926).

⁸⁸ The Minnesota Supreme Court itself recognized that any attempt by the state to require such intent would be unworkable and probably unconstitutional. 191 N.W.2d at 187.

⁸⁹ Furthermore, it is difficult to believe that legalization of homosexual marriages will operate to depress the birthrate to any significant degree. Private consen-

Another possible governmental interest derives from the fear that legalizing homosexual marriage will encourage blatant, offensive homosexual activity.⁹⁰ This fear may be directed at such minor displays of affection as kissing and holding hands in public, conduct universally tolerated in heterosexuals. If so, it must be regarded as the minimum concession that the majority must make to the rights and needs of a minority. On the other hand, if this fear is directed at public sexual activities presently forbidden to heterosexuals as well, the criminal law provides adequate means of preventing such conduct. There is no rational relationship between these fears and the granting or denial of a marriage license.

Another contention is that legalization of homosexual marriage would detrimentally affect minors. Homosexuals seeking partners might be seen as likely to exploit, abuse, or corrupt those who are especially vulnerable—the young and the physically or economically dependent. Furthermore, the existence of permanent and legal homosexual marriage might, by creating an acceptable norm of behavior, influence minors who are unsure of their sexual orientation.

Accepting *arguendo* the validity of this state interest, the argument is vulnerable on several counts. Since legalization may lessen some of the problems of homosexual life and make for more stable, long-term relationships, the amount

sual homosexuality is already tolerated. It is estimated that there are twenty convictions for every six million homosexual acts. Fisher, *The Sex Offender: Provisions for the Proposed New Maryland Criminal Code*, 30 MD. L. REV. 91, 95 (1970). See also Project: *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A.L. REV. 643, 689, 734-42 (1966). Those homosexuals who are sufficiently open about their orientation to wish to get married are unlikely to be enticed to parenthood by the benefits offered by heterosexual marriage. Furthermore, in light of the fears of overpopulation expressed by an increasing number of Americans, there is reason to believe that it is not in society's interest to encourage procreation beyond the level at which it naturally occurs. See statement by Ruth E. Hauser, U. S. Representative to the United Nations Commission on Human Rights, N.Y. Times, Aug. 11, 1970, § 1, at 23, col. 3. See also Brodie, *The Family Planning Services and Population Research Act of 1970—Public Law 91-572*, 5 FAMILY L.Q. 424, 424-30 (1971).

⁹⁰ On the governmental interest in barring lewd conduct in public, see Note, *Private Consensual Homosexual Behavior: The Crime and Its Enforcement*, 70 YALE L.J. 623, 624 (1961) and sources cited therein.

of homosexual proselytizing of minors may well decrease.⁹¹ After the *Wolfenden Report*, Great Britain passed laws which were liberal in their attitude toward homosexuals, yet observers report that such permissiveness did not lead to more promiscuity.⁹² To the extent that proselytizing continues, existing law against public indecency, solicitation, and seduction of minors will continue to discourage direct contacts. Denial of the right to marry would have little or no preventive effect at all in this area.

Second, there are indications that fears of minors being corrupted or unduly influenced by the legalization of homosexual activity (and presumably the legalization of same-sex marriage) are unfounded. The Committee on Homosexual Offenses and Prostitution, in the *Wolfenden Report*, rejected the claim that the adult homosexual represents a threat to minors.⁹³ Moreover, a person's views about consensual activities are largely unaffected by his knowledge or belief as to whether the activity is criminal or not.⁹⁴

As for indirect effects of legalization on minors, short of barring minors from reading about homosexual relationships or seeing films dealing with the subject, there is relatively little that the state can do. Certainly banning homosexual marriages is not, *per se*, an effective way to shield minors from any knowledge of the existence of homosexuality. The state can use less drastic means, such as educating minors as to the nature of homosexual life, rather than banning legal marriage between adults who are already homosexual.

Finally, some may argue that the government has a legitimate interest in the enforcement of morals. Criticizing the conclusion of the *Wolfenden Report*, Lord Devlin made a case against legalizing homosexual behavior in similar

⁹¹ See E. SCHUR, *CRIMES WITHOUT VICTIMS* 111 (1965).

⁹² H. HYDE, *THE LOVE THAT DARED NOT SPEAK ITS NAME* 269 (1970).

⁹³ *WOLFENDEN REPORT*, *supra* note 30, at 22-23.

⁹⁴ Walker & Argyle, *Does the Law Affect Moral Judgments?*, 4 BRIT. J. CRIM. 570, 578 (1964). Similarly, the *WOLFENDEN REPORT*, *supra* note 30, at 23, emphasized that in Sweden and the Netherlands, where homosexual reforms had been instituted some time before, there had been no increase in homosexual activity noted over a ten year period.

terms: when no common morality is maintained, disintegration ensues; therefore "society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions."⁹⁵

It is undoubtedly true, in America as in Great Britain, that society has considered homosexuality to be abhorrent and repulsive.⁹⁶ Using Devlin's reasoning, it might be concluded that the state should be able to discourage homosexuality by selective use of its power to issue marriage licenses. However, the great weight of modern authority is opposed to such "legislation of morality."⁹⁷ First, as H. L. A. Hart has pointed out, it would be difficult to set limits upon the power of the majority to enforce its concepts of "right" and "wrong."⁹⁸ Second, there is a growing belief among commen-

⁹⁵ P. Devlin, *THE ENFORCEMENT OF MORALS* 20 (1959).

⁹⁶ In most states, offenses described in the sodomy statutes are characterized by such terms as "abominable", "detestable", or "unnatural." Cantor, *Deviation and the Criminal Law*, 55 J. CRIM. L.C.&P.S. 441, 445-46 (1964). Only seventeen states simply describe the offenses; the rest use various adjectives. "Abominable" and "detestable" are used in the following state statutes: IND. ANN. STAT. § 10-4221 (1956); S.C. CODE ANN. § 16-412 (1962); UTAH CODE ANN. § 76-53-22 (1953); R.I. GEN. LAWS ANN. § 11-5-1 (1956); OKLA. STAT. ANN. tit. 21, § 88s (1951); MICH. STAT. ANN. § 28.355 (1962); MASS. ANN. LAWS ch. 272, § 34 (1956); WYO. STAT. ANN. § 6-98 (1957); MO. REV. STAT. § 563.230 (1959); FLA. STAT. ANN. § 800.01 (1965); MISS. CODE ANN. § 2A:2413 (1942); S.D. COMPILED LAWS ANN. 22-22-1 (1967). "Infamous" is used in the following state statutes: ARIZ. REV. STAT. ANN. § 13652 (1965); CAL. PENAL CODE § 286 (1955); IDAHO REV. CODE ch. 66, § 18-1605 (1947); NEV. REV. STAT. § 201.190 (1961); N.J. REV. STAT. § 2A:143-1 (1951); MONT. REV. CODES ANN. § 94-4118 (1947). "Crime against nature" or "against the order of nature" are used in the following state statutes: ALA. CODE tit. 14, § 106 (1958); ALASKA STAT. § 11.40.120 (1962); DEL. CODE ANN. tit. 11, § 831 (1953); GA. CODE ANN. § 26-591 (1953); LA. REV. STAT. § 14:89 (1950); HAWAII REV. LAWS § 309-34 (1955); ME. REV. STAT. ANN. tit. 17, § 1001 (1964); ORE. REV. STAT. § 167.040 (1965); TENN. CODE ANN. § 39-707 (1956).

⁹⁷ See, e.g., Hughes, *Morals and the Criminal Law*, 71 YALE L.J. 662 (1962); Mewitt, *Morality and the Criminal Law*, 14 U. TORONTO L.J. 213, 227 (1962); Samek, *The Enforcement of Morals*, 49 CAN. B. REV. 188 (1971); Sartorius, *The Enforcement of Morality*, 81 YALE L.J. 891 (1972); Williams, *Authoritarian Morals and the Criminal Law*, 1966 CRIM. L. REV. 132, 137-38. But see E. Rostow, *THE SOVEREIGN PREROGATIVE* 79 (1962): "Men often say that one cannot legislate moral values. I should say that we legislate hardly anything else."

⁹⁸ There must be some check on the abuse of majority judgment other than a pious hope that "the limits of tolerance might shift." Hart, *Immorality and Treason*, 62 LISTENER 163 (1959). For a discussion of the Devlin-Hart controversy, see generally Anastaplo, *Law and Morality: On Lord Devlin, Plato's Meno, and*

tators that behavior which does not harm others, which would include homosexual activity between consenting adults, should not be criminalized or otherwise attacked through legislative sanction.⁹⁹ Third, and most importantly, the fourteenth amendment (which the English Lord Devlin did not have to deal with directly) expresses an American concern for the equal treatment of all persons regardless of their moral worth in the eyes of the majority. The Equal Protection Clause would surely be emasculated if the state were conceded to have a "compelling interest" in disfavoring those who participate in unpopular (but not necessarily illegal) activities.

Even if it were assumed that the government has the power to legislate morality to the detriment of constitutionally guaranteed liberties, there are countervailing reasons why it might no longer wish to exercise this power to disfavor homosexuals. First, there is evidence that the nationwide and even worldwide disapproval of homosexuality is declining.¹⁰⁰ Conversely, in view of the increasing and understandable hostility toward the social order evident among many American homosexuals today, it would seem to be in society's interest to attempt to integrate them into the prevailing social pattern. In this way, the profound loneliness and anomie of homosexuals¹⁰¹ might be reduced by the alleviation of their sense of deviance and separation from the larger society.¹⁰² Many characteristics which people now attribute to homosexuals because of their sexual orientation are in fact

Jacob Klein, 1967 WIS. L. REV. 231; Blackshield, *The Hart-Devlin Controversy in 1965*, 5 SYD. L. REV. 441 (1967); R. Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986 (1968).

⁹⁹ See note 97 *supra*.

¹⁰⁰ France, Italy, Mexico, Uruguay, Denmark, Sweden, Switzerland, England, and Canada do not prohibit private adult homosexual behavior in their penal codes. See Model Penal Code § 207.5, Comment (1962). In the United States: Illinois, ILL. REV. STAT. ch. 38, §§ 11-2, -3 (1961); Connecticut, CONN. GEN. STAT. REV. § 53-216, repealed by Public Act 828, § 214 (1969), effective Oct. 1, 1970; Colorado, COLO. REV. STAT. ANN. ch. 40, art. 3, §§ 401-11 (1971 Supp.). The *Hooker Report* concludes that, although many Americans still view homosexuality as repugnant, public attitudes are changing. FINAL REPORT OF THE TASK FORCE ON HOMOSEXUALITY (HOOKER REPORT) (Oct. 10, 1964).

¹⁰¹ See M. HOFFMAN, *supra* note 31, at 77.

¹⁰² Cf. J. LOFLAND, *DEVIANCE AND IDENTITY* 209-94 (1970).

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the products of their social ostracism and isolation.¹⁰³ If homosexuality were legalized generally, many of its undesirable social effects might disappear.¹⁰⁴ Perhaps society's perceived need to protect itself from homosexuality would go with them.

Several immediate legal consequences of allowing homosexuals to marry could be raised by the state as reasons for continuing the ban on such marriage. It might be argued that homosexual marriage runs contrary to the present state laws against homosexual acts; that legalization would open the doorway to abuse of marriage by non-homosexual same-sex couples who would get married simply to enjoy the legal benefits of wedlock; and finally, that many laws and statutes now pertaining to married couples would have to be rewritten in light of the existence of homosexual marriage.

As to the first contention, while it is true that 47 states do outlaw some voluntary homosexual practices, it is questionable that desire to uphold these statutes constitutes a compelling justification for banning homosexual marriage. The statutes, which generally ban "sodomistic" intercourse both heterosexually and homosexually,¹⁰⁵ are rarely enforced against private homosexual acts.¹⁰⁶ Furthermore, the mere existence of homosexual marriage is not necessarily proof that the members of the union are committing illegal acts, since not all sexual acts associated with homosexuality are in fact illegal.¹⁰⁷ Finally, in light of *Griswold*,¹⁰⁸ *Stanley*,¹⁰⁹ and *Baird*,¹¹⁰ laws against homosexual acts may well be un-

¹⁰³ E. Hooker, *Male Homosexuals and Their "Worlds,"* in *SEXUAL INVERSION* (J. Marmor ed. 1965). Since lesbians are traditionally less condemned or more easily overlooked, this may explain why female homophile couples can often establish permanent relationships. M. HOFFMAN, *supra* note 31, at 175-76. But see Martin & Lyon, *supra* note 32, at 85.

¹⁰⁴ This would also largely solve the problem of blackmail to which many homosexuals are exposed at the present.

¹⁰⁵ See, e.g., MINN. STAT. ANN. § 617.08.

¹⁰⁶ See note 89 *supra*.

¹⁰⁷ See *McConnell v. Anderson*, 316 F. Supp. 809, 811 (D. Minn. 1970).

¹⁰⁸ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁰⁹ *Stanley v. Georgia*, 394 U.S. 557 (1969) (state cannot punish mere private possession of obscene material).

¹¹⁰ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

constitutional as violative of the individual's right to privacy.¹¹¹

As for abuse by non-homosexual same-sex couples seeking to get married solely to acquire the ancillary legal benefits, the problem is the same as now exists for heterosexual marriage. Couples of different sex are able to get marriage licenses without the state questioning their purposes or sincerity. The possibility of similar abuse by couples of the same sex is simply not compelling enough to deny marriage licenses to sincerely motivated homosexual couples.

Finally, the claim that some state laws might otherwise have to be rewritten has never before been accepted as a sufficient government interest in sustaining a discriminatory practice.¹¹² In any case many of these laws affecting marriage, particularly those involving property ownership, alimony, and child custody in divorce, may well have to be revised in light of the twenty-seventh amendment, should it be adopted.¹¹³

In sum, there appears to be no state interest sufficiently compelling to warrant continued denial of marriage licenses to homosexual couples. In the absence of such a compelling interest, under the strict scrutiny test, the right of homosexual couples to obtain a marriage license is dictated by the Equal Protection Clause.

V. CONCLUSION

Marriage is one of our society's most fundamental institutions. Conceptually it has generally been limited to the union of one man and one woman. Although private consensual homosexual activity might be legalized in this country without creating many problems, the expansion of marriage to encompass homosexual couples would, at least in theory, alter the nature of that institution.

¹¹¹ See Note, *Homosexuality and the Law*, 17 N.Y.L.F. 273, 295-96 (1971).

¹¹² Clearly judges were not impeded from striking down de jure segregation by the number of racial laws that had to be overturned.

¹¹³ H.R.J. Res. 208, 92d Cong., 2d Sess. (Oct. 12, 1971); S.J. Res. 8, 92d Cong., 2d Sess. (Mar. 22, 1972); 3 U.S. CODE CONG. & ADMIN. NEWS 835 (April 20, 1972).

The Supreme Court may in the future decide that such alteration is beyond its competence and that marriage should be confined to its present definition, absent a positive move on the part of individual state legislatures to broaden it. A decision to settle for the gradual development of a quasi-marital status, or instead to alter basic societal conceptions about marriage, will turn upon a balance of values which can only imperfectly be abstracted from the more familiar problems in the law of equal protection. As Justice Holmes once wrote:

I think it most important to remember whenever a doubtful case arises, with certain analogies on one side and other analogies on the other, that what is really before us is a conflict between two social desires, each of which seeks to extend its dominion over the case, and which cannot both have their way. . . . Where there is doubt the simple tool of logic does not suffice, and even if it is disguised and unconscious, the judges are called on to exercise the sovereign prerogative of choice.¹¹³

ARTHUR J. SILVERSTEIN*

¹¹³ Thus the Court upheld Utah's anti-polygamy statute in *Reynolds v. United States*, 98 U.S. 145 (1878), holding that "it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion." *Id.* at 165. Professor Rostow posed the *Reynolds* issue in this way:

Should we not then conclude that monogamy is so fundamental a theme in the existing common morality of the United States that the condemnation of polygamy as a crime is justified, even though in the end the repugnance to it rests on "feeling" and not on "reason?"

Rostow, *The Enforcement of Morals*, 1960 *CAMB. L.J.* 174, 190.

¹¹⁴ O. W. HOLMES, *Law in Science and Science in Law*, in *COLLECTED LEGAL PAPERS* 239 (1920).

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The Legality of Homosexual Marriage

Two men recently petitioned the Minnesota Supreme Court to compel the state to grant them a marriage license.¹ The court rejected their application for mandamus, and their appeal was subsequently dismissed by the United States Supreme Court.² But the claim was far from frivolous. A credible case can be made for the contention that the denial of marriage licenses to all homosexual couples violates the Equal Protection Clause of the Fourteenth Amendment.³ There are serious difficul-

1. *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (Minn. Sup. Ct., 1971), *appeal dismissed*, 41 U.S.L.W. 3167 (U.S. Oct. 10, 1972). Petitioners had applied for a marriage license under MINN. STAT. ANN. § 517.01 (1969), which does not specify the sex of the applicants:

Marriage, so far as its validity in law is concerned, is a civil contract, to which the consent of the parties, capable in law of contracting, is essential. Lawful marriage hereafter may be contracted only when a license has been obtained therefor as provided by law and when such marriage is contracted in the presence of two witnesses and solemnized by one authorized, or whom the parties in good faith believe to be authorized, so to do.

The clerk of the court declined to issue the license on the sole ground that petitioners were of the same sex.

2. *Baker v. Nelson*, 41 U.S.L.W. 3167 (U.S. Oct. 10, 1972).

3. In addition to their Fourteenth Amendment argument, petitioners in *Baker v. Nelson* also based their claim on a variety of other constitutional provisions, including the First, Eighth, and Ninth Amendments. Although the arguments under these provisions raise some interesting legal issues, they probably cannot be sustained under existing court precedent.

The First Amendment right to free speech and free assembly, as construed by the Supreme Court, includes a number of other rights, among them the right to engage in free and private associations. *Williams v. Rhodes*, 393 U.S. 23 (1968); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *NAACP v. Alabama*, 357 U.S. 449 (1958).

Justice Douglas, writing for the Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965), referred to the right of association as one of the "penumbras formed by emanations from those guarantees [specified in the Bill of Rights] that help give them life and substance." *Id.* at 484. Douglas' discussion of marriage is particularly significant:

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 faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. at 486.

However, the Supreme Court has never specifically declared the marriage unit to be an association within the terms of the First Amendment. Most right of association cases to date have dealt with associations organized for political purposes, and moreover, with existing associations rather than the formation of new ones.

Petitioners' Eighth Amendment claim was premised on the assertion that the denial of their right to marriage constituted punishment for a status or condition which they were powerless to change. They based their argument chiefly on the Supreme Court's decision in *Robinson v. California*, 370 U.S. 660 (1962), in which the Court struck down a state law under which a narcotics addict was sentenced to ninety days' imprisonment on the ground that to condemn a person for "an illness, which may be contracted innocently or involuntarily" constituted cruel and unusual punishment. *Id.* at 667. But *Robinson* concerned punishment for a "crime"; even Justice Fortas' liberal interpretation of *Robinson*, set forth in his dissent in *Powell v. Texas*, 392 U.S. 514, 567 (1968), does not extend the holding beyond the context of criminal sanctions.

Petitioners' Ninth Amendment claim was apparently based upon Justice Goldberg's

ties with this equal protection analysis, which make it questionable whether courts will uphold it under current precedent. Their claim, however, would almost certainly be vindicated under the proposed Equal Rights Amendment, which would establish a stricter prohibition against discriminatory treatment along sexual lines. This Note will first examine the constitutionality of restricting marriage licenses to heterosexual pairs under traditional equal protection doctrine, and will then turn to the implications of the Equal Rights Amendment for this practice.

I. The Fourteenth Amendment

It is by now well established that the Supreme Court varies the degree of scrutiny to which it subjects legislative classifications according to the groups and interests affected by any given classification.⁴ The so-called "strict scrutiny" standard is usually triggered by legislation which either contains a classification that is suspect because of the nature of the group disadvantaged, or threatens a "basic civil right of man."⁵ When this standard is employed, the government is required

concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479, 488-97 (1965). Justice Goldberg there contended that the Ninth Amendment was inserted into the Bill of Rights to protect from federal infringement certain fundamental rights not otherwise mentioned (e.g., in *Griswold*, the right to marital privacy). He argued that at least some of these fundamental rights, like some of the rights protected by the first eight amendments, were made applicable to the states by the Due Process Clause of the Fourteenth Amendment.

With this interpretation in mind, it might be argued that the Ninth Amendment shields the right to marry from governmental interference. Tangential support for this contention could be derived from *Loving v. Virginia*, 388 U.S. 1 (1967), in which the Court held that the right to marry was fundamental and that denial of that right on racial grounds violated the Due Process Clause. *Id.* at 12. However, it is doubtful that the Ninth Amendment significantly contributes to the resolution of this constitutional problem. If the right to marry persons of the same sex is fundamental and is not counterbalanced by important state interests, then an argument based on the Fourteenth Amendment, *infra* pp. 574-83, should carry Baker and McConnell's case. If not, the Ninth Amendment case can hardly stand on its own.

4. See, e.g., Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural Law—Due Process Formula,"* 16 U.C.L.A.L. REV. 716, 739-46 (1969); Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969); Note, *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 60-71 (1970).

5. Every classification, other than racial, which has been found to be suspect by the Court has been considered in the context of an important constitutional right. In the cases in which wealth/poverty distinctions were overturned, the rights infringed included voting (*Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966)), the right to adequate appellate review (*Griffin v. Illinois*, 351 U.S. 12 (1956)), and the right to representation during such review (*Douglas v. California*, 372 U.S. 353 (1963)). *Carrington v. Rash*, 380 U.S. 89 (1965), in which the impermissible classification was between military and civilian members of a community, dealt with the right to vote; *Shapiro v. Thompson*, 394 U.S. 618 (1969), outlawing discrimination on the basis of residency for welfare recipients, centered on the right to travel. Thus, while the inherently unfair nature of a classification against a group is important and may be sufficient inde-

The Legality of Homosexual Marriage

to prove the presence of a "pressing public necessity" to justify such classification.⁶

In actual practice, the Court has applied the full strict scrutiny standard only rarely outside the context of racial discrimination.⁷ In cases involving non-racial classifications, the Court's approach can more realistically be viewed as a balancing process, perhaps best articulated by Justice Marshall in his dissenting opinion in *Dandridge v. Williams*:

In my view equal protection analysis of this case is not appreciably advanced by the *a priori* definition of a "right," fundamental or otherwise. Rather, concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.⁸

There are thus three basic factors to be balanced: the degree to which legislative classifications disfavoring homosexuals should be "suspect," because of legislative motivation; the importance of obtaining marriage licenses to homosexuals as a class; and the interests of the government in denying such licenses to all same-sex couples.

A. Suspect Classification

The Supreme Court has never explicated its grounds for declaring certain classifications to be inherently suspect. However, examination of the classifications thus far held to be suspect does reveal certain common denominators which may have motivated the Court in so designating them.

Judge J. Skelly Wright expressly articulated one relevant criterion when he observed that classifications disfavoring "a politically voice-

pendently to render a classification suspect, *see, e.g.*, *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 807 (1969) (*dicta*), the nature of the right infringed by that classification is often crucial in determining whether the Court will apply its stricter standard. *See Note, Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

6. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

7. One such case is *Levy v. Louisiana*, 391 U.S. 68 (1968), in which the denial to illegitimate children of the right to sue under a state wrongful death statute was held unconstitutional. Other strict scrutiny cases, while superficially turning upon non-racial classifications, have heavy racial overtones. *See, e.g.*, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (poll tax requirement for voting found to discriminate against the poor); *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948) (state statute barring issuance of fishing licenses to persons "ineligible to citizenship" held to violate the Fourteenth Amendment. The Court observed that the "Japanese are among the few groups still not eligible." *Id.* at 412 n.1).

8. 387 U.S. 471, 520-21 (1970).

less and invisible minority" should be subjected to "closer judicial surveillance and review."⁹ Homosexuals as a group would appear to have no more political influence than the black and poor minorities with which Judge Wright was dealing.¹⁰

Classifications have also been found suspect when they are based on attributes which are inherent in the individual and wholly, or largely, beyond his control.¹¹ Whatever the causes of homosexuality, the orientation itself does not appear to be one that is freely chosen, nor in most instances can it be changed.¹² Groups which are the subjects of derogatory myths of stereotypes are among those which have been accorded the protection of the strict scrutiny standard, perhaps in part to insure that such stereotypes do not become the bases for legislative classifica-

9. *Hobson v. Hansen*, 269 F. Supp. 401, 508 (D.D.C. 1967), *remanded on other grounds sub nom. Smuck v. Hobson*, 402 F.2d 175 (D.C. Cir. 1969). Judge Wright's comments, made in the context of de facto school segregation, read in full:

Judicial deference to these [legislative and administrative] judgments is predicated in the confidence courts have that they are just resolutions of conflicting interests. This confidence is often misplaced when the vital interests of the poor and racial minorities are involved. For these groups are not always assured of a full and fair hearing through the ordinary political process, not so much because of the chance of outright bias, but because of the abiding danger that the power structure—a term which need carry no disparaging or abusive overtones—may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority. Those considerations impel a closer judicial surveillance and review of administrative judgments adversely affecting racial minorities, and the poor, than would otherwise be necessary.

Id. at 507-08.

While Judge Wright mentioned specifically only two groups—the poor and racial minorities—shut out by the power structure, he did not preclude the existence of others similarly disadvantaged. Professor Karst has explicated the decision in *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), in which a statute requiring opticians to receive written prescriptions from ophthalmologists or optometrists before duplicating or replacing lenses was upheld, in terms that buttress this notion:

In *Williamson*, the losers in the legislature were not permanently disadvantaged minorities. The opticians might well have anticipated new legislative alliances that would soften the impact of this legislation by amendment.

Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural Law—Due Process Formula,"* 16 U.C.L.A.L. REV. 716, 724 (1969).

10. No publicly declared homosexual has been elected to any significant position of power in the United States. In fact, hostility is manifest even to the expression of views espousing civil liberties for homosexuals. See, e.g., the comments of Judge Stevenson in *McConnell v. Anderson*, 451 F.2d 193, 196 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972).

11. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (classification disfavoring Japanese). See also *Levy v. Louisiana*, 391 U.S. 68 (1968) (classification disfavoring illegitimate children); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (classification disfavoring persons "ineligible to citizenship").

While it is true that some classifications found to be suspect, such as poverty or military status, are not wholly immutable or beyond the plaintiffs' control, they still represent statuses which are not always freely chosen or easily discarded.

12. See I. BIEBER AND ASSOCIATES, *HOMOSEXUALITY: A PSYCHOANALYTIC STUDY* 301, 310-19 (1962). For a recent discussion of the sociological and psychiatric debate centered on the concept of homosexuality as a disease which can be cured, see A. KARLEN, *SEXUALITY AND HOMOSEXUALITY* 572-606 (1971).

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Perhaps most importantly, a history of discrimination, both public and private, seems to characterize the groups granted this special judicial status.¹⁵ Discrimination against homosexuals¹⁶ represents a cultural theme in Western society which dates back to Biblical days.¹⁷ Such dis-

13. It is arguable that special fears born of racial prejudice encouraged the perception of Japanese-Americans as a potential threat during the Second World War, leading to the internment camps and *Korematsu*, while Caucasians of German or Italian descent were left relatively undisturbed. See Rostow, *The Japanese-American Cases—A Disaster*, 54 YALE L.J. 489, 496 (1945). Stereotypes also played a role in the controversy over the poll tax, which was ruled unconstitutional in *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), over the dissent of Justice Black:

The Court gives no reason at all to discredit the long-standing beliefs that making the payment of a tax prerequisite to voting is an effective way of collecting revenue and that people who pay their taxes are likely to have a far greater interest in their government

Id. at 677. The Court majority, in finding suspect the wealth-poverty classification in *Harper*, may well have been expressing its belief that the poor had suffered too long from the "long-standing beliefs" mentioned by Justice Black.

14. See generally Taylor, *Historical and Mythological Aspects of Homosexuality*, in *SEXUAL INVERSION* 140-64 (J. Marmor ed. 1965). Common misconceptions abound; one is that homosexuals are disposed to pedophilia, see M. SCHOFIELD, *SOCIOLOGICAL ASPECTS OF HOMOSEXUALITY* 149 (1965); D. WEST, *HOMOSEXUALITY* 114-20 (1967), and sources therein cited; another is that they predominate in certain social classes or professions, see REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION 17 (1957) [hereinafter cited as WOLFENDEN REPORT]; a third is that most male homosexuals are effeminate, see M. HOFFMAN, *THE GAY WORLD* 180-86 (1968), and that most female homosexuals are over-masculine, see Martin & Lyon, *The Realities of Lesbianism*, in *THE NEW WOMEN* (J. Cooke, C. Bunch-Weeks & R. Morgan eds. 1970), 79-80.

15. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1879) (state denial to Negro citizens of right to serve on juries held to violate the Fourteenth Amendment):

This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy.

Id. at 306.

16. One of the most serious areas of discrimination has been in the area of federal employment. See generally Note, *Dismissal of Homosexuals from Government Employment: The Developing Role of Due Process in Administrative Adjudications*, 58 GEO. L.J. 632 (1970); Note, *Government-Created Employment Disabilities of the Homosexual*, 82 HARV. L. REV. 1738 (1969); Note, *Is Governmental Policy Affecting the Employment of Homosexuals Rational?*, 48 N.C.L. REV. 912 (1970).

The Civil Service Commission, while tolerating other instances of "sexual misconduct" such as adultery, once applied strict standards to homosexual behavior because of what it perceived to be widespread public repugnance to homosexuality. See Note, *Government-Created Employment Disabilities of the Homosexual*, *supra*, at 1741-43. Such overt discrimination has since been modified as a result of *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969), in which the District of Columbia Court of Appeals held that there must be a specific connection between an employee's conduct and the efficiency of the civil service before such an employee could be dismissed.

17. Early aversion to homosexuality is seen in the Torah. See *Leviticus* 18:22, 20:13. The Talmudic law codes, relying on Biblical references, further elaborated the laws of sodomy. See, e.g., MISHNAH, SANHEDRIN VII, 4.

These codes were transmitted to the Christian church by its early leaders, particularly St. Paul. A. KINSEY, W. POMEROY, C. MARTIN & P. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 482 (1953). See generally D. BAILEY, *HOMOSEXUALITY AND THE WESTERN TRADITION* (1955). By the late Middle Ages, homosexuality was identified with heresy and often punishable by death. Modern views have modified but not erased this hostile attitude. See A. KARLEN, *supra* note 12, at 1-39, 44-62, 66-81, 85-99; T. SZASZ, *THE MANUFACTURE OF MADNESS* ch. 10 (1970); Taylor, *supra* note 14, *passim*.

crimination arguably has been at least as burdensome as that which has afflicted several of the minorities (including aliens and the poor) which have been shielded on occasion by the stricter judicial standard of review. However, the Court might reasonably find that discrimination against homosexuals has not been as burdensome as that affecting other minority groups, particularly blacks.

B. *The Interests of Homosexuals*

With respect to the second element in the balance—the importance of marriage licenses to homosexuals—Court precedent is again of little help. Even in the heterosexual context, the Supreme Court has never specifically ruled that marriage, standing alone, is a sufficiently fundamental right to elicit use of the strict scrutiny standard. However, the plausibility of such a holding is evident from a variety of cases. In the context of the Due Process Clause of the Fourteenth Amendment, the Court has stated that the right to marry is “one of the vital personal rights essential to the orderly pursuit of happiness by free men . . . one of the ‘basic civil rights of man,’ fundamental to our very existence.”¹⁸ This fact was found to be crucial to the Court’s conclusion that anti-miscegenation statutes deprive interracial couples of due process of law.¹⁹ The Court’s plurality opinion in *Griswold v. Connecticut*²⁰ again stressed the fundamental nature of the marriage relationship, noting that it draws special protection from a variety of constitutional safeguards, including the right of association.²¹ Most importantly, in *Skinner v. Oklahoma*,²² the progenitor of strict scrutiny cases, the Court held that the state’s sterilization statute required use of that more stringent standard in an equal protection context because of the fundamentality of “[m]arriage and procreation.”²³

However, even explicit judicial recognition of marriage as a fundamental interest to a heterosexual couple would not prove a fortiori that homosexuals have interests of a comparable magnitude in being per-

18. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

19. *Id.* See also *Meyer v. Nebraska*, 262 U.S. 390 (1923), which stated in dicta that marriage is part of that “liberty” protected by the Due Process clause because it is “essential to the orderly pursuit of happiness by free men.” *Id.* at 399. See also *Boddie v. Connecticut* 401 U.S. 371 (1971) (due process forbids denial of access to divorce courts because of inability to pay court fees and costs). The holding was based in part upon “the basic position of the marriage relationship in this society’s hierarchy of values.” *Id.* at 374.

20. 381 U.S. 479 (1965).

21. *Id.* at 486. See note 4 *supra*.

22. 316 U.S. 535 (1942).

23. *Id.* at 541. See also *United States v. Kras*, 41 U.S.L.W. 4117, 4121 (U.S. Jan. 10, 1973) (dicta).

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mitted to obtain marriage licenses. *Skinner* is not alone among Supreme Court cases in linking marriage with procreation when considering the importance of those rights.²⁴ It is unlikely, in light of Court dicta²⁵ and of the evolving attitudes toward marriage in our society, that constitutional protections surrounding the institution of marriage would be made dependent on the ability or willingness to bear children.²⁶ But it is still true that part of the importance of the marriage license to heterosexual couples derives from the social acceptance and legal protection which it guarantees for their natural children.²⁷ Such considerations would not apply to a same-sex pair.

On the other hand, state sanctioning of the marriage relationship brings with it numerous other legal, social and even psychic benefits which are of undiminished importance to homosexuals. Married individuals enjoy substantial tax benefits,²⁸ tort recovery for wrongful

24. *Skinner* states that the two rights together are "fundamental to the very existence of the race." 316 U.S. at 541. The Court implied a similar connection in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923):

The liberty thus guaranteed [by the Fourteenth Amendment] . . . denotes . . . freedom . . . to marry, establish a home and bring up children.

25. See the characterization of marriage by Justice Douglas in *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), set forth in note 4 *supra*.

26. The Minnesota Supreme Court in *Baker* itself recognized that any attempt by the state to require such intent might be both unworkable and unconstitutional. 291 Minn. at 313-14, 191 N.W.2d at 187.

27. See, e.g., 1971 Midyear Reports and Recommendations of the Family Law Section to the ABA House of Delegates on the Uniform Marriage and Divorce Act, 5 FAMILY L.Q. 133 (1971), and *The Uniform Marriage and Divorce Act*, *id.* at 205. Note that the present draft of the act provides for both maintenance and child support. *Id.* at 233-35. The *Baker* court's reason for denying mandamus to the petitioners was that "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis." 291 Minn. at 312, 191 N.W.2d at 186.

28. Benefits available under the present federal income tax law, for example, include: *Joint Returns*. INT. REV. CODE OF 1954, § 6013(a) provides that "A husband and wife may make a single return jointly of income taxes under subtitle A, even though one of the spouses has neither gross income nor deductions . . ." See *id.* at § 1 for rate of tax. In addition to the general advantage of factoring two incomes of different amounts into a single tax return, there are instances of joint returns being given other preferential treatment: See, e.g., *id.* at § 179(b) (with regard to additional first year depreciation allowance for small business, the ordinary limitation of \$10,000 is raised to \$20,000 for husband and wife filing jointly); *id.* at § 1244(b) (with regard to losses on small business stock, loss from the sale or exchange of an asset which is not a capital asset shall not exceed \$25,000 or \$50,000 in case of husband and wife filing joint returns); *id.* at § 121 (if taxpayer has attained age of 65, gross income does not include gain from the sale or exchange of property). For husband and wife filing a joint return, even though only one spouse satisfies the age requirement, both shall be treated as satisfying it; *id.* at § 37(i)(2)(A) (similar provision for retirement income).

Deductions. Spouses are allowed deductions for each other as dependents in certain instances. See INT. REV. CODE OF 1954, § 214 (when incapacitated or institutionalized); *id.* at § 213 (for medical expenses not compensated by insurance); *id.* at § 151 (generally, \$750 and an additional \$750 if one is blind).

However, certain provisions of the Internal Revenue Code potentially disfavor married people. See, e.g., INT. REV. CODE OF 1954, § 1239(a) provides that the gain from the sale of certain property between spouses is not considered a capital gain; *id.* at § 46(a)(4) (with regard to computing credit for investment in certain depreciable property, married individuals filing separate returns normally have only a \$12,500 limitation per individual

death,²⁹ intestate succession,³⁰ and a host of other statutory and common law privileges.³¹ They also incur special liabilities, such as the responsibility for support³² and maintenance³³ during marriage and for similar provision after divorce,³⁴ which may on balance be viewed as beneficial by a couple regardless of sexual orientation.³⁵ Beyond these strictly legal benefits, the formal status of marriage might reasonably be viewed as enhancing the stability, respectability, and emotional depth of any relationship between two individuals, regardless of whether the relationship is homosexual or heterosexual.³⁶

C. *The Interests of the Government*

Against the interests of homosexuals and the suspect nature of classifications disfavoring them must be placed the interests of the government in uniformly denying marriage licenses to same-sex couples. One possible argument against any official attempt to normalize the

instead of \$25,000); *id.* at § 48(c)(2)(B) (with regard to limitation on deductible cost of used property there is a \$25,000 ceiling for married persons filing separately instead of the normal \$50,000); *id.* at § 141 (standard deduction normally shall not exceed \$2,000, but for a married person filing separately, it shall not exceed \$1,000). *See also* Richards, *Discrimination Against Married Couples under Present Income Tax Laws*, 49 TAXES 526 (1971); Richards, *Single v. Married Income Tax Returns under the Tax Reform Act of 1969*, 48 TAXES 301 (1970).

29. *Coliseum Motor Co. v. Hestor*, 43 Wyo. 298, 305, 3 P.2d 105, 106 (1931).

30. *See, e.g.*, CONN. GEN. STAT. REV. § 46-12 (Supp. 1969).

31. Other benefits of legally sanctioned marriage include employee's family health care, group insurance, and social security survivor's benefits. Automobile insurance premiums are often lower for married people. *See generally* L. KANOWITZ, *WOMEN AND THE LAW* 35-93 (1969); H. KYRK, *THE FAMILY IN THE AMERICAN ECONOMY* (1953); J. MADDEN, *THE LAW OF PERSONS AND DOMESTIC RELATIONS* (1931). All benefits mentioned in this section which distinguish unfairly on the basis of sex may be subject to the effects of the Twenty-seventh Amendment if ratified. *See* p. 583 *et seq. infra*.

32. At common law and under various statutes the husband is bound to support his wife. *See, e.g.*, *In Re Fawcett's Estate*, 232 Cal. App. 2d 770, 777, 43 Cal. Rptr. 160, 165 (1965).

33. The husband is primarily liable for necessities furnished to his wife. *See, e.g.*, *Cromwell v. Anderson Furniture Co.*, 195 A.2d 264, 265 (D.C. Ct. App. 1963). *See also* Wanderer, *Family Expense Legislation as Affecting Common Law Liability of Husband for Necessaries*, 68 COM. L.J. 36 (1963).

34. *See, e.g.*, *Rambo v. Rambo*, 155 So. 2d 817 (Fla. App. 1963).

35. While some observers condemn the strictures of such laws, it cannot be denied that they often act to preserve the marriage relationship or at least insure that its break-up will follow an orderly pattern. *See Reports and Recommendations on the Uniform Marriage and Divorce Act and The Uniform Marriage and Divorce Act, supra* note 27.

36. *See* E. GRIFFITH, *MARRIAGE AND THE UNCONSCIOUS* 12 (1957); E. JAMES, *MARRIAGE AND SOCIETY* 204 (1952); A. MEARES, *MARRIAGE AND PERSONALITY* 7-8 (1958). *See also* New Jersey Welfare Rights Organization v. Cahill, 41 U.S.L.W. 1059 (U.S. Oct. 4, 1972), in which the Court observed that nonceremonial marriages lack "the aura of permanence that is concomitant with" ceremonial marriages and often do not provide "the stability necessary for the instillment" of proper social norms. *Id.* at 1059. Since few clergies are presently willing to marry a same-sex couple, the state's refusal to grant marriage licenses to such couples effectively deprives most of them of either a religious or a secular marriage ceremony.

The Legality of Homosexual Marriage

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homosexual relationship is that the government's approach toward homosexuality should be one of treatment and rehabilitation rather than tolerance and legalization. However, the implied assumption that most homosexuals can be "cured" is now widely questioned.³⁷

Another possible state interest lies in preventing an increase in the incidence of homosexuality among adolescents. However, it is highly questionable whether anyone can freely select his sexual orientation on the basis of comparative legal advantages.³⁸ Moreover, those countries which have legalized homosexual activity between consenting adults have recorded no perceptible increase in the incidence of homosexuality since such legalization.³⁹

Perhaps the most telling argument which the state might raise to justify the denial of marriage licenses to homosexual couples is that issuance of such licenses would run counter to the existing laws in many states against homosexual acts.⁴⁰ It is undoubtedly true that the legalization of homosexual marriage would put the states in the anomalous position of officially sanctioning a relationship which is very likely to encourage the commission of illegal sex acts. However, it should be noted that such statutes—prohibiting specified sexual activities between consenting adults in the privacy of their home—are very possibly unconstitutional.⁴¹ In any case, they are rarely enforced, even against homosexuals.⁴²

37. See WOLFENDEN REPORT, *supra* note 14, at 25-30. For a more recent examination of this continuing controversy and a discussion of the literature, see A. KARLEN, *supra* note 12, at 572-606. Even the most optimistic psychotherapists rarely put the "cure" rate at above one-third of the willing patients. A. KARLEN, *supra* note 12, at 572.

38. BIEBER AND ASSOCIATES, *supra* note 12, at 310-19.

39. H. HYDE, THE LOVE THAT DARED NOT SPEAK ITS NAME 269 (1970). THE WOLFENDEN REPORT, *supra* note 14, at 24, noted that in Sweden where reforms of laws dealing with homosexual acts had been instituted some time before, there had been no noticeable increase in homosexual activity over a ten-year period. In fact, it has been suggested that, to the extent that legalization may lessen some of the problems of homosexual life and make for more stable, long-term relationships, the amount of homosexual proselytizing of minors may well decrease in the wake of such reforms. See E. SCHUR, CRIMES WITHOUT VICTIMS 111 (1965). For the same reason, a similar decrease might follow the legalization of homosexual marriage.

40. A similar argument was accepted in *New Jersey Welfare Rights Organization v. Cahill*, 41 U.S.L.W. 1059 (U.S. Oct. 4, 1972), in which the Court justified the restriction of "Aid to Families of the Working Poor" to ceremonially married couples on the ground *inter alia* that the state has a proper and compelling interest in refusing to subsidize a living unit that encourages the violation of laws against fornication and adultery.

41. Such an argument might be based on the right to privacy as developed in such cases as *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969); and *Griswold v. Connecticut*, 381 U.S. 479 (1965). See Note, *Homosexuality and the Law*, 17 N.Y.L.F. 273, 295-96 (1971).

42. It is estimated that there are twenty convictions for every six million homosexual acts. Fisher, *The Sex Offender: Provisions for the Proposed New Maryland Criminal Code: Should Private, Consenting Adult Homosexual Behavior Be Excluded?*,

A final state interest which should be mentioned is of a more theoretical nature. The vast majority of Americans view marriage to be *by definition* a union of man and woman; a scarcely smaller number see homosexuality as "unnatural" and morally reprehensible.⁴³ The easy answer to these propositions is that the Fourteenth Amendment was passed for the express purpose of preventing the enforcement of exclusionary classifications based upon deeply felt beliefs which are not grounded on objective, rational distinctions. Not long before the passage of that Amendment, thousands of Americans sincerely believed that a voter was "by definition" a white, male, property owner, and that interracial marriages were immoral. Despite this argument, however, society's basic institutional conceptions must inevitably carry some weight in the balance of interests, even though they may not suffice alone to justify the denial of concrete legal benefits to those whose conceptions differ.⁴⁴

D. *Interests in the Balance*

In light of the difficulties with the equal protection analysis, it appears doubtful that classifications infringing upon homosexual marriage will receive the penetrating scrutiny evidenced in cases dealing with racial discrimination or with established fundamental interests such as criminal justice and the vote. Discrimination against homosexuals, while pervasive, has not involved the degree of government complicity which was largely responsible for the development of the strict scrutiny standard. Similarly, the interests of homosexuals in obtaining marriage licenses, while not inconsiderable, are not fully comparable to the corresponding interests of heterosexuals, which have not yet themselves formally attained the status of a "fundamental right" in the equal protection context.

However, even if strict scrutiny is not expressly applied to this issue,

30 MD. L. REV. 91, 95 (1970). See generally *Project: The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A. L. REV. 643, 689, 734-42 (1966).

43. As an indicator of this attitude, it should be noted that in most states, offenses described in the sodomy statutes are characterized by such terms as "abominable," "detestable," or "unnatural." Cantor, *Deviation and the Criminal Law*, 55 J. CRIM. L.C. & P.S. 441, 446 (1964). See also note 17 *supra*.

44. A stronger position is taken in P. DEVLIN, *THE ENFORCEMENT OF MORALS* 20 (1959); "[S]ociety is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions." For a critique of this position, see H.L.A. Hart, *Immorality and Treason*, 62 LISTENER 163 (1959). The Devlin-Hart controversy has been discussed extensively. See, e.g., Anastaplo, *Law and Morality: On Lord Devlin, Plato's Meno, and Jacob Klein*, 1967 WIS. L. REV. 231; Blackshield, *The Hart-Devlin Controversy in 1965*, 5 SYDNEY L. REV. 441 (1967); Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986 (1966).

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the Court would not be justified in falling back upon the simple "rationality" test which it developed primarily for the protection of economic interests.⁴⁵ Rather, in accordance with Justice Marshall's articulation, the Court should balance the conflicting interests of the state and homosexuals, taking into consideration the danger that legislative classifications disfavoring homosexuals may in fact be based upon prejudice and misinformation about the nature of that condition.

II. The Equal Rights Amendment

The Court's decision that the denial of marriage licenses to homosexuals does not abridge existing equal protection law would not save that practice from attack under the proposed Twenty-seventh Amendment. The version of the Amendment which is now before the states for ratification⁴⁶ declares, in relevant part, that "Equality of rights under law shall not be denied or abridged by the United States or by any State on account of sex."⁴⁷ The legislative history of the Amendment clearly supports the interpretation that sex is to be an impermissible legal classification, that rights are not to be abridged on the basis of sex.⁴⁸ A statute or administrative policy which permits a man to marry a woman, subject to certain regulatory restrictions, but categorically denies him the right to marry another man clearly entails a classification along sexual lines.

The possibility that such a classification would violate the Equal Rights Amendment was raised during both the congressional hearings and debates on that proposal.⁴⁹ The Amendment's chief sponsor in the

45. For cases applying the rationality test, see *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920); *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61 (1911).

46. The Equal Rights Amendment was passed by Congress on March 23, 1972. 118 CONG. REC. H. 2423 (daily ed. March 23, 1972). Less than two hours after the Senate acted, Hawaii became the first state to ratify the amendment. Congressional Quarterly 692 March 25, 1972. It will become effective two years after its ratification by a minimum of thirty-eight states.

47. H.R.J. RES. 208, S.R.J. 8 92d Cong., 1st Sess. (1971).

The first attempt at an equal rights amendment was the 1923 version: "Men and women shall have equal rights throughout the United States and in every place subject to its jurisdiction. Congress shall have power to enforce this article by appropriate legislation." H.R.J. RES. 75. 68th Cong., 1st Sess. (1923).

48. See, e.g., 118 CONG. REC. § 4561 (daily ed. March 22, 1972) (remarks of Senator Stevenson, co-sponsor of the amendment):

There is but one principle involved . . . sex, by and of itself cannot be used as a classification to deny or abridge any person of his or her equal rights under the law.

49. See 118 CONG. REC. § 4372 (daily ed. March 21, 1972) (remarks of Senator Ervin): Now, Mr. President, the idea that this law would legalize sexual activities between persons of the same sex or the marriage of persons of the same sex did not originate with me. I do not know what effect the amendment will have on laws which make homosexuality a crime or on laws which restrict the right of a man to marry another man or the right of a woman to marry a woman or which restricts the

Senate, Birch Bayh, rejected that interpretation, reasoning that a prohibition against homosexual marriage would not constitute impermissible discrimination so long as licenses were denied equally to both male and female pairs.⁵⁰ Senator Bayh's opinion should, of course, be given considerable weight in determining the legislative intent in phrasing and passing the Equal Rights Amendment.⁵¹ However, it cannot be seen as controlling unless it is at least reasonably consistent with established constitutional doctrine and the more general interpretation of the proposed Amendment as evidenced in the legislative history.

As Professor Paul Freund observed during the congressional debates, the Bayh reasoning runs counter to the Supreme Court's handling of the anti-miscegenation statutes under the Fourteenth Amendment.⁵² In *Loving v. Virginia*,⁵³ the Court ruled that a marriage license cannot be denied merely because the applicants are of different races. Such a denial was deemed to be an impermissible racial classification, even though it affected the races equally.⁵⁴

In light of the frequently asserted claim that the Equal Rights Amendment was designed to prohibit sex discrimination to at least

right of a woman to marry a man. But there are some very knowledgeable persons in the field of constitutional law . . . who take the position that if the equal rights amendment becomes a law, it will invalidate laws prohibiting homosexuality and laws which permit marriages between men and women.

See also 118 CONG. REC. § 4373 (daily ed. March 21, 1972) (remarks of Senator Ervin, quoting the testimony of Professor Paul Freund before the Judiciary Committee during hearings on the Amendment):

Indeed, if the law must be as indiscriminating concerning sex as it is toward race, it would follow that laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation. Whether the proponents of the amendment shrink from these implications is not clear.

50. 118 CONG. REC. § 4389 (daily ed. March 21, 1972):

The equal rights amendment would not prohibit a State from saying that the institution of marriage would be prohibited to men partners. It would not prohibit a State from saying the institution of marriage would be prohibited from two women partners. All it says is that if a State legislature makes a judgment that it is wrong for a man to marry a man, then it must say it is wrong for a woman to marry a woman—or if a State says it is wrong for a woman to marry a woman, then it must say that it is wrong for a man to marry a man.

Another of the Amendment's principal supporters, Professor Thomas Emerson of Yale Law School, has also expressed his belief that the Equal Rights Amendment was not intended to force the states to grant marriage licenses to homosexual couples and would not be so construed by the courts. Letter on file with the *Yale Law Journal*.

51. It should be noted, however, that various legislators dispute the importance of legislative history as a guide to interpretation of the Equal Rights Amendment. See, e.g., *Hearings on H.J. Res. 35, 208 Before Subcomm. no. 4 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. 75 (1971) (remarks of Representative Wiggins, paraphrasing the position of Senator Ervin):

The Senator just made the point that the Court at some future time will look at the words of the statute itself or the amendment itself and will not look to the legislative history, one of the reasons being that the States are not ratifying legislative history. They are ratifying the language itself.

52. See note 49 *supra*.

53. 388 U.S. 1 (1967).

54. *Id.* at 8.

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the degree that the Fourteenth Amendment presently prohibits racial discrimination,⁵⁵ *Loving* would appear to raise a strong presumption that homosexual couples could not be uniformly denied marriage licenses after ratification of the Twenty-seventh Amendment. That presumption can only be overcome by a showing that homosexual marriage falls within the scope of a particular countervailing interest or outright exception to the Equal Rights Amendment which would not have applied to the equal protection analysis in *Loving*. Such a showing cannot be made.

It was the clear intent of Congress to forbid classifications along sex lines regardless of the countervailing government interests which might be raised to justify such classifications. The language of the Equal Rights Amendment, which speaks of an "equality" that "shall not be denied or abridged," is much less flexible than that of the Fourteenth Amendment,⁵⁶ which has been held to permit the consideration of countervailing interests.⁵⁷ Professor Emerson explained that the new Amendment

means that differentiation on account of sex is totally precluded, regardless of whether a legislature or administrative agency may consider such a classification to be "reasonable," to be beneficial rather than "invidious," or to be justified by "compelling reasons."⁵⁸

The legislative history supports this proposition that the new Amendment represents an unqualified prohibition—an absolute guarantee.⁵⁹

55. See, e.g., 118 CONG. REC. § 4394 (daily ed. March 21, 1972) (remarks of Senator Gurney) in which the Senator maintained that passage of the Amendment was intended to compensate for the fact that the Supreme Court in *Reed v. Reed*, 404 U.S. 71 (1971), had failed to subject a sex classification to the strict scrutiny routinely afforded classifications based on race.

56. Compare the language of the Equal Rights Amendment, p. 583 *supra*, with the corresponding prohibition in the Fourteenth Amendment: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

57. See authorities listed in note 4 *supra*.

58. Emerson, *In Support of the Equal Rights Amendment*, 6 HAR. CIV. RIGHTS-CIV. LIB. L. REV. 225, 231 (1971). Professor Freund has agreed that "the proposal evidently contemplates no flexibility in construction but rather a rule of rigid equality." *Hearings*, *supra* note 51, at 72, quoted by Senator Ervin.

59. The House Judiciary Committee Report on the proposed amendment contained an additional section proposed by Congressman Wiggins. See p. 586 *infra*. Fourteen members of the Committee recorded their views separately, supporting the Amendment but opposing the additional section. H.R. REP. NO. 359, 92d Cong., 2d Sess. 5 (1971). This separate statement specifically cited Professor Emerson for the view that the Amendment establishes "the fundamental proposition that sex shall not be a factor in determining the legal rights of women or of men." *Id.* at 6. The House as a whole evidently adopted this separate statement when it rejected the Wiggins addition. Furthermore, the Senate Report on that body's version of the Equal Rights Amendment

In order to forestall this construction, the House Judiciary Committee recommended the following addition to the Amendment:

This article shall not impair the validity of any law of the United States which exempts a person from compulsory military service or any other law of the United States or of any State which reasonably promotes the health and safety of the people.⁶⁰

The purpose of the addition was to make it clear "that Congress and the State legislatures can take differences between the sexes into account in enacting laws which reasonably promote the health and safety of the people."⁶¹ The proposed addition was rejected in the House by a vote of 87-265.⁶²

While even an absolutist interpretation would not prevent the courts from balancing the Equal Rights Amendment against other *constitutional* provisions which conflict with its commands,⁶³ no such considerations were raised in defense of the anti-miscegenation laws and none would appear to be relevant to homosexual marriage. In discussing the Equal Rights Amendment, the only constitutional conflict envisioned by the commentators and legislators concerned the right to privacy,⁶⁴ and it can hardly be argued that the denial of a marriage license to a same-sex couple would in any way serve the interest of the individual in being *protected* from government intrusion into his private life.

The "absolute" prohibition contained in the Equal Rights Amendment is subject to only one exception, or what Professor Emerson and his associates have termed a "subsidiary principle":⁶⁵ the Amendment "would not prohibit reasonable classifications based on [physical] characteristics that are unique to one sex."⁶⁶ This exception was designed to shield laws, such as many of those applying to pregnancy or sperm donation, which affect only one sex but which cannot realistically be

stated that "the separate views of [the fourteen Committee members] in the House Report . . . state concisely and accurately the understanding of the Amendment . . ."

S. REP. NO. 689, 92d Cong., 2d Sess. 11 (1972).

60. H.R. REP. NO. 92-359, 92d Cong., 1st Sess. 1 (1971).

61. *Id.* at 2.

62. 117 CONG. REC. § 9390 (daily ed. October 12, 1971).

63. See Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 900 (1971). But see 118 CONG. REC. § 4258 (daily ed. March 20, 1972), in which Senator Ervin claims that the Equal Rights Amendment is "absolute in its terms" and is therefore not subject to balancing against other constitutional provisions.

64. See Brown, Emerson, Falk & Freedman, *supra* note 63, at 900; *Hearings, supra* note 51, at 40 (statement of Representative Griffiths).

65. Brown, Emerson, Falk & Freedman, *supra* note 63, at 893.

66. 118 CONG. REC. § 4585 (daily ed. March 22, 1972) (Senate Report, quoting H.R. Rep. 92-359).

said to "discriminate" against the other.⁶⁷ It might be argued that heterosexual intercourse and procreation are activities which, because of the unique physical characteristics of men and women, may only be performed by different-sex couples, that these activities are central to the societal concept of marriage, and that the state can therefore restrict the granting of marriage licenses to different-sex couples.

This reasoning, however, would import into the Equal Rights Amendment precisely those traditional societal judgments that the Amendment was designed to circumvent. For example, a law regulating the manner in which hospitals treat pregnant persons would not ordinarily discriminate against men, because it deals directly and narrowly with a unique physical characteristic which men do not possess. However, a law which stated that persons subject to pregnancy may not enlist in the armed services would probably be considered discriminatory, because it deals not only with an objective physical characteristic but also with overbroad societal judgments about the capabilities of persons having that characteristic.⁶⁸

In order to guard against illegitimate use of the "unique physical characteristics" principle, Professor Emerson and his associates have developed a series of factors which should be weighed by a court in determining the constitutionality of a physical characteristics classification under the Equal Rights Amendment.⁶⁹ These factors, which are not readily applicable to the peculiar circumstances presented by a ban on homosexual marriage, can be restated in terms of two more general tests: (1) are the physical characteristics upon which the classification is based truly unique to the class being regulated, and (2) is the regulation involved "closely, directly and narrowly confined to [those] unique physical characteristic[s]. . ."?⁷⁰

A statute restricting marriage licenses to heterosexuals would fail both of these tests. While it is perfectly true that no one has the physical characteristics to accomplish either procreation or heterosexual intercourse with a member of the same sex, it is equally true that many individuals, perhaps because of age or illness, are incapable of engaging in these activities with members of the opposite sex. Nor is there

67. *Hearings*, *supra* note 51, at 40 (statement of Representative Griffiths). See also Bayh, *The Need for the Equal Rights Amendment*, 48 NOTRE DAME LAWY, 80, 81 (1972); Brown, Emerson, Falk & Freedman, *supra* note 63, at 893.

68. See Brown, Emerson, Falk & Freedman, *supra* note 63, at 894-96, in which the authors come to a similar conclusion concerning the exclusion of women from government employment because of the absenteeism which might result from their potential to become pregnant.

69. Brown, Emerson, Falk & Freedman, *supra* note 63, at 895-96.

70. *Id.* at 894.

the necessary close relationship between these activities and the institution of legal marriage as it is now permitted. As shown above, the ability or willingness to procreate is not a prerequisite of legal marriage in this country,⁷¹ nor is the legality of an existing marriage in any way affected by the decision of both partners to forego heterosexual intercourse. More generally, the belief that two persons having the same primary sexual characteristics *cannot* benefit from many of the emotional, social and legal consequences of the legal status of marriage is factually untrue;⁷² the belief that they *should* not so benefit is a subjective conclusion beyond the scope of the unique physical characteristics principle.

With no relevant or countervailing interests to place against the rule of "absolute" equality of treatment, the proposed Equal Rights Amendment should be interpreted as prohibiting the uniform denial of marriage licenses to same-sex couples. If such a denial were to be permitted, it would have to be on the basis of an analysis which was consistent with the strict interpretation described above, and in addition, as Professor Emerson has pointed out, in matters as important as marriage "the burden of persuasion is on those who would impose different treatment on the basis of sex."⁷³ In the case of laws prohibiting homosexual marriage, such a burden cannot be carried.

III. Quasi-Marital Status—an Alternative Approach

Although private consensual homosexual activity might be legalized in this country without creating many problems, as it was in Great Britain, the expansion of marriage to encompass homosexual couples would alter the nature of a fundamental institution as traditionally conceived.

The Supreme Court may in the future decide that such alteration is beyond its competence and therefore that marriage should be confined to its present definition absent a positive move on the part of individual state legislatures to broaden it.⁷⁴ If such proves to be the

71. See p. 579 and note 26 *supra*.

72. See pp. 579-80 *supra*.

73. Brown, Emerson, Falk & Freedman, *supra* note 63, at 893.

74. This was essentially the Court's approach to polygamy in *Reynolds v. United States*, 98 U.S. 145, 165 (1878).

Whether that nineteenth century ruling would be affirmed today is at least open to question in light of the *Loving* decision. Mormons would appear to have a particularly strong argument against the *Reynolds* decision based on *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Wisconsin's attempt to force Old Amish children to attend school

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case, particular legal benefits available only to married couples might still be attacked on equal protection grounds under both the Fourteenth and Twenty-seventh Amendments.

If the Court granted homosexuals some of these benefits—without compelling states to grant marriage licenses—it might eventually create in effect a “quasi-marital” status. State legislatures might explicitly grant such a status, and specify the attendant rights.⁷⁵ For example, benefits such as tax advantages, wrongful death rights and intestate inheritance could be granted more easily to the homosexual couple than could inclusion within the complete maintenance-divorce-alimony complex of laws involving substantial state regulation. An analogy can be drawn to the line of Supreme Court decisions which has given illegitimate children certain rights, albeit a less-than-equal status in comparison to their legitimate siblings.⁷⁶

IV. Conclusion

In the final analysis, the Court should not avoid granting full relief from discriminatory legislation simply because that legislation is based on deeply held beliefs. A quasi-marital status might satisfy many of the interests of homosexuals in gaining marriage licenses, but it would inevitably fall short of fully normalizing their relationships. A legislative stigma of deviance would remain. The stringent requirements of the proposed Equal Rights Amendment argue strongly for removal of this stigma by granting marriage licenses to homosexual couples who satisfy reasonable and non-discriminatory qualifications.

through age sixteen held an unconstitutional infringement on freedom of religion), as noted by Justice Douglas in dissent, *id.* at 247. See generally H. Foster, *Marriage: A “Basic Civil Right of Man,”* 37 *FORDHAM L. REV.* 51 (1968).

75. The possibility of such a legislatively created quasi-marital status for homosexuals was suggested in J. GOLDSTEIN & J. KATZ, *THE FAMILY AND THE LAW* 9 n.1 (1965).

76. *Labine v. Vincent*, 401 U.S. 532 (1971); *Glonn v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 68 (1968).

RESUME

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UNDERGRADUATE RECORD

Degree — Bachelor of Arts 1971

Rutgers University
New Brunswick, New Jersey

Academic Distinctions:

Summa Cum Laude with highest distinction.

Phi Beta Kappa

Dean's List all semesters.

I was graduated from college in two years with a straight 'A' (1.00) average.

Henry Rutgers Scholar — an honors program for independent interdisciplinary research which culminated in a 550 page thesis on the medical knowledge of the Talmudic savants and a public presentation to the university community.

Activities:

Captain — Mettler Basketball Team (intramural)

Judo Club (Green Belt)

Big Brother Program — designed to enable an interface of underprivileged urban children with college students on a one-to-one basis.

Pre-Legal Society

LAW SCHOOL RECORD

Juris Doctor Degree 1974

Yale Law School
New Haven, Connecticut

Academic Distinctions:

Editor — Yale Law Journal
Topics Advisor — Yale Law Journal
Honors in 70% of graded courses.

Activities:

Executive Director — (YLS) Yale Legislative Services
YLS is a service organization which provides a wide range of free, non-partisan legislative services — innovative legislative drafting, reports on specific bills, and reports analyzing legal and policy problems for legislatures and other governmental bodies on the municipal, state and federal levels.

Member of the National Uniform Law Advisory Committee of the National Notary Association, Woodland Hills, California. Helped compose comprehensive draft legislation for a Uniform Notary Act.

Rapporteur for Panel Discussion on Expulsion and Expatriation at 67th Annual Meeting of the American Society of International Law, Washington, D.C. The presentations were published in the ASIL's Proceedings.

PROFESSIONAL EXPERIENCE

Member of the New Jersey Bar; District of Columbia Bar; New York Bar; District Court of New Jersey; District Court of the Southern District of New York; U.S. Court of Appeals for the Second and Third Circuits; United States Tax Court; United States Customs Court; United States Court of Customs and Patent Appeals.

I was an associate with the law firm of Fried, Frank, Harris, Shriver & Jacobson, 120 Broadway, New York, N.Y. The firm, which was established before the turn of the century, consists of approximately 300 attorneys, with offices in New York, Washington and London. It is a Wall Street firm with a general practice. The clients vary in size and type of business. They include major investment banking houses and large public corporations. The firm is divided into five departments: real estate, litigation, tax, corporate and estates and trusts. I had always been in the litigation department where my areas of concern have included: commercial law, security law, mergers and acquisitions, environmental law, public utility law, international law, anti-trust, and federal procedure.

The above areas were focused upon in a number of diverse forums including: state and federal courts on both the trial and appellate level; as well as numerous federal agencies such as the SEC, FERC, EPA, FPC; as well as many state agencies, e.g., securities commissions, pollution control commissions, public utility commissions, tax commissions, and the American Arbitration Association.

I have been engaged in every aspect of litigation:

- (a) drafting of complaints, answers, interrogatories, document requests, subpoenas, briefs, affidavits;
- (b) taking and defending depositions and examinations before trial;
- (c) supervising company wide pre-trial discovery;
- (d) practicing federal and state court motion practice;
- (e) preparing witnesses, both lay and experts, for direct as well as cross examination;
- (f) developing outline of proofs, exhibits and substantive testimony for trial;
- (g) personally advising and counselling clients on all stages of litigation process as well as both prophylactic and defensive steps;
- (h) personally arguing and appearing before state and federal judges, state and federal administrative agencies, and the American Arbitration Association;
- (i) negotiating settlements of disputes and pending litigations;
- (j) supervising other attorneys and professionals in all of the above; and
- (k) coordinating with co-counsel and of counsel in all of the above.

Since 1980, I have been engaged in private practice in Elizabeth, New Jersey. My concentration has been corporate work and real estate.

JUDICIAL EXPERIENCE

On April 4, 1985 I was sworn in as Municipal Court Judge of Elizabeth. The appointment was made by the Assignment Judge of Union County, the Honorable Edward W. Beglin, Jr. pursuant to NJSA 2A:8-10 and in accordance with rule 1:12-3 (a), rule 7:4-3 (b)(1). I served as an acting judge on a part-time basis. I also on occasion served as an acting judge for the City of Union.

The Municipal Court has jurisdiction over petty misdemeanors and misdemeanors which can result in imprisonment for up to a year. Typical cases, include assault, disorderly conduct, theft, criminal mischief, possession of marijuana, etc. All traffic offenses including drunk driving as well as violation of all city ordinances are heard in municipal court.

None of my decisions were ever appealed. Cases I heard prompted me to write a number of articles for publication in the New Jersey Law Journal. I was a columnist for the Law Journal with a monthly column entitled "View From the Municipal Bench". I attended a regular cycle of educational programs for municipal court judges sponsored by the Superior Court.

GOVERNMENTAL EXPERIENCE

On August 6, 1979, I was appointed Assistant Counsel to the Honorable Governor Brendan T. Byrne. My duties included advising on pending and proposed legislation, coordinating access between the various State departments and the Governor's office, counselling on policy issues and interdepartmental differences raised by the aforementioned departments, providing guidance to diverse State councils and commissions, and acting on behalf of the Governor and the Counsel on an assigned basis.

In April of 1979 I was appointed the Chairman of the Human Rights Commission of Elizabeth by the Honorable Mayor Thomas G. Dunn. The Commission was created by City Council pursuant to state-wide legislation to ensure that individual rights and freedoms are promoted. The objective of the Commission is to improve the quality of life for the residents of the City. Specifically, to protect against the deprivation or denial of any rights by any governmental agency, authority, their officials or employees.

In March of 1986, I was nominated by the Honorable Governor Thomas Kean and confirmed by the Senate Judiciary Committee and the Senate as a whole to be a Commissioner of the Public Broadcasting Authority. This autonomous agency operates New Jersey's statewide public television system consisting of four stations. Known as New Jersey Network, it is the largest producer of local programming of any public television organization in the United States.

TEACHING EXPERIENCE

Assistant in instruction at Yale College for a course entitled "Law in Society" under Professor Charles Black of the Yale Law School. The course was designed to teach law as a social science in the context of a liberal arts education.

Assistant Adjunct Professor of Law at New York Law School. The course prepared, but not taught was "Jewish Law" and focuses on a number of jurisprudential perspectives, including: (1) special attributes of a legal system that is predicated on religious considerations, (2) relationships of the law of quasi-autonomous communities to the politico-legal systems of which they are a part, (3) purported and achieved objectives of the system's application, (4) comparative attributes of other systems or frameworks.

Various public lectures on law before university, community and congregational groups, including: Temple Medical School; Rutgers University; J.E.C.; Cong. Talmud Torah of Flatbush.

COMMUNITY SERVICE

Treasurer and board member of the Jewish Educational Center, 330 Elmora Avenue, Elizabeth, New Jersey, founded a half a century ago by Rabbi Teitz, the Dean of New Jersey Jewry, the JEC consists of four synagogues, elementary and high schools for 800 students, two radio programs, a publishing division, and other endeavors.

Board member of Camp Dora Golding, R.D. #2, East Stroudsburg, Pennsylvania. A boys camp for 240 children chartered by the State of New York and a beneficiary of the Federation of Jewish Philanthropies.

Board member of Memorial General Hospital, 1000 Galloping Hill Road, Union, New Jersey. Founded in 1944, it is a 201 bed voluntary non-profit community hospital serving over 50,000 patients annually. The physician staff exceeds 250, while the nursing and ancillary staff consists of 750 employees.

PUBLICATIONS

Constitutional Law

1. The Legality of Homosexual Marriage (co-author) 82 Yale Law Journal 573 (1973).
Capsulized in 23 Law Review Digest 146.
2. Constitutional, Aspects of the Homosexual's Right to a Marriage License 12 Journal of Family Law 607 (1973).
3. Double Jeopardy and Hung Juries: United States v. Castellanos 5 Rutgers Camden Law Journal 218 (1974).
4. Rebuttal: An alternative Viewpoint on the Relationship of Unanimous Verdicts and Reasonable Doubt 11 Valparaiso Law Review 29 (1977).

International Law

5. Emigration: A Policy Oriented Inquiry 2 Syracuse Journal of International Law 149 (1974).

General

6. A Report and Proposed Legislation on Notaries Public 16 National Notary 8 (1973).
7. The Portrayal of Women in Television Advertising (co-author) 27 Federal Communications Bar Journal 71 (1974). 3 Advertising Law Anthology.

Torts

8. Compensating Those Injured Through Experimentation 48 Connecticut Bar Journal 398 (1974). 33 Federal Bar Journal 322 (1974).

Legal History

9. Censorship of Medical Works Hiding of the Book of Remedies 7 Dine Israel 151 (1976)

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| 10. Copyright in Jewish Law | 4 Performing Arts Review 33 (1973). 14 Tradition 28 (1974). |
| 11. Adoption in Jewish Law | 48 Connecticut Bar Journal 73 (1974). |
| 12. The Right of Appeal in Talmudic Law | 6 Case Western Reserve Journal of International Law 33 (1974). |
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| 14. Liability of the Physician in Jewish Law | 10 Israel Law Review 378 (1975). |
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| 16. Adverse Possession and Interruptions of the Prescriptive Period (Hebrew) | 1 Mirrer Yeshivah Journal 51 (1975). |
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| 20. Does the Oil Swim to the Top of the Water on Time? | 116 NJLJ 47 (July 11, 1985) |
| 21. Dress for Success | 116 NJLJ 195 (August 8, 1985) |
| 22. Better to do Damage than to Steal | 116 NJLJ 330 (September 5, 1985) |
| 23. Municipal Court or Municipal School of Law | 116 NJLJ 359 (September 12, 1985) |
| 24. Municipal Code or Municipal Mosaic | 116 NJLJ 544 (October 24, 1985) |
| 25. Live and Learn — An Obscure Exemption. | 116 NJLJ 701 (November 29, 1985) |
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