NOTES

Marital Status Classifications: Protecting Homosexual and Heterosexual Cohabitors

> When it is determined that the common law or the judge-made law is unjust or out of step with the times, we should have no reluctance to change it. . . . The law is not, nor should it be, static. It must keep pace with changes in our society since it was never intended . . . to be cast in iron.[1]

Introduction

Homosexuals[2] face a unique set of obstacles[3] which prevents their enjoyment of the same civil rights afforded heterosexuals. One such obstacle is the ban in every state on marriage by homosexual couples,[4] which denies to homosexuals the legal, financial, social, and psychological benefits and privileges afforded to married heterosexuals.[5] Homosex-

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1. Butcher v. Superior Court, 139 Cal. App. 3d 58, 64, 188 Cal. Rptr. 503, 507 (1983).

2. Throughout this Note, the term "homosexual" will be used to denote male and female homosexuals.

3. *See infra* notes 100-116 and accompanying text.

4. M.T. v. J.T., 140 N.J. Super. 77, 355 A.2d 204 (1976) (recognizing the national ban on marriage); *accord* B. v. B., 78 Misc. 2d 112, 355 N.Y.S.2d 712 (1974) (holding that a marriage between two persons of the same sex is a nullity and forms no legal relationship); Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974); Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972).

5. Marriage affords the participants:

> [P]referential tax treatment, a right of action with regard to a [spouse's] fatal accident[,] . . . social security benefits, and protection of the law of intestate succession. Moreover, the married couple benefits from innumerable nongovernmental benefits such as employee family health care, group insurance, lower automobile insurance, family membership in various organizations, and the ability to hold real estate by the entirety. Beyond these legal and economic benefits, marriage is . . . psychologically beneficial to the participants by strengthening the stability, emotional health and societal respectability of the relationship.

Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 874 (1979). *See also* Note, *The Right of an Unmarried Cohabitant to an Action for Negligent Infliction of Emotional Distress in California*, 15 PAC. L.J. 925 (1984) [hereinafter Note, *Emotional Distress*]; Note, *Homosexuals' Right to Marry: A Constitutional Test and a Legislative Solution*, 128 U. PA. L. REV. 193 (1979) [hereinafter Note,

ual couples may not gain the legal rights of marriage which cohabiting[6] heterosexuals may gain at any time by marrying.

This denial of rights based on marital status carries constitutional implications: equal protection of the law is violated when equivalent groups are treated differently.[7] This Note uses the term "marital status classification" to denote a law which separates persons for disparate treatment solely on the basis of marital status. Marital status classifications particularly injure two segments of society: homosexuals and cohabitors.

This Note discusses the rights currently afforded to homosexual cohabitors and focuses particularly on the various approaches available to homosexual couples to enforce these rights. Part One discusses *Hinman v. Department of Personnel*,[8] a California case in which a homosexual couple was denied employment benefits under a statute based on a marital status classification. Part Two focuses on the Equal Protection Clause,[9] the rights presently afforded to homosexual cohabitors, and the current legislative trends regarding homosexual cohabitors. Part Three applies an equal protection analysis to the facts in *Hinman*, compares homosexual cohabitors to heterosexual cohabitors, and questions the utility and propriety of legislative classifications based on marital status. This Note concludes with a proposal to facilitate judicial protection of the rights of unmarried cohabitors, whether heterosexual or homosexual, by replacing marital status with a new test to determine the legal significance of a couple's relationship. Under this new test, couples able to demonstrate the stability and significance of their relationship would be afforded the same legal protection as married couples.

I. The Rights of Homosexuals and Cohabitors and *Hinman v. Department of Personnel*

Homosexual cohabitors and heterosexual cohabitors have the same property rights. Both can establish contractual relationships, such as contracts of mutual support,[10] or become beneficiaries of insurance poli-

Right to Marry]; Mitchelson, *Equal Protection for Unmarried Cohabitors: An Insider's Look at* Marvin v. Marvin, 5 PEPPERDINE L. REV. 283 (1978); Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 576 (1973).

6. A cohabitor or cohabitant is "a person steadily living with another under marriage-like conditions without the good faith belief that he [or she] is legally married." Note, *Justifying the Denial of Wrongful Death Action to Cohabitants*, 20 SAN DIEGO L. REV. 417, 417 n.2 (1983) [hereinafter Note, *Denial of Wrongful Death*].

7. U.S. CONST. amend. XIV, § 1.

8. 167 Cal. App. 3d 516, 213 Cal. Rptr. 410 (1985).

9. U.S. CONST. amend. XIV, § 1. *See infra* note 43 and accompanying text.

10. *See, e.g., Hinman*, 167 Cal. App. 3d at 520-21, 213 Cal. Rptr. at 412; *infra* notes 163-165 and accompanying text.

cies.[11] Both can be co-owners of real and personal property and own joint checking accounts.[12] Neither can be arbitrarily discriminated against in employment on the basis of their sexual orientation.[13]

However, heterosexuals and homosexuals are treated differently in regard to personal rights not directly related to property. Heterosexual cohabitors generally have the right to marry,[14] and after living together over a long period of time, such couples can have their relationship decreed a common-law marriage, particularly if they have children.[15] Homosexuals cannot marry,[16] nor can their relationships develop into common-law marriages, regardless of how long they live together.[17] In addition, homosexuals have less privacy protection than heterosexual cohabitors. For instance, heterosexual cohabitors' private consensual sexual relations are protected by the right to privacy,[18] while homosexual relations are not protected.[19]

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11. *See, e.g., Hinman*, 167 Cal. App. 3d at 521, 213 Cal. Rptr. at 412; *see infra* notes 163-165 and accompanying text.

12. *See, e.g., Hinman*, 167 Cal. App. 3d at 521, 213 Cal. Rptr. at 412; *see infra* notes 163-165 and accompanying text.

13. *See* Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969); Gay Law Students v. Pacific Tel. and Tel., 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

In 1979, California's Governor issued Executive Order B-54-79, providing in part: "[The] California Constitution guarantees the inalienable right of privacy for all people . . . [and] government must not single out sexual minorities for harassment or recognize sexual orientation as a basis for discrimination; . . . the state government . . . shall not discriminate in state employment against any individual based solely upon the individual's sexual preference." (reported in *Hinman*, 167 Cal. App. 3d at 530 n.10, 213 Cal. Rptr. at 419 n.10). However, the executive order has been narrowly construed by the courts. For instance, the court of appeals in *Hinman* held that "nothing in the order . . . applies to alleged differences in benefit coverages. [The order applies to discrimination against employees themselves, not their lovers.] There are no differences in dental benefits given homosexual and heterosexual unmarried state employees, and thus, . . . there is . . . no discrimination at all." 167 Cal. App. 3d at 530, 213 Cal. Rptr. at 419.

14. Note, *Right to Marry, supra* note 5. *See also* Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974) (deeming the right to marry a fundamental right).

15. A common-law marriage is one not solemnized in the ordinary way (*i.e.*, non-ceremonial) but created by an agreement to marry, followed by cohabitation. Such marriage requires a positive mutual agreement—permanent and exclusive of others—to enter into a marriage relationship, cohabitation sufficient to warrant a fulfillment of the necessary relationship of man and wife, and an assumption of marital duties and obligations. Marshall v. State, 537 P.2d 423, 429 (Okla. Crim. App. 1975).

16. *See supra* note 4.

17. Common-law marriage, by definition, can only occur between those legally capable of making a marriage contract, thus effectively precluding homosexuals. BLACK'S LAW DICTIONARY 251 (5th ed. 1979). R. ACHTENBERG, SEXUAL ORIENTATION AND THE LAW § 3.04[1] (1985).

18. Bowers v. Hardwick, 106 S. Ct. 2841 (1986).

19. *Id.* at 2844. In *Bowers v. Hardwick*, the Supreme Court stated that the right to privacy, which previously was thought to offer protection to all private consensual relations, stemmed from an amorphous link between heterosexual sex and procreation and family:

Homosexual cohabitors, to enforce their rights and to gain access to government entitlements, have turned to marriage alternatives such as "adult adoption,"[20] wherein one cohabitor adopts the other as his legal child. Courts have had varied reactions to homosexual adult adoptions, ranging from support to condemnation.[21] A few courts have allowed adoptions when the participants' motivations were limited to the creation of a legally binding "family" relationship between two homosexuals. In *In re Adult Anonymous II*,[22] the parties' purpose in the adult adoption was neither insincere nor fraudulent, so the court allowed the adoption.[23] Other courts have reacted negatively to adult adoptions, which they suspect are an attempt to create a pseudo-marriage between homosexuals;[24] such adult adoptions have been termed a "grotesque parody" of a parent-child relationship.[25] Even if the adult adoption is upheld by a court, it does not ensure that a homosexual couple will receive the same legal benefits as a married couple would receive if the statute, like the one in *Hinman*, only covers spouses and minor children.

A review of legislation dealing with cohabitors over the past fifteen years indicates that the legislature may be moving toward more equivalent treatment of married and unmarried couples.[26] In 1975, Cali-

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> [N]one of the rights announced in [the right to privacy] cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . .

Id.

20. Adult adoption is a binding and legally recognized family relationship established when one adult adopts another. In California, an estimated 85 to 90 homosexual adult adoptions occur annually. Note, *Adult Adoptions: A "New" Legal Tool for Lesbians and Gay Men*, 14 GOLDEN GATE L. REV. 667, 702 (1984). The government entitlements and benefits flowing from the creation of a family relationship through adult adoption include the following: (1) it provides inheritance rights; (2) it deems a person next-of-kin for purposes such as gaining access to information limited to family members; (3) it helps the couple evade housing and zoning restrictions; (4) it helps the couple gain insurance and unemployment benefits; and (5) it allows the couple to immigrate into the United States and create a family unit. R. ACHTENBERG, *supra* note 17, at § 1.05[2].

21. One court held that a homosexual's adoption of another adult was acceptable solely for the purpose of preventing the adoptee's disapproving family from invalidating preexisting property arrangements between the two men. *In re* Adoption of Adult Anonymous I, 106 Misc. 2d 792, 800, 435 N.Y.S.2d 527, 531 (1981). Adult adoptions are disallowed if the participants' motive is to create a "pseudo-marriage." *Id.*

22. 88 A.D.2d 30, 35, 452 N.Y.S.2d 198, 201 (1982).

23. *Id.*

24. In *In re Robert Paul P.*, the court strongly stated that adoption cannot take the place of marriages, contracts, or wills. 117 Misc. 2d 279, 458 N.Y.S.2d 178, *aff'd*, 63 N.Y.2d 233, 471 N.E.2d 424, 481 N.Y.S.2d 652 (1983).

25. In *In re Robert Paul P.*, the court refused to allow a 57 year old man to adopt his 50 year old lover because it found their actual purpose was to create a pseudo-marriage. *Id.*

26. *See infra* notes 26-29. But see Elden v. Sheldon, 164 Cal. App. 3d 745, 210 Cal. Rptr. 755 (1985), where the court of appeals indicated that marriage and cohabitation are not legally equivalent relationships:

fornia's Uniform Parentage Act[27] expressly made marital status irrelevant to the definition of the legal parent-child relationship and its accompanying rights. In 1976, California passed the Fair Employment and Housing Act,[28] adding marital status as an unlawful basis for housing discrimination.[29]

However, homosexual and heterosexual cohabitors still do not have many rights that married persons possess. For instance, unlike married persons, homosexual and heterosexual cohabitors cannot state a cause of action for loss of the companionship of their partner.[30] Cohabitors are denied the tax benefits, social security benefits, group insurance availability, and lower automobile insurance premiums enjoyed by the married.[31] Cohabitors are also unprotected by the laws of intestate succession. They cannot hold property by the entirety in common law

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> [*Marvin*] merely held that parties to a meretricious relationship have the same rights to enforce contracts and to assert their equitable interests in property acquired through their effort as do other unmarried persons. Other cases have recognized the limitations of *Marvin* and have refused to find that a non-marital relationship is the equivalent of marriage.

Id. at 757 n.4 (citing Garcia v. Douglas Aircraft Co., 133 Cal. App. 3d 890, 184 Cal. Rptr. 390 (1982); Harrod v. Pacific Southwest Airlines, 118 Cal. App. 3d 155, 173 Cal. Rptr. 68 (1981)). See generally Note, *Denial of Wrongful Death*, *supra* note 6, at 434, recognizing a general trend toward equating cohabitation and marriage and arguing that obliteration of the marital status distinction actually lessens cohabitors' freedom of choice: "Liberty is lost when choice is destroyed; choice is destroyed when cohabitation becomes marriage-like because only one type of relationship remains where two types existed before. Denial of legal equivalence between cohabitant and spouse is necessary to end the post-*Marvin* trend [of equating the two]." *Id.*

27. CAL. CIV. CODE §§ 7000-7021 (West 1977 & Supp. 1986). Another law, the 1969 Family Law Act, CAL. CIV. CODE §§ 5100 et seq. (West 1977 & Supp. 1986), was also judicially interpreted so as to lessen the distinction between married and unmarried persons. The California Supreme Court held that when the Act was drafted in the 1960's, the issue of unmarried cohabitation was not addressed, and thus cohabitors' property settlements cannot be said to have been purposefully excluded from coverage. Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). Because the court could easily have excluded cohabitors from the Family Law Act, this ruling is consistent with the trend to protect unmarried cohabitors' rights.

28. CAL. GOV'T CODE § 12955 (West 1980). Some commentators view this statute as a tool for further equating treatment of married persons and cohabitors. "Already *Marvin* is used to extend legal equivalence between spouse and cohabitant. An innovative court might also rely on California Government Code section 12955 to further attach legal significance to cohabitation." Note, *Denial of Wrongful Death*, *supra* note 6, at 434. "The cited statute may represent a policy of equating cohabitation with marriage . . . and may be used by a court to rationalize further expansion." *Id.* at 434 n.102.

29. A California court of appeals interpreted the Fair Employment and Housing Act to indicate that there is no legitimate business interest in discriminating on the basis of marital status or cohabitation. Hess v. Fair Employment & Housing Comm'n, 138 Cal. App. 3d 232, 187 Cal. Rptr. 712 (1982). In Atkisson v. Kern County Housing Authority, 59 Cal. App. 3d 89, 130 Cal. Rptr. 375 (1976), the court earlier viewed the Act as proclaiming a general policy statement that California would no longer advocate, at least in the housing realm, marital status discrimination.

30. *See* R. ACHTENBERG, *supra* note 17.

31. *Id.*

states;[32] nor can they hold community property in community property states.[33] Homosexual and heterosexual cohabitors are not entitled to their partner's employee health care benefits.[34]

Hinman v. Department of Personnel[35] illustrates the problems encountered by homosexual couples attempting to gain the rights and privileges of married couples.[36] Boyce Hinman, an employee of the California Employment Development Department, applied through his prepaid group dental plan for dental coverage for himself and his cohabiting lover of twelve years, Larry Beatty.[37] The statute providing dental benefits[38] limited eligibility to the employee's spouse and children.[39] Hinman's lover was denied coverage because he was not married to Hinman.

Hinman brought an action for declaratory relief, claiming that the dental benefit statute denied homosexuals equal protection because it was a "sexual orientation classification"[40] which discriminated against homosexuals: California forbade him from marrying his cohabiting lover because they were both men, while the state denied benefits to his would-be spouse because they were not married. Hinman asserted that homosexual cohabitors are similar to married couples and should be treated

32. An estate by the entirety is a "[t]ype of joint estate which may be held only by two persons who are married to each other at the time that the estate is created . . . ." BLACK'S LAW DICTIONARY 492 (5th ed. 1979).

33. Community property is "[p]roperty owned in common by husband and wife each having an undivided one-half interest by reason of their marital status. The eight states with community property systems are: Louisiana, Texas, New Mexico, Arizona, California, Washington, Idaho and Nevada . . . ." *Id.* at 254.

34. *See, e.g.*, Hinman v. Dep't of Personnel, 167 Cal. App. 3d 516, 213 Cal. Rptr. 410 (1985).

35. *Id.*

36. Specifically, the couple in *Hinman* was attempting to obtain the property rights in employment benefits afforded to other state employees' spouses.

37. 167 Cal. App. 3d at 512, 213 Cal. Rptr. at 412.

38. State Employees' Dental Care Act, CAL. GOV'T CODE §§ 22950-22952 (West 1980).

39. The Act itself does not define "spouse" or "child;" the definitions are set forth in the Health Care Act, CAL. GOV'T CODE §§ 22751-22860 (West 1961), which defines "family member" as "an employee's or annuitant's spouse and any unmarried child (including an adopted child, a step child, or a recognized natural child. . . .)"

40. *Hinman*, 167 Cal. App. 3d at 519, 213 Cal. Rptr. at 411. A sexual orientation classification exists when a law classifies people according to their sexual orientation, and then treats the classes differently. *Id. See also* Rivera, *supra* note 5; Adamany, *The Supreme Court at the Frontier of Politics: The Issue of Gay Rights*, 4 HAMLINE L. REV. 185, 221 (1981).

Hinman's argument rested on the proposition that a "seemingly neutral statute which actually disqualifies a disproportionate number of one [group] is discriminatory and vulnerable to [attack]." Boren v. Department of Employment Dev., 59 Cal. App. 3d 250, 257, 130 Cal. Rptr. 683, 687 (1976). *See generally* United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1886) (discrimination in the enforcement or administration of a statute fair on its face is as much a denial of equal protection as the enactment of a statute which is discriminatory in the first place); Hardy v. Stumpf, 37 Cal. App. 3d 958, 112 Cal. Rptr. 739 (1974).

equally under the statute: homosexual couples should be awarded the same dental benefits as married couples receive.

Hinman's claim was denied by the trial and appellate courts.[41] The courts saw homosexual cohabitors as similarly situated to unmarried employees, not to married employees, and thus the state's denial of benefits to Hinman's lover was not because he was homosexual, but because he was unmarried. Furthermore, the courts asserted that legislative classifications based on marital status are not necessarily in violation of the Equal Protection Clause.[42]

II. Equal Protection for Homosexuals and Cohabitors

A. Purpose of the Equal Protection Clause

The Fourteenth Amendment to the United States Constitution provides: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[43] This does not require a state to treat everyone the same under its legislative schemes; rather, equal protection requires that groups similarly situated be treated equally.[44] Under the Equal Protection Clause, a court first questions whether the groups classified are indeed similarly situated.[45] The court then uses one of the various equal protection standards to determine whether the clause has been violated.

B. The Various Equal Protection Standards

The Supreme Court uses at least three different equal protection standards when examining the constitutionality of a statute:[46] (1) a

41. A petition for rehearing was denied May 23, 1985, and the California Supreme Court denied review August 15, 1985. 167 Cal. App. 3d at 531, 213 Cal. Rptr. at 410.

42. *See infra* note 82 and accompanying text.

43. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment applies only to the states and not the federal government; however, the Fifth Amendment Due Process Clause incorporates the Fourteenth Amendment Equal Protection Clause, and therefore the federal government must also provide equal protection. Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

44. *See* Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973); Purdy & Fitzpatrick v. California, 71 Cal. 2d 566, 578, 456 P.2d 645, 653, 90 Cal. Rptr. 77, 85 (1969); Darcy v. Mayor of San Jose, 104 Cal. 642, 645-46, 38 P. 500, 500 (1894); Sunstein, *Public Values, Private Interests and the Equal Protection Clause*, 1982 SUP. CT. REV. 127-66; Note, *Right to Marry*, *supra* note 5, at 193.

45. *Hinman*, 167 Cal. App. 3d at 524-25, 213 Cal. Rptr. at 414-15.

46. Multi-tiered analysis has developed over the last 48 years. The use of two different standards of equal protection was first advocated by Justice Stone in United States v. Carolene Products Company, 304 U.S. 144, 152-53 n.4 (1938). The third level is a product of the last 15 years, first used in Reed v. Reed, 404 U.S. 71, 75- 77 (1971).

Multi-tiered judicial review is not unanimously supported by judges. Justice Marshall has called three-tiered analysis a "rigidified approach to equal protection analysis." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting). Justice Marshall prefers to balance the "constitutional and societal importance of the interest ad-

lower tier, or rational basis analysis;[47] (2) an upper tier, or strict scrutiny analysis;[48] and (3) a middle tier, or intermediate scrutiny analysis.[49]

1. Rational Basis Analysis

The rational basis equal protection standard is a default standard: it is used when neither the strict scrutiny nor intermediate scrutiny analysis is appropriate.[50] Under the rational basis standard, to withstand judicial scrutiny a law must be rationally related to a legitimate state interest.[51]

In 1911, the Supreme Court listed four guidelines for reviewing laws challenged under the rational basis standard:[52] (1) laws carry a presumption of validity;[53] (2) they need not be mathematically precise, and some incidental inequities will be tolerated;[54] (3) courts are not bound to review a law based on its legislative purpose if any reason justifies the law as rational;[55] and (4) the person challenging the statute carries the burden of proving its unreasonableness.[56] The rational basis standard is clearly balanced in favor of upholding certain statutes and classifications.[57]

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versely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." *Id.* at 99.

Justice Stevens has stated, "There is only one Equal Protection Clause. . . . It does not direct the courts to apply one standard of review in some cases and a different standard in other cases." Craig v. Boren, 429 U.S. 190, 211 (1976) (Stevens, J., concurring).

In disapproving the development of intermediate-level review, Justice Rehnquist indicates that judges "have had enough difficulty with the two standards of review . . . so as to counsel weightily against the insertion of still another 'standard' between those two." *Id.* at 220 (Rehnquist, J., dissenting).

47. *See infra* notes 50-57 and accompanying text; *see also* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Richardson v. Belcher, 404 U.S. 78 (1971); Dandridge v. Williams, 397 U.S. 471 (1970); Williamson v. Lee Optical, 348 U.S. 483 (1955); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 994-96 (1978).

48. *See infra* notes 58-75 and accompanying text.

49. *See infra* notes 76-78 and accompanying text.

50. *See, e.g.*, Zobel v. Williams, 457 U.S. 55 (1982).

51. *Id.* at 60.

52. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

53. Because statutory classification is a uniquely legislative task, the legislature is to be afforded broad discretion in making legal classifications: a legislative act is "presumed valid" unless "it is without any reasonable basis, and therefore is purely arbitrary." *Id.* at 78.

54. A legislative classification is not unconstitutional merely "because it is not made with mathematical nicety, or because *in practice it results in some inequality.*" *Id.* (emphasis added).

55. "[I]f any state of facts reasonably can be conceived that would sustain [the classification], the existence of that state of facts at the time the law was enacted must be assumed." *Id.*

56. *Id.* at 78-79; McGowan v. Maryland, 366 U.S. 420 (1966).

57. The vast majority of statutes tested with the rational basis test pass review, leading one commentator to refer to it as "merely a rubber stamp review" (Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 808 (1984) [hereinafter Note, *Heightened Scrutiny*]), while another views it as "largely a sham as an independent standard of constitutional review . . . ." Simon,

2. *Strict Scrutiny*

The Supreme Court has deemed some interests as too important for the minimal review afforded by the rational basis standard. Instead, the courts use the upper-tier equal protection standard[58] when a legislative classification abridges a fundamental right,[59] or creates a "suspect class."[60] Under strict scrutiny review, (1) the state must have a *compelling* interest to justify the classification,[61] (2) the classification is presumed invalid,[62] and (3) the court will only examine the purpose of the law as articulated at the time of enactment by the legislature.[63]

Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination, 15 SAN DIEGO L. REV. 1041, 1113 (1978).

58. In *Zobel*, Justice Rehnquist referred to the standard as "strict scrutiny analysis." 457 U.S. at 55, 82-83 (Rehnquist, J., dissenting). *See also* Note, *Heightened Scrutiny, supra* note 57:

> If a classification is deemed suspect, the standard of review for any statute employing that classification is strict scrutiny: the use of the classification must be necessary to achieve a permissible goal of compelling importance. Further, the Court looks to articulated purposes only, eschewing the "any conceivable basis" approach. The Court deems classifications based on race, national origin, or, in some circumstances, alienage suspect. Strict scrutiny is essentially a presumption that the challenged law is invalid.

Id. at 810.

59. The Supreme Court in *Rodriguez*, 411 U.S. at 37-38, explains that education is not a fundamental right requiring strict scrutiny: "The present case . . . is significantly different from any of those cases in which the Court has applied strict scrutiny to . . . legislation touching upon Constitutionally protected rights. Each of our prior cases involved legislation which 'deprived,' 'infringed,' or 'interfered' with the free exercise of some fundamental personal right or liberty." The Court cites as examples of fundamental rights the right of procreation, Skinner v. Oklahoma, 316 U.S. 535 (1942), freedom of interstate travel, Shapiro v. Thompson, 394 U.S. 655 (1963), and the right to vote, Dunn v. Blumstein, 405 U.S. 330 (1972).

60. *See infra* notes 66-71 and accompanying text; Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971); Shapiro v. Thompson, 393 U.S. 618 (1969); Sail'er Inn v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971); J. ELY, DEMOCRACY AND DISTRUST 145-48 (1980); Note, *Suspect Classifications: A Suspect Analysis*, 87 DICK. L. REV. 407 (1983) [hereinafter Note, *Suspect Classifications*].

For strict scrutiny applications, see, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978); Graham v. Richardson, 403 U.S. 1, 11 (1971); Loving v. Virginia, 388 U.S. 365, 372 (1967); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938); Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984).

61. In contrast, the state interest need merely be legitimate under rational basis review. *See* Note, *Heightened Scrutiny, supra* note 57, at 810; *see also* Loving v. Virginia, 388 U.S. 1 (1967).

62. Note, *Heightened Scrutiny, supra* note 57, at 810.

63. *See supra* note 60 and accompanying text. Just as rational basis review leans heavily in favor of upholding a given law, strict scrutiny balances in favor of striking down legislation.

a. Fundamental Rights and Suspect Classifications

Fundamental rights are those rights "implicit in the concept of ordered liberty" and "deeply rooted in this nation's history and tradition."[64] Suspect classifications are those which treat groups disparately on the basis of certain arbitrary characteristics. Five criteria have been articulated by the courts to identify a suspect class:[65] (1) the class has been subjected to a history of discrimination and purposefully unequal treatment;[66] (2) members of the class suffer from unique social stereotypes, and bear a "badge of distinction;"[67] (3) the characteristic identifying the class is immutable;[68] (4) the trait is irrelevant to the group's ability to contribute to society;[69] and (5) the group is politically powerless, and thus requires extraordinary judicial protection from the majority.[70] Presently, the Supreme Court formally recognizes only classifications based on race and national origin or alienage as suspect for strict scrutiny analysis.[71] Although other characteristics such as indigency,[72] illegitimacy,[73] age,[74] and gender[75] may meet the elements of sus-

64. Bowers v. Hardwick, 106 S. Ct. 2841, 2844, 2846 (1986).

65. *See, e.g., Frontiero*, 411 U.S. 677 (1973); *Rodriguez*, 411 U.S. 1 (1973); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Acanfora v. Board of Educ., 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974).

66. *Frontiero*, 411 U.S. at 686. *See also infra* notes 101-105 and accompanying text.

67. *Frontiero*, 411 U.S. at 686. A badge of distinction refers to a trait that is highly visible, and thus, a ready basis for distinction, such as the color of one's skin. *See also infra* note 107 and accompanying text.

68. *Frontiero*, 411 U.S. at 686. An immutable trait is one that is not chosen, and is not susceptible to change, such as race. *See also infra* notes 108-111 and accompanying text.

69. *Frontiero*, 411 U.S. at 686. *See also infra* note 112 and accompanying text.

70. *See infra* notes 115-116 and accompanying text.

71. L. TRIBE, *supra* note 47, at 1012-15; Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023 (1979).

72. Many cases have recognized indigency as a special classification triggering more judicial protection. For criminal statutes based on indigency which were held to be unconstitutional, see Bounds v. Smith, 430 U.S. 817 (1977) (impoverished prisoners' right to access to the courts); Tate v. Short, 401 U.S. 395 (1971) (invalidated imprisonment due to inability to pay fine); Williams v. Illinois, 399 U.S. 235 (1970) (same); Douglas v. California, 372 U.S. 353 (1963) (indigent's right to counsel on appeal); Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent's right to counsel in felony prosecutions); Griffin v. Illinois, 351 U.S. 12 (1956) (indigent's right to a transcript on appeal). For civil statutes based on indigency which were held unconstitutional, see Boddie v. Connecticut, 401 U.S. 371 (1971) (indigent's right to divorce despite inability to pay fee).

73. Many laws have been invalidated for their disparate treatment of illegitimate persons. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977) (invalidated state law barring illegitimate children from inheriting from fathers); New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (invalidated part of Social Security Act creating two classes of children: legitimate and illegitimate); Gomez v. Perez, 409 U.S. 535 (1973) (invalidated state law denying judicially enforceable right of parental support of illegitimate children); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (invalidated workmen's compensation law denying equal recovery rights to dependent unacknowledged illegitimate children); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) (intermediate scrutiny of wrongful death statute applied

pect classifications, courts have not yet given these strict scrutiny.

3. *Intermediate-Level Scrutiny*

Intermediate-level scrutiny[76] is a third standard of review falling between the rational basis and strict scrutiny standards; under this standard a statutory classification must be *substantially related* to an *important* government interest.[77] As with strict scrutiny, a court looks only at the purposes of the law that have been articulated by the legisla-

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to mother receiving benefits from illegitimate son's death); Levy v. Louisiana, 391 U.S. 68 (1968) (heightened scrutiny of wrongful death statute excluding illegitimate children).

74. Recent cases indicate age discrimination may trigger intermediate scrutiny. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (applying middle level scrutiny to age classification).

75. Gender classifications are now officially afforded intermediate-level review. Craig v. Boren, 429 U.S. 190 (1976) (intermediate standard of review announced for sex discrimination cases). *See also* Kirchberg v. Feenstra, 450 U.S. 455 (1981) (invalidated law giving husbands, and not wives, the unilateral right to dispose of community property); Caban v. Mohammed, 441 U.S. 380 (1979) (invalidated law denying father the right to prevent illegitimate child's adoption); Orr v. Orr, 440 U.S. 268 (1979) (invalidated law allowing alimony only for wives); Califano v. Goldfarb, 430 U.S. 199 (1977) (invalidated law that required a husband, but not a wife, to show his financial dependency on his deceased spouse before becoming eligible for death benefits); Stanton v. Stanton, 421 U.S. 7 (1975) (invalidated state law with different ages of majority for males and females); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (invalidated part of Social Security Act paying death benefits only to widows, not to widowers); Frontiero v. Richardson, 411 U.S. 677 (1973) (struck down a federal statute requiring women in the armed forces to make a greater showing than men in the armed forces that their spouses are dependents); Reed v. Reed, 404 U.S. 71 (1971) (struck down law preferring men over women as estate administrators).

76. In Reed v. Reed, 404 U.S. 71 (1971), the Court first used the intermediate equal protection standard: it requires a law to have a more substantial basis than the traditional rational basis standard of review, yet does not carry as heavy a burden as the strict scrutiny test. *See* Note, *Right to Marry, supra* note 5, at 207 ("Middle-level scrutiny seeks to cope with the problem that there remain rights, not now classified as 'fundamental,' that remain vital to the flourishing of a free society, and classes, not now classified as 'suspect,' that are unfairly burdened by invidious discrimination unrelated to the individual worth of their members.") Intermediate-level scrutiny has developed because courts have found the traditional two-tiered approach overly rigid, artificial, and outcome-determinative. *See, e.g.*, Wengler v. Druggists Mutual, 446 U.S. 142, 152 (1980) (the Court rejected a statute which used administrative convenience as the sole justification for gender discrimination). Thus, a sliding scale of equal protection review has developed for certain "semi-suspect" classes, such as illegitimacy, age, and indigency classes. *See* Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18-24 (1972) (middle level scrutiny is "ordinary scrutiny with a bite"); *see also* Orr v. Orr, 440 U.S. 268 (1979); Califano v. Webster, 430 U.S. 313 (1977); Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971). *But see* City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985) (denying heightened scrutiny to classifications of the mentally retarded).

77. *See generally* Caban v. Mohammed, 441 U.S. 380 (1979); Orr v. Orr, 440 U.S. 268 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71, 76 (1971); Note, *Suspect Classifications, supra* note 60, at 408 (citing Wengler v. Druggists Mutual Co., 446 U.S. 142 (1980)); Gunther, *supra* note 76, at 18-24. *But*

ture.[78] This standard is currently applied to legislative classifications based on gender.

III. Homosexuals and Marital Status Classifications

A. Application of Equal Protection Analysis

1. Rational Basis Analysis

The Supreme Court has never explicitly indicated the appropriate standard of review for sexual orientation classifications.[79] Courts have usually applied the minimal demands of the lower-tier rational basis test, under which "statutory classifications will be set aside only if no grounds can be conceived to justify them."[80]

In the *Hinman* case, the trial and appellate courts agreed that the rational basis analysis was the appropriate standard for testing the dental benefits statute. The statute withstood constitutional challenge because it was found to be reasonably related to a legitimate purpose: it promoted the state interest in marriage because benefits were limited to the employee, his or her spouse, and his or her children.[81] All unmarried persons cohabiting with the employee were ineligible for benefits; the statute made no mention of sexual orientation. Although Hinman argued that homosexual cohabitors are "similarly situated" to married couples, the court of appeals did not address this argument except to conclude that the "plaintiffs are not similarly situated to heterosexual state employees *with* spouses. They are similarly situated to other *unmarried* state employees. Unmarried employees are all given the same benefits; plaintiffs have not shown that unmarried homosexual employees are treated differently than unmarried heterosexual employees."[82]

The relationship between the statute's denial of eligibility to cohabitors and an articulated state interest in promoting marriage was found to be indirect but acceptable by the court of appeals: "The state has a legitimate interest in promoting marriage. . . . While promoting marriage is not one of the express purposes of the Act, it is not necessary that the statutory scheme or policy directly promote the state interest in

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see Sail'er Inn v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (sex classifications are "suspect" and therefore strict scrutiny equal protection analysis applies).

At least three Supreme Court Justices have suggested a third element of the intermediate-level analysis: the burden shifts to the state to justify the legislative classification. Michael M. v. Superior Court, 450 U.S. 464, 490 (1981) (Brennan, J., joined by White and Marshall, JJ., dissenting).

78. Thus, the benefit of the doubt inures to the challenger, not the legislature.

79. Note, *Heightened Scrutiny*, *supra* note 57, at 798; L. TRIBE, *supra* note 47, at 87.

80. McDonald v. Board of Election Comm'r, 393 U.S. 802, 809 (1969). *See also* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 176-77 (1980); United States v. Carolene Products Co., 304 U.S. 144, 152-54 (1938).

81. *See supra* note 39 and accompanying text.

82. *Hinman*, 167 Cal. App. 3d at 526, 213 Cal. Rptr. at 416 (emphasis in original).

marriage. [It] need only be reasonably related to that interest."[83] The court then concluded that the statute did use reasonable means to promote the legitimate state interest in marriage.[84]

2. Strict Scrutiny

a. Fundamental Rights

A statute abridging a fundamental right requires heightened judicial review. So far courts have deemed few rights to be fundamental; determination of such rights may reflect traditional majoritarian precepts more than any judicial concept of fairness.[85]

The discriminatory effect of marital status classifications raises two questions: whether the right to marry is fundamental, and if so, whether homosexuals have the right to marry.[86] The availability of a homosexual right to marry would make marital status classification challenges moot for homosexuals. Courts have long disagreed on whether the right to marry is fundamental. This controversy remains unresolved: the Supreme Court "has never specifically ruled that marriage, standing alone, is a sufficiently fundamental right to elicit use of the strict scru-

83. *Id.* at 527, 213 Cal. Rptr. at 416.

84. *Id.* at 528, 213 Cal. Rptr. at 417. The *Hinman* case illustrates that challenges by homosexuals to laws such as the California statute face little or no likelihood of success if the equal protection violation is reviewed under the undemanding rational basis test.

85. For example, in Bowers v. Hardwick, 106 S. Ct. 2841 (1986), the Supreme Court held that the commission of sodomy between consensual adults in private homes is not protected as a fundamental right. The Court's reliance on traditional majoritarian morality is revealed in the Court's reasoning:

> [T]he Court has sought to identify the nature of [fundamental] rights qualifying for heightened judicial protection. In Palko v. Connecticut (1937) it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in Moore v. East Cleveland (1977) (opinion of Powell, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." . . . [¶]It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. . . . Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Id. at 2844-46 (citations omitted).

86. The Court has already shown its reluctance to protect homosexuals when it stated that the practice of homosexual sexual relations is not a fundamental right:

> [T]here is no such thing as a fundamental right to commit homosexual sodomy. . . . Condemnation of [homosexual] practices is firmly rooted in Judeo-Christian moral and ethical standards. Homosexual sodomy was a capital crime under Roman Law. [citations omitted] . . . . Blackstone described "the infamous crime against nature" as an offense of "deeper malignity" than rape, an heinous act "the very mention of which is a disgrace to human nature," and "a crime not fit to be named." . . . To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.

Id. at 2847 (Burger, C.J., concurring).

tiny standard."[87] Fundamental or not, the power of the state to regulate marriage is well-established,[88] and the promotion of marriage has been considered a compelling state interest.[89]

Homosexuals do not have the right to marry.[90] The many challenges to laws banning same-sex marriage have been uniformly unsuccessful,[91] despite the fact that the benefits of marriage are equally important to homosexuals and heterosexuals.[92] A Washington state court,

87. Note, *The Legality of Homosexual Marriage*, *supra* note 5, at 578. *But see* Griswold v. Connecticut, 381 U.S. 479, 486 (1965), in which the Court affirmed the importance of marriage. "[Marriage is] 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 . . . . [I]t is an association for as noble a purpose as any . . . ." *Id.*

88. Beeler v. Beeler, 124 Cal. App. 2d 679, 268 P.2d 1074 (1954) (the regulation of marriage is solely within the province of the legislature, except as restricted by the courts); *accord* Zablocki v. Redhail, 434 U.S. 374 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977); Loving v. Virginia, 388 U.S. 1 (1967); McClure *ex rel.* Caruthers v. Donovan, 33 Cal. 2d 717, 205 P.2d 17 (1949); Kelsey v. Miller, 203 Cal. 61, 263 P. 200 (1928); Haas v. Haas, 227 Cal. App. 2d 615, 38 Cal. Rptr. 811 (1964). For statutes regulating marriage, see, e.g., CAL. CIV. CODE § 4100 (West 1983 & Supp. 1986) (solemnization of marriage, and marriage licenses required); *id.* at § 4101 (capacity to consent).

89. *See supra* note 87. However, some commentators and courts argue that the power to regulate excludes "morality legislation:" the state can properly regulate marriage in a rationally based way to fulfill a reasonable purpose, but *not* "based on outdated concepts of morality, sexual stereotypes, and a misguided sense of tradition." Ingram, *A Constitutional Critique of Restrictions on the Right to Marry—Why Can't Fred Marry George—or Mary and Alice at the Same Time?*, 10 J. CONTEMP. L. 33, 34 (1985). *See also* Zablocki v. Redhail, 434 U.S. 374, 386 (1978): In regulating marriage, the state can impose "reasonable regulations that do not significantly interfere with decisions to enter into the marriage relationship, . . . [but only so far as they effectuate] sufficiently important state interests." But see Bowers v. Hardwick, 106 S. Ct. at 2846, in which denial of the existence of the fundamental right to engage in private homosexual relations was based on morality: "The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." *Id.*

90. *See supra* note 4.

91. One commentator has responded to the ban on same-sex marriages with a proposal that a new institution, "quasi-marriage," be created as a substitute for marriage by homosexuals:

> The legal unions of homosexual couples would be solemnized in the same way as are heterosexual marriages. The duly licensed homosexual couple could go to a justice of the peace, who would be authorized by statute to perform these ceremonies, or to an appropriate minister. Divorce proceedings for homosexuals would also be handled in the same fashion as heterosexual divorces. . . .
>
> Through quasi-marital status, homosexuals could obtain the financial [and psychological] benefits . . . now afforded married, heterosexual couples.

Note, *Right to Marry*, *supra* note 5, at 213.

92. *See* Rivera, *supra* note 5, at 874, 908; Ingram, *supra* note 89, at 34:

> [The human need for love is] fulfilled by intimate association with one particular person, including the opportunity to live together, with or without a sexual relationship. The law has long recognized the importance of this interest, most specifically in

in *Singer v. Hara*,[93] deemed heterosexual marriage a fundamental right, but denied the right to homosexuals because it viewed the prohibition against same-sex marriage to be a "natural consequence" of the nature of marriage:

> Although a fundamental interest may be involved, both the United States Supreme Court and this court have recognized that not every limitation or incidental burden on a fundamental right is subject to the strict scrutiny standard. When the regulation merely has an incidental effect on the exercise of protected rights, strict scrutiny is not applied.[94]

The "[s]tate has the absolute right to prescribe conditions for creating marriage relations."[95] Thus, under present law, homosexuals do not have the right to marry and marital status classifications are upheld because of the compelling state interest in promoting heterosexual marriages.

b. Suspect Classification

In *Hinman*, the plaintiff argued that strict scrutiny of the California dental benefit statute was required because it created a suspect class by treating homosexual cohabitors differently than married persons. The court of appeals rejected the argument: "We do not view the [statute] or its interpretation . . . as establishing *any* classification on the basis of sexual orientation, and thus, we shall not afford a strict scrutiny analysis to this case."[96] The court declined to decide whether homosexuals constitute a suspect class.[97]

Most courts that have addressed the issue indicate that homosexuals as a group do not qualify as a suspect class. Thus, only minimal rational basis review is afforded sexual orientation classifications. However, "none of the[se courts] have actually analyzed the applicability of suspect class criteria to homosexuals."[98]

> the actions for loss of consortium. . . . [But for a homosexual,] an intimate association with his or her chosen partner is prohibited by state law.

See also Note, *Emotional Distress*, *supra* note 5, at 994-50; Cullem, *Fundamental Interests and the Question of Same-Sex Marriage*, 15 TULSA L.J. 141 (1979); Note, *Right to Marry*, *supra* note 5, at 196; Ingram, *supra* note 89, at 55. *But see, e.g.*, Note, *Right to Marry*, *supra* note 5, at 200 ("Attempts have been made to invoke strict scrutiny in the context of homosexual marriage, but without success: Homosexuals have not been accorded suspect class status nor has homosexual marriage been deemed a fundamental right.").

93. 11 Wash. App. 247, 522 P.2d 1187 (1974).

94. *Id.* at 262, 522 P.2d at 1196. *See also* McCourtney v. Cory, 123 Cal. App. 3d 431, 439, 176 Cal. Rptr. 639, 643 (1981) (citing regulations affecting the right to marry such as that in Zablocki v. Redhail, 434 U.S. 374 (1979)).

95. Shaffer v. Heitner, 433 U.S. 186, 212 n.39 (1977).

96. *Hinman*, 167 Cal. App. 3d at 520, 213 Cal. Rptr. at 412.

97. *Id.*

98. Jones, Dronenburg v. Zech*: Judicial Restraint or Judicial Prejudice?*, 3 YALE L. & POL'Y REV. 245, 247 n.11 (1984). Professor Jones points out: "[C]ourts have expressed hesi-

Homosexuals meet the first criterion of suspect classification analysis: a history of discrimination.[99] Historically, homosexuals have been viewed as immoral, evil, or mentally ill;[100] and these views still persist today. Homosexuals have been the victims of violent attacks as well as housing and employment discrimination.[101] In many states, homosexual sexual acts are criminal[102] and the Supreme Court has found constitutional the states' power to prohibit sodomy and oral sex, even among consenting adults in the privacy of their own bedroom.[103] The Immigration and Naturalization Service officially excludes aliens on the basis of homosexuality. The military routinely practices pervasive discrimination against homosexuals.[104] Homosexuals have great difficulty in adopting children and gaining custody of their own children.[105]

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tancy in recognizing the fundamental rights of homosexuals in the contexts of suspect classification and privacy. . . ." *Id.* *See also* Vance v. Bradley, 440 U.S. 93 (1979); National Gay Task Force v. Board of Educ., 729 F.2d 1270 (10th Cir. 1984), *aff'd*, 105 S. Ct. 1858 (1985); *Dronenburg*, 741 F.2d 1388 (D.C. Cir. 1984); Rich v. Secretary of Army, 735 F.2d 1220, 1229 (10th Cir. 1984); Hatheway v. Secretary of Army, 641 F.2d 1376 (9th Cir.), *cert. denied*, 454 U.S. 864 (1981); *Hinman*, 167 Cal. App. 3d 516, 213 Cal. Rptr. 410 (1985); Clark, *Homosexual Public Employees: Utilizing Section 1983 to Remedy Discrimination*, 8 HASTINGS CONST. L.Q. 255 (1981); Comment, *Homosexuals' Right to Marry: A Constitutional Test and a Legislative Solution*, 128 U. PA. L. REV. 193 (1979); Pearldaughter, *Employment and Discrimination Against Lesbians: Municipal Ordinances and Other Remedies*, 8 GOLDEN GATE U.L. REV. 537 (1979).

99. *Rodriguez*, 411 U.S. at 28.

100. *See* Note, *Heightened Scrutiny*, *supra* note 57, at 821-24.

101. *Frontiero*, 411 U.S. at 684; *Rodriguez*, 411 U.S. at 28; BOGGAN, *supra* note 20, at 16-22, 69-75; CALIFORNIA COMMISSION ON PERSONAL PRIVACY, REPORT OF THE COMMISSION ON PERSONAL PRIVACY 341-358 (1982); J. D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970 (1983); Adamany, *supra* note 40; Karlen, *Homosexuality in History*, in HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL 75, 93-96 (J. Marmor ed. 1980); Lasson, *Homosexual Rights: The Law in Flux and Conflict*, 9 U. BALT. L. REV. 47 (1979); Licata, *The Homosexual Rights Movement in the United States: A Traditionally Overlooked Area of American History*, J. HOMOSEXUALITY 161 (Fall-Winter 1980-81).

102. Currently, 21 states and the District of Columbia have sodomy statutes. The states are Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Oklahoma, Rhode Island, South Carolina, Tennessee, Utah, and Virginia. Bowers v. Hardwick, 106 S. Ct. at 2845.

103. Bowers v. Hardwick, 106 S. Ct. 2841 (1986).

104. Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects . . . discipline, good order, and morale[,] . . . mutual trust and confidence[,] . . . integrity[,] . . . privacy[,] . . . recruit[ment] and [retention] of members[,] . . . public acceptance of military service[,] and . . . security.

DEPARTMENT OF DEFENSE DIRECTIVE 1332.14 Encl.8 (1981). *See also* Heilman, *The Constitutionality of Discharging Homosexual Military Personnel*, 12 COLUM. HUM. RTS. L. REV. 191, 193 (1980-81).

105. R. ACHTENBERG, *supra* note 17, at § 1.03[5][c]. *See also* Hitchens, *Social Attitudes, Legal Standards and Personal Trauma in Child Custody Cases*, 5 J. HOMOSEXUALITY 89, 90-

The second suspect class factor is that the group bear a badge of distinction, suffering from social stereotypes.[106] Many irrational stereotypes have pervaded social and legal perceptions of homosexuals.[107]

The third suspect class factor is that the characteristic be immutable.[108] Homosexuality is not chosen by the individual,[109] and experts believe that sexual orientation is permanently fixed during the first years of life.[110] Evidence of the immutability of homosexuality is supported by the fact that a person's sexual orientation has never actually been

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91 (Fall-Winter 1979-80); Rivera, *Homosexuality and the Law*, in HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES 323, 328-329 (1982); Slovenko, *Homosexuality and the Law: From Condemnation to Celebration*, in HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL, *supra* note 101, at 194, 214; Comment, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497, 523 (1984).

106. *Rodriguez*, 411 U.S. at 28.

107. Note, *Heightened Scrutiny*, *supra* note 57, at 821-24. *See also* Mathews v. Lucas, 427 U.S. 495, 506 (1976); *Frontiero*, 411 U.S. at 616. Homosexuals are thought of as "Pied Pipers" who "proselytize children to homosexuality or present role models that make homosexuality appear so attractive that young people will embrace it as a lifestyle." Note, *Heightened Scrutiny*, *supra* note 57, at 821-22 (footnote omitted). In fact, however, scientific data indicate that "[s]exual orientation is established very early in life and cannot be consciously acquired. A gay can no more 'convert' heterosexual children than a heterosexual can 'convert' homosexual children." *Id.* at 822.

Another stereotype about homosexuals is that they are child molesters. *Id.* at 822-23. This too, is unrelated to scientific reality.

> The average homosexual is neither likely to be a child molester, nor more likely than a heterosexual to be one. Indeed, with respect to physical sexual response alone [according to laboratory-measured arousal levels], heterosexuals are more likely to be aroused by children than are homosexuals. Finally, [statistics indicate] the typical child molester is much more likely to be heterosexual than homosexual.

Id. (footnotes omitted).

A third commonly held stereotype about homosexuals is that they are mentally ill. Prominent mental health authorities dismiss this stereotype: the National Association for Mental Health, the American Psychiatric Association, and the Surgeon General have redefined outmoded diagnostic categories, and "now agree that homosexuality, in and of itself, is not a mental illness." *Id.* at 824.

108. Immutability means that a suspect characteristic cannot be changed or controlled. Parham v. Hughes, 441 U.S. 347, 351 (1979); *Frontiero*, 411 U.S. 677 (1973); *Rodriguez*, 411 U.S. at 28; Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969).

109. Research indicates that homosexuality is not an activity, but a status or an orientation. J. MONEY & A. EHRHARDT, MAN & WOMAN, BOY & GIRL: THE DIFFERENTIATION AND DIMORPHISM OF GENDER IDENTITY FROM CONCEPTION TO MATURITY 228 (1972).

110. Baker v. Wade, 553 F. Supp. 1121, 1131 n.19 (N.D. Tx. 1982) (the court explicitly accepted the expert testimony of psychiatrist Dr. Judd Marmor, that sexual preference is probably fixed before age six); Acanfora v. Board of Educ., 359 F. Supp. 843, 848-49 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir. 1974) (the court cited with approval the testimony of psychologist Dr. John Money, embodied in his book MAN & WOMAN, BOY & GIRL, *supra* note 109, that sexual orientation is fixed at age five or six); Note, *Heightened Scrutiny*, *supra* note 57, at 818 n.137.

changed.[111]

The fourth suspect class factor is that the characteristic be irrelevant to the person's ability to contribute to society.[112] Sexual orientation is private, irrelevant to job performance,[113] and not readily apparent to the outside world if the individual wishes to conceal his or her orientation. Thus, it has no bearing on a person's ability to contribute to society.[114]

The fifth and final factor of the analysis is that the group be politically powerless, and in need of judicial protection.[115] Homosexuals are grossly underrepresented in government and lack substantial voting power in nearly all areas of the country:

> Most elected officials fear taking any action that would even appear to endorse homosexuality. Beyond this impetus to do nothing, legislators also face strong conservative pressure to deny gays any official recognition or help. Gays lack sufficient clout to pressure legislators to take pro-gay stances: gays are not only a minority, but a substantial number conceal their homosexuality and thus are unwilling to work for, advocate, or even be counted in favor of pro-gay legislation.[116]

Thus, homosexuality fits the five factors of a suspect classification.[117] However, it evidently is not sufficient that the factors "fit" a group: the Court also demands some extra impetus[118] before it will ex-

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111. "The researchers who have claimed 'successful' conversions [from homosexuality to heterosexuality] have yielded no more than limited and problematical behavioral changes. Even if behavior can be suppressed in some cases, nothing indicates that anyone can ever change a person's orientation. No first hand record of an actual conversion of sexual orientation exists." Note, *Heightened Scrutiny, supra* note 57, at 829. *See generally id.* at 820-21 nn.147-49; C. TRIPP, THE HOMOSEXUAL MATRIX 236-37, 243 (1975). *Contra* I. BIEBER, H. DAIN, P. DINCE, M. DRELLICH, H. GRAND, R. GUNDLACH, M. KREMER, A. RIFKIN, C. WILBUR & T. BIEBER, HOMOSEXUALITY: A PSYCHOANALYTICAL STUDY 318-19 (1962). For a criticism of this work, see Note, *Heightened Scrutiny, supra* note 57, at 820 n.147.

112. *Rodriguez*, 411 U.S. at 28; *Acanfora*, 359 F. Supp. at 853; *Sail'er Inn*, 5 Cal. 3d at 18, 485 P.2d at 540, 95 Cal. Rptr. at 340; Note, *Heightened Scrutiny, supra* note 57.

113. *See generally* Note, *Heightened Scrutiny, supra* note 57.

114. The irrelevance of sexual orientation to the ability to contribute to society is illustrated by evidence of generations of "closeted" homosexuals who kept their sexual orientation a secret with no effect on their success or job performance. *Id.*

115. *Rodriguez*, 411 U.S. at 28; McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972); Hobson v. Hansen, 269 F. Supp. 401, 408 (D.C. Cir. 1967), *appeal dismissed*, 393 U.S. 801 (1968); Adamany, *supra* note 40, at 135; Jones, *supra* note 98, at 254.

116. Note, *Heightened Scrutiny, supra* note 57, at 826.

117. Homosexuality was given intermediate scrutiny in Rowland v. Mad River School Dist., 105 S. Ct. 1373 (1985). *See also* L. TRIBE, *supra* note 47, at 944-46 n.17; Note, *Heightened Scrutiny, supra* note 57, at 827.

118. Gender classifications also arguably fit the five factors of suspect classifications. Women have historically been discriminated against. Sex is a highly visible badge of distinction. Gender is not chosen, and generally speaking, is not susceptible to change. Sex is irrelevant to a woman's ability to contribute to society. Women are politically underrepresented. Despite the possible "fit" of gender classifications into the suspect classification test, the Court has

tend strict scrutiny review to a class. To date, the Supreme Court has seen fit to apply strict scrutiny only to classifications based on race or national origin.[119]

3. *Intermediate-Level Scrutiny*

Courts have not applied strict scrutiny to statutes discriminating against homosexuals because the right to engage in homosexual acts is not considered a fundamental right, and because courts have not recognized the suspect classification status of homosexuals.[120] Yet, rational basis review is also inappropriate because, as a group, homosexuals meet the five criteria of a suspect classification. The only remaining standard of review which could reasonably be argued is the third standard of judicial review, intermediate-level review, which is presently applied to gender-based classifications.[121] Under this standard, a law must be substantially related to an important governmental interest before the

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never applied strict scrutiny to gender classifications. Clearly then, some impetus beyond the mechanical application of the test causes the Court to use the strict scrutiny analysis. *See* Note, *Heightened Scrutiny*, *supra* note 57, at 827. The Note identifies three justifications which give added impetus to a group meeting the requirements of a suspect classification: (1) a "process" argument—heightened scrutiny is needed to correct "imbalances of power and abuse in the political processes" because of the moral irrelevance of certain characteristics (*id.* at 828); (2) an "instrumental rationality justification for the application of heightened scrutiny," which means that "courts should strike down an irrational law if the benefits of invalidation outweigh the costs of instability, relitigation, and lack of uniformity" (*id.* at 833); and (3) a "public values theory"—classification on the basis of homosexuality should be presumed to be the result of an illegitimate motive (*id.* at 834).

The Supreme Court has appeared to note these justifications in its analysis of eligibility for suspect classification. *See* Plyler v. Doe, 457 U.S. 202, 216-17 n.4 (1982) (classification must "reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. . . . Classifications treated as suspect tend to . . . [relate to] certain groups [which] have historically been relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.") In United States v. Carolene Products Co., 304 U.S. 144 (1938), the Court noted that "prejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for correspondingly more searching judicial inquiry." *Id.* at 152-53 n.4 (citing *Rodriquez*, 411 U.S. at 28).

119. *See supra* note 71 and accompanying text. Many commentators predict that it will be a long time, if ever, before homosexuality will be considered suspect, particularly because the Court has refused to apply strict scrutiny protection to gender classifications. *National Gay Task Force*, 729 F.2d at 1273; Baker v. Wade, 553 F. Supp. 1121, 1144 n.58 (N.D. Tx. 1982); Childers v. Dallas Police Dep't, 513 F. Supp. 134, 147 n.22 (N.D. Tx. 1981), *aff'd mem.*, 669 F.2d 732 (5th Cir. 1982). Gender classifications concern women, who have historically suffered "inequity and occasional violence," but have never been ostracized as a group from society. Jones, *supra* note 98, at 255 n.48. In contrast, homosexuals, like racial classes, have faced a "history of social ostracism, scorn, ridicule and violent treatment." *Id.*

120. Bowers v. Hardwick, 106 S. Ct. 2841, 2847 (1986).

121. *See supra* note 76. The courts presently do not generally apply intermediate-level scrutiny to homosexuals.

classification is upheld,[122] and courts are restricted to considering the purposes of the statute as articulated by the legislature.

If middle-level scrutiny had been applied to the facts in *Hinman*, the court of appeals could not have relied on the unarticulated justification that the statute promoted marriage. Instead, it would have been limited to the articulated purpose of the statute: to provide dental benefits to state employees and their families. The state interest involved was to provide benefits at the least cost, by limiting them to the spouse and children of the employee himself, rather than including cohabiting lovers and others. A court, in applying intermediate scrutiny, would decide whether this state interest was important, and then review whether the law was substantially related to the interest. A court would probably uphold the dental benefit statute under such a standard.

If intermediate-level review were extended to homosexuals, a legislative classification would have to be based on sexual orientation before a court would apply intermediate-level review. Many of the statutes challenged by homosexuals, such as the one in *Hinman*, do not *explicitly* create sexual orientation classifications but instead create marital status classifications,[123] denying all unmarried persons benefits, regardless of their sexual orientation.

Hinman argued that the California dental benefit statute's marital status classification, *in conjunction* with the ban on same- sex marriages, had the *effect* of being a sexual orientation classification which discriminated against unmarried homosexual cohabitors.[124] If a statute does not classify *on its face* on the basis of a suspect class, its constitutionality cannot be questioned unless there is evidence of a legislative motive to treat homosexuals differently from heterosexuals because they are homosexuals.[125] No such motive was demonstrated in *Hinman*.

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122. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982). Some commentators have argued that intermediate-level scrutiny should be applied to equal protection challenges by homosexuals. *See generally,* Note, *Heightened Scrutiny*, *supra* note 57; *see also* Note, *Right to Marry*, *supra* note 5, at 193 (homosexual couples involved in exclusive, long-term relationships are similarly situated to committed heterosexual couples and middle-level judicial scrutiny should be applied to classifications based on sexual preference).

123. *See supra* note 39.

124. *Hinman*, 167 Cal. App. 3d at 519, 213 Cal. Rptr. at 411.

125. [T]he Equal Protection Clause is not violated in the absence of a showing that the relevant decisionmaker acted for an impermissible reason. . . . For Constitutional purposes, a person . . . is not treated [unequally] if he [is denied a benefit] as an incidental consequence of a decision that was intended to do something other than discriminate.

Sunstein, *supra* note 44, at 138-39 (citing Fullilove v. Klutznick, 448 U.S. 448 (1980); Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229 (1976)).

In *Hinman*, the plaintiff did not argue that the marital status classification in the statute was motivated by a desire to hurt homosexuals, but that the discriminatory effect of the statute was "seemingly neutral [but] actually disqualif[ied] a disproportionate number" of homosexu-

In summary, equal protection challenges by homosexuals have been uniformly unsuccessful. Courts refuse to afford even intermediate scrutiny, much less strict scrutiny review. Classifications based on homosexuality have been reviewed only under the rational basis test, which affords almost no protection.[126]

4. *The State Interest in Promoting Heterosexual Marriages*

The traditional judicial view is that marriage inherently benefits the state: "The obvious purpose of [a] marital status classification is to promote and protect the institution of marriage."[127] Courts have deemed the promotion of marriage to be a compelling state interest.[128] Two issues prompted by this arrangement are: (1) whether the promotion of such marriages is indeed a compelling or even rational state interest; and (2) "whether the maintenance of legal distinctions based on marital status is necessary to further that government interest."[129]

The state's promotion of marriage has disadvantages: by disallowing cohabitors the legally recognizable rights of the married, courts foster inequity in similar situations. For instance, in *Hinman*, the plaintiff's

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als from gaining the dental benefits of their state employment. *See supra* note 40. However, the law is settled that this effect, if unintended by the legislature, is not enough to hold a classification violative of the Equal Protection Clause: there must be a "bare [legislative] . . . desire to harm a politically unpopular group." United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973). Legislative intent is a crucial element of an equal protection violation. Without it, courts have upheld statutes with a much stronger "incidentally discriminatory effect" than the one in *Hinman*. For example, in Geduldig v. Aiello, 417 U.S. 484 (1974), a California insurance benefits program which excluded pregnancy was held *not* to have a discriminatory effect against women as a class:

> While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification. . . . [There is no discriminatory effect] absent showing that distinctions involving pregancy are *mere pretexts* designed to effect an invidious discrimination against [women].

Id. at 496-97 (emphasis added).

126. There is a strong presumption of the validity of legislative balancing and decisions. McDonald v. Board of Election Comm'r, 393 U.S. 802, 809 (1969).

127. Mitchelson, *supra* note 5, at 291. It is questionable whether marriage should be promoted in light of the high divorce rate. The skyrocketing number of children raised in broken homes is a reflection of the increasing dissatisfaction many couples have with the institution of marriage. *See* U.S. CENSUS BUREAU REPORT, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, POPULATIONS CHARACTERISTICS, SERIES P-20, NO. 365, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1980, at 4-5 (1981) [hereinafter U.S. CENSUS REPORT].

128. *See* Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974).

129. Mitchelson, *supra* note 5, at 291. *See also* Note, *Denial of a Wrongful Death Action*, *supra* note 6: "[O]ne recent [sociological research] project reports that 63 percent of cohabitating couples marry (usually not each other) or separate within two years. This data, unexplored in *Marvin*, suggests that the state need not feel compelled to legitimize cohabitation by equating it with marriage . . . ." *Id.* at 432-33 (citing Glick & Norton, *Marrying, Divorcing, and Living Together in the U.S. Today*, in POPULATION REFERENCE BUREAU, POPULATION BULLETIN (1977)).

cohabitor was denied dental benefits that would have been awarded if they were married. In light of the costs of the state policy promoting heterosexual marriage, it ought to be required that the policy actually does increase the number of marriages. There is no evidence that the current and long-standing policy of promoting marriage by penalizing the unmarried encourages a heterosexual to marry if he or she was not already so inclined, and homosexual orientation will certainly not be changed by punishing homosexual couples with same-sex marriage bans. "[P]erpetuation of judicial rules which result in an inequitable distribution of property [or benefits] accumulated during a nonmarital relationship is neither a just nor an effective way of carrying out that policy."[130]

What justifies the denial of a right for a homosexual to marry? The most frequent justification is the state's interest in promoting procreation.[131] Procreation has historically been intertwined with the concept of marriage; avoidance of procreation is grounds for annulment of marriage.[132] Courts consistently hold that marriage implies a willingness and ability to have children,[133] because procreation is "the foundation upon which must rest the perpetuation of society and civilization."[134]

Critics of the procreation justification assert that the ban on same-sex marriages "cannot withstand the requirement of demonstrating a rational basis. . . . Society is not threatened by every deviation from the norm . . . [but instead ought to err] on the side of tolerance and forbearance."[135] Not every heterosexual marriage involves procreation, nor is the physical ability to procreate a requirement for marriage:[136] "The continued assertion by courts that marriage must involve procreation

130. *Marvin*, 18 Cal. 3d at 683, 557 P.2d at 122, 134 Cal. Rptr. at 831. "In short, the numerous distinctions made between non-married and married persons cannot possibily promote marriages generally." Mitchelson, *supra* note 5, at 292.

131. *See* Note, *The Legality of Homosexual Marriage*, *supra* note 5, at 78-79; Rivera, *supra* note 5, at 875; *see also* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Gerwitz v. Gerwitz, 66 N.Y.S.2d 327, 329 (1945); Miller v. Miller, 132 Misc. 121, 122, 228 N.Y.S. 657, 657 (1928); Mirizio v. Mirizio, 242 N.Y. 74, 150 N.E. 605 (1926).

132. *Gerwitz*, 66 N.Y.S.2d at 329.

133. *Mirizio*, 242 N.Y. at 81, 150 N.E. at 607; Reynolds v. Reynolds, 85 Mass. (3 Allen) 605, 610 (1862).

134. *Mirizio*, 242 N.Y. at 81, 150 N.E. at 607.

135. Ingram, *supra* note 89, at 55. "The perceived incompatibility of marriage and homosexuality arises out of outmoded biases, which should not be allowed to justify denial of the legal, financial, and social benefits of marital status." Note, *Right to Marry*, *supra* note 5, at 196.

136. "The difference in reproductive capacity is not germane to comparison of homosexual and heterosexual marriages because courts have not regarded the ability to reproduce as part of the definition of marriage." Veitch, *The Essence of Marriage—A Comment on the Homosexual Challenge*, 5 ANGLO-AM. L. REV. 41, 42 (1976). *See also, e.g.*, M.T. v. J.T., 140 N.J. Super. 77, 355 A.2d 204, *cert. denied*, 71 N.J. 345, 364 A.2d 1076 (1976) (the state court upheld a marriage solemnized after the woman's successful sex-reassignment operation, despite the fact that transsexuals are sterile).

and heterosexual intercourse does no more than describe what is common to many marriages. [Prohibitions on marriage between homosexuals actually] are based on irrational prejudice and fear of unconventional activities and lifestyles."[137]

Another justification for marital status classifications is the desire to preserve the traditional family unit.[138] This is open to much criticism: first, it is a value judgment which is an inappropriate basis for inflicting marital status classification burdens onto cohabitors; second, the conventional family unit has disintegrated remarkably in past decades despite the benefits of marital status classifications.[139] Penalizing heterosexual and homosexual cohabitors in an effort to preserve traditional families is arbitrary and unfair. Nontraditional families are equally deserving of judicial protection.

A third justification for marital status classifications is the state's interest in "maintaining its exclusive franchise power over the marriage institution and the ceremonial requirements with respect thereto, in that the state is thereby provided with a central registry of valuable records."[140] This interest is certainly not a justifiable reason to discriminate against cohabitors' rights. Such records could be gathered in ways much less intrusive on the choice to marry,[141] and the state interest is of minimal import when balanced against the fundamental inequity it fosters.

The state's interest in preventing the spread of disease is a fourth justification for the prohibition of homosexual marriages,[142] but the logic of this rationale is questionable. The promotion of marriage among homosexuals ought to increase homosexual monogamy. The promiscuity now legally justified by the ban on same-sex marriages is much more

137. Ingram, *supra* note 89, at 55.

138. However, studies show that cohabitation mimics the traditional family form. *See* Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1128-37 (1981) ("Many cohabitation arrangements closely resemble the traditional family unit"); Note, *Emotional Distress*, *supra* note 5, at 939 ("studies . . . indicate that these [unmarried] couples exhibit economic behavior generally associated with married persons").

The traditional family form is increasingly unusual, due largely to the increase in divorces. *See* U.S. CENSUS REPORT, *supra* note 127, at 2 (marked increase has occurred in the rate of divorce in the United States. Since 1970, the divorce rate has climbed from 47 to 100 divorced persons per 1,000 married persons). Given the increase in cohabitation and divorce as well as other social changes since the 1960's, a narrow interpretation of the family unit would not reflect the realities of contemporary society. Mitchelson, *supra* note 5, at 293.

139. There are record numbers of working women, single-parent households, and "latchkey" children. *See* U.S. CENSUS REPORT, *supra* note 127.

140. Mitchelson, *supra* note 5, at 292.

141. Traditional census taking provides adequate records.

142. Note, *Constitutional Law—Family Law—Right to Marry Deemed Fundamental Right*, 1979 WIS. L. REV. 682, 700.

likely to spread disease than if homosexual marriages were allowed.[143]

The fifth justification for marital status classifications is the preservation of the majoritarian moral scheme. Courts and legislatures often reflect majoritarian societal values, and may view unconventional family environments as undesirable. However, the preservation of the traditional nuclear family, consisting of a working father and a mother in the home caring for the children, is an improper basis for a legislative classification because it is neither intrinsically superior nor attainable in today's social patterns. Yet, both heterosexual cohabitation and homosexuality have been widely perceived as immoral[144] and this perspective continues to permeate the legal system. In contrast, this perception is not shared by the millions of Americans who are heterosexual cohabitors[145] or homosexuals.[146]

Thus the state's interest in promoting heterosexual marriage and preventing homosexual marriage has little, if any, logical support, and such an interest should not be considered legitimate, let alone compelling, in light of the substantial inequities it produces.

B. Marital Status Classifications

Many laws discriminating against homosexuals classify by marital status rather than sexual orientation. These laws provide homosexual cohabitors with a new alternative to traditional equal protection challenges in order to gain access to government entitlements. Instead, the

143. In light of the current Acquired Immune Deficiency Syndrome (AIDS) epidemic, this interest becomes increasingly compelling. *See* Burda & Powells, *AIDS: A Time Bomb at Hospitals' Doors*, J. AMER. HOSP. ASSOC., Jan. 5, 1986, at 54(b).

144. Both have been proscribed as criminal. *See supra* note 102 and *infra* note 148 and accompanying text.

145. The incidence of cohabitation increased 800% between 1960 and 1970. Ledger v. Tippett, 164 Cal. App. 3d 625, 631, 210 Cal. Rptr. 814, 816 (1985). The U.S. Census Bureau reported that the number of persons of opposite sex who share living quarters doubled to 1.3 million between 1970 and 1976. Schwartz, *Living Together*, NEWSWEEK, Aug. 1, 1977, at 46. By 1980, approximately 3,120,000 individuals were living together, a 200% increase from 1970. U.S. CENSUS REPORT, *supra* note 127, at 4-5. This data indicates that a substantial number of people do not find cohabitation immoral. A court decision should not be based on the court's disapproval of the moral choices involved:

> As our state [California] Supreme Court has explicitly recognized, non-marital relationships are pervasive in current society, and mores in regard to cohabitation have changed radically, so that courts "cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many." Moreover, such conduct has been held to be within the penumbra of constitutional protection afforded the rights of privacy . . . so that intrusion by the state in this sensitive area is not a matter to be undertaken lightly.

In re Marriage of Wellman, 104 Cal. App. 3d 992, 998, 164 Cal. Rptr. 148, 152 (1980) (citing Marvin v. Marvin 18 Cal. 3d 600, 557 P.2d 123, 134 Cal. Rptr. 823 (1976)).

146. Estimates in 1977 placed the number of homosexuals in the United States at about 19 million. *See* Rivera, *supra* note 5, at 800 n.4. The number of homosexuals grows with the general population. *Id.*

validity of the marital status test as the sole test of legal significance can be questioned. Traditionally, unmarried persons were viewed as not having a relationship of sufficient importance to warrant the special protections and privileges afforded to those who underwent the pledge of legal significance: marriage.[147] It is no longer as certain whether marital status has retained its traditional importance as a distinguishing factor between a casual and significant relationship, and whether marriage should be a prerequisite before certain relationships are afforded legal protection.

The growing doubts about the validity of the marital status test spring from the tremendous surge of persons living together in significant relationships without marriage. Cohabitation has become a modern social phenomenon, mirroring the "sexual revolution" of the 1960's. While cohabitation was once a crime,[148] the number of cohabitors has increased tenfold between 1960 and 1980,[149] an indication of increasing social acceptance. The growing acceptance of heterosexual cohabitation parallels the increased acceptance of homosexuals,[150] who were once viewed as immoral but are now increasingly tolerated.[151]

Just as homosexuals have been waging legal efforts to gain protection of their relationships, so have heterosexual cohabitors been flung into legal disputes over the implications of their relationships. A prevailing issue today is whether greater legal protection should be extended to persons who are homosexuals or cohabitors, or both. As cohabitation has increased, so have the legal disputes between cohabitors, and thus the judiciary has been forced to accommodate their needs. In *Marvin v. Marvin*,[152] a couple began cohabiting after the plaintiff, Michelle Marvin, agreed to give up her career and take responsibility for their household in exchange for an express promise by Lee Marvin that he would financially support her for the rest of her life. The parties separated after seven years of cohabitation, and after the promised support ceased, Ms. Marvin sued for breach of contract. The California Supreme Court found that Ms. Marvin stated a cause of action for breach of contract.[153]

The decision showed that cohabitors and nonmarital relationships will be afforded legal protections despite the couple's unmarried status.[154] Cohabitors, like the parties to any agreement, can have reason-

147. *See supra* note 5 and accompanying text.

148. Criminal sanctions have been removed from cohabitation in California, as well as in many other states. CAL. PENAL CODE § 269(a) (West 1979).

149. *See supra* note 145.

150. *See supra* notes 26-29 and accompanying text.

151. *Id.*

152. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

153. *Id.* at 684-85, 557 P.2d at 123, 134 Cal. Rptr. at 832.

154. "*Marvin v. Marvin*, by recognizing and enabling enforcement of certain property rights of unmarried cohabitants, signaled the development of judicial remedies for persons

able expectations and "[t]he legal system of a society which now accepts nonmarital cohabitation must protect the reasonable expectations of those persons choosing this alternative lifestyle."[155] Courts and legislatures ought to be guided not by moral judgments, but by the reasonable expectations of the parties, which can provide workable guidelines for cohabitors' disputes.[156]

After *Marvin*, it is reasonable for an unmarried person to expect judicial protection of rights springing from his or her cohabiting relationship, if such relationship carries legal significance. Prior to *Marvin*, the gauge used to measure a relationship's legal significance was marriage, and once solemnized, the reasonable expectations of the married couple became fully enforceable. But now marital status is no longer the definitive statement of a relationship's seriousness: marital status is merely a traditional and convenient test for defining a legally significant relationship, and not a substantive requirement. It is simply one of many possible tests for determining whether a relationship is deserving of legal protection. This judicial trend toward deemphasizing marital status as the sole measure of a relationship's significance carries important implications for both heterosexual and homosexual cohabitors.[157]

Marvin lays out an analytical framework which views cohabitors' rights contractually, and which is equally applicable to homosexual cohabitors. "*Marvin* specifically directs trial judges to examine the conduct of the parties to a relationship, in the absence of express agreements, in order to determine their respective rights and reasonable expecta-

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living in nonmarital relationships." R. ACHTENBERG, *supra* note 17, at § 3.04[2][a][i] (footnote omitted).

155. Mitchelson, *supra* note 5, at 284-85. Marvin Mitchelson, the plaintiff's attorney, wrote: "The essence of *Marvin* is that relief will be provided in as equitable a manner as the facts of each case warrant." *Id.* at 284. It would be logically consistent to enforce homosexuals' reasonable expectations as well as heterosexuals'. "Since the court in *Marvin* based its decision on contract law, . . . its principles will apply to lesbians and gay males as well as to heterosexual couples." R. ACHTENBERG, *supra* note 17, at § 3.04[2][a][i].

156. The expectations of two people who decide to live together, though [unmarried], are nevertheless based upon certain elements of marriage that are implicit in any situation in which lovers engage each other to share their lives together. Namely, there are [reasonable] expectations of mutual support, companionship and *enjoyment of the fruits of labor* that come out of the relationship.

Mitchelson, *supra* note 5, at 285 n.8 (emphasis added).

157. Traditional notions of the family unit and lingering prejudice against homosexuals, however, have hampered legal reform . . . . [Many homosexual] couples form stable and significant cohabitation arrangements which serve the same function as a spousal relationship. . . . [T]he arguments in favor of extending [benefits] to unmarried heterosexual cohabitants also should be applicable to homosexual cohabitants . . . .

Note, *Emotional Distress*, *supra* note 5, at 949-50. "*Marvin* . . . redefined the rights of unmarried cohabitants with regard to financial interests in property. The decision did not necessarily limit these property rights to unmarried heterosexual couples." *Id.* at 950-51.

tions."[158] *Marvin* has been applied by at least one lower California court to homosexual cohabitors.[159]

IV. Proposal for a New Legal Significance Test

If marital status was not the sole legal test of a relationship's significance, what other tests may be employed? In *Butcher v. Superior Court*,[160] a California court laid out an alternative to marital status as a test of the legal significance of a relationship: "The relationship must be both *stable* and *significant*. If the plaintiff can show that the relationship meets both of these criteria, then he or she will have demonstrated the parallel to the marital relationship . . . ."[161]

Once alternative tests are used to replace marital status as the trigger for a relationship deserving legal protection, and the reasonable expectations of parties to a nonmarital relationship are taken into account, then there is no further bar to the enforcement of rights, including employment benefits, for heterosexual or homosexual cohabitors.

Marital status is not the only way to demonstrate the stability and significance of a relationship; in fact, the relative ease and frequency of marital dissolutions makes it debatable whether marital status is a proper indication of stability or significance.[162] The relationship itself should be scrutinized for certain elements indicative of stability and significance.[163]

> Evidence of the stability and significance of the relationship could be demonstrated by [six factors:] [1] the duration of the relationship; [2] whether the parties have a mutual contract; [3] the degree of economic cooperation and entanglement; [4] exclusivity of sexual relations; [5] whether there is a "family" relationship . . . [; and 6] those characteristics of significance which one may expect to find in what is essentially a de facto marriage.[164]

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158. Mitchelson, *supra* note 5, at 300.

159. Following the *Marvin* lead, a subsequent San Diego superior court [in *Richardson v. Conley*] recognized the relationship of two lesbians as sufficiently legitimate to require one of the women to pay support to the other when the relationship ended. The trial judge based the holding on the fact that two women participated in a [marriage-like] . . . ceremony . . . and had signed an agreement that one would take responsibility for the household and the other for financial support.

Note, *Emotional Distress*, *supra* note 5, at 951 (citing the unpublished case *Richardson v. Conley*, decided June 6, 1978 (discussed in THE ADVOCATE, No. 245 at 12 (July 12, 1978))).

160. 139 Cal. App. 3d 58, 188 Cal. Rptr. 503 (1983).

161. *Id.* at 70, 188 Cal. Rptr. at 512 (emphasis added).

162. *See supra* note 138.

163. "[T]he mere fact that a couple [is unmarried] cannot serve as a basis for a court's inference that the couple intend [sic] to keep their earnings and property separate and independent; the parties' intention can only be ascertained by a more searching inquiry into the nature of their relationship." *Marvin*, 18 Cal. 3d at 676 n.11, 557 P.2d at 117 n.11, 134 Cal. Rptr. at 826 n.11.

164. *Butcher*, 139 Cal. App. 3d at 70, 188 Cal. Rptr. at 512.

While these six factors are not exclusive, they establish a standard for evaluating relationships.

Application of the *Butcher* factors to *Hinman* shows that the test, though less precise than marital status, is workable.[165] In *Hinman*, the duration of the relationship was over twelve years at the time of the filing of the lawsuit. The parties had entered into contracts together and had covenants of mutual support. Their joint bank account and the co-ownership of their home indicated commingling of funds and financial entanglement. Their relationship was monogamous, and the two desired to marry. The couple's dependency and commitment to one another are evident in the fact that the two men were each other's beneficiaries in their respective life insurance policies and wills. The elements of stability and significance are demonstrable by the objective facts of the relationship.

While the "stable and significant" test may appear to be a marked departure from currently used legal approaches, courts have already been willing to look beyond the unconventional sexual orientation of the parties and allow reasonable expectations to guide the award of benefits. In *Donovan v. Workers' Compensation Appeals Board*,[166] a 1982 California case before the court of appeals, the homosexual cohabitor of a state employee made a claim for the employee's death benefits. Donovan claimed to be the cohabitor of Finnerty. Upon Finnerty's death, his dependents were eligible for death benefits from his government employment; the only dependent was Donovan. Under the applicable statutory language, eligible dependents included Finnerty's "family" and members of his "household"—there was no marital status restriction. The court reversed the denial of benefits to Donovan because the trial court had "purposefully avoided" finding Donovan a dependent when "confronted with the problem of an alleged homosexual live-in partner as claimant."[167] On remand, the lower court found Donovan qualified as Finnerty's "family," and awarded him $25,000 in death benefits.

When a court is faced with a marriage-like relationship between homosexuals, and eligibility for benefits *does* depend on a statutory mari-

165. Such a test would inevitably be intrusive, but it would be a voluntary invasion of privacy. Currently, with marital status as the only test, cohabitors have no means to enforce their rights. With an alternative test, cohabitors could choose to voluntarily bring their relationship within judicial examination and evaluation. If an unmarried couple did not desire potential legal protection of their rights, they would not have to come forward and subject their relationship to the judicial intrusion that must necessarily accompany a *Butcher*-type test. But for a couple seeking legal benefits, that option should be made available. *But cf. Ledger*, 164 Cal. App. 3d at 635-36, 210 Cal. Rptr. at 819 (female cohabitant has no cause of action for loss of consortium upon male cohabitant's death); *Hinman*, 167 Cal. App. 3d at 527, 213 Cal. Rptr. at 417 (denial of death benefits to unmarried partners of state employees is not discriminatory against homosexual employees).

166. 138 Cal. App. 3d 323, 187 Cal. Rptr. 869 (1982).

167. *Id.* at 328-29, 187 Cal. Rptr. at 873.

tal status classification, as in *Hinman*, the court should apply the *Butcher* "stable and significant" test rather than the marital status test. In *Hinman*, this would have made the plaintiff's cohabitating lover eligible for benefits.

If the *Butcher* test is implemented, marital status need not be cast aside. It remains as a decisive factor in the evaluation of the relationship. As Justice Broussard of the California Supreme Court has explained:

> The state [need not] equate marriage and nonmarital relationships in determining rights to [benefits. It would be proper to] invoke a presumption [that the requirements are satisfied when the claimants are married] without granting a like presumption for persons in nonmarital relationships. But the presumption in favor of marriage should not lead us to refuse to recognize that there exist close, enduring, and significant nonmarital relationships, that such relationships may give rise to moral and (under *Marvin*) legal obligations, and that in a particular case [the parallel of marriage can be established].[168]

A *Butcher*-type legal significance test should be substituted for the current marital status test to determine whether legal protection shall be afforded a relationship. Once such a test is used by the legislature and judiciary, homosexuals as well as heterosexuals would be equally able to make a showing of legal significance, and thus gain the benefits, protections, and privileges currently reserved for married heterosexuals.

Conclusion

Equal protection challenges to statutes discriminating against homosexuals have had little success. Courts have refused to view homosexual couples as "similarly situated" to heterosexual married couples, homosexuals do not have a fundamental right to marry, and homosexuality is not considered a suspect classification by the judiciary.

Adult adoptions, used by homosexual cohabitors to gain legal recognition and protection for their families, provide homosexuals with only limited benefits. Marital status classifications prevent homosexuals from gaining the full legal rights which heterosexuals enjoy. A new approach is needed to evaluate relationships and provide legal protections to those who fail to fit the conventional family mold. Courts should evaluate the significance of a relationship by measuring its stability and significance. Marital status should constitute a presumption of legal significance in a relationship, but should not be the only measure of the significance of the relationship.

Cohabitors, whether heterosexual or homosexual, share the same injury from marital status classifications. A new legal measure of a rela-

168. Norman v. Unemployment Ins. Appeals Bd., 34 Cal. 3d 1, 16, 663 P.2d 904, 915, 192 Cal. Rptr. 134, 145 (1983) (Broussard, J., dissenting).

tionship's significance would offer equal protection to all persons, regardless of their conformity with traditional sexual conventions, and would reflect increased social tolerance for a multitude of lifestyles. Such social diversity can flourish only through judicial and legislative acknowledgement of the reasonable expectations of heterosexual and homosexual cohabitors.

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